

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer



Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

NOTICE OF PUBLIC RULE-MAKING HEARING BEFORE THE COLORADO BOARD OF HEALTH

NOTICE is hereby given pursuant to the provisions of Section 24-4-103, C.R.S., that the Colorado Board of Health will conduct a public rule-making hearing on October 17, 2012 in the Sabin-Cleere Conference Room of the Colorado Department of Public Health and Environment, Bldg. A, First Floor, 4300 Cherry Creek Drive, South, Denver, CO 80246, to consider the promulgation of procedural rules for the Board of Health. The Board meeting commences in the morning. For the specific time this hearing is scheduled, please consult the meeting agenda on the Board's Web site at <http://www.cdphe.state.co.us/op/bh/index.html> on or after Friday, October 5, 2012, or call (303) 692-3464.

The purpose of this hearing is to receive public comments on proposed procedural rules for the State Board of Health. The proposed rules establish who may serve as a rulemaking chair, set forth how the Board will conduct rulemaking hearings, establish deadlines for submission of written materials, and authorize limitations on written materials and oral comments.

The proposed rules have been developed by the State Board of Health pursuant to Section 25-1-108(1)(c)(I), C.R.S.

Copies of the proposed rules may be obtained by contacting the Colorado Department of Public Health and Environment, State Board of Health Office, EDO A-5, 4300 Cherry Creek Drive S., Denver, CO 80246, (303) 692-3466. The proposed amendments will also be available on the Board's Web site at <http://www.cdphe.state.co.us/op/bh/index.html> under "Notices of Upcoming Public Rulemaking Hearings and Draft Proposed Rules."

The Board encourages all interested persons to participate in the hearing by providing written data, views, or comments, or by making oral comments at the hearing. At the discretion of the Chair, oral testimony at the hearing may be limited to five minutes or less depending on the number of persons wishing to comment.

The Board requests submission of written materials no later than October 3, 2012 to allow the Board sufficient time to review the comments prior to the meeting. Persons wishing to submit written comments or views should submit them to:

Colorado Board of Health
ATTN: Jamie L. Thornton, Program Assistant
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South EDO-A5
Denver, Colorado 80246-1530
FAX: 303-691-7702, e-mail: Jamie.thornton@state.co.us

The proposed revisions to be considered at the hearing, together with the proposed statement of basis and purpose, specific statutory authority and regulatory analysis will be available for inspection at the above address by any person at least five working days prior to the hearing.

Dated this 14 day of August 2012.


Christopher E. Urbina, MD, MPH
Executive Director/Chief Medical Officer

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STATEMENT OF BASIS AND PURPOSE
AND SPECIFIC STATUTORY AUTHORITY FOR
State Board of Health Procedural Rules
6 CCR 1014-8

August 16, 2012

Basis and Purpose.

The Board of Health has had a set of bylaws for many years that govern the Board's internal operations, such as meeting dates and locations, and quorum requirements. The Board has always conducted its rulemaking hearings in accordance with the Colorado Administrative Procedures Act (C.R.S. §24-4-103) but has not had any additional procedural rules which further flesh out the rulemaking process. The three other Type 1 rulemaking bodies within the department (Air Quality Control Commission, Solid and Hazardous Waste Commission, and Water Quality Control Commission) have their own procedural rules. In 2010, Board staff suggested that establishing a set of procedural rules by which the Board could lay out how it will conduct meetings and rulemaking hearings could be useful to the public and to the Board. The Board discussed the idea in various work sessions and retreats and reviewed several draft proposals before beginning a stakeholder process in June 2012. Input from that process is discussed in the **Major Factual and Policy Issues Encountered** section below.

The purpose of these rules is to provide further definition and clarification regarding how the Board of Health conducts its rulemaking hearings and general business. The rules clearly set forth the expectations and protocols to all persons appearing before the Board to ensure that a level playing field exists for all. The procedural rules establish the expectations of the Board regarding the participants in the rulemaking process, lay out what the participants should expect in the process, and establish a structure to support and illuminate the process for all involved.

Second, the procedural rules of the Board are designed to facilitate the rulemaking process for all interested persons, including the Board members. The procedural rules are intended to promote participation by all interested persons in a fair and responsible manner and to facilitate the Board rendering thoughtful and well-informed decisions. By establishing procedural rules that are clear, concise, and have been the subject of public input and debate, the Board aims to create a level playing field for all the participants. Structured and transparent operating rules can help assure fair and impartial hearings, allow the decision-makers to focus on the substantive issues, simplify the process, and minimize unnecessary distractions.

Finally, the procedural rules establish a process whereby all Board members have the opportunity to preside over a rulemaking hearing. Currently the Board's bylaws provide that the President or Vice-President of the Board will conduct meetings and hearings. Allowing other members to take a leadership role in rulemaking hearings will expand the experience base and be helpful in succession planning for the Board.

Specific Statutory Authority. These rules are promulgated pursuant to the following statutes: C.R.S. §25-1-108(1) (c) (I).

48 Major Factual and Policy Issues Encountered.

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50 During the initial discussions among the Board, some members expressed concerns that having
51 formal procedural rules would intimidate some people and result in more limited public
52 participation in the process. Other concerns raised were whether having procedural rules would
53 limit the Board's flexibility to adapt to a given situation or prohibit it from acting on a more
54 informal basis when appropriate.

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56 On June 15, 2012, the Board held a stakeholder meeting to receive comments on the original
57 draft document. Over 4,000 notices regarding the meeting were distributed via U.S. Mail or
58 electronic mail. Two sets of written comments were received and 13 people attended the
59 meeting. Three Board members attended the stakeholder meeting and responded to questions
60 and comments. One stakeholder requested that the Board allow additional public comment
61 when amendments are made during the public hearing. The stakeholder recognized that it may
62 not be an issue that required an amendment to the proposed regulations but requested the Board
63 to make it part of its normal practice. The second set of written comments proposed changes to
64 the definitions section to include a definition of "opponent" and to clarify that an "interested
65 person" includes individuals, organizations, associations and governmental agencies. Another
66 suggestion included conforming amendments to sections 3.01.2(2), 3.03.1, and 3.03.2 regarding
67 the Board's ability to set limitations on the length, format and period for written and oral
68 testimony.

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70 A representative at the stakeholder meeting suggested four changes to the proposal. First, that
71 the Board use "party status" procedures similar to those used by other Commissions to address
72 the "interested person" concerns. The second suggestion was for the Board to include any
73 limitations it intends to impose in the notice of proposed rulemaking. It was also recommended
74 that the Board amend or eliminate the provision in sections 3.02.5(d) and 3.03.3(d) related to
75 whether there is consensus between the rule proponent and the amending party about a proposed
76 change. Finally, the representative suggested that whether or not a person or entity participates
77 in the development of the proposal should not be a factor considered by the Hearing Chair when
78 deciding whether to allow "new" information.

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80 One commenter at the stakeholder meeting opposed having any limitation on the amount or
81 length of written comments submitted to the Board. Two Board members suggested that the
82 definition of "interested person" delete "aggrieved" to be consistent with the definitions in the
83 Colorado Administrative Procedures Act ("APA"). The Board agreed to change the definition of
84 "interested person" so that it is consistent with the APA

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86 Alternative Rules Considered and Why Rejected.

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88 Throughout the two years that the Board discussed developing procedural rules, it considered
89 several different models. First, it looked at the types of procedural rules used by the other Type
90 1 rulemaking bodies within the department (Air Quality Control Commission, Solid and
91 Hazardous Waste Commission, and Water Quality Control Commission). Each one of these
92 Commissions has slightly different procedures with varying levels of process. After significant
93 discussion, the Board rejected adopting those models because it deemed them too formal and
94 restrictive for the needs of the Board and the people that appear before it. During the course of

95 all the discussions, it was of paramount concern that the Board remains approachable and
96 accessible to anyone wishing to be heard. The Board members believe that this proposal creates
97 a level and fair playing field for all participants by clearly setting forth the Board's expectations
98 and responsibilities for everyone.

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DRAFT REGULATORY ANALYSIS
for
Proposed Amendments to 6 CCR 1014-8
State Board of Health Procedural Rules

August 16, 2012

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10 **1. A description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

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14 This rule will affect all people who appear before the board to participate in rulemaking hearings. This group includes individuals, organizations, associations, and governmental agencies.
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18 **2. To the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.**

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22 The board expects that the clear direction provided to rulemaking participants and the board members will result in more efficient rulemaking hearings. Established deadlines for submission of comments by participants should minimize the last minute substantive changes and alternatives proposals that can disrupt and otherwise draw out the rulemaking process.
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28 Additionally, the procedural rules set forth the board's expectations regarding the participants in the rulemaking process, lay out what the participants should expect in the process, and establish a structure to support and illuminate the process for all involved. Board staff currently can spend significant time explaining the rulemaking process to the public and department staff. By establishing procedural rules that are clear, concise, and have been the subject of public input and debate, everyone will know how the rulemaking process works and how they can participate. Structured and transparent operating rules can help assure fair and impartial hearings, allow the decision-makers to focus on the substantive issues, simplify the process, and minimize unnecessary distractions.
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39 **3. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

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42 None.

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44 **4. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.**

47 There are no probable costs to this rule. However, the board believes that there are
48 significant potential benefits as stated above. By maintaining the status quo (operating
49 without procedural rules), some of the public are unclear as to how they may engage in a
50 rulemaking hearing and may forgo participating at all. Some participants may
51 intentionally circumvent the stakeholder process conducted by the department and only
52 raise their concerns at the rulemaking hearing. This often results in confusion and delay
53 because neither the department nor the board members are adequately prepared to
54 consider the new issues.

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56 **5. A determination of whether there are less costly methods or less intrusive methods**
57 **for achieving the purpose of the proposed rule.**

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59 There are no less costly or less intrusive methods.

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61 **6. A description of any alternative methods for achieving the purpose of the proposed**
62 **rule that were seriously considered by the agency and the reasons why they were**
63 **rejected in favor of the proposed rule.**

64

65 During the initial discussions, the board reviewed the procedural rules used by the Air
66 Quality Control Commission, the Solid and Hazardous Waste Commission, and the
67 Water Quality Control Commission. The board determined that while those procedural
68 rules worked well for those entities, it was important that any procedural rules the board
69 would contemplate reflect its values. The Commissions' rules were considered lengthy,
70 complex, and potentially intimidating to the public that regularly appears before the
71 board. After discussions at the board's 2011 retreat and subsequent work sessions, the
72 board developed the present proposal. This proposal will effectively serve the needs of
73 the citizens for a forum to express their views and the board's desire to conduct its
74 business in a fair, open, and consistent manner.

75

76 **7. To the extent practicable, a quantification of the data used in the analysis; the**
77 **analysis must take into account both short-term and long-term consequences.**

78

79 No empirical data was used in formulating the proposal. However, the board examined
80 and considered the rulemaking experience of other entities with procedural rules in
81 developing this proposal.

Highlighted text indicates language changed since the July 18, 2012 Request for Rulemaking

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State Board of Health
PROCEDURAL RULES
6 CCR 1014-8

August 16, 2012

Regulation I. General Provisions

Section 1.01 Definitions

- 1.01.1 “Board” means the Colorado State Board of Health
- 1.01.2 “Department” means the Colorado Department of Public Health and Environment and its staff.
- 1.01.3 “General public” means any members of the public not in the attentive public or associated with a group or organization on any given issue; laypersons.
- 1.01.4 “Hearing Chair” means the Board member that presides over a rulemaking hearing.
- 1.01.5 “Interested person” means any person who may be ~~affected or~~ aggrieved by agency action.
- 1.01.6 “Proponent” means a person or entity that is advocating for the adoption of a rule proposal.
- 1.01.7 “Rule-making” means the Board process for the formulation, amendment, or repeal of a rule.
- 1.01.8 “Staff” means the administrator for the Board, the program assistant for the Board and any person employed by the department or on contract with the department. **“On contract” includes working within the department via a temporary contract.**

Regulation II. Hearing Chair

Section 2.01 Who serves and how selected

- 2.01.1 Any member of the Board may serve as a Hearing Chair for a rulemaking hearing.
- 2.01.2 The president of the Board shall serve as the Hearing Chair for rulemaking hearings, or in his or her absence, the vice-president. The president may also select any member to serve as a Hearing Chair as provided in 2.01.3
- 2.01.3 At the time the Board sets a rulemaking hearing, or at anytime thereafter, the President may select a member of the Board to serve as the Hearing Chair. The President shall use his or her discretion in selecting a Hearing Chair but in no event may the Hearing Chair have an actual or perceived/apparent conflict of interest. **Any actual or perceived/apparent conflict of interest** must be voluntarily disclosed as provided in C.R.S. §24-18-110 by the prospective hearing chair during the selection process in the subject matter of the rulemaking hearing over which he or she shall preside.

43 Regulation III. Rulemaking Hearings

44 Section 3.01 General Provisions

45 3.01.1 The rulemaking hearing ordinarily is conducted under Robert's Rules of
46 Order –Revised, but the Board may from time to time act on a more
47 informal basis, but in no event shall the hearing fail to comply with ~~title~~
48 ~~24, article 4 of the Colorado Revised Statutes C.R.S. §24-4-103~~ Nothing
49 in these rules shall be construed to limit the ability of Board members to
50 ask appropriate questions of any participant in a rulemaking hearing.

51 3.01.2(1) The Board shall conduct a public rulemaking hearing before
52 promulgating any rule. The Board shall afford any interested persons,
53 members of the general public and department staff an opportunity to
54 submit written data, views, or arguments. The Hearing Chair may set
55 appropriate limitations on the length, format, time frame for submission
56 and general scope of any written data, views, or arguments in the notice of
57 proposed rulemaking or by a subsequent order of the Board.

58 (2) The Board may allow interested persons, members of the general
59 public and department staff to present data, views or arguments orally at
60 the rulemaking hearing if the Board determines, in its discretion, that such
61 oral testimony will be helpful. Oral testimony at the rulemaking hearing
62 may be limited. The Hearing Chair may impose reasonable restrictions on
63 the oral testimony at the rulemaking hearing, including but not limited to,
64 restricting the amount of time, and prohibiting duplicative or repetitive
65 testimony.

66 3.01.3 Board members, department staff, interested parties, and the general
67 public may not address the Board until recognized by the Hearing Chair.

68 Section 3.02 Submission of Written Comments

69 3.02.1 The Board may require that written data, views and arguments be
70 submitted in advance of the rulemaking hearing as stated in the notice of
71 proposed rulemaking or by a subsequent order of the Board. Written
72 data, views, comments and arguments shall be submitted no later than five
73 (5) calendar days prior to the rulemaking hearing unless extenuating
74 circumstances exist.

75 3.02.2 The Board may limit or prohibit the introduction of new substantive
76 written information concerning a proposed rule at the rulemaking hearing.

77 3.02.3 The Board may set appropriate limitations on the length, format, time
78 frame for submission and general scope of any written data, views, or
79 arguments. The Board may specify the limitations in the notice of
80 proposed rulemaking or by a subsequent order of the Board.

81 3.02.4 Interested persons and the department are encouraged to develop
82 consensus positions which emanate from discussions prior to the
83 rulemaking hearing. The Board, interested persons and the department
84 must have a reasonable opportunity, in light of the circumstances, to
85 evaluate any alternative proposals.

86 3.02.5 The Hearing Chair may limit or prohibit the introduction of new
87 substantive written or oral information concerning a proposed rule or
88 alternative proposal at the rulemaking hearing. When determining

- 89 whether to consider new written substantive information the Board may
90 consider:
- 91 a. whether the submitter has been given an opportunity to be involved
92 in the stakeholder process and with the development of the original
93 rule proposal rule being proposed and/or discussions concerning
94 the rule proposal;
 - 95 b. the timing of the new information or alternative proposal and the
96 hearing;
 - 97 c. the complexity of the issues being presented;
 - 98 d. the degree to which the proponent of the rule and the interested
99 persons involved in the rulemaking hearing are or expect to be in
100 agreement on the substantive issues; and
 - 101 e. whether any statutory or programmatic requirements exist
102 regarding the need for Board action.

103 Section 3.03 Oral Comments at Rulemaking Hearing

104 3.03.1 The Board encourages the general public to participate in rulemaking
105 hearings by commenting on proposed rules or alternate proposals. The
106 Board will generally afford any interested person an opportunity to submit
107 data, views, and arguments orally at the hearing, but, where appropriate,
108 may require that such data, views, and arguments be submitted in writing
109 in advance of the rulemaking hearing as reflected in the notice of proposed
110 rulemaking or by order of the Board.

111 3.03.2 The Board will generally set aside a portion of the rulemaking hearing to
112 hear comments and testimony from the general public. The Hearing Chair
113 always has the right to limit or prohibit the oral testimony of the general
114 public or interested persons at the rulemaking hearing. Organized groups
115 of individuals are urged to identify one spokesperson. Speakers should be
116 as concise as possible, and avoid repeating comments previously made by
117 others.

118 3.03.3 The Board and/or Hearing Chair may limit or prohibit the introduction of
119 new substantive oral information concerning a proposed rule or alternative
120 proposal at the rulemaking hearing. When determining whether to
121 consider new substantive oral information the Board may consider:

- 122 a. whether the commenter has been given an opportunity to
123 be involved with the development of the original rule proposal and/or
124 discussions concerning the rule proposal;
 - 125 b. the timing of the new information or alternative proposal
126 and the hearing;
 - 127 c. the complexity of the issues being presented;
 - 128 d. the degree to which the proponent of the rule and the
129 interested persons involved in the rulemaking hearing are or expect to be
130 in agreement on the substantive issues; and
 - 131 e. whether any statutory or programmatic requirements exist
132 regarding the need for Board action.
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135 Regulation IV. Miscellaneous

136 **RESERVED.**

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