

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
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INITIAL STATEMENT OF REASONS

The California Department of Food and Agriculture's Fertilizing Materials Inspection Program (FMIP) is statutorily tasked with licensing and label registration, tonnage reports, field inspections, and administration of the Fertilizer Research and Education Program (FREP). The FMIP is responsible for the review and registration of product labels, promoting agronomically sound and environmentally safe use of fertilizing materials through FREP, and ensuring fertilizing materials are safe and effective, and meet the nutrients guaranteed by the manufacturer. Producers of agricultural minerals, auxiliary soil and plant substances, commercial fertilizers, soil amendments, specialty fertilizers and organic input materials (OIM) are statutorily mandated to register with the FMIP.

SECTIONS AFFECTED

California Code of Regulations (CCR), Title 3, Division 4, Chapter 1, Subchapter 1, Articles 3-7, Sections 2300.1, 2303, 2304, 2308, 2315, 2318, 2320.2, 2322, 2322.1, 2322.2, and 2322.3.

PROBLEM STATEMENT

The objective of the proposed regulations is to clarify the statutes in the Food and Agricultural Code (FAC) related to labeling and administrative penalties. The proposed changes will provide improved clarity and uniformity, and correctly align our administrative penalties with the referenced statutes. Thirty-five (35) statutes and regulations were added to the administrative penalty violations matrix to address the previously omitted law and regulation sections. The proposed revisions standardize the penalties and provide improved transparency with fertilizer labeling; these changes will provide the fertilizer industry with a better understanding of labeling requirements, thus providing fuller disclosures for the end user and further consumer protections.

BENEFITS

The proposed changes to the regulations will provide improved clarity and uniformity to the fertilizer industry. The changes will also provide improved reference, justification, standardization, and context for administrative penalties. The proposed amendments to the administrative penalty violations matrix add thirty-five (35) previously missing sections of the fertilizer laws and regulations, so the program can enforce compliance of all provisions. These changes will be beneficial to consumers by providing greater transparency with fertilizer labeling, offering improved disclosures for the end user, and ensuring better standardization and fundamental fairness in enforcement.

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. These terms may be used to categorize misbranding violation penalties, so it is important these terms are characterized by accepted, existing legal definitions.

Section 2303. Labeling Requirements

Section 2303(i) is being amended to ensure consistency and better standardization with other state departments of agriculture and the Association of American Plant Food Control Officials (AAPFCO). No other state requires the terminology, "Water Soluble *Organic* Nitrogen" or "Water Insoluble *Organic* Nitrogen," in its format for guaranteed analysis. Further, some other states specifically prohibit the term "*Organic*" from those phrases as it may be deemed misleading in the context of forms of nitrogen.

Section 2303(k) is being amended to ensure that soil amendments are correctly labeled with regards to the many different ingredients in soil amendments. The revised regulation provides industry with guidance to follow for the correct labeling format. The proposed amendment provides a needed visual example of the regulatory text for the fertilizer industry to use as a template when crafting compliant product labels. The omission of these examples would lead to additional label review time for the Department and delayed

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product registrations for industry because there is not enough guidance of the correct label format at present time.

Section 2303(v) is being amended to change the year and version of the AAPFCO official publication from “2017”, “No.70” to “2018”, “No.71.” This amendment will ensure the Department and industry are using the current version of the AAPFCO official publication for definitions and official fertilizer terms.

Section 2304. Biotics.

Section 2304 is being amended to eliminate confusion of product category and assist in the universal labeling of fertilizing materials that contain biotics. Many fertilizing material product classifications contain biotics, not just auxiliary soil and plant substances. Without this revision, the fertilizer regulation would be inaccurate in this regard, because many product categories contain biotics which require the same basic labeling guidelines.

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 standardized requirements.

ARTICLE 2. SAMPLES

Section 2315. Sampling Procedure.

Section 2315 is being amended to standardize the sampling of packaged dry fertilizing materials according to the guidelines of the AAPFCO. AAPFCO sampling guidelines are followed by most other states and the association has statistical data for this sampling method. CDFA’s sampling method has not been re-evaluated since it was created in 1974.

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.

ARTICLE 4. REGISTRATION

Section 2320.2. Registration Application for Organic Input Material Product Label.

Section 2320.2 is being amended to remove the reference to the Organic Input Material Fertilizing Materials Registration Application form. In accordance with Gov. Code 11340.9 the Department can use the form without having to incorporate the form by reference in the CCR, because the information it requires is only what is required in FAC Sections 14601 – 14604).

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.

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 as the entity which schedules informal hearings.

Section 2322.3 is being amended to increase the amount of time for a hearing officer to render a decision from 15 days to 30 days. These changes add the ability for the written decision to be served via email and removes “audio tape” because hearings may now be recorded by digital or other means.

ARTICLE 7. MILL ASSESSMENTS

Article 7 is being added to cover the subject matter currently covered in Article 6; there is no other change.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The proposed regulatory changes are based upon feedback from the fertilizing materials industry and the Department’s registration staff, environmental scientists, and special investigators. No documentation is included for the proposed changes to regulations.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The majority of the proposed regulatory actions are technical in nature, and will provide clarity to the regulated industry and end users of fertilizing materials regulations already specified in statute. These clarifying changes will not have an economic or fiscal impact on the fertilizing materials industry, related businesses, or the general public.

For proposed regulations that will require label changes, firms may utilize their current labels until updated versions are created during their two-year renewal cycle as a regular course of business. There will be no additional fees due, as registrants are required to pay a registration fee, whether they make label changes or not, during renewal.

Some of the administrative penalty guidelines for the Table “A”: Violations Matrix within 3CCR Section 2322 have been revised to better standardize the monetary amounts and to ensure uniformity of enforcement. It is expected that the industry will comply with the law, so any increased penalties will not have an economic impact on the industry. Firms in violation may have an economic impact of the fine amount, but this is similar to the violations matrix in its current form. The existing violations matrix has more fine variability (“up to \$5,000 per violation,” in most cases), whereas the proposed revisions create a more standardized, tiered system to ensure uniformity and fundamental fairness. Firms fined for a violation will still have the right to due process through a hearing. Many violations also require a Notice of Warning prior to a fine being applied.

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Based on 2017 figures, only eight noncompliant firms out of 3,055 fertilizer licensees would be affected by these penalty revisions. In 2017, 25 product registration violations (FAC § 14601) were assessed penalties of \$250 each (all 25 violations were from these eight noncompliant firms). Based upon the proposed increase to a \$500 registration violation penalty, this would equal \$6,250 in additional penalties for these eight firms.

It is critical to address this proposed regulatory action would not financially impact any compliant firm.

The Department concludes that these regulations will not:

- (1) Create or eliminate jobs within California
- (2) Create new businesses or eliminate existing businesses within California
- (3) Affect the expansion of businesses currently doing business within California
- (4) Affect the health and welfare of California residents, worker safety, and the state's environment

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Section 2300.1(i), (j), and (k) – There is no economic impact to these proposed regulations as they are merely definitions to help explain and clarify terms.

Section 2303(i) – There is no economic impact as firms may still use existing labels for two years beyond their next registration renewal cycle. Firms may update their labeling upon their next label printing, as a regular course of business. It is estimated that less than 3% of registered labels in California possess the “water soluble *organic* nitrogen” and “water insoluble *organic* nitrogen” claims.

Section 2303(k) – There would be no adverse economic impact as the proposed amendment provides guidance for label formatting to assist firms in creating their labels. The revised guidance is expected to expedite the review of firm labels and would ensure that soil amendments are correctly labeled. Firms may utilize their current labels until updated versions are created during their two-year renewal cycle, as a regular course of business.

Section 2303(v) – There is no economic impact as the proposed amendment is technical in nature and only amends the year and version of the AAPFCO official publication from 2017 No. 70 to 2018 No. 71.

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Section 2304 – The proposed amendment is technical in nature and does not have an economic impact. The proposed text simply recognizes that biotics may also be present in a number of different product classifications, not just auxiliary soil and plant substances.

Section 2308 – There would be no adverse economic impact as the proposed amendment provides formatting guidance to assist firms in creating their labels and consequently ensuring soil amendments are correctly labeled. The revised guidance is expected to expedite the review of firm labels. Firms may utilize their current labels until updated versions are created during their two-year renewal cycle, as a regular course of business.

Section 2315 – There is no economic impact as the proposed amendment is technical in nature, only relating to modifications in CDFA’s fertilizer sampling protocol.

Section 2318 – The proposed amendment only provides guidance and consistency in regulations; it would not have an adverse economic impact.

Section 2320.2 – There is no economic impact as the proposed amendment is technical in nature and only removes reference to the Department’s OIM product registration form.

Section 2322 – The cost for amending and incorporating these proposed regulations would be insignificant. These proposed regulations will add authority and provide clarity to users of fertilizing materials. The proposed regulations will have no significant statewide adverse economic impact on the fertilizer industry and no economic impact on firms that are compliant with the FAC and CCR.

For firms with a first violation, there is an increase in the penalty amounts in two FAC sections, FAC Section 14591, for fertilizing materials license violations, and Section 14601, for product registration violations. The penalty for a first violation will be \$500 and each subsequent violation will be \$1,000. The revised penalties are in-line with the referenced statutes. Additionally, previously open-ended penalties (i.e. “Violations assessed up to \$5,000”) have been revised to be more standardized and uniform with a tiered system of \$1,000 for the first violation, \$2,500 for the second violation, and \$5,000 for each subsequent violation.

Based on 2017 assessed penalties, only eight noncompliant firms out of 3,055 fertilizer licensees would be affected. In 2017, 25 product registration violations (FAC Section 14601) were assessed penalties of \$250 each (all 25 violations were from these eight noncompliant firms). Based upon the proposed increase to a \$500 penalty, this would equal \$6,250 in additional penalties for those firms only. No license violation penalties were assessed in 2017.

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Furthermore, is expected that the fertilizer industry will comply with the law and regulations, so any increase in penalties will not have an economic impact on the industry as a whole. Firms assessed a Notice of Proposed Action will still have the right to due process through a hearing.

It is critical to address this proposed regulatory action would not financially impact any compliant firm.

Section 2322.1 – There is no economic impact to the proposed amendment as it is technical in nature relating to amended contact information and the option of formal administrative penalty hearings.

Section 2322.2 – There is no economic impact to the proposed amendment as it is technical in nature relating to amended contact information and the option of formal administrative penalty hearings.

Section 2322.3 – There is no economic impact to the proposed amendment as it merely extends the time frame of a hearing officer’s decision from 15 days to 30 days and provides the option to email the written decision.

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 measured 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.

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Section 2303(k) – No reasonable alternatives exist. FAC Section 14601 mandates the Department to regulate bulk organic input material soil amendments, so regulations that limit labeling guidance to “packaged” soil amendments are no longer accurate.

Section 2303(v) – The alternative is to continue to use the 2017 AAPFCO official publication. Consequently, 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 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. CDFA’s existing sampling procedure for packaged dry material has not been evaluated in over 40 years, while AAPFCO’s data is more current.

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 2320.2 – One alternative is to continue to use the outdated OIM registration application form revised 07/13. This would jeopardize the Department’s International Organization for Standardization (ISO) 17065 accreditation because the outdated version does not have the text “date” and “approved” as well as the OIM form number (OIM-0001), which are required for the Department to maintain its ISO 17065 accreditation.

Another alternative is to revise the regulation form to include an OIM form number, which would mean the form would then have two numbers, and amend the section to change the revision date for the registration form. This alternative would necessitate a rulemaking processing for each revision of the form.

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.

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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 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 2322.3 – 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.

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DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

The proposed regulations do not duplicate or conflict with federal regulations.