

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 6. ADMINISTRATIVE PENALTIES

ADDENDUM TO THE INITIAL STATEMENT OF REASONS

SECTIONS AFFECTED

California Code of Regulations (CCR), Title 3, Division 4, Chapter 1, Subchapter 1, Articles 1,3, and 6, Sections 2300.1, 2308, 2315, 2318, 2322, and 2322.1.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION, PER GOVERNMENT CODE 11346.2(b)(1):

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

ARTICLE 1. STANDARDS AND LABELING

Section 2300.1. Definitions

Section 2300.1(i), (j), and (k) is being added to provide clarity for the terms "fraud," "willful misconduct," and "gross negligence," by providing definitions from Black's Law Dictionary. "Willful misconduct" combines definitions for both "willful misconduct" and "misconduct" as the Black's Law Dictionary definition for "willful misconduct" uses the term "misconduct" to describe itself (e.g. "misconduct committed voluntarily and intentionally") and a more detailed definition was necessary. These terms are necessary as they categorize misbranding violation penalties, so it is important these terms are characterized by accepted, existing, legal definitions.

Section 2308. Packaged Soil Amendments.

Section 2308 is being amended to remedy the omission of bulk organic input material soil amendments, because currently it appears the Department is limited to regulating packaged soil amendments. The proposed changes are necessary as the omission of bulk organic input materials soil amendments creates a potential loophole for

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standardized requirements. Additionally, subsection (e) is being amended for the reason above, as well as to provide clarity regarding “wetting agent” labeling requirements. The “wetting agent” amendments are necessary because current verbiage lacked clear guidance and resulted in delayed product registrations for industry.

ARTICLE 3. LICENSING

Section 2318. Licensing.

Section 2318 is being amended to provide guidance on resubmitting license applications returned as incomplete and create uniformity with the regulations for registration applications. This is necessary to ensure that the Department can contact firms with incomplete license applications and provide clear timeframe as to when applications require or do not require a new application fee. The 180-day license application timeframe is proposed as it would place it in alignment with the 180-day registration application timeframe identified in CCR Section 2320.1(b).

ARTICLE 6. ADMINISTRATIVE PENALTIES

The subject of **Article 6** is being changed from Mill Assessments to Administrative Penalties to more accurately reflect the subject matter of this article, which will now cover Sections 2322 through Section 2325.

Section 2322. Administrative Penalty Guidelines.

Section 2322 is being amended to remove unnecessary quotation marks from the “A” in Table A, and to add thirty-five applicable sections of the fertilizer laws and regulations to the administrative penalty violations matrix. Additional proposed amendments ensure that the administrative penalties are fully supported and legally defensible by statute, and provide a reference for the industry to review. The changes were reviewed to ensure consistency and legal integrity with existing statute. They also provide better standardization and ensure the penalties are equally applied.

The proposed amendments ensure that all applicable laws and regulations are represented within the violations matrix and that the administrative penalties are in line with the statutes from which they originate. In addition, the matrix possesses a “compliance timeframe”. This timeframe had not been included in statute in all instances, which permits firms who are violating the law to continue doing so for an additional 30 days with impunity. The revised version includes references to the applicable FAC and CCR statutes giving it more credence.

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Within 2322(b), proposed amendments are being made to accurately identify the corresponding sections in the Food and Agricultural Code and California Code of Regulations. Accurately referencing the correct corresponding sections mandates the need for this change.

Additionally, the purpose and necessity of each violations matrix section are provided below in specific groupings, where applicable:

Violations Matrix - FAC Sections 14591 and 14601

The purpose for revising the violation amounts for licensing and registration is because the current violation amount (\$250) is less than some required fees (\$500 for organic input material registration). Presently, some firms may pay less money for a violation penalty than the cost for compliant registration. This is necessary because noncompliant firms could profit on distributing large amounts of fertilizer, so these incrementally higher penalty amounts could aid in deterrence. The Department has retained a Notice of Warning for the first violation.

Violations Matrix - FAC Section 14611

The mill assessment is an inspection fee that is paid quarterly based on a firm's fertilizing materials sales. The purpose of augmenting this section in the violations matrix is to ensure that firms are reporting their sales and paying any required assessment. It is necessary to ensure level competition by equal reporting and to provide necessary inspection fees. The previous penalty level was a minimal deterrent to bad actors. The additional penalty is necessary as a reasonable deterrent for firm's to complete their obligation to submit quarterly mill assessments. The Department has retained a Notice of Warning for the first violation.

The Department originally sought to include license cancellation language to match statutory language in FAC 14613. However, the program is amending this area by removing the cancellation language as the purpose in the violations matrix is to identify standardized penalty amounts for each violation. This is necessary because the cancellation requirements are addressed in a separate statute (FAC 14613) and are unrelated from the administrative penalty guidelines in CCR Section 2322.

The purpose and necessity of including the 15% delinquent payment penalty of mill assessments in the violations matrix text is because it is included in the FAC 14611 statute and is a monetary penalty. It serves to further identify standardized penalty amounts.

Violations Matrix - FAC Section 14623

The Department originally sought to include license revocation language to match statutory language. However, the program amending this area by removing the

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revocation of the license language as purpose in the violations matrix is to identify standardized penalty amounts for each violation. This is necessary because the revocation requirements are addressed under the statute and are separate from the administrative penalty guidelines in CCR Section 2322.

FAC Section 14631

The Department has proposed amending this violation matrix section in order to limit the risk of repeat offenders that do not provide a label. After the first violation, the penalty amounts have been increased because necessity merits penalties that reflect the severity of the violations for habitual offenders. The Department has retained a Notice of Warning for the first violation. However, firms that repeatedly distribute unlabeled fertilizing materials put consumers at risk and competition at a disadvantage.

Violations Matrix - FAC Sections 14655, 14681, 14682, and CCR Sections 2302 and 2319 (and all subsections)

These sections within the violations matrix are being revised to accurately reflect the seriousness of these violations, as they deal with movement of quarantines, misbranding, adulteration, excessive presence of heavy metals, or selling fertilizers intended only for experimental use. The purpose was to establish standardized tiers for these penalties that fall within the “not more than five thousand dollars” authority set forth in FAC Section 14651.5. The necessity is to ensure that firms in violation of these sections are all treated equally and fairly, yet provide flexibility in the event of violations that arise from fraud, willful misconduct, gross negligence or are a threat to public safety. The current verbiage of “up to \$5,000” for violations is deemed to be too arbitrary and broad, as well as potentially allowing for inconsistent penalty valuations.

Violations Matrix - Violations Matrix - CCR Sections 2300(e)-2300(j), 2301, 2303, 2304, 2305, 2306, 2308, 2309, 2311, 2312, 2320.3, 2320.4 (and all subsections)

The proposed amendments within these violation matrix sections are primarily related to labeling concerns. The purpose was to uniformly express that violations under these labeling sections may fall under FAC 14681(a) – Misbranding, false or misleading, or 14681(c) – Misbranding, not labeled as required by regulations, depending on the particular label compliance issue. These amendments were necessary because the existing verbiage currently links all labeling violations under 14681(a) and it is currently not accurate or reflective for all violations under these CCR labeling sections. It is also important and necessary to demonstrate that monetary penalties fall under FAC 14681 and that the Department isn't using a redundant penalty for monetary gain. The Department has retained a Notice of Warning for the first violation.

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Violations Matrix - FAC Section 14641 and 14642 and CCR Sections 2323 and 2424 (and all subsections)

These sections within the violations matrix are being included to accurately reflect the seriousness of these violations, as they involve the potential denial of access to records, premises, sampling, or access to production facilities. The purpose was to establish a maximum penalty for firm's not permitting to fulfill their statutory duties. This is necessary because access to production facilities, sampling, and records are the most critical element to carry out the basic provisions afforded to this regulatory branch by the legislature. FAC Section 14501(b) states, in part, that the branch's intent is "to provide assurance to the consumer of (fertilizing materials) that the product purchased is properly identified, and to provide assurance of the validity of the quality and quantity represented by the manufacturer of these products."

Violations Matrix - CCR Sections 2300(k)(2), 2300(l), and 2314

These are newly proposed sections to the violations matrix. The purpose is to ensure that all sections with the potential for violations are included for standardization and completeness. It is necessary to include these three sections as to ensure that firms properly notify the Department regarding changes to a product's composition, composition disclosures, and provide analytical results for subsamples. The Department has included a Notice of Warning for the first violation. Subsequent violations are assessed \$1,000 due to the nature of persistent noncompliance.

Violations Matrix - CCR Section 2320 and 2326.1

These sections are reflective of FAC Section 14601 and 14611, respectively. The purpose of these additions are to clearly communicate that CCR Section 2320 is an extension of FAC Section 14601, and CCR Section 2316.1 an extension of FAC Section 14611, through which those penalties apply and it is not "in addition to". This is necessary to eliminate confusion that this violation would potentially "double dip". CCR Section 2320 provides additional clarity to FAC 14601 as it posits that fertilizing materials "shall not be distributed or sold unless the product is registered." Similarly, CCR Section 2326.1 provides additional clarity to FAC Section 14611 as it illustrates the how the mill assessment amounts are separately designated for the branch and for funding for research and education regarding the use and handling of fertilizing material.

Violations Matrix - CCR Section 2325

The intent of this newly proposed part of the violations matrix is to ensure that necessary fertilizer sales records are maintained and are able to be provided under audit. There is no notice of warning for this violation because the Department may need to audit specific records that cannot necessarily be reproduced at a later date. This is necessary because record maintenance and the ability to audit is essential for an equitable marketplace. While the monetary penalties are not significant relative to

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some other violations, they will help serve as a deterrent for failing to maintain and provide records of transactions.

Section 2322.1 is being amended to clarify that a notice of adverse determination may include a notice to deny a right, authority, license or privilege or the renewal thereof. This language is necessary to provide clarity of what a notice of adverse determination can include. Further this section is being amended to clarify that respondent has 30 days to contest the notice of adverse determination. This language is necessary to be consistent with Food and Agricultural Code section 14651.5(c). Additionally, this section 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. This section is being amended to add language relaying that any objection to the Department's selection of the informal hearing procedure shall be made to the Legal Office of Hearings and Appeals and shall be resolved by the Hearing Officer prior to the hearing. This language is necessary to notify the regulated public that they can make an objection to the use of the informal hearing procedure and to notify them how to make an objection. The language requiring the objection be in writing and that it shall be resolved by the hearing officer prior to the hearing are necessary so that both, the administrative record is complete, and to be consistent with Government Code section 11445.30(b)-(c).

Note of clarification for FAC Sections 14651.5, 14652, and 14655(b) as they apply to CCR Section 2322's Administrative Penalty Guidelines and the Violations Matrix:

Section 14651.5 provides the statutory authority for the administrative penalty guidelines in CCR Section 2322.

Section 14652 is the authority for assigning adulteration and misbranding violations as misdemeanors. These misdemeanor violations are not part of the informal administrative penalty process, but would rather be charges sought through county district attorney's or the attorney general's office.

Section 14655(b), relating to movement of quarantine, differentiates between a civil administrative penalty violation (as specified under 14651.5) and a misdemeanor, which would be pursued formally through a county district attorney or attorney general's office and in lieu of administrative penalties.