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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: November 4, 2016

SUBJECT: Rules of the Water Quality Control Commission, Department of Public Health and Environment, concerning the Colorado discharge permit system, 5 CCR 1002-61 (LLS Docket No. 160425; SOS Tracking No. 2016-00302).¹

Summary of Problem Identified and Recommendation

Section 25-8-202 (1)(i), C.R.S., authorizes the Water Quality Control Commission to promulgate rules that are necessary or proper regarding the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S. Section 25-8-502 (1.1)(a) and (1.6), C.R.S., specify that all fees attributable to the animal agriculture sector are to be credited to the animal feeding operations fund. The Commission's Rule 61.15 (c) purports to determine how all annual permit fees are to be credited to various funds. But the Commission did not include the animal feeding operations fund in Rule 61.15 (c). **Because the Commission failed to promulgate rules addressing the crediting of fees to the animal feeding operations fund, we recommend that Rule 61.15 (c) of the**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2017, unless the General Assembly acts by bill to postpone such expiration.

rules of the Commission concerning the Colorado discharge permit system not be extended.

Analysis

1. **The statute requires a portion of annual permit fees to be credited to the animal feeding operations fund, but Rule 61.15 (c), which purports to govern the crediting of all fees to the appropriate funds, fails to specify the crediting of the fees to this fund.**

Section 25-8-502 (1.1)(a) and (1.6), C.R.S., specify that a portion of annual permit fees are to be credited to the animal feeding operations fund:

25-8-502. Application - definitions - fees - funds created - public participation - repeal. (1.1) **For each regulated activity listed in this subsection (1.1), the division may assess an annual permit fee** and a nonrefundable permit application fee for new permits that must equal fifty percent of the annual permit fee. The full amount of the application fee is credited toward the annual permit fee. All such fees must be in accordance with the following schedules:

(a) **The animal agriculture sector includes annual fee schedules** for regulated activities associated with animal feeding operations **as follows:**

(I) General permit: The division shall assess a CAFO an annual permit fee not to exceed two hundred fifty dollars plus four cents per animal unit, based on the CAFO's permitted capacity; except that, from July 1, 2009, through June 30, 2018, the division shall assess a CAFO an annual permit fee not to exceed seven hundred fifty dollars plus nine cents per animal unit, based on the CAFO's permitted capacity.

(II) Individual permit: The division shall assess a CAFO an annual permit fee not to exceed five hundred dollars plus eight cents per animal unit, based on the CAFO's permitted capacity; except that, from July 1, 2009, through June 30, 2018, the division shall assess a CAFO an annual permit fee not to exceed one thousand five hundred dollars plus nine cents per animal unit, based on the CAFO's permitted capacity.

(III) (A) Effective July 1, 2009, through June 30, 2018, the division shall assess an unpermitted CAFO an annual administrative fee, not to exceed six cents per animal unit based upon the CAFO's registered capacity, to cover the direct and indirect costs associated with the environmental agriculture program, including inspections, compliance assurance, compliance assistance, and associated regulatory interpretation and review.

(B) This subparagraph (III) is repealed, effective July 1, 2018.

(IV) (A) Except as otherwise provided in this subparagraph (IV), the division shall assess on each housed commercial swine feeding operation an annual permit fee, not to exceed twenty cents per animal, based on the operation's working capacity, to offset the direct and indirect costs of the program created in section 25-8-501.1.

(B) From July 1, 2009, through June 30, 2018, the division shall assess on each housed commercial swine feeding operation an annual permit fee that shall not exceed twenty-six cents per animal, based on the operation's working capacity, to offset the direct and indirect costs of the program created in section 25-8-501.1. This sub-subparagraph (B) is repealed, effective July 1, 2018.

(C) As used in this subparagraph (IV), "working capacity" means the number of swine the housed commercial swine feeding operation is capable of housing at any one time.

(1.6) There is hereby created the animal feeding operations fund, which consists of all fees collected for regulated activities associated with the animal agriculture sector in paragraph (a) of subsection (1.1) of this section, as well as all fees collected for services provided by the division associated with the animal agriculture sector in subsection (1.3) of this section. The division shall transmit the fees to the state treasurer, who shall credit them to the animal feeding operations fund. Any unexpended and unencumbered moneys remaining in the animal feeding operations fund at the end of any fiscal year remain in the animal feeding operations fund and shall not be transferred or revert to the general fund or any other fund. The general assembly shall annually appropriate the moneys in the animal feeding operations fund to the department of public health and environment for the direct and indirect costs associated with the permitting and oversight of animal feeding operations under this article. [Emphasis added.]

Rule 61.15 (c) purports to be an exhaustive list of how annual permit fees are allocated among the various funds that relate to the discharge permit system:

61.15 PERMIT FEES - GENERAL PROVISIONS

(c) The annual permit fee or interim fee must be paid within the thirty (30) days of receipt of the Division's billing statement. All fees assessed shall be made payable to the Department of Public Health and Environment - Water Quality Control Division. **(All fees collected by the Division shall be credited to the appropriate sector funds:**

- (i) Water Quality Certification Sector Fund as provided in 25-8-502(1.2)(a)
- (ii) Commerce and Industry Sector Fund as provided in 25-8-502(1.5)(a)(I)
- (iii) Construction Sector Fund as provided in 25-8-502(1.5)(a)(II)
- (iv) Pesticides Sector Fund as provided in 25-8-502(1.5)(a)(III)
- (v) Municipal Separate Storm Sewer System Sector Fund as provided in 25-8-502(1.5)(a)(IV)

(vi) Public and Private Utilities Sector Fund as provided in 25-8-502(1.5)(a)(V)

The annual fee is to be used to support the expenses of the clean water program activities of the Division.

It is the intent of the General Assembly as stated in section 25-8-502(1)(c) C.R.S. as amended that a portion of the expenses of the discharge permit system be funded from the general fund, reflecting the benefit derived by the general public. [Emphasis added.]

The Commission has broad, general rule-making authority to promulgate rules that are necessary or proper regarding the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S.:

25-8-202. Duties of commission - rules. (1) The commission shall develop and maintain a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state and, to ensure provision of continuously safe drinking water by public water systems, and, in connection therewith, shall:

(i) Exercise all incidental powers necessary or proper for carrying out the purposes of this article including the powers to issue and enforce rules and orders;

But nothing in §25-8-202 (1)(i), C.R.S., or any of the Commission's other narrower grants of rule-making authority, allows the Commission to promulgate a rule governing the crediting of annual permit fees that omits the fees that are required by statute to be credited to the animal feeding operations fund.

Because §25-8-502 (1.1)(a) and (1.6), C.R.S., specify that a portion of annual permit fees are to be credited to the animal feeding operations fund and Rule 61.15 (c), which purports to govern the crediting of all fees to the appropriate funds, does not specify that any fees are credited to that fund, the Commission has failed to promulgate rules addressing the crediting of fees to the animal feeding operations fund, and Rule 61.15 (c) therefore should not be extended.

Recommendation

We therefore recommend that Rule 61.15 (c) of the rules of the Commission concerning the Colorado discharge permit system not be extended because the Commission failed to promulgate rules addressing the crediting of fees to the animal feeding operations fund.

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