

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 2. SAMPLES
ARTICLE 4. REGISTRATION
ARTICLE 6. ADMINISTRATIVE PENALTIES

INITIAL STATEMENT OF REASONS

The California Department of Food and Agriculture's (Department) 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, packaged 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 1, 2, 4, and 6, Sections 2303, 2309, 2315, 2317.5, 2320.2, 2320.4, and 2322.

PROBLEM STATEMENT

The objective of the proposed regulations is to clarify the statutes in the Food and Agricultural Code (FAC) related to fertilizing materials labeling, sampling procedures, and investigational allowances. The proposed changes and additions are necessary to provide greater transparency and clarity of fertilizing material labeling, improve flexibility and efficiency with fertilizing material sampling, and add comprehensive and objective investigational allowances for fertilizer analysis.

DOCUMENT RELIED UPON

Hart, John. Fertilizer and Lime Materials. *Fertilizer Guide*. FG 52, Oregon State University, reprinted May 1998, revised August 1990, pp. 1-5.

Organic Input Material Label Registration Application, 513-026 (Rev. 06/19)

BENEFITS

The proposed changes to the regulations will provide improved clarity and uniformity related to fertilizing materials labeling, sampling procedures, and investigational allowances. These changes will provide benefits to growers and consumers through greater transparency with fertilizer labeling, improve disclosures for the end user, and enhanced consumer protections. This rulemaking will also provide for flexibility and improved efficiency for fertilizing sampling. The proposed actions will also provide for additional investigational allowances with fertilizer analysis and less restrictive parameters for the fertilizer industry striving to ensure that their products meet secondary and micronutrient fertilizer label guarantees in a fair, uniform manner.

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

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

ARTICLE 1. STANDARDS AND LABELING

Section 2303. Labeling Requirements.

Section 2303(d) is being amended to clarify chain of custody and product responsibility for bulk commercial fertilizers and agricultural minerals through label disclosure. This is necessary because the current text (“licensee’s name and address”) has led to confusion and misunderstanding about which licensee should appear on a label. When bulk material changes custody through distribution, the original label guarantor should no longer be held responsible for the quantity and quality of the product because they no longer have possession or control of the material. The last licensee has custody and control of the material prior to distribution to the grower or customer and it would be reasonable and customary that they are represented on the bulk commercial fertilizer or agricultural mineral label as the guarantor.

Section 2303(i)(3) is being amended and **(i)(3)(A)** is being adopted to provide uniform standardization for liming materials labeling through a universal lime score that growers can reference to better determine a product’s overall quality. A lime score is a numerical expression using the equations and calculations set forth in the Oregon State University Fertilizer Guide for Fertilizer and Lime Materials which indicate the quality of lime based on calcium carbonate equivalent, fineness factor, and moisture content. A lime score communicates to growers “at a glance” the overall quality of the lime product, independent of physical appearance or cost. This is necessary because a lime score would provide California growers with a valuable resource for evaluating lime products that may

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otherwise look identical in appearance, but may have radically different effects on their soil and crops.

Section 2309. Phosphorous Materials.

A comma is being added to Section 2309 to ensure correct grammar is used throughout the regulation text. This is necessary to ensure accurate grammar.

Section 2309(a)(3)(A) is being adopted to ensure that total phosphoric acid, which is not readily available to plants and crops, is not mistaken for available phosphoric acid. This is necessary because the proposed labeling revisions ensure that the difference is much more transparent to consumers. This is also necessary because the fertilizer industry currently uses this proposed standard on most applicable labels and the amended text memorializes the existing industry standard into regulation.

ARTICLE 2. SAMPLES

Section 2315. Sampling Procedure.

Section 2315(b)(1), (b)(2), and (d) are being amended to be more accurate, descriptive, and reflective of typical sampling scenarios. Section 2315(b)(1) removes the word “delivery” from “delivery stream” and “during the delivery” because this statement can be misinterpreted as a sampling method used only when fertilizing material is being delivered, instead of simply being an additional descriptor for the word, “stream”. This section also revises “loaded or unloaded” for better clarity. This is necessary to clarify because bulk cup-type sampling is performed when a stream of bulk, dry fertilizer is being loaded or unloaded at any point in the channels of trade. This section also provides clearer terms for who is in possession of the material. This is necessary because the current term, “Registrant”, applies only to entities who have registered products. Bulk commercial fertilizer and bulk agricultural minerals, commonly sampled by this method, do not require registration, so “person or distributor” would be more appropriate by definition.

Section 2315(b)(2) adds sampling scoops as a sampler option to complement the existing dry, bulk samplers: bulk cup-type sampler and Missouri-D sampler. This is necessary because fertilizing material with large particle sizes may jam the Missouri-D sampler and sampling scoops is a viable alternative. Sampling scoops are commonly used options to sample bulk gypsum, compost, and soil amendments. This section also clarifies that samples can be obtained from piles, windrows, or bulk bags, in addition to compartments. This is necessary because bulk fertilizing materials are commonly stored in pile, windrows, or bulk bags, and not just compartments.

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Section 2315(d) is being amended because the Department's restrictive fill devices for sampling are designed for various container sizes and not just bulk tanks. These revisions are necessary to ensure that the sampling methods are accurate and comprehensive.

Section 2315(c)(1) and **(c)(4)** are being amended and **(c)(3)** is being repealed to make the sampling procedure for gypsum more accurate and descriptive. Section 2315(c)(3) is being repealed because a trowel is no longer a viable sampling tool due to sanitation and contamination concerns.

Section 2317.5. Investigational Allowances.

Section 2317.5(b) is removing existing language limiting the maximum investigational allowance for secondary and micronutrients at one percentage point. This is necessary because the current investigational allowances do not provide any additional buffer for inherent lab analysis variance for manufacturers who produce secondary nutrients with a guaranteed analysis over 16% or micronutrient guarantees at 3.4 – 10% or more, as they are capped at one percentage point. This may result in these products to be more frequently, and potentially incorrectly, found in violation due to perceived deficiencies within their high analysis products.

Section 2317.5(c) provide fertilizer manufacturers with the additional published values of investigational allowances for soluble silicon, total phosphoric acid, and lime score. Investigational allowances account for variations inherent in the taking, preparation, and analysis and/or calculations of an official sample of fertilizer. Fertilizer manufacturers/guarantors are required to provide a guaranteed analysis on labeling for percentages of primary nutrients, secondary nutrients, micronutrients, or other claims. This section communicates thresholds for which any analyzed deficiency would be considered in violation versus values that are within an acceptable investigational allowance due to laboratory variations. This is necessary to ensure that investigational allowances are included and available for all assays that the Department analyzes and could potentially find in violation.

The proposal also revises “guaranteed analysis” for humic acid and vitamin b-1 to “guarantee” to more accurately reflect that these guarantees are in a separate nonplant food ingredient section of the label and not within the guaranteed analysis for plant nutrients. This is necessary to be consistent with the existing definition of guaranteed analysis in Food and Agricultural Code Section 14536.

Section 2317.5(c)(1)(A) is being revised because the cited National Organic Program code section (7 CFR 205.601(j)(7)) is inaccurate. This incorrect section describes micronutrient requirements, not requirements for liquid fish products and pH. This is

necessary to correct the error and refer to the accurate Code of Federal Regulations section.

ARTICLE 4. REGISTRATION

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

Section 2320.2(b)(2)(A) is being adopted to ensure that the Department is notified of the accurate and correct final manufacturing location for organic input materials. This is necessary so the Department can observe production at required organic input material inspections to verify a product's organic integrity. An inaccurately listed location may result in a delayed inspection or may misrepresent an organic input material.

Section 2320.4. Use of the Term “Organic on Labels and/or Labeling.

Section 2320.4(c) and (c)(1) is being amended so that the required organic declaration is more clearly identifiable on labels and labeling. The amendments will also ensure that the declaration is required anywhere that a fertilizer firm is promoting a product as “organic,” but that does not meet the National Organic Program standard as an organic input material. This is necessary to create more transparency and help reduce confusion about products that are not approved for organic food and crop production in California.

ARTICLE 6. ADMINISTRATIVE PENALTIES

Section 2322. Administrative Penalty Guidelines.

Section 2322 is being amended to clarify that a “description of” the violation is included in the administrative penalty matrix, versus the full violation text. “Article 10” is being removed because Article 10 only covers Sections 14651-14661 of the Food and Agricultural Code and the violations matrix lists sections for other articles as well. This is necessary to ensure accuracy.

Revisions to the text are being amended or adopted for code sections 2303(d)(1) through 2320.2(b)(2)(A) to ensure that the code section language proposed in this rulemaking package is also within the Administrative Penalty Guidelines. This is necessary to ensure that the Administrative Penalty Guidelines has the correct and most up-to-date revised or adopted text.

Section 2303(d)(1) was deemed a minor violation based on the description of a “Minor” violation in Section 2322(a)(3), Administrative Penalty Guidelines. If the last licensee

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distributing the fertilizing material was not represented as the label guarantor, there would be minimal adverse effects on consumers.

Section 2309(a)(3)(A) ensures that total phosphoric acid, which is not readily available to plants and crops, is not mistaken for available phosphoric acid. This is necessary because the proposed labeling revisions ensure that the difference is much more transparent to consumers. This is also necessary because the fertilizer industry currently uses this proposed standard on most applicable labels and the amended text memorializes the existing industry standard into regulation.

Section 2320.2(b)(2)(A) was deemed a serious violation based on the description of a “Serious” violation in Section 2322(a)(1), Administrative Penalty Guidelines. By not providing an accurate manufacturing/production location(s) for the final product on the product formula sheet, it is misbranding and may be misleading as to where a product is actually produced.

Section 2320.4(b) is being revised in order to capitalize the word “Program” for the National Organic Program. This is necessary as capitalizing the National Organic Program is grammatically correct.

Section 2320.4(c) and (c)(1) is being amended so that the required organic declaration is more clearly identifiable on labels and labeling. The amendments will also ensure that the declaration is required anywhere that a fertilizer firm is promoting a product as “organic,” but that does not meet the National Organic Program standard as an organic input material. This is necessary to create more transparency and help reduce confusion about products that are not approved for organic food and crop production in California.

All changes within Section 2322 are necessary to ensure that all applicable regulations are included for consistency, standardization, and comprehensiveness.

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 staff. For Section 2303(i)(3), the Department relied upon is Fertilizer and Lime Materials. *Fertilizer Guide*. FG 52, Hart, John, Oregon State University, reprinted May 1998, revised August 1990, pp. 1-5.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The proposed regulatory actions are technical in nature and will provide clarity to the regulated industry and end users of fertilizing materials regulations specified in statute.

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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.

For the revisions and inclusions with the administrative penalty violations matrix, the proposed regulatory action would not financially impact any compliant firm and the penalties are consistent with existing standards and text.

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 2303(d) – There would be no economic impact to bulk fertilizer distributors that provide a bulk product label as the guarantor because labels are typically provided in one of three ways: (1) distributors use the original manufacturer's label and overlabel or "sticker over" the manufacturer's name/address with their firm name/address, (2) they print out a basic label on demand from an office printer, or (3) they hand-write a label from pre-existing inventories of blank hand tags. All three options are acceptable, no-cost options for the last licensee to be represented as the guarantor on a label.

Section 2303(i)(3) and (i)(3)(A) – There is no economic impact to these proposed regulations as they merely clarify necessary label requirements for bulk liming materials. Bulk lime manufacturers or label guarantors may utilize their current labels until updated versions are created during their two-year renewal cycle, as a regular course of business.

Section 2309(a)(3) – There is no economic impact to these proposed revisions as they are merely to clarify necessary label requirements for phosphorous materials. All or most firms that this proposed revision affects already label their products according to the proposed regulations. For any firms that do not utilize the proposed text, firms may utilize

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their current labels until updated versions are created during their two-year renewal cycle, as a regular course of business.

Section 2315(b)-(d) – There is no economic impact as the proposed amendments and additions are technical in nature and only relate to modifications in CDFA’s fertilizer sampling procedures by field inspectors.

Section 2317.5(b) & (c) – The proposed amendment provides guidance and consistency regarding laboratory investigational allowances that are technical in nature and would not have an adverse economic impact.

Section 2320.2(b)(2)(A) – The proposed amendment would not have an adverse economic impact as it merely requires the accurate disclosure of an organic input material’s manufacturing location.

Section 2320.4(c) & (c)(1) – The proposed amendment would not have an adverse economic impact. Firms already possess this verbiage on their labels, but upon future renewal cycles, they will be required to include the verbiage in all caps. Firms may utilize their current labels and/or related labeling, like marketing materials, until updated versions are created during their two-year renewal cycle, as a regular course of business.

Section 2322 – The proposed additions and amendments will have no economic impact on firms that are compliant with the FAC and CCR. CCR § 2309 (Phosphorous Materials) and § 2320.4 (Use of the term “Organic”) were already present within the administrative penalty guidelines. The proposed additions of CCR § 2303(d)(1) (Last Licensee as Label Guarantor) and CCR § 2320.2(b)(2)(A) (Production Location for OIM Product Manufacturing) would only have an economic impact for is a firm did not correct the issue after a Notice of Warning was issued or if a firm provided a false location of their organic input material production. Firms assessed a Notice of Proposed Action for a penalty will still have the right to due process through a hearing.

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

Section 2303(d)(1) – The alternative is to retain the existing “licensee’s name and address” criteria on labeling, however, this had led to confusion and misunderstanding for the distribution of bulk commercial fertilizers and agricultural minerals. When bulk material changes custody, the original label guarantor should no longer be held responsible for the quality and quality of the product because they no longer have possession or control of the material. The last licensee has custody and control of the material prior to distribution to the grower or customer and it would be reasonable and

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customary that they are represented on the bulk commercial fertilizer or agricultural mineral label as guarantor.

Section 2303(i)(3) – The alternative is to not require a lime score for bulk liming material. Lime scores are not standardized across many states. However, a lime score would communicate to growers “at a glance” the overall quality of the lime product, independent of appearance or cost. A lime score is a functional, numerical expression indicating the quality of lime from calcium carbonate equivalent analysis, fineness factor, and moisture content. Lime scores would provide California growers with a valuable resource for evaluating bulk liming materials that may otherwise look identical in appearance, but have radically different effects on their soil and crops.

Section 2309(a)(3) – The alternative would be not to add the asterisk labeling requirement for total phosphoric acid grades. However, this would result in a misleading label to growers and consumers as they would assume that the phosphoric acid within the product was immediately available to plants and crops. With total phosphoric acid, much of the phosphoric acid is not available to plants or crops and won’t be for subsequent seasons. The proposed asterisk simply connects the total phosphoric acid grade to the required disclosure statements. All or most of the industry firms that sell these products currently label them either using the asterisk by the phosphoric acid grade or by indicating “0”, so this proposed regulation mimics the current industry standard rather than create a new labeling condition.

Section 2315(b)(1), (b)(2) & (d) – The alternative for Section 2315(b)(1) is to leave the subsection as is, but this may lead to continued confusion as to whether this type of sampling occurs only at delivery or applies both to loading or unloading.

Within Section 2315(b)(2), the alternative for a sampling scoop as a sampling method is to either include it as a new subsection that follows the information about the Missouri-D Sampler. Since the sampling parameters are identical, it was included within the same subsection for simplicity’s sake. Including the sampling scoop within this subsection is appropriate and concise and it aligns it with the other two dry bulk samplers of a bulk cup-type sampler and Missouri-D sampler. It is important to include a sampling scoop as an equivalent sampling method option in relevant field sampling scenarios. An alternative for Section 2315(b)(2)(ii) and (iii) is to use the term “bulk super sacks” or “bulk totes,” rather than “bulk bags”. However, the terms were deemed to be synonymous and interchangeable.

An alternative for Section 2315(d) considered “bottles, jugs, buckets, drums, or containers”, but “containers” accurately and more concisely reflected all the packaged options for liquids. No other alternatives were considered because the proposed revisions

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are intended to be more accurate, descriptive, and reflective of typical sampling scenarios.

Section 2315(c)(1), (c)(3) & (c)(4) – No other alternatives were considered because the proposed revisions are intended to be more accurate, descriptive, and reflective of the typical sampling conditions. For Section 2315(c)(3), using a trowel as a sampler is no longer a viable sampling tool due to sanitation and contamination concerns.

Section 2317.5(b) – The alternative would be to retain the existing language limiting the maximum investigational allowance for secondary and micronutrients at one percentage point. For manufacturers who produce secondary nutrients with a guaranteed analysis over 16%, or micronutrient guarantees at 3.4 – 10% or more, the current investigational allowances do not provide any additional buffer for inherent lab analysis variance as they are capped at one percentage point. This may result in these products to be more frequently, and potentially incorrectly, found in violation due to perceived deficiencies within their high analysis products.

Section 2317.5(c) – The alternative is for California to consider products with soluble silicon, total phosphoric acid, or lime score deficiencies to be in violation without regard for typical analytical or calculation variations that occur in a laboratory environment. Fertilizer manufacturers would therefore be accountable for deficiency violations that may not be completely accurate due to known deviations in sample taking, sample preparation, laboratory equipment and methods.

Section 2317.5(c)(1)(A) – No other alternatives were considered because the current cited Code of Federal Regulations (7 CFR 205.601(j)(7)) is inaccurate.

Section 2320.2(b)(2)(A) – The alternative would be to not include the proposed text requiring the accurate manufacturing location of the final product and have the Department request that information under the purview of Section 2320.2(b)(9), “Any additional information deemed necessary by the secretary.” However, introducing this new text provides more consistent clarity and transparency for to convey this important information.

Section 2320.4(c) & (c)(1) – The alternative for Section 2320.4(c) would be to retain the existing declaration format, but it is not as clear or transparent to consumers that material claimed to be “organic” hasn’t undergone the rigors of review as a registered organic input material intended for organic food and crop production.

No alternative was considered for Section 2320.4(c)(1) because if the declaration requirement is not extended to labeling, such as webpages and marketing materials, a loophole exists where firms can readily claim their fertilizer products to be “organic” which

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creates a false perception to the consumer. Adding the proposed declaration to labeling would create more transparency and eliminate misconceptions.

Section 2322 – An alternative is not appropriate as the wording must be revised to match the proposed wording of the sections presently included within the violations matrix, CCR § 2309 and § 2320.4. For the proposed additions, CCR § 2303(d)(1) or CCR § 2320.2(b)(2)(A), there is no alternative as it is important to include proposed sections in the “Table A: Violations Matrix” with the progressive enforcement penalties comparable to similar code sections for consistency and standardization purposes.

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.

In accordance with Government Code Section 11346.5(a)(13), the Department must determine that no reasonable alternative is considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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 OR CONFLICT WITH FEDERAL REGULATIONS

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