

**DEPARTMENT OF FOOD AND AGRICULTURE  
PROPOSED CHANGES IN THE REGULATIONS  
Title 3. Food and Agriculture  
Division 3. Economics  
Chapter 1. Fruit and Vegetable Standardization  
Subchapter 4. Fresh Fruits, Nuts and Vegetables  
Article 11. Avocados  
1408.22 Avocados, Fruit Dropped by Extreme Winds**

**INITIAL STATEMENT OF REASONS**

**PROBLEM STATEMENT**

The Food Safety Modernization Act was signed into law by President Obama in 2011. Federal regulations related to on-farm food safety were promulgated in 2014. It is the Food and Drug Administration's (FDA) strategy of prevention rather than reaction to food safety events. The regulations cover such activities as water testing, personal worker hygiene, cleaning of equipment, biological soil amendments, and wildlife intrusion. These rules were adopted after a considerable public comment period in which all affected parties had the opportunity to provide input.

The Federal Produce Safety Rule subpart K, Section 112.114, expressly prohibits distribution of produce that drops to the ground before harvest, except for produce dropped intentionally as part of the normal harvest activity (e.g., some tree nuts).

The California Code of Regulations (CCR) Title 3, Division 3, Subchapter 4, Article 11, Section 1408.22 provides an allowance for fruit dropped to the ground as a result of extreme winds. This section gives the department discretion for the qualification of time period determining the "extreme winds" and factors to identify "windfall fruit". It further allows for maturity testing and upon passage of that test, release for marketing of such fruit.

The Supremacy Clause, Article VI of the United States Constitution states in part that all laws made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land. With the newly released Federal Produce Safety Rule, Section 1408.22 of the CCR is in direct conflict with the Federal law and must be changed to be in compliance.

**BENEFITS**

The benefits of this regulatory change will prohibit consumers from purchasing fruit that has come in contact with the ground, thereby minimizing potential contamination.

## **PURPOSE**

In 1915, the Legislature began to establish, in statute, minimum standards for fresh fruits, nuts, and vegetables by governing such factors as weight compliance, packaging, container size, labeling, color, and maturity. The California Department of Food and Agriculture's (Department's) Standardization Program is responsible for enforcing laws and regulations establishing minimum state standards for fruits and vegetables. This is accomplished by supervising county agricultural commissioners who carry out enforcement at the local level.

Section 14 of the Food and Agricultural Code authorizes the Department to adopt rules and regulations in accordance with the Administrative Procedure Act. Additional authority vested in this section grants the California Department of Food and Agriculture Secretary the authority to amend or repeal rules and regulations.

Section 407 of the Food and Agricultural Code 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.

Section 42681 of the Food and Agricultural Code authorizes that the director [Secretary] by regulation may prescribe methods of selecting samples of lots or containers of fruits, nuts, and vegetables on a basis of size or other specific classification, which are reasonably calculated to produce by such sampling fair representations of the entire lots or containers which are sampled, and make such other regulations as are reasonably necessary to secure uniformity in the enforcement of this division.

Section 42682 of the Food and Agricultural Code authorizes that the director [Secretary] may upon petition of a person that the director [Secretary] finds has a substantial interest in the growing or handling of the particular fruit, nut, or vegetable involved, establish, modify, or rescind by the regulation, which initially took effect January 1, 1971, standard container, lid, marking, sizing requirement for commodities, and packing arrangements for any fruits, nuts, or vegetables, for which specific quality standards have otherwise been provided by law or regulation.

Section 42683 of the Food and Agricultural Code authorizes that the director [Secretary], in promulgating regulations concerning standard containers, lids, marking, sizing, consumer packages or packing requirements for fruits, nuts, and vegetables, will consider such factors as the ease of handling, identification, federal laws, rules or regulations, containers, lids and packs in substantial use in the industry and the competitive position of the California fruit, nut, and vegetable industry.

Section 42941 of the Food and Agricultural Code mandates that it is unlawful for any person to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported, or sell any fruits, nuts, and vegetables in bulk, or in any container or subcontainer, unless such fruits, nuts, and vegetables, and their

containers, conform to the provisions of this division or the regulations promulgated thereunder.

**SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE 11346.2(b) (1):**

**Section 1408.22 Repealed.** This section provides an allowance for avocados dropped to the ground as a result of extreme winds. It also gives the department discretion for the qualification of time period determining the “extreme winds” and factors to identify “windfall fruit”. It further allows for maturity testing and upon passage of that test, release for marketing of avocados.

The Federal Produce Safety Rule subpart K, Section 112.114 expressly prohibits distribution of produce that drops to the ground before harvest except for produce dropped intentionally as part of the normal harvest activity (e.g., some tree nuts).

Due to the federal prohibition of this previously accepted practice, it is necessary to repeal the California regulation allowing windfall avocados to be sold. This will prevent California producers from potential violations as a result of conflicting laws.

**REPORTS RELIED UPON**

The Department relied upon the following documents in establishing this proposed rulemaking action:

Food Safety Modernization Act: Federal Produce Safety Rule subpart K, Section 112.114

**ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

Purpose

The purpose is to repeal the California regulation allowing windfall avocados to be sold. This will prevent California producers from potential violations as a result of conflicting laws.

The Creation or Elimination of Jobs within the State of California

The proposed repeal to Section 1408.22 is designed to prevent California producers from potential violations as a result of conflicting laws by allowing discretion for the qualification of time period determining the “extreme winds” and factors to identify “windfall fruit”. The Department has determined that this regulatory action will not have an impact on the creation or elimination of jobs in the State of California.

The Creation of New Businesses or the Elimination of Existing Businesses within the State of California

This repeal only applies to avocados grown in California. Therefore, the Department has

determined that this regulatory action will not have a significant impact on the creation of new businesses or the elimination of existing businesses in the State of California.

#### The Expansion of Businesses Currently Doing Business within the State of California

The Department has initially determined that the proposed changes in the regulations will result in no significant added costs to businesses affected by these proposed changes. Due to the federal prohibition of an allowance for fruit dropped to the ground as a result of extreme winds, it is necessary to repeal the California regulation allowing windfall avocados to be sold. This will prevent California producers from potential violations as a result of conflicting laws. Consumers will benefit because fruit will no longer be able to be sold after coming into contact with the ground thereby minimizing potential contamination. Therefore, the Department has determined that this regulatory action will not have a significant impact on the creation of new businesses or the elimination of existing businesses in the State of California.

#### Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The proposed regulatory action will benefit the health and welfare of California residents because fruit will no longer be able to be sold after coming into contact with the ground, thereby minimizing potential contamination.

The proposed rulemaking will indirectly impact worker safety and the states environment.

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

There has not been a significant windfall event in California since 2009. The Department has determined that this proposed change to the regulations will not have a significant adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, because there are no costs to businesses.

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

The Department has not identified any reasonable alternatives to the proposed action, and no adverse impacts to small businesses are expected as a result of this proposed action.