



COLORADO

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

2023 Sunset Review

Evidential Breath-Testing Cash
Fund



October 13, 2023



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 13, 2023

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Pursuant to section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies (DORA) undertakes a robust review process culminating in the release of multiple reports each year on October 15.

A national leader in regulatory reform, COPRRR takes the vision of their office, DORA and more broadly of our state government seriously. Specifically, COPRRR contributes to the strong economic landscape in Colorado by ensuring that we have thoughtful, efficient, and inclusive regulations that reduce barriers to entry into various professions and that open doors of opportunity for all Coloradans.

As part of this year's review, COPRRR has completed an evaluation of the Evidential Breath-Testing Cash Fund (Fund). I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2024 legislative committee of reference.

The report discusses the question of whether there is a need for the Fund created under Section 1301.1(9) of Article 4 of Title 42, C.R.S. The report also discusses the effectiveness of Colorado Department of Public Health and Environment in carrying out the intent of the statutes and makes recommendations for statutory changes for the review and discussion of the General Assembly.

To learn more about the sunset review process, among COPRRR's other functions, visit coprrr.colorado.gov.

Sincerely,

Patty Salazar
Executive Director





Sunset Review: Evidential Breath-Testing Cash Fund

Background

What are breathalyzers?

Breathalyzers are devices used by law enforcement to establish the alcohol content of a person's breath. The results of such tests are admissible evidence in court and administrative proceedings. In Colorado, the devices are owned and certified by the Colorado Department of Public Health and Environment (CDPHE).

What is the Evidential Breath-Testing Cash Fund?

The Evidential Breath-Testing Cash Fund (Fund) at CDPHE is intended to receive and hold funds to facilitate the purchase of breathalyzers.

Why was the Fund created?

The Fund was created in 2014, in the wake of the state's need to replace all 200 of its breathalyzers. The Fund represented an attempt to ensure that CDPHE would have access to funds at such time that the state's stock of breathalyzers would again need to be replaced.

How does the Fund receive funds?

Although the Fund was created to receive funds from the General Assembly as well as gifts, grants and donations, no money has ever been deposited into the Fund.

What does the Fund cost?

CDPHE incurs no costs associated with the Fund.

Key Recommendations

- Sunset the Fund.

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Background

Sunset Criteria

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are guided by statutory criteria and sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether the program under review is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To address the second sunset criterion--whether conditions that led to the initial creation of the program have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the fifth sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency or the agency's board performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the fourteenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

¹ Criteria may be found at § 24-34-104, C.R.S.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review. While not necessarily exhaustive, the table below indicates where these criteria are applied in this sunset report.

Table 1
Application of Sunset Criteria

Sunset Criteria	Where Applied
(I) Whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare.	<ul style="list-style-type: none"> • Profile of Evidential Breath-Testing • History of Regulation • Recommendation 1
(II) Whether the conditions that led to the initial creation of the program have changed and whether other conditions have arisen that would warrant more, less, or the same degree of governmental oversight.	<ul style="list-style-type: none"> • History of Regulation
(III) If the program is necessary, whether the existing statutes and regulations establish the least restrictive form of governmental oversight consistent with the public interest, considering other available regulatory mechanisms.	<ul style="list-style-type: none"> • Legal Summary
(IV) If the program is necessary, whether agency rules enhance the public interest and are within the scope of legislative intent.	<ul style="list-style-type: none"> • Legal Summary • Program Description and Administration
(V) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters.	<ul style="list-style-type: none"> • Legal Summary • Program Description and Administration
(VI) Whether an analysis of agency operations indicates that the agency or the agency's board or commission performs its statutory duties efficiently and effectively.	<ul style="list-style-type: none"> • Program Description and Administration
(VII) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.	<ul style="list-style-type: none"> • Not applicable
(VIII) Whether regulatory oversight can be achieved through a director model.	<ul style="list-style-type: none"> • Not applicable
(IX) The economic impact of the program and, if national economic information is not available, whether the agency stimulates or restricts competition.	<ul style="list-style-type: none"> • Profile of Evidential Breath-Testing

Sunset Criteria	Where Applied
(X) If reviewing a regulatory program, whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession or regulated entity.	<ul style="list-style-type: none"> Not applicable
(XI) If reviewing a regulatory program, whether the scope of practice of the regulated occupation contributes to the optimum use of personnel.	<ul style="list-style-type: none"> Not applicable
(XII) Whether entry requirements encourage equity, diversity, and inclusivity.	<ul style="list-style-type: none"> Not applicable
(XIII) If reviewing a regulatory program, whether the agency, through its licensing, certification, or registration process, imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses, certifications, or registrations that the agency denied based on the applicant's criminal history, the number of conditional licenses, certifications, or registrations issued based upon the applicant's criminal history, and the number of licenses, certifications, or registrations revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification.	<ul style="list-style-type: none"> Not applicable
(XIV) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.	<ul style="list-style-type: none"> Recommendation 1

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at coprrr.colorado.gov.

The functions of the Colorado Department of Public Health and Environment (CDPHE) and the State Board of Health (Board), as enumerated in Section 1301.1(9) of Article 4 of Title 42, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2024, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of CDPHE and the Board pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed Evidential Breath-Testing Cash Fund (Fund) should be continued and to evaluate the performance of CDPHE and the Board. During this review, CDPHE must demonstrate that the Fund serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff interviewed CDPHE staff and other stakeholders, and reviewed Colorado statutes.

The major contacts made during this review include, but are not limited to:

- Mothers Against Drunk Driving
- CMI, Inc.
- Colorado Department of Human Services
- Colorado Department of Public Health and Environment
- Colorado Department of Public Safety
- Colorado Department of Revenue
- Colorado Department of Transportation
- Colorado District Attorneys' Council

Profile of Evidential Breath-Testing

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first criterion asks whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare.

To understand the need for the Evidential Breath-Testing Cash Fund (Fund), it is first necessary to recognize what it does and the role it plays in the enforcement of the state's drunk driving laws.

If, during a traffic stop, law enforcement suspects that the driver of the motor vehicle is under the influence of alcohol, a field sobriety test may be administered. If that test confirms law enforcement's suspicions, the driver must be given the option of submitting to a blood test or breath test to determine the alcohol content of the driver's blood or breath.² Alternatively, the driver may refuse testing altogether.

In the event the driver selects to have their breath tested, law enforcement will take the driver to a location in possession of a breathalyzer that is owned by and has been certified by the Colorado Department of Public Health and Environment (CDPHE).

CDPHE currently utilizes the Intoxilyzer 9000 (I-9000) and owns 212 of them. Of these, 158 are deployed at 135 of the state's 246 law enforcement agencies, covering 62 of the state's 64 counties.

The test, in turn, must be conducted by a law enforcement officer who has been certified by CDPHE to conduct such tests, of which there were approximately 3,500 as of January 2023. The results of such tests are admissible evidence in any criminal or administrative proceedings.

In fiscal year 21-22, law enforcement agencies administered 6,488 such tests of drivers, resulting in approximately 4,500 administrative filings with the Colorado Department of Revenue's Division of Motor Vehicles. In calendar year 2022, these tests resulted in approximately 5,500 criminal filings in the state's courts.

In order to purchase the breathalyzers, the Evidential Breath-Testing Cash Fund (Fund) was created to receive and hold funds until needed to purchase new equipment. Only the Fund is the subject of this sunset review.

The ninth sunset criterion questions the economic impact of the program and, if national economic information is not available, whether the agency stimulates or restricts competition. One way this may be accomplished for the Fund is to explore the costs associated with drunk driving.

² § 42-4-1301.1(2)(a)(I), C.R.S.

Drunk driving has real costs, both in terms of lives lost, emotional distress and dollars.

In 2020, the most recent year for which such data are available, 32 people died in the United States every day as the result of crashes involving alcohol, for a total of 11,654. That same year, the annual estimated cost of drunk driving-related deaths in the United States totaled approximately \$123.3 billion.³

While similar economic data for Colorado are not readily available, in 2020, 33 percent of all fatal crashes involved an alcohol or drug impaired driver.⁴

³ Centers for Disease Control and Prevention. *Impaired Driving: Get the Facts*. Retrieved May 17, 2023, from www.cdc.org.gov/transportationsafety/impaired_driving/impaired-drv_factsheet.html

⁴ Colorado Task Force on Drunk & Impaired Driving, *2020 Annual Report*, p. 5.

Legal Framework

History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset and second sunset criteria question:

Whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare; and

Whether the conditions that led to the initial creation of the program have changed and whether other conditions have arisen that would warrant more, less or the same degree of governmental oversight.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

Breathalyzers are devices used by law enforcement to establish the alcohol content of a person's breath. In Colorado, they are owned and certified by the Colorado Department of Public Health and Environment (CDPHE).

Of note, all devices used in the state must be the same model so that all law enforcement agencies in the state are using the same technology to acquire evidence, and to simplify system functionality and maintenance, as well as the training and certification of those law enforcement officers who use the devices to test breath.

Prior to 2013, the breathalyzer utilized by CDPHE was the 5000EN. In 2013, the 5000EN motors were no longer available, so the instruments could no longer be repaired. The decision was made to replace all 5000ENs with the current model, the Intoxylizer 9000 (I-9000). As a result, CDPHE had to acquire 200 new I-9000s.

With no federal funds available, CDPHE requested funding from various sources, including state and local law enforcement agencies. While the necessary funding was eventually acquired, many agree that the experience created a considerable amount of ill will.

Seeking to avoid a repeat of the fundraising experience of 2013, the General Assembly passed House Bill 14-1310 (HB 1310) the next year, creating the Evidential Breath-Testing Cash Fund (Fund). According to the minimal testimony offered on the bill, HB 1310 represented an attempt to proactively and incrementally raise \$2 million over 10 years to ensure that CDPHE had the funds necessary to replace the then-new instruments as early as 2024, when they were expected to reach the end of their useful life. However, testimony revealed that there was no funding source for the planned

\$200,000 per year appropriation and, as a result, HB 1310 contained no appropriations clause.

Finally, the bill scheduled the Fund to repeal, following this sunset review, in 2024.

Legal Summary

The third, fourth and fifth sunset criteria question:

Whether the existing statutes and regulations establish the least restrictive form of governmental oversight consistent with the public interest, considering other available regulatory mechanisms;

Whether agency rules enhance the public interest and are within the scope of legislative intent; and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters.

A summary of the current statutes and rules is necessary to understand whether statutory requirements are set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

When a Colorado law enforcement officer has probable cause to believe that a person driving a motor vehicle has been driving under the influence, driving under the influence with a blood alcohol content of 0.08 percent or higher, driving while ability impaired or underage drinking and driving, that driver must cooperate in completing a test of the person's breath or blood for the purpose of ascertaining the alcohol content of the person's blood or breath.⁵ Failure to submit to either test is considered a refusal to submit to testing.⁶ Such a test must be administered within two hours of the person's driving.⁷

To facilitate CDPHE's purchase of the instruments used to test drivers' breath under such circumstances (breathalyzers), the General Assembly created the Fund,⁸ which is the sole subject of this sunset review.

⁵ § 42-4-1301.1(2)(a)(I), C.R.S.

⁶ § 42-4-1301.1(2)(a)(II), C.R.S.

⁷ § 42-4-1301.1(2)(a)(III), C.R.S.

⁸ § 42-4-1301.1(9)(a), C.R.S.

The Fund includes any money appropriated by the General Assembly,⁹ any interest derived from the deposit and investment of such money¹⁰ and any gifts, grants or donations obtained by CDPHE.¹¹ Any money remaining in the Fund at the end of a fiscal year must remain in the Fund and may not be transferred to the General Fund or any other fund, unless the balance of the Fund exceeds \$2 million.¹²

Finally, the State Board of Health (Board) may promulgate rules for the administration of the Fund,¹³ but it has not done so.

⁹ § 42-4-1301.1(9)(a), C.R.S.

¹⁰ § 42-4-1301.1(9)(b), C.R.S.

¹¹ § 42-4-1301.1(9)(c), C.R.S.

¹² § 42-4-1301.1(9)(b), C.R.S.

¹³ § 42-4-1301.1(9)(d), C.R.S.

Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The fifth and sixth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters; and

Whether an analysis of agency operations indicates that the agency or the agency's board or commission performs its statutory duties efficiently and effectively.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

The Evidential Breath-Testing Cash Fund (Fund) was created in the Colorado Department of Public Health and Environment (CDPHE) to facilitate the purchase of breathalyzers, which are devices that are owned and certified by CDPHE and used by law enforcement to establish the alcohol content of a person's breath. The results of such tests are admissible evidence in court and administrative proceedings.

In 2013, CDPHE purchased 200 instruments at a cost of approximately \$1.67 million, which also included software, simulators, factory training and \$20,000 in related supplies. The Fund was created as a sort of bank account to provide funding for future purchases.

However, no money, from any source, has ever been deposited into the Fund, and there are no full-time equivalent employees or expenditures associated with it.

That is not to say, however, that CDPHE has not acquired any breathalyzers since the Fund was created. Due to vacancy savings and existing instruments needing fewer or less costly repairs than anticipated, CDPHE was able to utilize Law Enforcement Assistance Fund (LEAF)¹⁴ dollars to purchase the following number of instruments in the years indicated:

- In 2020, three instruments;
- In 2021, four instruments;
- In 2022, four instruments; and
- In 2023, five instruments.

¹⁴ LEAF is a program that provides supplemental funding to local agencies to assist in their enforcement of Colorado's impaired driving laws.

Although not directly related to the Fund, the following discussion and data are offered to provide some context as to how the breathalyzers, which the Fund is intended to purchase, are used.

CDPHE currently utilizes the Intoxilyzer 9000 (I-9000) and owns 212 of them. Of these, 158 are deployed at 135 of the state's 246 law enforcement agencies, covering 62 of the state's 64 counties. Twenty of the instruments that are not deployed are used to train and certify law enforcement officers on the devices. The remaining 34 breathalyzers that are not deployed are used to either replace deployed instruments when they break, or they have been removed from service with their parts being used to repair other breathalyzers.

A breathalyzer may be used for two types of test: recertification and evidential. Recertification tests are conducted by certified law enforcement officers every 180 days or less in order to maintain an officer's certification to use the device. The officers administer these tests on themselves, utilizing the same protocols as they would to administer a test intended to be used as evidence.

Evidential tests, as the name implies, are the tests administered by law enforcement on drivers to test the amount of alcohol in their breath. Table 2 below illustrates, for the fiscal years indicated, the number of evidential tests administered state-wide.

Table 2
Evidential Tests Administered

Fiscal Year	Number of Evidential Tests Administered
17-18	8,408
18-19	8,529
19-20	6,575
20-21	4,977
21-22	6,488
Total	34,977

The overall decline in the number of evidential breath tests administered can be attributed to a number of factors. Beginning in 2019, the Colorado Bureau of Investigation began offering free blood tests to law enforcement agencies, which can be used to detect not only alcohol, but also drugs.

Additionally, during the COVID-19 pandemic, many law enforcement agencies reduced or suspended the use of breath tests in an attempt to limit the spread of the virus.

Finally, the number of law enforcement officers certified to perform evidential breath tests remains below pre-COVID-19 pandemic levels, meaning there are fewer officers able to conduct the tests.

The purpose of administering evidential breath tests is to ascertain whether a driver was driving under the influence of alcohol and if so, for the test results to be used as evidence in legal proceedings.

Two types of legal proceedings can result from an evidential breath test: criminal and administrative. Criminal proceedings take place in the state's courts and ascertain whether the driver should be convicted of an alcohol-related crime.

Administrative proceedings, on the other hand, take place at the Colorado Department of Revenue's Division of Motor Vehicles and ascertain whether the a driver's license should be suspended or revoked.

Table 3 illustrates, for the calendar years indicated, the number of cases filed in Colorado courts that involved charges of driving under the influence (DUI).

Table 3
DUI Court Filings

Calendar Year	Number of DUI Filings
2018	20,424
2019	20,037
2020	17,640
2021	15,274
2022	15,711
Total	89,086

CDPHE staff estimates that evidential breath tests were used as evidence in approximately 35 percent of these cases.

Although a variety of factors may explain the decrease in the number of DUI filings beginning in 2020, these declines more or less coincide with the decrease in the number of breath tests administered, so several of the same explanations may be applicable.

Table 4 illustrates, for the fiscal years indicated, the number of administrative cases brought by the Department of Revenue to suspend a driver's license, based on intoxicated driving.

Table 4
Administrative Filings

Fiscal Year	Number of Administrative Filings	Number of Filings Involving Breath Test	Number of Filings Involving Blood Test	Number of Filings Involving a Refusal to Any Test
17-18	18,973	6,546	5,812	7,172
18-19	18,521	5,529	5,701	7,291
19-20	16,401	4,666	4,865	6,870
20-21	14,190	5,097	2,443	6,650
21-22	14,551	4,453	3,402	6,696
Total	82,636	26,291	22,223	34,679

The tables above illustrate the frequency with which the breathalyzers are used, and the resulting legal proceedings. As the data in Table 4 demonstrate, evidential breath tests are used in approximately 31.9 percent, almost a third, of administrative proceedings.

The data in Table 3 regarding court filings and Table 4 regarding administrative proceedings do not necessarily add up. Several explanations are available for this. First, administrative proceedings tend to occur more quickly than court proceedings so an administrative proceeding may occur in one fiscal year, while the court proceeding occurs in a subsequent fiscal year. Additionally, a criminal case may be dismissed before it is filed, but the administrative proceeding may still occur, resulting in a discrepancy in the data. Further, a criminal proceeding that involves drugs only, and no alcohol, will not be referred for an administrative proceeding, resulting in a discrepancy in the data. Regardless, the data offered in these tables are simply to provide context for how the evidence obtained from the instruments that could be purchased through the Fund is used.

Not surprisingly, the breathalyzers must be repaired and maintained. Table 5 illustrates, for the fiscal years indicated, CDPHE's expenditures in this regard.

Table 5
Maintenance Expenditures

Fiscal Year	Expenditures
17-18	\$15,281
18-19	\$18,677
19-20	\$39,091
20-21	\$42,660
21-22	\$36,690
Total	\$152,399

The decrease in expenditures in fiscal year 21-22 can be attributed to a corresponding increase in personal services that same year. Since the funding for upkeep, as delineated in Table 5, is derived from LEAF dollars, which also fund other, related efforts, the pot of money is fixed and must be spent on several different functions. As a result, an increase in one area results in a decrease in another.

Regardless, the expenditures in Table 5 illustrate that the cost to maintain and repair the current stock of instruments has steadily increased each year. This is to be expected as the devices age and require more maintenance and repairs.

Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendation that follows is offered in consideration of this criterion, in general, and any criteria specifically referenced in that recommendation.

Recommendation 1 – Sunset the Evidential Breath-Testing Cash Fund.

The first sunset criterion questions whether the program under review is necessary to protect the public health, safety and welfare.

Without question drunk driving is a serious public health and safety issue. In 2020, the most recent year for which such data are available, 32 people died in the United States every day as the result of crashes involving alcohol, for a total of 11,654. That same year, the annual estimated cost of drunk driving-related deaths in the United States totaled approximately \$123.3 billion.¹⁵

While similar economic data for Colorado are not readily available, in 2020, 33 percent of all fatal crashes involved an alcohol or drug impaired driver.¹⁶

A key component in the battle against drunk driving is the breathalyzer, which is a device operated by certified law enforcement personnel that measures the level of alcohol in a suspect's breath. The results of these tests are then admissible evidence in both court and administrative proceedings. Such proceedings can result in the suspect's incarceration or a sentence of probation and can also result in the suspension or revocation of the suspect's driver's license. All of these measures are intended to deter drunk driving in general and to prevent additional violations in particular.

To avoid systemic inefficiencies, significant operational expense and potential legal challenges, it is key that all of the breathalyzers in the state be the same make and model. Currently, the state utilizes the Intoxilyzer 9000 (I-9000), which is still the most recent model available and is still being produced.

The I-9000, however, is not inexpensive. A new I-9000 costs approximately \$7,500. When the state, through the Colorado Department of Public Health and Environment (CDPHE), last replaced all of its devices in 2013, much ill will was created in the attempt to secure funds for the purchase of the devices.

As a result, the General Assembly created the Evidential Breath-Testing Cash Fund (Fund) to serve as a repository into which funds could be raised over time—10 years to

¹⁵ Centers for Disease Control and Prevention. *Impaired Driving: Get the Facts*. Retrieved May 17, 2023, from www.cdc.org.gov/transportationsafety/impaired_driving/impaired-driv_factsheet.html

¹⁶ Colorado Task Force on Drunk & Impaired Driving, *2020 Annual Report*, p. 5.

be specific—so that when the breathalyzers next needed to be replaced—estimated at the time to be the mid-2020s—most, if not all of the necessary funds would be available. The Fund is able to receive appropriations from the General Assembly, as well as gifts, grants and donations.

Had the Fund worked as intended, an argument could be made that it is necessary to protect the public health and safety because it is part of the system designed to deter drunk driving and hold accountable those who drive while intoxicated.

However, the Fund has not worked as intended. In fact, no money has ever been deposited into the Fund. At the time of the Fund’s creation in 2014, no appropriation was made, and the bill’s sponsors conceded that how funds would be identified for deposit into the Fund had yet to be determined. In the almost 10 years since the Fund’s creation, nothing has ever been deposited into the Fund. CDPHE has not requested any funds from the General Assembly, the General Assembly has appropriated no funds and CDPHE has secured no gifts, grants or donations.

Regardless, CDPHE has acquired a few instruments over the years to gradually replace the devices as they reached the end of their useful lives. Due to vacancy savings and existing breathalyzers needing fewer or less costly repairs than anticipated, CDPHE was able to utilize Law Enforcement Assistance Fund (LEAF) dollars to purchase the following number of instruments in the years indicated:

- In 2020, three instruments;
- In 2021, four instruments;
- In 2022, four instruments; and
- In 2023, five instruments.

Since it has not been used in almost 10 years, it is impossible to conclude that that the Fund is necessary to protect the public health and safety.

According to CDPHE staff, however, given the length of time since the Fund’s creation and staff turnover during that nearly decade-long span, memories faded to the point that key staff were unaware of the Fund’s existence until the commencement of this sunset review. This provides at least a partial explanation as to why CDPHE has not secured any funding to be deposited into the Fund.

Since the commencement of this sunset review, CDPHE staff has identified some potential grants and is exploring whether and how to divert additional LEAF¹⁷ dollars into the Fund.

However, as CDPHE’s own experience has demonstrated, devices can be replaced as needed, and could even be scheduled to be retired, so long as production of the I-9000

¹⁷ LEAF is a program that provides supplemental funding to local agencies to assist in their enforcement of Colorado’s impaired driving laws.

continues. At such time that the I-9000 is no longer available, the state will once again face the daunting task of replacing all breathalyzers in the state at the same time.

Although breathalyzers are a key component in the battle against drunk driving, since neither the General Assembly nor CDPHE has ever deposited dollars into the Fund, and since CDPHE has demonstrated that a piecemeal approach to replacing the I-9000 is feasible, at least in the short term, the General Assembly should sunset the Fund.