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Colorado General Assembly



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MEMORANDUM

To: Committee on Legal Services

From: Jennifer Berman, Office of Legislative Legal Services

Date: March 6, 2026

Subject: Rules of the Solid and Hazardous Waste Commission, Hazardous Materials and Waste Management Division, Department of Public Health and Environment, concerning solid waste sites and facilities, 6 CCR 1007-2 part 1 (LLS Docket No. 260035; SOS Tracking No. 2025-00500).¹

Summary of Problem Identified and Recommendation

Although this rule is not scheduled to expire until May 15, 2027, Representative Camacho has asked that the Office review the rule during the current regular session of the General Assembly.

The Office has reviewed the Solid and Hazardous Waste Commission's rules concerning solid waste sites and facilities and has concluded that Rule 18.2.7 of the commission's rules is not within the commission's rule-making authority. Specifically, the Solid and Hazardous Waste Commission (commission) has exceeded its rule-making authority by directing the producer responsibility program for statewide recycling advisory board (advisory board) to conduct an evidentiary hearing about the factors used to increase or decrease annual dues assessed against a producer of covered materials (producer), which hearing is neither contemplated in statute nor included within the advisory board's statutorily granted

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I)(A), C.R.S., these rules are not scheduled to expire until May 15, 2027, but Representative Camacho asked that the Office of Legislative Legal Services review the rules during the current regular session of the General Assembly.

authority. Moreover, the rule conflicts with section 24-4-105 (3), C.R.S., of the State Administrative Procedure Act, which requires that a hearing be presided over by the regulating agency, an administrative law judge from the office of administrative courts, or, if authorized by law, a hearing officer who is a member of the agency. **We, therefore, recommend that Rule 18.2.7 of the rules of the Solid and Hazardous Waste Commission concerning solid waste sites and facilities be repealed, effective May 15, 2026.**

Analysis

1. The commission lacks statutory authority to grant the advisory board additional duties.

The advisory board consists of 13 voting members comprising local government, environmental, producer, and recycling facility representatives who are appointed by the executive director of the Department of Public Health and Environment.² Section 25-17-704 (7), C.R.S., lists the precise authority that the advisory board has been granted as follows:

25-17-704. Producer responsibility program for statewide recycling advisory board- creation - membership. (7) The advisory board shall:

- (a) Advise the organization throughout the needs assessment process in accordance with section 25-17-705 (3)(b);
- (b) Review the needs assessment reported to the advisory board pursuant to section 25-17-705 (3)(c);
- (c) Review the plan proposal submitted under section 25-17-705 (4);
- (d) Consult with the organization on amendments to the plan proposal and the amended plan proposal;
- (e) Recommend that the executive director approve or reject the plan proposal or amended plan proposal;
- (f) Review the annual report submitted by the organization under section 25-17-709 (2)(a); and
- (g) Consult with the organization on the development and updating of the minimum recyclable list.

In Rule 18.2.7³, the commission purports to expand the advisory board's authority to include the authority to hold an evidentiary hearing requested by a producer to contest whether the factors used to increase or reduce the producer responsibility dues assessed against the producer by the producer responsibility organization

² §25-17-704 (2)(a), C.R.S.

³ Attached as Appendix A.

(PRO) designated to implement a producer responsibility program for statewide recycling (program) comply with the plan establishing the program. Under the rule, the advisory board is allowed to consider evidence submitted at the hearing and make a recommendation to either uphold the producer's dues assessment or reduce the dues assessment. In other words, the advisory board serves as the hearing officer and finder of fact regarding the appropriateness of the producer responsibility dues assessed by the organization. Specifically, the commission's rules provide, in relevant part:

18.2.7 Producer dues eco-modulation factors hearing

(A) Timeline to request a hearing

A producer who receives a final invoice from the PRO or individual producer of an alternative collection program assessing annual dues for the Program **may request a hearing before the advisory board** to contest whether the eco-modulation factors increasing or reducing the dues assessed comply with the Plan. ...

(C) Hearing process

The advisory board has the authority to hear producer hearing requests in compliance with 24-4-105, C.R.S. ...

At the hearing, the producer bears the burden to show that the eco-modulation factors included in the dues assessed by the invoice do not comply with the Plan ... **The advisory board may consider any evidence submitted with the hearing request and any evidence submitted by the PRO or individual producer of an alternative collection program**, if applicable. Following completion of the hearing, the board must make a recommendation to either uphold the producer's dues as invoiced or reduce the producer's dues based on the error found. The board must issue its recommendation in writing and include reasoning supporting its recommendation and the recommended final dues amount. ...

(D) Director review, decision

The Director of the Hazardous Materials and Waste Management Division must review the board's recommendation and make a decision whether to approve or reject the recommendation ... If the Director decides to reject the board's recommendation, **the Director must make their own decision regarding the eco-modulation factors included in the dues based on the record reviewed by the board. ... (Emphases added)**

Part 7 of article 17 of title 25, C.R.S., the statutes governing the program, not only does not grant the advisory board the authority to conduct the evidentiary hearing, but does not contemplate the hearing at all. The only hearing contemplated in the statutes is mentioned in section 25-17-710, C.R.S., regarding alleged violations of part 7 of article 17 of title 25, C.R.S. Under section 25-17-710 (2)(b), C.R.S., the commission is authorized to conduct that hearing regarding alleged violations “in accordance with section 24-4-105.”

The commission has rule-making authority to “promulgate rules in accordance with article 4 of title 24 as may be necessary for the administration of this part 7 and the enforcement of this part 7 pursuant to section 25-17-710.”⁴ But, that authority is not so broad as to create a hearing when none is contemplated by the statutory framework of the program. Moreover, the rule-making authority does not include adding to the statutorily-limited authority of the advisory board. Rule 18.2.7, therefore, exceeds the commission’s rule-making authority.

2. The commission’s delegation of fact-finding authority to the advisory board to preside over an evidentiary hearing conflicts with the State Administrative Procedure Act.

The State Administrative Procedure Act (Act) governs the administrative procedures by which state agencies conduct themselves, including the administrative procedures governing evidentiary hearings. In section 24-4-105 (3), C.R.S., the Act provides, in part:

24-4-105. Hearings and determinations. (3) At a hearing only one of the following may preside: The agency, an administrative law judge from the office of administrative courts, or, if otherwise authorized by law, a hearing officer who if authorized by law may be a member of the body which comprises the agency. ...

Part 7 of article 17 of title 25, C.R.S., the statutes governing the program, clearly contemplates the commission as the relevant agency to hold a hearing whereby, in section 25-17-710 (2)(b), C.R.S., the statute authorizes the commission to hold a hearing regarding alleged violations “in accordance with section 24-4-105.”

Rule 18.2.7 of the commission’s rules directly conflicts with section 24-4-105 (3), C.R.S., by instead delegating to the advisory board the authority to hold an evidentiary hearing in accordance with the Act, as follows:

18.2.7 Producer dues eco-modulation factors hearing

⁴ §25-17-705 (7), C.R.S.

(C) Hearing process

The advisory board has the authority to hear producer hearing requests in compliance with 24-4-105, C.R.S. ...

By delegating to the advisory board the authority to preside over an evidentiary hearing, the commission's rules directly conflict with section 24-4-105 (3), C.R.S., of the Act because the advisory board is not the commission, an administrative law judge from the office of administrative courts, or a hearing officer who is a member of the commission. Rather, the composition of the voting members of the advisory board consists of 13 local government, environmental, producer, and recycling facility representatives, none of whom represent the commission, and many of whom represent private entities affected by the implementation of the program.

Recommendation

We therefore recommend that Rule 18.2.7 of the rules of the Solid and Hazardous Waste Commission concerning solid waste sites and facilities be repealed because Rule 18.2.7 exceeds the commission's rule-making authority and conflicts with statute.

APPENDIX A

Department of Public Health and Environment

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-2

Part 1 - Regulations Pertaining to Solid Waste Sites and Facilities

18.2.7 Producer dues eco-modulation factors hearing

(A) Timeline to request a hearing

A producer who receives a final invoice from the PRO or individual producer of an alternative collection program assessing annual dues for the Program may request a hearing before the advisory board to contest whether the eco-modulation factors increasing or reducing the dues assessed comply with the Plan, IPP, applicable regulations, guidance or the Producer Responsibility Act. Before requesting a hearing, a producer must first proceed through mediation. The producer may request a hearing within 35 days following the final outcome of the mediation. All requests for hearing must be sent to the following email address, eprcomments@state.co.us, no later than 5pm Mountain Time on the 35th day. A producer may withdraw its request for a hearing at any time upon notice via email to eprcomments@state.co.us.

(B) Requirements for a request for hearing

A producer who requests a hearing must include the following information in its request. Producers who do not address all requirements will have their request dismissed. If applicable, a producer may request the following information be protected as confidential business information under the process set forth in Section 18.1.4.

A request for hearing must:

- (1) Be submitted in writing and include the name of the entity requesting the hearing and the full name, address, email, and phone number of the actual individual who will be the main contact for the request;
- (2) Include a detailed description of the alleged error in the eco-modulation factors included in the producer dues calculations with citations to the specific authority under the Producer Responsibility Act and any other authorities and/or documents in support;
- (3) Include documentation of completion of mediation;

(4) Include a copy of the final disputed invoice and proof of payment, including the date of payment, of the disputed dues; and

(5) State the amount of time anticipated for the hearing.

(C) Hearing process

The advisory board has the authority to hear producer hearing requests in compliance with 24-4-105, C.R.S. Hearings may be held in person, virtually or in a hybrid format at the advisory board's discretion.

Upon receipt of a complete hearing request, the administrator for the advisory board or the administrator's designee must forward the request to the board. The administrator for the board or the administrator's designee must also issue a notice of hearing describing the prehearing and hearing processes to the producer via email and post the notice on its webpage. The administrator for the board or the administrator's designee must then schedule the producer's request for a hearing at the next available board meeting that allows for at least 30-days notice prior to the hearing.

The PRO or individual producer of an alternative collection program may request party status at the hearing by submitting an email to epcomments@state.co.us, no later than 10 days after the notice of hearing is posted to the board's webpage.

At the hearing, the producer bears the burden to show that the eco-modulation factors included in the dues assessed by the invoice do not comply with the Plan, IPP, applicable regulations, guidance or the Producer Responsibility Act. The advisory board may consider any evidence submitted with the hearing request and any evidence submitted by the PRO or individual producer of an alternative collection program, if applicable. Following completion of the hearing, the board must make a recommendation to either uphold the producer's dues as invoiced or reduce the producer's dues based on the error found. The board must issue its recommendation in writing and include reasoning supporting its recommendation and the recommended final dues amount.

Should the producer who requested the hearing fail to attend it, the advisory board may make a recommendation based on the evidence in the record and any evidence and testimony from the PRO or individual producer of an alternative collection program.

(D) Director review, decision

The Director of the Hazardous Materials and Waste Management Division must review the board's recommendation and make a decision whether to approve or reject the recommendation within 45 days after receipt. If the Director decides to reject the board's recommendation, the Director must make their own

decision regarding the eco-modulation factors included in the dues based on the record reviewed by the board. The Director must issue their recommendation in writing and include reasoning supporting their decision. The Director must communicate their decision to all parties to the hearing via email 45 days after receiving the board's recommendation.

(E) No stay, refund

A producer's obligation to pay the dues assessed by the PRO or individual producer of an alternative collection program is not stayed while the hearing request is pending.

If the Director of the HMWMD decides for the producer, a producer will receive a refund of the total amount of increased dues from the assessed eco-modulation factors within a reasonable amount of time but no later than 60 days following the Director's decision.

(F) Judicial review

A producer may seek judicial review of any final decision of the Director of HMWMD as permitted by § 24-4-106, C.R.S.