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DEPARTMENT OF AGRICULTURE

Inspection and Consumer Services Division

RULES PERTAINING TO HAND WEEDING AND HAND THINNING BY AGRICULTURAL WORKERS

8 CCR 1202-18

PART 1. DEFINITIONS

- 1.1 “Actively engaged in the transition to certified organic agriculture” means that land is being managed according to the rules implementing the National Organic Program (“NOP”) at 7 CFR Part 205 (as incorporated herein by reference) for 36 months prior to harvest of the first organic crop and being certified organic by a United States Department of Agriculture (“USDA”) NOP accredited certifier.
- 1.2 “Agricultural activities” are those services or activities included in section 203(f) of the federal Fair Labor Standards Act of 1983, 29 U.S.C. § 201 et seq., as amended, or section 3121(g) of the federal Internal Revenue Code of 1986, as amended (both as incorporated herein by reference).
- 1.3 “Agricultural employee” has the same meaning set forth in § 8-2-206(1)(b), C.R.S. (as incorporated herein by reference).
- 1.4 “Agricultural employer” has the same meaning set forth in § 8-3-104(1), C.R.S. (as incorporated herein by reference).
- 1.5 “Agricultural property” means a contiguous or non-contiguous parcel of land on which agricultural activities are conducted and which is owned or leased by the same person or entity, including property leased from the federal or state government. Agricultural properties do not include properties owned or leased by the state or political subdivisions of the state, including state institutions of higher education, on which agricultural activities occur.
- 1.46 “Commissioner” means the Commissioner of the Colorado Department of Agriculture.
- 1.57 “Department” means the Colorado Department of Agriculture.
- 1.68 “Exempted Activity” means any activity described under §§ 8-13.5-203(2)(c)(~~l~~) through (VII), C.R.S., that is not subject to temporal or other limitations on hand weeding or hand thinning of weeds or other non-desirable plant life (as incorporated herein by reference).
- 1.79 “Farm Record” means any record or other business-related information that identifies a farm’s ownership or contains trade secrets, privileged information, or confidential commercial, financial, geological, or geophysical data. Such record or information can be in written, printed, photographic, electronic or digital format and can include, but is not required to include: crop information, financial information, purchase and sale information, operational protocols, or account numbers or unique identifiers issued by government or private entities.

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- 1.810 “Organic System Plan” has the same meaning set forth in 7 C.F.R. § 205.2 (as incorporated herein by reference).
- 1.911 “Prolonged” means continuing for a long, uninterrupted period of time that lasts longer than is necessary to accomplish a given objective or end.
- 1.4012 “Suitable and appropriate” means acceptable or right for a particular purpose or situation.
- 1.4413 “Unnecessary” means not required to be done, achieved, or present, including not needed to achieve a given objective or end.
- 1.4214 “Variance certificate” means a written or electronic document issued by the Colorado Department of Agriculture to an agricultural employer that permits more than occasional or intermittent hand-weeding of agricultural or horticultural products on an agricultural property(ies) owned or leased by the agricultural employer.

PART 2. VARIANCE PROCEDURE AND REQUIREMENTS

- 2.1 An agricultural employer must receive a variance certificate from the Department prior to having any agricultural worker, including workers working through a contract service, hand weed agricultural or horticultural products greater than 20 percent of the worker’s weekly work time on an agricultural property(ies) owned or leased by an agricultural employer.
- 2.1.1 When determining whether an agricultural worker will hand weed “greater than 20 percent of the worker’s weekly work time,” the agricultural employer must account for the hours performed hand weeding on the entire agricultural property(ies), including time spent hand weeding on portions of the agricultural property(ies) where Exempt Activities occur.
- 2.2 The agricultural employer seeking a variance certificate must submit an application for a variance on a form provided by the Commissioner at least 10 business days prior to the commencement of hand weeding activities on the subject agricultural property(ies).
- 2.2.1 The application must include, but is not limited to, the following:
- 2.2.1.1 The name and contact information for the person or entity requesting the variance;
- 2.2.1.2 An explanation of why the variance is being requested;
- 2.2.1.3 An explanation of why, to the best of the agricultural employer’s knowledge, the hand weeding performed under the requested variance will not involve prolonged and unnecessary stooping, kneeling, or squatting and does not create a risk of acute, chronic, or debilitating injuries to agricultural workers;
- 2.2.1.4 An explanation of why, to the best of the agricultural employer’s knowledge, there is no suitable long-handled tool or other alternative means of performing the work that is suitable and appropriate to both the

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production of the agricultural or horticultural commodity and the scale of the operation;

2.2.1.5 Confirmation that the hand weeding to be performed under the variance certificate is not hand weeding that can be performed under any Exempt Activity;

2.2.1.6 Confirmation that an agricultural employer will not have any agricultural worker use a short-handled hoe for weeding and thinning in a stooped, kneeling or squatting position;

2.2.1.7 Confirmation that an agricultural employer will provide any agricultural worker engaged in hand weeding and hand thinning an additional five minute rest period in the middle of each work period;

2.2.1.8 Confirmation that the agricultural employer will provide gloves and knee pads, as necessary, to each agricultural worker engaged in hand weeding or thinning;

2.2.1.9 A description of any other procedures, methods, and strategies, including, but not limited to, agronomy practices and weed management methods to be applied on the subject agricultural property(ies), that the agricultural employer will use to protect agricultural workers from risk of acute, chronic, or debilitating injury during hand weeding or thinning conducted under the requested variance certificate; and

2.2.1.10 Any other information required by the Commissioner to administer §§ 8-13.5-203(d) and (e), C.R.S., (as herein incorporated by reference).

2.3 All variance certificates, including those issued to agricultural employers actively transitioning to organic agriculture, are valid for one calendar year.

2.4 All variance certificates apply to the agricultural employer and the agricultural property(ies) identified in the application, unless that property(ies) description has been modified as described in Part 2.6 below.

2.4.1 A separate variance certificate is required for additional properties not so identified or modified.

2.5 Variance certificates may not be assigned or transferred to a different agricultural employer.

2.6 If, after receipt of a variance certificate from the Department, the agricultural employer wishes to modify the agricultural property(ies) covered by the variance certificate, that agricultural employer must file a request to modify the variance certificate.

2.6.1 Any such request must be filed on a form provided by the Commissioner at least 10 business days prior to permitting more than occasional or intermittent hand weeding or thinning on the modified agricultural property(ies).

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- 2.7 Variance certificates do not cover hand weeding during otherwise Exempt Activities.
- 2.8 Applications for a variance must be signed by an authorized representative of the agricultural employer who possesses the legal authority to make binding decisions for the agricultural employer.
- 2.9 Farm records and other business-related information shared with the Department, including information provided as part of the application process, are confidential pursuant to § 24-72-204, C.R.S., and 7 C.F.R. § 205.501(a)(10) (both as incorporated herein by reference).

PART 3. SPECIAL REQUIREMENTS FOR AGRICULTURAL EMPLOYERS TRANSITIONING TO ORGANIC AGRICULTURE

- 3.1 An agricultural employer that is actively engaged in the transition to certified organic agriculture, but not yet certified organic by the USDA NOP or an accredited organic certifier, must request a variance from the Department pursuant to Part 2 above in order to have agricultural workers hand weed or hand thin more than occasionally or intermittently.
- 3.1.1 An agricultural employer that is actively engaged in the transition to certified organic agriculture is only eligible to receive a variance certificate for up to three consecutive years.
- 3.1.1.1 The Commissioner may issue a variance certificate pursuant to Part 2 above for additional consecutive periods to such an agricultural employer when the agricultural employer establishes that a third party has applied prohibited substances or methods to the agricultural employer's property without the permission of the agricultural employer, such that the agricultural employer's transition to organic agriculture must be extended for another three years.
- 3.1.1.2 Nothing in this Part. 3.1 prohibits the Commissioner from exercising the Commissioner's discretion to issue variance certificates pursuant to Part 2 above for additional consecutive periods upon a showing of extenuating circumstances by the agricultural employer.
- 3.2 Notwithstanding Part 3.1 above, variance certificates described in Part 2 above are not required if:
- 3.2.1 An agricultural employer's agricultural property is already USDA NOP certified and that agricultural employer has included and identified additional and specific fields or greenhouses in its Organic System Plan as transitioning from conventional to organic agriculture.
- 3.2.2 An agricultural employer is transitioning agricultural property from conventional to certified organic agriculture and is participating in a formal transition program with an accredited USDA organic certifier.
- 3.3 Nothing in this Part 3 requires an agricultural employer that is actively engaged in the transition to certified organic agriculture to request a variance for Exempt Activities.

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PART 4. INCORPORATION BY REFERENCE

4.1 Material incorporated by reference does not include any later amendments or editions of the incorporated material. Copies of material incorporated by reference in these rules is available for public inspection during regular business hours. This incorporated material may be obtained at a reasonable charge or examined by contacting the Inspection and Consumer Services Division Director, Department of Agriculture, 305 Interlocken Parkway, Broomfield, CO 80021. Further, the incorporated material may be examined at no cost on the Internet at:

7 C.F.R. Part 205 (2015): https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7cfr205_main_02.tpl

29 U.S.C. § 201 et seq (2018): <https://www.law.cornell.edu/uscode/text/29/chapter-8>

7 U.S.C. § 3121 (2019): <https://www.law.cornell.edu/uscode/text/26/3121>

Title 8, Article 2, Section 206(1)(b); Title 8, Article 3, Section 104(1); and Title 8, Article 13.5, Sections 203(2)(c), (2)(d), and (2)(e) of the Colorado Revised Statutes (2021): <https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzk1YTlxMS04YmJhNjBINWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWylBO9&crd=fabde68b-1861-48c2-8e5a-64339f7937a1>

Title 24, Article 72, Section 204 of the Colorado Revised Statutes (2021): <https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzk1YTlxMS04YmJhNjBINWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWylBO9&crd=fabde68b-1861-48c2-8e5a-64339f7937a1>

PARTS 5 – 6. RESERVED

PART 7. STATEMENTS OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE

7.1 Adopted December 8, 2021 - Effective January 30, 2022

STATUTORY AUTHORITY:

The Commissioner of Agriculture adopts these rules pursuant to §§ 8-13.5-203(2)(d) and (e), C.R.S.

PURPOSE:

To comply with Senate Bill 21-87 by establishing rules concerning allowances, limitations, and variances for agricultural employers to permit certain hand weeding and/or thinning activities by agricultural workers by:

1. Defining key terms;
2. Establishing the requirements and process for requesting a variance from the Colorado Department of Agriculture (“Department”) that allows more than occasional or intermittent hand weeding by agricultural workers; and

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3. Establishing allowances and limitations for hand weeding and hand thinning for agricultural employers actively engaged in the transition to certified organic agriculture while ensuring that agricultural workers are not at risk of acute, chronic, or debilitating injuries.

FACTUAL AND POLICY ISSUES:

The factual and policy issues encountered while drafting these rules are as follows:

1. The Department identified multiple terms that were not defined in §§ 8-13.5-201 and 203, C.R.S. To provide clarity to the regulated community both as to the meaning of terms used in these rules and to the types of activities that are not subject to limitations on hand weeding or thinning (i.e., Exempt Activities), the Department has included definitions in Part 1.
2. The Department has excluded properties owned or leased by the state or political subdivisions of the state, including state institutions of higher education, from the definition of agricultural property at Part 1.3 because neither the state nor political subdivisions of the state are regulated employers pursuant to § 8-3-104(12)(b), C.R.S. As such, the state and political subdivisions of the state, including institutions of higher education in the state, are not subject to limitations on hand weeding or thinning. However, individuals or entities who lease land from the state or a political subdivision of the state and who conduct agricultural activities on those leased lands are subject to these rules.
3. A variance certificate is not required if an agricultural employer only engages in activities that are already exempt from hand weeding and thinning limitations by statute. Specifically, §§ 8-13.5-203(2)(c)(~~I~~) through (~~VII~~), C.R.S., establishes classes of activities that are not subject to variance requirements ("Exempt Activities"). In other words, a variance certificate allowing agricultural workers to hand weed more than occasionally or intermittently is not required for Exempt Activities ~~because those activities are not subject to temporal or other limitations on hand weeding or hand thinning of weeds. Part 2.7 therefore makes clear that variance certificates do not cover hand weeding during otherwise Exempt Activities.~~
4. However, the Department understands that many agricultural employers conduct Exempt Activities and non-Exempt Activities on the same agricultural property(ies). Although agricultural employers do not need to seek a variance certificate for Exempt Activities, those employers must consider the hours spent hand weeding or thinning during those activities when determining if hand weeding during a worker's weekly work time will exceed the occasional or intermittent threshold, defined as "twenty percent or less of an agricultural worker's weekly work time." § 8-13.5-201(b), C.R.S. This is because the governing statute does not define "weekly work time," and the plain meaning of that phrase encompasses any and all work conducted as part of the worker's employment. Therefore, Part 2.2.1 requires that, when determining whether a variance certificate is required to hand weed more than occasionally or intermittently, the agricultural employer account for the hours performed hand weeding on the entire agricultural property(ies), including time spent hand weeding on portions of the agricultural property(ies) where Exempt Activities occur.

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5. The activities conducted by an agricultural employer are closely tied to the agricultural property(ies) that the agricultural employer owns, leases, or otherwise controls, maintains, and operates. Because the variance will cover specific hand weeding operations conducted on specific properties, the Department needs information on those properties in order to assess whether the agricultural employer has made the necessary statutory showing required to receive a variance. For this reason, the Department has determined that variances are employer- and property-specific, and, therefore, Part 2 of these rules requests information on agricultural properties and activities on those specific properties.
6. ~~Section 8-13.5-203(2)(e), C.R.S., only allows the Department to approve a request for a variance when the agricultural employer has established that three, specific criteria are met. As such, the burden is on the agricultural employer to establish that: i) the hand weeding performed under the variance does not involve prolonged and unnecessary stooping, kneeling, or squatting and does not create a risk of acute, chronic, or debilitating injuries for agricultural workers; ii) there is no suitable long-handled tool or other alternative means of performing the work that is suitable and appropriate to both the production of the agricultural or horticultural commodity and the scale of the operation; and iii) the applicant is not engaged in any of the seven other exempt activities listed at § 8-13.5-203(2)(c), C.R.S.~~
67. ~~This statutory mandate does not grant any inspection or enforcement authority to the Department concerning the variances. Therefore, neither Part 2 nor Part 3 of the Department's rules provide for pre-variance inspections, post-variance inspections, or oversight concerning whether an agricultural employer complies with the requirements necessary for the Department to issue a variance. Instead, the Department must rely on information provided by the agricultural employer to establish that the requirements for a variance are met. In so doing, the Department recognizes that each agricultural operation is unique; thus, the agricultural employer will be in the best position to, for example, analyze the suitability of various long-handled or other tools to their operations or the appropriateness of hand weeding certain agricultural or horticultural commodities. Therefore, Parts 2.2.1.3 through 2.2.1.5 of the Department's rules require explanations from the applicant as to how the criteria described immediately above have been met.~~
78. ~~Because the variance process includes a consideration of risk of acute, chronic, or debilitating injury to an agricultural worker, Parts 2.2.1.6 through 2.2.1.8 of the Department's rules require confirmation from the applicant that statutory requirements at §§ 8-13.5-203(2)(a), (3), and (4), C.R.S., setting forth protections afforded to agricultural workers, have been met. The Department has no oversight authority over an applicant's compliance with these statutory requirements; such compliance is the responsibility of the applicant. Similarly, That said, Part 2.2.1.9 requests information on other procedures or methods the agricultural employer intends to provide to protect agricultural workers from risk of acute, chronic, or debilitating injury.~~
89. ~~A variance certificate applies to the specific agricultural employer and all agricultural properties identified in the application for a variance. The Department recognizes, however, that agricultural properties owned, leased, or otherwise worked may change in any given year. To account for this reality, Part 2.6 establishes a process by which an agricultural employer may modify the agricultural properties to which the variance certificate applies. This ensures that an agricultural employer's variance extends to new properties or parcels where hand weeding or thinning may occur, provided all requirements in Part 2.6 have been met.~~

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910. Section 8-13.5-203(2)(d) charges the Department with promulgating rules that establish allowances and limitations for hand weeding and hand thinning for agricultural employers actively engaged in the transition to certified organic agriculture, while ensuring that agricultural workers are not at risk of acute, chronic, or debilitating injuries. The Department identified three classes of agricultural employers most likely to be transitioning to organic agriculture in Part 3 of its rules: i) those who are actively certified but are transitioning conventional fields to organic fields pursuant to their Organic System Plan; ii) those who are transitioning their operations or specific portions of their operations to organic agriculture pursuant to a formal transition program offered by an accredited certifier; and iii) those considering or operating in the three-year transition period required to become certified organic (i.e., where the fields or greenhouses have had no prohibited substances applied or methods used).
- ~~4011.~~ There is no way for the Department to track the identity or progress of the third category of transitioning agricultural employers ~~described above~~ who are not part of a formal transitioning program. And, because § 8-13.5-203(d), C.R.S., does not grant the authority to the Department to inspect transitioning fields, the Department lacks general oversight authority over any such transition. Therefore, the Department has determined that the most effective way to limit hand weeding in these instances is pursuant to the variance process described in Part 2 of the rules.
- ~~412.~~ Section 8-13.5-203(c)(III), C.R.S., exempts certified organic operations from limits on hand weeding or thinning. ~~Some~~ Because transitioning agricultural employers ~~operate~~ operate under an existing Organic System Plan or under a formal transitioning program overseen by an accredited certifier. Such transitioning operations are carefully monitored by USDA NOP or the certifier and, because those transitioning operations will soon be certified organic, the Department has determined that no variance will be required for these groups of transitioning agricultural employers who operate under oversight by certifiers or USDA NOP.
- ~~4213.~~ Part 3.1 establishes the general rule that agricultural employers actively engaged in the transition to certified organic agriculture are only eligible to receive a variance certificate for up to three consecutive years. This three-year limitation matches the three-year period where a transitioning grower may not use or apply prohibited methods or substances to the transitioning land. However, the Department's experience as an organic certifier demonstrates that there are situations where this three-year period must be extended. For example, third parties may apply or otherwise allow prohibited substances to contact transitioning fields without the permission of the transitioning grower (e.g., pesticides applied to non-conventional fields drift onto transitioning fields; fire suppression activities require the application of prohibited substances to transitioning fields to stop the spread or threat of fire to other areas). Therefore, provided the requirements in § 8-13.5-203(2)(e), C.R.S., are met, Part 3.1.1.1 allows the Commissioner to issue a variance certificate for additional consecutive periods to account for such situations. However, the Department cannot enumerate the myriad ways in which a transition to organic agriculture may be interrupted without the knowledge or permission of the transitioning grower. To address this issue, Part 3.1.1.2 allows the Commissioner to exercise his or her discretion to consider the extenuating circumstance(s) presented by the applicant and then exercise his or her discretion to issue variance certificates consistent with § 8-13.5-203(2)(e), C.R.S., for additional consecutive periods.