

**TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE
DIVISION 4. PLANT INDUSTRY. CHAPTER 1. CHEMISTRY.
SUBCHAPTER 1. FERTILIZING MATERIALS
(Notice published January 21, 2011)**

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the California Department of Food and Agriculture (Department) proposes to amend, Title 3, Division 4, Chapter 1, Subchapter 1 of the California Code of Regulations (CCR) sections 2300(g), 2300.1, 2302, 2303(l), 2320, and 2321. The Department also proposes to add the following sections to Title 3, Division 4, Chapter 1, Subchapter 1 of the California Code of Regulations: 2303(w), 2320.1, 2320.2, 2322, 2322.1, 2322.2, 2322.3, 2322.4, and 2323.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comment relevant to the proposed regulatory action to the Department. The written comment period closes at 5:00 p.m. on March 7, 2011. The Department will consider only comments received at the Department offices by that time. Submit comments to:

Amadou Ba, Chief
Fertilizing Materials Inspection Branch
California Department of Food and Agriculture
1220 N Street
Sacramento, CA 95814

AUTHORITY AND REFERENCE

Notice is hereby given that the California Department of Food and Agriculture, pursuant to the authority vested by Sections 14, 401, 407, 14502, 14591, 14601, 14621, 14622, 14623, 14628, 14631, 14641, 14642, 14651.5, 14655, 14681, 14682 of the Food and Agricultural Code (FAC), and to implement, interpret, or make specific Sections 14528, 14532, 14533, 14550.5, 14557, 14558, 14583.5, 14591, 14601, 14611, 14523, 14631, 14641, 14642, 14651, 14651.5, 14652, 14655, 14661, 14681, and 14682 of the FAC.

Section 407 of the Food and Agricultural Code (FAC) authorizes the Secretary of the Department to adopt such regulations as are reasonably necessary to carry out the provisions of the Food and Agricultural Code which the Secretary is directed or

authorized to administer or enforce.

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 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.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Proposed amendments to Section 2300 would 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.

Proposed amendments to Section 2300.1 would establish definitions for the term “custom blend” and “blender” as they relate to fertilizing material.

Proposed amendments to Section 2302 would repeal provisions related to concentrations of non-nutrient metals for inorganic commercial fertilizers and specialty fertilizers.

Proposed amendments to Section 2303(l) would modify 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.

Proposed Section 2303(w) would 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.

Proposed amendments to Section 2320 would modify 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.

Proposed Section 2320.1 et seq. would establish a fee and registration renewal period for each organic input material product label submitted for registration. This section would also 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.

Proposed Section 2320.2 et seq. would mandate that organic input materials submitted for registration shall comply with the requirements of the National Organic Program standards. In addition, this section would 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.

Proposed amendments to Section 2321 would modify regulations requiring tonnage reporting to align with the statutory requirements provided in FAC Section 14623.

Proposed Section 2322 would 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 Section 2322 to enhance uniform and consistent application of the corresponding penalties.

Proposed Section 2322.1 would provide a mechanism for any person or his or her duly authorized representative to contest a notice of adverse determination and request an informal hearing.

Proposed Section 2322.2 would establish filing deadlines and procedures for contesting a notice of adverse determination for any violation of the applicable California Code of Regulations. In addition, this proposed section would provide a mechanism for a respondent to request a formal hearing in lieu of an informal one.

Proposed Sections 2322.3 and 2322.4 would mandate departmental proceedings for a hearing schedule and notification for formal and informal hearings.

Proposed Section 2323(a) would 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.

Proposed Section 2323(b) would 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.

Proposed Section 2323(c) would 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.

Proposed Section 2323(d) would 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.

Proposed Section 2323(e) would mandate the Department to conduct specified sampling and analysis for the purpose of determining compliance.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or businesses: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Adoption of these regulations will not:

- (1) Create or eliminate jobs within California;
- (2) Create new businesses or eliminate existing businesses within California; or
- (3) Affect the expansion of businesses currently doing business within California.

Significant effect on housing costs: None.

EFFECT ON SMALL 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. The proposed changes implement the statutory provisions contained in AB 856 (Ch. 257, Stats. of 2009) and are intended to regulate and enforce fertilizing materials standards and labeling, tonnage reporting, civil penalties, registration, and inspection.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative it considered or that has been otherwise identified and brought to the attention of the Department would be more effective in carrying out the purpose of which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during

the written comment period.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Amadou Ba, Chief
Fertilizing Materials Inspection Branch
California Department of Food and Agriculture
1220 N Street
Sacramento, CA 95814
Telephone (916) 445-0444; Fax (916) 445-2171

The backup contact person for these inquiries is:

Brian Cote, Special Investigator
Inspection and Compliance Branch
California Department of Food and Agriculture
1220 N Street, Sacramento, CA 95814
Telephone: (916) 445-2180; Fax: (916) 445-2427

Please direct requests for copies of the proposed text of the regulations, the initial statement of reasons, the modified text of the regulation, if any, or other information upon which the rulemaking is based to Brian Cote at the above address.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Department will have the rulemaking file available for inspection and copying throughout the rulemaking process at its office at 560 J Street, Suite 220, Sacramento, CA 95814. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, and meeting minutes from various Fertilizer Inspection Advisory Board and Fertilizer Inspection Advisory Board AB 856 Subcommittee meetings. Copies may be obtained by contacting Brian Cote at the address or phone number listed on the previous page.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications, which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Brian Cote at the address provided on the previous page. The Department will accept written comments

on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Brian Cote at the address provided on the previous page.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through the Department's website at: <http://www.cdfa.ca.gov/is/Regulations.html>

DEPARTMENT OF FOOD AND AGRICULTURE

Date

Nate Dechoretz, Deputy Secretary