DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS
Title 3. California Code of Regulations
Division 4. Plant Industry
Chapter 1. Chemistry
Subchapter 1. Fertilizing Materials

INITIAL STATEMENT OF REASONS

The California Department of Food and Agriculture's (CDFA's) Fertilizing Materials Inspection Program is statutorily tasked with licensing and label registration, tonnage reports, field inspections, and administration of the Fertilizer Research and Education Program (FREP). The Fertilizing Materials Inspection Program is responsible for reviewing and registering product labels, promoting agronomically sound and environmentally safe use of fertilizing materials through FREP, and ensuring fertilizing materials are safe, 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 are statutorily mandated to register with the Fertilizing Materials Inspection Program.

In 2008, the Department developed a strategic plan for its Fertilizing Materials Inspection Program that was completed in 2008. As a result of the strategic planning, CDFA expanded its staff for fertilizing materials label review, field inspections, and manufacturer distributor licensure. Assembly Bill (AB) 856 (Ch. 257, Stats. of 2009) contained the statutory provisions designed to permit CDFA to expand its inspection program by increasing the fee cap on conventional products and establishing a new fee specifically for organic products. AB 856 (Ch. 257, Stats. of 2009) authorized new staff to focus on inspection and testing of fertilizer input materials, specifically in regard to organic products.

AB 856 (Ch. 257, Stats. of 2009) mandated that the CDFA Secretary require registration of each label for organic input material and collect registration fees to be deposited into the Organic Input Materials Account. AB 856 (Ch. 257, Stats. of 2009) provided that the registration fee for organic input material shall not exceed $500 per product and specified that registration may not be issued without a current license. AB 856 (Ch. 257, Stats. of 2009) required the inspection of organic input material manufactures at least once annually. In addition, AB 856 (Ch. 257, Stats. of 2009) made it a misdemeanor to knowingly adulterate an organic material with ingredients that do not comply with federal standards and requirements.

In June 2010, the Department formed the AB 856 Subcommittee composed of individuals from the Fertilizer Inspection Advisory Board, the fertilizer industry, and various stakeholders. The Fertilizer Inspection Advisory Board AB 856 Subcommittee was tasked with developing the regulatory framework for implementing the provisions of AB 856 (Ch. 257, Stats. of 2009), identifying oversight and implementation issues, and completing a final report which would be submitted to the Department.

The Department, the Fertilizer Inspection Advisory Board AB 856 Subcommittee, and the Fertilizer Inspection Advisory Board determined that it is necessary to promulgate regulations which establish the procedures and regulatory authority concerning compost nutrient guarantees (i.e., lab reports and nutrient variability); organic input material label review and registration (including blends); site, facility, and ingredient inspection procedures, requirements, and uniformed protocol; out-of-state inspections; clarification in regard to the scope of organic input materials when no claims are made by the supplier for organic production; a civil penalty matrix to enhance uniformity and cohesion; and, label registration fees.

California Food and Agricultural Code (FAC) Section 14528 et seq. tasks the Secretary of CDFA with reviewing the definition of organic input materials and implementation issues that may arise or have arisen on account of that definition.

FAC Section 14591 mandates every person, prior to manufacturing and distributing fertilizing materials, to obtain a license from the Department for each plant and business location that he or she operates.

FAC Section 14601 et seq. provides that each differing fertilizing materials label, other than weight or packaging size, such as changes in the guaranteed analysis, derivation statement, or anything that implies a different product for specialty fertilizer, packaged agricultural mineral, auxiliary soil and plant substance, organic input material, and packaged soil amendment shall be registered. Registration fees are statutorily prohibited from exceeding $200 per product, except that the registration fee for organic input material shall not exceed $500 per product.

FAC Section 14601(e) authorizes the Department to require proof of labeling statements and other claims made for any specialty fertilizer, agricultural mineral, packaged soil amendment, organic input material, or auxiliary soil and plant substance, before the Department registers any such product. As evidence of proof, the Department may rely on experimental data, evaluations, or advice furnished by scientists, including scientists affiliated with the University of California, and may accept or reject additional sources of proof in the evaluation of any fertilizing material. In all cases, experimental proof shall relate to conditions in California under which the product is intended for use.

FAC Section 14601(f) requires organic input material manufacturers to be inspected at least once per year. The Department may perform site inspections of organic input material manufacturing processes used to validate label nutrient guarantees, claims, and compliance with National Organic Program standards during the registration process. The Department may accept inspections performed by a third-party organization recognized by the National Organic Program for out-of-state organic input material manufacturers. All inspection records obtained by the third-party organization shall be made available to the Department upon request. When a third-party organization is conducting a site inspection, the organization shall notify the department

of when the inspection is going to take place no less than 72 hours in advance of the inspection. Department representatives may be present at the inspection.

FAC Section 14623 establishes that a tonnage report shall be submitted to the Department semiannually, not later than January 31 and July 31 of each year. The Department shall impose a penalty in the amount of $200 on any person who does not submit the report on or before those dates. Any tonnage report that is more than 90 days past due is a cause for revocation of the license.

FAC Section 14631 provides that every lot, parcel, or package of fertilizing material distributed into or within this state shall have attached to it, or the shipment shall be physically accompanied by, a label as required by the Department, by regulation. The Department may require proof of labeling statements and claims made for any fertilizing material. As evidence of proof, the Department may rely on experimental data, evaluations, or advice furnished by scientists, including scientists affiliated with the University of California, and may accept or reject additional sources of proof. The Department shall cancel the approval of, or refuse to approve, a fertilizing material label if the Department determines that adequate proof of label claims does not exist. The Department, after a hearing, may cancel the license of any person who distributes a fertilizing material with a label for which approval has been canceled or a label that has not been approved by the Department.

FAC Section 14641 mandates that the Department shall have free access at reasonable times to all records, premises, production processes, or conveyances that are used in the manufacture, transportation, importation, distribution, storage, or application of any fertilizing material.

FAC Section 14642 et seq. provides that the Department shall, at all times and to the extent necessary for enforcement, do all of the following: take samples of any substance; make analyses or examinations of any substance; conduct investigations concerning the use, sale, adulteration, or misbranding of any substance; and, inspect the fertilizing material manufacturing facilities and take samples at various stages of production to verify label and labeling claims and the production process.

FAC Section 14651 et seq. establishes that unless otherwise specified in this chapter, any violation of this chapter, or the regulations adopted pursuant to this chapter, is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000) for the first violation and not less than one thousand dollars ($1,000) for each subsequent violation. This section also provides for a hearing process for suspending or revoking any violation concerning this chapter.

FAC Section 14651.5 et seq. mandates that the Department shall levy a civil penalty against any person who violates this chapter in an amount of not more than $5,000 for each violation. This section also provides that a person against whom a civil penalty is levied shall be afforded an opportunity for a hearing before the Department, upon a request being made within 30 days after the date of issuance of the notice of penalty.

FAC Section 14652 et seq. provides that it is unlawful for any person to manufacture or distribute in this state any fertilizing material without complying with this chapter or the regulations adopted pursuant to this chapter. This section also provides that any violation of this subdivision is a misdemeanor punishable by fines ranging from $5,000 to $15,000, depending upon the severity of the violation.

FAC Section 14655(a) establishes that any lot of fertilizing material for which a hold order or notice is issued shall be held by the person having control of the material and shall not be distributed or moved except under the specific directions of the Department, pending final disposition pursuant to this chapter. This does not prevent the person who has control of the material from inspecting any seized material or from taking a reasonable sample for evidence while in the presence of a person designated by the Department.

FAC Section 14655(b) provides that the movement, distribution, or sale of all or part of any product by the person having control of the material that has been quarantined by the Department, unless the movement, distribution, or sale has the prior approval of the Department, is a violation subject to a civil penalty as specified in FAC Section 14651.5, or a misdemeanor punishable by a fine of not more than $5,000. A second or subsequent violation of this subdivision is a misdemeanor punishable by a fine of not less than $10,000.

FAC Section 14681 mandates that no person shall distribute misbranded fertilizing materials and defines the conditions under which a fertilizing material shall be deemed misbranded.

FAC Section 14682 provides that no person shall distribute an adulterated fertilizing material and defines the conditions under which a fertilizing material shall be deemed adulterated.

These proposed regulations would make additions and amendments to Title 3, Section 2300 et seq. of the California Code of Regulations. Accordingly, these regulations are intended to implement the provisions and statutory mandates of AB 856 (Ch. 257, Stats. of 2009). Specifically, these proposed regulations would:

- Amend Title 3, California Code of Regulations Sections 2300(g), 2300.1, 2302, 2303(l), 2320, and 2321.

- Adopt Title 3, California Code of Regulations Sections 2303(w), 2320.1, 2320.2, 2322, 2322.1, 2322.2, 2322.3, 2322.4, and 2323.

- Provide that the statement "State of California Approved" or other indication of official approval is prohibited in labeling and advertising unless allowed for organic input material.

- Establish definitions for the term "custom blend" and "blender" as they relate to fertilizing material.

- Repeal provisions related to concentrations of non-nutrient metals for inorganic commercial fertilizers and specialty fertilizers.

- Amend provisions for labeling requirements to specify that wetting agents shall state the name of the specific wetting agent on company letterhead and note if confidential.

- Provide that in adopting the labeling requirements, accepted definitions, and official fertilizer terms listed in the 2010 American Association of Plant Food Control Officials Publication, volume 63 may be considered.

- Amend registration provisions for fertilizer materials to provide that organic input material shall be registered in the name of the legal entity or person whose name appears on the label before being distributed in this state. In addition, organic input material shall not be sold or distributed unless the product is registered.

- Establish a fee and registration renewal period for each organic input material product label submitted for registration. AB 856 (Ch. 257, Stats. of 2009) tasked CDFA with reviewing, registering, and inspecting organic input material production processes at fertilizing manufacturing facilities. In addition, AB 856 specified that the registration fee for organic input material shall not exceed five hundred dollars ($500) per product, as the registration of organic input material labels require additional Department resources and review time to ensure that nutrient guarantees and claims are scientifically feasible and meet National Organic Program standards. On March 4, 2010, the Fertilizer Inspection Advisory Board recommended an initial label registration fee of $500 for organic input materials. These new activities require additional personnel and funds to review approximately 800 new organic input material product labels and take approximately 200 organic input material samples for laboratory analysis per year to ensure that the fertilizing material nutrient levels can be derived from the sources stated in the derivation statement on the product. The implementation of the organic input materials registration fee will benefit California organic growers and consumers by ensuring that all organic food and crop production meet National Organic Program standards and are not adulterated by synthetic fertilizers.

- Provide that if the Secretary returns an incomplete application for organic input material product registration to the applicant, the applicant has 180 days from the date the Secretary initially returned the application to resubmit a complete application without payment of a new registration fee. A new registration fee must accompany applications resubmitted after 180 days from the date the Secretary returned the application.

- Mandate that organic input materials submitted for registration shall comply with the requirements of the National Organic Program standards.

- Establish that product label registration for organic input material shall be made on an application designated by the Department. In addition, this proposed regulation establishes the criteria required on the application for the organic input material product label registration.

- Amend regulations requiring tonnage reporting to align with the statutory requirements provided in FAC Section 14623.

- Establish civil penalty guidelines for applying the mandates FAC Section 14651.5. Accordingly, the civil penalty guidelines define violation classes as "Serious," "Moderate," and "Minor." A civil penalty matrix is included within proposed California Code of Regulations Section 2322 to enhance uniform and consistent application of the corresponding penalties.

- Provide a mechanism for any person or his or her duly authorized representative to contest a notice of adverse determination and request a formal or informal hearing.

- Establish filing deadlines and procedures for contesting a notice of adverse determination for any violation of the applicable California Code of Regulations.

- Mandate departmental proceedings for a hearing schedule and notification for formal and informal hearings.

- Align the California Code of Regulations with the Food and Agricultural Code to provide that the Department shall have free access at reasonable times to all records, premises, production processes, storage facilities, inventories, or conveyances that are used in the manufacture, transportation, importation, distribution, storage, or application of organic input material.

- Align the California Code of Regulations with the Food and Agricultural Code, authorizing the Department to perform site inspections of organic input material manufacturers and manufacturing processes used to validate label nutrient guarantees, claims, and compliance with National Organic Program standards at least once per year.

- Establish procedures for the Department to accept inspections performed by a third-party organization recognized by the National Organic Program for out-of-state organic input material manufactures.

- Mandate manufacturers of organic input material to maintain all records demonstrating compliance with National Organic Program standards and submit complete documentation describing all ingredients, manufacturing processes,

process control information, laboratory analysis of incoming ingredients and finished products, and other information as required by the Department.

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

The Department is relying upon the following documents pertaining to the proposed regulatory changes:

- Fertilizer Inspection Advisory Board meeting minutes dated May 14, 2009, July 16, 2009, March 4, 2010, April 20, 2010, August 19, 2010, and November 16, 2010.

- Fertilizer Inspection Advisory Board AB 856 Subcommittee meeting minutes dated June 9, 2010, July 13, 2010, August 3, 2010, September 15, 2010, and October 21, 2010.

- Draft Fertilizer Inspection Advisory Board AB 856 Subcommittee meeting minutes dated November 12, 2010.

- California Department of Food and Agriculture, Fertilizing Materials: Organic Input Material - Estimated Fiscal Year (FY) 2011-2012 revenues and expenditures (with a registration fee for organic input material at the statutory maximum authorized under Food and Agricultural Code Section 14601(b)).

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

No other alternatives were presented to or considered by the Department in regard to the proposed rulemaking as written.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department has not identified any alternatives that would lessen any adverse impact on small businesses.

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

The Department has initially determined that the proposed changes to the regulations would result in no added costs to small businesses affected by these proposed changes. This is based on the fact stated in the "SMALL BUSINESSES IMPACT STATEMENT."