

**BEFORE THE WATER QUALITY CONTROL COMMISSION, STATE OF
COLORADO**

**IN THE MATTER OF PROPOSED REVISIONS TO THE BASIC STANDARDS AND
METHODOLOGIES FOR SURFACE WATER, REGULATION #31(5 CCR 1002-31),
AND THE PROPOSED REVISIONS TO THE CLASSIFICATIONS AND NUMERIC
STANDARDS FOR MULTIPLE RIVER BASINS**

**RESPONSIVE PREHEARING STATEMENT FOR AMERICAN RIVERS, AUDUBON
ROCKIES, AMERICAN WHITEWATER, CONSERVATION COLORADO, SAN JUAN
CITIZENS ALLIANCE, TROUT UNLIMITED AND WESTERN RESOURCE
ADVOCATES**

American Rivers, American Whitewater, Audubon Rockies, Conservation Colorado, San Juan Citizens Alliance, Trout Unlimited and Western Resource Advocates, by and through the undersigned, respectfully submit this responsive prehearing statement to the proponent's prehearing statement addressing proposed revisions to the Basic Standards and Methodologies for Surface Water, Regulation #31 (5 CCR 1002-31), and proposed revisions to the classifications and numeric standards for multiple basins.

I. INTRODUCTION

The organizations within this party, including American Rivers, American Whitewater, Audubon Rockies, Conservation Colorado, San Juan Citizens Alliance, Trout Unlimited and Western Resource Advocates, have a common goal of safeguarding clean water in Colorado. Colorado is a headwaters state and home to over 107,000 miles of rivers. Together, these rivers supply water to eighteen states and parts of Mexico. From drinking water and agriculture, to recreation and aquatic habitat, clean water is perhaps the most valuable, and unique natural resource in the State of Colorado. The party organizations understand that high quality water in our rivers, streams and wetlands are critical to the long-term health of our ecosystems, communities, and economies across Colorado, from urban neighborhoods to headwater streams.

The Clean Water Act was enacted to protect our nation's water from degradation by human activities. Its primary goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and provide continual, incremental improvements to the quality of streams, rivers and wetlands. The Colorado Water Quality Control Commission is responsible for implementing the protections of the Clean Water Act, including by classifying important uses of state waters (e.g., aquatic life, municipal, recreation, etc.) and adopting water quality standards to protect those uses. The Commission is also charged with implementing statutory and regulatory provisions that prevent degradation of higher water quality as a critical component to meeting the goals of the Clean Water Act.

II. ANTIDegradation

A. Summary of Discussion

The Antidegradation Rule, as implemented by the Commission since the late 1980s, provides that the highest quality waters (Outstanding Waters) have their quality maintained without degradation, that most high quality waters (reviewable waters) have their quality maintained unless there are important social and economic reasons to allow their degradation, and that only waters not of a high quality face degradation - and then only down to the minimum standards necessary to maintain their classified uses. For more than 30 years, the Commission has designated as use protected waters where the quality is already fairly poor. Importantly, by designating a water use protected, the Commission is carving out an exception to the goals of the Clean Water Act, subjecting the reach to degradation rather than driving its improvement and foregoing the public's interest in high quality water and the corresponding recreational and ecosystem values.

This proposed rule change would almost certainly result in degradation of many additional Colorado streams, rivers and wetlands in direct contradiction to the aims of the Clean Water Act. The proposed rule change would give the Commission the ability to designate a stream "use-protected" when only one parameter does not meet the standards, even if water quality is better than water quality standards for all other parameters. Additionally, the rule change would allow the degradation of stream temperature (which is not one of the 12 parameters usually considered in designation decisions), while also permitting the increased presence of other contaminants, such as nitrates and metals. This approach is contrary to the 1992 statute, which clearly establishes that rigorous antidegradation review should apply to the vast majority of waters.

Further, the parties share a number of concerns about the impacts of the proposed rule changes that the Division describes in its Prehearing Statement. In particular, as the Division explains, the proposed changes to the rule "may, however, alter the protection of water quality in Colorado — that is, the protection of assimilative capacity or the increment of water quality better than necessary to support Aquatic Life and Recreation uses." WQCD Prehearing Statement June 2021 Reg. No. 3 RMH at 76.

The Division also points out in its statement that the proposed changes:

make[] 31.8(2)(b)(ii) more ambiguous and difficult to interpret (i.e., what is 'substantial' pollution), while also clearly expanding the set of parameters that may be considered and the waters that the commission may designate as "Use Protected" as opposed to 'Reviewable.' The proposed change would make it newly permissible for the commission to designate otherwise high-quality waters as Use Protected based solely on evidence of substantial exceedances of Aquatic Life and Recreation use-based standards caused by reversible human activity.

WQCD Prehearing Statement June 2021 Reg. No. 3 RMH at 76.

We have additional concerns about the Division's suggestions that the proposed rule changes could adversely impact potential future or existing Outstanding Water designations. Many of the parties have been working collaboratively during the San Juan and Gunnison triennial review

process to secure Outstanding Waters designations for particularly valuable waters. The Division makes the following point in its prehearing statement, of particular concern:

The proposed change may also have additional regulatory repercussions, to the extent that it is the product of the commission's interpretation of the Colorado Water Quality Control Act. As one example, it is possible, though not necessary, that the change could impact designation of waters with current or potential Outstanding Waters designations. Like Regulation 31.8(2)(b)(ii), the Outstanding Waters criteria at Regulation 38.2(a)(i) provide that even if waters would otherwise meet a set of objective measures warranting an Outstanding Waters designation, the commission may decide that an Outstanding Waters designation should not apply "if the Commission determines that, due to the presence of substantial natural or irreversible human-induced pollution for parameters other than those listed above, the quality of the waters in question should not be considered better than necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." The similarities between the wording of Regulation 31.8(2)(b)(ii) and Regulation 31.8(2)(a)(i) suggest that similar changes to the Outstanding Waters criteria could also be required ... [although] this result is not inevitable."

WQCD Prehearing Statement June 2021 Reg. No. 3 RMH at 77.

While the noticed rule changes do not propose to alter Outstanding Waters designations, if adopted, the proposal would set an unsettling precedent that could undermine efforts to protect Colorado's most significant waters from degradation.

The parties request that the Commission not move forward with the proposed rule changes. The parties were made aware of the significant changes to the antidegradation rule -- including their potential impact on Outstanding Water designations -- late in the process. We will work in good faith over the next month to digest other parties' responsive pre-hearing statements and rebuttals and share additional information and solutions in our rebuttal statement.

B. Detailed Discussion on Factual and Legal Claims

1. The Colorado Water Quality Control Act does **not** require changes to the use protected designation criteria set forth in section 31.8(2)(b)(ii).

Section 31.8(2)(b)(ii), sometimes known as the "Other Pollution Test," provides that a stream can be designated use protected -- and so subject to degradation without antidegradation review - - even if it meets state standards for all the 12 parameters in the parameters test, should the Commission determine that "due to the presence of substantial natural or irreversible human induced pollution[,] . . . the quality of the waters in question should not be considered better than necessary to support aquatic life class 1 and/or recreation class P uses."

The "Other Pollution Test" has been in the books in its current form for over 33 years. It was first adopted when the rule was finalized in 1988. In 1992, the state legislature enacted section 25-8-209, providing statutory authority for the Antidegradation Rule. In 1993, the Commission amended its Antidegradation Rule "to conform the Commission's regulatory provisions

regarding water quality designations with these new statutory provisions.” Section 3.1.24.A. The Commission did not alter the “Other Pollution Test” then nor are we aware of any arguments from that hearing suggesting it was inconsistent with the statute.

2. The proposed changes to the “Other Pollution Test” open the door to substantially more use protected designations and to significant degradation of the state’s waters.

Under the rule in place for the last 33 years, exceedances of a single water quality standard parameter could trigger the less protective use-protected designation, but only if the proponent could show that the pollution was the result of natural or irreversible human activity. The “natural or irreversible human condition” test is an integral part of the rule and has limited the number of use protected designations made using this provision. In fact, while the parties have not yet performed an exhaustive search, it may have been used for the first time in 2020. This is consistent with the Clean Water Act’s goal of protecting higher quality waters and the Commission’s statement that the test is meant to be seldomly used.

The proposed elimination of the “natural or irreversible human activity” qualifier opens the door for use protected designation when water quality is good, but for a single pollutant, and even when there are efforts to address that single pollutant. In such instances, significant degradation of higher quality water could occur without the rigorous analysis required by the Antidegradation Rule.

3. The proposed changes to the “Other Pollution Test” allows regulated entities to deteriorate water quality and use the deterioration as the basis to allow for further degradation.

Not only does the proposed change open the door to a significant increase in use protected designations, it actually encourages dischargers to degrade water quality. Under the rule in place for the last 33 years, a discharger that contributed to the degradation of a stream could not seek use protected designation if the discharger was causing or contributing to the problem. Under the proposed change, a discharger could take advantage of a single pollutant exceedance, whether or not the discharger caused or contributed to it, as a license to increase the levels of pollution in the stream for **all** pollutants.

4. The Commission’s designation of Segment 15 as use protected during the June 2020 hearing was arbitrary and capricious and contrary to the Commission’s rules.

During its June 2020 South Platte basin standards hearing, the Commission determined that Segment 15 should be designated as use protected even though the Antidegradation Rule as then written did not allow for such designation. The decision was proposed after the record was closed, allowing no party or member of the public to respond. The decision was also made in contravention of the Commission’s legal counsel, who opined that disregarding the Antidegradation Rule set forth in the Basic Standards could expose the Commission to a challenge on the basis of arbitrary and capricious action. Indeed, such action was arbitrary and

capricious, as the Commission is not free to disregard the Basic Standards, a state-wide regulation, whenever it feels it is expedient during a basin regulation. This rulemaking hearing includes the South Platte regulation in its notice. The Commission should reverse its June 2020 decision as contrary to the law.

III. EXHIBITS

The parties do not intend to introduce any exhibits at this time, although the parties reserve the right to designate exhibits in response to information contained in other parties' prehearing or rebuttal statements.

IV. WITNESS

The party plans to call one witness to testify at the above-captioned rulemaking.

Melinda Kassen, JD. Ms. Kassen will testify as to her involvement with the development of Colorado's antidegradation policy from 1986 to 1992. At that time, Ms. Kassen was an attorney with the Environmental Defense Fund (EDF). Ms. Kassen will describe EDF's multi-pronged effort to upgrade Colorado's 1979 antidegradation policy (that applied then to three dozen reaches). This effort included EDF participating as a party to the 1988 and 1992-93 Basic Standards triennial review hearings. In 1988, the Commission adopted the framework for the antidegradation policy in Regulation 31.8, including the use-protected and outstanding waters designations, what would constitute reviewable waters and how the State would implement the balancing test for those. In 1992, after the Colorado General Assembly adopted HB 92-1200, formally writing designations into the Colorado Water Quality Control Act, the Commission considered and adopted some relatively minor changes to Regulation 31.8. Ms. Kassen will explain how, given the Division's description in its prehearing statement, that the proposed changes to the discretionary prong for making a Use Protected designation is unnecessary to conform to state law (especially given that the Commission decided during the 1992 triennial review and after the statute had been passed not to change the language it is now proposing to strike). She will also explain how the proposal conflicts not only with the fundamental Clean Water Act principle of continual and incremental improvement, but also with the federal antidegradation rule.

Respectfully submitted this 14th day of April, 2021.

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