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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: December 5, 2017

SUBJECT: Rules of the Commissioner of Agriculture, Plant Industry Division, Department of Agriculture, concerning Rules and Regulations Pertaining to the Administration and Enforcement of the Pesticide Applicators' Act, 8 CCR 1203-2 (LLS Docket No. 170397; SOS Tracking No. 2017-00284).¹

Summary of Problem Identified and Recommendation

Section 24-4-103 (12.5)(a), C.R.S., authorizes agencies to adopt rules that incorporate by reference certain items, including federal regulations, if the rules meet listed requirements. But the Commissioner's Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d), which attempt to incorporate various federal regulations, do not comply with the statutory requirements. **Because these rules conflict with the statute, we recommend that Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d) of the rules**

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, 2018, unless the General Assembly acts by bill to postpone such expiration.

of the Commissioner of Agriculture Pertaining to the Administration and Enforcement of the Pesticide Applicators' Act not be extended.

Analysis

1. Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d) all attempt to incorporate various federal regulations, but none of them comply with the statutory requirements for incorporation by reference.

Section 24-4-103 (12.5), C.R.S., of the State Administrative Procedure Act authorizes agencies to adopt rules that incorporate by reference certain items, including federal regulations, if the rules meet listed requirements. Those requirements, as applicable here, are as follows:

24-4-103. Rule-making - procedure - definitions - statutory citation correction - repeal. (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:

(II) **The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule;**

(IV) **The rule states where copies of the code, standard, guideline, or rule are available for a reasonable charge from the agency adopting the rule and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, guideline, or rule; and (Emphases added)**

So, to comply with section 24-4-103 (12.5)(a)(II) and (a)(IV), a rule must: Fully identify the incorporated code by date; state that the rule does not include any later amendments; identify the address of the agency where the code is available for public inspection; state where copies of the code are available from the agency adopting the rule (in this case, the Department of Agriculture); and state where copies are available from the agency of the United States originally issuing the code.

The Commissioner has both general and specific rule-making authority regarding the use of pesticides as provided in the Pesticide Applicators' Act, article 10 of title 35, C.R.S.:

35-10-118. Powers and duties of the commissioner. (2) The commissioner is authorized to adopt all reasonable rules for the administration and enforcement of this article, including, but not limited to:

(a) The regulation of all aspects of pesticide application, including, but not limited to, the storage, use, application, and disposal of any pesticide or device that requires licensure for use by any person subject to this article;

(b) The establishment of qualifications for any applicant and standards of practice for any of the licenses authorized under this article, including the establishment of classifications and subclassifications for any license authorized under this article;

(c) The issuance and reinstatement of any license authorized under this article and the grounds for any disciplinary actions authorized under this article, including letters of admonition, other discipline through stipulation, or the restriction, probation, denial, suspension, or revocation of any license authorized under this article;

(d) The content of the examination required for the administration of this article and the amount of any examination and examination grading fee.

The Commissioner also has specific rule-making authority to regulate the use of pesticides in the cultivation of retail marijuana:

24-20-112. Implementation of section 16 of article XVIII of the Colorado constitution - criteria for pesticide use - education oversight and materials.

(1) The governor shall designate a state agency to promulgate rules to designate criteria that identify pesticides that may be used in the cultivation of marijuana as authorized pursuant to article 43.4 of title 12, C.R.S. The designated agency may consult with other state agencies in promulgating the rules. The agency shall publish a list of pesticides that meet the criteria on its website.

The governor has designated the Department of Agriculture as the agency to carry out the duties specified in section 24-20-112, C.R.S. Nothing in the Commissioner's rule-making authority allows the Commissioner's rules to be inconsistent with the State Administrative Procedure Act's incorporation by reference requirements.

The Commissioner adopted Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d), all of which attempt to incorporate various federal regulations by reference. Those rules state:

Part 17. The Use of Pesticides in the Production of Cannabis

17.03. Any pesticide used in the cultivation of cannabis must be registered with the Colorado Department of Agriculture, except for purposes of research and demonstration conducted in accordance with **40 CFR Part 172**.

17.04. Any pesticide registered with the Colorado Department of Agriculture may be used in accordance with its label or labeling directions for the cultivation of cannabis in the State of Colorado under the following conditions:

(a) For products registered by the Environmental Protection Agency under Section 3 of the Federal Insecticide, Fungicide, Rodenticide Act:

(1) All active ingredients of the pesticide product are exempt from the requirements of a tolerance, as established under **40 C.F.R. Part 180, Subparts D and E**;

(b) Notwithstanding Part 17.04(a)(3) the Commissioner has the authority to permit the use of a pesticide product, that does not expressly allow use on crops intended for human consumption if:

(1) The active and inert ingredients are exempt under **40 C.F.R. Part 180, Subparts D and E**;

(d) For 25(b) minimum risk pesticide products as defined in **40 CFR 152.25(f)**; the pesticide product label allows use on the intended site of application and allows use on crops or plants intended for human consumption. **(Emphases added)**

Because the rules do not include any of the statutorily required elements for incorporation by reference, Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d) conflict with the statute and should not be extended.

Recommendation

We therefore recommend that Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d) of the rules of the Commissioner of Agriculture concerning Rules and Regulations Pertaining to the Administration and Enforcement of the Pesticide Applicators' Act not be extended because they conflict with the statute regarding incorporation by reference.