

**WATER QUALITY CONTROL COMMISSION  
STATE OF COLORADO**

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**PROPONENT’S PREHEARING STATEMENT OF CHERRY CREEK BASIN WATER  
QUALITY AUTHORITY**

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**IN THE MATTER OF PROPOSED ADOPTION OF REVISIONS TO THE CHERRY CREEK  
RESERVOIR CONTROL REGULATION, REGULATION #72 (5 CCR 1002-72)**

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The Cherry Creek Basin Water Quality Authority (“CCBWQA” or the “Authority”), by and through its counsel, Davis Graham & Stubbs LLP, provides this submission to the Colorado Water Quality Control Commission (“Commission”) pursuant to the Colorado Water Quality Control Act (“WCQA”), C.R.S. § 25-8.5-101, et seq. and applicable CCBWQA control regulations.

**I. INTRODUCTION AND BACKGROUND**

In this limited scope rulemaking, the Authority respectfully requests that the Water Quality Control Commission (“Commission”) consider and adopt revisions to Regulation No. 72.7 and related definitions in 72.2. The Authority submitted its proposed revisions to Regulation No. 72 and related proposed Statement of Basis and Purpose to be considered during the limited scope rulemaking, which were published with the Commission’s Notice of Public Rulemaking Hearing on December 13, 2021.

The Commission conducted an informational hearing on May 10, 2021, for triennial review of the Cherry Creek Reservoir Control Regulation, Regulation No. 72 (5 CCR 1002-72). At this hearing, the Water Quality Control Division (“Division”) requested that the Commission schedule this limited scope rulemaking hearing in 2022 to consider revisions to Section 72.7 concerning municipal separate storm sewer systems (“MS4”) permit requirements. The Commission also scheduled a supplemental informational hearing in 2022 to reevaluate the timing and scope for a broader Regulation 72 rulemaking hearing to address revisions to other sections of Regulation 72.<sup>1</sup>

The Authority is participating as the proponent in this rulemaking following significant work among the Division, the Authority and its consultants, MS4 members of the Authority, and the Colorado Department of Parks and Wildlife to propose revisions Regulation No. 72.7 that make it consistent with MS4 permitting requirements and eliminate outdated and obsolete stormwater control technology requirements, while continuing and furthering the Authority’s obligation to preserve water quality. Attached as Exhibit 1 is the redline of Authority’s proposed revisions to Regulation No. 72; attached as Exhibit 2 is the Authority’s proposed statement of basis and purpose (SBP) for this rulemaking.

As the proponent of regulatory revisions for this limited scope triennial review rulemaking hearing, the Authority anticipates at this time that, depending on opposition, it will need \_\_\_\_ hours to present testimony and introduce exhibits, inclusive of its rebuttal testimony and exclusive of possible cross-examination by the Division’s counsel, other parties, or questioning by the Commission.

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<sup>1</sup> The supplemental informational hearing has been set in February 2022 and is not the subject of this prehearing statement.

The Authority bases this request on its contemporaneous submittal of written testimony from \_\_\_\_\_ witnesses in support of the Authority’s proposed revisions to Regulation No. 72, each of whom is anticipated to orally present a brief summary of their respective written testimony and further respond to limited questions and potential cross-examination.

## **II. BACKGROUND OF THE CHERRY CREEK BASIN WATER QUALITY AUTHORITY AND CHERRY CREEK RESERVOIR AND BASIN REGULATIONS**

In 1985, the Authority was initially formed by an intergovernmental agreement between local entities within the Cherry Creek basin. In 1988, Colorado enacted legislation to both create and empower the Authority as a quasi-municipal corporation and political subdivision of the State of Colorado. C.R.S. § 25-8.5-101 *et seq.* Under that statute, the Authority’s Board currently consists of representatives of two counties, six cities and towns, one special district, and seven public, non-affiliated representatives appointed by the Governor, specifically: (1) Arapahoe County; (2) Douglas County; (3) City of Aurora; (4) City of Greenwood Village; (5) Town of Castle Rock; (6) Town of Parker; (7) City of Lone Tree; (8) City of Centennial; (9) one representative of the seven special districts within the basin, and (10) seven Governor appointees, for a total of sixteen members.<sup>2</sup> A number of the Authority’s members operate MS4s that are each subject to the Division’s COR080000 Phase 2 MS4 general permit for standard MS4s within the Cherry Creek basin.<sup>3</sup>

The Colorado Legislature created the Authority to, among other things, protect water quality in the Cherry Creek basin and Cherry Creek Reservoir (“Reservoir”)<sup>4</sup> for recreation, fisheries, water supplies, and other beneficial uses. C.R.S. § 25-8.5-101. The Authority is uniquely authorized and directed by Colorado statute to protect and preserve water quality in the Cherry Creek basin and Reservoir and to plan and coordinate efforts of the various entities within the watershed to achieve those goals. C.R.S. § 25-8.5-101, 111.

In 1985, the Commission established Regulation No. 72, the Cherry Creek Reservoir Control Regulation to implement phosphorus and chlorophyll *a* goals that had been adopted in Regulation 38. *See* 5 CCR 1002-72, at 72.15. Regulation No. 72 is based on a state/local partnership for controlling total phosphorus and further provides a basis for actions to protect the Reservoir’s water quality. The Commission originally set an annual total phosphorus loading limit of 14,270 pounds under that same Control Regulation, which was intended to equate to the Reservoir’s growing season average total phosphorus concentration standard of 35 µg/l and chlorophyll *a* concentration of 15 µg/l. *Id.* In a 2009 rulemaking, the Commission adopted changes to Regulation No. 72 to, among other things, remove all annual total phosphorus load-related components from the regulation and establish a three-tiered stormwater system for development and redevelopment within the basin. *Id.* at 72.27. In a 2012 rulemaking, the Commission adopted changes to clarify specific areas that are covered by stormwater requirements and provide consistency between State and Federal stormwater requirements. *Id.* at 72.28.

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<sup>2</sup> NTD: these are the entities included on the Authority’s website listing of Board members. Confirm this is accurate and Town of Foxfield and City of North Castle Pines were previously members but are not currently listed as included in the Board?

<sup>3</sup> *See* <https://cdphe.colorado.gov/wq-municipal-ms4-general-permits>.

<sup>4</sup> The Authority does not, however, own or operate the Cherry Creek Reservoir; the U.S. Corps of Engineers (“USACE”) does. The USACE impounded Cherry Creek in 1950 to protect the City and County of Denver from flash floods that might originate within the creek’s 385 square mile drainage basin.

Although the Cherry Creek basin has experienced substantial growth during the past 35 years, the Authority and its partners have generally succeeded in preserving, protecting, and improving the Reservoir's water quality and beneficial uses. The Authority, its member agencies, and partners have improved wastewater treatment and upgraded associated technologies, installed nonpoint source and regulated stormwater controls, and utilized its land use agency responsibilities to control phosphorus in the inflow to the Reservoir.

### **III. PROPOSED REVISIONS TO REGULATION NO. 72.7 AND 72.2 RELATED TO STORMWATER PERMITTING**

In this limited scope rulemaking, the Authority requests the Commission adopt changes to Regulation 72.7 Stormwater Permits Requirements (and related definitions in 72.2) only to eliminate inconsistencies in the current Regulation with existing and pending MS4 permits and incorporate applicable changes in the Division's stormwater permit requirements. MS4 permits are issued as part of the Colorado Discharge Permit System (CDPS), and, in addition to Regulation 72.7, regulated stormwater in the Cherry Creek Basin is also governed by Regulation 61 and Colorado Discharge Permit COR080000, which includes program requirements specific to water quality.

Since the last revision to Regulation No. 72.7 in 2012, changes have been made to Regulation No. 61 and to the MS4 permits issued to Authority members. Studies have also been completed since that time to better understand the effectiveness of certain stormwater control techniques and advances in stormwater control technology that the MS4s implement. As a result, current MS4 permits have advanced beyond the stormwater control requirements that are currently contained in Regulation 72.7, making a number of them obsolete and inconsistent with Regulation 61 and current permitting practices. Accordingly, the Authority requests that the Commission adopt certain revisions to update and modernize the Regulation 72.7 with respect to definitions, permitting details, and changes in stormwater permit requirements. The major substantive revisions include changes to better align with Regulation 61 and current versions of MS4 permits, the deletion of prescriptive lists of Best Management Practices, and simplification of the development/redevelopment of tier structures.

Following is an overview of the Authority's proposed changes and the reasons why the Authority submits that such changes are necessary and appropriate:

First, the Authority's proposed changes to Regulation No. 72.7 are better aligned with the current version of Regulation 61 and with current and forthcoming versions of stormwater MS4 permits, which will decrease administrative burdens on local governments who must comply with the regulations and permits. It will also improve clarity for consultants and contractors working in the Cherry Creek Basin. The requirements in Regulation 72.7 are incorporated by reference into the Division's COR080000 Phase 2 MS4 general permit<sup>5</sup> for standard MS4s within the Cherry Creek basin, which creates some confusion and complexity when protective measures specified in the permits differ from the specific but now-obsolete provisions of Regulation 72.7. This general permit nominally expired in June 2021 but has been administratively extended until it is renewed. The Division has informed the Authority and Commission that it intends to renew the COR080000 Phase 2 MS4 general permit in 2022. In addition, the Division expressly indicated to the Commission last April that it preferred the Commission have the opportunity to consider revising Regulation 72.7's requirements before Regulation 72.7 is incorporated by reference into the renewed COR080000

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<sup>5</sup> See Permit at 9, Part I(E), *available at* <https://oitco.hylandcloud.com/Pop/docpop/docpop.aspx>.

general permit, because the current regulation “is outdated in parts, difficult to incorporate into permits, and can be confusing for permittees to implement in combination with other more updated permit requirements.” *See* Division Memorandum to Commission dated April 28, 2021, RE: 2021 Triennial Review Informational Hearing for Cherry Creek Reservoir Control Regulation No. 72 at 4. The Authority’s proposed revisions are intended precisely to avoid that current confusion and create consistency between Regulation 72.7 and MS4 permits, as suggested by the Division and described herein.

Second, the Authority requests removal from Regulation 72.7 of prescriptive lists of Best Management Practices (BMPs, referred to in 72.7 as “Control Measures”) for construction and post-construction requirements. The proposed edits are instead oriented to performance and process-based requirements, which is a protective approach for stormwater quality regulation that also allows flexibility for control measure selection and implementation based on site-specific conditions and is consistent with current MS4 permitting. In particular, new definitions are proposed that correspond with terminology and concepts in the MS4 permits, including “design standards.” The proposed Tier 3 post-construction stormwater requirements reference the current MS4 permit post-construction options that include “base design standards” or “design standards.” This revision will provide clarity and enable options consistent with the current MS4 permit requirements related to water quality capture volume, runoff reduction, pollutant reduction standards, and treatment at regional facilities. Furthermore, removal of the prescriptive lists of BMPs/control measures is appropriate because many of the listed BMPs in the current regulation are obsolete and use outdated terminology. The Authority believes that transitioning the regulation to focus on performance and process-based control measure requirements using more modern and effective technologies will be protective of water quality and avoid current permitting problems and confusion.

Third, the Authority proposes to simplify the Tier 2 and 3 development/redevelopment categories to better align with the current MS4 permit coverage thresholds. This proposed change would include as Tier 2 (rather than Tier 3) sites with 5,000 square feet or more of added impervious area but less than one acre of disturbed area and not part of a larger common plan of development or sale that disturbs one acre or more. The reason for this proposed change is mainly administrative, since Tier 3 sites would comply with MS4 requirements, which include a one acre of disturbance threshold. Analysis of recent development review submittals to the Authority showed that the land area associated with these development/redevelopment projects in 2020 was only 0.02% of total land area. As with the existing regulation, Tier 2 sites must still implement post-construction measures, including by developing, implementing, and enforcing a program that “ensures that a combination of structural and/or nonstructural controls are in place that would prevent or minimize water quality impacts...” *See* Ex. 1, 72.7(2)(c). Accordingly, the administrative benefits of simplifying the tiers to be consistent with the design standards found in the MS4 permit outweigh any potential conflict with MS4 permits.

The Authority also believes that, with the revisions proposed in this limited scope rulemaking, the revised Section 72.7 will be equally or more protective of water quality than it is currently and will still go above and beyond basic stormwater MS4 permit requirements authorized under Regulation 61. Specifically, during construction-phase stormwater management, all construction sites require some level of construction control measures. Certain proposed exemptions are more stringent than the current regulation due to addition of a one-acre limit related to the exemptions. *See e.g.* Ex. 1, 72.7(2)(b)(2)(i)(B), (ii)(B). For post-construction stormwater management, some level of control measure implementation is required for development and redevelopment down to 500 square feet of impervious area as described above (Tier 2), in contrast to the current MS4 permit threshold of 1 acre

of disturbed area. Finally, the Authority’s proposed revisions to the regulation provide greater emphasis on runoff reduction and green infrastructure, which broaden the regulation’s previous emphasis on “concentration-based” pollutant reduction. This proposed revision will recognize the benefit of volume reduction as an important component of reducing pollutant loads.

Finally, the Authority proposes the Commission adopt minor changes to the Definitions, Section 72.2, to correspond and be consistent with the proposed revisions in Section 72.7. Specifically, the terms “Disturbed area,” “individual home construction,” and “Water Quality Capture Volume” are used only in Section 72.7, not in any other section of Regulation No. 72. The Authority proposes the Commission adopt revisions to remove these terms from the broader definitions section in section 72.2 and include them in section 72.7 where the terms are used. The Authority also proposes revising the definition for “Regulated Stormwater” to clarify that the term applies to stormwater discharges to state waters that are required to be permitted under the “Duty to Apply” provision of Regulation 61. The Authority proposes to delete the definition of “Enhanced BMP” as this term is not used within Regulation No. 72 except in this definition.

#### **IV. WITNESSES**

The Authority’s witnesses include the following:

**NOTE: Possible witness are Jessica DiToro; Jane Clary; Bill Ruzzo and/or others from the Authority Board; Ashley Byerley and/or others from the TAC; plus Zach and/or Andrea to answer questions.**

#### **VI. EXHIBITS**

The Authority’s exhibits include the following:

Exhibit 1: Proposed redlined revisions to Regulation No. 72.2 and 72.7.

Exhibit 2: Proposed Statement of Basis and Purpose

**NOTE: If we submit written testimony, it will be as exhibits here. Are there other exhibits?**

#### **V. RESERVATIONS**

The Authority reserves the right to present testimony, witnesses, and exhibits for purposes of the rebuttal statement and at the hearing, to use demonstrative aids at the hearing that contain information provided in any exhibits and testimony supplied by the Authority, to present alternative language to the proposed revisions to Regulation No. 72, to respond to alternate proposals submitted by any party, and to address future changes to any alternate proposals of any party.

#### **VI. CONCLUSION**

Based on the foregoing, the Authority respectfully requests that the Commission adopt the proposed revisions to Regulation No. 72.2 and 72.7 as set forth in the Authority’s attached Exhibit 1 redline and adopt the statement of basis and purpose proposed in the Authority’s attached Exhibit 2.

Respectfully submitted this 26th day of January 2022.

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By:

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