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| REVIEW OF NEW SPECIFICATION OR SPECIFICATION CHANGE  | Log No. 208-10 |
| **Specification Section No.:** 208 | **Item:** 208.09 Regulatory Mechanism for Water Quality |
| **Originating Office:** Office of Communications | **By:** Tripp Minges |
| **Date Sent For Review:** April 27, 2018 | **Date Comments Due: May 18, 2018** |
| Submit response to: STANDARDS AND SPECIFICATIONS UNIT, DIVISION OF PROJECT SUPPORT 4TH FLOOR, CDOT HEADQUARTERS |
| **Vote****/N** | **Concurrent Reviews – Others Commenting** | The attached Draft Specification is submitted for your review and comments. If not returned by Date Comments Due, the draft specification will be considered to be approved unless the Standards and Specifications Unit of the Project Development Branch [(303) 757-9474, (303) 757-9402] is advised otherwise.**REMARKS:** If these proposed changes are approved, our unit will issue these in a new standard special provision. |
|  | **Spec Committee Members:** |  **✓** |
|  | Co-Chairman: Lacey |  |
|  | Region 1: Quirk |  |
|  | Region 1: Lucerna |  |
|  | Region 2: Pieper |  |
|  | Region 3: Jean |  |
|  | Region 4: Boespflug |  |
|  | Region 5: Valentinelli |  |
|  | Project Development: Lacey |  |
|  | Specifications: Yu |  |
|  | Bridge: Bui |  |
|  | Contracts & Market Analysis: Atamo |  |
|  | Materials: Wieden |  |
|  | Traffic Engineering: Matthews |  | REVIEWER COMMENTS:( ) Approved ( ) Disapproved ( ) ModifiedIf disapproved or modified, give reason why and show any modifications on the attached draft copy: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_ Name/Signature Date |
|  | Maintenance: Weldon |  |
|  | FHWA: Larson |  |
|  | Attorney General: Milan |  |
|  |  |  |
|  | **Others:** |  |
|  | Colorado Contractors Assoc.: Moody |  |
|  |  |  |
|  | **Technical Committees:** |  |
|  | PDAC |  |
|  | Drainage Advisory Committee (DAC) |  |
|  | Water Quality Advisory Committee (WQAC) |  |

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| **COLORADO DEPARTMENT OF TRANSPORTATION****SUBMITTAL OF NEW SPECIFICATION OR SPECIFICATION CHANGE** | Log No. (Assigned by Standards and Specifications Unit)208-10 |
| TO: Standards & Specifications Unit Project Development Branch | FROM:Tripp Minges Headquarters Environmental(Region, Branch or Technical Committee) |
| SPECIFICATION SECTION NO.208.09 | ITEMErosion Control | PriorityRoutine  Fast  |
| Reason for this new or changed specification:CDOT is revising subsection 208.09 in response to requirements noted within CDOT’s MS4 Construction Program Manual, MS4 Permit COS-000005 and the recent Administrative Order of Compliance on Consent (AOC) issued by the U.S. Environmental Protection Agency.The Colorado Department of Public Health and Environment, Water Quality Control Division (Division) added new requirements to CDOT’s regulatory mechanism to implement and enforce within CDOT’s MS4 Construction Sites Program. These requirements specify the elements that are required in CDOT’s regulatory mechanisms (i.e., Specification 208.09) as well as exemptions from the regulatory mechanism that are listed in the attached document.Several items of note within EPA’s AOC is 1) CDOT failed to implement their regulatory mechanism to ensure Contractor compliance with water quality and erosion control measures. 2) CDOT also failed to address Chronic occurrences of findings noted on the headquarter or region led inspections on projects and 3) CDOT did not have a uniform Construction Sites Program.The proposed revised version of 208.09 will address all regulatory agency requirements to insure compliance with all permits and EPA’s AOC. Further, the revision shall simplify the 208.09 process to further insure compliance.Noteworthy changes to the proposed revision of 208.09:* The Engineer is now required to assess liquidated damages (LD) for the Contractor’s failure to follow water quality control specifications.
* All non-conformance to water quality control specifications is identified, recorded, and approved through ESCAN.
* Simplified the Deferment process for Regular Findings.
* The 48 hour grace period changing to a 7 day grace period prior to LDs on Regular Findings
* The number of specifications that apply to 208.09 are reduced by approximately 20%
* The severity of liquidated damages is proportional to the severity of the noncompliance
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| New or Revised Specification: Please see attached |
| NOTE: See Procedural Directive 513.1 for a description of appropriate specification development procedures. |

 CDOT Form #1215 1/15

 REVISION OF SECTION 208.09

Regulatory Mechanism for Water Quality

Section 208 of the Standard Specifications is hereby revised for this project as follows:

Delete subsection 208.09 and replace with the following:

**208.09 Regulatory Mechanism for Water Quality.** The Department will identify and document Findings not in compliance with the Water Quality Specifications, as specified in subsection 208.09(a)6, during Headquarter and Region water quality control inspections or observation by the Engineer. The Engineer will immediately notify the Contractor of these findings by issuing Form 105, which will be tracked in ESCAN/CARL software. Failure by the Contractor to clarify a finding location with the Engineer shall not interrupt the timelines noted in 208.09(b).

Timelines noted in subsection 208.09(b) do not indemnify the Contractor from failing to comply with Colorado Discharge Permit System Stormwater Construction Permit (CDPS-SCP) timelines for corrective actions. The CDPS-SCP (Part I.D.8) states corrective actions “…must be addressed as soon as possible, immediately in most cases, to minimize the discharge of pollutants.”

1. *Definitions*.
2. Compliance Assistance. A low risk event as determined by the Region Water Pollution Control Manager (RWPCM). Compliance assistance events are not considered a Finding and not subject to the Regulatory Mechanism noted in subsection 208.09(b).
3. Deferment. A request from the Contractor to the Engineer to delay implementation of corrective actions for Regular Findings pertaining to Water Quality Specifications. Deferments may only be granted due to extraordinary circumstances. However, it is at the Department’s discretion to approve or reject these requests.
4. Finding. An incident discovered through inspection by the Department or by Engineer observation, which is noncompliant with the Water Quality Specifications. A Finding will be classified as one of the following:
5. Regular Finding. A situation upon inspection that is in noncompliance with the Water Quality Specifications.
6. Severe Finding. A discharge outside the project’s Limits of Construction (LOC), subsection 107.25(a)2, to State waters or to a live inlet where the pollutant cannot be reclaimed.
7. Chronic Finding. A Chronic Finding is assessed when the same Regular Finding at the same location is documented twice in the last three Headquarter or Region water quality control inspections. Engineer observed findings outside these inspections will not apply.
8. Inspection Form 105. The Form 105 issued by the Engineer documenting findings from a Headquarter or Region led water quality inspection (subsection 208.03(c)2(3)(i and ii)).
9. Location. The place where the finding was observed; can be a document (e.g., stormwater management plan [SWMP]) or physical location. A physical location must be described with enough detail to guide an independent party to the spot of the finding. Physical locations must be supported with at least one photograph.
10. Recalcitrance. Contractor has shown willful negligence or misrepresentation or unwillingness to adhere to the Water Quality Specifications.
11. Water Quality Specifications. Subsection 107.25, Sections 208, 213 and 216, and Standard Plans M-208-1 and M-216-1.
12. *Liquidated Damages and Stop Work Orders.* The Contractor will be subject to Liquidated Damages for incidents of failure to comply with the Water Quality Specifications and implement corrective actions to resolve noncompliance in the time frame established in subsection 208.09(b). Liquidated damages will not be considered a penalty but will be assessed to recover costs associated with environmental damages, and engineering and administrative expenses incurred by the Department for the Contractor’s failure to comply with the Water Quality Specifications. Liquidated damages will accumulate for each finding, for each cumulative day that the finding remains uncorrected. Liquidated damages associated with incidents pertaining to this subsection do not indemnify the Contractor of other Liquidated Damages associated with this project.

In addition to Liquidated Damages, the Contractor will be subject to a project-wide Stop Work Order for recalcitrance and the Engineer may issue a Stop Work Order for Chronic and Severe Findings in accordance with subsection 105.01.

Findings are closed when the corrective action is complete, reported to ESCAN and accepted by the Department. The Department will notify the Contractor through ESCAN when the corrective action is accepted or denied. Liquidated damages will be assessed by the type of finding as follows and will continue until the corrective action is approved by the Department.

1. Regular Finding. The time required to repair a Regular Finding shall begin at 11:59 PM on the date the Inspection Form 105 is issued. The Contractor shall have no more than a 7-day grace period to correct the Regular Finding, before Liquidated Damages are assessed. The grace period extends until 11:59 PM on the 7th day after the Inspection Form 105 was issued.

The Engineer will issue a Form 105 notifying the Contractor that Liquidated Damages are accruing at $1,500 per day for each full or partial day a Regular Finding remains uncorrected after the 7-day grace period. At 11:59 PM on the 14th day, each uncorrected, undeferred Regular Finding will be assessed as recalcitrant and the Engineer will issue a project-wide stop work order. The Contractor shall fix each recalcitrant finding and submit a plan to avoid future instances of each recalcitrance to the Department for approval. The recalcitrance plan shall be in writing, signed by the Superintendent and shall include:

1. Each Recalcitrant Finding,
2. Why the corrective action for each Recalcitrant Finding was not implemented within 14 days, and
3. How the Contractor will avoid future recalcitrance.

The Department will discuss the recalcitrance plan and may meet with the Superintendent to recommend modifications, if needed. The Engineer will issue a Form 105 accepting or rejecting the recalcitrance plan within 24 hours of the Contractor submitting a plan or resubmitting a modified plan.

The Contractor will neither be reimbursed for costs incurred to fix each Recalcitrant Finding pertaining to a control measure in the SWMP plan nor costs to prepare the recalcitrance plan. The Contractor shall propose additional control measures, if needed, according to subsection 208.04(a). Once the Department approves the corrective action and the recalcitrance plan, the project-wide Stop Work Order and Liquidated Damages will be lifted.

1. Severe Finding. In response to a Severe Finding, the Engineer will issue Inspection Form 105 and immediately assess Liquidated Damages of $3,500 per Severe Finding. Severe Findings shall not be eligible for the 7-day grace period (subsection 208.09(b)1). Liquidated damages will accrue at $3,500 per Severe Finding per day beginning at 11:59 PM of day the Inspection Form 105 is issued.
2. If the Severe Finding is a discharge to State waters, the Contractor shall prevent any further discharge and shall reclaim discharge which has not yet entered State waters. The Contractor shall report the discharge to CDPHE in accordance with CDPS-SCP requirements.
3. If the Severe Finding is a discharge outside the LOC that does not enter State waters, the Contractor shall fully reclaim the discharge before it enters State waters and implement relevant CDPS-SCP noncompliance notification procedures.

The Engineer may require the Contractor to submit a plan for permanent stabilization of disturbed areas outside the LOC per 208.04(e)4 for approval. Permanent stabilization plans pertaining to Severe Findings and subsequent stabilization activities are not subject to 208.09(b).

The Contractor shall not be reimbursed for activities undertaken to reclaim the discharge, stabilize areas outside the LOC and implement relevant CDPS-SCP noncompliance notification procedures.

1. Chronic Finding. In response to a Chronic Finding, the Engineer will issue Inspection Form 105 and immediately assess Liquidated Damages of $1,500 per Chronic Finding. Chronic Findings shall not be eligible for the 7-day grace period (subsection 208.09(b)1). Liquidated damages will accrue at $1,500 per Chronic Finding per day beginning at 11:59 PM of day the Inspection Form 105 is issued.

When the Chronic Finding is comprised of two Severe Findings, the Department will assess Liquidated Damages in accordance with subsections 208.09(b)2 and 208.09(b)3.

1. *Deferment*: If the Contractor seeks deferment, the Superintendent shall submit a deferment request to the Engineer by 11:59 PM of the day after the issuance of Inspection Form 105. Chronic and Severe Findings are not eligible for deferment. The deferment request shall be in writing, signed by the Superintendent and shall include:
2. Regular Findings to be deferred
3. The reasons why the Findings cannot be corrected in 7 days
4. An action plan containing:
5. Methodology to protect water quality until deferred Findings are corrected and accepted
6. Milestones to measure progress toward completion
7. Additional control measures to be implemented until deferred Findings are corrected and accepted
8. Corrective completion dates for each Finding

The Department will discuss the deferment request and may meet with the Superintendent to recommend modifications to the action plan. The Engineer will issue a Form 105 accepting or rejecting the deferment request by 11:59 PM of the third day after the Inspection Form 105 documenting the Regular Finding is issued. The Department will not accept a deferment for operational error, lack of resources, improperly installed control measures, inadequate control measures, lack of preventative maintenance, careless or improper operation, or other non-proactive reason.

Preparation of deferment documentation and additional materials, including additional control measures, required to complete the action plan shall be at the Contractor’s expense. Time frames noted in subsection 208.09(b)1 will not be stopped during the deferment review period, therefore, Liquidated Damages will be assessed beginning 11:59 PM on day 7 if the deferment request is rejected and, furthermore, a rejected deferment plan (subsection 208.09(c)) shall not absolve the Contractor from recalcitrance.

The Engineer will assess Liquidated Damages in the amount of $1,500 per day, and partial day, for uncorrected Deferred Findings. These Liquidated Damages will start on the date the uncorrected work was deferred to be completed (subsection 208.09(c)(3)(iv). In addition, Liquidated Damages will be assessed retroactively to 11:59 PM of the day the finding was originally noted on the Inspection Form 105.

1. *Conflict* *Resolution*. Subsections 105.22, 105.23, and 105.24 detail the process through which the parties (CDOT and the Contractor) agree to resolve any issue that may result in a dispute.
2. *Exemptions*. The Engineer will exempt from subsection 208.09(b) situations of Compliance Assistance, Documented Upset Conditions, Documented Reportable Spills and Documented Winter Exemptions. Release from subsection 208.09(b) does not exempt the Contractor from compliance with CDPS-SCP, Part I.D.8.
3. Documented Upset Condition. The Contractor shall report, both verbally and in writing, the Upset Condition to CDPHE per CDPS-SCP Part II.A.6 and subsection 208.03(c)2(5)(iv) and provide written documentation to the Engineer. The Engineer will issue a Form 105 and recognize the exemption to the Regulatory Mechanism. The Contractor shall also update the SWMP notebook with the Form 105 and the documented Upset Condition.
4. Documented Reportable Spills. The Contractor shall report, both verbally and in writing, the Reportable Spill to CDPHE per subsection 107.25(b)16 and provide written documentation to the Engineer. The Engineer will issue a Form 105 and recognize the exemption to the Regulatory Mechanism. The Contractor shall also update the SWMP notebook with the Form 105 and the documented Reportable Spill.
5. Winter Exemptions. The Contractor is unable to address findings noted on the Region or Headquarter led water quality control inspection due to:
6. snow covers the entire site for an extended period and;
7. no construction activity and;
8. melting conditions posing a risk of surface erosion do not exist.

The Contractor shall request a Winter Exemption to the Department. If approved, the Engineer will issue a Form 105 and recognize the exemption to subsection 208.09(b). The Contractor shall also update the SWMP notebook with the Form 105 and the documented Winter Exemption. Liquidated Damages, if assessed, will only accrue up to the point where the Winter Exemptions are approved.

1. Compliance assistance during Region or Headquarter led water quality control inspections. The RWPCM will record compliance assistance on the inspection form.