COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research & Regulatory Reform

2019 Sunset Review

Colorado Seed Act

October 15, 2019

COLORADO
Department of Regulatory Agencies
Executive Director's Office

October 15, 2019

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 Act. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2020 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 27 of Title 35, C.R.S. The report also discusses the effectiveness of the Colorado Commissioner of Agriculture and staff 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,

Patty Salazar
Executive Director

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Department of Regulatory Agencies

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SUMMARY

What is regulated?

The Colorado Seed Act (Act), which is administered by the Colorado Commissioner of Agriculture (Commissioner), primarily represents a "truth in labeling" approach to regulation. The Act requires seed containers to bear a label as to contents, contaminants, germination rates, the origin of the seed and the entity responsible for packaging that seed, among other things.

Why is it regulated?

The Act helps to ensure that consumers—both agricultural and other—are acquiring the type and quality of seed they intend to acquire. The Act also helps to protect Colorado's environment from the spread of weed seed.

Who is regulated?

The Act requires the following to register with the Commissioner:

- Seed labelers (202 in 2018) are in the business of labeling seed for sale;
- Farmer seed labelers (69 in 2018) label seed produced for sale on property owned or rented by them;
- Custom seed conditioners (17 in 2018) are in the business of cleaning seed owned by others; and
- Retail seed dealers (918 in 2018) are in the business of selling seed at retail in Colorado.

How is it regulated?

Seed labelers, farmer seed labelers, custom seed conditioners and retail seed dealers must register with the Commissioner each year. Colorado Department of Agriculture (Department) staff conduct inspections to ensure compliance with the Act.

What does it cost?

In fiscal year 17-18, the Commissioner spent approximately $209,500, and dedicated 1.42 full-time equivalent employees, to the administration and enforcement of the Act.

What disciplinary activity is there?

In 2018, the Commissioner placed 10 lots of seed under cease and desist orders (CDOs), over 52,000 pounds of seed offered by retail seed dealers under CDOs, and issued CDOs to 46 distinct locations.

KEY RECOMMENDATIONS

Continue the Act for 11 years, until 2031.
The Act primarily represents a "truth in labeling" approach to regulation to provide some assurance to consumers that they are purchasing the type and quality of seed that they intend to purchase. This is accomplished by the establishment of labeling requirements for seed and registration requirements for those who work with seed. As such, the Act represents the least restrictive form of government regulation consistent with protecting the public.

Repeal the Act's arbitration provisions.
If a buyer of seed suffers damage because the seed does not produce, perform in conformance with the label or warranty or due to negligence of the seller, the buyer must submit a claim for arbitration with the Commissioner before the buyer can proceed with any legal action in the courts. The Commissioner must then launch an investigation and, if the claims are meritorious, convene an arbitration council. This process demands that resources be diverted from other enforcement activities, thereby hindering the Commissioner's ability to effectively enforce and otherwise administer the Act. Finally, the arbitration process actually hinders public protection by requiring the consumer to participate in a non-binding process before proceeding to court. Therefore, the arbitration process should be repealed.

METHODOLOGY

As part of this review, Colorado of Policy, Research and Regulatory Reform staff conducted a literature search; interviewed Department staff and stakeholders and reviewed Department records and Colorado statutes and rules.

MAJOR CONTACTS MADE DURING THIS REVIEW

Colorado Corn Growers Association
Colorado Department of Agriculture, Plant Industry Division
Colorado Dry Bean Administrative Committee
Colorado Farm Bureau
Colorado Wheat
Colorado Seed Growers Association
Colorado Seed Industry Association
Colorado State University Seed Laboratory
Farmers Business Network
Marijuana Industry Group
North American Rock Garden Society

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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www.dora.colorado.gov/opr

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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 criteria[1] 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:

I. 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;

II. 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;

III. 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;

IV. Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;

V. 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;

VI. The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;

VII. 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;

VIII. 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(6)(b), C.R.S.

IX. Whether the agency through its licensing or certification 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 or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications 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; and

X. Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

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 a particular regulatory program 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 ascertain a second aspect of the first sunset criterion--whether conditions that led to initial regulation 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 third 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 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 tenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

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.

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 Colorado Commissioner of Agriculture (Commissioner) as enumerated in Article 27 of Title 35, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2020, 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 Commissioner pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the Commissioner and staff. 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 conducted a literature search; interviewed Department of Agriculture (Department) staff and stakeholders and reviewed Department records and Colorado statutes and rules.

Profile of the Industry

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks 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.

In order to understand the need for regulation, it is first necessary to understand what the industry does, how it works, who it serves and any necessary qualifications.

The sixth sunset criterion requires COPRRR to evaluate the economic impact of regulation. One way this may be accomplished is to review economic statistics for the industry.

The agriculture industry contributes approximately $40 billion to Colorado's economy, employing more than 170,000 people on 36,000 farms and ranches.[2]

Colorado ranked 21st among the 50 states in 2017 in terms of total agricultural sales, with the state's agricultural valuation totaling approximately $7.5 billion. While livestock, poultry and their products constitute the majority of that value, the value of crops totaled approximately $2.2 billion that same year.[3]

A key component to Colorado's agriculture industry is high quality seed that is relatively free of contaminants, has relatively high germination rates and has relatively high purity rates. The better the seed, the greater the economic benefits.

To help ensure that Colorado's farmers, and consumers in general, obtain quality seed, the state has enacted the Colorado Seed Act (Act). The Act, in large part, represents a "truth in labeling" effort. Every container of seed sold, or offered or exposed for sale in the state must have a legible, plainly written label or tag.[4]

In Colorado, the information that must be displayed on a label varies by the type of seed. There are different requirements for vegetable and flower seed for home gardeners, agricultural and turf grass seed and tree and shrub seed. Typical label elements include:[5]

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[2] Colorado Department of Agriculture. *AGRI-CULTURE*. Page 49. Retrieved on March 27, 2019, from https//philosophycommunication.com/html/cdabrochure.html

[3] U.S. Department of Agriculture. *2017 Census of Agriculture: State Profile—Colorado*. Retrieved on September 16, 2019, from www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/Colorado/cp99008.pdf

[4] Colorado Department of Agriculture, "Colorado Retailers Guide to Handling Seed."

[5] Not all label elements listed are required for all labels. *See* Colorado Department of Agriculture, "Labeling Agricultural and Turfgrass Seed in Colorado", "Labeling Tree and Shrub Seed in Colorado" and "Labeling Vegetable & Flower Seed for Home Gardeners in Colorado". For the explanations of seed elements, *see* U.S. Department of Agriculture, Natural Resources Conservation Service Plant Materials Program, "A Simplified Guide to Understanding Seed Labels," Maryland Plant Materials Technical Note No. 2, August 2007.

- Kind, variety or name of the species—the cultivar, species and common name of the plant;
- Lot number—a series of letters or numbers used for tracking purposes;
- Origin—where the seed was grown;
- Percentage of pure seed—how much of the material in the container is the desired seed;
- Percentage of hard or dormant seed—how much of the seed will not germinate readily because of a hard seed coat;
- Percentage of inert matter—how much of the material in the container is plant debris or other materials that are not seed;
- Net weight—how much total material is in the container;
- Germination rate—the rate at which the seed will readily germinate;
- List of restricted noxious weed seed;
- Month and year the seed was tested—the date should generally be within one year of the planned date for using the seed; and
- Name and address of the labeler.

To ensure compliance with the Act and the labeling requirements, the Act requires certain individuals and entities to register with the Commissioner:[6]

- Seed labelers are "in the business of labeling seed for sale in Colorado and whose name and address appear on the label of such seed;"[7]
- Farmer seed labelers label only seed produced for sale on property owned or rented by them or their employer in Colorado;[8]
- Custom seed conditioners are in the business of conditioning seed where ownership of the seed is retained by the owner;[9] and
- Retail seed dealers are "in the business of selling seed at retail in Colorado."[10]

[6] § 35-27-111(1), C.R.S.
[7] § 35-27-103(24), C.R.S.
[8] § 35-27-103(10), C.R.S.
[9] § 35-27-103(7), C.R.S.
[10] § 35-27-103(21), C.R.S.

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 criterion questions 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.

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

As early as 1929, Colorado required seed to be inspected. By 1943, Colorado had enacted the Colorado Seed Act (Act).

In the late 1980s, Colorado's winter wheat crops were suffering from widespread weed infestations, resulting in a 50 percent decline in crop yields. This led to the creation of a task force[11] and the ultimate repeal and reenactment of the Act in 1993.

A primary feature of Senate Bill 93-017 was a new registration requirement for seed dealers, which followed a recommendation from a 1992 sunrise review of seed sellers. The bill also increased enforcement authority for the Colorado Commissioner of Agriculture (Commissioner), including the ability to impose fines of up to $2,500 per violation and the ability to revoke a registration. The bill also created an arbitration council to hear consumer complaints against seed dealers. Finally, the bill scheduled the Act to sunset in 1999.

Following the 1998 sunset review of the Act, Senate Bill 99-122 repealed the Seed Advisory Committee and made several technical changes to the Act.

House Bill 07-1307 made several changes to the arbitration council, including repealing the ability of the Commissioner to request the arbitration council's assistance in determining civil penalties and changing the size and composition of the arbitration council.

The Act was continued in Senate Bill 09-116, following a sunset review in 2008, and Senate Bill 10-072 exempted seed potatoes from the provisions of the Act.

[11] Colorado Department of Regulatory Agencies, "1992 Sunrise Review of Colorado Seed Sellers," June 1992, p. 4.

Legal Summary

The second and third sunset criteria question

> 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; 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 regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

Seeds are regulated at both the federal and state levels.

Summary of Federal Law

At least two federal laws apply to the regulation of seeds:

- The Federal Seed Act regulates the interstate shipment of seeds by requiring that seed be labeled with information that allows purchasers to make informed decisions.[12]

- The Plant Variety Protection Act "provides legal intellectual property rights to breeders of new varieties of plants that are reproduced by seed or that are tuber-propagated."[13]

Summary of Colorado Law

The Act's legislative declaration states that

> truth in the labeling of seed is of paramount importance to the citizens of Colorado because the distribution of and subsequent use of poor quality seed caused by inaccurate or misleading labeling of such seed can result

[12] United States Department of Agriculture, Agricultural Marketing Service. *Federal Seed Act*. Retrieved February 26, 2019, from www.ams.usda.gov/rules-regulations/fsa
[13] United States Department of Agriculture, Agricultural Marketing Service. *Plant Variety Protection Act*. Retrieved February 26, 2019, from www.ams.usda.gov/rules-regulations/pvpa

> in severe economic hardship due to low crop yields, poor crop quality, and the spread of noxious weed seed.[14]

Towards this end, unless otherwise exempt,

> every container of seed which is sold, offered or exposed for sale, bartered, or distributed within this state for propagation shall conspicuously bear a legible and plainly written or printed label or tag in English which shall provide all information required by the Commissioner. The label shall not bear false or misleading information.[15]

The Act defines seed as "agricultural, vegetable, ornamental, shrub, or tree seed for propagation."[16]

No seed can be brought into the state unless it has been tested, is in a container that satisfies the Act's labeling requirements and meets all other requirements of the Act.[17]

In general, no one may act as a custom seed conditioner, farmer seed labeler, retail seed dealer or seed labeler unless registered with the Commissioner.[18] All registrations expire on the last day of February each year.[19]

A custom seed conditioner is a person who "engages in the business of conditioning seed by either a stationary or portable seed cleaner, if ownership of the seed is retained by the customer."[20] Conditioning is defined as "drying, cleaning, scarifying, sizing or any other operation that changes the purity or germination of the seed."[21]

A farmer seed labeler is a person who "labels seed produced for sale on property owned or rented by such person or such person's employer."[22]

A retail seed dealer is a "person who engages in the business of selling seed at retail in Colorado."[23]

A seed labeler is "a person who engages in the business of labeling seed for sale and whose name and address appears on the label of such seed."[24]

In general, registration fees may not exceed:[25]

[14] § 35-27-102, C.R.S.
[15] § 35-27-105(1)(a), C.R.S.
[16] § 35-27-103(23), C.R.S.
[17] § 35-27-108(1), C.R.S.
[18] § 35-27-111(1), C.R.S.
[19] § 35-27-111(2)(b)(II), C.R.S.
[20] § 35-27-103(7), C.R.S.
[21] § 35-27-103(6), C.R.S.
[22] § 35-27-103(10), C.R.S.
[23] § 35-27-103(21), C.R.S.
[24] § 35-27-103(24), C.R.S
[25] § 35-27-111(4), C.R.S.

- $300 for custom seed conditioners, plus $75 for each additional location;
- $300 for seed labelers, plus $75 for each additional location;
- $75 for farmer seed labelers, plus $25 for each additional location; and
- $75 for retail seed dealers, plus $25 for each additional location.

The Act provides several exemptions from its registration requirements, including:[26]

- Those who register as a custom seed conditioner, farmer seed labeler or seed labeler need not also register as a retail seed dealer;
- Those who register as a seed labeler need not also register as a custom seed conditioner;
- Those who register as a farmer seed labeler need not also register as a custom seed conditioner if they clean or condition their own seed only; and
- Those who act as a retail seed dealer and sell only prepackaged seed in containers of one pound or less need not register as a retail seed dealer if the seed labeler supplying the prepackaged seed is registered as such.

The Commissioner may issue a letter of admonition, or deny, suspend or revoke a registration if the registrant:[27]

- Refuses or fails to comply with any provision of the Act, any rule promulgated by the Commissioner under the Act, or any lawful order of the Commissioner;
- Is convicted of a felony for conduct regulated by the Act;
- Is disciplined by another jurisdiction;
- Refuses to provide the Commissioner with reasonable, complete and accurate information; or
- Falsifies any information the Commissioner may request.

Additionally, the Commissioner may impose a civil penalty for any violation of the Act, not to exceed $2,500 per violation,[28] and only after the person charged is given notice and an opportunity to be heard.[29]

The Commissioner may embargo seed, which prevents the removal or disposition of the seed, if the Commissioner finds or has reasonable cause to believe that any seed is adulterated or misbranded or is not labeled pursuant to the Act, and is in violation of the Act.[30]

The Act does not apply to, among other things:[31]

- Seed not intended for propagation;

[26] § 35-27-111(3), C.R.S.
[27] § 35-27-117(1), C.R.S.
[28] § 35-27-118(1), C.R.S.
[29] § 35-27-118(2), C.R.S.
[30] § 35-27-119, C.R.S.
[31] § 35-27-104(1), C.R.S.

- Seed in storage or consigned to a seed conditioning establishment for conditioning or for sale outside the state, except that such seed is subject to the Act's labeling and advertising requirements;
- Seed sold or consigned to a merchant, if such seed is to be re-cleaned before it is sold for propagation, except that such seed is subject to the Act's advertising requirements;
- Seed of a variety not protected by the federal Plant Variety Protection Act (PVPA), sold on a grower's premises and delivered to a purchaser, if such seed is: grown on such grower's premises, not delivered by common carrier or by mail, and not commercially advertised in any way, except that such seed is subject to the Act's noxious weed provisions;
- Seed brought into the state by the Colorado Agricultural Experiment Station for experimental purposes or for storage in the U.S. Department of Agriculture's Agricultural Research Service's National Center for Genetic Resources Preservation;
- Any person who produced seed for such person's own use on property owned or rented by such person or for such person's employer;
- Seed held for wholesale transactions, except that such seed is subject to the Act's labeling requirements; and
- Seed potatoes.

The Commissioner has specific duties related to seed beans, including:[32]

- "Establishing tolerances of seed-borne pathogens, inspection procedures and standards, and approval procedures for those seed beans found to be within allowable tolerances";
- "Designating those areas of the state in which such provisions apply"'
- Retaining agents to conduct inspections to ensure seed beans comply with the Act; and
- Establishing reasonable fees.

Every person whose name appears on a label as a handler of the seed therein must keep complete records concerning the origin, sale, shipping and disposition of such seed for two years. Further, they must keep a file sample of such seed for at least two years after final disposition of such seed.[33]

The Commissioner is empowered to administer and enforce the Act, and to adopt any rules necessary to complete that mission, including those:[34]

- Establishing the methods to inspect, sample, analyze and test seed;
- Amending the lists of prohibited and restricted noxious weed seed;

[32] § 35-27-109, C.R.S.
[33] §§ 35-27-110 and -112, C.R.S.
[34] § 35-27-114(1), C.R.S.

- Establishing procedures and standards, including defining allowable tolerances to be used for the inspection and approval of seed beans;
- Establishing procedures and standards to embargo seed;
- Enforcing any disciplinary actions for violating the Act, including letters of admonition or the denial, suspension or revocation of any registration; and
- Inspecting, sampling, analyzing and testing seed pursuant to the Act.

It is a violation of the Act to sell, offer or expose for sale, barter or distribute any seed if such seed contains:[35]

- More than two percent of weed seed[36] by weight;
- Prohibited noxious weed;[37] or
- More restricted noxious weed seed[38] per pound than the amount declared on the label or more than the amount allowed by the Commissioner.

Violation of the Act's provisions related to weed seed carries a fine of $2,500 per violation.[39]

It is unlawful and a violation of the Act to, among other things:[40]

- Detach, alter, deface or destroy any label if such person is not the ultimate customer;
- Alter or substitute seed or other material in a manner that may defeat the purpose of the Act;
- Disseminate any false or misleading advertising regarding a specific lot of seed;
- Perform or hold oneself out as being authorized to perform any of the acts for which registration under the Act is required without being so registered;
- Refuse or fail to comply with the provisions of the Act or any rules promulgated under the Act; and
- Sell, offer or expose for sale, barter or distribute any seed if such seed has, in general:[41]
    - Not been tested to determine the percentage of germination of such seed within the previous 13 months;

[35] § 35-27-113(2)(a), C.R.S.
[36] Section 35-27-103(16), C.R.S., defines weed seed as "seed produced from plants which are especially troublesome and detrimental and which may cause damage or loss to a considerable portion of the land or livestock of a community."
[37] Section 35-27-103(16)(a), C.R.S., defines prohibited noxious weed seed as "the seed of perennial, biennial, and annual weeds which are highly detrimental and especially difficult to control. The presence of prohibited noxious weed seed in seed precludes the sale of see for propagation. Prohibited noxious weed seed includes the seed of any weed so designated by the Commissioner."
[38] Section 35-27-103(16)(b), C.R.S., defines restricted noxious weed seed as "the seed of weeds which are very objectionable in fields, lawns, and gardens but which can be controlled by good cultural practices. Restricted noxious weed seed includes the seed of any weed so designated by the Commissioner."
[39] § 35-27-113(2)(b), C.R.S.s
[40] § 35-27-113(3), C.R.S.
[41] § 35-27-113(1), C.R.S.

- Been treated with a material that is poisonous to humans or livestock unless the labeling contains a warning;
- Not been labeled in accordance with the Act;
- Been the subject of false or misleading advertising;
- Been sold in the form of screenings but is not labeled and invoiced as such;
- Been labeled or advertised as certified or registered, but has not been produced, conditioned and packaged in conformity with the requirements of the certifying agency; and
- Been sold by a variety name but is not of that variety.

Every label required under the Act must state that arbitration is required for any claim arising out of the sale of seed. However, arbitration is not required if such notice is not given.[42] The Act provides a specimen of the required language.[43]

Before any buyer of seed who suffers damage because such seed does not produce or perform in conformance with the labeling or warranty, or because of negligence on the part of the retail seed dealer, commences any legal action, the buyer must file a verified complaint with the Commissioner for arbitration.[44] The complaint must be accompanied by a filing fee of $10.[45]

In each case, the Commissioner must appoint an arbitration council comprising three members: the dean of the College of Agriculture of Colorado State University; the President of the Colorado Seedsmen's Association and the president of any organization of Colorado farmers.[46] The members of the arbitration council receive no compensation for their duties, but are reimbursed for any actual and necessary expenses.[47]

The Commissioner must investigate the allegations in the complaint and submit to the arbitration council a report with the results of the investigation.[48] The arbitration council must issue its own report, and it must include findings of fact, conclusions of law and recommendations as to costs, if any.[49] The arbitration council's report may be introduced as evidence of the facts in any subsequent litigation, although the court may give such weight to the arbitration council's findings as the court sees fit.[50]

All fees and civil penalties are credited to the Plant Health, Pest Control, and Environmental Protection Cash Fund.[51]

[42] § 35-27-123(2)(a), C.R.S.
[43] § 35-27-123(2)(b), C.R.S.
[44] § 35-27-123(1)(a), C.R.S.
[45] § 35-27-122(2)(a), C.R.S.
[46] § 35-27-122(1)(a), C.R.S.
[47] § 35-27-122(2)(h), C.R.S.
[48] § 35-27-122(2)(c), C.R.S.
[49] § 35-27-122(2)(e), C.R.S.
[50] § 35-27-123(3)(c), C.R.S.
[51] § 35-27-124, C.R.S.

Finally, the Commissioner has promulgated various rules to implement the Act:

- Part 1: Definition and Construction of Terms
- Part 2: The Registration System
- Part 3: Label Requirements for Agricultural, Vegetable, and Flower Seeds
- Part 4: Labeling Kind and Variety or Type and Performance Characteristic of Flower Seed
- Part 5: Kinds of Flower Seeds Subject to Germination Labeling Requirements and Germination Standards for Flower Seeds
- Part 6: Label Requirements for Tree and Shrub Seeds
- Part 7: Noxious Weed List
- Part 8: Germination Standards
- Part 9: Stacking and Labeling of Seed Lots by Dealers
- Part 10: The Sampling of Seed Lots
- Part 11: Analysis and Testing of Seeds
- Part 12: Tolerances
- Part 13: Sales of Disease Free Seed Beans
- Part 14: Incorporation by Reference
- Part 15: Records Required to be Kept
- Part 16: Pesticide Treated Alfalfa Seed and Clover Seed
- Part 20: Statements of Basis and Purpose

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 third, fourth and fifth 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;
>
> Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively; and
>
> 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.

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

The Colorado Commissioner of Agriculture (Commissioner) is tasked with administering and enforcing the Colorado Seed Act (Act). As a practical matter, staff in the Department of Agriculture's Division of Plant Industry (Department and Division, respectively) are responsible for the day-to-day implementation of the Act.

Table 1 illustrates, for the fiscal years indicated, the Division's fiscal and staffing information related to implementation of the Act.

Table 1
Agency Fiscal Information

Fiscal Year	Cash Fund	General Fund	Total Expenditures	FTE
13-14	$149,339	$200,087	$349,426	Unavailable
14-15	$131,920	$236,406	$368,325	2.87
15-16	$94,129	$235,153	$329,282	1.95
16-17	$145,367	$103,876	$247,243	1.50
17-18	$144,012	$65,437	$209,449	1.42

Data regarding full-time equivalent (FTE) employees for fiscal year 13-14 is unavailable because of a change in accounting systems. As a result, staff was unable to retrieve staffing data for that fiscal year.

As of July 2019, the Division dedicated 1.2 FTE to administration of the seed program:

- 0.2 FTE Program Management II (Coordinator), who manages the seed program; assigns inspections; conducts investigations, enforcement and arbitrations; provides educational information at formal presentations and develops materials for web-based communications;
- 0.5 FTE Inspector III, who conduct sampling and seed label inspection, provide education when violations are identified and draft cease and desist orders in the field when label violations are identified; and
- 0.5 FTE Administrative Assistant III, who manages registrations, follows up on communications with delinquent registrants and newly identified registrants; provides education on label requirements and registration mandates by phone and email.

The seed program is funded with both cash and general funds. Cash funds are raised by the imposition of registration fees. Effective July 30, 2019, the fees are:

- Seed labeler: $300
- Farmer seed labeler: $75
- Custom seed conditioner: $300
- Retail seed dealer: $75

A separate registration must be obtained for each location at which a registrant operates. For seed labelers and custom seed conditioners, the fee for each additional location is $75. For farmer seed labelers and retail seed dealers, the fee for each additional location is $25. All fees are capped by statute at their current levels. Multiple “brands” may be labeled at a single location and under the same registration.

The Department utilizes General Fund dollars to help support the seed program when cash funds are insufficient. To reduce the extent to which this is necessary, the seed program suspended inspections of retail seed dealers in summer 2019, and plans to do so again in summer 2020.

Fluctuations in cash fund versus General Fund expenditures reflected in Table 1, can generally be attributed to changes in personnel allocated to the Act’s administration from both fund sources. Although the cash fund may have been charged for a certain number of FTE, those individuals may have worked for the seed program on a limited basis.

Registrations

The eighth sunset criterion questions whether the scope of practice of the regulated industry contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

The Act authorizes four distinct registration types:

- **Seed labelers** are "in the business of labeling seed for sale in Colorado and whose name and address appear on the label of such seed;"[52]
- **Farmer seed labelers** label only seed produced for sale on property owned or rented by them or their employer in Colorado;[53]
- **Custom seed conditioners** are in the business of conditioning seed where ownership of the seed is retained by the owner;[54] and
- **Retail seed dealers** are "in the business of selling seed at retail in Colorado."[55]

Those registered as seed labelers, farmer seed labelers or custom seed conditioners need not register as retail seed dealers,[56] and those registered as seed labelers need not register as custom seed conditioners.[57]

Further, only those selling prepackaged seed in containers greater than one pound must register as retail seed dealers, but the seed labeler supplying such seed must be properly registered.[58]

To obtain any type of registration under the Act, one need only complete a one-page application form that solicits general demographic information, submit samples of any seed labels that will be used and pay the required fee. All registrations expire on the last day of February each year.

Table 2 illustrates, for the calendar years indicated, the number of each type of registrations issued under the Act.

[52] § 35-27-103(24), C.R.S.
[53] § 35-27-103(10), C.R.S.
[54] § 35-27-103(7), C.R.S.
[55] § 35-27-103(21), C.R.S.
[56] § 35-27-111(3)(a), C.R.S.
[57] § 35-27-111(3)(b), C.R.S.
[58] § 35-27-111(3)(d), C.R.S.

Table 2
Registration Information

Calendar Year	Seed Labelers	Farmer Seed Labelers	Seed Conditioners	Retail Seed Dealers	Total Locations Registered
2014	203	54	23	961	1,237
2015	188	52	18	788	1,046
2016	202	73	24	878	1,177
2017	217	67	23	970	1,277
2018	202	69	17	918	1,290

"Total" is the total number of active locations with registrations for the years indicated. A single business may hold more than one registration, but the business pays a reduced fee for additional locations.

As the data in Table 2 indicate, the number of registrations has fluctuated from one year to the next, but, overall, they have remained relatively stable.

Inspections

The seventh sunset criterion requires COPRRR to examine 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.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Unless otherwise exempt,

> every container of seed which is sold, offered or exposed for sale, bartered, or distributed within this state for propagation shall conspicuously bear a legible and plainly written or printed label or tag in English which shall provide all information required by the Commissioner. The label shall not bear false or misleading information.[59]

The Act defines seed as "agricultural, vegetable, ornamental, shrub, or tree seed for propagation."[60]

[59] § 35-27-105(1)(a), C.R.S.
[60] § 35-27-103(23), C.R.S.

By rule, the required contents of a label vary by the type of seed at issue. Typical label elements include:[61]

- Kind, variety or name of the species—the cultivar, species and common name of the plant;
- Lot number—a series of letters or numbers used for tracking purposes;
- Origin—where the seed was grown;
- Percentage of pure seed—how much of the material in the container is the desired seed;
- Percentage of hard or dormant seed—how much of the seed will not germinate readily because of a hard seed coat;
- Percentage of inert matter—how much of the material in the container is plant debris or other materials that are not seed;
- Net weight—how much total material is in the container;
- Germination rate—the rate at which the seed will readily germinate;
- List of restricted noxious weed seed;
- Month and year the seed was tested—the date should generally be within one year of the planned date for using the seed; and
- Name and address of the labeler.

To ensure compliance with these requirements, and to ensure that seed being offered for sale has been tested within the previous 13 to 16 months, depending on the type of seed, Department staff conducts two types of inspections.

In the early part of the calendar year, Department staff inspects seed labelers and their warehouses, whereby staff obtains representative samples (which are obtained in compliance with national guidelines) of the seed being stored. These samples are sent to the Colorado State University Seed Lab for testing. Test results are then compared to what is reported on the seed label to ensure the label is reporting data within acceptable tolerances.

These types of inspections are based on both risk and efficiency. Since an increasing percentage of seed is now shipped directly to farmers, there is less seed stored in warehouses. However, most of the seed that is stored in warehouses is held by seed labelers who tend to specialize in wildland mitigation, and this seed tends to have higher levels of noxious weed seed.

The second type of inspection focuses on retail seed dealers. These are performed in conjunction with inspections conducted under the Colorado Nursery Act. Seed Act inspections focus on examining seed on the shelf to ensure labels are not out of date (i.e., that testing was last performed within the previous 13 to 16 months, depending

[61] Not all label elements listed are required for all labels. *See* Colorado Department of Agriculture, "Labeling Agricultural and Turfgrass Seed in Colorado", "Labeling Tree and Shrub Seed in Colorado" and "Labeling Vegetable & Flower Seed for Home Gardeners in Colorado". For the explanations of seed elements, *see* U.S. Department of Agriculture, Natural Resources Conservation Service Plant Materials Program, "A Simplified Guide to Understanding Seed Labels," Maryland Plant Materials Technical Note No. 2, August 2007.

on the type of seed). During these inspections, Department staff also seeks to ensure that the seed labelers that packaged the seed and the seed dealer that is selling the seed are properly registered.

These types of inspections are mostly risk based, but based on risk as determined under the Colorado Nursery Act. These inspections tend to focus on establishments that receive nursery stock from origins known to have high levels of pests.

Table 3 illustrates, for the calendar years indicated, the number of inspections conducted and the amount of seed sampled.

Table 3
Sampling/Inspections to Verify Truth in Labeling

	2014	2015	2016	2017	2018
Total number of seed lots sampled	303	291	246	251	259
Total number of pounds sampled	8,416,901	1,059,945	824,924	415,455	987,497
Total number of retail locations inspected	396	285	299	138	199
Total pounds inspected	1,907,322	4,344,914	1,039,651	54,306	1,102,462

Note the variations in the amount of seed sampled across categories and years. This can largely be attributed to several variables, including the time of year in which the samples were taken (relatively full versus relatively empty warehouses), the geographical area in which the samples were taken (e.g., rural versus urban areas), and the market in general. Staff reports a noticeable increase in seed being shipped directly to farmers, rather than to warehouses.

The overall decline in the number of retail locations inspected can be attributed to decreasing resources. As revenues have fallen, so too have the number of such inspections.

Complaint and Disciplinary Activity

The seventh sunset criterion requires COPRRR to examine 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.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Although anyone may file a complaint against a registrant, which would trigger an investigation to determine whether a violation occurred, most violations of the Act are identified through inspections and investigations conducted pursuant to requests for arbitration (discussed more fully below). Between fiscal years 13-14 and 17-18, the Commissioner received just four complaints outside of the inspection and arbitration processes: one for mislabeled seed and three for operating as a retail seed dealer without a registration (all of which subsequently registered). Table 4 illustrates, for the calendar years identified, the number and types of violations, regardless of complaint source.

Table 4
Violations

Nature of Violation	2014	2015	2016	2017	2018
Distributing seed without a registration	1	3	3	3	3
Sampling – truth in labeling violation - germination	11	18	30	13	9
Sampling – truth in labeling violation - purity	7	30	29	8	4
Sampling – truth in labeling violation – noxious weed	16	2	1	1	0
Expired test date – labeling violation	208	292	331	54	150

By far, the greatest number of violations can be attributed to test date violations. These are the result of the label indicating that the seed was last tested more than 13 to 16 months earlier.

When a sample is tested and a discrepancy is found between the test results and the label on the seed, staff routinely issues a cease and desist order (CDO), thereby stopping the sale of the subject seed. Once the label has been corrected, the seed may be sold.

Staff follows a similar process for failing to register and for seed that has not been tested within the previous 13 to 16 months.

Table 5 provides greater detail regarding the number of CDOs issued. Of note, all but two CDOs were complied with. In those two cases, no further action was taken, due to lack of resources.

Table 5
Cease and Desist Order Information

Nature of Violation	2014	2015	2016	2017	2018
Total lots under CDO issued based on sampling results	32	47	52	21	10
Number of pounds under CDO at retail	24,887	3,883,216	1,039,651	1,634	52,719
Number of locations with seed lots under CDO	59	78	75	14	46
Number of lots inspected at retail under CDO	320	307	331	57	197

When individuals petition the Commissioner for arbitration (discussed in greater detail below), staff launches an investigation into the claim. When these investigations reveal a violation of the Act, the Commissioner may impose a fine. Table 6 illustrates, for the years indicated, the number and value of fines imposed and collected.

Table 6
Fines

Fiscal Year	Fines Imposed	Total Value of Fines Imposed	Total Value of Fines Collected
13-14	0	$0	$0
14-15	0	$0	$0
15-16	1	$4,950	$2,475
16-17	2	$7,500	$3,750
17-18	0	$0	$0

The Commissioner has historically held half of the assessed fine in abeyance in an attempt to gain compliance. As of this writing, this practice is under review. Regardless, Table 6 demonstrates that relatively few fines are imposed and they do not represent significant dollar values.

All three fines identified in Table 6 were imposed as the result of investigations conducted related to requests for arbitration.

Arbitration Council

Every label required under the Act must state that arbitration is required for any claim arising out of the sale of seed. However, arbitration is not required if such notice is not given.[62]

Before any buyer of seed who suffers damage because such seed does not produce or perform in conformance with the labeling or warranty, or because of negligence on the part of the retail seed dealer, commences any legal action, the buyer must file a verified complaint with the Commissioner for arbitration.[63] The complaint must be accompanied by a filing fee of $10.[64]

For each case, the Commissioner must appoint an arbitration council comprising three members: the Dean of the College of Agriculture of Colorado State University; the President of the Colorado Seedsmen's Association and the president of any organization of Colorado farmers.[65] The members of the arbitration council receive no compensation for their duties, but are reimbursed for any actual and necessary expenses.[66]

The Commissioner must investigate the allegations in the complaint and submit to the arbitration council a report with the results of the investigation.[67] The arbitration council must also issue a report that includes findings of fact, conclusions of law and recommendations as to costs, if any.[68] The arbitration council's report may be introduced as evidence of the facts in any subsequent litigation although the court may give such weight to the arbitration council's findings as the court sees fit.[69]

If the investigation reveals a violation of the Act, the Commissioner may issue a CDO, impose a fine, or both, regardless of whether the case is ultimately heard by the arbitration council.

Table 7 illustrates, for the fiscal years indicated, details regarding the arbitration claims filed.

[62] § 35-27-123(2)(a), C.R.S.
[63] § 35-27-123(1)(a), C.R.S.
[64] § 35-27-122(2)(a), C.R.S.
[65] § 35-27-122(1)(a), C.R.S.
[66] § 35-27-122(2)(h), C.R.S.
[67] § 35-27-122(2)(c), C.R.S.
[68] § 35-27-122(2)(e), C.R.S.
[69] § 35-27-123(3)(c), C.R.S.

Table 7
Arbitration Information

Fiscal Year	Number of Arbitration Matters[70]	Number of Claimants	Number of Respondents	Department Legal Fees	Laboratory Fees	Disposition of Request
13-14	0	0	0	0	0	Not Applicable
14-15	0	0	0	0	0	Not Applicable
15-16	1	2	2	$11,496	$0	Denied – No arbitration clause on the label
16-17	3	5	3	$2,784	$1,350	Denied – No violation of label requirements, no warranty to arbitrate
17-18	0	0	0	$0	$0	Not Applicable
18-19	1	10	8	$11,074	$0	Denied – no violation of label requirements, no warranty to arbitrate
Total	**5**	**17**	**13**	**$25,354**	**$1,350**	

Most arbitration cases arise when seed fails to perform as anticipated. In such instances, the buyer, often a farmer, seeks redress. However, the arbitration statute requires the buyer to file for arbitration against the retail seed dealer, who may or may not be the party responsible. Although the labeler or seed producer may actually bear the brunt of the responsibility, the arbitration process is used as a means of bringing the Department into the dispute. Thus, what the Department classifies as multiple cases, has been simplified as a "Matter" for purposes of this discussion.

Between fiscal years 13-14 and 18-19, the Commissioner was requested to arbitrate only five matters. Those five matters involved 17 claimants and 13 retail seed dealers. Of these, four were ultimately denied when the Commissioner's investigation revealed that the claims at issue did not pertain to the warranty made on the seed label (which is the only matter subject to arbitration) and one because the label did not contain the required arbitration clause.

Regardless, Department costs associated with these claims amounted to almost $27,000, yet the 17 claimants paid just $170 in filing fees.

[70] "Matter" is an artificial construct developed to more easily present the data in Table 7. A matter may involve multiple claimants and respondents, given the nature of the way in which the arbitration process works, all centered on a single seed product.

Collateral Consequences – Criminal Convictions

The ninth sunset criterion requires COPRRR to examine whether the agency under review, through its licensing processes, imposes any sanctions or disqualifications based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

The Commissioner has no authority to deny, revoke or otherwise sanction a registration based on criminal history. As a result, no such actions have been taken.

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 recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

Recommendation 1 – Continue the Colorado Seed Act for 11 years, until 2031.

The Colorado Seed Act (Act) primarily represents a "truth in labeling" approach to regulation. The Act requires all seed containers to bear a label as to contents, contaminants, germination rates, the origin of the seed and the entity responsible for packaging that seed, among other things. The Act further requires seed labelers, farmer seed labelers, custom seed conditioners and retail seed dealers to register with the Colorado Commissioner of Agriculture (Commissioner).

The first sunset criterion asks whether regulation is necessary to protect the public health, safety and welfare. The Act protects the public in at least two ways.

First, the Act protects agricultural consumers by providing some assurance that they are acquiring the quality of seed that they intend to acquire. This assurance is accomplished by requiring seed labels to provide information regarding the type and kind of seed in the container, the germination rate, the purity rate and the extent to which the seed may be contaminated with weed seed, insects or other contaminants. This assurance assists the state's agricultural industry to operate more efficiently and profitably.

The Act also protects other consumers by helping to ensure that they obtain the seed they are paying for. It is virtually impossible to visually distinguish between some types of seed, such as turf grass. The Act's labeling requirements assure consumers that what is in the bag of seed is what they think it is.

Next, the Act helps to protect the environment from weed seed. Although weeds, including noxious weeds, enter the state by a variety of means, seed is one of them. The Act's labeling requirements (and the testing that goes along with them), help to mitigate the spread of weeds into and within the state.

The Act's registration requirements provide the Commissioner with a means to enforce the Act's labeling requirements. By requiring the individuals and businesses involved in the Colorado seed industry to register, the Commissioner is able to conduct inspections to ensure that what is printed on a seed container's label is true and accurate (within certain tolerances).

The second sunset criterion asks whether current regulation represents the least restrictive form of regulation consistent with the public interest. The Act accomplishes

this goal by creating a simple "truth in labeling" system, along with a registration system for those who work in the seed industry. The Act does not impose any requirements as to the quality of seed packaged, labeled, conditioned or sold in the state. Rather, the Act merely requires the label on the seed accurately describe the relevant characteristics of the seed inside the container. Thus, the Act protects the public interest in the least restrictive manner.

Further, the Act imposes no competency or other requirements on registrants. The Commissioner need only know who is operating and where in order to facilitate inspections under the Act. Thus, the Act represents the least restrictive way of accomplishing this by creating a simple registration system.

For all these reasons, the General Assembly should continue the Act for 11 years, until 2031. Eleven years is an adequate continuation period given the relatively straightforward recommendations contained in this sunset report.

Recommendation 2 – Repeal the Act's arbitration provisions.

If a buyer of seed suffers damage because the seed does not produce, perform in conformance with the label or warranty or due to negligence of the seller, the buyer must submit a claim for arbitration with the Commissioner before the buyer can proceed with any legal action in the courts.[71] To initiate the arbitration process, the buyer need only submit a verified complaint to the Commissioner, along with a filing fee of $10.[72]

The Commissioner is then obligated to conduct an investigation of the allegations, which may include:[73]

- Employing the services of experts;
- Examining the buyer, the seller and anyone else who may have relevant information;
- Growing a representative sample of the seed; and
- Conduting any other necessary investigative activities.

At the conclusion of the investigation, the Commissioner must prepare a report and forward it, along with the complaint, to an arbitration council, which must comprise:[74]

- The Dean of Colorado State University's College of Agriculture;
- The President of the Colorado Seedsmen's Association; and
- The president of any organization of farmers in the state that the Commissioner determines to be appropriate.

[71] § 35-27-123(1)(a), C.R.S.
[72] § 35-27-122(2)(a), C.R.S.
[73] §§ 35-27-122(2)(c and f), C.R.S.
[74] §§ 35-27-122(1)(a) and -122(2)(c), C.R.S.

The arbitration council must conduct an arbitration hearing in accordance with the state's Uniform Arbitration Act. At the conclusion of the hearing, the arbitration council must submit its arbitration report, which must include findings of fact, conclusions of law and recommendations, to the Commissioner within 60 days of the conclusion of the arbitration hearing.[75] The Commissioner must then transmit the arbitration report to the parties.[76]

Although elaborate and mandatory, the Act's arbitration process is not binding. Either party may proceed to court once the arbitration process is concluded. Thus, it is reasonable to question why the state is involved in what amounts to a private dispute.

The Act's arbitration provisions were invoked in just five matters[77] between fiscal years 13-14 and 18-19, as illustrated in Table 7, and recreated here.

Table 7
Arbitration Information

Fiscal Year	Number of Arbitration Matters	Number of Claimants	Number of Respondents	Department Legal Fees	Laboratory Fees	Disposition of Request
13-14	0	0	0	0	0	Not Applicable
14-15	0	0	0	0	0	Not Applicable
15-16	1	2	2	$11,496	$0	Denied – No arbitration clause on the label
16-17	3	5	3	$2,784	$1,350	Denied – No violation of label requirements, no warranty to arbitrate
17-18	0	0	0	$0	$0	Not Applicable
18-19	1	10	8	$11,074	$0	Denied – no violation of label requirements, no warranty to arbitrate
Total	**5**	**17**	**13**	**$25,354**	**$1,350**	

In none of these instances was the arbitration council actually convened. Indeed, the last time the arbitration council convened was in fiscal year 10-11. Until fiscal year 15-16, this was the last time the Commissioner received a request for arbitration.

[75] §§ 35-27-122(2)(d and e), C.R.S.
[76] § 35-27-122(2)(i), C.R.S.
[77] "Matter" is an artificial construct developed to more easily present the data in Table 7. A matter may involve multiple claimants and respondents, given the nature of the way in which the arbitration process works, all centered on a single seed product.

In the more recent matters, the Commissioner's investigations revealed a lack of anything to actually arbitrate. Regardless, the Commissioner spent almost $27,000 on those five matters, and recovered just $170 in filing fees.

The third sunset criterion asks, among other things, whether the agency's operations are impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters. The Act requires the Commissioner to devote resources to investigating arbitration claims and holding (i.e., staffing) arbitration hearings, thereby diverting those resources away from conducting inspections and other enforcement activities related to the Act.

The fourth sunset criterion asks whether the agency performs its statutory duties efficiently and effectively. The arbitration process demands that resources be diverted from other enforcement activities, thereby hindering the Commissioner's ability to effectively enforce and otherwise administer the Act.

Importantly, the arbitration process represents a delay on the road to litigation. The parties are not bound by the results of the arbitration, but the Commissioner must expend monetary and personnel resources to investigate and hold hearings on what amounts to a private dispute between a buyer and seller of seed. Without the Act's mandatory arbitration process, the parties would be free to proceed directly to court free of the state's interference.

Fears of the courts being flooded with suits can be allayed by the fact that the Commissioner received arbitration claims for just five matters over the course of eight years. With a filing fee of $10, it cannot be claimed that the arbitration process forced anyone to rethink filing a claim. Indeed, just the opposite could be argued: with such a low filing fee, it is surprising that more claims have not been filed.

Finally, the first sunset criterion asks whether regulation is necessary to protect the public health, safety and welfare. The arbitration process actually hinders public protection by requiring the consumer of seed (the buyer, in this case) to participate in a non-binding process before proceeding to court. The arbitration process protects the seller of seed, not the consumer.

For all these reasons, the General Assembly should repeal the Act's arbitration provisions.

Recommendation 3 – Repeal the statutory provisions related exclusively to seed beans.

The Act defines seed broadly, as any agricultural, vegetable, ornamental, shrub or tree seed intended for propagation, but it specifically exempts seed potatoes from the Act.[78] Arguably, then, seed beans are seeds, within the definition of the Act, thereby extending the provisions of the Act to seed beans.

[78] § 35-27-103(23), C.R.S.

However, section 35-27-109, Colorado Revised Statutes (C.R.S.), addresses seed beans only, by requiring the Commissioner to establish tolerances for seed bean-borne pathogens, inspection standards and procedures and approval procedures. This same provision authorizes the Commissioner to assess special fees related only to the regulation of seed beans.

The first sunset criterion asks whether the conditions that led to the initial regulation have changed, and whether other conditions have arisen that would warrant more, less or the same degree of regulation. This criterion is particularly important when discussing seed beans.

There was a time when the Colorado State University (CSU) had a large seed bean program, and when beans were produced in more abundance across the state. However, the CSU seed bean program has contracted, seed beans are no longer shipped from east of the Continental Divide because they are widely recognized as having disease and the state's bean industry has contracted significantly. Thus, conditions have changed that warrant less regulation.

Finally, staff at the Colorado Department of Agriculture (Department) does not recall an instance in which this provision of the Act was invoked.

Repealing section 35-27-109, C.R.S., will not exempt seed beans from the Act. Rather, such a repeal will simply subject them to the Act to the same extent as any other type of seed.

For all these reasons, the General Assembly should repeal section 35-27-109, C.R.S.

Recommendation 4 – Direct that all funds raised through the imposition of civil fines be credited to the state's General Fund.

The Plant Health, Pest Control, and Environmental Cash Fund (Cash Fund) is created in section 35-1-106.3, C.R.S., and all fees and civil fines collected pursuant to the Act are to be deposited into it.[79]

Ordinarily, when an agency is given fining authority, 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 collection agencies,[80] accountants, pharmacists and pharmacies, professional engineers, professional land surveyors, architects, chiropractors, lay midwives, physical therapists and veterinarians, to name a few.[81]

[79] § 35-27-124, C.R.S.
[80] § 5-16-134(2), C.R.S.
[81] § 12-20-404(6)(b), C.R.S.

The seventh sunset criterion asks whether, among other things, final dispositions of complaints are in the public interest or are self-serving to the profession. Arguably, when civil fines are credited to a cash fund, fees paid by the regulated industry should be reduced accordingly, thus casting a shadow over the legitimacy of the fines.

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 fines assessed under the Act be deposited in the state's General Fund.

Recommendation 5 – Repeal the registration fee caps.

The Act requires the Commissioner to establish registration fees, but caps those fees at:[82]

- $300 for seed labelers and custom seed conditioners, and
- $75 for farmer seed labelers and retail seed dealers.

The Act further requires the Commissioner to establish fees for each additional location at which a registrant operates and caps those fees at:[83]

- $75 for seed labelers and custom seed conditioners, and
- $25 for farmer seed labelers and retail seed dealers.

Prior to July 2019, these caps had been reached for all registration categories except retail seed dealers and for the additional locations for seed labelers and custom seed conditioners. However, effective July 30, 2019, all fees reached their statutory maximums.

While fee caps provide the regulated community with a level of assurance that these fixed costs cannot exceed a certain level, and are generally viewed as a means of keeping government spending from increasing beyond what is necessary, they also have the effect of reducing the resources available to the regulator to effectively enforce the law.

These effects are clearly evident in the Commissioner's enforcement of the Act. According to the data reported in Table 1, total expenditures related to the Act have decreased from a high of $349,426 in fiscal year 13-14 to a low of $209,449 in fiscal year 17-18, a decrease of 40 percent.

[82] § 35-27-111(4)(a), C.R.S.
[83] § 35-27-111(4)(b), C.R.S.

These totals fail to reveal the entire story, however, because during that same period, the Commissioner augmented program funding with General Fund dollars. In fiscal year 13-14, the Commissioner expended $200,087.35 in General Fund dollars on administration of the Act, and that sum has steadily declined to a low of $65,436.44 in fiscal year 17-18, a decrease of 67 percent.

This decrease in funding has resulted in an appreciable reduction in inspections. The data in Table 3 illustrate that the number of seed lots sampled decreased from 303 in calendar year 2014 to 259 in calendar year 2018, a decrease of approximately 15 percent.

More evident is the decrease in the number of retail seed dealer inspections, as those decreased from 396 in 2014 to 199 in 2018, a decrease of approximately 50 percent. Worse, due to funding shortfalls, staff reports that no such inspections took place in 2019 and none are expected in 2020, even with the slight increase in fees effective July 30, 2019.

Indeed, according to the Commissioner's own rules,

> The seed program has consistently cut back on the work conducted by the program to meet budget constraints. This is documented in the number of seed samples collected and seed inspections performed. The program took 550 seed samples in 1999 and has gradually reduced that number to the current 301 to account for budget constraints. The program averaged over 900 seed inspections per year in the late 1990s and is now conducting about 650 inspections per year.[84]

The third sunset criterion asks, among other things, whether the agency's operations are impeded by any circumstances, including budgetary and resource matters, and the fourth criterion asks whether the agency performs its duties efficiently and effectively. The dearth of funding has clearly impeded the Commissioner's ability to effectively enforce the Act, as the number of inspections was cut in half during the five years analyzed for this sunset review, and reduced to none for the two years after that five-year window. Without those inspections, it is impossible to know whether the labels on the seed being sold to farmers and other consumers is accurate, which is the purpose of the Act.

Finally, the current fee caps have been in place since at least 1993, when the Act was repealed and re-enacted. Had these caps been adjusted for inflation they would be almost double today:

- $300 in 1993 dollars is roughly equivalent to $529 in 2019
- $75 in 1993 dollars is roughly equivalent to $132 in 2019

[84] 8 CCR § 1203-6-20.6(4). Rules and Regulations Pertaining to the Administration and Enforcement of the Colorado Seed Act.

- $25 in 1993 dollars is roughly equivalent to $44 in 2019

However, simply raising the caps to adjust for inflation only serves to recreate the same problem in the future. The better course is to repeal the caps altogether.

Repealing the fee caps will not enable the Commissioner to increase fees with abandon. The Commissioner will still have to commence formal rulemaking to adjust the fees, so public input is assured. Further, the General Assembly will still have to authorize the Commissioner to expend those funds.

The fees assessed under the Act are intended to supplement any General Fund dollars appropriated for the administration of the Act.[85] However, as those General Fund appropriations continue to decline, the need for additional cash funds increases in order to effectively enforce the Act.

Finally, repealing the fees from statute will allow the Commissioner greater flexibility in establishing fees. Throughout this sunset review, much discussion centered on whether fees should be based on a registrant's volume of business, on the number of brands a registrant owns or the number of locations a registrant operates. Simply authorizing fees without the statutory caps would allow the Commissioner to more equitably assess those fees.

For all these reasons, the General Assembly should repeal the statutory fee caps and allow the Commissioner to establish registration fees by rule.

Recommendation 6 – Repeal multiple location discount on fees.

In addition to requiring the Commissioner to assess registration fees, the Act also requires the Commissioner to establish reduced fees for those registrants operating at additional locations.[86] For example, a large, national retailer that sells grass and other types of seed may pay $300 to register one of its stores as a retail seed dealer, but it pays only $75 for each of its additional stores.

While this might have made sense when most registrants tended to be independent or small businesses, it makes less sense in the 21st Century, when big box stores and large corporations are more prevalent.

Further, and more importantly, the Commissioner must expend the same amount of resources to inspect each retail seed dealer, for example, regardless of whether the registrant maintains 1 or 20 locations. Each location constitutes a separate registration and is subject to the same degree of regulation. In short, no less regulatory effort is expended on enforcing the Act on the ninth location versus the first.

[85] § 35-27-124, C.R.S.
[86] § 35-27-111(4)(b), C.R.S.

The third sunset criterion asks, among other things, whether the agency's operations are impeded by any circumstances, including budgetary and resource matters, and the fourth criterion asks whether the agency performs its duties efficiently and effectively. The dearth of funding has clearly impeded the Commissioner's ability to effectively enforce the Act, as highlighted in Recommendation 5, as the number of inspections was cut in half during the five years analyzed for this sunset review, and reduced to none for the two years after that five-year window. The requirement that multiple locations receive discounts on their registration fees has undoubtedly contributed to this situation. Without those inspections, it is impossible to know whether the labels on the seed being sold to farmers and other consumers is accurate.

Therefore, the General Assembly should repeal the requirement that the Commissioner assess reduced registration fees for additional locations.

Recommendation 7 – Repeal specific registration effective and renewal dates.

Section 35-27-111(2)(b)(I), C.R.S., provides for registration effective and renewal dates for the period of time prior to 2001. As such, the General Assembly should repeal this section as obsolete.

Section 35-27-111(2)(b)(II), C.R.S., provides for registration effective and renewal dates commencing on March 1, 2001, by stating:

> Notwithstanding subparagraph (I) of this paragraph (b), registrations renewed between March 1, 2000, and February 1, 2001, shall expire on February 28, 2001. Effective March 1, 2001, all registrations shall be effective March 1 of each year and shall expire the last day of February of each year.

The first sentence of this provision is now obsolete, and as such, the General Assembly should repeal it. The second sentence is not only problematic, but it creates certain inefficiencies and should be amended.

Read literally, an applicant that applies for a registration on May 1 and is approved on May 2 could receive a registration that is effective the previous March 1 or the upcoming March 1. The statute seems to preclude a registration becoming effective on any date other than March 1.

Fortunately, the Commissioner has not interpreted the Act this literally, and registrations become effective on the date they are approved. Regardless, all registrations expire on the last day of February.

However, this statutory timeframe forces the Commissioner into a process that may not be the most efficient. Repealing the specific dates from the Act, while retaining a one-year registration period, would allow the Commissioner to implement the most efficient

registration and renewal timelines, which may or may not align with what the Act currently requires.

The third sunset criterion asks, among other things, whether existing statutes or procedures impede agency operations. The statutory timeframes around registrations may impede the Commissioner's most efficient utilization of resources in this area.

Additionally, many in the agricultural industry maintain multiple licenses and registrations issued by the Commissioner, the Department or both. It would be easier for registrants if all of their Department-related credentials could be renewed simultaneously. The Act's provisions hinder this.

The sixth sunset criterion inquires about, among other things, the economic impact of regulation. A renewal system that is consistent across the Department could, arguably, represent a more economically efficient system.

For all these reasons, the General Assembly should repeal the obsolete language in section 35-27-111(2)(b), C.R.S., and amend the remainder of that section to allow the Commissioner to establish renewal dates.

Recommendation 8 – Make technical changes to the Act.

The Act has been in place for many decades. As with any law, it contains instances of outdated, duplicative and confusing language, and the Act should be revised to eliminate obsolete references and to reflect current terminology and administrative practices. This change is technical in nature, so it will have no substantive impact on regulation.

The General Assembly should make the following technical change:

> **Section 35-27-124, C.R.S.** This provision is no longer necessary and should be repealed, since the described transfer of funds from the Seed Cash Fund to the Plant Health, Pest Control, and Environmental Protection Cash Fund took place in 2009.

Administrative Recommendation 1 – The Commissioner should expand outreach to seed libraries and exchanges.

The Act's legislative declaration states,

> The General Assembly hereby finds and declares that truth in the labeling of seed is of paramount importance to the citizens of Colorado because the distribution and subsequent use of poor quality seed caused by inaccurate or misleading labeling of such seed can result in severe

> economic hardship due to low crop yields, poor crop quality, and the spread of noxious weed seed. It is the intent of the General Assembly in enacting [the Act] to prevent the distribution and use of poor quality seed through the regulation of the labeling, the labelers, and the sellers of seed for propagation in Colorado.[87]

While the legislative declaration fairly clearly targets seed used in the agricultural industry, the Act itself is broader in scope in that it requires every container of seed that is sold, offered or exposed for sale, bartered or distributed within the state for propagation to bear a label in accordance with the requirements of the Act.[88] Thus, even a packet of native wildflower seeds sold at a mountain gift shop, must be properly labeled.

The owner of that gift shop, however, need only be registered as a retail seed dealer if the owner sells seed in prepackaged containers weighing more than one pound.[89]

Similarly, seed libraries and seed exchanges, which tend to be non-profit organizations where individuals share the seed they have cultivated, are subject to the same labeling and registration requirements. However, unlike the mountain gift shop, a seed library or seed exchange is more likely to actually package the seed it makes available to its members or where members package the seed themselves. This has raised some concern as to whether seed libraries and seed exchanges are familiar with the Act's labeling requirements and the state's restrictions on noxious weed seed.

One option presented during the course of this sunset review is to require these entities to register with the Commissioner, perhaps at a reduced or waived registration fee. This would inform the Commissioner of where the entities are located to facilitate inspections of them.

However, the second sunset criterion requires an examination into the least restrictive form of regulation consistent with the public interest. Assuming that mitigating the spread of noxious weed seed is a valid concern, regardless of how the seed it disseminated, then this issue is ripe for discussion here.

However, before creating a new registration type, the Commissioner should undertake more concentrated outreach efforts with respect to seed libraries and seed exchanges. There is no evidence that they are violating the Act's labeling provisions or that they are complicit in the spread of noxious weed seed. Therefore, a more measured approach is justified.

For these reasons, the Commissioner should increase outreach to seed libraries and seed exchanges to inform them of the requirements of the Act.

[87] § 35-27-102, C.R.S.
[88] § 35-27-105(1)(a), C.R.S.
[89] § 35-27-111(3)(d), C.R.S.