

SUNSET REVIEW OF THE EGG LAW

**Submitted by
The Colorado Department of Regulatory Agencies
Office of Policy & Research
June 1994**

July 27, 1994

The Honorable Vickie Agler, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, CO 80203

Dear Representative Agler:

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

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

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

The report discusses the question of whether there is a need for the regulation provided under Article 21 of Title 35, C.R.S. The report also discusses the effectiveness of the division and staff in carrying out the intention of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joseph A. Garcia
Executive Director

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EXECUTIVE SUMMARY

The Department of Regulatory Agencies, Office of Policy and Research ("OPR"), has conducted the Sunset Review of the egg licensing functions of the Colorado Department of Agriculture (hereinafter "the Department"). OPR recommends that the candler's license be discontinued, but that the wholesaler's and retailer's license be continued.

All eggs imported and sold in Colorado must be graded to meet Colorado consumer grades (USDA equivalent grades). All wholesalers must candle and grade eggs according to USDA standards, grades, and weight classes. Before eggs may be sold in Colorado they must be candled. The importers and wholesalers have a vested interest in ensuring that the eggs are candled correctly. If they are not, they will be rejected. Thus, licensing individual candler is, in this day and age, not necessary to ensure that eggs are edible. Government regulation and oversight of egg wholesalers is necessary to protect the public health by preventing the sale of inedible eggs. It is also needed to protect the public from deceptive trade practices of unscrupulous egg sellers.

To determine what class of retail egg license an establishment must purchase, the Department looks at the retailer's total annual gross sales from the previous year as reported to the department of revenue. This would include gasoline sales in stores such as Texaco food stores and other convenience stores. OPR recommends to amend the retailer's license to exempt gasoline sales from inclusion in the total annual gross sales of the establishment.

OPR recommends that the licensing fees section be repealed and authority be given to the state Commission of Agriculture to set license fees in regulations. All money collected from license fees go to the General Fund and the egg inspection program is funded by the General Fund; however, it was the intent of the legislature that agricultural programs be self-supporting.

This report will make recommendations to improve the egg law by repealing certain sections and suggest that they be put into departmental regulations. For example, the statute requires that eggs be stored and transported in sanitary and temperature controlled conditions, and that they be stored at a temperature of 60 degrees Fahrenheit or less in order to protect the eggs from spoilage. This temperature is now known not to be safe. Current scientific evidence requires eggs to be stored at a temperature no higher than 45 degrees Fahrenheit. Therefore, someone could be following the current law, yet still be placing the public in danger.

Another example of a statutory section that should be transferred to regulations is the advertising and labeling requirement sections. The requirements are too detailed and specific to be in the statute. These statutory mandates tie the hands of the Colorado Department of Agriculture, so that if the administrative procedures set in those statutes are no longer effective, the Department cannot adapt or change those procedures so that they become effective.

There are several licensing categories that are obsolete. For example, all egg breakers, and egg product dealers must be licensed under this statute; however, Colorado has not had any egg breakers or egg dealers for approximately fifteen years. Therefore, OPR recommends that obsolete licensing categories and requirements be discontinued.

BACKGROUND

THE SUNSET PROCESS

The issuance of licenses relating to poultry eggs through the Colorado department of agriculture in accordance with Article 21 of Title 35, C.R.S. shall terminate on July 1, 1995 unless continued by the General Assembly § 24-34-104(24.1)(e), C.R.S.. During the year prior to this date, it is the duty of the Department of Regulatory Agencies to conduct an analysis and evaluation of the licensing of eggs in the state of Colorado pursuant to §§ 35-21-104 and 35-21-107(2).

During this review the Department of Agriculture must demonstrate that there is still a need for the licensure of retailers, wholesalers, candlers, and other persons who buy eggs and that the regulation is the least restrictive consistent with the public interest. The Department's findings and recommendations are submitted to the Sunrise and Sunset Review Committee of the General Assembly. (Statutory criteria used in Sunset Reviews may be found in the Appendix of this report).

The Sunset Review process includes an analysis of the statute, and interviews with State licensing authorities, staff, industry representatives and local government officials. The Department makes every effort to elicit information and comment from all interested parties.

HISTORY

The first standards and grades for eggs were introduced by the United States Department of Agriculture (hereinafter "USDA") in 1925. Prior to this introduction, eggs were sold with no regard to grade, quality, candling, or packing. Grades and standards were not necessary because most of the people still lived in fairly rural areas, and bought their eggs directly from the source. They either raised their own poultry, bought their eggs from neighbors, or bought them from nearby poultry farmers. At that time, egg producers were directly responsible to their customers.

Colorado's first egg law was enacted in 1933. There were three principal objectives that the law was trying to accomplish:

- (1) Prevention of the sale of eggs unfit for human food;
- (2) Prevention of fraud and deception in the sale of eggs; and,
- (3) Promotion and development of the industry.

A 1936 report by the Colorado Department of Agriculture (hereinafter "the Department") showed that the law was achieving the objectives with increasing success. The licensing fees generated enough revenue to fund the program which employed eight inspectors and one supervisor. At that time, there were four licensing categories:

<u>Category of License</u>	<u># of Licenses</u>	<u>Fee Amount</u>
(1) Producers Licenses	7,292	No fee
(2) Retail Licenses	3,420	\$ 3.00
(3) Country Receiver Licenses	366	\$10.00
(4) Wholesale Licenses	215	\$50.00

In 1956, the egg law was reenacted to replace the 1933 act which had remained in effect in almost its original form for 23 years. The licensing fees for retailers were based on a stores' gross volume of sales. The categories were

(1) Less than \$50,000.00	\$ 4.00
(2) \$50,000 to \$500,000.00	\$ 15.00
(3) Over \$500,000.00	\$ 25.00

There are now five categories of license fees. Some of the fees in the present statute are actually less than those above.

In the early 1960s, the egg inspection program was cash funded. The legislature lowered the licensing fees for retailers and a court decision exempted many retailers from paying a license fee (the law was not written clearly). As a result, the egg program did not generate enough revenue to continue its extensive inspection program. By 1963, the section only had one clerk, one assistant supervisor, and one fieldman to cover the entire poultry and egg program.

During this period, approximately 2,000 retailers voluntarily paid their license fees to keep part of the program functioning. In 1964, the Governor provided \$50,000.00 from his emergency fund to enable the department to hire four additional field men. The egg and poultry inspection was resumed. The 1965 legislature passed a law to correct the fee schedule program. The present law was amended in 1973. It gave the commission authority to change the grades and weight classes to conform to USDA regulations and to conform with the federal Egg Products Inspection Act.

In 1977, at the request of the Joint Budget Committee, the Department tried to raise additional revenue by amending the law to charge a fee per dozen eggs. Industry protested and the amendments were defeated in committee.

Currently, there are approximately fourteen egg producers in Colorado. Most producers are also wholesalers. Because there is no producer category for licensing, and because most of the producers also act as wholesalers, they actually hold a wholesaler license. There are four big producers who provide the majority of eggs consumed in Colorado. They supply approximately 3 million eggs each year, some of which are imported. Eggs are imported because Colorado's producers/wholesalers cannot satisfy the entire egg market demand. The other ten producers/wholesalers are smaller operations and might occasionally import eggs from out-of-state.

Federal

The primary intent of the Egg Products Inspection Act was to force compulsory inspection of all egg products, and to see that only edible eggs were used in egg products. USDA surveillance of producers and packers was instituted, and uniform standards were established for all eggs that moved in inter-state commerce. This law forced each state to either adopt official federal standards or at least to accept them.

Congressional (Agriculture Committee) House Report No. 91-1670 elaborated the purposes and reasons for the Egg Products Inspection Act.

This proposal is designed to strengthen the ability of Federal and State government to protect the Nation's consumers and to provide an environment where the egg products and shell egg industries will continue to flourish. Thus, a concerted effort will be made to assure that eggs and egg products (i.e. liquid, frozen, or dried eggs) are safe and wholesome for consumers.

This bill prohibits the distribution of unwholesome shell eggs or their use in food products, and provides for mandatory continuous inspection of egg product processing plants.

It is applicable to intrastate as well as interstate and foreign commerce. . . .

Clean, sound shell eggs are not a public health problem. These eggs are marketed for retail sale under the various State egg laws which generally provide for proper grading and sizing and accurate labeling. States do an adequate job of surveillance at the retail levels to check these eggs for compliance with their requirements. However, leaking, cracked, or checked and dirty eggs do pose a public health hazard. Such eggs can carry salmonellae and other bacteria. Salmonellosis is one of the major food-borne illnesses affecting human beings. Salmonellae and other pathogenic bacteria are carried on the shell of the dirty egg and may result in contamination when the egg is broken. In addition, if the shell is cracked or broken, bacteria may enter the egg. . . .

Legislation is needed to provide mandatory inspection of egg products and to prevent the sale of eggs that could pose a health hazard. Because of the universal use of eggs and egg products in manufacturing a host of food products, nearly everyone consumes eggs in one form or another every day.

The content of this report also explains the reasoning behind Colorado's egg inspection program. The Egg Products Inspection Act is the basis of the agreement Colorado has with the USDA. It is a cooperative agreement where Colorado inspects eggs at the producer level. This is called the "shell egg surveillance" program. State inspectors examine eggs at the producer level for compliance with federal regulation for wholesomeness (is the egg edible). The inspections are done quarterly by two state inspectors. The USDA pays the state approximately \$12,000 per year to inspect producers under this law.

SUMMARY OF STATUTE AND RULES

The egg law regulates the buying and selling of eggs within Colorado and sets standards for those eggs that are imported. The Department licenses egg retailers, wholesalers, candlers, egg breakers, egg product dealers, consignment receivers, in-state wholesale truckers, out-of-state dealers or truckers. Egg producers are not licensed as producers; there is no such licensing category. There is no need for one. A large producer will usually hold a wholesaler license because wholesaling is part of their business, plus he will have a candler's license because the statute requires he candle his eggs before they are sold. The practical effect of these requirements is that the small farmer/producer who sells directly from his farm wholesale probably only has a candler's license. Any person who produces and sells only at retail less than two hundred fifty dozen eggs per month is exempt from all provisions of this statute.

Retail license fees are based on the total gross sale of the establishment for the previous calendar year, as reported to the department of revenue or, in the case of chain stores, total annual gross sales of individual stores for the previous calendar year as reported to the Department. For a retailer who was not in business for the previous calendar year, the fee is \$2.00. The other retail license fees are

<u>Retail</u>		<u>Fee amount</u>
Class I	Gross sales up to and including \$50,000	\$ 2.00
Class II	Over \$50,000 to and including \$100,000 gross sales	\$ 5.00
Class III	Over \$100,000 to and including \$200,000 gross sales	\$ 8.00
Class IV	Over \$200,000 to and including \$500,000 gross sales	\$15.00
Class V	Over \$500,000 gross sales	\$25.00

The annual license fees for wholesalers are based on the average number of cases of eggs sold per week during the previous year. If a wholesaler was not in business during the previous calendar year, the fee is \$25.00. The other wholesaler license fees are

Wholesaler

Fee amount

Class I	Up to and including 50 cases per week	\$ 25.00
Class II	Over 50 cases to and including 100 cases per week	\$ 50.00
Class III	Over 100 cases to and including 250 cases per week	\$100.00
Class IV	Over 250 cases to and including 750 cases per week	\$300.00
Class V	Over 750 cases per week	\$500.00

The statute also requires the wholesaler to keep records that accurately indicate the number of eggs sold per week during the year. These records must be kept for two years, and the business must allow the Department to examine them in order to determine how many eggs the wholesaler actually sells.

Candler

Any person who candles eggs in Colorado must obtain a candler's license. This includes producers who sell candled and graded eggs of their own production to retailer, restaurants, or manufacturers. The license entitles the person to candle and grade eggs in Colorado. The annual license fee is \$2.00.

Miscellaneous Licenses

- Out-of-state wholesalers or truckers who sell eggs in Colorado are classified as a Class IV wholesaler and must obtain a Class IV wholesaler license. This category includes persons, other than a common or contract carrier, who haul eggs into Colorado for someone other than himself.
- A Colorado business who does not have a wholesale license and who uses trucks or other vehicles in buying eggs from producers or other dealers must obtain a license for each vehicle used. The license fee is \$25.00.
- Any one who operates retail delivery trucks or other vehicles and who sells eggs from these vehicles to the consumer, must obtain a Class I retailer license for each vehicle used.
- The license fee for egg breakers is based on the businesses annual production in pounds:

Class I	Up to and including 50,000 pounds/year	\$25.00
Class II	Over 50,000 pounds/year	\$50.00

- The license fee for anyone selling frozen eggs or egg solids (dried eggs) is the same as a wholesaler, and is based on the number of pounds sold per week per year. If a person already has a wholesaler's or breaker's license, they do not need to obtain a separate frozen egg and egg solids sellers license.
- The annual license fees for consignment receivers is \$15.00. A consignment receiver is any person who receives eggs from producers for the account of the first receiver.

All money collected from license fees are deposited to the state's General Fund.

Miscellaneous statutory requirements

The statute governs the importation, classification, and grades of eggs, frozen eggs, and egg products sold in Colorado. All eggs imported into Colorado must be candled and edible.

All eggs sold in Colorado must be graded into Colorado consumer grades. These grades and weight classes are based on the United States Department of Agriculture grades and weight classes for shell eggs and standards for quality of individual shell eggs. The Department has the authority to adopt any regulation necessary to conform to current USDA regulations for shell eggs.

The statute requires that eggs be stored and transported in sanitary and temperature controlled conditions, and that they be stored at a temperature of 60 degrees Fahrenheit or less. Furthermore, the statute outlines the paperwork that must follow all eggs that are sold in Colorado. Explicit requirements for labeling egg containers and advertising eggs for sale are detailed in the statute.

Enforcement

The Department has general rule making authority under § 35-21-106(1), C.R.S.. This subsection declares "[t]he commission is authorized to formulate such rules and regulations as it may deem proper and necessary for the enforcement of the provisions of this article. " It has the authority to place "stop sale notices" on eggs being sold or offered for sale if the statute has been violated. The Department also has the authority to suspend or revoke a license if that person has violated the statute or any rules and regulations promulgated by the Department. However, the Department does not have authority to deny, limit, or refuse to renew a license no matter what the applicant or licensee has done.

The only remedies stated in the statute are criminal penalties and actions against the license, such as revocation and suspension. Violation of any provision of this statute constitutes a misdemeanor. There is no provision that gives the Department the authority to pursue civil remedies against a offender.

SUNSET ANALYSIS

The purpose of the egg law continues to be the prevention of the sale of eggs unfit for human food, prevention of fraud and deception in the sale of eggs, and promotion and development of the egg industry. To accomplish this purpose, the Department licenses and inspects, among others, retailers, wholesalers, candlers, and producers of poultry eggs within Colorado.

Potential Public Harm

Securing the safety of our food supply is recognized as an appropriate problem with which the government should become involved. One of the most common food borne illnesses that people contract is *Salmonella*. *Salmonella* is a natural inhabitant of the intestinal tract of food animals and pets. It is also found in wild animals of all types. Because it inhabits the intestines of animals, it is shed by infected animals in fecal material, and in many cases, in urine as well. From these sources, the bacteria contaminate the environment generally and can grow in foods, waters, and on inanimate objects which are contaminated by feces for periods of hours or days and often come in contact with other susceptible animals in whom a new infection is begun.

Salmonella can survive and grow in environments other than the intestinal tract of animals. They are resistant and adaptable and are able to grow in a wide range of temperatures. In some cases, the organisms appear to survive for long periods in the environment outside of the animal; however, it is not clear that the bacteria has survived for a long time or whether the environment has been recontaminated from some other infected animal.

It is a commonly accepted assumption that only a small number illnesses caused by salmonella are ever recognized and diagnosed. The number of cases reported may be a little as 1% of the actual number. There is general agreement that salmonellosis, or salmonella gastroenteritis occurs in small outbreaks as food borne infections, and that children and the elderly are the most likely targets for this infection. The effects of contracting the illness are nausea, diarrhea, dehydration, and in frail populations, even death. Eggs that are produced in, transported in, and stored in unsanitary and inappropriate conditions are perfect carriers of salmonella and other bacteria. If handled improperly, they are a threat to the public health. It would be unwise for the government to neglect its duty to protect the public by not inspecting and regulating eggs.

The Department also protects the consumer by preventing fraud and deception by those who sell eggs to the public. Eggs are priced according to their grades and standards. Egg grades are a commonly known method by which a consumer can tell the quality of the product. When a consumer buys a particular grade of egg, and pays a price commensurate with that grade, that consumer expects to get the product for which he paid. If he chooses to buy what he thinks are grade "AA" eggs and pay more for them than he would for grade "B" eggs, the consumer should get grade "AA" eggs. If a business passes off grade "B" eggs as grade "AA" eggs, the consumer is deceived and economically harmed.

Honest businesses may also be harmed by companies trying to "dump" substandard eggs. The "dumpor" can undercut the prices of the honest businesses by selling substandard eggs for a bargain price, but passing them off as a higher quality eggs. The unsuspecting consumer has no way of knowing that the eggs are not of a particular quality. This fraudulent practice hurts honest businesses that cannot sell a quality product for the same price as the eggs sold by the "dumpor" as well as the consumer.

Licensing

Licensure is important for identifying who is selling eggs, and it is important for funding the inspection program. The Department collects approximately \$60,000.00 from license fees and federal money for the "shell egg surveillance" agreement. The majority of egg licenses issued go to retail outlets. As summarized in the previous section, there are several classifications of retail licenses which are based on the total gross annual sales from the pervious year as reported to the department of revenue. As the law is currently written, this would include gasoline sales in stores such as Texaco food stores and other convenience stores. Therefore, such a store that sells maybe 5 dozen eggs per week could pay the same for an egg license as a Safeway store that sells hundreds of dozens of eggs per week. Prior to last year, the Departmental policy was not to include gasoline sales when determining the amount of the license fee. This past year, this policy was changed in order to comply with the law.

OPR believes the statute should be amended to exempt gasoline from inclusion in an establishment's total gross annual sales from the previous year as reported to the department of revenue. Administratively, this would be easy to implement for the retailers as well as the Department. In the department of revenue's reporting forms for total gross annual sales, gasoline is separated out from the rest of a store's total gross annual sales.

Inspection

Egg inspecting is a part of the Inspection and Consumer Services Division. The division utilizes a multiple-inspection program through its Technical/Field Services Section. This section is responsible for all field inspections, testing, and/or sampling for Eggs, Measurement Standards (small devices), Meat Inspection, Feed, and Fertilizer programs. For example, when an inspector enters a grocery store, he will examine the scales for accuracy, test packaged goods for truth in labeling, inspect eggs for cleanliness, cracks, and correct grading, and perhaps, if the store does custom slaughtering, examine the butcher shop area for adherence to meat slaughtering regulations, as well as their animal feeds and plant fertilizers.

(See Appendix C for a map showing the inspectors' territories)

OPR recommends that the Department continue to do the inspection instead of transferring it to another agency for several reasons:

1. They already have an inspector in the store to test the measuring devices, and examine store packaged food for truth in labeling violations;
2. The Department's inspectors are already trained in this specialized examination procedure. The state department of health and county health departments would have to spend a lot of money training their people on how to inspect eggs;
3. The state department of health and the county health departments, especially the smaller communities, do not have the funds and/or manpower to implement this program;
4. The Department already has established cooperative working arrangements with the USDA and the egg industry.

If the Department inspected only producers and wholesalers, they would not be able to inspect those producers and wholesalers who are located out-of-state. The Department, by inspecting eggs at the retail level, is able to trace the ownership of the eggs all the way back to the producer. If there is a problem with the quality of the eggs a retail store receives, the Department can investigate to find out with whom the problem lies. Inspection at retail stores also ensure that out-of-state producers and wholesalers who import eggs into Colorado are held to the same standards as in-state producers and wholesalers.

For example, in 1990, the major out of state supplier for the convenience stores in Colorado was experiencing problems with having too many eggs rejected. The Department did a warehouse destination inspection of the company's warehouse and discovered that it was not the convenience store company who was damaging their eggs when delivering them to their retail outlets. The Department discovered that the company was receiving the inferior eggs from their out-of-state supplier.

Currently, there is a situation that illustrates what will probably happen should retail egg inspections be eliminated. The egg inspection program recently underwent a performance audit. The auditor noticed that an unusually large number of eggs were being rejected by one particular inspector, and he wanted to find the reason for this. The Department had heard through the industry grapevine that a producer and wholesaler in a neighboring state was aware that the inspector is only able to inspect a store 2 - 3 times per year; therefore, the producer/wholesaler are dumping substandard eggs into Colorado that would not pass inspection in his state. Unless and until an inspector gets to those retail stores selling such eggs, consumers are at risk - both for health hazards and fraud.

EGG INSPECTIONS

Title of Performance Measure	FY 91-92 Performance	FY 92-93 Performance
Egg Program		
a. Inspections	5,521	4,320
b. Dozens Inspected	1,223,889	1,118,287
c. Dozens Rejected	71,999	27,109
d. Percent Rejected	5.88%	2.4%
Eggs: USDA Surveillance		
a. Inspections	68	75
b. Dozens Inspected	1,265,000	756,154
c. Dozens Rejected	32,700	1,845
d. Percent Rejected	2.58%	.24%

Egg Program

- a. Number of Inspections Performed.
- b. Number of Dozens Inspected.
- c. Number of Dozens Rejected.
- d. Percent Rejected.

Miscellaneous

The egg law is out-of-date in many respects. Most of it was last amended over 20 years ago, and there are a few subsections that are even 30 years old. For example, the statute requires that egg breakers and egg solids sellers obtain a license even though there have not been any egg breakers or egg solids sellers in Colorado for at least fifteen years. There is a requirement set in statute that states refrigeration of eggs must be kept at a temperature of not more than 60 degrees Fahrenheit. Current scientific evidence shows that refrigeration must be closer to 45 degrees Fahrenheit in order to inhibit salmonella and other bacterial growth. A provision that specific should not be in statute; it should be addressed in regulation where it can be changed more easily to fit the most current information.

Enforcement

The Department does not have adequate authority to deal with violators of the statute. The only judicial remedy they have is criminal; there are no civil remedies available. While criminal penalties are a necessary enforcement tool, they should not be the only one available. Local district attorneys' offices do not place violations of the egg statute at a high priority as compared to the other criminal violations that they must prosecute. Therefore, the Department should have the authority to assess civil penalties against violators of the statute.

The only actions that the Department may take against a license are suspension or revocation of that license. They do not have the authority to take less drastic actions such as placing the licensee on probation or issuing a license with restrictions attached. They also do not have the authority to deny an application for a license or the authority to refuse to renew a license no matter what the licensee or applicant has done. They cannot deny an application for a license even if the Department had previously revoked the applicant's license. They need this authority in order to respond more effectively to violations.

License Fees

Colorado's general agriculture act requires the Department to "[a]nnually fix such inspection and license fees and service charges within maximum limits provided by law as may be necessary to pay the cost of service performed and reasonable reserves for contingencies, including cost of depository, account, disbursement, auditing, and rental of quarters and facilities furnished by the state; . . ." § 35-1-104(1)(e), C.R.S..

Although all license fees collected by the egg licensing program are deposited into the state General Fund, and the program is funded through the General Fund, it was clearly the intent of the legislature that license fees should at least pay for the operational costs of agricultural programs. According to the Department, the amount of revenue the fees generate do not pay for the actual costs of the services they perform. Furthermore, the Department has antiquated data gathering and reporting capabilities and needs to upgrade the support systems for this program in order to operate it more effectively.

The last time most of the license fees were changed was in 1965, almost thirty years ago. The only exception is the class III wholesaler license fee was decreased from \$200.00 to \$100.00 in 1973.

RECOMMENDATIONS

RECOMMENDATION 1: CONTINUE LICENSING EGG WHOLESALERS, RETAILERS, AND RETAIL DELIVERY TRUCKS BY THE COLORADO DEPARTMENT OF AGRICULTURE.

OPR believes that it is in the public interest to continue licensing egg wholesalers, retailers, and retail delivery trucks by the Colorado Department of Agriculture.

In order for the Department to protect the public health by preventing the sale of inedible eggs, and in order for the Department to prevent fraudulent and deceptive trade practices, they must have a range of remedies available to compel compliance with the statute. Among the most important of these remedies is the ability to stop a business from endangering the public health or defrauding the public. Sometimes the only way this can be done is to revoke that business's license. It is a drastic remedy that should be used only in extreme situations and only after due process. But, that remedy must be available for use should it become necessary.

If wholesalers and retailers are not licensed, the Department would not have the full range of remedies available to deal with potentially serious situations. The Department's history is evidence that they are not likely to abuse the power to revoke a license. They have this authority now, and they have not revoked any licenses in the last twenty years. Their focus is getting businesses to comply with the law, not putting people out of business.

RECOMMENDATION 2: DISCONTINUE LICENSING EGG CANDLERS.

It is not necessary for the Department to license egg candlers in order to protect the public health. Neither is it necessary to license candlers in order to prevent deceptive and fraudulent trade practices.

The egg candling license has become unnecessary over the years. When the egg law was first enacted, there were a great number of egg candlers, and regulating them helped ensure the edibility of eggs sold to consumers. The industry has changed and the number of egg candler licensees has greatly diminished. Egg candlers work for wholesalers who have an economic interest in ensuring that the eggs they sell will meet all standards and grades. Therefore, it is in the wholesaler's business interest to make sure their candlers know what they are doing. If the candler does not know what he is doing, the wholesaler may lose a lot of money when its eggs are rejected as inedible.

Therefore, OPR recommends that egg candlers no longer be required to obtain a license from the Department. Discontinuing this license does not affect other parts of the statute that require eggs be candled before they are sold in Colorado. State and federal grades and standards still must be met.

RECOMMENDATION 3: REPEAL THE FOLLOWING LICENSING CATEGORIES AND PROVISIONS IN THE STATUTE THAT WOULD BECOME IRRELEVANT SHOULD THESE CATEGORIES BE REPEALED:

(A) CONSIGNMENT RECEIVERS § 35-21-104(1), C.R.S.

This licensing category is obsolete. Consignment receivers are not relevant to the egg industry any longer. Their position has been usurped by the wholesaler. It is an unnecessary licensing category that should be deleted.

The corresponding provision that should be repealed is § 35-21-104(4)(d) - the license fee for consignment receivers.

(B) COLORADO WHOLESALER TRUCKER § 35-21-104(1), C.R.S.

This licensing category is redundant. There is no reason to separate a wholesale trucker from any other wholesaler. This is another category that may have been relevant thirty years ago, but does not mean anything today. If someone is acting as a wholesaler, then he needs to get a wholesaler license.

The corresponding provision that should be repealed is § 35-21-104(2)(f) - the license fee for a Colorado Wholesaler Trucker.

(C) OUT-OF-STATE DEALER OR TRUCKER § 35-21-104(1)

This licensing category is also redundant. If a dealer or trucker is acting solely as a wholesaler (he is not merely hauling eggs into Colorado for a wholesaler or producer), then he must get a wholesaler's license. If the trucker is hauling eggs for someone else, he does not need a license at all.

The corresponding provision is § 35-21-104(2)(c) - the license fee for out-of-state wholesaler or trucker.

(D) EGG BREAKERS AND EGG SOLIDS SELLER §§ 35-21-104(1), (2)(A), C.R.S.

These two licensing categories are obsolete. There have not been any egg breakers or egg solids seller operating in Colorado for at least fifteen years. Therefore, there is no need to have this licensing category and they should be repealed.

The corresponding provisions are § 35-21-104(1)(b), (c),(d) and § 35-21-104(2)(g)(h) - the license fees for egg breakers and egg solids seller and requirements egg breakers must meet in order to become licensed.

RECOMMENDATION 4: AMEND THE LICENSING OF RETAIL EGG SELLERS TO EXEMPT GASOLINE SALES FROM INCLUSION IN THE TOTAL ANNUAL GROSS SALES OF THE ESTABLISHMENT.

Currently, gasoline is included in a store's total gross annual sale when determining what license fee it must pay.

That means that a Texaco convenience store that sells both gasoline and food could pay the same for a license as a Safeway grocery store even though the Texaco store might only sell a few dozen eggs per week.

Inspection of retail stores by the Department is important. For the sake of brevity, detailed arguments for this position will not be repeated in this analysis except to say that the current expectations of the public are for stricter regulation regarding the safety of our food. Consumers also expect to be given enough information about the foods they buy in order to make informed choices. Should retail inspections be discontinued, the consumer would have less protection. They cannot candle the eggs themselves so they cannot verify that the store is complying with the law.

RECOMMENDATION 5: ADD A SECTION TO THE EGG STATUTE THAT GIVES THE DEPARTMENT THE AUTHORITY TO ASSESS CIVIL PENALTIES.

The Department needs to have the authority to assess civil penalties against violators of the statute. Currently, they only have the authority to pursue criminal charges, and suspend or revoke licenses. The Department's goal is to get licensees and others to comply with the law. To do this they need a range of remedies to use that best fit a situation. The other agricultural laws and sections have found the use of civil penalties to be the most effective way to encourage compliance. There is no such remedy in the egg law which hampers the Department's ability to enforce the statute. Therefore, OPR recommends that the following provision be added to the statute:

Civil penalties. (1) Any person who violates any provision of this (statute) or any regulation enacted pursuant to this (statute) is subject to a civil penalty as determined by the commissioner. The maximum penalty shall not exceed \$750.00 per violation per day.

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

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

(4) Under a finding that the commissioner did not have probable cause to impose a civil penalty, the person charged may recover his costs and attorney fees from the department of agriculture.

(5) All moneys collected from civil penalties pursuant to the provisions of this section shall be transmitted to the state treasurer and credited to the general fund.

(6) Before imposing a civil penalty, the commissioner may consider the effect of such penalty on the ability of the person charged to stay in business.

(This language was taken directly from the Civil penalties section of Farm Products and Commodity Handler Acts)

RECOMMENDATION 6: AMEND THE EGG LAW, § 35-21-104(1), TO CHANGE THE WORDING OF WHO MUST BE LICENSED TO "EVERY PERSON BUYING FOR RESALE. . . ."

Section 35-21-104(1), C.R.S. requires "[e]very person buying, selling, candling, or receiving on consignment poultry eggs within this state shall obtain, on or before July 1, of each year, from the department, a retailer's, wholesaler's, or candler's license, applicable for each place where such business is conducted. . . ." This provision may easily be interpreted to mean that the average consumer would have to obtain a license before he bought eggs. Obviously that was not the intent of the legislature when they drafted this provision. To clear up any possible confusion the words "**for resale**" should be added after "every person buying. . . ."

RECOMMENDATION 7: ADD A PROVISION TO THE ENFORCEMENT SECTION OF THE STATUTE THAT GIVES THE DEPARTMENT THE AUTHORITY TO INSPECT THE PREMISES AND BUSINESS RECORDS OF ANY RETAIL, WHOLESALE, OR PRODUCER THAT SELLS EGGS.

In order to enforce the egg law, the Department needs to be able to inspect the condition of eggs, and the condition of the area in which they are stored. The Department must also be able to look through the records of a business in order to trace the eggs back to their source.

This is a public health issue as well as an economic issue. If there were to be a salmonella outbreak, the ability to trace the eggs back to their source would be invaluable in order to contain the spread of the disease. Furthermore, if a wholesaler tried to dump substandard eggs into the marketplace, the Department would need the ability to trace the eggs back to the responsible wholesaler.

Therefore, the following provision should be added that reads:

The commissioner shall be the enforcing authority of this statute, and he or his authorized representative shall have access during regular business hours to all places of business and all business records pertinent to any proper inquiry in the administration of this statute.

RECOMMENDATION 8: AMEND THE EGG LAW AND CHANGE THE DEFINITION OF "EDIBLE EGGS."

The current definition of "Edible eggs" is "eggs which are free from mould [sic], blood ring, blood spot, bloody whites, filth, stuck yolk, black rot, whit rot, mixed rot, or any other inedible quality, this includes adhering fecal or other extraneous matter covering more than one-fourth of the shell surface. Eggs which have been subjected to incubation practices, whether natural or artificial, shall be classed as inedible."

OPR recommends adding the words "as defined in United States Department of Agriculture requirements" after the words "or any other inedible quality; . . .," and striking the words "this includes adhering fecal or other extraneous matter covering more than one-fourth of the shell surface. Eggs which have been subjected to incubation practices, whether natural or artificial, shall be classed as inedible."

The current standards and grades of eggs in Colorado correspond to USDA requirements and the Department does not intend to change this policy any time soon. Therefore, it makes more sense to strike language that could possibly conflict with USDA requirements the statement "this includes adhering fecal or other extraneous matter covering more than one-fourth of the shell surface" should be stricken.

It is logical to strike the language about incubation practices because that is addressed in USDA regulations already.

RECOMMENDATION 9: REMOVE ALL LICENSING FEES FROM THE STATUTE AND GIVE THE DEPARTMENT OF AGRICULTURE COMMISSION AUTHORITY TO SET FEES.

All licensing fees are paid into the General Fund, unlike many regulatory programs which are cash funded. The amount for licenses are fixed in statute and have been listed earlier in this report. The last time most of these fees were changed was in 1965. Some of the fees are less than they were in the 1950s.

In the interest of brevity, detailed arguments for removal of fees from the statute will not be repeated in this analysis except to point out that it was the intent of the legislature that the Department of Agriculture generate enough revenue to pay for the cost of the services it performs. However, with the fee caps imposed by the statute the Department is not able to cover its costs, but it must still continue to perform its statutory duties. Therefore, the fees as set in the statute are not accomplishing their purpose.

It is an inefficient use of governmental resources to require legislation in order to adjust fees. The legislative process is a very time consuming and expensive process. It makes more sense to delegate the responsibility to set license fees to the Department of Agriculture Commission. The state agricultural commission is comprised of members who are active in the agricultural industry, and who are appointed by the governor. Two must be appointed from each of the state's four agricultural districts. The industry's concerns and interests are represented by the commission; therefore, the possibility of a fee "fiasco" is slight.

Furthermore, the commission meetings are open to the public and it must meet at least once every three months. This process affords any interested person the opportunity for input into any rules and regulations the commission establishes. It works as a check and balance against any inappropriate exercise of regulatory authority.

There would still be legislative oversight of the fees the Department collected and the cost of the program. Each year the Department must submit a budget to the Joint Budget Committee for approval. This budget process allows the Legislature to review the amount of the fees the Department sets.

RECOMMENDATION 10: AMEND THE EGG LAW TO GIVE THE COMMISSIONER THE AUTHORITY TO RESTRICT, OR REFUSE RENEWAL OF A LICENSE AND TO PLACE A LICENSEE ON PROBATION.

Currently, the Department has the authority to revoke and suspend a license. They do not have the authority to take less drastic actions such as placing the licensee on probation or allowing the licensee to stay in business, but with restrictions placed on his license. They also do not have the authority to deny an application to someone for any reason except that he has not paid the license fee.

The Department should have the authority to deny an application to someone who poses both a health and economic threat to the public. This would give the Department the authority to respond effectively to different problems with various solutions.

RECOMMENDATION 11: REPEAL CERTAIN SECTIONS OF THE EGG LAW AND ALLOW THE DEPARTMENT TO PROMULGATE REGULATIONS TO REPLACE THEM.

There are some sections of the egg law that are too specific and technical to be in a statute. There is a temperature requirement in the statute that says eggs must be stored at no higher than 60 degrees Fahrenheit. If licensees complied with this provision in the law, they would endanger the public health. Something like the correct temperature at which to store eggs should be in regulation so that it may be changed more easily as our knowledge changes. § 35-21-103(2), C.R.S.

Sections 35-21-103(4) - (9) should be repealed and the Department should promulgate regulations to take their place. These provisions regulate the labeling and advertising of eggs and they are at least thirty years old. They may have addressed the way the marketplace functioned at that time, but the requirements are outdated and they do not address today's problems and concerns. These types of provisions should be in regulation so that the Department may respond to market changes and public concerns.

For example, instead of dictating the size of type that must be used to advertise the grade of the egg, it would be more helpful to require that the date by which the eggs should be sold were required be placed on the carton of eggs. Or, instead of dictating what an invoice for the sale of eggs must contain, it would be more helpful to require a container of eggs to have the USDA Establishment Number on it. We are not necessarily recommending that these changes be put in statute. We are suggesting that these types of issues be addressed in regulation.

ADMINISTRATIVE RECOMMENDATION: REQUIRE THE DEPARTMENT TO WRITE A COMPUTER SOFTWARE PROGRAM FOR THE INSPECTION AND FIELD SERVICES SECTION.

The Inspection and Field Services Section of the Department has a computer system that allows them to input a large amount of information. There is information about licenses and inspection results performed by field agents; however, this information cannot be used because the Department has not written a software program to retrieve this data in any meaningful form; therefore, they must extract and analyze the data by hand when a report is needed. In order to operate at an efficient level, the Department must be able to retrieve and analyze this information in order to for the section to operate effectively.

APPENDIX A

SUNSET STATUTORY EVALUATION CRITERIA

- I. Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- II. If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- III. Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;
- IV. Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- V. Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- VI. The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;
- VII. Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- VIII. Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- IX. Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

APPENDIX B - ORGANIZATIONAL INFORMATION

INSPECTION AND CONSUMER SERVICES (MULTI-INSPECTORS)

1	Agricultural Program Specialist V
2	Agricultural Program Specialist III
12	Agricultural Program Specialist II
3	Administrative Assistant IV
This Section Has 18 FTEs Assigned To It	

APPENDIX C - TERRITORIES FOR MULTI-INSPECTORS

