



# MEMORANDUM

**TO:** Board of County Commissioners  
**DATE:** June 1, 2020  
**FROM:** Bruce T. Barker, Weld County Attorney  
**SUBJECT:** Legal Effect of PHO 20-28

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The Board of County Commissioners has been asked several times to submit to Governor Polis and Colorado Department of Public Health and Environment (“CDPHE”) Executive Director Jill Ryan a request for a variance from Fourth Amended Public Health Order 20-28 (“PHO 20-28”). That PHO includes a variance procedure whereby counties may ask for approval of an “alternative COVID-19 suppression plan endorsed by the local public health agency and adopted by the county commissioners or other county-level governing body, in addition to verification from local hospitals that they have the capacity to serve all people needing their care.” Presumably, the variance would allow restaurants, gyms and other businesses to open fully without having to comply with the COVID-19 restrictions set forth in PHO 20-28.

Prior to requesting a variance from an order of any kind, one must first determine if the order is valid. That determination is based upon a review of whether the person or entity making the order has the statutory authority to do so and, if so, whether the maker did so in a procedurally correct manner.

PHO 20-28 is not directed at any specific individual or owner of property. Instead, it is a series of generally applicable rules applying to every person physically in Colorado depending upon whether they fit into various defined categories.

C.R.S. § 24-4-102 (15) defines the term, “rule,” as follows:

(15) “Rule” means the whole or any part of every agency statement *of general applicability and future effect implementing, interpreting, or declaring law or policy* or setting forth the procedure or practice requirements of any agency. “Rule” includes “regulation”. (Emphasis added.)

C.R.S. § 24-4-102 (10) defines the term, “order,” as follows:

(10) “Order” means the whole or any part of *the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by any agency in any matter other than rule-making.* (Emphasis added.)

PHO 20-28 is a series of “rules” couched as an “order.” Therefore, the analysis is whether Ms. Ryan had the legal authority to issue the rules set forth in PHO 20-28.

I conclude PHO 20-28 is without legal effect. My reasoning is as follows:

1. PHO 20-28 cites no authority in statute for its support. It appears Ms. Ryan based the PHO solely on the directive she received from Governor Polis set forth in Executive Order (“EO”) D 2020 044 (“Safer at Home”). The Governor’s Safer at Home EO states that its legal authority derives from the Colorado Disaster Emergency Act, C.R.S. §§ 24-33.5-701, *et seq.* However, the only statutes I find there that are applicable are C.R.S. §§ 24-33.5-704 and 24-33.5-704.5. Neither statute provides the Governor the legal authority to issue rules of general applicability to address the pandemic COVID-19. Perhaps that is why he directed Ms. Ryan to issue PHO 20-28, figuring that she must have legal authority as the Executive Director of the CDPHE. However, Ms. Ryan has no such authority to issue a PHO full of **rules** without going through the rulemaking procedures set forth in C.R.S. § 24-4-103.
2. Ms. Ryan or the State Board of Health could have enacted the rules through emergency rulemaking as allowed in C.R.S. § 24-4-103 (6)(a):

(6)(a) A temporary or emergency rule may be adopted without compliance with the procedures prescribed in subsection (4) of this section and with less than the twenty days’ notice prescribed in subsection (3) of this section, or where circumstances imperatively require, without notice, ***only if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest and makes such a finding on the record. Such findings and a statement of the reasons for the action shall be published with the rule.*** A temporary or emergency rule may be adopted without compliance with subsections (2.5) and (2.7) of this section, but shall not become permanent without compliance with such subsections (2.5) and (2.7). A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than one hundred twenty days after its adoption or for such shorter period as may be specifically provided by the statute governing such agency, unless made permanent by compliance with subsections (3) and (4) of this section. (Emphasis added.)

None of the rules in PHO 20-28 were published in the Colorado Register March 10 – May 25, 2020. Therefore, procedurally the issuance of PHO 20-28 did not comply with the requirements of C.R.S. § 24-4-103 (6)(a).

Additionally, if the CDPHE had wanted to deal with COVID 19 as an “epidemic disease” or “communicable disease” pursuant to C.R.S. § 25-1.5-102, they were required by C.R.S. § 25-1.5-102 (1)(a)(II) to go through rulemaking:

- (1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows:

(a)(I) To investigate and control the causes of epidemic and communicable diseases affecting the public health.

(II) For the purposes of this paragraph (a), ***the board shall determine, by rule and regulation, those epidemic and communicable diseases and conditions that are dangerous to the public health.*** The board is authorized to require reports relating to such designated diseases in accordance with the provisions of section 25-1-122 and to have access to medical records relating to such designated diseases in accordance with the provisions of section 25-1-122. (Emphasis added.)

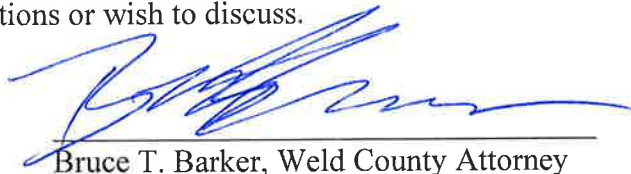
No such determination through rulemaking was noticed in the Colorado Register March 10 – May 25, 2020.

PHO 20-28 should have been issued as an emergency rule. Governor Polis could have directed such procedure in EO D 2020 044. For whatever reason the CDPHE chose not to go that route and as a result PHO 20-28 is without legal effect.

3. I always become suspicious of an order's validity when there is no enforcement by the entity that provides legal enforcement for the person or entity issuing the order. On Friday I did a search of the Colorado Courts On-line -filing system and found no cases brought by the Colorado Attorney General ("AG") to enforce PHO 20-28, or for that matter, any of the other COVID-19 related PHO's. I am unaware of any active enforcement of PHO 20-28 in Weld County.

I see no reason for there to be a request for a variance from PHO 20-28, because it is of no legal effect.

Please let me know if you have any questions or wish to discuss.



Bruce T. Barker, Weld County Attorney