



CO L O R A D O

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

**2018 Sunset Review:
Colorado Seed Potato Act and the Seed
Potato Advisory Committee**

October 15, 2018



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 15, 2018

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. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Colorado Seed Potato Act and the Seed Potato Advisory Committee (Advisory Committee). I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2019 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 27.3 of Title 35, C.R.S. The report also discusses the effectiveness of the Commissioner of Agriculture and the Advisory Committee in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Marguerite Salazar
Executive Director





COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2018 Sunset Review

Colorado Seed Potato Act and the Seed Potato Advisory Committee

SUMMARY

What is regulated?

The Colorado Seed Potato Act (Act) generally stipulates that no seed potatoes in lots that are sufficient to plant one or more acres can be planted unless they are certified or unless they are no more than one generation from certified seed potatoes. Certified seed potatoes are generally free of, or have acceptable levels of, disease.

Why is it regulated?

The purpose of the Act is to control and minimize the spread of contagious community diseases in potato crops. Colorado's San Luis Valley presents a relatively unique environment, where seed potatoes and commercial potatoes are grown in close proximity, thereby increasing the risk of the spread of disease from commercial potatoes to seed potatoes.

Who is regulated?

Although much emphasis is placed on using certified seed potatoes, the Act pertains most directly to commercial potato growers by articulating when they must use certified seed potatoes and when they may use non-certified seed potatoes.

How is it regulated?

The Commissioner of Agriculture (Commissioner), through the Colorado Department of Agriculture (Department), audits the records of at least 10 percent of the potato growers in Colorado each year to ensure compliance with the Act. The Seed Potato Advisory Committee (Advisory Committee), which consists of nine members appointed by the Commissioner, assists the Department and the Commissioner in promulgating rules and in determining whether to grant permission to plant non-certified seed potatoes.

What does it cost?

In 2017, the Department spent \$426 and allocated 0.01 full-time equivalent employees to administration and enforcement of the Act.

What disciplinary activity is there?

Between 2012 and 2017, the entire life of the program, the Commissioner imposed 15 fines on potato growers, totaling almost \$45,000 for 49 violations.

KEY RECOMMENDATIONS

Continue the Act for nine years, until 2028.

The intent of the Act is to control and limit the spread of contagious community diseases in Colorado's potato crop. Although results cannot necessarily be attributed to the Act, evidence suggests that the level of at least one type of potato disease has declined in recent years. Therefore, the General Assembly should continue the Act for nine years, until 2028.

Continue the Advisory Committee.

The nine-member, Commissioner-appointed Advisory Committee consists of representatives from academia, commercial potato growers and seed potato growers. The Advisory Committee provides potato growers with a mechanism to participate in the implementation of the Act by providing input to the Department and the Commissioner on audits of grower records and current practices in the seed and commercial potato industries. Therefore, the General Assembly should continue the Advisory Committee.

Direct that all money collected by the Commissioner as the result of civil penalties assessed under the Act be deposited in the State's General Fund.

All civil penalties imposed under the Act are deposited into the Seed Potato Cash Fund (Cash Fund). Ordinarily, when an agency is given fining authority or the authority to assess civil penalties, such funds are credited to the General Fund. This is done so that the agency has no incentive to impose fines, other than taking legitimate disciplinary action. Importantly, no allegations of impropriety were made during the course of this sunset review. Rather, this is a "good government" recommendation. Therefore, the General Assembly should direct that all civil penalties assessed under the Act be deposited into the General Fund.

METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff interviewed stakeholders and Department staff, reviewed Colorado statutes and rules, and toured seed potato farms and related facilities in the San Luis Valley.

MAJOR CONTACTS MADE DURING THIS REVIEW

Colorado Certified Potato Growers Association
Colorado Department of Agriculture
Colorado Potato Administrative Committee, Area II
Colorado State University
Seed Potato Advisory Committee Members

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:
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Background

Introduction

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 based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- 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;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- 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;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- 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;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

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

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
 - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

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: www.dora.colorado.gov/opr.

The functions of the Commissioner of Agriculture (Commissioner) as enumerated in Article 27.3 of Title 35, Colorado Revised Statutes (C.R.S.), including the Seed Potato Advisory Committee (Advisory Committee) created in section 35-27.3-107, C.R.S., shall terminate on September 1, 2019, 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 the program under review pursuant to section 24-34-104, C.R.S., and of the Advisory Committee pursuant to section 2-3-1203, C.R.S.

The purpose of these reviews is to determine whether the Advisory Committee and the currently prescribed regulation should be continued and to evaluate the performance of the Commissioner and staff of the Department of Agriculture (Department). During this review, the Commissioner must demonstrate that the program 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 stakeholders and Department staff, reviewed Colorado statutes and rules, and toured seed potato farms and related facilities in the San Luis Valley.

Profile of the Industry

Potatoes are a major agricultural product in Colorado. In 2016, the most recent year for which data are available, Colorado potato farmers planted 57,300 acres at a total value of \$213.5 million.²

Pursuant to the marketing order regulating the handling of potatoes, Colorado is segregated into three distinct areas:

- Area I = The Western Slope: Routt, Eagle, Pitkin, Gunnison, Hinsdale, and La Plata counties and all points west of those counties.³
- Area II = The San Luis Valley: Saguache, Huerfano, Las Animas, Mineral, and Archuleta counties and all points south of those counties.⁴
- Area III = every part of the state not in Areas I or II.⁵

Table 1 illustrates, for the calendar years indicated, the total number of potato growers in Colorado. Throughout this sunset report, data are presented by calendar year, since this more closely aligns with the growing season for potatoes.

Table 1
Colorado Potato Growers

	2012	2013	2014	2015	2016	2017
Area II	168	172	164	161	154	155
Area III	8	7	7	7	7	7
Total	176	179	171	168	161	162

No potatoes are grown in Area I as of this writing. The data in Table 1 demonstrate a slow but steady decline in the number of potato growers.

While there are hundreds of varieties of potatoes (i.e., purples, golds, reds and more), there are generally two types of potatoes. Commercial potatoes are grown for commercial sale to grocery stores, restaurants and processors for ultimate consumption. Seed potatoes are grown for the specific purpose of being replanted as commercial potatoes.

Although commercial potatoes are grown in Colorado only in Areas II and III, seed potatoes are grown only in Area II. In fact, Area II presents a relatively unique environment within the United States in that both commercial potatoes and seed potatoes are grown in fields next to one another. This creates a situation in which the

² U.S. Department of Agriculture. *Colorado Agricultural Statistics 2017*, p. 21. Retrieved on November 14, 2017, from www.nass.usda.gov/statistics_by_State/Colorado/Publications/Annual_Statistical_Bulletin/Bulletin2017.pdf

³ 7 C.F.R. § 948.4(a).

⁴ 7 C.F.R. § 948.4(b).

⁵ 7 C.F.R. § 948.4(c).

risk of spreading disease from commercial potatoes to seed potatoes is increased. While some level of disease is expected, diseased potatoes result in lower quality, and thus lower prices. As a result, it is in the interest of all potato growers to mitigate the spread of disease, particularly in seed potatoes.

Some common potato diseases include:

- Late Blight,
- Potato mop top virus,
- Potato Virus Y,
- Ring rot, and
- Tobacco rattle virus.

Two of the primary ways to plant potatoes is to propagate them vegetatively or to plant seed potatoes. When propagating vegetatively, a single potato is cut into pieces and then planted. In this process, any disease is carried forward into future generations of the potato. The use of seed potatoes is viewed as a means of curtailing the continuance and spread of disease. In fact, the goal of growing seed potatoes is to produce “clean seed,” that is, potatoes that are relatively, if not entirely, disease free.

There are two primary ways of growing seed potatoes: micro-propagation or by purchasing “small tubers.”

When growing by micro-propagation, the grower first obtains a clone of the desired variety of potato from a clone bank. In Colorado, Colorado State University (CSU) maintains a clone bank in the San Luis Valley. The grower then clips the clone at each of several nodes and plants the clippings in a biogel. As each clipping grows, it is clipped again and again such that the original clone ultimately yields thousands of plants. When the clippings are ready, they are transferred to seedling trays and placed in a greenhouse. In about 90 days, the “small tubers” are harvested. The potato variety, as well as growing conditions, dictate the number of small tubers produced by each plant.

The small tubers are then placed in storage, during which time, they may be sent to a laboratory for testing. Regardless, when they are planted in the spring, they are subject to both visual and laboratory tests. When they are harvested in the fall, they become seed potatoes and a sample is sent to CSU. CSU operates a winter testing program through which the sample seed potatoes are planted in Hawaii and monitored for the development of disease. Once the sample is declared “clean,” they are considered “certified seed potatoes” and may be sold as such to commercial growers who will grow them into commercial potatoes.

Those who grow certified seed potatoes are considered to be certified growers. Table 2 illustrates, for the calendar years indicated, the number of certified seed potato growers in Colorado.

Table 2
Colorado Seed Potato Growers

	2012	2013	2014	2015	2016	2017
Certified Growers	27	24	23	22	20	20

All of Colorado’s certified seed potato growers are located in Area II.

The cost of seed potatoes depends on the particular variety and other factors. Anecdotally, the cost to plant an acre ranges anywhere from \$400 to several thousands of dollars.

Legal Framework

History of Regulation

To control and minimize the spread of contagious community diseases by reducing the overall inoculum pool present in potato crops, the General Assembly enacted the Colorado Seed Potato Act (Act) and the Seed Potato Advisory Committee (Advisory Committee) in 2010. The Act was intended to comply with seed potato standards set forth in the State National Harmonization Program.⁶

Senate Bill 10-072, which created the Act, also specifically exempted seed potatoes from the Colorado Seed Act.

Since its enactment, the Act has not been amended, and this is the first sunset review of the Act and the Advisory Committee.

Legal Summary

The Act is created in section 35-27.3-101, *et seq.*, Colorado Revised Statutes (C.R.S.). One of the stated purposes of the Act is to control and minimize the spread of contagious community diseases in potato crops.⁷ A community disease is,

a disease or pest that can move from field to field during the potato growing season and is not confined to any single potato grower's operation. The term includes blight and potato virus Y.⁸

Seed potatoes are simply “vegetatively propagated tubers used or intended to be used for potato production.”⁹

All seed potatoes distributed by any person in lots that are sufficient to plant one or more acres in Colorado must be certified by the Potato Certification Service of Colorado State University (CSU), or the certifying agency of another state, territory or country.¹⁰ All such potatoes must be accompanied by:¹¹

- An official tag or bulk certificate indicating that they are certified seed potatoes;
- A certificate of shipping point inspection;
- A North American Plant Health Certificate issued by the certifying authority for seed potatoes imported from outside Colorado; and
- Any other documents necessary to provide information pertaining to:
 - A description of the grade of seed potatoes;

⁶ § 35-27.3-102, C.R.S.

⁷ § 35-27.3-102, C.R.S.

⁸ § 35-27.3-103(5), C.R.S.

⁹ § 35-27.3-103(17), C.R.S.

¹⁰ §§ 35-27.3-104(1) and -103(3), C.R.S.

¹¹ §§35-27.3-104(2) and -104(3), C.R.S.

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- The findings of field inspections and postharvest inspections conducted on each lot of seed potatoes, including the name and amount of any diseases observed;
 - The generation of seed potatoes; and
 - Evidence that the seed potatoes were tagged, packed and sealed under the certification standards of the state, territory or country in which they were grown.

In general, no seed potatoes in lots that are sufficient to plant one or more acres can be planted in Colorado, unless those seed potatoes have been certified.¹² Uncertified seed potatoes may be planted if they were grown and stored as part of that grower's farming operations and they are no more than one generation from certified parent seed potatoes or qualified parent potatoes.¹³

A grower who plants such uncertified seed potatoes may plant progeny from those seed potatoes in additional years if, in each additional year, the seed potato stock is submitted to CSU for testing, and CSU approves the stock for planting.¹⁴

In any year that the Commissioner of Agriculture (Commissioner), in consultation with the Advisory Committee, determines that there is an insufficient volume of certified seed potatoes, growers may apply to the Advisory Committee for permission to plant uncertified seed potatoes. Such approvals are valid for a single growing season. No seed potatoes can be planted when bacterial ring rot, late blight or an unacceptable level of community diseases is present in the seed potatoes.¹⁵

Each person who grows potatoes in lots of one acre or greater, must keep and maintain records for at least two years of the amount and variety of potatoes planted in each field.¹⁶ Such records must evidence:¹⁷

- The acreage planted by potato variety; and
- The amount (by weight) and source of the seed used to plant the acreage, with documents relating to:
 - For seed potatoes purchased, the documents related to certification of the seeds; or
 - For uncertified seed potatoes, the testing history and the seed potatoes used to replant the grower's own operations.

In consultation with the Advisory Committee, the Commissioner must select a qualified employee of the Colorado Department of Agriculture (Department) or an independent auditor to review the records of at least 10 percent of potato growers once every seed potato crop cycle.¹⁸

¹² § 35-27.3-105(1)(a), C.R.S.

¹³ § 35-27.3-105(2)(a), C.R.S.

¹⁴ § 35-27.3-105(2)(b), C.R.S.

¹⁵ § 35-27.3-105(3), C.R.S.

¹⁶ § 35-27.3-106(1), C.R.S.

¹⁷ § 35-27.3-106(2)(b), C.R.S.

¹⁸ § 35-27.3-106(2)(a), C.R.S.

The Act contains conflicting provisions pertaining to the manner in which these reviews are paid. Section 35-27.3-106(2)(a), C.R.S., stipulates that the costs of such reviews are to be paid by the Area Committee for Area Number II, as established in the Marketing Order Regulating the Handling of Potatoes. However, section 35-27.3-108(1)(VII), C.R.S., requires the Commissioner to establish fees for services performed by the Department and further requires that such fees be billed on a *pro rata* basis to the Area Committees for Area Number II and Area Number III.

In addition to administering and enforcing the Act, the Commissioner is required to promulgate rules that:¹⁹

- Establish the requirements for compliance verification, testing, sampling and inspection;
- Specify quality or disease standards for potatoes;
- Allow for the random selection of 10 percent of potato growers subject to the annual records review;
- Establish standards for uncertified seed potato stock that may be planted;
- Establish methods for determining that bacterial ring rot or an unacceptable level of community diseases is not present in seed potatoes; and
- Designate the type of records that must be kept by growers.

For lots sufficient to plant one or more acres, the Commissioner has determined that:²⁰

- Such lots contain no more than five percent tubers with virus, including no more than one percent potato virus Y serotype strains;
- No tubers in the lot may contain any Mop Top or Tobacco Rattle Virus;
- The lot must be free of Bacterial Ring Rot and Golden nematode; and
- All seed potatoes imported into the San Luis Valley must meet the requirements of the Quarantine for Late Blight.

Any person who plants or distributes seed potatoes in violation of the Act is subject to a civil penalty of between \$20 and \$100 per acre.²¹ Failing to maintain complete and accurate records may result in a civil penalty of between \$500 and \$1,000.²² In no event can a civil penalty exceed \$2,500 per violation.²³ All civil penalties are credited to the Seed Potato Cash Fund.²⁴

The Advisory Committee consists of nine members, appointed by the Commissioner:²⁵

- Four potato growers who do not grow seed potatoes and whose operations are located in Area Number II;

¹⁹ § 35-27.3-108(1), C.R.S.

²⁰ 8 CCR 1203-22-2.2.0, Rules and Regulations Pertaining to the Colorado Seed Potato Act.

²¹ § 35-27.3-110(1)(b), C.R.S.

²² § 35-27.3-110(1)(c), C.R.S.

²³ § 35-27.3-110(1)(a), C.R.S.

²⁴ § 35-27.3-110(4), C.R.S.

²⁵ § 35-27.3-107(1)(b)(I), C.R.S.

-
- One potato grower who does not grow seed potatoes and whose operation is located in Area Number III;
 - Two members of the Colorado Certified Potato Growers' Association, one of whom must be its sitting president;
 - One employee of CSU; and
 - One employee of the Department.

Whenever possible, the employees of CSU and the Department must be knowledgeable of seed potatoes.²⁶

Advisory Committee members may serve no more than two consecutive, three-year terms²⁷ and they receive no compensation or reimbursement from the State of Colorado or the Department.²⁸

The Advisory Committee is required to:²⁹

- Advise the Commissioner in establishing rules under the Act,
- Assist in the determination of the availability of potatoes,
- Recommend whether to grant permission to plant uncertified seed potatoes,
- Recommend independent auditors to perform required records reviews, and
- Consult with the Commissioner regarding the administration and enforcement of the Act.

²⁶ § 35-27.3-107(1)(b)(II), C.R.S.

²⁷ § 35-27.3-107(2)(a), C.R.S.

²⁸ § 35-27.3-107(3), C.R.S.

²⁹ § 35-27.3-107(4), C.R.S.

Program Description and Administration

The Commissioner of Agriculture (Commissioner) is granted primary authority to administer and enforce the Colorado Seed Potato Act (Act). In practice, staff in the Colorado Department of Agriculture's Plant Industry Division (Department and Division, respectively) is tasked with the day-to-day operations associated with the Act.

Table 3 illustrates, for the calendar years indicated, the number of staff dedicated to administering and enforcing the Act, as well as the Division's expenditures associated with the Act. Staffing costs are not depicted in Table 3, as they are absorbed by the Division.

Table 3
Agency Fiscal Information

Calendar Year	Expenditures	FTE
2012	\$1,310	0.02
2013	\$690	0.01
2014	\$725	0.01
2015	\$375	0.01
2016	\$3,583	0.02
2017	\$426	0.01

The increases in expenditures in 2016 can be attributed to an increase in complaints and disciplinary actions and the resulting legal fees associated with them.

Funding for the administration of the Act is slightly unusual. On the one hand, the Act directs the Commissioner to establish fees for the administration and enforcement of the Act, to be paid by the two area committees pro rata.³⁰ On the other hand, the Act stipulates that the Area Committee for Area II must pay the costs of administering and enforcing the Act.³¹ Finally, all civil penalties assessed under the Act are credited to the Seed Potato Cash Fund.³²

Due to low expenditures and the collection of civil penalties, no fees have been assessed as of this writing. In other words, all funding for the program has come from the fines that have been assessed. As a result, the apparent conflicting provisions as to how fees are to be apportioned between the two Area Committees have not been tested.

³⁰ § 35-27.3-108(1)(b)(IV), C.R.S.

³¹ § 35-27.3-106(2)(a), C.R.S.

³² § 35-27.3-110(4), C.R.S.

The Act also creates the Seed Potato Advisory Committee (Advisory Committee), which comprises nine members, appointed by the Commissioner:³³

- Four potato growers who do not grow seed potatoes and whose operations are located in Area II;
- One potato grower who does not grow seed potatoes and whose operation is located in Area III;
- Two members of the Colorado Certified Potato Growers' Association, one of whom shall be its sitting president;
- One employee of CSU; and
- One employee of the Department.

The Advisory Committee is required to:³⁴

- Advise the Commissioner in establishing rules under the Act,
- Assist in the determination of the availability of potatoes,
- Recommend whether to grant permission to plant uncertified seed potatoes,
- Recommend independent auditors to perform required records reviews, and
- Consult with the Commissioner regarding the administration and enforcement of the Act.

The Advisory Committee typically meets once per year, and generally meets in the San Luis Valley, where most of the commercial potatoes and all of the seed potatoes in the state are grown.

The Advisory Committee has offered a variety of recommendations to the Commissioner over the years on a variety of topics:

Certified Seed Exemption Requests

2012 - recommended approval of two requests to plant uncertified seed potatoes.

2014 - recommended denial of a single request to plant uncertified seed potatoes.

2017 - recommended approval of three requests to plant uncertified seed potatoes.

Audits of Grower Records

2011 - reviewed the inspection forms and participated in “dry run” inspections to evaluate the proposed forms and determine what paperwork growers would need to produce in order to facilitate the audit.

2014 - recommended altering the number of growers audited to ensure that as close to 10 percent as possible are audited each year.

³³ § 35-27.3-107(1)(b)(I), C.R.S.

³⁴ § 35-27.3-107(4), C.R.S.

Outreach and Education

2017 - a member of the Advisory Committee gave a presentation at the Southern Rocky Mountain Agricultural Conference to assist growers in their compliance with the Act.

Of particular note is one issue that the Advisory Committee encountered in late 2017 into early 2018. A grower requested permission to plant uncertified seed. The Advisory Committee recommended that the seed potatoes be tested first. Based on the test results, the request was withdrawn.

Also in late 2017, the Advisory Committee recommended that the General Assembly continue the Act past the 2019 sunset date.

Finally, the Advisory Committee consulted with the Division in determining that Department staff, as opposed to any third-party contractor, should conduct the audits of grower records required under the Act.

Audits

Although the Act allows commercial growers to plant seed potatoes that are one year out from being certified, the focus of the Act is to ensure that most of the seed potatoes planted in the state are certified.

To ensure compliance with this goal, the Division audits the records of at least 10 percent of all potato growers each year. Individual growers are randomly selected.

During an audit, staff utilizes a checklist which seeks to document, among other things:

- The field identification number for each field in which potatoes were planted;
- The cultivar (variety) and generation of the potatoes planted in the field;
- The number of acres in the field;
- The hundred weight per acre of the potatoes planted in the field;
- The bulk certificate number or prior year seed lot certificate number of the potatoes planted in the field;
- The shipping point inspection;
- The North American Plant Health Certificate if the seed potatoes were imported from outside of Colorado; and
- Documentation of Late Blight quarantine compliance, if the seed potatoes were imported from outside of the San Luis Valley.

In general, audits conducted of growers in Area II are conducted by Department personnel based in the San Luis Valley, and growers in Area III are audited by Division personnel based in the Denver Metro area. The audits typically take between 10 minutes and one hour to complete, depending the level of complexity and how well organized the records are.

Table 1, replicated here, illustrates, for the calendar years indicated, the number of individual commercial potato growers in Areas II and III, respectively. Each Area maintains its own Area Administrative Committee, which identifies the growers in that committee's area.

**Table 1
Colorado Potato Growers**

	2012	2013	2014	2015	2016	2017
Area II	168	172	164	161	154	155
Area III	8	7	7	7	7	7
Total	176	179	171	168	161	162

As of this writing, no potatoes are grown in Area I.

The data in Table 1 demonstrate the number of potato growers is slowly, but steadily, declining. This has been attributed by some to be a result of the passage of the Act and the refusal or unwillingness of some growers to use certified seed potatoes or to grow certified seed potatoes.

Table 4 illustrates, for the calendar years indicated, the number of individual growers audited.

**Table 4
Audits Completed**

Calendar Year	Area II	Area III	Total
2012	23	0	23
2013	17	2	19
2014	11	0	11
2015	18	0	18
2016	17	1	18
2017	22	2	24

Oftentimes, a single commercial potato growing operation consists of several individual growers. If one of these individuals is selected for audit, the audit will encompass them all. Thus, while 10 percent of individual growers may be audited in a given year, it is possible that less than 10 percent of growing operations are audited.

Of note, three audits in 2012 and two in 2017 were based on complaints. In fact, one of the inspections in 2017 involved CSU. During the course of the inspection under the Act, the Division discovered a violation of the Late Blight Quarantine.

Complaints and Disciplinary Actions

Although anyone can file a complaint alleging a violation of the Act, some complaints arise from findings of the audits of growers' records. Table 5 illustrates, for the calendar years indicated, the number and nature of complaints received.

**Table 5
Complaints**

	2012	2013	2014	2015	2016	2017
Recordkeeping	3	0	0	0	10	0
Distributing Uncertified Seed	1	0	0	0	2	0
Planting Uncertified Seed More than One Year Out	0	1	0	0	0	0
Total Number of Complaints	4	1	0	0	12	0

When a violation of the Act has occurred, the Commissioner may impose civil penalties not to exceed \$2,500 per violation. This maximum is further limited to between \$20 and \$100 per acre per violation for distributing or planting uncertified seed, and between \$500 and \$1,000 per violation for recordkeeping violations.

Table 6 illustrates, for the calendar years indicated, the number of civil penalties assessed pursuant to the Act.

**Table 6
Final Agency Actions**

	2012	2013	2014	2015	2016	2017
Number of Violations	13	5	0	0	31	0
Number of Civil Fines Assessed	4	1	0	0	10	0
Dollars of Civil Fines Assessed	\$3,300	\$1,700	\$0	\$0	\$39,840	\$0

Figures in Tables 5 and 6 may not add up due to the fact that a complaint may be filed but no violation was found, or because a single complaint may reveal multiple violations.

The number of fines assessed in a single year may be less than the number of violations in that year because multiple violations committed by a single grower may result in a single fine.

In 2016, one seed potato grower distributed uncertified seed potatoes to multiple growers, one of which went on to redistribute those uncertified seed potatoes. While many of the growers who bought and planted the uncertified seed were fined for records violations, the fines relating to planting uncertified seed were largely held in abeyance. In three instances, the growers destroyed their crops, resulting in a finding of "no violation."

Collateral Consequences – Criminal Convictions

Section 24-34-104(6)(b)(IX), C.R.S., requires the Colorado Office of Policy, Research and Regulatory Reform to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

Criminal history of growers plays no role in the administration of the Act.

Analysis and Recommendations

Recommendation 1 – Continue the Colorado Seed Potato Act for nine years, until 2028.

When the General Assembly enacted the Colorado Seed Potato Act (Act) in 2010, it did so for two express purposes:³⁵

- To control and minimize the spread of contagious community diseases by reducing the overall inoculum pool present in potato crops, and
- To comply with seed potato standards set forth in the State National Harmonization Program (Harmonization Program).

While it is not possible to say that all potato disease has been eradicated from Colorado, there is general consensus that the level of disease in the state has declined since passage of the Act. Indeed, anecdotal evidence suggests that through the imposition of virus tolerances placed on seed potatoes, the quality of that seed has increased and led to reduced disease loads.

Further, the Colorado Potato Certification Service at Colorado State University (CSU), tests and certifies Colorado seed potatoes. Test results indicate that the total acreage rejected for Mosaic (a prevalent potato disease) declined from a high of approximately 4,000 acres in 2013 to just under 1,000 acres in 2017.³⁶ What's more, the total acreage that passed the testing increased slightly from approximately 7,300 acres in 2015 to approximately 8,500 acres in 2017.³⁷

While these changes are not dramatic and cannot necessarily be linked directly to the Act, they do indicate that in an environment created by the Act, the level of disease has declined somewhat. These data also demonstrate that potato disease continues to exist in Colorado, necessitating continuation of the Act as a tool in reducing the overall level of disease in the state.

The second reason for passing the Act was to comply with the Harmonization Program, which

seeks to facilitate U.S. international negotiations on market access for potatoes by: 1) developing a minimum set of pest management and certification standards; and 2) establishing a state commitment to those standards and establishing federal oversight for the implementation of the [Harmonization Program].³⁸

³⁵ § 35-27.3-102, C.R.S.

³⁶ A. Houser, "PCS Update: 2017 Crop," Colorado Potato Certification Service, February 5, 2018, p. 40.

³⁷ A. Houser, "PCS Update: 2017 Crop," Colorado Potato Certification Service, February 5, 2018, p. 41.

³⁸ National Plant Board. *Question and Answers for the State National Harmonization Program for Seed Potatoes*. Retrieved on July 23, 2018, from www.nationalplantboard.org/wp-content/uploads/docs/snhp_q_a.doc

Colorado became a full participant in the Harmonization Program in February 2017 with the execution of a memorandum of understanding between the Colorado Department of Agriculture (Department) and the U.S. Department of Agriculture. For Colorado, the Harmonization Program helps to, among other things, facilitate exports of potatoes to Mexico. Among the responsibilities of states that participate in the Harmonization Program are the implementation of recordkeeping requirements,³⁹ such as those required under the Act.

The Act requires potato growers to maintain records pertaining to:⁴⁰

- The acreage planted by potato variety; and
- The amount (by weight) and source of the seed used to plant the acreage, with documents relating to:
 - For seed potatoes purchased, the documents related to certification of the seeds; or
 - For uncertified seed potatoes, the testing history and the seed potatoes used to replant the grower's own operations.

Anecdotal evidence suggests that these recordkeeping requirements are not particularly onerous and are, in fact, more or less consistent with what the private market requires through Good Agricultural Practices. Such practices are mandated by commercial purchasers of potatoes to ensure the quality of the product they are passing along to their own customers.

Thus, participation in the Harmonization Program serves the public interest by facilitating the export of Colorado potatoes to Mexico in a manner that is not particularly restrictive. Additionally, the level of disease in Colorado's potato crops has begun to trend downward, even if slightly, and it will take continued vigilance to maintain that downward trend.

For all these reasons, the General Assembly should continue the Act for nine years, until 2028.

Recommendation 2 – Continue the Seed Potato Advisory Committee.

The Seed Potato Advisory Committee (Advisory Committee) comprises nine members, appointed by the Commissioner of Agriculture (Commissioner):⁴¹

- Four potato growers who do not grow seed potatoes and whose operations are located in Area II;
- One potato grower who does not grow seed potatoes and whose operation is located in Area III;

³⁹ National Plant Board. *Question and Answers for the State National Harmonization Program for Seed Potatoes*. Retrieved July 23, 2018, from www.nationalplantboard.org/wp-content/uploads/docs/snhp_q_a.doc

⁴⁰ § 35-27.3-106(2)(b), C.R.S.

⁴¹ § 35-27.3-107(1)(b)(l), C.R.S.

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- Two members of the Colorado Certified Potato Growers' Association (CCPGA), one of whom must be its sitting president;
 - One employee of CSU; and
 - One employee of the Department.

The Advisory Committee typically meets once each year and mostly in the San Luis Valley, where most of the state's potato farms are located.

The Act, which also creates the Advisory Committee, was enacted at the behest of the state's potato growers, who, generally, recognized the need to improve the quality of seed potatoes to reduce disease pressure on commercial potato crops.

The Advisory Committee provides potato growers with a mechanism to participate in the implementation of the Act by providing input to the Department on audits and inspections and current practices in the seed and commercial potato industries. The Advisory Committee also reviews requests for exemptions from various statutory requirements. In short, the Advisory Committee provides the link between the Department's administration of the Act and the potato industry that must abide by the terms of the Act. As such, most recognize the Advisory Committee as providing an indispensable level of expertise to the Department and the Commissioner.

Therefore, the General Assembly should continue the Advisory Committee and it should do so without another sunset clause. If the Act is continued, as is advocated in Recommendation 1 of this sunset report, then the Advisory Committee will be reviewed as part of the review of the entire Act.

Recommendation 3 – Alter the composition of the Advisory Committee by repealing the requirement that one of the two members of the CCPGA be its sitting president, by repealing the seat set aside for the Department and by adding a seat for an Area I grower.

The Advisory Committee comprises nine members, all appointed by the Commissioner. Two of these seats merit discussion:⁴²

- Two members of the CCPGA, one of whom shall be its sitting president; and
- One employee of the Department.

Advisory Committee members are appointed to three-year terms. However, the President of the CCPGA serves as such for only a single year, although an individual may serve up to two one-year terms. This creates a dilemma for the CCPGA: the president who serves for one year is appointed to a three-year term on the Advisory Committee. To simplify matters, the General Assembly should amend the statute to simply direct the Commissioner to appoint two members of the CCPGA. One of those members may or may not be the organization's president, but the organization will retain adequate representation on the Advisory Committee.

⁴² § 35-27.3-107(1)(b)(I), C.R.S.

Next the Advisory Committee exists to provide advice and recommendations on a number of matters to the Commissioner and thus, to the Department. It makes little sense for an employee of the organization receiving the advice, and staffing the Advisory Committee, to have a seat on the Advisory Committee. Such an employee can provide advice to the Commissioner outside of the Advisory Committee. Additionally, the statute limits all appointees to an unlimited number of terms, but no more than two consecutive three-year terms. Thus, it is possible, that the individual who administers the program created under the Act, and who staffs the Advisory Committee, could be precluded from sitting on the Advisory Committee after six years. This runs the risk of running afoul of the provision that requires this individual to be knowledgeable about seed potatoes.

To remedy this, the seat for the Department should be repealed. While this will create a situation where there is an even number of Advisory Committee members, tie votes need not hinder action. Since this is an advisory committee, the Commissioner has always been free to act counter to an Advisory Committee recommendation.

Finally, noticeably absent from the composition of the Advisory Committee is representation from Area I. Since no potatoes are currently grown in Area I, this is logical. However, as of this writing, Department staff has reason to believe that at some point in the near future, potato production may begin in Area I. While it is not yet known whether this would be commercial or seed potato production, a seat on the Advisory Committee should be reserved for Area I, but the Commissioner should not be required to fill that seat until such time as potato production actually begins.

For these reasons, the General Assembly should repeal the requirement that one of the CCPGA seats on the Advisory Committee be reserved for that organization's president, repeal the seat reserved for an employee of the Department and create a seat to represent Area I at such time as Area I commences potato production.

Recommendation 4 – Reconcile statutory conflicts regarding the payment of fees such that Area II pays for the administration and enforcement of the Act.

Although the Commissioner has never had to assess any fees to cover the costs of the program, because the money realized through civil penalties has been sufficient to cover such costs, the Act nevertheless contains conflicting provisions relating to the collection of fees and how the costs of the records reviews are to be recovered.

Section 35-27.3-106(2)(a), Colorado Revised Statutes (C.R.S.), provides that the Area Committee for Area II (the San Luis Valley) “shall pay the actual costs of such records reviews.” This implies that Area II is to pay for all of records reviews, including those conducted on growers in Area III.

However, section 35-27.3-108(1)(b)(VII), C.R.S., directs the Commissioner to promulgate rules that, among other things, establish a schedule of fees for services performed by the Department “which fees shall be billed on a pro rata basis to the Area Committees

[for Area II and Area III].” This provision clearly states that each area is to pay for the records reviews performed on growers in their respective areas.

Recall that only Area II grows seed potatoes. As a result, Area II realizes any benefits of the Act at a disproportionately higher rate than does Area III. In this sense, it seems logical that Area II pay for the costs of the records review.

This holds true even if, as alluded to in Recommendation 3 of this sunset report, potato production begins in Area I. If this occurs, production will likely be limited to commercial or seed potatoes, not both. The reason Area II is the primary beneficiary of the Act is because only Area II grows both commercial and seed potatoes, which increases the risk of the spread of disease.

Indeed, according to stakeholders, the original intent was for Area II to cover all of the costs of administering the Act. Therefore, the General Assembly should clarify that Area II must pay for the administration and enforcement of the Act.

Recommendation 5 – Repeal the option of utilizing an independent auditor in the review of grower records.

Recall that the Act requires potato growers to keep and maintain certain records that are subject to review by the Commissioner. The Act specifies that

The Commissioner shall, upon recommendation from the Advisory Committee, select a qualified Department employee or independent auditor to perform a records review on at least 10 percent of potato growers subject to [the Act] once every potato crop cycle.⁴³

This is reinforced by section 35-27.3-107(4), C.R.S., which directs the Advisory Committee to recommend independent auditors to perform the records reviews.

In practice, Department staff has conducted these reviews and they are likely to continue to do so for there is likely no one more qualified to conduct the reviews. Therefore, the General Assembly should repeal the option of utilizing an independent auditor and instead direct Department staff to perform this function.

Recommendation 6 – Direct that all future monies collected by the Commissioner as the result of civil penalties assessed under the Act be deposited in the state’s General Fund.

The Seed Potato Cash Fund (Cash Fund) is created in section 35-27.3-111, C.R.S., and all fees and civil penalties collected pursuant to the Act are to be deposited into it. Indeed, section 35-27.3-110(4), C.R.S., reinforces this intent by directing that all money collected from any civil penalty pursuant to the Act be credited to the Cash Fund.

⁴³ § 35-27.3-106(2)(a), C.R.S.

Ordinarily, when an agency is given fining authority, or the authority to assess civil penalties, such funds are credited to the state’s General Fund. This is done so that the agency has no incentive to impose fines, other than taking legitimate disciplinary action. Examples of programs adhering to this principle include those regulating accountants,⁴⁴ collection agencies,⁴⁵ pharmacists and pharmacies,⁴⁶ electricians,⁴⁷ professional engineers,⁴⁸ professional land surveyors,⁴⁹ architects,⁵⁰ chiropractors,⁵¹ lay midwives,⁵² physical therapists,⁵³ plumbers⁵⁴ and veterinarians⁵⁵ to name a few.

The fact that the program created under the Act is so inexpensive to run has created an unusual situation. Table 7 draws on data provided in Tables 3 and 6 to illustrate, for the years indicated, total program expenditures compared to civil penalties assessed.

**Table 7
Program Expenditures and Civil Penalties Assessed**

Calendar Year	Expenditures	Civil Penalties
2012	\$1,310	\$3,300
2013	\$690	\$1,700
2014	\$725	\$0
2015	\$375	\$0
2016	\$3,583	\$39,840
2017	\$426	\$0

As a result of low expenditures and the assessment of civil penalties, the Cash Fund was running a surplus of almost \$40,000 at the end of 2017, far in excess of the 16.5 percent maximum reserve authorized under section 24-75-402(2)(a), C.R.S. That being said, the funds currently in the Cash Fund should remain, and any future fines should be credited to the General Fund.

Importantly, no allegations of impropriety were made during the course of this sunset review. Rather, this is simply a “good government” recommendation.

For all these reasons, the General Assembly should direct that all future monies collected by the Commissioner as a result of civil penalties assessed under the Act be deposited in the state’s General Fund.

⁴⁴ § 12-2-123(5)(b), C.R.S.

⁴⁵ § 5-16-134(2), C.R.S.

⁴⁶ § 12-42.5-124(5)(b), C.R.S.

⁴⁷ § 12-23-118(7), C.R.S.

⁴⁸ § 12-25-105(9), C.R.S.

⁴⁹ § 12-25-205(8), C.R.S.

⁵⁰ § 12-25-308(4)(b), C.R.S.

⁵¹ § 12-33-117(1.5), C.R.S.

⁵² § 12-37-107(2)(b), C.R.S.

⁵³ § 12-41-122(2), C.R.S.

⁵⁴ § 12-58-116.5(4), C.R.S.

⁵⁵ § 12-64-111(4), C.R.S.

Recommendation 7 – Repeal the \$2,500-maximum amount of civil penalty that the Commissioner may impose.

The Commissioner may impose civil penalties of between \$20 and \$100 per acre per violation for distributing or planting uncertified seed potatoes,⁵⁶ and between \$500 and \$1,000 per violation for record keeping violations.⁵⁷ However, the total of all civil penalties must not exceed \$2,500 per violation.

Given these limitations, if a grower plants one acre of uncertified seed, the fine is, at most, a mere \$100. If a grower plants 500 acres of uncertified seed, the fine is, at most, \$2,500 because of the statutory cap.

While the Commissioner has assessed relatively few civil penalties for violations of the Act (15 over 6 years), most agree that the civil penalties are too low to pose an effective deterrent. In short, it can be more economical to violate the Act and pay the civil penalty than to comply with the Act. Although the cost of seed potatoes varies considerably from one variety to another, most agree that the level of the fine should be higher than the cost of seed potatoes.

Given the variations in seed costs, identifying the ideal dollar amount for a fine is nearly impossible to ascertain. However, if the statutory cap of \$2,500 per violation were repealed, then the level of the fines may reach a point of creating a sufficient deterrent. In the example above, the grower who plants 500 acres of uncertified seed would now face a fine of \$50,000. While such a sum may or may not be higher than the cost of the seed potatoes involved, it is sufficient to make a grower think twice about violating the Act.

Therefore, the General Assembly should repeal the maximum amount of civil penalty that the Commission may impose.

Recommendation 8 – Make technical changes to the Act.

As with any law, the Act contains instances of obsolete, duplicative and confusing language, and it should be revised to reflect current terminology and administrative practices. These changes are technical in nature, so they will have no substantive impact.

The General Assembly should make the following technical changes:

- **Section 35-27.3-105(4), C.R.S.** This provision permitted the planting of uncertified seed potatoes prior to January 1, 2012, the effective date of the Act, and should be repealed.
- **Section 35-27.3-107(2)(b), C.R.S.** This provision provided for the initial terms of Advisory Committee members and should now be repealed.

⁵⁶ § 35-27.3-110(1)(b), C.R.S.

⁵⁷ § 25-27.3-110(1)(c), C.R.S.

Administrative Recommendation 1 – The Commissioner should audit grower records utilizing both random and risk-based selection criteria.

The Act requires the Commissioner to review the records of at least 10 percent of potato growers once every seed potato crop cycle.⁵⁸ The Department has implemented this provision by randomly selecting 10 percent of potato growers each year, without regard to past compliance history. As a result, a grower who is completely compliant could, conceivably, be audited every year, whereas a grower who has violated may not be audited for five years or more.

While selecting growers randomly incentivizes all growers to remain in compliance, it does nothing to focus on those who have violated the Act in the past. When this is coupled with civil penalties that are, at least arguably, so low that they prevent very little deterrent, it is reasonable to infer that at least a small number of growers play the odds that they will not be audited, and violate the Act.

To account for this, the Commissioner should retain selecting growers randomly, but should also ensure that growers who have violated are audited annually, for a certain number of growth cycles, to ensure their compliance. Such a practice would remain within the spirit of the Act, which requires that at least 10 percent of growers be audited each year. The Act establishes a floor for the number of records reviews to be conducted, not a ceiling.

⁵⁸ § 35-27.3-106(2)(a), C.R.S.