

DEPARTMENT OF FOOD AND AGRICULTURE
Title 3 of the California Code of Regulations

Notice of Proposed Rulemaking

Extended Comment Period for 45 Days

The Department of Food and Agriculture intends to adopt sections 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708 and 4709 of the regulations in Title 3 of the California Code of Regulations pertaining to Appeals to the Secretary.

This notice is being provided to be in compliance with Government Code Section 11346.4.

PUBLIC HEARING

A public hearing is not scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than 15 days prior to the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person or his or her authorized representative may submit written comments relevant to the proposed amendment to the Department. Comments may be submitted by mail, facsimile (FAX) at 916.654.1018 or by email to Stephen.Brown@cdfa.ca.gov. The written comment period closes at 5:00 p.m. on September 15, 2014. The Department will consider only comments received at the Department offices by that time. Submit comments to:

Stephen Brown
Department of Food and Agriculture
Plant Health and Pest Prevention Services
1220 N Street
Sacramento, CA 95814
Stephen.Brown@cdfa.ca.gov
916.654.1017
916.654.1018 (FAX)

Following the public hearing if one is requested, or following the written comment period if no public hearing is requested, the Department of Food and Agriculture, at its own motion, or at the instance of any interested person, may adopt the proposal substantially as set forth without further notice.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing law provides that any interested person that is aggrieved by any action or order of a commissioner may appeal in writing to the Secretary within five days after notice of action or order if no other time limit is prescribed within which to appeal from such action or order. No appeal may be taken from any authorized summary action of the commissioner (FAC section 5103).

Anticipated Benefits from This Regulatory Action

Currently there are no regulations related to FAC section 5103. These proposed regulations would establish the transparent regulatory framework for the processes and procedures for such appeals. This will ensure that an appellant has a clear understanding of their and the Department's responsibilities, how and where to appeal, timeframes involved, form and effective date of the decision rendered, etc. Therefore, the public is aware of the appeals process to the Secretary when finding resolution of an unsatisfactory order/action given by the Commissioner, in order to promote fairness and social equity in the justice system.

There is no existing, comparable federal regulation or statute.

The Department considered any other possible related regulations in this area, and we find that these are the only regulations dealing in this subject area, and the only State agency which can implement these regulations related to FAC section 5103. As required by Government Code Section 11346.5(a)(3)(D), the Department has conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing state regulations.

AMENDED TEXT

The adoption of these regulations will establish:

General Provisions - which statutory and regulatory authorities may be appealed, the time frame within which to appeal, that failure to appeal within a timely manner shall be cause to deny the request for a hearing, appeals to the Secretary shall be in writing and filed with the Director of PHPPS, where to send the appeals and the timeframe for when an appeal is considered effectively filed;

Effect of Commissioner's Action or Order of Required Action- the commissioner's action or order shall be suspended after the appeal to the Secretary has been filed with the Director with the exception that if any articles, containers, means of conveyance, farm machinery or farm implements or plant material or any other thing is on hold due to being infested, contaminated or associated with a quarantine pest of concern to the commissioner or Department, the hold shall remain in effect during the appeal period and pending the outcome of the hearing;

Conduct of Hearings - hearings shall be presided over and conducted by a Hearing Officer designated by the Secretary, may be based upon the written record or telephonic or oral testimony, hearings not held solely on the written record shall be recorded, the appellant may submit any documentation or evidence in support of their objections by facsimile, e-mail, personal delivery or U.S. Mail and it is the responsibility of the appellant to ensure that the materials are sent in a manner so as to arrive prior to the hearing;

Sole Issue of Hearings under this Section - the only issue before the Hearing Officer shall be whether, when the commissioner imposed the specified action or order there was reason to believe, upon any basis reasonably supportable by standard epidemiological evidence or credible scientific research or facts or regulation or statute, the action or order

was legally and biologically appropriate; and, the appropriateness of the action(s) (including its time and place and method) required by the action or order is not before the Hearing Officer, but only whether or not there was an adequate basis for imposition of the action or order;

Form of Decision - the decision of the Hearing Officer shall be in writing, in minute order form, contain only a brief statement of the conclusion and findings to support the conclusion, may be handwritten, shall be issued within 10 business days after the conclusion of the hearing and mailed within 10 business days to all appellants who did not consent to the action or order by the commissioner and may contain an explanation of the commissioner's warrant and abatement authority;

Effective Date of Decision - the Hearing Officer's decision shall be effective immediately upon its first articulation under section 4704;

Judicial Review - the appellant may challenge the Hearing Officer's decision by filing a writ of administrative mandamus within 90 days of the date the is mailed to the appellant in the appropriate court pursuant to Code of Civil Procedure section 1094.5 and that such proceedings shall not stay the action or order specified by the commissioner;

Continuance - that a request for continuance of a hearing, by the appellant, must be filed with the Director as soon as practicable prior to the scheduled hearing, may be granted if good cause exists and shall be granted upon a determination by the Director of PHPPS that such continuance is epidemiologically feasible and not inconsistent with the public health safety and welfare;

Burden of Proof - the standard of proof to be applied by the Hearing Officer shall be the preponderance of the evidence and that the burden of proof shall be on the appellant; and,

Evidence - all evidence related to the issue of the hearing will be admitted regardless of any civil rule which would otherwise bar its admission and those objections to and arguments about evidence may be considered by the Hearing Officer when determining the weight to be given to the evidence.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None and no nondiscretionary costs or savings to local agencies or school districts.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or business: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Small Business Determination

The Department has determined that the proposed regulations may affect small business.

Significant effect on housing costs: None.

Results of the Economic Impact Analysis

Amendment of these regulations will not:

- (1) Create or eliminate jobs within California;
- (2) Create new businesses or eliminate existing businesses within California; or
- (3) Affect the expansion of businesses currently doing business within California.

There are no known specific benefits to the worker safety or the health of California residents. The Department is not aware of any specific benefits the amendment of this regulation will have to the protection of public safety of California residents or worker safety. Based upon the economic analysis, the Department believes the amendment of this regulation benefits those who may wish to appeal a commissioner's action or order. As a result, the public is given a fair treatment and right to judicial review when resolving issues with Commissioner's order in the appeals process. [Gov. Code sec. 11346.3(b)].

The Department has evaluated and determined that the amendment of this regulation is not inconsistent with existing State regulations. There are no other comparable existing State regulations [Gov. Code sec. 11346.5(a)(3)(D)].

ALTERNATIVES CONSIDERED

The Department must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposal described in this Notice.

AUTHORITY

The Department proposes to adopt sections 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708 and 4709 pursuant to the authority vested by section 407 of the Food and Agricultural Code.

REFERENCE

The Department proposes this action to implement, interpret and make specific Sections 407 and 5103 of the Food and Agricultural Code.

CONTACT

The agency officer to whom written comments and inquiries about the initial statement of reasons, proposed actions, location of the rulemaking files, and request for a public hearing may be directed to is: Stephen S. Brown, Department of Food and Agriculture, Plant Health and Pest Prevention Services, 1220 N Street, Room A-316, Sacramento, California 95814, (916) 654-1017, FAX (916) 654-1018, E-mail: sbrown@cdfa.ca.gov. In his absence, you may contact Lindsay Rains at (916) 654-1017. Questions regarding the substance of the proposed regulation should be directed to Stephen S. Brown.

INTERNET ACCESS

The Department has posted the information regarding this proposed regulatory action on its Internet Web site (www.cdfa.ca.gov/plant/Regulations.html).

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department of Food and Agriculture has prepared an initial statement of reasons for the proposed actions, has available all the information upon which its proposal is based, and has available the express terms of the proposed action. A copy of the initial statement of reasons and the proposed regulations in underline and strikeout form may be obtained upon request. The location of the information on which the proposal is based may also be obtained upon request. In addition, when completed, the final statement of reasons will be available upon request. Requests should be directed to the contact named herein.

If the regulations adopted by the Department differ from, but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency officer (contact) named herein.