



COLORADO

Air Quality Control Commission

Department of Public Health & Environment

Adjudicatory Hearing Guidebook

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I. INTRODUCTION

The Air Quality Control Commission (“Commission” or “AQCC”) is an administrative agency responsible for implementing the policies set forth by the Colorado General Assembly to oversee Colorado’s air quality program pursuant to the Colorado Air Pollution Prevention and Control Act (“APPCA”), Section 25-7-101 et seq., C.R.S., as amended.

The primary role of the Commission is to adopt an air quality management program that promotes clean and healthy air for Colorado’s citizens and visitors, protects Colorado’s scenic and natural resources in a cost-effective and efficient manner, and ensures that Colorado meets National Ambient Air Quality Standards established by the United States Environmental Protection Agency. The Commission also uniformly and equitably enforces its rules and regulations through adjudicatory proceedings, ensuring that the goals of the air quality program the Commission has adopted are not compromised.

This Guidebook has been prepared to provide members of the public and other interested parties information on the adjudicatory hearing process. The Commission tried to make this Guidebook as informative and accurate as possible. If you participate in the adjudicatory process, you are responsible for reviewing relevant statutes and rules to make sure you understand your rights and responsibilities. More details regarding this process may be found in the Commission’s Rules of Practice and Procedure, 5 CCR 1001-1, the Air Pollution Prevention and Control Act, C.R.S. §25-7-101, et seq., and the Colorado Administrative Procedures Act (“APA”), C.R.S. §24-4-103. The Commission hopes that this Guidebook will help facilitate involvement and improve the understanding of the adjudicatory process.

For further information regarding any of the topics addressed in the Guidebook, please contact the Commission Office at:

Colorado Air Quality Control Commission
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South, EDO-AQCC-A5
Denver, Colorado 80246
Email: cdphe.aqcc-comments@state.co.us
Web: <https://www.colorado.gov/cdphe/aqcc>

Thank you.

II. PROCESS SUMMARY

As noted in the Introduction, the Commission is the administrative agency responsible for adopting and revising Colorado air quality standards and regulations. The Commission also enforces the standards and regulations through adjudicatory proceedings. Adjudicatory proceedings include notice and hearing activities which determine past and future rights and obligations of individual persons or sources (e.g., appeals of Air Pollution Control Division (“Division”) compliance orders and noncompliance penalty determinations, challenges of Division denials of proposed permits, and applications for declaratory orders. This section provides a brief overview of these requirements.

A. Overview of the Adjudicatory Process

The APA, APPCA, and the Commission’s Rules of Practice and Procedure establish four general categories of adjudication requirements:

- Requirements relevant to **initiating the adjudicatory hearing**, which ensure that the Commission and other interested parties, have information regarding the adjudicatory hearing.
- Requirements relevant to the **prehearing process**, which ensure that parties compile complete cases and encourage settlement and resolution prior to the adjudicatory hearing.
- Requirements relevant to the **adjudicatory hearing**, which ensure that the adjudicatory hearing proceeds in an efficient and orderly manner.
- Requirements after the adjudicatory hearing.

1. The Request for Adjudicatory Hearing

A person requesting an adjudicatory hearing must file a **hearing request** with the Commission within twenty days after receiving a Division order of violation or noncompliance or Division order assessing a noncompliance penalty. Hearing requests must also be filed with the Attorney General.

The Commission Office will include hearing requests on the agenda for the next Commission meeting following receipt of the hearing request, where the Commission will grant or deny the request. If the Commission grants the request for adjudicatory hearing, the Commission will set the adjudicatory hearing for a date within ninety days after receiving the request for hearing if the hearing relates to a Division compliance order, declaratory order, or permit appeal. The Commission will set the adjudicatory hearing for a date within sixty days after receiving the request for hearing if the hearing relates to an order assessing a noncompliance penalty.

Adjudicatory hearings are typically scheduled for one of the Commission's monthly meetings, which generally occur on the third Thursday and/or Friday of every month. Thirty days prior to the adjudicatory hearing, the Commission will publish notice of the hearing in the local newspaper and on the Commission website.

2. The Prehearing Process

Once the Commission schedules an adjudicatory hearing, interested individuals are required to follow certain procedures in order to be involved in the adjudication. The **hearing notice** contains instructions on how to apply for party status in the proceedings as well as filing deadlines. A **petition for party status** must be filed with the Commission no later than thirty days prior to the hearing, if not otherwise specified in the hearing notice. The person requesting the adjudicatory hearing must appear as a party. The Division must appear as a party in adjudications of Division actions.

The Commission encourages settlement prior to the adjudicatory hearing. The person requesting the hearing must submit to the Commission Hearing Officer at least forty-five days before the scheduled hearing date a report stating whether settlement is likely and whether continuance of the scheduled hearing is appropriate.

Parties may conduct depositions and discovery but must complete discovery at least five days before the adjudicatory hearing, unless otherwise ordered by the Hearing Officer.

The Commission will schedule a **prehearing conference** for a date between thirty and twenty days before the adjudicatory hearing to define the issues, establish the details of the hearing process, and help resolve differences. Each party must file a **prehearing statement** with the Commission at least five days prior to the adjudicatory hearing, or as otherwise specified in the hearing notice.

The person who requested the adjudicatory hearing may request dismissal of the case at any time by filing such request with the Commission.

3. The Adjudicatory Hearing

After the parties fulfill all prehearing procedural requirements, the Commission holds the adjudicatory hearing. The Division has the burden of proof in proceedings regarding violations of the Air Pollution Prevention and Control Act, Commission regulations, permits, or orders. The permit applicant has the burden of proof in appeals of permit terms and conditions or permit denials. The Commission often establishes a plan for party presentations, including order of presentation and time limits. The Commission may also allow public participation. Following all presentations, the Commission will decide the case by majority vote.

4. Requirements after the Adjudicatory Hearing

Any party or Commissioner who participated in the final decision may request to reconsider part or all of the final decision. A request to reconsider must be filed with the Commission within ten days of the date of the decision. If the Commission decides to reconsider the issue, the matter will be placed on the agenda for the next Commission meeting.

Any party may also move for a stay of the final Commission determination while judicial review is sought. The party may move for a stay at the conclusion of the adjudicatory hearing or by filing a motion with the Commission at least five days before the next Commission meeting.

B. Chronology of Events

The following Chronology summarizes the events discussed in the Overview of the adjudicatory process:

- 1) Request for adjudicatory hearing (within 20 days after a Division order)
- 2) Commission decision to deny or grant the request (at the next Commission meeting but at least 15 days after receiving the request)
- 3) Request for continuance due to settlement discussions (at least 45 days before the hearing)
- 4) Notice of adjudicatory hearing published in the newspaper and on the Commission website (at least 30 days prior to the hearing)
- 5) Request for party status due (no later than 30 days prior to the hearing)
- 6) Prehearing statements due (typically 5 days before the prehearing conference)
- 7) Prehearing conference (typically scheduled 20-30 days prior to the hearing)
- 8) Request for continuance (at least 10 days before the hearing)
- 9) Completion of discovery (at least 5 days before the hearing)
- 10) Adjudicatory hearing conducted according to the date listed in the hearing notice (typically the third Thursday of the month unless otherwise noticed)
- 11) Commission finding or order (within 30 days after the hearing)
- 12) Request to reconsider (within 10 days of decision)
- 13) Request for stay (at the conclusion of the hearing or at least 5 days before the next Commission meeting following the decision)

III. INITIATING AN ADJUDICATORY HEARING

A person requesting an adjudicatory hearing must file a request with the Commission within twenty days after receipt of a Division order of violation or noncompliance or Division order assessing a noncompliance penalty. Hearing requests must also be filed with the Attorney General.

A. Hearing Request

The Hearing Request contains basis information about the request for adjudication and must include:

- a. The name of the person(s) requesting the hearing, including address and telephone number;
- b. A general statement of the relevant facts, the legal issues to be addressed, and the relief requested by the proponent;
- c. A copy of any Division compliance order, noncompliance penalty determination, or permit which is the subject of the request;
- d. A statement identifying the date of receipt of the compliance order, date of issuance of the noncompliance penalty determination, or date of publication of public notice for a permit; and;
- e. An estimate of the time that will be required for the hearing.

IV. THE PREHEARING PROCESS

After the Commission approves the request for adjudicatory hearing, but prior to the hearing, interested persons have an opportunity to become involved in the adjudicatory process. The procedures to obtain party status are discussed in more detail below. The Commission's prehearing process is overseen by a Hearing Officer appointed by the Commission chair.

A. Hearing Notice

The Commission publishes the hearing notice in the local newspaper and also posts the notice on the Commission's website. Any individual that would like to receive a notice of a hearing can join the Commission's mailing list by providing the appropriate mailing information to the Commission. Notice of an adjudicatory hearing is published at least thirty days prior to commencing the hearing. The hearing notice will contain the general subject matter, prehearing conference and hearing information, instructions to obtain party status, and pertinent filing deadlines. Because of the timing of the Commission meetings and the publication of the Colorado Register, the notice period typically results in a three month period between the time of a request for hearing and the actual hearing itself.

B. Party Status Application

The hearing notice includes a deadline for requesting party status to an adjudicatory hearing, no later than thirty days prior to the adjudicatory hearing if not otherwise specified. The Commission may grant late party status for good cause shown. The Commission will grant party status to any person affected by the proceeding whose interests are not already adequately represented. Persons with party status must meet certain deadlines for the submission of documents as specified in the notice, must submit their documents to the other parties, will receive copies of documents submitted by other parties, may make an oral or written presentation at the hearing, and have the right to make objections and cross-examine witnesses.

The person requesting the adjudicatory hearing must appear as a party. The Division must appear as a party in adjudications of Division actions. The United States Environmental Protection Agency may also appear as a party.

D. Settlement Period and Continuance

The Commission encourages efforts to settle adjudicatory proceedings and will favorably consider requests for continuances to allow such discussions. At least forty-five days before the adjudicatory hearing, the party requesting the hearing must submit a report to the Commission Hearing Office stating whether settlement is likely and continuance of the scheduled hearing is appropriate.

Other parties may file a request for continuance with the Commission at least ten days before the scheduled adjudicatory hearing. The Hearing Officer may grant motions for continuance filed less than ten days before the hearing only for good cause shown. The Hearing Officer will decide on requests for continuance after all parties have had an opportunity to respond to the request. Any party may appeal the Hearing Officer's decision to the Commission.

D. Prehearing Statements

Each party must submit a prehearing statement at least five days prior to the prehearing conference. Each party must file electronic copies with the Commission and email copies to each other party, the Assistant Attorney General representing the Commission, and the Assistant Attorney General representing the Division. If prehearing statements are not delivered to the Commission by the due date, the Commission may revoke party status. The prehearing statement must include:

- An executive summary, in lay persons terms, discussing the general position and contents of the prehearing statement;
- An explanation of the factual and legal issues and the position being taken on each;

- A list of the issues to be resolved by the Commission;
- A copy of all exhibits that will be introduced at the hearing;
- A list of witnesses with a brief description of their testimony, including a description of any exhibits the witness will discuss or rely upon;
- The reasonable estimate of the amount of time necessary for presentation; and
- All written testimony to be offered into evidence at the hearing;

The prehearing statements must reflect final positions on the factual and legal issues to ensure that parties conduct all necessary discussions before prehearing statements are due. The Commission may reschedule the hearing if prehearing statements do not reflect final positions.

E. Prehearing Conference

Each party must attend the prehearing conference, typically scheduled twenty to thirty days prior to the adjudicatory hearing. At the prehearing conference, the parties will identify for the Hearing Officer any remaining unresolved issues and the Hearing Officer will attempt to facilitate further negotiation among the parties toward resolution of the issues. The Hearing Officer will also prepare the parties for the hearing, determine the amount of time for and order of presentation, and entertain any prehearing motions or applications for late party status. Parties must file any prehearing motions concerning the hearing procedures or other issues with the Commission electronically. Persons submitting an application for late party status should also submit a prehearing statement.

At the conclusion of the prehearing conference, the Assistant Attorney General representing the Commission will draft a prehearing order for the Hearing Officer that reflects any rulings made by the Hearing Officer with respect to the hearing procedures and specifies the time and order of presentations at the hearing.

F. Amended Prehearing Statements

Parties may amend or supplement their prehearing statements to address issues raised at the prehearing conference only. The Hearing Office will specify the deadline to file amended prehearing statements.

V. THE ADJUDICATORY HEARING

The Hearing Officer acts as hearing chair at the adjudicatory hearing. The prehearing order generally provides for presentation by the party bearing the burden of proof, other party presentations, and rebuttal presentation by the party bearing the burden of proof. The Commission may allow public participation at appropriate times.

In adjudicatory hearings concerning an alleged violation of the Colorado Air Pollution Control Act, Commission regulation, Division order, permit term or condition, or State Implementation Plan, the Division bears the burden of proof. In adjudicatory hearings concerning permit applications, the applicant bears the burden of proof.

Once all comment and argument has been heard, the Hearing Officer will close the hearing and commence deliberations. During this time, Commissioners discuss the information they have received. The Commission will make a final decision within thirty days after the completion of the hearing. The effective date of the Commission's final decision is the date of adoption of a dispositive resolution of the matter, unless the Commission designates another effective date.

Typically, the Commission's deliberations occur in public. However, the Commission may opt to conduct an Executive Session to ask for advice from the Commission's attorney or to discuss other topics, to the extent permissible under the Colorado Open Meetings Act. Executive Sessions are closed to the public. Once such topics are addressed, the Commission will re-open the public meeting to make any decisions.

The Commission will arrange for a full and complete record of all proceedings and testimony presented at the adjudicatory hearing.

VI. FOLLOWING THE ADJUDICATORY HEARING

A Requests for Reconsideration

Any party or Commissioner who participated in the final decision may request to reconsider part or all of the final decision. A request to reconsider must be filed with the Commission within ten days of the date of the decision. The Technical Secretary will arrange a prompt meeting of the Commission. A majority vote by the Commission members who participated in the original final decision is required to approve the reconsideration. If the Commission decides to reconsider the issue, the matter will be placed on the agenda for the next Commission meeting.

B. Stays Pending Judicial Review

Any party may move for a stay of the final Commission determination while judicial review is sought. A party adversely affected or aggrieved by the adjudicatory decision may seek judicial review within thirty-five days after the effective date of the decision. The party may move for a stay at the conclusion of the adjudicatory hearing or by filing a motion with the Commission at least five days before the next Commission meeting. If the motion is made after the adjudicatory hearing, the Commission will hear the motion at the next Commission meeting and afford all participants in the adjudicatory hearing an opportunity to respond to the motion. After hearing the presentation and any comments, the Commission will make a decision on the motion to stay the final adjudicatory decision.