

**State of California
Office of Administrative Law**

In re:
Department of Food and Agriculture

Regulatory Action:
Title 03, California Code of Regulations

Adopt sections: 9301, 9302

**Amend sections: 9000, 9102, 9106,
9202, 9203**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2025-0122-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regulatory action by the Department of Food and Agriculture (Department) proposed to adopt sections 9301 and 9302, and amend sections 9000, 9102, 9106, 9202, and 9203 in title 3 of the California Code of Regulations (CCR) to include recordkeeping and Notice of Use requirements for the Cannabis Appellations Program.

On January 22, 2025, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On March 6, 2025, OAL notified the Department that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3).

DISCUSSION

The Department's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) No exemption applies to the present regulatory action under review.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The “clarity” standard is further defined in section 16 of title 1 of the CCR, which provides:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or

(3) ...

(4) ...

(5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or

(6) ...

(b) Persons shall be presumed to be “directly affected” if they:

(1) are legally required to comply with the regulation; or

(2) are legally required to enforce the regulation; or

(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following provisions in the Department's proposed regulatory action do not satisfy the clarity standard.

1.1. Proposed Floating Paragraph of Section 9301

The proposed floating paragraph of section 9301 reads:

For each appellation of origin used in the advertising, labeling, marketing, or packaging of cannabis, cultivators must maintain the following in accordance with all recordkeeping requirements developed by the Department of Cannabis Control pursuant to Business and Professions Code section 26160:

The proposed language is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subs. (a)(1) and (a)(5).) The reference to "in accordance with all recordkeeping requirements developed by the Department of Cannabis Control" is vague, making it unclear as to what the scope and content of these recordkeeping requirements are and what those directly affected must do to remain compliant with these requirements. Additionally, without specificity, this provision could result in a prospective incorporation by reference of future regulatory requirements developed by the Department of Cannabis Control.

1.2. Proposed Subsection (a) of Section 9301

Proposed subsection (a) of section 9301 reads:

Records showing 100 percent of the cannabis was produced in the
appellation of origin in accordance with the track and trace program
developed by the Department of Cannabis Control pursuant to Business
and Professions Code section 26067; and

Proposed subsection (a) is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subs. (a)(1) and (a)(5).) The use of "in accordance with the track and trace program" makes it unclear as to whether the requirement applies to specific records within the track and trace system or if the track and trace system itself is used to verify 100 percent of the cannabis was produced in the appellation of origin. Additionally, this ambiguity makes it unclear whether compliance requires cultivators to maintain separate records showing 100 percent of the cannabis was produced in the appellation of origin or if they can rely solely on the track and trace program for verification.

One commenter stated:

It is unclear how a licensee is supposed to keep records showing all cannabis was produced in an appellation of origin "in accordance with the [CCTT] program."

Proposed subsection (a) is also unclear because it conflicts with the Department's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(2).) In a response to the public comment asserting that the reference to "in accordance with the track and trace program" is unclear as to how these records are to be kept, the Department stated:

When and where the plant initially originates is required in Track and Trace, as is the harvest date and when the plant is moved from the cultivation site. Where the plant is moved is also documented and thus the location of the curing, grading, and trimming are also recorded.

These Track and Trace records will demonstrate that cannabis meets the portion of the statutory requirement that the cannabis is produced within the appellation.

The Department indicates in this response to comment that the records in the Department of Cannabis Control's track and trace program will meet "the portion of the statutory requirement that the cannabis is produced within the appellation." However, this is not specified in the regulation.

1.3. Proposed Subsection (e) of Section 9302

Proposed subsection (e) of section 9302 reads:

If the department does not receive Notice of Use of a specific appellation of origin during a period of five (5) years, the department may issue notice of final decision that the appellation of origin is cancelled.

Proposed subsection (e) is unclear because it can reasonably and logically be interpreted to have more than one meaning. (Cal. Code Reg., tit. 1, sec. 16, sub. (a)(1).) The use of "may" makes it unclear when the Department will

choose not to issue a notice of final decision that the appellation of origin has been canceled, even if no Notice of Use is received during a period of five (5) years.

Proposed subsection (e) is also unclear because it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(5).) As written, it is unclear what a "notice of final decision" is, and what the process is for it being issued.

1.4. Proposed Subsection (e)(1) of Section 9302

Proposed subsection (e)(1) of section 9302 reads:

At least 30 days before canceling an appellation of origin, the department will provide written notice to the licensees' email(s) previously provided in a Notice(s) of Use associated with that appellation of origin.

Proposed subsection (e)(1) is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subs. (a)(1) and (a)(5).) As written, it is unclear what is required to be in the "written notice" and what rights or options, if any, cultivators have upon receiving it.

For the reasons discussed above, the proposed regulatory changes failed to comply with the clarity standard of the APA.

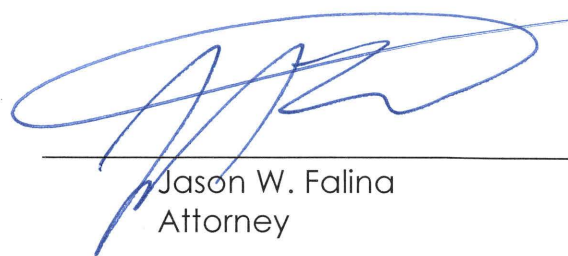
CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Department on the date indicated below.

The Department must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment

for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any comments containing objections or recommendations must be summarized and responded to in the Final Statement of Reasons. The Department must resolve all other issues raised in this Decision of Disapproval of Regulatory Action prior to OAL approving a resubmittal.

Date: March 13, 2025



Jason W. Falina
Attorney

For: Kenneth J. Pogue
Director

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