

**STATE ENVIRONMENTAL LAWS
AFFECTING
COLORADO AGRICULTURE**

*(See NASDA's Website for Federal Environmental Laws
Affecting Agriculture)*

A Project of the

**National Association of State Departments
of Agriculture Research Foundation**

through the

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Research and Information**



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Table of Contents

This document has two components: the state and federal guide. To complete this guide, please download the federal guide which is also on NASDA's Website.

The Project Participants	CO-iii
Disclaimer	CO-iv
Quick Reference Guide	CO-v
I. Water Quality	CO-1
A. Colorado Water Quality Laws and Regulations	CO-1
1. Colorado Discharge Permit System (NPDES) Permit Program	CO-2
2. Agriculture and the Colorado Pollutant Discharge System	CO-4
3. Confined Animal Feeding Operations in Colorado	CO-5
a. CAFOs/HCAFOs Requirements	CO-5
b. Land Application of Manure	CO-7
c. Concentrated Aquatic Production Facilities in Colorado	CO-8
5. Nonpoint Source Pollution in Colorado	CO-9
6. Colorado Soil and Conservation Districts	CO-10
II. Groundwater	CO-11
A. Colorado Groundwater Laws and Regulations	CO-11
1. Colorado Safe Drinking Water Act	CO-11
2. Colorado Water Wells	CO-12
III. Air Quality	CO-13
A. Colorado Air Quality Laws and Regulations	CO-13
IV. Solid Waste and Hazardous Waste	CO-16
B. Colorado Solid Waste and Hazardous Waste Laws and Regulations	CO-16
1. Treatment, Storage, Transportation and Disposal of Hazardous Wastes	CO-16
2. Dead Animal Disposition	CO-17
3. State Storage Tank Laws	CO-18
a. Aboveground Storage Tanks	CO-19
b. Underground Storage Tanks	CO-19
V. Pesticides and Chemigation	CO-20
A. Colorado Pesticide and Chemigation Laws and Regulations	CO-20
1. Colorado Pesticide Act	CO-21
a. Registration and Licensure	CO-21
b. Prohibited Acts	CO-21

2.	Colorado Pesticide Applicator’s Act	CO-22
3.	Colorado Chemigation Act	CO-24
VI.	Protection of Wildlife	CO-25
A.	Colorado Wildlife Protection Laws and Regulations	CO-25
1.	Colorado Wildlife Laws in General	CO-25
2.	Damage to Property by Wildlife	CO-28
VII.	Enforcement of State Environmental Laws	CO-28
VIII.	Other State Statutes Affecting Agriculture	CO-29
A.	Farmland Preservation	CO-29
1.	Zoning and Planning	CO-29
2.	Conservation Easements	CO-30
B.	Nuisance and Right-to-Farm	CO-30
1.	Nuisance	CO-31
2.	Right-to-Farm	CO-31
C.	Noxious Weeds	CO-32
	Appendix A - Agencies	CO-33

The Project Participants

National Association of State Departments of Agriculture Research Foundation

The National Association of State Departments of Agriculture (NASDA) is a nonprofit association of public officials representing the Commissioners, Secretaries, and Directors of Agriculture in the fifty states and four territories. The NASDA Research Foundation is a 501(c)(3) nonprofit, tax-exempt corporation for education and scientific purposes.

National Center for Agricultural Law Research and Information

The National Center for Agricultural Law Research and Information (Center) was created in 1987 under Public Law 100-202, 101 Stat. 1329-30 to address the complex legal issues that affect American agriculture. The Center focuses its efforts on research, writing, publishing, development of library services, and the dissemination of information to the public. The Center is located at the University of Arkansas School of Law in Fayetteville, Arkansas.

Natural Resources Conservation Service

The Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS), is a federal agency within the U.S. Department of Agriculture (USDA). NRCS conservationists work with private landowners and operators to help them protect their natural resources.

U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) is a federal agency with primary responsibility for implementation of most federal laws designed to protect, enhance, and conserve the nation's natural resources.

Disclaimer

This guide is designed for use by farmers, ranchers, landowners, and their consultants in understanding the effect environmental laws have on agricultural operations. It is not a substitute for individual legal advice. Producers should always confer with their own attorneys, consultants, or advisors, as well as federal, state, and local authorities responsible for the applicable environmental laws.

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The contents and views expressed in this guide are those of the authors and do not necessarily reflect the policies or positions of the United States Department of Agriculture (USDA) NRCS or EPA.

Although every effort has been made to ensure the accuracy of the information contained in this book, environmental statutes, regulations, and ordinances are constantly changing. In addition, the overwhelming complexity and extent of environmental law make it impossible for a single book to describe in complete detail and depth all of the environmental laws and regulations impacting agricultural operations. The following material is simply a basic primer on environmental law for agricultural producers. For these reasons, the utilization of these materials by any person constitutes an agreement to hold harmless the authors, the National Center for Agricultural Law Research and Information, the University of Arkansas, the United States Department of Agriculture, the National Association of State Departments of Agriculture Research Foundation, the Natural Resources Conservation Service, and the United States Environmental Protection Agency for any liability, claims, damages, or expenses that may be incurred by any person or organization as a result of reference to, or reliance on, the information contained in this book.

The background research and final documents were completed in August 2003. Updates of the information contained in the guide will occur on an annual basis and be made available on the internet.

Anyone with comments concerning the guide should contact the NASDA Research Foundation at 1156 15th Street, N.W., Suite 1020, Washington, D.C. 20005, or phone (202) 296-9680.

Quick Reference Guide

Producer Note: The following chart is intended as a quick reference guide to permits which may be necessary for a particular operation. If a permit is necessary, refer to the page numbers listed referencing this document for further information and contact the agencies listed in the final column for information on applications and procedures for securing a permit for an operation. A list of agencies and contact information is also provided in Appendix A.

Regulatory Area	Type of Activity	Permit Required	Agency
Water Quality <i>pp. 1-11</i>	Livestock and aquaculture operations, depending on size	NPDES and state general permit may be required	EPA Region VIII, Colorado Department of Public Health and Environment/Water Quality Control Division (CDPHE/WQCD) and Local Authority
	Wetlands dredge and fill activity or dam, dike, or bridge building activities	Section 404 permit	US Army Corps of Engineers with EPA and CDPHE/WQCD approval
	Water usage	Permit may be required	CDPHE/WQCD, Colorado Division of Water Resources (CDWR) and State Engineer
	Water well construction and use	Permit required	State Engineer and CDPHE/WQCD
Groundwater <i>pp. 11-13</i>	Groundwater protection	Permit may be required	CDPHE/WACD, Colorado Department of Agriculture (CDA) and Local Authority

Regulatory Area	Type of Activity	Permit Required	Agency
Air Quality <i>pp. 13-16</i>	Grain terminals and grain elevators	Permit required	EPA Region VIII or CDPHE/Air Quality Control Division (AQCD) and Local Authority
	General agricultural operations including odor, dust, or flies	No permit, but may be subject to nuisance suits	EPA Region VIII or CDPHE/AQCD and Local Authority
	Burning	Permit may be required	CDPHE/AQCD and Local Authority
Solid Waste and Hazardous Waste <i>pp. 16-20</i>	Storage, treatment, or disposal of hazardous or solid waste	Permit may be required for disposal, treatment, or storage activities	EPA Region VIII and CDPHE/Hazardous Materials and Waste Management Division (HMWMD)
	Public notice of hazardous waste	No permit	CDPHE/HMWMD and Local Emergency Planning Committee
Pesticides and Chemigation <i>pp. 20-24</i>	Application and use of pesticides	Certification, License, Registration may be required	EPA Region VIII, CDA and Local Authority
	Use of pesticides around farmworkers	Verification of training is required	EPA Region VIII, CDPHE and CDA
	Record keeping	Permit may be required	EPA Region VIII, USDA and CDA
Wildlife Protection <i>pp. 24-28</i>	Taking of wildlife	Permit required if endangered or threatened species may be affected	U.S. Fish and Wildlife Service and Colorado Department of Natural Resources/Division of Wildlife (CDNR/DOW)

STATE ENVIRONMENTAL LAWS AFFECTING COLORADO AGRICULTURE

Producer Note: Agricultural producers are faced with many challenges in today's rapidly changing world. Changes in industrialization, use of computer-based technology, governmental involvement in market dynamics, and environmental regulation are affecting producers in a number of ways. Environmental regulation is a complex area with both federal and state government involvement. Keeping informed is the producer's most useful instrument for meeting the challenges of today's agriculture. This information on environmental regulation is provided to inform producers of the breadth and scope of environmental laws which may impact daily production activities.

I. WATER QUALITY

A. Colorado Water Quality Laws and Regulations

Most states have enacted clean water legislation. While these statutes usually contain provisions similar to those found in the parallel federal legislation, there may be significant differences. In fact, state statutes may impose requirements that are even more restrictive than the federal law. In all cases, CWA requirements must be followed, and are enforced along with the state enacted statutes and regulations implemented by the state administrative agencies. Under the CWA, EPA has delegated the NPDES permit program to many states. Although retaining some oversight responsibility, EPA has delegated the NPDES to Colorado. Colorado has officially accepted this responsibility¹ and now has its own permitting system, to be discussed below.

Caution: Because environmental laws and regulations change frequently, all producers must stay in contact with both state and federal officials in order to remain aware of and in compliance with changes in the law.

Producer Note: Often the specifics of environmental laws are found in agency regulations. In addition, regulations are likely to be amended frequently. As a result, a producer must keep in contact with offices administering specific programs in order to keep up with all changes which may occur.

The state of Colorado is dependent upon its rivers, streams, lakes, and subsurface waters as both a public and private water supply, and for agricultural, industrial, and recreational uses. Moreover, Colorado is part of the arid West. Water is a scarce resource. Colorado assigns a high priority to controlling water pollution.

¹ COLO. REV. STAT. ANN. §§ 24-78-101, -102 (West 1997).

Section 402(b) of the Clean Water Act² is the federal statutory provision authorizing the EPA to approve state NPDES programs. The EPA has delegated the NPDES program authority to Colorado and approved the Colorado discharge permitting system (CDPES).³ Colorado has established a water quality control program through the Colorado Water Quality Control Act (WQCA)⁴ in order to restore and maintain a clean and adequate supply of water. The WQCA covers both surface and groundwaters. The Colorado Water Quality Control Commission (WQCC) administers the WQCA. The WQCC has members appointed by the Governor. The WQCC's responsibilities include drafting control regulations that implement the WQCA.⁵ The Colorado Water Quality Control Division (WQCD) serves as full-time staff to the WQCC and enforces the WQCA in the field. The WQCD's responsibilities include drafting and issuing Colorado discharge permits discussed below. The EPA, however, still reviews the permits and makes comments regarding them when necessary.

1. Colorado Discharge Permit System (NPDES) Permit Program

Colorado administers its EPA-authorized NPDES permit program under its own state permitting program. The permitting system is implemented through specific regulations promulgated by the Colorado Water Quality Control Division (WQCD) of the Colorado State Department of Public Health and Environment (CDPHE). These regulations have been promulgated to implement Colorado Water Quality Control Act (WQCA). They are designed to be in conformity with the federal Clean Water Act (CWA) and those regulations promulgated in pursuance thereof.⁶ The permitting system is called the Colorado Discharge Permit System (CDPS). The permits issued under the CDPS are called Colorado Discharge Permits (CDPs).

The CDPS prohibits any person in Colorado from discharging any pollutants from a point source into state waters without first obtaining a Colorado Discharge Permit (CDP) from the WQCD.⁷ State waters include not only surface water (streams, rivers, and lakes) but also groundwater (water found underground). An application for a discharge permit into surface waters is the same as an application for a discharge permit into groundwater. The CDPS also prohibits any person from discharging a pollutant into a ditch or man-made conveyance for the purpose of evading the requirement to obtain a permit. The WQCD issues two types of permits for the discharge of pollutants. A general permit is issued for common activities like sand and gravel mines. An individual permit is issued for facilities which require site specific considerations. The individual

² 33 U.S.C. § 1342(b) (1994).

³ 40 Fed. Reg. 16,713 (April 14, 1975).

⁴ COLO. REV. STAT. ANN. § 25-8-101 (West 1997).

⁵ § 25-8-205(1).

⁶ 5 COLO. CODE REGS. § 6.1.0 1002-2 (1997).

⁷ COLO. REV. STAT. ANN. § 25-8-501 (West 1997).

permit is for the “end of pipe” type pollution. According to the WQCD, a general permit is granted, if at all, within thirty (30) days (or sooner) after a complete application is filed with the WQCD. An individual permit is granted, if at all, within 180 days (6 months) after a complete application is filed with the WQCD.

A point source is defined under the WQCA as any conveyance where a pollutant is discharged which is discernible, confined, and discrete. Examples of a point source include a pipe, a ditch, a channel, a tunnel, a conduit, a well, and a concentrated animal feeding operation (CAFO). Relevant to the agricultural producer, pollutant is defined to include dredged soil, dirt, slurry, solid wastes, sewage sludge, garbage or trash, chemical waste, biological nutrient, wrecked or discarded equipment, rock, sand, and any industrial or agricultural waste.⁸

Although, the WQCD requires a person who discharges pollutants into state waters to apply for a permit from the WQCD, a permit application formerly filed and duly acquired under the federal CWA is deemed to be a complete permit application filed under the state statute. Thus, each NPDES permit priorly issued pursuant to the federal CWA shall be deemed to be a temporary permit issued under the statute which expires upon the expiration of the federal permit. However, when the federal permit expires, if the permittee wishes to continue discharging pollutants into state waters, he or she must apply for a CDP from the Colorado WQCD.

Under the CDPS, a discharger of pollutants must file a permit application with the WQCD, not less than one hundred eighty (180) days prior to the date proposed for commencing the discharge into either surface or groundwater.⁹ The WQCD will advise the applicant within forty-five (45) days after the receipt of the application if, and in what respects, the application is incomplete. If the WQCD fails to advise the applicant within the forty-five (45) days, the application is deemed complete.

Some activities related to agriculture which will require an individual discharge permit include confined animal feeding operations (feedlots) which meet the definition of a CAFO in the federal act. Activities which will require a general discharge permit include aquatic animal production operations (fish hatcheries), the washing of temporary stables or any other facility that discharges wash water associated with animal wastes, washing of root crops such as potatoes, onions, sugar beets, or other fruit/vegetable agricultural produce or other water discharges associated with vegetable wastes.¹⁰ The applicant must pay a fee for the discharge permit. The fee is \$84.00 for livestock facilities handling under 5,000 animal units and \$166 for livestock facilities handling over 5,000 animal units.¹¹

⁸ § 25-8-501.

⁹ § 25-8-502(2)(a).

¹⁰ 5 COLO. CODE REGS. § 6.1.0 1002-2 (1997).

¹¹ COLO. REV. STAT. ANN. § 25-8-502(1)(b)(I) (West 1997).

Violations of the WQCA have serious consequences for the discharger. Any person who violates the WQCA can be assessed a civil fine of up to \$10,000.00 per day for each day during which the violation occurs.¹² Furthermore, any person who recklessly, knowingly, intentionally, or with criminal negligence discharges any pollutant into any state waters commits criminal pollution under the WQCA if he or she:

- Violates any permit requirement;
- Violates any cease and desist order or clean-up order issued by the WQCD; or
- Allows a discharge without a required permit.

Criminal violations of the WQCA can be punished by a criminal fine up to \$25,000.00 for each day the violation occurs.¹³

2. Agriculture and the Colorado Pollutant Discharge System

The most common agricultural discharges are irrigation return flows and wastes from animal feeding operations (AFOs). Colorado law exempts, except as required by federal statutes or regulations, the following types of agricultural activities from the discharge permit requirements including:

- Any flow or return flow of irrigation water into state waters;
- Animal wastes on farms and ranches; and
- Other agricultural wastes on farms and ranches.¹⁴

While irrigation return flows -- the tailwater, tile drainage or surfaced groundwater flow from irrigated land -- remain exempt there have been some recent changes that impact the exemption of animal wastes. In late 1998, Colorado passed legislation -- via an initiative and a vote of its citizens -- that mandates an individual discharge permit for the operation, construction, or expansion of a housed commercial swine feeding operation (HCSFO).¹⁵ Under the statute, a HCSFO is an operation where swine are raised in buildings or other enclosed structures for forty-five days or longer in any twelve-month period and where no crop or forage growth or production is sustained in the area of confinement and the facility is capable of housing eight hundred thousand pounds or

¹² § 25-8-608 (West Supp. 1998).

¹³ § 25-8-609(3).

¹⁴ § 25-8-504.

¹⁵ § 25-8-501.1 (West 1999).

more of live animal weight of swine at any one time or is deemed a commercial operation under local zoning or land use regulations.

Furthermore, the statute requires the WQCC to formulate rules that will, at a minimum, require waste management plans, setbacks, waste storage criteria, financial responsibility for closure, and waste application rates for HCSFOs. Finally, and maybe most importantly, the statutory provisions explicitly do not preclude local governments from imposing more restrictive requirements on HCSFOs.

In addition to the above requirements for large swine operations, federal and state laws/regulations also apply, as detailed below, to other confined animal feeding operations.

3. *Confined Animal Feeding Operations in Colorado*

Colorado's regulatory scheme recognizes two different categories of confined animal feeding operations: concentrated animal feeding operations (CAFOs) and other animal feeding operations (AFOs). CAFOs and its companion -- housed concentrated animal feeding operations (HCAFOs) -- as defined below, are required to be operated as "no-discharge" facilities, which means no-discharge of manure or process wastewater to waters of the state except during an applicable design storm event. Such an event, paralleling the federal requirement, may occur as a result of a storm of a 24-hour duration which yields a total precipitation of a magnitude which has a probability of recurring once every twenty-five (25) years.

Although not under the same regulatory scheme, AFOs which do not meet the CAFO/HCAFO criteria must nevertheless protect surface water, groundwater, and soil resources through the use of best management practices (BMPs) based upon existing physical conditions and constraints at the facility site. These BMPs may include the installation of adequate manure and process wastewater collection facilities and the installation of storage and land application facilities.

However, it is important to note all confined feeding operations located in hydrologically sensitive areas -- areas of significant groundwater recharge, waters which are currently used for drinking water purposes or could be used for drinking water purposes in the future and waters subject to antidegradation review -- are considered to be CAFOs.¹⁶

a. CAFOs/HCAFOs Requirements

As noted above, CAFOs and HCAFOs are prohibited from discharging manure or process wastewater into the waters of Colorado. Moreover, because of the hydrological sensitivity of the areas around the Denver metropolitan area, specifically the watersheds of Cherry Creek Reservoir, Bear Creek Basin, and Chatfield Reservoir, all confined animal feeding operations located therein are considered to be CAFOs/HCAFOs and must follow the regulatory requirement for such.

¹⁶ 5 COLO. CODE REGS. §§ 1002-81.2, -81.5 (1998).

Under Colorado’s environmental regulations, an “AFO” is defined as any confined animal or poultry growing operation (facility) for meat, milk, or egg production or where livestock are stabled and fed in a confined place for longer than 45 days in any 12 month period and crop or forage growth or production is not sustained in the area of confinement. A “CAFO” is a feeding operation where the number of animals confined are equal to or exceed: (a) 1,000 slaughter and feeder cattle, (b) 700 mature dairy cattle (milked or dry), (c) 2,500 swine over 55 pounds each, (d) 500 horses, (e) 10,000 sheep or lambs, (f) 55,000 turkeys, (g) 100,000 laying hens (if there is overflow watering), (h) 30,000 laying hens or broilers (if there is a liquid manure handling system), (i) 5,000 ducks, or (j) 1,000 animal units. A “HCAFO” is an operation in a building which is totally roofed with either open or enclosed sides where livestock or poultry are housed on solid concrete or dirt collection areas in pens, stalls, or cages.

An animal unit is a unit of measurement that dictates the animal capacity of an animal-feeding operation containing two or more species. The animal unit capacity of an operation is determined by multiplying the number of animals of each species by the appropriate equivalency factor, found below, and summing the resulting totals for all the species contained in the feeding operation.

The equivalency factors for the most common species of livestock found in Colorado are:

- Slaughter and feed cattle-1.0;
- Mature dairy cattle-1.4;
- Butcher and breeding swine (over 55 lbs.)-0.2;
- Sheep or lambs-0.2;
- Horses-1.0;
- Turkeys-0.02;
- Broiler or layer chickens-0.01.

Relating to this regulation, waters of the state includes any and all surface and subsurface waters which are contained in or flow in or through Colorado, excepting sewage waters or waters in treatment works and disposal systems. As stated before, there is a prohibition against the discharge of any manure or process wastewater from CAFOs and HCAFOs into waters of the state. Manure is defined as feces, urine, litter, bedding, or feed waste from animal feeding operations. Process wastewater means any process-generated wastewater and any precipitation (rain or snow) which comes into contact with any manure or any other raw material or intermediate or final material resulting from the production of animals or poultry. Process wastewater includes stormwater runoff from the facility and there shall be no stormwater runoff discharges of manure

and wastewater into Colorado waters unless it is the result of a storm equal to or in excess of the amount resulting from a 25-year, 24-hour storm.¹⁷

In order to comply with the no discharge provision of the regulations, the HCAFO and the CAFO operator should use certain management practices or construction standards to deal with the animal waste. Such management practices include, but are not limited to:

- Using earthen storage structures like lagoons or basins; or
- Using formed storage tanks made of concrete, steel, or wood.¹⁸

Additionally, in order to protect groundwater, CAFOs/HCAFOs must:

- Construct their retention structures of compacted or in-situ earthen materials or very low permeable materials in order to maintain a seepage rate at or below the identified regulatory standards;
- Maintain their retention structures in order to provide for storage of storm water runoff which has come in contact with manure or process wastewater in addition to the accumulated manure and process wastewater;
- Remove the accumulations of manure and process wastewater from the retention structure to prevent overflow; and
- Ensure process wastewater retention structures are equipped with either irrigation or evaporation systems capable of dewatering the retention structures.¹⁹

b. Land Application of Manure

There are specific regulations which deal with the land application of manure or the process wastewater. Generally, there is a prohibition against manure and process wastewater being distributed on agricultural lands in a manner which might adversely affect the quality of waters of the state. The rate of the land application of manure and process wastewater is limited. After August 30, 1992, any new facility which intends to land-apply manure or process wastewater must submit a land application plan to the Division. If treatment other than land application is utilized

¹⁷ 5 COLO. CODE REGS. § 1002-81.2.

¹⁸ 5 COLO. CODE REGS. § 1002-81.3.

¹⁹ 5 COLO. CODE REGS. § 1002-81.4.

prior to discharge to state waters, a CDPS permit must be obtained for the operation from the Division.²⁰

There are control regulations relating to the application of manure or process wastewater by CAFOs/HCAFOs. They must abide by the following principles:

- Manure and process wastewater must not be applied to lands in a manner that adversely affects the quality of state waters;
- When irrigation disposal of process wastewater is employed, the irrigation application rate should not exceed the estimated soil infiltration rate. For flood irrigation, tailwater facilities shall be provided. Irrigation application rates shall be adjusted to avoid significant ponding of concentrated runoff in surface depressions or seasonal drainage ways; and
- There shall be no discharge of manure or process wastewater into state waters resulting from land application activities when the ground is frozen, saturated or during rainfall events.²¹

c. Concentrated Aquatic Production Facilities in Colorado

Colorado regulates aquaculture as an “agricultural enterprise” and as a “point source.” Aquaculture as an agricultural enterprise is regulated through the Colorado Aquaculture Act (CAA)²² by the Colorado Department of Agriculture (CDA). Additionally, because aquaculture is a point source, it is regulated by the Colorado Water Quality Control Division (WQCD) under the Colorado Water Quality Control Act (WQCA).

The purpose of the CAA is to impose upon aquaculture facilities certain record-keeping and importation requirements. Under the CAA, no person shall operate a fish production facility for the purpose of propagating, selling, trading, or transporting live fish unless the fish production facility possesses a valid and current aquaculture facility permit issued by the CDA.²³

However, under the WQCA, the pollution caused by aquaculture is curtailed. Colorado defines a concentrated aquatic animal production facility as a point source if it is a hatchery, fish farm, or other facility which meets the criteria in federal regulations.²⁴ In addition, the WQCD may

²⁰ 5 COLO. CODE REGS. § 1002-81.5.

²¹ *Id.*

²² COLO. REV. STAT. ANN. § 35-24.5-101 (WEST 1998).

²³ § 35-24.5-109(1).

²⁴ 40 C.F.R. 122, app. C (1998).

designate a warm or cold water aquatic animal production facility that does not meet the federal regulation definition as a concentrated aquatic animal production facility if it determines that it is a significant contributor of pollution to state waters. Some additional factors considered by the WQCD are:

- The location and quality of the receiving state waters;
- The holding, feeding, and production capacities of the facility; and
- The quantity and nature of the pollutants reaching state waters.

Depending upon the size and type of the operation, a facility may be required to obtain an CPDES permit. A permit application is not required from an aquatic operation designated as a concentrated aquatic animal production facility until the WQCD conducts an on-site inspection of the facility. A concentrated aquatic animal production facility applying for a CPDES permit must provide the following information to the WQCD:

- The maximum daily and average monthly flow from each outfall;
- The number of ponds, raceways, and similar structures;
- The name of the receiving water and source of intake water;
- For each species of aquatic animals, the total yearly and maximum harvestable weight; and
- The calendar month of maximum feeding and the total mass of food fed during that month.

5. Nonpoint Source Pollution in Colorado

Nonpoint source pollution is a type which comes from many diffuse sources. It results after rainfall or snowmelt moves over agriculture and urban lands. This runoff picks up and carries away natural and manmade pollutants which eventually end up in the rivers, lakes, and streams of Colorado.

The federal Clean Water Act (CWA) has placed special emphasis on controlling nonpoint source pollution. Section 319 of the CWA requires each state to develop a nonpoint source assessment report and a management program. Consequently, in 1989, Colorado established an assessment report and management program approved by the Colorado Water Quality Control Commission (WQCC) and the Environmental Protection Agency (EPA). The WQCC has the power

to promulgate control regulations to control nonpoint source pollution.²⁵ A Nonpoint Source Task Force was formed in 1987 under the WQCD and it advises the WQCD and WQCC on nonpoint source control. An Agriculture/Silviculture Subcommittee was formed and charged with promoting and encouraging the development of nonpoint source projects.

The control regulations in Colorado for nonpoint source pollution resulting from agriculture are limited.²⁶ The state statute prefers using incentive, grant, and cooperative programs instead of control regulations to control nonpoint source water pollution control related to agricultural practices. Control regulations related to agricultural practices shall be promulgated only if incentive, grant, and cooperative programs are determined by the WQCC to be inadequate and such regulations are necessary to meet state law or the federal act.²⁷

6. Colorado Soil and Conservation Districts

The Colorado Soil Conservation Act²⁸ created the Soil Conservation Board (SCB) and Soil Conservation Districts (Districts). A soil conservation district has very broad powers to prevent and control soil erosion within the state. These include the power to:

- Conduct surveys and research relating to the character of soil conservation and the preventative measures needed;
- Conduct demonstration projects to promote soil conservation practices;
- Enter into agreements with landowners within the district to facilitate erosion control, flood control, and water conservation practices;
- Acquire real property, or any interest in real property by eminent domain for projects designed exclusively for flood or sediment control;
- Issue a tax levy or assessment essential to accomplishing the purposes of the district after approval by qualified voters; and
- Make available to landowners agricultural and engineering machinery and equipment, fertilizer, seeds, and seedlings.

²⁵ COLO. REV. STAT. ANN. § 25-8-205 (West 1997).

²⁶ *Id.*

²⁷ *Id.*

²⁸ § 35-70-101 (West 1998).

Soil conservation districts serve a fundamental role in promoting conservation by providing Colorado farmers and ranchers with valuable technical information on natural resources.

It is incumbent upon the Colorado farmer and rancher to avoid the negligent management of his/her lands in order to prevent the blowing of soil. The farmer or rancher may be potentially liable under the Colorado Soil Erosion-Dust Blowing Act of 1954.²⁹ Under this Act, any owner who sustains damages to his property which is caused by negligent conduct associated with the soil blowing from another's land, may recover actual damages from the negligent land occupier or owner.³⁰ Farmers and ranchers should contact their local District for technical information to prevent the negligent management of the lands they either own or lease.

II. GROUNDWATER

A. Colorado Groundwater Laws and Regulations

1. Colorado Safe Drinking Water Act

Colorado implements the federal safe drinking water act.³¹ The Colorado Department of Public Health and Environment (CDPHE) is charged with adopting and enforcing minimum general sanitary standards and regulations in order to protect the quality of drinking water supplied to the public.³² Such standards and regulations adopted include only those minimum standards that are necessary to assume enforcement of the federal Safe Drinking Water Act (SDWA). The goal is for the CDPHE to assume enforcement and to promulgate standards and regulations that facilitate the implementation of the federal act. However, those standards and regulations promulgated may not be any more stringent than those required by the SDWA.

On the other hand, Colorado has enacted legislation to protect groundwater from improper use of agricultural chemicals by providing for the management of the chemicals. This is to prevent, minimize, and mitigate the presence of the chemicals in groundwater. Additionally, there is an educational component for applicators and the general public on chemical use. The CDA is responsible for establishing the rules for the implementation of the legislation.

²⁹ § 35-72-101.

³⁰ § 35-72-101(2).

³¹ COLO. REV. STAT. ANN. § 24-78-103(a) (West 1997).

³² § 25-1-107.

Producer Note: The Colorado legislature has expressed its regard for the federal Safe Drinking Water Act in a legislative declaration found in § 25-8-502: “The federal environmental protection agency (EPA) has imposed numerous requirements under the federal Safe Drinking Water Act that do not properly take into account the escalating cost of such requirements on small communities and the unreasonable burdens that are borne by municipal water systems. Under the current regulatory structure it is questionable whether it is appropriate or feasible for the state of Colorado to continue to implement the federal Safe Drinking Water Act. It is the intent of the general assembly to take legislative action to transfer the enforcement duties under the federal Safe Drinking Water Act back to the federal environmental protection agency if the concerns of the general assembly expressed are not adequately addressed.”

2. *Colorado Water Wells*

Colorado regulates the installation of water wells within the state. Any user proposing to drill a well extracting tributary ground water must make an application to the State Engineer for a permit to construct and operate the well. Colorado law requires that any well must be drilled, repaired, or abandoned according to certain minimum standards set by the legislature.³³ Specifically, it regulates water well construction and pump installation. Any person who is engaged in the business of well drilling or the installation of pumping equipment must obtain a license from the State Board of Examiners of Water Well Construction.³⁴ However, the law exempts private landowners from the license requirement who construct wells entirely on their own land using their own equipment.³⁵ The minimum standards imposed by state law include that:

- Water wells must be located in such a manner that the well and its surroundings can be kept in a sanitary condition;
- Wells must be adequate in size to permit the installation of pumping equipment to produce the volume of water sought to be obtained in compliance with the well permit; and

Wells must be constructed or abandoned in such a manner as to maintain natural protection against pollution of water-bearing formations and to exclude known sources of contamination.³⁶

³³ § 37-90-109.

³⁴ § 37-91-105.

³⁵ § 37-91-106(3).

³⁶ § 37-91-110.

Producer Note: Because of the arid nature of much of the state, Colorado has very strict rules regulating water usage. With a few minor exceptions, all waters of the state are administered according to the prior appropriation doctrine (first in time, first in right). To administer this system of water appropriation, Colorado has been divided into seven major river basins and the Colorado Division of Water Resources (CDWR) has an office in each basin. Producers who want to drill wells on their property or expand their use of surface water should work closely with the Colorado Water Quality Control Division (WQCD) and the CDWR. To drill a well, one must acquire water rights from the State Engineer or the Water Court located within the particular water district.

Colorado is a pure appropriation state, in that, there is a complete integration of surface and groundwater. Groundwater law is governed by the Colorado Groundwater Management Act (CGMA). Under the CGMA, a distinction is made between tributary and nontributary ground water. Groundwater which is hydraulically connected to a natural stream is considered tributary and is administered as part of the stream system in accordance with the laws of prior appropriation. Groundwater that is not hydraulically connected to a natural stream is considered nontributary and is administered based on overlying land ownership. In addition, water found in designated basins has been removed from the jurisdiction of the State Engineer and the Water Court to the Ground Water Commission.

Non-tributary groundwater is water not found within any designated groundwater basin and is not hydrologically connected to natural streams. The doctrine of prior appropriation does not apply to nontributary groundwater. The water is appropriated based on the ownership of the overlying land. There is a rebuttable presumption that all groundwater in Colorado is tributary to a natural stream. Thus, any user proposing to drill a well extracting tributary groundwater must make an application to the State Engineer for a permit to construct and operate the well.

III. AIR QUALITY

A. Colorado Air Quality Laws and Regulations

Colorado enacted the Colorado Air Pollution Prevention and Control Act (CAPPCA) to regulate air pollution in the state.³⁷ Regulations promulgated pursuant to the CAPPCA are adopted by the Colorado Air Quality Control Commission (CAQCC). However, the CAPPCA is administered by the Colorado Air Quality Control Division (CAQCD). The CAQCC promulgates and adopts emission control regulations which may or may not require the use of effective practical air pollution controls to deal with air pollution.³⁸

The CAQCD regulates air pollution through a permitting system. The three types of permitting programs are the:

³⁷ COLO. REV. STAT. ANN. § 25-7-102 (West 1997).

³⁸ § 25-7-109.

- Air Pollution Emission Notice(APEN);
- Construction Permit Program; and
- Operating Permit Program

The APEN is a form used by a business to report the emission of air pollutants in urban areas to the Air Pollution Control Division. An APEN must be submitted:

- When uncontrolled actual emissions that have not been reported exceed 1 ton per year for criteria pollutants or exceed the appropriate threshold for hazardous air pollutants;
- Prior to installation or replacement of new or existing pollution control equipment;
- Prior to any change in ownership of a facility;
- When there is a change in a permit limit or condition impacting emissions; and
- When a significant change in annual actual emissions occurs.

There are basically three levels to the APEN: (a) those not required to file an APEN, (b) those required to file an APEN but not required to get a permit, and (c) those required to file an APEN and eventually required to get an air pollution control permit.³⁹

Despite the sweeping coverage of the APEN requirements, agriculture is generally exempt. Colorado Air Regulation #3 exempts: “agricultural activities from APEN requirements.” What is exempt includes those agriculture operations normally conducted at the farm or ranch such as cultivating and harvesting. However, the exemption does not include grain elevator operations, feed mill operations or other post-harvesting activities normally not conducted on the farm or ranch. These exemptions were established by the Colorado Air Quality Control Commission and were not based on any specific statutory language regarding agriculture.

The Construction Permit Program requires air pollution permits for new or modified sources that emit pollution into the atmosphere. A construction permit is issued for the life of the project unless modified. The specific rules for regulating this pollution will depend on whether the source is located within a clean (attainment) area or a dirty (non-attainment) area. Individuals responsible for any construction site should contact the Air Pollution Control Division to determine whether their site is a potential source of air pollution and whether it is located in an attainment or non-attainment area.

³⁹ Colorado Air Quality Control Commission Reg. No. 3.

The Operating Permit Program requires a permit for all pollution sources that have the potential to emit, on a yearly basis, more than 100 tons of a regulated pollutant. Individuals required to apply for an operating permit include any source which emits or might emit any single hazardous air pollutant (HAP) or 25 tons/year for a combination of HAP's or 100 tons per year of a criteria pollutant which includes, nitrogen, or sulfur compounds, carbon monoxide, particulate matter, or volatile organic compounds.

Pollution is broadly defined by the Act as any fume, smoke, particulate matter, vapor, gas, or any combination thereof which is emitted into or otherwise enters the atmosphere, including, but not limited to, any physical, chemical, biological, or radioactive substance. CAQCC regulates:

- Visible pollutants;
- Emissions of sulfur oxides, sulfuric acids, hydrogen sulfide, nitrogen oxides, carbon oxides, hydrocarbons, fluorides, and any other chemical substance;
- Odors, except for those odors originating from livestock feeding operations;⁴⁰ and
- Open burning activity.

The emissions control regulations require that no person may cause or allow the emission of odorous air contaminants from any single source to result in detectable odors. The CAQCD may cite violators of emissions control regulations. However, certain favorable provisions are made for agriculture.

Despite the statutory allowance for broad regulatory powers, the CAQCC may not regulate emissions from agricultural production. When the source of emission is an agricultural operation, no violation may be cited by the CAQCD provided that the best practical treatment, maintenance, and control currently available are utilized in order to maintain the lowest possible emission (CAQCC Reg. No.2). The Act defines “agricultural production” as:

- Farming;
- Seasonal crop drying;
- Animal feeding; and
- Pesticide application.⁴¹

⁴⁰ COLO. REV. STAT. ANN. § 25-7-109(2).

⁴¹ § 25-7-109(8).

While nearly all forms of agricultural production emissions resulting from farming, seasonal crop drying, animal feeding, and pesticide application may not be regulated by the CAQCC, the Commission may regulate emissions from agricultural production if they are considered “major stationary sources,” defined as “any stationary facility or source of air pollutant which directly emits, or has the potential to emit, one hundred tons per year or more of any pollutant” by federal law.⁴²

Although CAQCC does not have authority to regulate odors from livestock feeding operations, it appears that the legislation⁴³ passed by Colorado citizens in November 1998, may allow housed commercial swine feeding operations to be sued by any person due to the odors that the facility emits. Under the statute, any person who is adversely affected by a HCSFO may file a civil action to enforce the provisions of the statute, which has as one of its purposes the protection of Colorado’s air quality, i.e. odors.

In summary, agricultural operations will not be required to obtain air quality permits from the state. However, to insure an operation is in compliance with all air quality requirements, owners and operators should contact the Air Pollution Control Division to insure they may not be considered “major stationary sources.”

<p>Producer Note: Colorado farmers and ranchers may find helpful guidance from the publication: <i>Consult Permitting Made Easy</i> by Colorado Air Pollution Control Division.</p>
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IV. SOLID WASTE AND HAZARDOUS WASTE

B. Colorado Solid Waste and Hazardous Waste Laws and Regulations

<p>Producer Note: While most farmers and ranchers are not generators, transporters, or disposers of solid waste, it is important to check with state officials concerning the definitions of solid waste to determine whether an operation's activities could be regulated under state solid and hazardous waste statutes.</p>

1. *Treatment, Storage, Transportation and Disposal of Hazardous Wastes*

The Colorado Hazardous Materials and Waste Management Division (WMD) administers the regulation of solid and hazardous wastes in the state. The Division shares the responsibility of siting, permitting, and regulation of solid waste disposal sites with local governments who also have jurisdiction. Hazardous waste is defined by the Hazardous Waste Siting Act.⁴⁴ Hazardous waste

⁴² 42 U.S.C. § 7602(j) (1994).

⁴³ COLO. REV. STAT. ANN. § 25-8-501.1 (West 1999).

⁴⁴ COLO. REV. STAT. ANN. § 25-15-101(6).

does not include agricultural waste from the raising of crops or animals, including animal manures which are returned to the soil as fertilizers or soil conditioners. Irrigation return flows are also specifically exempted.

Anyone who operates a facility for solid waste disposal where processing, treatment, or final disposal of a solid waste occurs must obtain a Certificate of Designation(CoD).⁴⁵ Exceptions to this requirement include:

- Persons other than a governmental unit who dispose of their own waste on their own property as long as the site complies with state regulations and is not a public nuisance;
- Persons engaged in mining operations under a permit issued by the WMD of Minerals and Geology of the Colorado Department of Natural Resources;
- Recycling operations;
- Persons using processed sludge for beneficial purposes as long as the sludge meets all State Board of Health and CDA requirements; and
- Solid waste transfer facilities.

To obtain a CoD, persons proposing a facility to dispose of solid waste must apply to a particular government entity. In an unincorporated area of any county, the person must apply with the board of county commissioners in which the site is to be located. If within the boundaries of a municipality, the person must apply to the governing body of the municipality in which the site is to be located.

Rules and regulations relating to the permitting and routing of hazardous materials transportation have been promulgated by the Chief of the Colorado State Patrol.⁴⁶ However, these rules and regulations do not apply to farm machinery exempted by statute, agricultural distribution equipment attached to or conveyed by such farm machinery, or vehicles used to transport to or from the farm or ranch site products necessary for agricultural production, except when the vehicles are used in any commercial business other than agriculture.⁴⁷

2. Dead Animal Disposition

Under Colorado law, the county board of health is responsible for making regulations for nuisances which are sources of health and causes of sickness within its respective limits. Within

⁴⁵ 6 COLO. CODE REGS. § 1007-2 (1997).

⁴⁶ COLO. REV. STAT. ANN. § 42-20-108(2) (West 1997).

⁴⁷ § 42-20-108(4).

their respective counties, agriculture producers must assume special responsibilities when disposing of dead animals. According to state law, no person shall put any dead animal or part of the carcass of any dead animal into any lake, river, creek, pond, road, street, alley, lane, lot, field or meadow, common, or in any place within one mile of the residence of any person, unless the same and every part thereof is burned or buried at least two feet underground.⁴⁸ If an owner of the dead animal knowingly permits the disposed animal to remain in a position in violation of the above requirements, they may be found guilty of a misdemeanor. Penalties include:

- Punishment by a fine of up to fifty dollars together with the costs of prosecution; and
- Imprisonment in the county jail for up to ten days for failure to pay the fine.

3. *State Storage Tank Laws*

Leakage of some substances from underground and aboveground storage tanks constitutes a potential threat to the waters and the environment of Colorado. Statutes have been promulgated establishing a program for the protection of the environment and public health to prevent and mitigate the contamination of the subsurface soil, groundwater, and surface water which may result from the leakage from underground storage tanks.⁴⁹

The Department of Labor and Employment administers regulation of storage tanks.⁵⁰ The owner of any aboveground or underground storage tank system which contains regulated substances defined by federal law⁵¹ must register the tank with the state inspector of oils within thirty (30) days after the first day the tank is used.⁵² Registrations must be renewed annually. The state inspector of oils may issue a notice of violation to any person believed to be in violation of the law. If the individual does not abide by the notice of violation, the inspector may issue an enforcement order. A failure to abide by the enforcement order may result in the violator paying a civil penalty not to exceed five thousand dollars (\$5,000) per tank for each day of the violation.⁵³

⁴⁸ § 25-1-612 (West 1998).

⁴⁹ § 8-20.5-201 (West 1997).

⁵⁰ § 8-20.5-108(b).

⁵¹ 42 U.S.C. A. § 9601(4) (1998).

⁵² COLO. REV. STAT. ANN. § 8-20.5-102(1) (West 1997).

⁵³ § 8-20.5-107(6).

a. Aboveground Storage Tanks

Aboveground Storage Tanks (ASTs) do not include:⁵⁴

- A wastewater treatment tank system that is part of a wastewater treatment facility;
- Equipment or machinery that contains regulated substances for operation purposes;
- Farm and residential tanks;
- Aboveground storage tanks located at natural gas pipeline facilities that are regulated under state or federal natural gas pipeline acts;
- Aboveground storage tanks associated with natural gas liquids separation, gathering, and production;
- Aboveground storage tanks used to store heating oil for consumptive use on the premises where stored; and
- Aboveground storage tanks used to store flammable and combustible liquids at mining facilities and construction and earthmoving projects, including gravel pits, quarries, and borrow pits, where in the opinion of the state inspector of oils, tight control by the owner or contractor and isolation from other structures make it unnecessary to meet the requirements of state law.

b. Underground Storage Tanks

Underground storage tanks (USTs) are defined as tanks and connected underground pipes which store regulated substances that are used to contain an accumulation of regulated substances where the volume of the tank and associated pipes is ten (10) percent or more beneath the surface of the ground. However, USTs do not include:

- Any farm or residential tank with a capacity of one thousand one hundred (1,100) gallons or less used for storing motor fuel for noncommercial purposes;
- Any tank used for storing heating oil for consumptive use on the premises where stored;
- Any surface impoundment, pit, pond, lagoon, or landfill;
- Any storm-water or waste-water collection system;

⁵⁴ § 8-20.5-101(1).

- Any flow-through process tank;
- Any liquid trap or associated gathering lines directly related to oil or gas production and gathering; and
- Any storage tanks located in an underground area, such as a basement, cellar, mine-working, drift, shaft, or tunnel area, if the tank is situated upon or above the surface of the floor.⁵⁵

V. PESTICIDES AND CHEMIGATION

A. Colorado Pesticide and Chemigation Laws and Regulations

Producer Note: Colorado, like most states, has laws designed to control the use of pesticides. The laws are designed to closely monitor the distribution and ultimate use of these substances within the state. In Colorado, EPA’s Regional Office certifies producers of agricultural commodities for the use of restricted-use pesticides.

Colorado recognizes the valuable function that pesticides play in controlling insects, rodents, weeds and other pests which may destroy crops or livestock.⁵⁶ However, pesticides contain toxic substances that might pose a serious risk to the public health. Therefore, Colorado regulates pesticides, commercial pesticide applicators, and the practices of pesticide application through chemigation. Colorado accomplishes this task by regulating everything from the registration, labeling, transportation, distribution, storage and commercial application to the disposal of any pesticide and of certain devices. The regulation of pesticides and commercial pesticide application is accomplished through three particular acts: The Pesticide Act,⁵⁷ Pesticide Applicators’ Act⁵⁸ and the Colorado Chemigation Act.⁵⁹

The Colorado Water Quality Control Act (WQCA), as discussed above, deals specifically with pollution from agricultural chemicals, defined as pesticides and commercial fertilizers. WQCA has stated that the public policy of the state is to protect groundwater and the environment from impairment or degradation due to the improper use of agricultural chemicals while allowing for their

⁵⁵ § 8-20.5-101.

⁵⁶ COLO. REV. STAT. ANN. § 35-10-102 (West 1997).

⁵⁷ §§ 35-10-101 to 35-9-128.

⁵⁸ §§ 35-10-101 to 35-10-128.

⁵⁹ §§ 35-11-101 to 35-11-117.

proper and correct use.⁶⁰ As such, the Commissioner of the Colorado Department of Agriculture (CDA) has been delegated specific powers and duties with regard to the implementation of the legislative declaration to deal with pollution from agricultural chemicals. Those powers vested in the CDA include the power to make rules for: (1) facilities for the storage of pesticides in bulk, (2) mixing and loading areas where certain amounts of liquid and dry pesticides and commercial fertilizers and other active pesticides are handled. These amounts are specified by statute. However, no rule made pursuant to this power is applicable to any field mixing and loading of agricultural chemicals.⁶¹ Therefore, for the agriculture producer who limits his/her dealings with pesticides to field mixing and loading, there is no need be concerned with rules which are relevant to pesticide storage facilities.

1. Colorado Pesticide Act

The Colorado Pesticide Act (CPA) is administered by the CDA. It regulates the registration, labeling, transportation, distribution, storage, use, and the disposal of any pesticide and of certain pesticide devices in the state. The CPA specifically regulates the marketing aspects of pesticides and fertilizers much like the regulations for marketing and labeling of seeds.

a. Registration and Licensure

The CPA requires all pesticides and pesticide devices which are distributed in the state to be registered with the CDA.⁶² Any person who acts as a restricted-use pesticide dealer must obtain a valid pesticide dealer license which is issued by the CDA.⁶³ Upon obtaining a license, the licensed dealer will be made aware of the special duties required such as proper record keeping.⁶⁴

b. Prohibited Acts

It is unlawful under the CPA for any person to distribute within the state any pesticide or device which has not been registered pursuant to the provisions of the CPA. The following are also prohibited under the CPA:

- The distribution or delivery of any pesticide with labeling which is inconsistent with the representations made in connection with its registration;

⁶⁰ § 25-8-205.5.

⁶¹ § 25-8-205.5(b)(1).

⁶² § 35-9-106.

⁶³ § 35-9-114(1).

⁶⁴ § 35-9-117.

- The distribution or delivery of any pesticide which is misbranded or adulterated or any device which is misbranded or adulterated;
- The distribution or delivery of any pesticide in adulterated containers;
- The distribution or delivery of any pesticide which is any container which is unsafe due to damage;
- The distribution, delivery or use of any pesticide to any person required by law to be certified, licensed, or have a permit to sue or purchase pesticides in the state; and
- The performance of any act or promoting oneself as qualified to perform any act without possessing a valid license to do so for which licensure as a pesticide dealer is required.

Any violation of the CPA may result in civil penalties not to exceed \$5,000 per violation and also may result in criminal charges ranging from a class one (1) misdemeanor to a class three (3) misdemeanor. Each day counts as a separate violation.⁶⁵

2. Colorado Pesticide Applicator's Act

The Colorado Pesticide Applicator's Act (CPAA) is an act which regulates certain persons who apply pesticides.⁶⁶ Colorado issues applicator licenses in the following classifications:

- Qualified supervisor;
- Certified operator;
- Commercial applicator;
- Limited commercial applicator; and
- Public applicator.

All licensed qualified supervisors and operators must demonstrate competency in the responsible use of pesticides by successfully completing the appropriate pesticide applicator examination.⁶⁷

⁶⁵ COLO. REV. STAT. ANN. §§ 35-9-124, -125 (West 1997).

⁶⁶ § 35-10-101.

⁶⁷ § 35-10-115.

The CPAA requires that certain applicators of pesticides perform certain duties in accordance with state law. Important to the agricultural producer is the commercial applicator and the limited commercial applicator. A commercial applicator is defined as any person who engages in the business of applying pesticides or operating a device for hire.⁶⁸ Specifically, a person who is classified as a commercial applicator must obtain and possess a valid commercial applicator business license issued by the CDA. Second, the commercial applicator is mandated to meet certain record keeping requirements.⁶⁹ The limited commercial applicator is any person who applies pesticides only on property owned or leased by that person or that person's employer in the course of conducting a business. The limited commercial applicator is not required to obtain a license.⁷⁰ However, both the commercial applicator and the limited commercial applicator must keep records of each pesticide application for a period of three (3) years after the date of application.⁷¹

Unlawful acts under the CPAA include, but are not limited to:⁷²

- Performing acts without a license which require licensure;
- Promoting oneself as qualified to perform acts for which licensure is required;
- Refusing to comply with a cease and desists order issued by the CDA;
- Using, storing, or disposing of pesticides, pesticide containers, rinsates, or other related materials, or to supervise or recommend such acts, in a manner inconsistent with labeling directions of the pesticide;
- Using or recommending the use of any pesticide or device not registered with the CDA inconsistent with the restrictions of the CDA;
- Using any device or directing the use of a pesticide without providing the appropriate supervision of a qualified supervisor licensed in that class or subclass of pesticide application; and
- Failing to maintain records required by the CPAA.

The CPAA imposes criminal and civil penalties for its violation. A violation of any part of the CPAA is subject to a civil penalty fine not to exceed one thousand dollars (\$1,000) per violation.

⁶⁸ § 35-10-103(2).

⁶⁹ § 35-10-111.

⁷⁰ § 35-10-109.

⁷¹ § 35-10-111.

⁷² § 35-10-117.

A second violation results in the fine being doubled with a potential criminal penalty as a class one (1) misdemeanor.⁷³

Despite these broad regulations of pesticide applicators, the provisions of the Colorado Pesticide Applicator's Act do not apply to any person who applies pesticides for the purposes of producing any agricultural commodities on property owned or rented by him or his employer or, if such acts are performed without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person.⁷⁴

3. Colorado Chemigation Act

The Colorado Chemigation Act (CA) requires persons who use chemigation as a type of irrigation practice to obtain a permit from the Colorado Department of Agriculture (CDA).⁷⁵ Chemigation is an irrigation technique whereby chemicals, including fertilizers, pesticides, and insecticides, are applied to crops or land mixed in water through a closed irrigation system. A closed irrigation system is a system which uses a device or a combination of devices such as a pipe, hose, or other conduit which connects directly to any source of groundwater or surface water and applies that water for agriculture purposes. Chemigation occurs when the water in the closed irrigation system is mixed with fertilizers, pesticides, or insecticides and is then applied for agriculture purposes.

If an agricultural producers wishes to use chemigation as an irrigation technique, they must obtain a permit from the CDA's Division of Plant Industry. In the application for the chemigation permit, the applicant is required to certify that the irrigation system for which he/she is seeking a permit includes properly installed and functioning equipment in accordance with state law. A person who utilizes the chemigation irrigation technique without a permit may be held both criminally and civilly liable. If the agriculture producer utilizes chemigation without a permit he/she commits a class six (6) felony and may be punished by state law and fines up to one-thousand dollars (\$1,000).

⁷³ COLO. REV. STAT. ANN. §§ 35-10-122, -123 (West 1997).

⁷⁴ § 35-10-104(2)(a).

⁷⁵ § 35-11-103(1).

VI. PROTECTION OF WILDLIFE

A. Colorado Wildlife Protection Laws and Regulations

Producer Note: Many states have additional measures which either enhance protections under federal laws or address issues peculiar to wildlife found within the state. These states also may address common problems caused by wildlife. Colorado has laws protecting wildlife.

1. Colorado Wildlife Laws in General

The Colorado Nongame, Endangered, or Threatened Species Conservation Act⁷⁶ is a statutory scheme to protect endangered and threatened species. Endangered species means any species or subspecies of native wildlife whose prospects for survival or recruitment within Colorado are in jeopardy as determined by the Colorado Wildlife Commission (CWC).⁷⁷ The CWC serves as the primary governing body over wildlife in the state. The Division of Wildlife serves as field-staff for the implementation of Colorado wildlife laws. The CWC regulates the taking, possession and use of all wildlife in the state.⁷⁸

The following acts are prohibited by Colorado law dealing with protected wildlife that is endangered or threatened:

- Taking protected wildlife;
- Possessing protected wildlife;
- Transporting, exporting, or shipping protected wildlife; and
- Selling or offering for sale protected wildlife.⁷⁹

Taking means to acquire possession of wildlife but does not include killing or wounding by a motor vehicle accident.⁸⁰ It is illegal for any person to hunt, take, or possess any wildlife that is

⁷⁶ COLO. REV. STAT. ANN. § 33-2-101 (West 1997).

⁷⁷ § 33-1-106.

⁷⁸ § 35-10-101.

⁷⁹ § 33-2-105(3), (4).

⁸⁰ § 33-1-102(43),

the property of Colorado without a permit.⁸¹ All wildlife within the state which is not lawfully acquired and held by private ownership is declared to be the property of Colorado.⁸² Any person, regardless of age, who hunts, takes, or possesses wildlife in Colorado must obtain a valid license and keep the license on his or her person when hunting, taking or possessing the wildlife. A person who fails to abide by this requirement is guilty of a misdemeanor. He or she may be punished by a fine or imprisonment, or both. Moreover, license suspension points may be assessed against the person and the person's license may be suspended for one year, or in some cases, for life.

Other unlawful acts with respect to wildlife include:

- Possessing live wildlife when required by the CWC to have a license for the possession;
- Unlawfully altering, transferring, selling, loaning, or assigning one's lawfully acquired license to another;
- Purchasing or obtaining any hunting license without a hunter education certificate issued by the Colorado Wildlife Division (for persons born after January 1, 1949);⁸³
- Possessing in Colorado any nonnative or exotic wildlife except in accordance with certain regulations of the CWC;⁸⁴
- Failing to permit the inspection of personal identification, licenses, firearms, or wildlife while hunting, trapping, fishing or possessing wildlife for any purpose;
- Failing to stop and produce licenses, firearms, and wildlife when encountering wildlife check stations, regardless of whether in possession of wildlife or not;⁸⁵
- Failing to void a license or a carcass tag as required;
- Attempting to elude a wildlife manager or peace officer after having received a visual or audible signal to stop;

⁸¹ § 33-6-109(1).

⁸² § 35-1-101(2).

⁸³ § 33-6-107(8).

⁸⁴ § 33-6-109(4).

⁸⁵ § 33-6-111(2).

- Failing to maintain evidence of gender and species on the species possessed, hunted, or trapped;⁸⁶
- Selling or purchasing any wildlife or soliciting another person another to illegally hunt or take any wildlife for commercial gain;⁸⁷
- Importing any live wildlife into Colorado without obtaining an importation license;⁸⁸
- Releasing or knowingly allowing the escape of live native or nonnative or exotic wildlife in Colorado in violation of CWC rules;
- Advertising, conducting, promoting, or participating in any contest involving the killing of any big game or the display for comparison of big game;⁸⁹
- Failing to make a reasonable attempt to locate and take into possession wildlife that the person wounded or may have wounded;⁹⁰
- Hunting, trapping or taking wildlife (a) outside of season, (b) without proper fluorescent orange garments, (c) in a careless manner or (d) on privately owned land without first obtaining permission from the owner or person in possession of such land;⁹¹ and
- Posting any public lands or lands not held within the individual's exclusive control as privately owned lands.

Taking wildlife which is the property of Colorado is either a misdemeanor or a felony. For example, the taking of animals which are listed as endangered or threatened is subject to a fine of up to one-hundred thousand dollars (\$100,000) and imprisonment of up to one (1) year in the county jail, or both, and an assessment of twenty (20) license suspension points.⁹² For violations, the CWC may suspend any or all license privileges for a period of one year to life.

⁸⁶ COLO. REV. STAT. ANN. § 33-6-112 (West 1997).

⁸⁷ § 33-6-113(1).

⁸⁸ § 33-6-114(2).

⁸⁹ § 33-6-118(9).

⁹⁰ § 33-6-119(1)(a).

⁹¹ §§ 33-6-116, -120 to -122.

⁹² § 33-6-109(3)(a).

2. *Damage to Property by Wildlife*

Despite the licensure requirements to take or hunt wildlife in the state of Colorado, certain provisions allow the taking of wildlife without a license. Any person may hunt, trap,⁹³ or take certain species without a license on lands owned or leased by the person if the species is causing damage to crops, real or personal property, or livestock.

The following species may be hunted or taken without a license if they are causing damage to crops, real or personal property, or livestock:

- Certain bird species including black-billed magpies, common crows, starlings, English or house sparrows, common pigeons; and
- Other species including coyotes, bobcats, red foxes, raccoons, jackrabbits, badgers, marmots, prairie dogs, pocket gophers, Richardson's ground squirrels, rock squirrels, thirteen-lined ground squirrels, porcupines, crayfish, tiger salamanders, muskrats, beavers, exotic wildlife, and common snapping turtles.⁹⁴

In addition, any person may kill skunks or rattlesnakes when necessary to protect life or property.

Big game animals may not be taken or killed even if they cause damage to property. Big game animals include elk, white-tailed deer, mule deer, moose, rocky mountain bighorn sheep, rocky mountain goats, pronghorn antelopes, black bears, and mountain lions. If a landowner suffers damage to his orchards, nurseries, crops under cultivation, or harvested crops by big game, he may be able to make a claim to the state for compensation.⁹⁵ When an individual suffers damage to livestock forage caused by big game, he or she must notify the Colorado Division of Wildlife (CDW) of the damages within ten (10) days after the discovery of the damage. Proof of loss forms must then be filed within ninety (90) days after the notification of the CDW. The CDW will determine whether the claim is valid. If there is a disagreement regarding the claim, the entire matter may be submitted to arbitration within ten (10) days.⁹⁶

VII. ENFORCEMENT OF STATE ENVIRONMENTAL LAWS

As with federal environmental laws, persons who violate the regulatory requirements of state environmental laws face substantial penalties. The specific penalties vary to some degree with each

⁹³ In 1996, voters adopted a constitutional amendment limiting the use of leghold or body-gripping traps.

⁹⁴ COLO. REV. STAT. ANN. § 33-6-107(9) (West 1997).

⁹⁵ § 33-3-104(d).

⁹⁶ § 33-3-204(1), (2)(a).

statute. However, they generally include both civil and criminal fines. Additional fines can be assessed for each day that an operation remains in violation. For severe or repeated violations, jail sentences can be imposed. State agencies can also bring proceedings, either in court or before an administrative tribunal, to enjoin a producer's activities and force compliance with the statute. In some cases, citizens may also file suits to enforce the requirements of the environmental laws. As with the federal statutes, state laws afford producers the right to administrative and/or judicial review of agency decisions.

VIII. OTHER STATE STATUTES AFFECTING AGRICULTURE

Producer Note: Many other state statutes have the potential of impacting agricultural operations and their relationship to the environment. The following is a brief discussion of state laws in Colorado.

A. Farmland Preservation

1. Zoning and Planning

Producer Note: Agricultural operations frequently are controlled by local planning or zoning board activities. Since it is not possible to outline each local area's requirements, a producer must check with local boards to determine local planning and zoning regulations which may affect an operation.

Zoning legislation⁹⁷ authorizes counties and municipalities to divide their jurisdictions into districts or zones and to permit or restrict the uses of land and structures within the established zones. The agricultural use of land may be regulated and conditions may be imposed on the use of the land, including some environmental restrictions. Moreover, building codes may be established by counties and municipalities; however, buildings or structures used for the sole purpose of providing shelter for agricultural implements, farm products, livestock or poultry may be excepted from county building codes.⁹⁸

⁹⁷ COLO. REV. STAT. ANN. §§ 30-28-101 *et seq.*(West 1990 & Supp. 1998)(county), 31-23-301 *et seq.*(West 1990 & Supp.1998) (city).

⁹⁸ § 30-28-201.

2. Conservation Easements

Producer Note: Many states have passed laws allowing preservation or conservation of agricultural land through the use of easements. When easements are used for these purposes, the law frequently has certain requirements relating to the creation, compensation and enforcement of the easement.

Colorado has adopted legislation which permits conservation easements.⁹⁹ Under the provisions, a “conservation easement in gross” can be created which establishes a perpetual -- unless otherwise stated in the creating instrument -- interest in real property that is freely transferable in whole or in part for certain purposes. The general purposes for the easements are:

- Retaining or maintaining the property, including improvements, in a natural, scenic or open condition;
- Retaining or maintaining the property as a wildlife habitat or for agricultural, horticultural, recreational, forest or other use;
- Maintaining the property in a condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity; or
- Conserving or preserving buildings, sites or structures having historical, architectural or cultural interests or value.

The easements are created by the record owners of the land by a deed or other written agreement or can be created through a grant to a governmental entity or charitable organization which has been in existence for at least two years prior to receipt and is tax exempt under Internal Revenue Code section 501(c)(3). Additionally, the agreement must be properly recorded to be valid. Moreover, the easements are subject to assessment, taxation, or exemption per applicable laws.

B. Nuisance and Right-to-Farm

Producer Note: Many producers are confronted with concerns of local residents. These problems may originate from dust or odor generated by the operation or may result from a lack of knowledge of what is involved in an agricultural operation. While not specifically an area where the state or federal authorities may become involved, court actions can be brought against the operation. These actions are usually based on a nuisance theory, and in some cases, a right-to-farm defense may apply.

⁹⁹ §§ 38-30.5-101 *et seq.* (West 1990).

1. Nuisance

Generally a nuisance is any activity or use of property that causes an annoyance, inconvenience, injury or interference with another.¹⁰⁰ A nuisance can be either public or private. A public nuisance is “doing or [failing] to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public.”¹⁰¹ A private nuisance results from a substantial invasion of one’s use and enjoyment of their home measured by the standard of the effect upon a normal person in the same or similar circumstances.¹⁰² State law gives the injured parties the right to sue the person causing or allowing the nuisance.

Colorado law specifically defines certain activities as public nuisances.¹⁰³ Additionally, Colorado has declared noise, in excess of certain limits, as a public nuisance.¹⁰⁴ Although exceptions to the noise statute exist, agricultural operations are not included in the exceptions. Under the statute, any resident of Colorado may sue to abate, prevent, and enjoin the person or operation that is causing the excessive noise.

2. Right-to-Farm

In order to reduce the loss of agricultural resources in the state, Colorado has enacted legislation that limits the circumstances under which agricultural operations can be deemed to be a nuisance.¹⁰⁵ Although not offering absolute protection, the statute declares that an agricultural operation is not a private or public nuisance due to any changed conditions in or about the operation if:

- The agricultural operation has been in operation for more than one year; and
- The operation was not a nuisance at the time it began.

¹⁰⁰ State Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994).

¹⁰¹ *Id.*

¹⁰² Staley v. Sagel, 841 P.2d 379 (Colo. 1992).

¹⁰³ COLO. REV. STAT. ANN. §§ 16-13-301 *et seq.*

¹⁰⁴ §§ 25-12-101 *et seq.*

¹⁰⁵ §§ 35-3.5-101 *et seq.*

However, the protection does not apply when:

- The operation is being conducted in a negligent manner;
- There is a change in the operation that results in a private or public nuisance; or
- The operation substantially increases in size.

C. Noxious Weeds

Under the Colorado Noxious Weed Act,¹⁰⁶ the general assembly has mandated the governing bodies of counties and municipalities to include, as part of their duties, plans to manage noxious weeds. Under the Act, the local governing bodies have the right to enter both public and private property in order to inspect for noxious weeds. If noxious weeds are present, the local governing body has the authority to notify the landowner or occupant of the presence of the weeds and require the owner or occupant to manage the weeds by the best available control measures.

¹⁰⁶ COLO. REV. STAT. ANN. §§ 35-5.5-101 *et seq.*

Appendix A - Agencies

Producer Note: State and federal agencies are available to answer questions regarding environmental matters and a producer's compliance with environmental laws and regulations. The following is a list of organizations which should be able to answer questions or provide materials for a producer.

Colorado Agencies:

Colorado Department of Agriculture

700 Kipling Street, Suite 4000

Lakewood, CO 80215-5894

(303) 239-4100

(303) 239-4125 fax

<http://www.ag.state.co.us/>

Divisions:

Animal Industry

(303) 239-4158

(303) 239-4164 fax

Brands Inspection

(303) 294-0895

(303) 294-0918 fax

Markets

(303) 239-4114

(303) 239-4125 fax

Plant Industry

(303) 239-4140

(303) 239-4177 fax

Rocky Mt. Regional Animal Health Lab

(303) 844-3185

(303) 458-7857 fax

Colorado Department of Natural Resources

131 Sherman Street, Room 718

Denver, CO 80203

(303) 866-3311 or (800) 536-5308 toll free

(303) 866-2115 fax

<http://www.dnr.state.co.us/edo/>

Divisions:

Geological Survey

(303) 866-2611

(303) 866-2461 fax

Minerals & Geology

(303) 866-3567

(303) 832-8106 fax

Oil & Gas Conservation Commission

(303) 894-2100

(303) 894-2109 fax

Parks

(303) 866-3437

(303) 866-3206 fax

State Soil Conservation Board

(303) 866-3351

(303) 832-8106 fax

Water Resources

(303) 866-3581

(303) 866-3589 fax

Water Conservation Board

(303) 866-3441

(303) 866-4474 fax

Wildlife

(Located at 6060 Broadway)

(303) 291-7208

(303) 294-0874 fax

Colorado Department of Public Health & Environment

4300 Cherry Creek Drive South

Denver, CO 80246-1530

(303) 692-2035

(303) 691-1971 fax

<http://www.cdphe.state.co.us/>

Divisions:

Air Quality

(303) 692-3478

(303) 691-7702 fax

E-mail: comments.apca@state.co.us

Air Pollution Control

(303) 692-3100

(303) 782-5493 fax

Disease Control & Environmental

(303) 692-2700

(303) 782-0904 fax

Hazardous Materials & Waste Management

(303) 692-3320 or (888) 569-1831 toll free

(303) 759-5355 fax

Pollution Prevention

(303) 692-2975

(303) 782-4969 fax

Water Quality Control

(303) 692-3500

(303) 782-0390 fax

E-mail: comments.wqca@state.co.us

District Offices for Water Quality:

Grand Junction District

(970) 248-7150

Pueblo District

(719) 545-4650

Steamboat Springs District

(970) 879-7479

Colorado State University Cooperative Extension

1 Administration Building

Colorado State University

Fort Collins, CO 80523

(970) 491-6281

(970) 491-6208 fax

<http://www.colostate.edu/Depts/CoopExt/>