

City and County of Denver

Energize Denver
Benchmarking and Energy
Performance Requirements

Buildings 25,000 Square Feet and Larger

Technical Guidance for Penalties and Enforcement

This shortened version of the Technical Guidance contains information relevant to the Enforcement process but retains the Section numbers from the full guide.

Version 1.0
November 17, 2022

Nothing in this Guidance shall supersede any Denver ordinance or regulation.

[Denver Revised Municipal Code, Chapter 10, Article XIV.](#)

5. PENALTIES AND ENFORCEMENT

5.1 Penalties

CASR prefers that building owners invest in their buildings to reach the 2030 targets instead of paying penalties to the city and is committed to supporting building owners with their efforts and exploring the flexibility that alternate compliance options can afford. As recommended by the Task Force, CASR will “focus its efforts on doing everything it can to support those out of compliance in quickly putting a plan in place and implementing upgrades as soon as possible, rather than simply fining those who missed their first compliance target.” CASR is structuring the penalties to be slightly higher than the average cost of compliance to assist project and facility managers with getting approvals on projects with good returns from energy savings. The team is also committed to assisting under-resourced buildings with designing and implementing compliance plans so that penalties are not imposed.

5.1.1 Types of Penalties

For the performance requirements, there are two main types of penalties: a *target penalty* and a *maintenance penalty*.

- Target Penalty – A *target penalty* is assessed if the building did not reach the 2024 Interim Target, 2027 Interim Target, or 2030 Target. If the building has not met the 2030 target, it will stay at the target penalty level annually assessed until the target is met.
- Maintenance Penalty - Once the building reaches its 2030 target, it would be switched over to a *maintenance penalty* on an annual basis for not maintaining the 2030 target indefinitely. If the building’s annual site EUI is 5% worse than the target it is supposed to be maintaining, the building would switch back to the target penalty level until the target has been achieved again.

There are other reasons why a penalty may be assessed:

- A complete and accurate Benchmarking report was not submitted by the annual deadline
- Errors in data the Owner has submitted to CASR, that could include energy use data, solar generation, and capacity, use attributes, building information, calculations, or results. The Owner shall correct such errors, submit the updated benchmarking report to CASR, and notify CASR of the updated submission. Failure to correct the errors would be considered a failure to submit a complete and accurate report for that year.
- Knowingly withholding information or submitting inaccurate information that affects performance evaluation
- Building owner does not satisfy the requirements of an Alternate Compliance Timeline Adjustment agreement

5.1.2 Penalty Assessment

For the performance requirements, penalties are assessed by taking the “kBtu not achieved” as calculated in the Performance Evaluation Section 3.7.2, then multiplying it by the cost per kBtu to calculate the penalty amount.

$$\text{“kBtu not achieved”} * \text{Cost/kBtu} = \$ \text{ penalty amount}$$

For buildings that have received an approved benchmarking exemption and alternate compliance option for the performance evaluation year, penalties would be assessed according to the ACO agreement. For buildings without a benchmarking report for an evaluation year, penalties are assessed using either the previous year’s benchmarking report or the local median EUI data by building type for 2019 if the building has never benchmarked. If a previous benchmarking report is used, the assumption will be that no improvements have been made and performance is at the same level. If CASR has never received a benchmarking report and uses 2019 local median EUI

data, the assumption will also be that the building continues to perform at the median and penalties will be assessed accordingly.

5.1.3 Penalty Schedule

Energize Denver’s Task Force recommended that “fines should be somewhat more than the cost of compliance and should be heftier for buildings with an alternate compliance timeline. The compliance obligation and status of the building must be tied to the building with disclosure requirements, an attachment to the deed or a development agreement that attaches to the parcel.” The Energize Denver Ordinance enables CASR to assess a civil penalty of “up to \$0.70 for each required kBtu reduction per year that the owner’s covered building fails to achieve in that year.” *CASR reserves the right to enforce penalties at the maximum level but will assess penalties at the minimum level provided in Table 7*, so building owners can focus on achieving the 2030 targets without maintenance penalties along the way. The full penalty schedule with minimum and maximum levels is in Appendix F.

TABLE 7 – MINIMUM PENALTY SCHEDULE

Type	Penalty Level	Assessment Period
Benchmarking, failure to correct errors, knowingly withholding or inaccurate information	\$2,000	annually
Target Penalty	\$0.30/kBtu	2024, 2027, 2030
Maintenance Penalty	\$0.05/kBtu	Starting 2031 then annually
Failure to reach target as agreed in Alternate Compliance Agreement	According to date of submission in Table 5	As outlined in agreement

A visual representation of the enforcement timeline is shown in Figure 5. As a reminder, timeline adjustments are available to owners who are making efforts at compliance and need assistance with the target timelines.

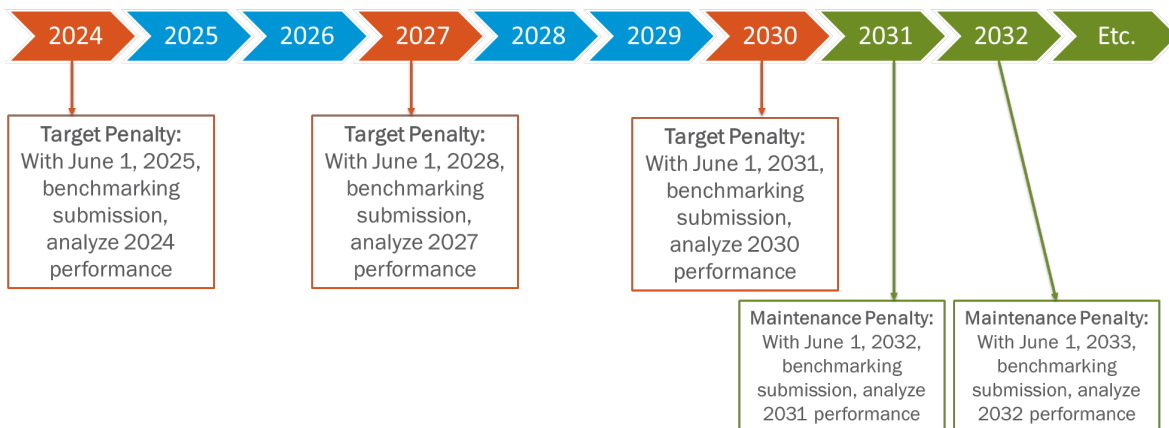


FIGURE 5 – VISUAL REPRESENTATION OF MINIMUM PENALTY SCHEDULE

5.1.4 Example Compliance Scenarios with Penalties

This section contains several examples of combining different compliance strategies and resulting penalties assessed. Penalties are cumulative because the interim targets are designed to help the building be on track to meet the 2030 target, so early action is encouraged. In all of these examples, the minimum level for target penalties were assessed in an Office building that is 150,000 sq. ft.

5.1.4.1 Example # 1

This example shows a building that did nothing to improve their EUI (Table 8).

Scenario:

- Did not receive the electrification credit
- Did not purchase or install renewables
- Did not apply for a timeline adjustment ACO
- Building achieved *no reduction* from a 2019 baseline of 80 EUI

TABLE 8 – EXAMPLE 1: NO REDUCTIONS

Year	EUI Targets	EUI Actual	kBtu Performance	kBtu Target	kBtu not achieved	Penalty Level	Penalty
2024	69	80	12,000,000	10,350,000	1,650,000	\$0.30/kBtu	\$495,000
2027	59	80	12,000,000	8,850,000	3,150,000	\$0.30/kBtu	\$945,000
2030	48.3	80	12,000,000	7,245,000	4,755,000	\$0.30/kBtu	\$1,426,500
Cumulative Penalties							\$2,866,500

5.1.4.2 Example # 2

This example shows a building that did make some progress on their 2030 target but did not take advantage of the renewables credit to fill in the gap (Table 9).

Scenario:

- Did not receive the electrification credit
- Did not purchase or install renewables
- Did not apply for a timeline adjustment ACO
- Building achieved *some reduction in EUI*

TABLE 9 – EXAMPLE 2: SOME EUI REDUCTIONS

Year	EUI Targets	EUI Actual	kBtu Performance	kBtu Target	kBtu not achieved	Penalty Level	Penalty
2024	69	67	10,050,000	10,350,000	-	\$0.30/kBtu	\$0
2027	59	58	8,700,000	8,850,000	-	\$0.30/kBtu	\$0
2030	48.3	52	7,800,000	7,245,000	4,755,000	\$0.30/kBtu	\$166,500
Cumulative Penalties							\$166,500

5.1.4.3 Example # 3

This example shows a building that knew they were going to miss the 2024 target but purchased renewables instead of submitting a timeline adjustment application. It did make some progress on their 2030 target and used renewables again in 2030 to fill in the gap (Table 10).

Scenario:

- Did not receive the electrification credit
- Purchased long-term off-site renewables contract
- Did not apply for a timeline adjustment ACO
- Building achieved *their 2030 target with EUI reductions and Renewables Credit (RC)*

TABLE 10 – EXAMPLE 3: EUI REDUCTION AND RENEWABLE CREDIT

Year	EUI Targets	EUI Actual	kBtu Performance	kBtu Target	kBtu not achieved	Penalty Level	Penalty
2024	69	72+RC	10,300,000	10,350,000	-	\$0.30/kBtu	\$0
2027	59	62+RC	8,700,000	8,850,000	-	\$0.30/kBtu	\$0
2030	48.3	52+RC	7,100,000	7,245,000	-	\$0.30/kBtu	\$0
Cumulative Penalties							\$0

5.1.4.4 Example # 4

This example shows a building that was planning a renovation with energy efficiency measures for 2024 with some operational adjustments occurring in 2025 and a solar installation, so they submitted a timeline adjustment application (Table 11). Through the timeline agreement, the new target dates for the building were 2026 and 2030.

Scenario:

- Did not receive the electrification credit
- Installed renewables
- Timeline adjustment shifted the targets to 2026 and 2030
- Building achieved their 2030 target with EUI reductions and Renewables Credit (RC)

TABLE 11 – EXAMPLE 4: TIMELINE ADJUSTMENT AND RENEWABLE CREDIT

Year	EUI Targets	EUI Actual	kBtu Performance	kBtu Target	kBtu not achieved	Penalty Level	Penalty
2026	60	42+RC	5,800,000	9,000,000	-	\$0.40/kBtu	\$0
2030	48.3	42+RC	5,800,000	7,245,000	-	\$0.40/kBtu	\$0
Cumulative Penalties							\$0

5.1.4.5 Example # 5

This example shows a building that reached their 2030 target and was shifted to maintenance penalty levels (Table 12). For 2031, the building maintained their EUI target and even performed a little better in 2032. In 2033, the building’s energy performance worsened, resulting in a small penalty at the \$0.05/kBtu level. In 2034, the building’s performance continued to worsen, more than 5% away from their EUI target, so the penalty was switched back to the target penalty of \$0.30/kBtu. In 2035, the building corrected their energy performance within 5% of the EUI target, they would be switched back to the smaller maintenance penalty level, or even better, no penalties if performance is better than the target.

Scenario:

- Building met their 2030 target and switched to maintenance penalties
- Maintained target for two years but went above 5% threshold in 2034, so target penalty level assessed (5% threshold = 50.7 EUI or 7,605,000 kBtu)

TABLE 12 – EXAMPLE 5: MAINTENANCE PENALTIES

Year	kBtu Performance	kBtu Target	kBtu not achieved	Penalty Level	Penalty
2031	7,245,000	7,245,000	0	\$0.05/kBtu	\$0
2032	7,200,000	7,245,000	0	\$0.05/kBtu	\$0
2033	7,295,000	7,245,000	50,000	\$0.05/kBtu	\$2,500
2034	8,000,000	7,245,000	755,000	\$0.30/kBtu	\$226,500

2035	7,200,000	7,245,000	0	\$0.05/kBtu	\$0
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5.2 Enforcement

5.2.1 Benchmarking

Owners of covered buildings will be subject to a civil penalty, according to Table 6, if the building’s benchmarking report is not submitted by the annual deadline. The following is an outline of the steps for benchmarking penalty assessments, shown as a timeline in Figure 6:

1. **Warning Notice:** Once the deadline has passed, CASR will send a warning notice by email. The building owner will have a 30-60 day grace period from the benchmarking deadline to submit the benchmarking report or correct data issues in a “pending” submission. The length of the grace period will be determined by CASR on an annual basis.
2. **Civil Penalty - Administrative Citation:** If the building owner is not in compliance by the end of the grace period, an administrative citation is issued. The building owner has 30 days to either submit the benchmarking report (which nullifies the citation) or file an appeal.
3. **Payment:** If the building owner does not file an appeal or submit the benchmarking report, the owner has one hundred eighty (180) days from the date of the citation to pay the penalty amount with the manager of finance.
4. **Property Lien:** If a building owner fails to pay the required amount within one hundred eighty (180) days, the civil penalty will be considered a debt to the city until paid in full. The debt is a perpetual lien on the property, and is superior and prior to all other liens, regardless of their dates of recordation, except for liens for general taxes and prior special assessments, until the civil penalty owed, delinquent interest, and recording fees have been paid in full.

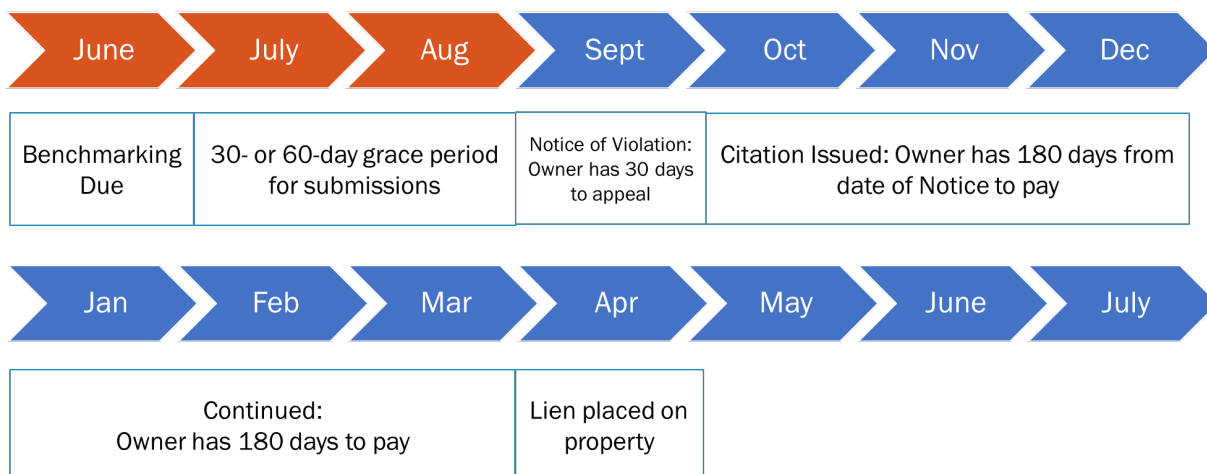


FIGURE 6: BENCHMARKING REQUIREMENTS ENFORCEMENT TIMELINE

5.2.2 Performance Requirements

Building owners will be subject to a civil penalty, in accordance with Table 6, if targets have not been achieved or maintained or another reason previously listed. The following is an outline of the steps for penalty assessments, shown as a timeline in Figure 7:

1. **Warning Notice:** Once the performance evaluation has been completed for a covered building, CASR will send a warning notice. The building owner will have ninety (90) days from the date of the warning notice to submit an application for an alternate compliance option, if applicable.
2. **Notice of Violation:** If the building owner has not applied for an alternate compliance option by the end of the 90 days, CASR will issue a notice of violation. The building owner will have thirty (30) days to file an appeal of the notice of violation (see Section 5.2.3).

3. Civil Penalty – Administrative Citation: If the building owner has not filed an appeal, an administrative citation is issued. The building owner has one hundred eighty (180) days to pay the penalty with the manager of finance.
4. Property Lien: If a building owner fails to pay the required amount within one hundred eighty (180) days, the civil penalty will be considered a debt to the city until paid in full. The debt is a perpetual lien on the property, and is superior and prior to all other liens, regardless of their dates of recordation, except for liens for general taxes and prior special assessments, until the civil penalty owed, delinquent interest, and recording fees have been paid in full.

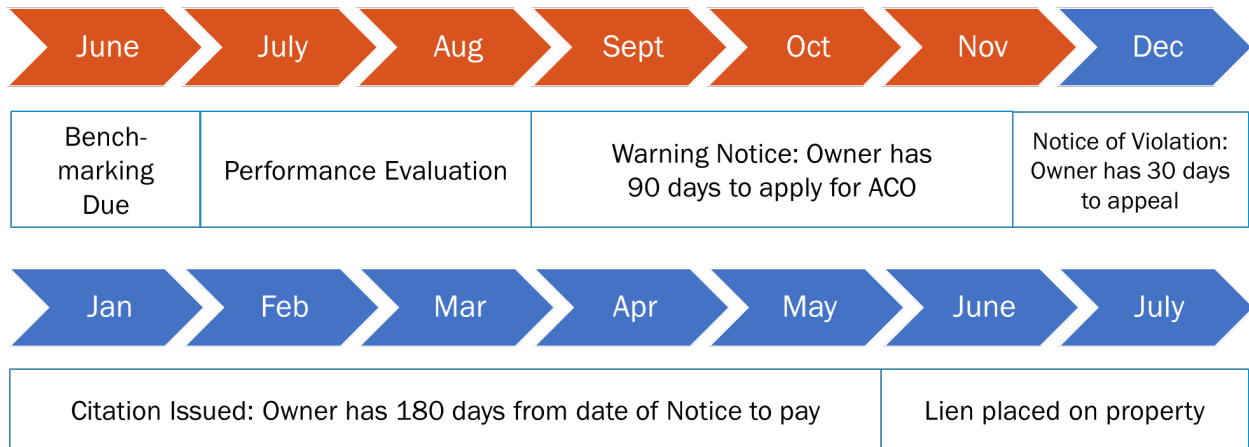


FIGURE 7: PERFORMANCE REQUIREMENTS ENFORCEMENT TIMELINE

5.2.3 Appeals

A building owner has the right to appeal the administrative citation by filing a “petition for appeal.” All documents to be filed with the Director must be submitted through the online form or delivered to CASR at 201 W. Colfax Avenue, 7th floor, Denver, CO 80201, or other address as directed on its website.

5.2.3.1 Initiating an Appeal

An appeal is initiated by filing a Petition for Review of a Notice of Violation. The Petition, together with a nonrefundable filing fee, must be filed within thirty (30) days from the date of service of the Notice or Order being appealed, or within a time period outlined in the Notice or Order. The filing fee for an appeal of a Notice of Violation is \$25.00. Payments by check must be payable to the Manager of Finance. Timely filing of the Petition and payment of the filing fee are jurisdictional prerequisites to an appeal.

5.2.3.1.1 Petition for Review

All petitions, briefs, and other papers must be written or typed, and if any of these papers are illegible, the Manager may refuse to accept the filing. No particular form of petition is required, provided the petition includes:

- Petitioner's name, mailing address, and telephone number.
- If Petitioner has legal representation, the name, mailing address, and telephone number of that representative.
- The Code provision(s) and, if any, the rule and regulation at issue; the dollar amount in controversy; and the time during which the matter at issue accrued or occurred.
- A copy of the Notice or Order under appeal.
- The reason(s) Petitioner believes the Notice or Order is factually or legally contrary to the ordinances of the city, or the policies and regulations of the department.
- A statement of the relief requested (i.e., outcome desired).

- If appropriate, any exhibits (including any drawings, floor plans, or pictures) supporting Petitioner's position.
- The signature of the Petitioner or Petitioner's legal representative.

If a legible petition is timely filed with the filing fee and substantially includes the information listed in this section, the hearing clerk shall accept the petition. If the petition is illegible or does not substantially comply, the hearing clerk may refuse to accept the filing, but must provide written notice to the petitioner describing the deficiency.

5.2.3.2 *Representation*

A natural person may represent himself or herself or be represented by an attorney admitted to practice in any of the United States. If the Petitioner is not a natural person or sole proprietor, it must be represented by an attorney admitted to practice in any of the United States unless the Director allows a shareholder, member, partner, board member, or officer to represent the business entity. In this case, the representative of the business entity must submit a properly executed power of attorney at or before the hearing.

5.2.3.3 *Responsibilities of the Director and/or Hearing Officer*

- Determination of Each Appeal - The Director and/or Hearing Officer shall conduct a hearing on each accepted Petition, including those submitted for determination based on written argument and written statement of facts.
- Assignment of Hearing Officer - the Director, at their sole discretion, may delegate the conduct of the hearing or the review of a matter submitted for determination based on written argument and written statement of facts to a Hearing Officer.
- Duties and functions - the Hearing Office and/or Manager shall perform the duties and functions necessary and incidental to determining the matter, hearing all evidence, examining all documents, ruling on evidentiary questions, and generally conducting a quasi-judicial proceeding in conformance with the Code, these Rules, and other applicable rules and regulations.
- Subpoenas. Upon request by any party, the Director and/or Hearing Officer may issue a subpoena. The party requesting the subpoena shall serve it upon the person whose attendance is required and provide notice to all other parties and interested persons in accordance with Rule 45 of the Colorado Rules of Civil Procedure. All costs related to the subpoena, including witness and mileage fees, must be paid by the requesting party in accordance with Rule 45.

5.2.3.4 *The Hearing*

5.2.3.4.1 *Scheduling the Hearing Date*

- Generally, hearings will be scheduled in the order petitions are filed but may be scheduled out of order as the hearing clerk finds appropriate. If requested, the hearing clerk may grant each party one rescheduling request. At the request of either party, the Director may grant continuances for good cause shown.
- No later than ten (10) days before the hearing, the hearing clerk shall provide written notice of the date, time, and place of all hearings to the parties. Written notice must be sent to the Petitioner via first class mail at the address specified in the Petition and to the Manager of the appropriate division.

5.2.3.4.2 *Prehearing Activities*

- Ex Parte Communications. All oral and written communications between any party with the Director or the Hearing Officer that are not on the record, concern the subject matter of the appeal, and are made without the other party present or copied on written correspondence are prohibited.

- CASR Response. CASR may file a response to the Petition and provide other information to the Hearing Officer that it believes will assist in deciding the matter. The response is due within 14 days of the Office's receipt of the Petition.
- Petitioner's Appearance/Failure to Appear. Any Petitioner who fails to appear at a scheduled hearing waives the right to a hearing and adjudication of issues related to the hearing, provided that notice of the hearing was mailed in the time and manner set forth in Rule 7.5(E)(v). Failure to appear at a hearing that is noticed in accordance with those requirements, may result in dismissal of the Petition and affirmation of the Notice or Order.
- Prehearing Statement. At the request of any member or upon a motion from a party, the Director may require the parties to file a prehearing statement. The purpose of a prehearing statement is to define the issues to be presented; identify the witnesses and exhibits to be presented, the time required for the hearing; and disclose generally the nature of the testimony to be presented to allow a fair hearing of the issues. The prehearing statement must be filed at least five (5) business days before the hearing date, or as otherwise ordered by the Hearing Officer. The prehearing statement must present the issues raised by the Petition, agreed and disputed facts, copies of exhibits not included with the Petition, names of witnesses with a brief statement summarizing their testimony, and if either party expects that more than 15 minutes will be needed to present their case, a request for a specific amount of time. Petitioner's exhibits must be numbered and the Office's exhibits must be lettered. If a prehearing statement is required and a party fails to list witnesses or to provide copies of exhibits to the prejudice of the other party or the Hearing Officer's consideration of the issues, the Hearing Officer may disallow testimony by unlisted witnesses and may refuse to admit unlisted exhibits into evidence, except for purposes of rebuttal.

5.2.3.4.3 Burden of Proof

- Notices of Violation by the Manager are presumed to be correct. The Notice serves as prima facie evidence of the existence of the violation.
- The Petitioner has the burden of persuasion and must prove by a preponderance of the evidence (presented at the hearing or submitted by written brief and supporting material) that the Notice or Order is legally contrary to the applicable ordinances, rules, and regulations or that the facts presented do not show a violation of the applicable ordinance or rules and regulations.
- For procedural efficiency, the order of proceedings may be altered to require the Office to present its case in support of the Notice or Order first. The burden of persuasion, however, remains with the Petitioner to show the correctness of its position by a preponderance of the evidence.
- Expert Witnesses. A witness intending to give opinion testimony must first be qualified as an expert.
- Recordings and Transcripts. All hearings must be recorded or transcribed. A copy of the recording or transcript of a recording will be provided at the expense of the party who requests it.

5.2.3.4.4 Hearing Order of Proceedings

- Docket call by the Hearing Officer.
- Administration of Oath: All oral testimony must be given under oath administered by the Hearing Officer in substantially the following form: "Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?" with a required affirmative response.
- Opening statement by a representative of the Office, unless waived or reserved until the opening of CASR's case
- Opening statement by Petitioner, unless waived
- Presentation of testimony and other evidence by Petitioner, allowing cross-examination by CASR (exhibits shall be lettered for identification)

- Presentation of testimony and other evidence by CASR with cross-examination by Petitioner (exhibits shall be numbered for identification)
- Rebuttal testimony and evidence, if any
- Sur-rebuttal testimony and evidence, if the Hearing Officer chooses
- Argument, if is desired by the Hearing Officer
- Closing argument by Petitioner summarizing the evidence, legal basis, and argument in support of its position. If the Petitioner chooses not to present a closing argument, none shall be allowed by CASR.
- Closing argument by CASR summarizing the evidence, legal basis, and argument in support of its position.
- Instead of or in addition to argument, the Hearing Officer may request the submission of written briefs.

5.2.3.4.5 Presentation of Case at Hearing

- **Time Allowed.** The Petitioner and the Department will each have fifteen minutes to present their respective cases (opening statement, presentation of evidence, rebuttal evidence, and closing statement) to the Hearing Officer unless one of the parties has requested more time to present its case. Cross-examination time is not included in the fifteen-minute time limit. A request for additional time must be made in the prehearing statement if one is required. Otherwise, the request must be made in writing at least seven days before the hearing. In determining whether and how much additional time to allow, the Hearing Officer shall consider the complexity of the case, the needs of due process, and fairness to the Parties. This Rule is intended to afford a full and fair hearing of each Petition in an orderly and expeditious manner that will allow for prompt hearing of Petitions.
- **Copies.** Copies made by printers and by duplicating and facsimile machines may be admitted into evidence or substituted in evidence in place of original documents.
- **Electronic Documents.** An electronic document, a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature may be admitted into evidence or substituted in evidence in place of original documents.

5.2.3.4.6 Submission on Written Briefs

A petitioner may choose to submit the case on written briefs, supporting data, affidavits, or stipulated facts rather than through oral testimony at a hearing. If the Petitioner chooses to submit a case on written briefs:

- He or she must provide written notice of this election to the Manager at least seven (7) days before the hearing;
- CASR is limited to submitting its position in writing.
- The Hearing Officer shall establish a briefing schedule and provide written notice of it to the parties.

5.2.3.5 Recommended Decision

The Hearing Officer shall make a written Recommended Decision, which must be sent to Petitioner by first class mail, postage prepaid and provided to CASR within 30 days of the date of the hearing.

Possible outcomes:

- If Petitioner did not carry its burden of persuasion, the Hearing Officer may: uphold the Notice or Order; uphold, suspend, or reduce the civil penalty; and require payment of any outstanding assessed civil penalties and costs by a specified date.
- If Petitioner carried its burden of persuasion, the Hearing Officer may dismiss the Notice or Order and overturn the assessment of civil penalties.

Unless a party timely requests the Director to review a Hearing Officer's Recommended Decision, the Recommended Decision becomes the Decision of the Director on the date it is served upon Petitioner by personal service, or if served via U.S. Postal Service, ten days after it is sent first class mail, postage prepaid.

5.2.3.6 Petition for Director Review of Recommended Decision

Any party may file a Petition for Director Review of the Hearing Officer's Recommended Decision. The Petition must be filed with the Director within ten (10) days of mailing of the decision. For the purpose of this filing requirement, for a Petition sent via first class mail, postage prepaid, or via overnight delivery service, the date of filing will be the date postmarked or delivered to the City, respectively.

No particular form of Petition for Director Review of the Hearing Officer's Recommended Decision is required, provided that the following information is set forth in writing:

- The case number;
- A summary of the party's objections to the Hearing Officer's findings of fact, conclusions of law, and Recommended Decision;
- A statement of the relief requested;
- The name, address and telephone number of the party seeking Director review of the Recommended Decision, and the name, address, and telephone number of that party's legal representative, if any, authorized to present them in the matter; and,
- The signature of the party seeking Director review of the Recommended Decision or of that party's legal representative.

The Director is not bound by a Hearing Officer's Recommended Decision; the Director's review of Recommended Decisions, however, is limited to the administrative record established at the underlying hearing before the Hearing Officer.

The administrative record includes all filings and documents provided to the Hearing Officer before and during the hearing. If the matter was submitted for determination on written briefs, the administrative record includes the Recommended Decision, filings and documents submitted. An index of the administrative record shall be provided to the parties at the time the record is provided to the Director. The administrative record should be provided to the Director at least seven days before the meeting at which it is scheduled for Director review.

5.2.3.7 Final Decision; Compliance

When the Director issues a decision either after hearing or determining an appeal in the first instance or after the Director reviews a Recommended Decision, its decision becomes the Final Decision that is subject to review under Rule 106(a)(4), C.R.C.P. If a Petition for Director review of a Recommended Decision is not filed within ten (10) days, the Recommended Decision becomes the Final Decision. All Final Decisions must be complied with. If a Final Decision includes a conditional waiver of any civil penalty, in whole or in part, and Petitioner does not fully comply with the conditions, the civil penalty is automatically reinstated in its entirety without further Director action.