DEPARTMENT OF FOOD AND AGRICULTURE

PROPOSED CHANGES IN THE REGULATIONS

CALIFORNIA CODE OF REGULATIONS
TITLE 3. FOOD AND AGRICULTURE
DIVISION 4. PLANT INDUSTRY
CHAPTER 1. CHEMISTRY
SUBCHAPTER 1. FERTILIZING MATERIALS
ARTICLE 1. STANDARDS AND LABELING
ARTICLE 3. LICENSING
ARTICLE 4. REGISTRATION
ARTICLE 5. TONNAGE REPORTING
ARTICLE 6. ADMINISTRATIVE PENALTIES
ARTICLE 7. MILL ASSESSMENTS

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS & ADDENDUM TO INITIAL STATEMENT OF REASONS (*incorporated by reference*)

The Initial Statement of Reasons overview is still valid.

A 45-day notice was published from July 6, 2018 to August 20, 2018. In response to comments received and to ensure consistency under the Administrative Procedure Act, a 15-day notice was published from November 21, 2018 to December 5, 2018, a second 15-day notice was published from June 18, 2019 to July 3, 2019, and a third 15-day notice was published from December 6, 2019 to December 21, 2019 that included:

1) modifications to the originally proposed regulatory text

Substantive changes to the originally proposed text include:

- Proposed changes to 3CCR Section 2303(k) and 2320.2(b) have been withdrawn
- 3CCR §2300.1 - Revisions to proposed definitions of “willful misconduct” and “gross negligence”
- 3CCR §2303(v) - Acceptance of the “most recent edition” of the annual Association of American Plant Food Control Officials (AAPFCO) Official Publication as a reference for possible fertilizer terms and definitions
- 3CCR §2322 - A time frame for escalation of penalties established
- 3CCR §2322 Table A: Violations Matrix - Re-instituting a notice of warning for some penalties
- 3CCR §2322 Table A: Violations Matrix - Establishing standardized violation tiers and penalties

- 3CCR §2322 Table A: Violations Matrix – Revising description of violations for more clarity
- 3CCR §2322 Table A: Violations Matrix, Food and Agricultural Code (FAC) §14681(d) – Withdrawing text and penalty
- 3CCR §2322 Table A: Violations Matrix – An established time frame for retention of Organic Input Material manufacturer records
- 3CCR §2322.1 – Establishing a deadline to appeal a notice of proposed action and establish a standard for objection to informal hearing procedure
- 3CCR §2322.3 – Remove that the burden of proof for a hearing shall be on the respondent

SECTIONS AFFECTED

CCR, Title 3, Division 4, Subchapter 1, Sections 2300.1 , 2303, 2304, 2308, 2315, 2318, 2322, 2322.1, 2322.2, 2322.3, and 2323.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

SPECIFIC NECESSITY OF EACH SUBSTANTIVE CHANGE

The following provide the specific purpose, rationale, and summaries of these proposed changes to the CCR's related to fertilizing materials.

ARTICLE 1. STANDARDS AND LABELING

3CCR §2300.1(j) removes the proposed word "improper" as it was deemed to be unnecessary and superfluous within the proposed definition of willful misconduct.

3CCR §2300.1(k) removes the proposed phrase "a lack of slight diligence or care" as it infers to be a milder requirement when compared to other text within the proposed definition of gross negligence.

3CCR §2303(k) is being withdrawn as the original text better conveys the original intent for soil amending ingredient labeling.

3CCR §2303(v) utilizes the "most recent edition" so that this regulation would not have to be unnecessarily updated every year for each annual edition of the Association of American Plant Food Control Officials publication. FAC §14681(d) provides additional necessity, in that "due regard shall be given to commonly accepted definitions and official

fertilizer terms such as those prescribed by the Association of American Plant Food Control Officials," and does not provide for a specific year to be identified.

ARTICLE 4. REGISTRATION

3CCR §2320.2 remains unchanged. The text that was initially proposed to be removed is being withdrawn as the program must reference a specific application incorporated by reference and cannot provide a generalized designation for an application.

ARTICLE 6. ADMINISTRATIVE PENALTIES

3CCR §2322(a) establishes a timeframe for escalation of penalties which is necessary to ensure that penalties cannot be escalated in perpetuity. Five years is consistent with CDFA's record's retention policy which is reviewed and approved by the California Records and Information Management Program, State Records Center, Department of General Services.

3CCR §2322, Table A: Violations Matrix – Section Codes FAC 14591, 14601, 14611, 14631, 3CCR 2300, 2301, 2303, 2304, 2305, 2306, 2308, 2309, 2311, 2312, 2314, 2320, and 2326.1 establishes or re-inserts a notice of warning for the first violation, as well as 30 days to comply within the penalty column. This was necessary to retain a compliance timeframe and allow due process for firms to resolve minor violations.

3CCR §2322, Table A: Violations Matrix – Section Codes FAC 14591, 14601, 3CCR 2300(k)(2), and 2300(l) establishes the second and subsequent violation at $500. This is to serve as a necessary deterrent as presently the violation amount is less than the amount to obtain an organic fertilizer registration. The penalty amount is consistent for certain minor violations.

3CCR §2322, Table A: Violations Matrix – Section Code FAC 14611 establishes a delinquent payment penalty which was necessary to keep the penalty consistent with the text in statute.

3CCR §2322, Table A: Violations Matrix – Section Code FAC 14623 possesses language that past due tonnage reporting is cause for revocation of the license. This verbiage was withdrawn because the purpose of the Violations Matrix is to provide clarity for administrative penalty actions only. The violations matrix is intended to only reflect monetary penalties. An action for revocation of a license requires a different type of hearing.

3CCR §2322, Table A: Violations Matrix – Section Code FAC 14681(a), 14682(a), 3CCR 2300(g), 2302(a), 2303(h) have proposed changes to the description of violation column which is necessary to use the language in statute. For 2303(h), the language was abbreviated to "The statement shall follow the required format," which alleviates the

necessity to duplicate the entire comprehensive labeling format found within the regulation.

3CCR §2322, Table A: Violations Matrix – Section Code FAC 14681(d) was withdrawn which was necessary because the intent of "unless the plant nutrients conform to the definition of identity" is unclear. No definition for "identity" current exists. As a result, it is uncertain what would trigger a violation and subsequent penalty. The fertilizer industry may request that the Department define "identity" in the future, at which time this section may be revisited within the Violations Matrix.

3CCR §2322, Table A: Violations Matrix – Section Codes 3CCR 2300, 2301, 2303, 2304, 2305, 2306, 2308, 2309, 2311, 2312, 2320.3, and 2320.4 includes verbiage in the violations column that the penalty for FAC 14681(a) and/or (c) would apply for subsequent violations. This is necessary because all continued section violations lead to a misbranding violation that could be derived from "not labeled according to regulations," "false or misleading," or both depending up the situation. This language is applied equally to ensure consistency and standardization.

3CCR §2322, Table A: Violations Matrix – Section Codes 3CCR 2300(j), 2301, and 2303(s)(1) establishes penalty tiers for the second, third, and subsequent violations, as well as provides direction for violations that arise from fraud, willful misconduct, gross negligence or are a threat to public safety. This is necessary to ensure penalties are standardized deterrents in-line with similar code sections.

3CCR §2322, Table A: Violations Matrix – Section Code 3CCR 2300(m) was withdrawn because label registration renewal is a Department function and no firm could receive a violation, so it is not necessary to include.

3CCR Section 2322(b), Table A: Violations Matrix, 3CCR §2304(b)(1) added the proposed text "or per gram for dry material" within the violations matrix in order to match the correct language in the §2304(b)(1) regulation.

3CCR §2322 Table A: Violations Matrix – **Section Code 3CCR 2323(c)** includes a time frame for retention of Organic Input Material manufacturer records which is necessary to be consistent with CDFA's record's retention policy which is reviewed and approved by the California Records and Information Management Program, State Records Center, Department of General Services.

3CCR §2322, Table A: Violations Matrix – Section Codes 3CCR 2326.1 proposes new text necessary to keep the section consistent with FAC 14611 and clearly identify that violations and penalties are applied as FAC 14611 and not in addition to FAC 14611.

3CCR §2322.1 establishes a deadline to appeal a notice of proposed action and establish a standard for objection to informal hearing procedure, which is necessary for due process, clarity, and transparency.

3CCR §2322.3 removes text that the burden of proof for a hearing shall be on the respondent which provides fundamental fairness for the Department to establish proof of violation(s).

SUMMARY AND RESPONSE TO WRITTEN COMMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD ENDING AUGUST 20, 2018

COMMENT 1.1: Submitter states concern "that there is minimal clarification as to how an inspection is to be done. Under FAC Section 14642, 'Sampling and access to facility" it states that the Secretary shall to the extent necessary for the enforcement 'inspect the fertilizing material manufacturing facilities and take samples at various stages of production to verify label and labeling claims and production processes.' For example, in a field inspection, are inspectors expected to roll a bag to ensure that a homogenous sample is taken? We would like details and clarifications to be made to this section so that industry knows how a field inspection is to be undertaken."

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because Title 3, California Code of Regulations (3CCR), Article 2. Samples, commencing with Section 2313 and ending with Section 2317, identifies the parameters regarding fertilizer sampling. CDFA has proposed revising 3CCR Section 2315, Sampling Procedure, to be consistent with AAPFCO. Sampling is outlined in detail as it is relatively uniform in concept across locations. In contrast, facility variations are extensive. It is not possible to proscribe the diverse actions necessary to deal with the multitude of differing criteria and conditions. Each inspection will vary depending on whether a firm produces organic input materials, conventional fertilizing materials, commercial fertilizer, agricultural minerals, specialty fertilizer, auxiliary soil & plant substances, or soil amendments. The program hosts an annual workshop each year outlining common details of inspections and answers industry questions.

COMMENT 1.2: Submitter states that #9 and #11 in the Table "A": Violations Matrix within 3CCR Section 2322 removes "30 days to comply" and that it appears that a fine of $1,000 is assessed for the first violation with no warning or opportunity to remedy the labeling/misbranding issue. The submitter requests that there be a 30-day compliance timeframe to be reinstated.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations by providing a 30-day notice of warning/notice of violation for minor violations, including all labeling violations within 3CCR 2300 and 2303 subsections. For moderate and serious violations, CDFA has determined that significant potential for harm to consumers or

competitive harm associated with these violations warrant action being taken with the first violation.

COMMENT 1.3: Submitter believes that the proposed fines have increased substantially, when compared with the prior regulation (citing $250 to $500 and $500 to $1,000 or more). The submitter contends that the increase is arbitrary as outlined in California NOPR, dated July 6, 2018, "Most of the revisions within 3CCR Section 2322 'Table A': Violations Matrix are to clarify and standardize, not increase liability to firms". They further state that an increase of 100% will increase liability to the affected firms.

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations. On page four of the Notice of Proposed Rulemaking, dated July 6, 2018, states, "The proposed regulations would have no economic impact to *compliant* fertilizer firms" (emphasis added) and in the section cited by the submitter it states, "*Most* of the revisions…are to clarify and standardize, not increase liability to firms" (emphasis added). There are only four code sections with increases (FAC 14591 – licensing, FAC 14601 – product registration, FAC 14611 – mill assessments, FAC 14631 – unlabeled product). For each of those sections, a notice of warning is issued first to allow firms adequate time to comply and serve notice prior to any monetary penalties. In the case of the registration penalty, for example, the increase is not arbitrary as second violation of $500 is equal to the existing registration fee maximum.

COMMENT 2.1: Submitter thanks CDFA for formally recognizing "Soil Amending Ingredients" in the proposed regulations, but states that it fails to recognize "Beneficial Substances" as defined by the Association of American Plant Food Control Officials (AAPFCO). There continues to be discrepancies between states between "Nonplant Food Ingredients" and "Soil Amendments."

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by withdrawing the proposed revisions to 3CCR section 2303(k).

COMMENT 2.2: Submitter asks if 'silica' is a soil amendment or "Beneficial Substance" and clarification on purpose statement labeling for 'silica'.

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because it is very specific in nature and doesn't apply to this regulations package. CDFA currently accepts "silicon dioxide" claims, not "silica" within nonplant food ingredient requirements (3CCR Sections 2303(g) or (l)), depending on the ingredient source. "Sand," a source of silica, is also acceptable as a packaged soil amendment ingredient (FAC Section 14552(e)). The submitter can inquire about specific labeling questions with our fertilizing materials help desk at (916) 900-5022.

COMMENT 2.3: Submitter requests that CDFA recognize and allow the subheading of 'Contains Beneficial Substances/Contains Beneficial Substances,' as with the current proposal of 'Soil Amending Ingredients'.

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because of the general lack of uniformity across all states for these subheadings. CDFA intends to continue to work with AAPFCO toward uniformity in this area prior to memorializing all potential alternatives in regulations.

COMMENT 2.4: Submitter requests that PDFs with the new proposed regulation language be 'searchable.'

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because the PDF of the proposed regulation text available at the "Proposed Text" link at https://www.cdfa.ca.gov/is/regulations.html is "searchable". Issues may be due to individuals using older versions of Adobe Reader or Acrobat.

COMMENT 3.1: Regarding 3CCR Section 2303(k), the submitter states that only six states regulate potting mixes as either horticultural growing mediums or soil/plant amendments. In the other 44 states, potting mixes do not meet the definition as they do not "amend" native soil. Adding "Soil Amending" in front of "Ingredients" would conflict with other states' regulations. For garden soil products, it would likely trigger some states to require registration as a soil amendment and run into similar formatting issues. Submitter suggests that CDFA align with AAPFCO model regulations for soil amendments.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by withdrawing the proposed revisions to 3CCR section 2303(k).

COMMENT 3.2: Regarding 3CCR Section 2318, the submitter agrees with CDFA that there should not be a new licensing application fee if a revised application is submitted within 180 days.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by proceeding with the originally proposed regulation change.

COMMENT 3.3: Regarding #1 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter contends that an administrative fine of $500 without an investigation to determine culpability is unreasonable.

RESPONSE: CDFA has considered this comment and incorporated it into the regulations by re-inserting the 30-day notice of warning/notice of violation for the first violation for minor violations. For moderate or serious violation classifications, CDFA has determined that due to significant false, misleading or deceptive business practices that involve

misbranding, adulteration, movement of quarantined products, refusal to submit records or access to premises, or potential for consumer or competitive harm that these violations warrant action being taken with the first violation.

COMMENT 3.4: Regarding #2 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter requests that the Department continue the practice of issuing a Notice of Warning or change the definition of "distribute" (FAC Section 14529) to accommodate situations where a product is just passing through the state, through either a warehouse or through transportation.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations by providing a 30-day notice of warning/notice of violation for all minor violations. Additionally, if a manufacturer is transporting a product through California they should be prepared to provide documentation that the products are not intended for sale in California. Based on this documentation, if products were not intended for the California channels of trade, a violation would not be issued.

COMMENT 3.5: Regarding #3 and #4 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter asks if all products in the channels of trade are subject to penalties under Section 14591 (unlicensed manufacturer), if a license is cancelled due to delinquent mill assessments or tonnage reporting.

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because California distribution is deemed to have occurred based upon evidence obtained by the Department. Any product already distributed prior to the license being cancelled would not be subject to additional penalties as these sections deal with not paying fees or submitting reports and does not relate to the quality or safety of the product.

COMMENT 3.6: Regarding #5 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter asks if a product is distributed without a label in California and is subject to an unlabeled violation, would it also be in violation and subject to a $500 penalty for FAC Section 14601 (unregistered product) for the first violation as opposed to a Notice of Warning.

RESPONSE: CDFA would like to provide an explanation to the submitter's inquiry. Yes, and in addition may also be assessed a penalty for being unregistered. CDFA does not believe this regulation requires clarification as CDFA believes the regulation is sufficient to make the industry aware of their obligations to register fertilizing material products and ensure they have labeling.

COMMENT 3.7: Regarding #9 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter asks if a deficient sample is issued misbranding and adulteration violations, would the penalty be based on the first violation only ($1,000) or the first and second ($3,500).

RESPONSE: CDFA would like to provide clarification to this comment. The penalty would be based upon the first violation. In the example provided, the penalty amount would be $1,000 for the first misbranding violation and $1,000 for the first adulteration violation equaling a total of $2,000.

COMMENT 3.8: Regarding #11 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that the penalty matrices under 3CCR Section 2303 conflict with this section (FAC Section 14681(c)). The submitter states that it appears that both penalties could be applied for the same violation. They suggest that they change this section to match those of Section 2303. The submitter also requests that a Notice of Warning be implemented first to ensure a firm can correct the nonconformance.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations. CDFA understands how it could appear that both a labeling violation (CCR 2303) and a misbranding violation (FAC 14681(c)) could both be assigned for the same violation. A labeling violation (CCR 2303) is a constituent of a misbranding violation (FAC 14681). FAC 14681 is where the monetary penalty may be applied. CDFA has revised Table "A" Violations Matrix of 3CCR Section 2322 to better reflect the association and make it clearer. These violations may only result in one assessed penalty.

COMMENT 3.9: Regarding #11 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that previously approved and registered labels may require revisions at the renewal period according to 3CCR Section 2300(m). The submitter requests that the labeling matrices for FAC Section 14681(c) and 3CCR Section 2303 be amended to allow for labeling variances based on active registration and conforming to new regulation changes. The revised language may include "or as agreed upon by the CDFA Registration staff." The submitter also requests that the first violation receive a Notice of Warning for the first violation, as current language would assess a penalty immediately.

RESPONSE: CDFA has considered this comment and incorporated the notice of warning request into regulations but did not incorporate the labeling variances request because it may allow non-compliant labels to remain in the channels of trade indefinitely, potentially perpetually misleading the public. CDFA has provided a 30-day notice of warning/notice of violation for all minor violations, including all labeling violations within 3CCR 2300 and 2303 subsections.

COMMENT 3.10: Regarding #12 and #13 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter expresses concern that minor variances from a product's guaranteed analysis will result in a minimum $1,000 penalty without knowing whether it is a sampling/testing issue or an actual product issue. The submitter requests that this matrix section retain the text, "Composition variability associated with inherent properties of physical blending, feedstock, and sampling of fertilizing materials will be considered as minor violations." The submitter also states that it is unclear if the penalty assessments

are per deficient sample or the number of each violations within a sample. Specifically, , the submitter asks if a deficient sample is issued misbranding and adulteration violations, would the penalty be based on the first violation only ($1,000) or the first and second ($3,500).

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because an investigational allowance is applied to all deficient samples and if a sample is deficient but within the acceptable investigational allowance, no penalty is assigned.

The text “Composition variability associated with inherent properties of physical blending, feedstock, and sampling…” is replaced through the applied investigational allowances. Penalty assessments are for the deficient product as a whole and not for each individual nutrient assay that may be deficient. The penalty would be based upon the appropriate first violation. In the example provided, the penalty amount would be $1,000 for the first misbranding violation and $1,000 for the first adulteration violation equaling a total of $2,000.

COMMENT 3.11: Regarding 3CCR Section 2300(m) in Table “A” Violations Matrix of 3CCR Section 2322, the submitter states that this should not be in the violations matrix as this is a CDFA action, not a registrant action. Additionally, it is unclear as to whether the violation will be assessed against a label previously approved by CDFA based on a change in CDFA’s review standards.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by withdrawing 3CCR §2300(m) from Table “A” Violations Matrix.

COMMENT 3.12: Regarding #25 in Table “A” Violations Matrix of 3CCR Section 2322, the submitter contends that as written, this penalty matrix prohibits the inclusion of a density statement on packaged specialty liquid fertilizers, which is required by other states.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because the description of the violation matches the language found in 3CCR section 2303(b)(3). Additionally, CDFA believes the language is clear and doesn’t prohibit the inclusion of a density statement on packaged specialty liquid fertilizers, rather states it is only required for bulk liquid products.

COMMENT 3.13: Regarding #30 and #37 in Table “A” Violations Matrix of 3CCR Section 2322, the submitter stated that a CDFA review of label formats for soil amending ingredients indicated “NONPLANT FOOD INGREDIENT” was not a requirement for the label.

RESPONSE: CDFA would like to provide an explanation to the submitter's inquiry. This section refers to auxiliary soil and plant substance products. If the product is a packaged soil amendment or a bulk organic input material soil amendment, this labeling would not be required. Please refer to FAC Section 14513 for a definition of auxiliary soil and plant substance.

COMMENT 3.14: Regarding #41 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that as compared to the current 3CCR Section 2304(b)(1), the matrix is missing, "or per gram for dry material".

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by adding the requested language so the description of violation for 3CCR section 2304(b)(1) found in Table "A" Violation Matrix is consistent with the language found in 3CCR section 2304(b)(1).

COMMENT 3.15: Regarding 3CCR Section 2323(c) in Table "A" Violations Matrix of 3CCR Section 2322, the submitter requests that the department provide a time requirement for maintaining these records.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by adding a five-year time requirement for maintaining all records demonstrating compliance with National Organic Program standards.

COMMENT 4.1: Submitter states that nearly all the proposed violation matrix provisions impose higher costs on businesses, and many remove discretion from agency personnel to impose penalties according to the seriousness of the violation. The submitter adds that the increased costs would detrimentally affect businesses operating inside California.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because the proposed regulations would have no economic impact to *compliant* fertilizer firms. CDFA contends that the revised provisions better standardize penalties, so that all noncompliant firms are treated equally with regards to penalty valuations. Penalties based upon discretion from agency personnel could be viewed as biased. Additionally, all minor violations provide a 30-day notice of warning/notice of violation, so firms have an opportunity to comply. All violation matrix provisions are applied equally for businesses operating inside or outside California.

Compliant businesses would not be detrimentally affected by the revised matrix provisions. Based on 2017 penalties, only eight noncompliant firms out of 3,055 fertilizer licensees would be affected by these penalty revisions. There would have been no additional cost to any other business.

COMMENT 4.2: Regarding 3CCR Section 2303(k), the submitter states that only six states regulate potting mixes as either horticultural growing mediums or soil/plant

amendments. In the other 44 states, potting mixes do not meet the definition as they do not "amend" native soil. Adding "Soil Amending" in front of "Ingredients" would conflict with other states' regulations. For garden soil products, it would likely trigger some states to require registration as a soil amendment and run into similar formatting issues. Submitter suggests that CDFA align with AAPFCO model regulations for soil amendments.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by withdrawing the proposed revisions to 3CCR section 2303(k).

COMMENT 4.3: Submitter states that the Notice of Warning for a first offense has been removed from several provisions in the violations matrix. The Notice of Warning provides an effective, immediate compliance directive without monetary penalties. The submitter requests that CDFA consider issuing a warning for a company's first violation for any given provision, instead of for each product.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations by providing a 30-day notice of warning/notice of violation for minor violations for the first violation. For moderate or serious violation classifications, CDFA has determined that due to significant false, misleading or deceptive business practices that involve misbranding, adulteration, movement of quarantined products, refusal to submit records or access to premises, or potential for consumer or competitive harm that these violations warrant action being taken with the first violation. Violations are designated when stated provisions expressed within the violations matrix are violated and are not necessarily product-specific.

COMMENT 4.4: Submitter mentions that many provisions currently state "may assess a penalty up to X dollar amount." The permissive "may give CDFA the discretion to assess the seriousness of the penalty and penalize accordingly. A very minor variance in a product could be strictly interpreted as a violation, though the consequence to health and the environment is minimal or nonexistent. Agency personnel should retain the discretion to realize the absence of severity and scale the penalty accordingly.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because the proposed penalty tiers provide more standardization and ensure that the laws and regulations are applied equally to all.

COMMENT 4.5: Submitter states that removing the "Compliance Timeframe" could allow CDFA to administer multiple violations on the same product in different locations in the same day, such as with an unregistered product. A predetermined time to come into compliance will prevent market interruptions while minor violations are addressed. Submitter adds that there is not sufficient time for the registrant to apply for and obtain registration as the timing for approval exceeds the previously stated 30 days.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations by providing a 30-day notice of warning/notice of violation for minor violations for the first violation. CDFA contends that a 30-day notice of warning/notice of violation is sufficient notification for industry to make a determination for noncompliant products in the channels of trade.

COMMENT 4.6: Regarding #2 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter requests that the Department continue the practice of issuing a Notice of Warning and change the definition of "distribute" (FAC Section 14529) to accommodate situations where a product is just passing through the state, through either a warehouse or through transportation.

RESPONSE: CDFA has considered this comment and has accepted it in part and rejected it in part. In addressing the submitter's request that the Department continue the practice of issuing a Notice of Warning, CDFA has incorporated it into the regulations by providing a 30-day notice of warning/notice of violation for minor violations for the first violation. For moderate or serious violation classifications, CDFA has determined that due to significant false, misleading or deceptive business practices that involve misbranding, adulteration, movement of quarantined products, refusal to submit records or access to premises, or potential for consumer or competitive harm that these violations warrant action being taken with the first violation. However, in addressing the submitter's recommendation of updating the definition of "distribute" as defined in Food and Agricultural Code section 14529, CDFA did not incorporate it into the regulations because CDFA has no authority to amend the statute.

Additionally, if a manufacturer is transporting a product through California they should be prepared to provide documentation that the products are not intended for sale in California. Based on this documentation, if products were not intended for the California channels of trade, a violation would not be issued.

COMMENT 4.7: Regarding #11 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that the penalty matrices under 3CCR Section 2303 conflict with this section (FAC Section 14681(c)). The submitter states that it appears that both penalties could be applied for the same violation. They suggest that they change this section to match those of Section 2303.

RESPONSE: CDFA has considered this comment and has incorporated it into regulations. CDFA understands how it could appear that both a labeling violation (CCR 2303) and a misbranding violation (FAC 14681(c)) could both be assigned for the same violation. A labeling violation (CCR 2303) is a constituent of a misbranding violation (FAC 14681). FAC 14681 is where the monetary penalty may be applied. CDFA has revised Table "A" Violations Matrix of 3CCR Section 2322 to better reflect the association and make it clearer. These violations may only result in one assessed penalty.

COMMENT 4.8: Regarding #11 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that previously approved and registered labels may require revisions at the renewal period according to 3CCR Section 2300(m). The submitter requests that the labeling matrices for FAC Section 14681(c) and 3CCR Section 2303 be amended to allow for labeling variances based on active registration and conforming to new regulation changes. The revised language may include "or agreement with the CDFA Registration staff."

RESPONSE: CDFA has considered this comment and concluded that the first sentence no longer applies as 3CCR Section 2300(m) was removed from the penalty matrix. The submitters labeling variances request was not incorporated into the regulations because if labeling variances, based on a product's active registration and an agreement with CDFA (as proposed in the comment), were allowed it would permit non-compliant labels to remain in the channels of trade indefinitely.

COMMENT 4.9: Regarding #13 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter expresses concern that minor variances from a product's guaranteed analysis will result in a minimum $1,000 penalty without knowing whether it is a sampling/testing issue or an actual product issue.

The submitter adds that FAC Section 14647 provides for allowable tolerances to account for analytical, sampling, and preparation variation. The submitter requests that these tolerances are provided in regulation and align with AAPFCO tolerance standards. The submitter adds that they would like the matrix to be revised from "…falls below or differs from that which is it is purported to possess by its labeling" to "…falls below the allowed analytical tolerance for that element."

The submitter requests that this matrix section retain the text, "Composition variability associated with inherent properties of physical blending, feedstock, and sampling of fertilizing materials will be considered as minor violations."

RESPONSE: CDFA has considered this comment and did not incorporate it into the regulations because an investigational allowance is applied to all deficient samples and if a sample is deficient but within the acceptable investigational allowance, no penalty is assigned.

The text "Composition variability associated with inherent properties of physical blending, feedstock, and sampling…" is replaced through the applied investigational allowances.

CDFA is currently preparing a regulatory change to include the existing investigational allowances which are identical to AAPFCO's investigational allowances for primary, secondary, and micronutrients.

COMMENT 4.10: Regarding 3CCR Section 2300(m) in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that this penalty is a statement of rule for CDFA and not an action for the registrant that would be subject to penalty. The submitter requests that this section is removed from the penalty matrix.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by withdrawing 3CCR §2300(m) from Table "A" Violations Matrix.

COMMENT 4.11: Regarding #41 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that as compared to the current 3CCR Section 2304(b)(1), the matrix is missing, "or per gram for dry material".

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by adding the requested language so the description of violation for 3CCR section 2304(b)(1) found in Table "A" Violation Matrix is consistent with the language found in 3CCR section 2304(b)(1).

COMMENT 4.12: Regarding 3CCR Section 2323(c) in Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that it is not practical to maintain organic input material records indefinitely. The submitter asks that the Department provide a time requirement for maintaining these records, such as "For the time period the material is in the marketplace, or 5 years, whichever longest."

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by adding a five-year time requirement for maintaining all records demonstrating compliant with National Organic Program standards.

COMMENT 5.1: Submitter states that they would like to see the program spend additional resources and focus on products that are not registered, misbranding conventional products as "organic" or marketing products deficient in nutrients.

RESPONSE: CDFA consistently spends considerable time and resources investigating unregistered products, misbranded labeling, and products deficient in nutrients. In the future, these violations will continue to be areas of emphasis.

COMMENT 5.2: Submitter asks whether escalating violations are for a calendar year or "forever." Submitter requests a start and stop date for violations, because once a firm gets into the multiple violations category, they could be stuck there forever.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by modifying the text of 3CCR Section 2322(a) by adding, "Escalation of penalties may apply for a revolving five-year period from the date of each unique section code violation." Five years is consistent with CDFA's record's retention policy which is

reviewed and approved by the California Records and Information Management Program, State Records Center, Department of General Services.

COMMENT 5.3: Submitter states that the violations matrix should be "up to" a certain penalty amount to provide the Department with flexibility to address unforeseen circumstances. The proposed penalty tiers may be transparent and predictable, but "up to" is good for both sides. Once the proposed tiers are in regulation they often cannot be reduced even in the appeals process because there is no clear flexibility. "Up to" would also help drive settlements.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because the proposed penalty tiers provide more standardization and ensure that the laws and regulations are applied equally to all.

COMMENT 5.4: Regarding 3CCR Section 2320.3(a)(1), the submitter states that claims on a website are "advertising," so they should be held to the same standards as with a label. The submitter suggests this applies to "products sold in California."

RESPONSE: CDFA has considered this comment and would like to clarify that 3CCR Section 2320(a)(2) contains the text that expresses that websites are extensions of labeling when making claims regarding suitability for use in organic crop and food production. This criteria would apply to all organic input material products that meet the definition of "distribute" in California under FAC Section 14529.

SUMMARY AND RESPONSE TO WRITTEN COMMMENTS RECEIVED DURING THE 15-DAY PUBLIC COMMENT PERIOD ENDING DECEMBER 5, 2018

COMMENT 1.1: Regarding #13 in Table "A" Violations Matrix of 3CCR Section 2322, the submitter asks if there are no longer allowable deviations for nutrient claims and if the minimum guarantees are true minimums. Submitter states that their lab adheres to AAPFCO investigational allowances for quality control parameters, so they would like to know if they need to change their process to comply with CDFA.

RESPONSE: CDFA would like to provide an explanation to the submitter's inquiry. CDFA maintains investigational allowances for nutrient claims. Guaranteed analysis minimums are still enforced, but allowances for variations that occur in the taking, preparation, and analysis of an official sample are applied, as per FAC Section 14647. The investigational allowances for primary, secondary, and micronutrients are identical to the Association of American Plant Food Control Officials investigational allowances.

COMMENT 2.1: Submitter states that they would like to see the program spend additional resources and focus on products that are not registered, misbranding conventional products as "organic" or marketing products deficient in nutrients.

RESPONSE: CDFA consistently spends considerable time and resources investigating unregistered products, misbranded labeling, and products deficient in nutrients. In the future, these violations will continue to be areas of emphasis.

COMMENT 2.2: Regarding 3CCR Section 2323(c), the commenter stated that CDFA did not provide any information of support for the proposed 5-year escalation of penalties time frame. If an escalation time frame is necessary, it should be relevant to the regulatory time frame of the product, such as a two-year registration period. The commenter adds that CDFA should not re-register a product that is violative. The commenter also states that CDFA should include a process where violations can be resolved, and escalation potential is closed.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because 5-years is consistent with CDFA's records retention policy which is reviewed and approved by the California Records and Information Management Program, State Records Center, Department of General Services.

COMMENT 2.3: Regarding 3CCR Section 2320(a)(1) and 2320(a)(2), the commenter suggests that label claims on a website is "advertising" and marketing, so they should be held to the same standards. The submitter suggests these claims should include "products sold in California."

The commenter also added that an organic input material approved by OMRI, might be sold as a conventional fertilizer in California to a farmer that isn't organic. CDFA enforces the position that OMRI listings require CDFA OIM registration and issues a violation. Not all of these are sold as organic, such as with lime.

RESPONSE: CDFA has considered this comment and would like to clarify that 3CCR Section 2320(a)(2) contains the text that expresses that websites are extensions of labeling when making claims regarding suitability for use in organic crop and food production. This criteria would apply to all organic input material products that meet the definition of "distribute" in California under FAC Section 14529.

CDFA agrees with the second part of the comment regarding OMRI-approved organic input materials. CDFA requires product registration as an organic input material (OIM) for any OIM listed with a third-party organization claiming suitability for use in organic food and crop production (3CCR Section 2320.3). If these products are sold conventionally, they would still require OIM registration because organic input suitability is still being claimed.

COMMENT 2.4: Regarding 3CCR Section 2318(b), the submitter states that if a registration fee has been submitted and the Department has not responded to the resubmittal, the registrant can request a refund of registration fee.

RESPONSE: *Although the submitter stated "registration fee," CDFA will respond as if they correctly identified "license fee," since 3CCR Section 2318 is exclusively regarding licensing.* CDFA has considered this comment and did not incorporated it into the regulations because the proposed text clearly states that a new license fee is required, "more than 180 days *from the date the secretary initially returned the application"* (emphasis added). If the Department has not responded to a resubmittal, it is not factored into a requirement for a new license fee.

COMMENT 2.5: Regarding 3CCR Section 2300(m) within Table "A" Violations Matrix of 3CCR Section 2322, the submitter states that they agree with the removal of this section from the violations matrix.

RESPONSE: CDFA has considered this comment and has incorporated it into the regulations by proceeding with the proposed removal.

COMMENT 2.6: Regarding 3CCR Section 2309, the submitter requests that if the registrant can substantiate that the additional phosphoric acid does not contribute to the guaranteed analysis, then it should not be required to be included in the derivation statement.

RESPONSE: CDFA has considered this comment and did not incorporated it into the regulations because section 3CCR Section 2309 sets guidelines for "phosphorous acid" products, not "phosphoric acid" products.

SUMMARY AND RESPONSE TO WRITTEN COMMMENTS RECEIVED DURING THE SECOND 15-DAY PUBLIC COMMENT PERIOD ENDING JULY 3, 2019

No comments were received during the 2nd 15-day public comment period ending on July 3, 2019.

SUMMARY AND RESPONSE TO WRITTEN COMMMENTS RECEIVED DURING THE THIRD 15-DAY PUBLIC COMMENT PERIOD ENDING DECEMBER 21, 2019

COMMENT 1.1: Regarding 3CCR Section 2303(k), the submitter claims that it could be misleading as to what types of products the regulation is referring to by removing the proposed text. By removing soil amendment text, it may lead affected parties to think that the derivation for commercial fertilizers and/or agricultural minerals (or all product labels) needs to be listed in decreasing amounts.

RESPONSE: CDFA has considered this comment and would like to clarify that the proposed revisions section 2303(k) have been withdrawn. The text still states that it applies "for packaged soil amendments and organic input material bulk soil amendments."

REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE DEPARTMENT'S REASONS FOR REJECTING THOSE ALTERNATIVES

Section 2300.1(i), (j), and (k) – The alternative is not to include the legal definitions of "fraud," "willful misconduct," and "gross negligence." The definitions help to classify serious violations from minor violations and provide flexibility in proposed penalties. Currently many sections of "Table 'A': Violations Matrix" state that "Violations may be assessed up to $5,000." We have amended many of these sections to take a more incremental approach ($1,000 / $2,500 / $5,000), but these terms and legally accepted definitions help identify which violations may constitute a $5,000 penalty for egregious actions. Without these clarifying definitions, "Violations may be assessed up to $5,000" would remain.

Section 2303(i) – The alternative is to retain the existing regulation. Retaining the existing regulation would result in some approved, registered labels in California not being accepted by other states that do not permit the term "*organic*" in guaranteed analysis claims. Retaining the existing regulation may harm sections of the industry that would need different labels to comply with the requirements of other states, instead of one standardized label.

Section 2303(v) – The alternative is to continue to use the 2017 AAPFCO official publication or to constantly update a specific publication year in regulation. Both of these alternatives would lead to referencing an outdated publication version. As a result, the definitions and official fertilizer terms relied upon by the Department and industry would be outdated.

Section 2304 – The alternative is to leave the existing verbiage in the regulation. This is problematic because the existing regulation does not address other product categories that may also contain microorganisms, which need the same labeling guidance as auxiliary soil and plant substances.

Section 2308 – No reasonable alternatives exist. FAC Section 14601 mandates the Department to regulate all organic input materials including bulk organic input material soil amendments, so regulations that limit labeling guidance to "packaged" soil amendments are no longer accurate.

Section 2315 – The alternative is to retain the existing sampling procedure. However, CDFA's sampling procedure would not be in-line with most other states who follow sampling guidance from AAPFCO.

Section 2318 – The alternative is to make no amendment to this section. Consequently, there would be no guidance for resubmitting applications returned as incomplete, and the regulations for license applications would not be consistent with the regulations for registration applications.

Section 2322 – The proposed Table "A" amendments are the result of a three-year working group comprised of the Department's special investigators and environmental scientists. Two alternatives to the table's structure were proposed.

The first alternative suggested changing the "Compliance Timeframe" column to "Reference" or "Authority," then including the corresponding statute numbers within that column. The first alternative was simply streamlined into the proposed amendment by citing the referenced statutes within the penalty column.

The second alternative was similar to the first, but would also include excerpts from the reference statutes in addition to the section numbers. The Department felt that the inclusion of excerpts would be redundant.

Pursuant to Government Code Section 11346.9(a)(4), the Department has determined that no alternative considered by the agency would be more effective and less burdensome or costly to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Pursuant to Government Code section 11346.9(a)(5), if anyone proposes an alternative that would lessen the adverse economic impact on small businesses, the final statement of reasons must include an explanation setting forth the Department's reasons for rejecting any proposed alternatives.

Section 2322.1 – is being amended to correctly identify the Legal Office of Hearings and Appeals and its address for correspondence related to administrative penalties. This section also removes the formal and informal hearing option because it is unnecessary. Now that there is a Legal Office of Hearings and Appeals when a party requests a hearing the Legal Office of Hearings and Appeals makes a determination based on the Administrative Procedure Act (APA) as to whether a matter should proceed by informal hearing or whether it is the party's right to have a formal hearing.

Section 2322.2 – is being amended to correctly identify the Legal Office of Hearings and Appeals and its address for correspondence related to administrative penalties. This section also removes the formal and informal hearing option because it is unnecessary.

Now that there is a Legal Office of Hearings and Appeals when a party requests a hearing the Legal Office of Hearings and Appeals makes a determination based on the APA as to whether a matter should proceed by informal hearing or whether it is the party's right to have a formal hearing.

Section 2322.3 – The alternative would be to retain the existing regulation. This would result in hearing officers having less time to render a decision to administrative penalty hearings and not allowing the modern option of sending the written decision as an email attachment.

Pursuant to Government Code section 11346.9(a)(4), the Department has determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Pursuant to Government Code section 11346.9(a)(5), if anyone proposes an alternative that would lessen the adverse economic impact on small businesses, the final statement of reasons must include an explanation setting forth the Department's reasons for rejecting any proposed alternatives.

Duplication of Statutes and Regulations

In Title 3, CCR, Section 2322(b), the Description of Violation column of Table A: Violations Matrix purposely duplicates or restates statutes in Division 7, Chapter 5, Article 10 of the California Food and Agricultural Code and regulations in Title 3, Division 4, Chapter 1 of the California Code of Regulations. Notwithstanding the APA nonduplication standard in Government Code Section 11349.1(a)(6), the Department's duplication and restatement of these statutes and regulations is necessary to satisfy the clarity standard in Government Code Section 11349.1(a)(3). One of the main purposes of the Violations Matrix is to provide a single location where the description, severity, and consequences of violations are transparently communicated. Any duplication or restatement of statutes and regulations are for the benefit of industry understanding, Department enforcement, and ease of reading. If the Violations Matrix merely provided citations to the statutes and regulations covered in the matrix, both industry and the Department would be required to cross-reference the individual statutes and regulations, which would be both time consuming and would defeat the essential purpose of a clear, comprehensive Violations Matrix.

Addendum to Final Statement of Reasons – Nonsubstantial Changes Made to Regulation Text During Office of Administrative Law Review

Minor technical changes were made to punctuation, grammar, underline, strikethrough, and to conform the regulatory text to existing California regulations. None of the changes materially altered the requirement, right, responsibility, condition, prescription, or other regulatory element in the regulations.