



**COLORADO**

**Department of  
Regulatory Agencies**

Colorado Office of Policy, Research &  
Regulatory Reform

**2017 Sunset Review:  
Environmental Management System  
Permit Program**

*October 13, 2017*



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 13, 2017

Members of the Colorado General Assembly  
c/o the Office of Legislative Legal Services  
State Capitol Building  
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Environmental Management System Permit Program. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2018 legislative committee of reference.

The report discusses the question of whether there is a need for the program created under Article 6.6 of Title 25, C.R.S. The report also discusses the effectiveness of the Department of Public Health and Environment in carrying out the intent of the statutes and makes recommendations for statutory changes.

Sincerely,

Marguerite Salazar  
Executive Director





# COLORADO

## Department of Regulatory Agencies

Colorado Office of Policy, Research &  
Regulatory Reform

### 2017 Sunset Review Environmental Management System Permit Program

#### SUMMARY

##### ***What is an Environmental Management System?***

An environmental management system (EMS) is a set of processes and practices that enable an organization to reduce its environmental impacts and increase its operating efficiency. The EMS framework enables an organization to achieve its environmental goals through consistent review, evaluation and improvement. This constant self-evaluation should help to identify opportunities for improving environmental performance without dictating a level of environmental performance that must be achieved.

##### ***What is an EMS Permit?***

The EMS Permit Program (Program), housed in the Colorado Department of Public Health and Environment's Division of Environmental Health and Sustainability, Sustainability Unit (Department), represents an attempt to create a process whereby a facility could voluntarily consolidate multiple permits into a single EMS permit, thereby streamlining the regulatory burdens associated with maintaining multiple permits and, ideally, recognizing greater environmental benefits.

##### ***Who is regulated?***

Three facilities participated in the Program during its pilot phase. No facilities have participated since 2007.

##### ***How is it regulated?***

Eligibility was predicated on membership in the Department's voluntary Environmental Leadership Program (ELP) at the gold or platinum tier. Although rules were never promulgated to outline platinum tier eligibility, in federal fiscal year 2016, there were 105 gold tier ELP participants. Department staff estimates that approximately 42 of them held multiple permits, making them ideal candidates for an EMS permit.

##### ***What does it cost?***

No funds or employees are allocated to the Program.

## KEY RECOMMENDATIONS

### **Sunset the Environmental Management System Permit Program.**

The Program, while a well-intentioned attempt at regulatory innovation, is unworkable for a variety of reasons. Since it has been more or less defunct since 2007, it has done nothing to protect the health, safety and welfare of the public. Therefore, the General Assembly should sunset the Program.

## METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff interviewed Department staff, federal officials, representatives of previous EMS permit holders and other stakeholders and reviewed Colorado statutes and rules.

## MAJOR CONTACTS MADE DURING THIS REVIEW

Colorado Association of Commerce and Industry  
Colorado Department of Public Health and Environment  
Colorado Farm Bureau  
Colorado Livestock Association  
U.S. Environmental Protection Agency

### **What is a Sunset Review?**

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:  
Colorado Department of Regulatory Agencies  
Colorado Office of Policy, Research and Regulatory Reform  
1560 Broadway, Suite 1550, Denver, CO 80202  
[www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr)



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# Background

## Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
  - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

## Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

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## Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

## Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

## Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.



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## Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

## **Sunset Process**

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

The functions of the Environmental Management System (EMS) Permit Program (Program) as enumerated in Article 6.6 of Title 25, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2018, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the Program pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed program to issue a single permit based on a facility's EMS should be continued and to evaluate the performance of the Department of Public Health and Environment (Department). During this review, the Department must demonstrate that the Program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## **Methodology**

As part of this review, COPRRR staff interviewed Department staff, federal officials, representatives of previous EMS permit holders and other stakeholders and reviewed Colorado statutes and rules.

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## Profile of the Program

The U.S. Environmental Protection Agency (EPA) defines an EMS as “a set of processes and practices that enable an organization to reduce its environmental impacts and increase its operating efficiency.”<sup>2</sup>

The EMS framework enables an organization to achieve its environmental goals through consistent review, evaluation and improvement. This constant self-evaluation should help to identify opportunities for improving environmental performance without dictating a level of environmental performance that must be achieved.<sup>3</sup>

According to the EPA, the most commonly used framework for an EMS was developed by the International Organization for Standardization and articulates five main stages:<sup>4</sup>

- Commitment and Policy
- Planning
- Implementation
- Evaluation
- Review

This is commonly known as the “Plan-Do-Check-Act” methodology.<sup>5</sup>

The Program sought to predicate environmental permitting on the EMS platform.

Various federal statutes, such as the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act, require the states to develop EPA-approved permitting processes that align with each of these acts. Major components of these permits involve regular and periodic reporting requirements and inspections, recordkeeping requirements, renewals and the payment of fees. Thus, in addition to the costs of complying with the terms of a particular permit, there can be significant costs associated with the accompanying reporting, recordkeeping and inspection requirements.

Recognizing these ancillary costs, the Colorado General Assembly created the Program. As originally envisioned, a facility that held multiple permits could consolidate those permits into a single EMS permit, thereby reducing the reporting, recordkeeping and inspection burdens associated with holding multiple permits while improving environmental performance.

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<sup>2</sup> U.S. Environmental Protection Agency. *Learn About Environmental Management Systems*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>3</sup> U.S. Environmental Protection Agency. *What is an EMS?* Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>4</sup> U.S. Environmental Protection Agency. *EMS under ISO 14001*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>5</sup> U.S. Environmental Protection Agency. *EMS under ISO 14001*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

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Building on the Colorado Department of Public Health and Environment’s existing Environmental Leadership Program (ELP), the Program was piloted, on a voluntary basis, with gold tier ELP participants only. Such participants have already proven to be trustworthy and, most importantly, already have an EMS in place.

According to a draft of the pilot program’s final report,

[T]he intent was to allow a company to use its internal resources more effectively and efficiently to reduce a facility’s environmental impact, and utilize a business based system to meet and exceed environmental requirements.<sup>6</sup>

Further, under the traditional permitting process,

[F]acilities must obtain one permit for each medium source. One of the goals of the EMS [Pilot] Program was to change this paradigm, to address cross-media environmental impacts and ultimately mitigate environmental pollutants on a holistic level; thereby, offering participating facilities the opportunity to obtain a single “whole-facility” permit through the EMS [Pilot] Program.<sup>7</sup>

Thus, the Program was intended to consolidate multiple permits pertaining to multiple media,<sup>8</sup> and their associated regulatory burdens, into a single, EMS permit.

Four companies applied to participate in the original pilot of the Program, and three obtained permits. However, due to difficulties in implementing it, the Program has been defunct since 2007.

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<sup>6</sup> P. Woodford, “DRAFT: Environmental Management System Permit Pilot Project Final Report,” Colorado Department of Public Health and Environment, June 1, 2007, p. 3.

<sup>7</sup> Draft Memorandum from C. Ruble, Regulation Development and Enforcement Coordinator, Division of Environmental Health and Sustainability to L. Wolk, Executive Director and Chief Medical Officer, Colorado Department of Public Health and Environment, Regarding Rulemaking Hearing: “Proposed repeal of 5 CCR 1004-1, *Environmental Management System Permit Program Regulation*, for the rulemaking hearing to occur in September 2016,” September 21, 2016.

<sup>8</sup> In this context, the term “media” refers to various components of the natural environment, such as air, water and land.

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# Legal Framework

## History of Regulation

The Environmental Management System (EMS) Permit Program (Program) was created by the General Assembly in House Bill 04-1147 to further enhance environmental protection by authorizing innovative advances in environmental regulatory methods and approaches. Specifically, the General Assembly found that the State should promote and develop environmental regulatory approaches that:

- Encourage facility owners and operators to assess the environmental impact of their operations;
- Encourage innovation by and measure success through facility owners and operators setting measureable goals;
- Provide facility owners and operators with flexibility to implement the most effective pollution prevention, source reduction or other pollution reduction strategies for their particular facilities, while complying with verifiable and enforceable pollution limits;
- Encourage superior environmental performance, continuous improvement toward sustainable levels of resource usage, and minimal levels of pollution discharges, emissions and releases;
- Recognize facility owners and operators that are considered environmental leaders and that reduce pollution to levels below what is required by applicable law, through participation in the Program;
- Consolidate environmental requirements into one permit, while respecting local agency jurisdiction and encouraging local agencies to participate, and allow facility owners and operators to make environmental decisions based upon all environmental considerations;
- Reduce the time and money spent by agencies and facility owners and operators on paperwork and other administrative tasks that do not benefit the environment, including streamlining permit, recordkeeping, and reporting requirements;
- Increase public participation and encourage stakeholder consensus in the development of innovative environmental regulatory approaches and methods for monitoring the environmental performance of projects pursuant to state law;
- Encourage groups of facilities and communities to work together to reduce pollution levels below what is required by law;
- Provide reasonable assistance to facilitate meaningful stakeholder participation; and
- Increase understanding and transparency of environmental laws and promote communication among agencies, regulated entities and the public.

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The bill authorized the Colorado Department of Public Health and Environment (Department) to implement the Program on a voluntary basis with a limited number of participants such that all existing environmental standards would be satisfied, but through the use of alternative methods and procedures.<sup>9</sup> To qualify for participation, an entity had to demonstrate, among other things, that it was an environmental leader in Colorado.<sup>10</sup>

In 2006, the Program underwent its first sunset review and it was continued via Senate Bill 07-218 until 2018. The bill further delineated that entities that satisfied the requirements of the Department's Environmental Leadership Program's silver, gold or platinum tiers could apply to participate in the Program.

## Legal Summary

The Program is created in Article 6.6 of Title 25, Colorado Revised Statutes (C.R.S.). The Program must:

allow participants to meet existing environmental standards of a law, rule, order or permit related to the control or abatement of pollution through the use of alternative methods and procedures while ensuring compliance with an established ambient air or water standard.<sup>11</sup>

An EMS is,

an overall management system as approved by the Department, but that at a minimum identifies and addresses environmental concerns through the allocation of resources, assignment of responsibilities and ongoing evaluation of practices, processes and procedures to achieve sound environmental performance.<sup>12</sup>

Under the Program, all conventional environmental permits issued by the Department and any local agency and held by that facility remain in effect and are incorporated into the permit issued under the Program.<sup>13</sup>

Any permit issued under the Program must include, at a minimum:<sup>14</sup>

- The elements of an EMS;
- A requirement and criteria for audits of the EMS;
- A requirement and criteria for environmental compliance audits;
- A requirement and criteria for reporting a summary of the results of the environmental compliance audits;

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<sup>9</sup> § 25-6.6-104(1), C.R.S.

<sup>10</sup> § 25-6.6-104(4), C.R.S.

<sup>11</sup> § 25-6.6-104(1), C.R.S.

<sup>12</sup> 5 CCR 1004-1-1.2.11, Environmental Management System Permit Program Regulations.

<sup>13</sup> 5 CCR 1004-1-1.1, Environmental Management System Permit Program Regulations.

<sup>14</sup> § 25-6.6-104(3), C.R.S., and 5 CCR 1004-1-2.2, Environmental Management System Permit Program Regulations.

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- Environmental performance standards and limits;
  - A requirement that Program participants commit to measurable environmental benefits and continual environmental improvement;
  - Monitoring, reporting, recordkeeping and testing requirements;
  - The ability for an analysis and consideration of all environmental impacts in developing environmental requirements;
  - A requirement for a community involvement and communications plan; and
  - Procedures that reduce otherwise required permit modification procedural requirements.

The Program is voluntary and only those entities satisfying the requirements of silver, gold and platinum tiers of the Department's Environmental Leadership Program may apply to participate.<sup>15</sup>

For an entity to qualify as a silver tier participant, it must have no serious environmental violations for at least one year, no convictions or out-of-court settlements of formal charges of a criminal violation of an environmental requirement for at least two years and not entered into a settlement agreement or consent order for serious violations of an environmental requirement for at least one year prior to the submission of an application for a permit under the Program.<sup>16</sup> Since no permit under the Program can be issued to silver tier applicants until the applicant first achieves compliance with gold or platinum tier requirements, no entity may enter the Program at the silver tier.<sup>17</sup> Rather, a silver tier entity may apply to the Program, but a permit cannot be issued until the entity achieves gold or platinum tier status.

For an entity to qualify as a gold tier participant, it must have no serious environmental violations for at least three years, no convictions or out-of-court settlements of formal charges of a criminal violation of an environmental requirement for at least five years and not entered into a settlement agreement or consent order for serious violations of an environmental requirement for at least three years prior to the submission of an application for a permit under the Program.<sup>18</sup>

The statute directs the Department to establish the criteria for platinum tier participants that must be more stringent than those of the gold tier,<sup>19</sup> but the Department has not done so.

A permit issued under the Program is enforceable in the same manner as any other permit issued by the Department.<sup>20</sup>

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<sup>15</sup> § 25-6.6-104(4)(a), C.R.S.

<sup>16</sup> § 25-6.6-104(4)(a)(III), C.R.S.

<sup>17</sup> § 25-6.6-104(4)(a)(III)(D), C.R.S.

<sup>18</sup> § 25-6.6-104(4)(a)(II), C.R.S.

<sup>19</sup> § 25-6.6-104(a)(I), C.R.S.

<sup>20</sup> § 25-6.6-105(2), C.R.S.

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The Executive Director of the Department is vested with the authority to promulgate rules necessary for issuing, implementing, revoking or enforcing any permit issued under the Program.<sup>21</sup> These rules cover topics such as:<sup>22</sup>

- Applicability and Definitions;
- Eligibility and General Requirements for EMS Permits;
- EMS Permit Application Requirements;
- Processing of EMS Permit Applications;
- EMS Permit Issuance, Modification, Revocation and Reopening for Cause;
- Public Participation Requirements;
- Operational Flexibility, Measureable Environmental Benefits and Continual Environmental Improvement Projects;
- Auditing, Compliance Assurance Monitoring, Reporting, Recordkeeping and Testing;
- Appeal of an EMS Permit; and
- Confidential Information or Data Contained in Permit Applications or Reports Submitted Pursuant to Regulations.

Finally, on or before January 1, 2007, the Department was required to assess and report the Program's effectiveness in improving, enhancing and protecting the environment, garnering resource efficiencies and decreasing administrative burdens. Further, the Department was required to make recommendations as to whether and in what manner the Program should be continued.<sup>23</sup> A draft of this report was prepared, but it is unclear whether it was finalized.

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<sup>21</sup> § 25-6.6-104(2), C.R.S.

<sup>22</sup> See 5 CCR 1004-1, Environmental Management System Permit Program Regulations.

<sup>23</sup> § 25-6.6-105(4), C.R.S.

## Program Description and Administration

The Environmental Management System (EMS) Permit Program (Program) is a voluntary program administered by the Colorado Department of Public Health and Environment's Division of Environmental Health and Sustainability, Sustainability Unit (Department). No funds or employees are allocated to the Program.

Only companies that participate in the Department's voluntary Environmental Leadership Program (ELP) at the silver, gold or platinum tiers are eligible to apply for an EMS permit. Table 1 illustrates, for the federal fiscal years indicated, the number of participants in the ELP at each level.

**Table 1**  
**Environmental Leadership Program Participants, By Tier**

Federal Fiscal Year	Bronze	Silver	Gold	Total
2012	15	38	81	134
2013	22	41	83	146
2014	24	29	96	149
2015	29	34	97	160
2016	27	37	105	169

Due to the Department's regular interaction with the federal government, data are reported based on the federal government's fiscal year (October 1 through September 30).

Average annual participation over the five years reported is 23.4 companies at the bronze tier, 35.8 at the silver tier and 92.4 at the gold tier. On average, a total of 151.6 companies participate in the ELP each year.

The statute directs the Department to establish the criteria for platinum tier participants that must be more stringent than those of the gold tier,<sup>24</sup> but the Department has not done so.

To obtain an EMS permit, the ELP participant would contact the ELP Coordinator at the Department. Staff would review the request to determine eligibility, considering factors such as the changes to existing permits being sought.

During the pilot phase of the Program, four companies expressed interest in participating, but only three actually obtained an EMS permit. After discovering difficulties in implementing the Program, due to federal regulatory complications, these permits essentially dissolved.

<sup>24</sup> § 25-6.6-104(a)(I), C.R.S.



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Since the end of the pilot program in 2007, only two facilities (one in 2008 and one in 2013) have requested EMS permits. After consultations between the Department and the facilities, the parties determined that the facilities actually sought modifications to existing permits, not new EMS permits. Both modification requests were accommodated through the traditional permitting processes.

There are currently no active EMS permits.

### **Collateral Consequences – Criminal Convictions**

Section 24-34-104(6)(b)(IX), C.R.S., requires the Colorado Office of Policy, Research and Regulatory Reform to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

Since the program has been defunct since 2007, no EMS permits have been denied or revoked based on the criminal history of an EMS permit holder during the reporting period.

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## Analysis and Recommendations

### Recommendation 1 – Sunset the Environmental Management System Permit Program.

The U.S. Environmental Protection Agency (EPA) defines an environmental management system (EMS) as “a set of processes and practices that enable an organization to reduce its environmental impacts and increase its operating efficiency.”<sup>25</sup>

The EMS framework enables an organization to achieve its environmental goals through consistent review, evaluation and improvement. This constant self-evaluation should help to identify opportunities for improving environmental performance without dictating a level of environmental performance that must be achieved.<sup>26</sup>

According to the EPA, the most commonly used framework for an EMS was developed by the International Organization for Standardization and articulates five main stages:<sup>27</sup>

- Commitment and Policy
- Planning
- Implementation
- Evaluation
- Review

This is commonly known as the “Plan-Do-Check-Act” methodology.<sup>28</sup>

Various federal statutes, such as the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act require the states to develop EPA-approved permitting processes that align with each of these acts. Major components of these permits involve regular and periodic reporting requirements and inspections, recordkeeping requirements, renewals and the payment of fees. Thus, in addition to the costs of complying with the terms of a particular permit, there can be significant costs associated with the accompanying recordkeeping, reporting and inspection requirements.

When a facility holds multiple permits under multiple federal statutes, the cost and burden of compliance can become significant.

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<sup>25</sup> U.S. Environmental Protection Agency. *Learn About Environmental Management Systems*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>26</sup> U.S. Environmental Protection Agency. *What is an EMS?* Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>27</sup> U.S. Environmental Protection Agency. *EMS under ISO 14001*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

<sup>28</sup> U.S. Environmental Protection Agency. *EMS under ISO 14001*. Retrieved on July 17, 2017, from [www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS](http://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS)

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The EMS Permit Program (Program), housed in the Colorado Department of Public Health and Environment’s Division of Environmental Health and Sustainability, Sustainability Unit (Department), sought to create a process whereby a facility could voluntarily consolidate multiple permits into a single EMS permit, thereby streamlining the regulatory burdens associated with maintaining multiple permits and, ideally, recognizing greater environmental benefits.

Eligibility was predicated on membership in the Department’s voluntary Environmental Leadership Program (ELP) at the gold or platinum tier. Although rules were never promulgated to outline platinum tier eligibility, in federal fiscal year 2016, there were 105 gold tier ELP participants. Department staff estimates that approximately 42 of them held multiple permits, making them ideal candidates for an EMS permit.

However, demand for the EMS permit never materialized. Originally created as a pilot program in 2004, only four companies opted to begin the application process. In the end, only three actually obtained EMS permits.

During the pilot program, the participants still had to maintain and comply with all of the recordkeeping, reporting, inspection and renewal requirements of the underlying permits. Anecdotal evidence suggests that participants, which were already proven environmental leaders by virtue of their participation in the ELP, participated in the hopes that the permanent Program would recognize the anticipated regulatory benefits. The pilot program showed the potential for improving environmental performance, and was continued in 2007, following a sunset review.

However, Department staff maintains that the EPA informed the Department that all existing conventional permits (i.e., permits for waste, air and water) would have to remain in effect,<sup>29</sup> thereby defeating the intent of the single, multi-media EMS Permit. To be clear, anecdotal evidence suggests that the EPA was not necessarily opposed to the concept of a single permit, it was simply not willing to commit the resources to developing the Program without sufficient demand.

Not all of the blame for the failure of the EMS Permit Program lies at the feet of the EPA. According to a draft of the pilot program’s final report:

Further complications to maintaining existing permits was the number of different permit writers that needed to be coordinated with and division priorities that existed for the permitting units. These challenges lead to greater staff resistance, engagement and understanding of the goals of the project. The EMS permit was viewed more as something experimental (or that the Sustainability Program was doing) and not a viable way of approaching permits within the environmental divisions. Thus, the project was only partially implemented as initially designed.<sup>30</sup>

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<sup>29</sup> P. Woodford, “DRAFT: Environmental Management System Permit Pilot Project Final Report,” Colorado Department of Public Health and Environment, June 1, 2007, p. 12.

<sup>30</sup> P. Woodford, “DRAFT: Environmental Management System Permit Pilot Project Final Report,” Colorado Department of Public Health and Environment, June 1, 2007, p. 12.

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In other words, the Department's own bureaucracy also stood in the way of developing fully integrated permits. Further complicating this is the fact that environmental permits tend to be "siloed" according to the statute under which they are issued. As a result, integrating the statutes and their respective permitting processes would represent a monumental undertaking.

Additionally, the reference to "different permit writers" alludes to local permitting requirements, in addition to the various divisions within the Department. The Program never developed sufficiently to include local agencies in the single EMS permit, so local permits were still necessary where required.

Regardless of EPA's willingness or unwillingness to create a single, multi-media permit or the bureaucratic hurdles associated with implementing the Program, sunset is justified.

Another challenge associated with the Program was the notion of streamlining inspections. Holding multiple permits for multiple media necessitates multiple inspections. One goal of the Program was to streamline this process, but doing so is, very likely, impractical.

Inspectors tend to be specialists in a particular area or media. In order to conduct a single inspection of all of a facility's media, the inspector would have to be a specialist in all media, a sort of "superinspector." Most agree that the acquisition of such a skill set is impractical. As a result, multiple inspections by multiple inspectors would remain necessary, thereby defeating at least one of the reasons for the creation of the EMS permit.

Finally, one of the underlying premises of the EMS permit is the idea that the regulatory flexibility inherent in a single permit would eliminate the need for a facility to seek modifications to existing permits. However, the Department has mechanisms in place to streamline even this process.

A major difficulty in conducting this sunset review was the general lack of documentation surrounding the Program. Since no permits have been issued in a decade, much of the original documentation has been lost or destroyed, individuals with knowledge of the original pilot program have moved on to other positions and could not be located, and memories have faded.

In the end, the Program, while a well-intentioned attempt at regulatory innovation, is unworkable for a variety of reasons. Since it has been more or less defunct since 2007, it has done nothing to protect the health, safety and welfare of the public. Therefore, the General Assembly should sunset the Program.