

COLORADO DEPARTMENT OF REGULATORY AGENCIES  
OFFICE OF POLICY AND RESEARCH

# COLORADO NURSERY ACT

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## 1995 SUNSET REVIEW



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1995-1996 Members***

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June 30, 1995

The Honorable Richard Mutzebaugh, Chair  
Joint Legislative Sunrise/Sunset Review Committee  
State Capitol Building  
Denver, Colorado 80203

Dear Senator Mutzebaugh:

The Colorado Department of Regulatory Agencies has completed the evaluation of the **nursery registration program of the Colorado Nursery Act**. We are pleased to submit this written report, which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to §24-34-104 (8)(a), of the Colorado Revised Statutes, which states in part:

*"The Department of Regulatory Agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section..."*

*The Department of Regulatory Agencies shall submit a report and such supporting materials as may be requested, to the Sunrise and Sunset Review Committee created by joint rule of the Senate and House of Representatives, no later than July 1 of the year preceding the date established for termination..."*

The report discusses the question of whether there is a need for the regulation provided under article 26 of title 35, C.R.S. The report also discusses the effectiveness of the division and staff in carrying out the intention of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joseph A. Garcia  
Executive Director

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## *EXECUTIVE SUMMARY*

Regulatory Agencies has completed its 1995 Sunset Review of the nursery registration program of the Colorado Nursery Act. The program is administered through the Commissioner of Agriculture and the Department of Agriculture.

The program incorporates three regulatory processes. The first is the registration of all persons engaged in the business of selling nursery stock. The second is annual inspections of nurseries, nursery dealers and turfgrass sod farms. The third is the issuance of inspection certificates without which the export of Colorado nursery products to other states would be impossible. The purpose of these actions is to ensure that public health is protected and that nursery stock is free of disease and insect infestation. In fiscal year 1993-94 registrations were issued to 1,504 individuals and businesses. A total of 885,250 nursery stock items were inspected and the sale of 12,623 nursery substandard stock items was prevented under this Act. This sunset review makes the following recommendations intended to further advance public health and welfare protections under this Act:

1. The General Assembly should continue the registration of all persons selling nursery stock as provided for under §35-26-105 et. seq., C.R.S.
2. The Commissioner should request that both renewal and initial applicants for registration provide the Department with information regarding the likely sources of their nursery stock and information on the states where the applicant may export nursery stock.

## *BACKGROUND*

### **The Sunset Process**

Colorado law requires that the registration functions of the Commissioner of Agriculture be terminated on July 1, 1996, unless continued by the General Assembly (§24-34-104, C.R.S.). The sunset review involves an analysis and evaluation of the regulatory program. The goal of this sunset review is to determine if this regulation is consistent with public interest and serves to protect the public. The review also evaluates the form of regulation to ensure it is neither intrusive nor, ineffective. A complete list of the sunset evaluation criteria can be found in Appendix A of this report.

The complete Colorado Nursery Act was reviewed in 1990. The program was recommended for continuation and, it was further recommended that licensure be eliminated in favor of registration. The recommendation was adopted and this review evaluates the implementation of reduced regulation subsequent to that review. The analysis presented here includes a review of the present statute, rules, the advisory committee role and the June 1990 Sunset Report recommendations. Interviews were held with the program director, advisory committee members, and nursery stock program directors from regional states.

### **Regulation of the Sale of Nursery Stock in Colorado**

#### ***History of Regulation***

The Colorado Nursery Act was initially enacted in 1953. Prior to this time, portions of the law regulating nurseries could be found in several places within the Colorado Revised Statutes. The core of this agricultural regulation, however, was in Article 15 of Chapter 6, C.R.S. (1963). The driving force behind consolidation within the Nursery Act was the fear that Colorado would become a “dumping ground” for substandard nursery stock sent here from other states. Through the Nursery Act, a set of standards for nursery stock and a program of inspections to enforce these standards were introduced.

Since 1971, there have been few major changes in the law. In 1987, the regulation of the nursery stock industry was converted to a cash funded basis. License fees were used to support the regulatory program. Subsequently, inspection fees were also assessed, providing additional program revenue. In 1991, the licensure of persons selling nursing stock was replaced by a registration program. The advisory committee composition was also amended and member terms were limited and staggered. Additionally, the Commissioner promulgated an extensive set of rules and regulations in consultation with the Nursery Advisory Committee and with the industry at large. It is reported by the program director that these rules contribute greatly to the effective and equitable administration of the nursery stock regulatory program.

#### ***Update on the 1990 Sunset Review Recommendations***

The most significant aspect of the 1990 sunset review was the recommendation that a registration program be adopted in lieu of a licensure program. Additionally, the composition of the Nursery Advisory Committee was changed from 10 to 8 members. The committee representation was also amended to include 1 member from the Colorado State University Extension Program, 6 representatives from groups or individuals regulated under the Act and, for 1 representative of the general public. Committee terms were established at 3 years, and limited to 2 consecutive terms. The expiration of member terms were staggered. Each of these changes were adopted by the 1991 General Assembly.

The Commissioner and Department of Agriculture in conjunction with the Department of Regulatory Agencies also introduced a number of recommendations to strengthen this regulatory program. Each of the following recommendations were subsequently enacted into law:

- \* The penalty for noncompliance with a stop sales order was clarified and unnecessary language was repealed;
- \* Authority for the Commissioner to issue administrative subpoenas to enter and inspect nursery stock and to conduct record reviews was granted;
- \* Violations of the Act were established as class 3 misdemeanor offenses;
- \* The delegation of the Commissioner's authority was made more efficient;
- \* The authority for enforcement of the Act was considerably strengthened through: (1) cease and desist orders, (2) temporary restraining orders and, (3) the requirement for a priority hearing before any stay of a cease and desist order can be granted by the courts;
- \* If a practitioner fails to appear in court as ordered by the Commissioner, said practitioner is found to be in contempt of the court;
- \* Authority was granted the Commissioner to permanently restrain or enjoin questionable practices brought to the Department's attention;
- \* Authority was granted for records on complaints under investigation to remain closed to public review;
- \* Authority was granted for any registration to be revoked if a registrant was or is engaged in illegal actions relevant to this Act.



The recommendation that greenhouses be included under the Act was not adopted. Greenhouses are currently inspected if they need a certificate allowing them to export nursery stock to other states. They are not required to register nor are they subject to other regulatory provisions of the Nursery Act. A recommendation that the commissioner use contracted inspectors to supplement and target inspection efforts was also introduced. Regulations were subsequently introduced (26-7.1, C.C.R.), however, no contracted inspectors have been hired to date. The need to increase the number of nursery inspections may still exist. Reliance on an annual inspection only provides a snapshot on the condition of nursery stock.

### ***Importance of Green Industries to Colorado***

Nurseries, nursery dealers, turfgrass sod farms and landscape contractors comprise an important sector of Colorado's economy. Approximately 10,029 persons are employed within this sector.

## *SUMMARY OF STATUTE*

### **Nursery Stock Registration**

The Colorado Nursery Act is found in §35-26-101 et. seq., C.R.S. The Nursery Act is administered by the Commissioner and Department of Agriculture. The purpose of the law is to promote public health and welfare through the registration, inspection and certification of nursery stock. The intent is to ensure that imported and exported nursery stock is free of insect infestation and plant diseases. The law also empowers the commissioner to levy penalties, take action against an individual registration, and to directly enforce compliance through the use of stop sale orders, cease and desist orders and other administrative methods.

Section 35-26-106 (1), C.R.S. states, “A person shall not engage in the business of selling nursery stock in this state, nor shall he advertise with the intent and purpose of selling nursery stock in this state, without having first obtained a registration issued by the commissioner.” Statute provides that a registration fee can be assessed and that the amount of the fee be established in rule, not to exceed \$100. This section also authorizes a charge for the actual cost of making inspections. The inspection fee is paid by the nursery and is used to defray the costs of these inspections. The commissioner is further directed to establish a minimum cost and to determine this actual cost. Section 35-26-106(4) creates the Colorado nursery fund and directs the general assembly, “to make annual appropriations from such fund to the department for the direct and indirect costs of carrying out the purposes of (the article).” Unexpended appropriations are not returned to the general fund but, are returned to the Colorado nursery fund.

**Rules for  
Administration  
and  
Enforcement  
of the Colorado  
Nursery Act**

The rules and regulations regarding the Colorado Nursery Act are found at 26-1 et. seq., C.C.R. These rules provide a larger list of definitions, a technical discussion of the grading of nursery stock, and the condition required for stock to be sold in Colorado. Grading of nursery stock is based on such factors as height, caliper, root spread and the type of nursery stock. Chapter 26-3.1, C.C.R., requires that “all nursery stock shall be free of insect pests and plant diseases.” Requirements for container, potted, bare root, balled and bench packed stock are also described. The remaining regulations address the need for special labeling requirements, fees for inspection and registration, and standards for qualification of contracted nursery stock inspectors.

Of specific interest for this review are Chapters 26-5 (fees) and 26-7 (standards and fees for qualification of nursery stock inspectors). Inspection fees are currently set at \$24 per hour with a minimum of \$12 being charged per inspection. The charges can only be assessed for actual time involved with the inspection. The time required to complete inspections varies widely and is a function of the type of facility being inspected and the volume of nursery stock on the premises. Registration fees in 1992 were set at \$75, increased from an earlier \$60 fee. These fees are in compliance with the Colorado Nursery Act.

Persons are also permitted to seek a contract with the Department of Agriculture to conduct inspections. Chapter 26-7, C.C.R., identifies the requirements for such a contract. Each applicant is required to demonstrate knowledge suitable to perform all inspections. The applicants must also be familiar with the Colorado Nursery Act and all associated rules and regulations. The measure of this knowledge is provided for through a state examination. The regulation further allows the Department of Agriculture to charge applicants for the time and material costs incurred during the qualification process. However, according to the program director, the Department has not encouraged contracting of inspections because of potential administrative problems with that approach and the high probability of increased cost associated with using more inspectors.

## *SUNSET ANALYSIS*

### **Mission of Nursery Stock Registration and Inspection Program**

The nursery stock registration and inspection program continues to help protect the public from the threat of insect infested or diseased nursery stock. The program also promotes interstate commerce within nursery industries by providing a certificate of inspection. Similar inspections of nursery stock is conducted in all states and Colorado essentially uses the same standards as those used throughout the United States. The regulated industry is also well represented through the Nursery Advisory Committee and through public rule hearings conducted as appropriate. The following sections contain an evaluation of the regulatory activities conducted by the Commissioner and Department of Agriculture.

### **Evaluation of Regulatory Activities**

#### ***Registration in Lieu of Licensure***

The 1991 General Assembly accepted a recommendation to establish a registration system in lieu of a license requirement. It was learned that any individual could obtain a license if they submitted an application and paid the required \$60 fee. The Department of Regulatory Agencies argued that licensure did not prevent untrained or inexperienced persons from selling nursery stock. The parties involved also agreed that licensing did not prevent public harm but provided revenue and identified nursery facilities within the state. Additionally, no actions were ever taken against any licensee.

From FY 1986 to FY 1990 the number of licenses issued ranged from 1,367 to 1,599 persons and businesses. From FY 1991 to FY 1994 the number of registrations issued ranged from 1,422 to 1,504, with the largest number being registered in FY 1994. This data appears to represent that a steady number of practitioners are selling nursery stock in Colorado. The program manager also reports that turnover within this industry is usually limited to landscaping businesses. A comparison of the labor and employment data from the 1990 and 1995 sunset review also support the argument that this industry was not significantly impacted by the decision to introduce a reduced form of regulation. Additionally, there have been no actions taken against a registrant during the 1991 to 1994 period. The Office of Policy and Research believes these facts support the conclusion that licensure was not necessary and that a registration program is sufficient to identify persons selling nursery stock in Colorado.

**Number of Persons Licensed from 1986 to 1990**

<i>Fiscal Year</i>	<b>86-87</b>	<b>87-88</b>	<b>88-89</b>	<b>89-90</b>	<b>90-91</b>
<b>Number of Licenses</b>	1,429	1,599	1,414	1,367	1,433

**Number of Persons Registered from 1991 to 1994.**

<i>Fiscal Year</i>	<b>91-92</b>	<b>92-93</b>	<b>93-94</b>
<b>Number of Registrations</b>	1,422	1,457	1,504

### ***Inspection of Registered Facilities***

Inspections of nursery stock achieve 2 goals. The first goal is to ensure that the nursery stock meets the insect and disease free requirements outlined in both statute and rule. The second goal is to certify that the nursery stock is suitable for export to other states. Nurseries wishing to import stock to Colorado must also have a certificate of inspection before any material can be shipped to or sold in this state. The Commissioner and Department of Agriculture invest considerable resources for these inspections and can demonstrate a number of successes.

Section 35-26-103, C.R.S. requires that each registered location be inspected annually. This requirement's most obvious failure is that such an inspection provides only a snapshot in time. Although a thorough inspector may discover nursery stock which is dead or dying, infected by pests or disease or which otherwise violates the Colorado Nursery Act, the inspection is held on 1 day out of 365 in a year. Reliance upon a certificate of inspection from inspectors in another state may also be misplaced. Despite the use of essentially uniform standards of inspection, surveyed states also report a reliance on annual inspections. Authorities contacted were unable to present literature or study data which concludes that annual inspections do or do not provide a sufficient form of protection.

From FY 1990 to FY 1994 an average of 64% of all registered facilities were inspected. The facilities not inspected largely include landscaping businesses that do not hold a stock of nursery products. Only landscape businesses that hold a stock of nursery products are inspected. Thus, a more accurate report would be approximately 95% of registered facilities that hold nursery stock are inspected annually. In FY 1989-90, the number of nursery stock items inspected was 489,506 items. Only 4 years later this figure increased to 885,250. The impact of chain stores may also be negatively impacting the inspection resources available. The number of stop sale orders has also increased from 7,635 in FY 1989-90 to 12,623 in FY 1993-94. The Department of Agriculture issues stop sale orders on any nursery stock items they inspect and find to be substandard. The owner of the stock items is then prohibited from selling them unless and until the owner can show that the stock items are no longer substandard. However, resources for follow-up on stop sale orders are just as limited as those for annual inspections. The following table presents a trend of data relevant to these issues. However, a more complete analysis of these and other indicator data may be necessary to adequately explain any problems which could exist.

**Indicator Data on Inspections of Nursery Stock from Fiscal Year 1989-90 to Fiscal Year 1993-94.**

<i>Fiscal Year</i>	<b>1989-90</b>	<b>1990-91</b>	<b>1991-92</b>	<b>1992-93</b>	<b>1993-94</b>
<b>Number of Inspections</b>	983	946	907	998	853
<b>No. Items Inspected</b>	489,506	482,680	473,767	880,997	885,250
<b>No. of Stop Sale Orders Issued</b>	7,635	8,840	5,496	13,788	12,623
<b>% of Stop Sale Orders Issued</b>	1.6	1.8	1.2	1.6	1.4

### ***The Colorado Nursery Cash Fund***

Section 35-26-106(4), C.R.S. requires that, “all fees and charges collected pursuant to this article shall be transmitted to the Colorado nursery fund.” It is further stated that, “all monies contained in said fund at the end of a fiscal year shall...remain available for appropriation as provided in this section.” The fund was created through legislation in 1987 and at the end of FY 1993-94 reports a fund balance of \$76,117.76. The last three years of budget data reflects that this program is 96% self-sufficient. Specifically, \$366,708 in expenditures have been charged to \$353,692 in revenue. It should also be noted that several reviews by the State Auditor report satisfaction with the accounting methods used to track this and other Department cash funds.

### ***Colorado Agents Avoid Serious Gypsy Moth Problem***

The Commissioner and Department of Agriculture should be recognized for a recent success story. Last year, during an annual inspection, an investigator identified 34 gypsy moth egg masses on evergreen trees shipped from Michigan. These moths can have a devastating effect on the individual nursery stock and have the reproductive strength to significantly impact an entire ecosystem of evergreen trees. Specifically, each egg has the ability to produce 500 larvae. The 34 discovered gypsy moth eggs masses could in effect create 17,000 first generation larvae. These larvae could potentially develop into egg masses and give rise to 8.5 million second generation larvae. The egg masses were discovered before they hatched and a serious infestation was prevented. This year special attention was directed to finding gypsy moth egg masses and only 3 to 5 have been found. The Commissioner and Department of Agriculture also notified the State Forest Service who are watching for any adverse developments.



**The Nursery  
Advisory  
Committee**

As mentioned earlier in this report, the Nursery Advisory Committee serves to advise the Commissioner on matters related to the rules and regulations that administer and enforce the Colorado Nursery Act. The committee is representative of the regulated industry and have conducted their business in a cost effective manner. The Nursery Committee meets sparingly preferring to share information via telephone and written communication methods. Recently, the advisory committee discussed the possible need for regulations, regarding root control or grow bags. Members of the advisory committee were able to share horticultural standards and specifications recommended to the American Association of Nurserymen. These standards and specifications are currently under consideration for inclusion within Colorado regulations. A second issue presented involved the lack of care and handling of trees, especially those balled and burlapped, prior to planting in landscape projects. Concern over disease and insect infestation exists, because the root systems of the trees are often left unprotected before they are planted. The way these trees are transported to the landscape site is also a concern. As a result, a rule was modified to allow for the monitoring and inspection of trees exhibiting this disease and insect infestation risk. This sunset review values this type of information sharing and industry based involvement in the regulatory process

## RECOMMENDATIONS

### Should the Program be Continued?

The regulation of persons and businesses selling nursery stock in Colorado should continue. Each of the three regulatory processes used: (1) registration, (2) inspection and, (3) the issuance of inspection certificates for export essentially achieve the program's goals. Specifically, public health and welfare is promoted because these activities help to ensure that nursery stock within the state is free from disease and insect infestation. These protections also promote a positive stimulus of the state's economy. This sunset review recommends continuation of the Nursery Registration Program.

In addition to continuation of the program, this report encourages the Department of Agriculture to continue its efforts to increase the frequency of nursery inspections in Colorado to further the benefits derived from the regulatory scheme.

***Recommendation 1 - The General Assembly should continue the registration of all persons selling nursery stock as provided for under §35-26-105 et. seq., C.R.S.***

### Administrative Changes

The collection of additional information from persons seeking to register or renew a registration may be beneficial to the nursery stock industry and the regulatory program. Currently, only the name and address of each registrant is recorded, to facilitate the annual inspection process. The Kansas Agriculture Department, however, also requests information on the likely sources that businesses would use to purchase their nursery stock. Additionally, they collect information on the states where that business might export their nursery stock.

This information serves a number of purposes. By learning of the likely sources of nursery stock, if a particular insect or plant disease is located within a state or within a shipment from a given nursery it is easier for Colorado inspectors to notify affected nurseries in Colorado of the potential pest or disease problem. The annual inspection process is intended to locate any disease or insect problems. With information on the likely source of substandard or problem nursery stock, inspectors could move more deliberately to inform or conduct inspections of other nurseries within Colorado who share common stock suppliers. Knowing the states that a Colorado nursery might export materials to, can also help to make the inspection process more efficient and effective. Efforts would be spent looking for problems endemic to the identified state or states that might receive exports from Colorado nurseries. This could also improve the effectiveness of Colorado's export certification process.

The program director reports that a number of computerized methods exist to manage this additional information. There is also no apparent fiscal impact to requesting this information, other than changing the language on state request for registration documents and letters. The implementation of this recommendation may also help to reduce the number of stop sale orders issued for common problems. Once common problems with suppliers or exporters are identified, industry pressures are likely to resolve the issues without excessive government regulation.

***Recommendation 2 - The Commissioner should request that both renewal and initial applicants for registration provide the Department with information regarding the likely sources of their nursery stock and information on the states where the applicant may export nursery stock.***

*APPENDICES*

## Sunset Statutory Evaluation 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 of the Department of Regulatory Agencies 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 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;
- (IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

## Colorado Nursery Act

**35-26-101. Short title.** This article shall be known and may be cited as the "Colorado Nursery Act".

**35-26-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Advertisement" means the attempt by publication, dissemination, solicitation, or circulation, visual, oral, or written, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any property.

(1.5) (Deleted by amendment, L. 91, p. 151, 5, effective July 1, 1991.)

(1.7) "Body politic" means any agency of this state or of the federal government, or any unit of local government, including any county, city, town, school district, local improvement or service district, or special district, or any other governmental unit having authority under the law to tax or impose assessments, including special assessments.

(2) "Botanical name" means that name used in the binomial system of nomenclature consisting of the genus and the species of a particular plant and, if there be one, the variety name of the species.

(3) "Collected nursery stock" means any nursery stock removed from its original native habitat.

(4) "Collector" means any person who collects nursery stock for sale purposes.

(5) "Commissioner" means the commissioner of agriculture.

(6) "Common name" means the name of any plant which is in common and widest use in the state, to designate the kind and variety of a plant.

(7) "Dead or dying condition" means a condition in which a plant is without living tissue, or is weakened to a point that it is unlikely to grow with reasonable vigor when given reasonable care.

(8) (Deleted by amendment, L. 91, p. 151, 5, effective July 1, 1991.)

(9) "Department" means the department of agriculture.

(10) "Insect pests" means the small invertebrate animal in the phylum arthropoda comprising the class insecta which generally have segmented bodies, are six-legged, and are usually winged, such as beetles, bugs, bees, and flies, including a similar class of arthropods whose members are wingless and generally have more than six legs, such as spiders, mites, ticks, centipedes, and wood lice which are injurious to nursery stock.

(11) "Landscape contractor" means a person who provides nursery stock for compensation or value as part of a site development or landscaping service.

(12) "Nursery" means any grounds or premises on or in which nursery stock is propagated, held, or grown for sale purposes.

(13) "Nurseryman" means any person owning, leasing, or managing a nursery. All persons engaged in the operation of a nursery are farmers and are engaged in agriculture for all statutory purposes.

(14) "Nursery stock" means all plants, whether field grown, container grown, or collected native plants; trees, shrubs, vines; turfgrass sod, seedlings, perennials, biennials; and buds, cuttings, grafts, and scions thereof, grown or collected or kept for propagation, sale, or distribution; except that it does not mean dormant bulbs, tubers, roots, corms, rhizomes, pips, field, vegetable, or flower seeds, bedding plants, annual plants, and florists' greenhouse plants, flowers, or cuttings commonly known as greenhouse stock.

(15) (Deleted by amendment, L. 91, p. 151, 5, effective July 1, 1991.)

(16) "Orchard plants" means trees, shrubs, and vines which are grown solely for their fruit or other products.

(17) "Person" means any firm, partnership, association, corporation, society, individual, or combination of individuals.

(18) "Place of business" means each separate nursery, store, stand, sales ground, lot, or any location from which nursery stock is being sold, offered for sale, or distributed.

(19) "Plant diseases" means the pathological condition in nursery stock caused by fungi, bacteria, nematodes, viruses mycoplasmas, or parasitic seed plants.

(20) "Stop-sale order" means a written order prohibiting the sale of nursery stock.

(21) "Turfgrass sod" means a strip or section of one or more grasses or other plants acceptable for lawn plantings which, when severed from its growing site, contains sufficient plant roots to remain intact, and does not contain weeds in excess of the amounts specified by the commissioner.

(22) "Weed" means any plant which grows where not wanted.

**35-26-103. Inspections.** (1) Premises in this state on which nursery stock is kept for sale or offered for sale shall be inspected at least once each year by the commissioner or his authorized agents, and all areas in this state which are sources of collected nursery stock may be inspected by the commissioner or his authorized agents. Inspections may also be made by the commissioner or his authorized agents at any time deemed appropriate by the commissioner based on information known to the commissioner or based on any complaint received by the commissioner alleging failure to comply with any provision of this article or any rule or regulation promulgated pursuant to this article.

(2) No person shall sell in this state any nursery stock except from sources available for inspection.

(3) The commissioner may promulgate rules establishing minimum standards for the qualification of individuals who are authorized to make inspections as agents of the commissioner under this article and who are not employees of the department. The commissioner may charge an annual fee for qualifying such individuals as inspectors pursuant to this subsection (3). Such fee shall be in an amount sufficient to defray the costs of qualifying inspectors pursuant to this subsection (3).

(4) On an annual basis, the commissioner shall make public the results of such inspections in order to inform the public as to the major sale sources of nursery stock found not to be of the quality permitted to be sold, and the location where such nursery stock was offered for sale. Publication of such reports shall be as provided for in sections 35-1-107 (3) and 24-1-136, C.R.S.

**35-26-104. Labeling.** (1) There shall be securely attached to each item of nursery stock when offered for sale or delivered, or to each bundle or lot when sold as a single lot of the same kind, grade, size, and variety, a label showing the correct botanical or accepted common name and the grade or size of such nursery stock.

(2) The grade or size shall meet the specifications established by rules or regulations after public hearing and publication by the commissioner.

(3) The labeling required in subsection (1) of this section shall not apply to turfgrass sod. Each and every lot of turfgrass sod sold shall be labeled by stating on the sales contract, invoice, or bill of lading such information as required by the commissioner.

**35-26-105. Prohibited acts - removal from sale - advisory alerts.** (1) No person shall sell or offer for sale:

(a) Nursery stock in a dead or dying condition;  
(b) Nursery stock infested or infected with insect pests or plant diseases; or  
(c) Nursery stock in violation of any other provision of this article or any rules or regulations promulgated pursuant to this article.

(2) The commissioner or his authorized agents shall issue a stop-sale order to any person offering nursery stock for sale in violation of any provision of this article or any rules or regulations promulgated pursuant to this article. Any person receiving a stop-sale order shall remove such stock from sale immediately.

(3) Failure to comply with any stop-sale order may result in penalties as set forth in section 35-26-109.

(4) If the commissioner makes a finding, after notice and opportunity for a hearing, that substandard plant material is being sold by a nursery outside of Colorado to any nursery in this state, the commissioner may ban any products from said nursery from sale or distribution in Colorado and any further shipments of nursery stock from said nursery may be seized and destroyed. Upon such banning, the commissioner shall issue an alert to all persons registered under this article setting forth the commissioner's finding and advising registrants that the purchase of plant material from such offending nursery constitutes a violation of this article.

**35-26-106. Registrations and fees - Colorado nursery fund created.** (1) A person shall not engage in the business of selling nursery stock in this state, nor shall he advertise with the intent and purpose of selling nursery stock in this state, without having first obtained a registration issued by the commissioner. Such registration shall expire on December 31 of each year. Application for registration shall be submitted on a form prescribed by the commissioner. The commissioner shall, by rule or regulation, establish a registration fee for each place of business. Such fee shall not exceed one hundred dollars. Applicants for a registration who were registered at any time during the calendar year immediately preceding the year for which application is made shall apply for a registration by March 1 or pay an amount double the registration fee. No registration is transferable. All registrants shall inform the commissioner in writing of any change of address prior to any such change of address. All registrants shall meet the requirements of this article and the rules and regulations promulgated pursuant to this article.

(2) Collectors shall produce upon demand, written evidence of authorization to have collected any and all nursery stock held or offered for sale. Such evidence of authorization shall provide information as required by rule and regulation promulgated pursuant to this article.

(3) A charge for the actual cost incurred in making inspections shall be collected to defray the costs of inspections made pursuant to this article. The commissioner shall, by rule or regulation, establish a minimum charge per inspection, and shall determine the actual cost incurred in making inspections and establish the charge therefor.

(4) All fees and charges collected pursuant to this article shall be transmitted to the Colorado nursery fund, which fund is hereby created. The general assembly shall make annual appropriations from such fund to the department for the direct and indirect costs of carrying out the purposes of this article. In addition, any moneys contained in said fund at the end of a fiscal year shall not revert to the general fund, but shall, together with all reimbursements or accretions thereto from whatever source derived, remain available for appropriation as provided in this section.



**35-26-107. Advisory committee - sunset review.** (1) Effective July 1, 1991, the terms of the members of the nursery advisory committee serving immediately prior to said date are terminated. The commissioner shall appoint a nursery advisory committee of eight members to advise the commissioner in formulating rules and regulations governing the production, sale, and distribution of nursery stock. The committee shall include one member representing both the Colorado state university cooperative extension and experiment station, six members registered under this article who are residents of this state, and one member representing the general public who is a resident of this state. Of the members of the advisory committee initially appointed, one registrant member and the Colorado state university cooperative extension and experiment station member shall serve for a term ending June 30, 1992, three registrant members shall serve for a term ending June 30, 1993, and the member representing the general public and two registrant members shall serve for terms ending June 30, 1994. Thereafter members of the advisory committee shall serve for terms of three years, and no member of the advisory committee shall serve more than two consecutive terms.

(2) Members of the advisory committee shall receive no compensation other than reimbursement for actual and necessary traveling and subsistence expenses incurred in the performance of their official duties as members of such committee.

(3) (a) This section is repealed, effective July 1, 1996.

(b) Prior to said repeal, the nursery advisory committee shall be reviewed as provided for in section 2-3-1203, C.R.S.

**35-26-108. Access to locations and records - administrative subpoena - complaints and investigations.** (1) (a) At any time during regular business hours, the commissioner shall have free and unimpeded access upon consent or upon issuing or obtaining an administrative search warrant to all buildings, yards, warehouses, and storage facilities owned or operated by a registrant in which any nursery stock is kept, stored, handled, processed, or transported for the purpose of carrying out any provision of this article or any rule made pursuant to this article.

(b) At any time during regular business hours, the commissioner shall have free and unimpeded access upon consent or upon issuing or obtaining an administrative search warrant to all records required to be kept at any reasonable time and may make copies of such records for the purpose of carrying out any provision of this article or any rule made pursuant to this article.

(2) The commissioner, upon his own motion or upon the complaint of any person, may make any and all investigations necessary to ensure compliance with this article.

**35-26-109. Penalties.** (1) Any person who intentionally violates any provision of this article or the rules or regulations promulgated pursuant to this article commits a class 3 misdemeanor and shall be punished as provided in section 18-1-106, C.R.S.

(2) Any person who violates any provision of this article, or any rule or regulations made pursuant to this article is subject to a civil penalty, as determined by the commissioner. The maximum penalty shall not exceed one thousand dollars per violation.

(3) No civil penalty may be imposed unless the person charged is given notice and opportunity for a hearing pursuant to article 4 of title 24, C.R.S.

(4) If the commissioner is unable to collect such civil penalty or if any person fails to pay all of the civil penalty or a set portion as determined by the commissioner, the commissioner may bring suit to recover such amount plus costs and attorney fees by action in any court of competent jurisdiction.

(5) Before imposing any civil penalty under this section, the commissioner may consider the effect of such penalty on the ability of the person charged to stay in business.

(6) (Deleted by amendment, L. 91, p. 155, 12, effective July 1, 1991.)

**35-26-110. Out-of-state nurseries.** (1) The commissioner shall require out-of-state nurseries selling nursery stock in the state of Colorado to deliver to the commissioner a certified copy of the "state of origin" certificate of inspection of the nursery. This requirement may be satisfied by delivering to the commissioner a list of inspected and certified nurseries from the "state of origin" in lieu of individual certificates of inspection from each nursery. Each shipment of nursery stock entering the state of Colorado shall be accompanied by a certificate of inspection which states that the nursery stock has the appearance of freedom from insect pests and plant diseases.

(1.5) An out-of-state nursery advertising and selling nursery stock in Colorado and having no duly appointed resident agent in this state upon whom process may be served as provided by law shall be deemed to have appointed the secretary of state as the agent of said nursery upon whom service of process may be had in the event of any suit against said nursery. Service on the secretary of state of any such process shall be made by delivering to and leaving with him or with his deputy, an assistant, or a clerk two copies of such process. The secretary of state shall also require a statement which contains the name and address of the nonresident's home or home office. After receipt of such process the secretary of state shall forward to the defendant a copy of the process by registered mail, return receipt requested. The person so serving the secretary of state shall immediately send or give to the commissioner a notice of such service and a copy of the process. The secretary of state shall collect at the time of any service of process on him as resident agent a fee which shall be determined and collected pursuant to section 24-21-104 (3), C.R.S.

(2) (Deleted by amendment, L. 91, p. 156, 13, effective July 1, 1991.)

**35-26-111. Rules and regulations.** The commissioner is hereby authorized and directed to promulgate such rules and regulations as he may deem necessary and proper for the furtherance and enforcement of the provisions of this article. Such rules and regulations shall be promulgated in accordance with applicable provisions of article 4 of title 24, C.R.S.

**35-26-112. Delegation of duties.** The powers and duties vested in the commissioner by this article may be delegated to qualified employees of the department.

**35-26-113. Bodies politic.** (1) All growing fields and all other premises in this state on which nursery stock is being grown or held by bodies politic for the purpose of planting on public or private grounds shall be inspected at least once each year by the commissioner or his authorized agents.

(2) A body politic shall not plant nursery stock infested with insect pests or infected by plant diseases on public or private grounds.

(3) A body politic shall be subject to the inspection fees set forth in section 35-26-106 (3).

**35-26-114. Enforcement.** (1) After an investigation, the commissioner may, through the attorney general, institute and prosecute the proper proceedings for the enforcement of any of the provisions of this article, or for the recovery of any money due the department, or any penalty provided for in this article, and shall defend in like manner all suits, actions, or proceedings brought against the commissioner or the department.

(2) The commissioner may deny, suspend, or revoke a registration if the applicant or holder thereof does not engage in the sale of nursery stock.

(3) (a) Whenever the commissioner has reasonable cause to believe a violation of any provision of this article or any rule made pursuant to this article has occurred and immediate enforcement is deemed necessary, he may issue a cease and desist order, which may require any person to cease violating any provision of this article or any rule made pursuant to this article. Such cease and desist order shall set forth the provisions alleged to have been violated, the facts alleged to have constituted the violation, and the requirement that all actions be ceased forthwith.

(b) In the event that any person fails to comply with a cease and desist order within twenty-four hours, the commissioner may bring a suit for a temporary restraining order and injunctive relief to prevent any further or continued violation of such order.

(c) No stay of a cease and desist order shall be issued before a hearing thereon involving both parties.

(d) Matters brought before a court pursuant to this section shall have preference over other matters on the court's calendar.

(4) The commissioner shall have full authority to administer oaths and take statements, to issue administrative subpoenas requiring the attendance of witnesses before him and the production of all books, memoranda, papers, and other documents, articles, or instruments, and to compel the disclosure by such witnesses of all facts known to them relative to the matters under investigation. Upon the failure or refusal of any witness to obey an administrative subpoena, the commissioner may petition the district court, and, upon a proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey such an order of the court shall be punishable as a contempt of court.

(5) Whenever it appears to the commissioner, upon sufficient evidence satisfactory to the commissioner, that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this article or of any rule or of any order promulgated under this article, he may apply to any court of competent jurisdiction to temporarily or permanently restrain or enjoin the act or practice in question and to enforce compliance with this article or any rule or order promulgated under this article. In any such action, the commissioner shall not be required to plead or prove irreparable injury or the inadequacy of the remedy at law. Under no circumstances shall the court require the commissioner to post a bond.

(6) Complaints of record made to the commissioner and the results of his investigations may, in the discretion of the commissioner, be closed to public inspection, except as provided by court order, during the investigatory period and until dismissed or until notice of hearing and charges are served on a registrant.

(7) The commissioner may deny, revoke, or suspend any registration for any of the following:

(a) If the party has violated any provision of this article or any rules promulgated pursuant to this article;

(b) If the party has had a felony conviction related to the conduct regulated by this article;

- (c) If there has been fraud or deception in the procurement or attempted procurement of a registration;
- (d) If the party has failed to comply with a lawful order of the commissioner;
- (e) If the party has knowingly misrepresented information on his application;
- (f) If the party has had an equivalent registration or license revoked or suspended by any authority; and
- (g) If the party has forged or otherwise falsified a certificate of inspection.

**35-26-115. Termination of function - repeal of article.** The registration functions of the commissioner and the department as set forth in this article are terminated on July 1, 1996. This article is repealed, effective July 1, 1996. Prior to such repeal, the registration functions shall be reviewed as provided for in section 24-34-104, C.R.S.