

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS

Title 3, California Code of Regulations

Section 3162

Pest Ratings and Mitigating Actions

INITIAL STATEMENT OF REASONS/

POLICY STATEMENT OVERVIEW

The California Department of Food and Agriculture (Department) is promulgating this regulation to establish a pest rating process for various organisms that impact agriculture and the environment. This regulation further establishes the appropriate Department authorized statewide mitigating actions based upon the assigned pest rating.

Description of Public Problem, Administration Requirement, or Other Condition or Circumstance the Regulation is Intended to Address

The Department is mandated to develop and maintain a list of invasive pests that have a reasonable likelihood of entering California for which a detection, exclusion, eradication, control, or management action by the state might be appropriate. In developing the list, the Department shall consider any invasive pests identified by the federal or state government for which a detection, exclusion, eradication, control, or management action might be undertaken (FAC Section 5261). The Department shall also make the plan available to the public, including making it available on the Department's internet web site (FAC Section 5262).

In order to meet these obligations, the Department must determine and specify what a plant pest is. An organism is defined as a plant pest that is dangerous or detrimental to the agricultural industry. Once a determination is made that an organism is a plant pest, the Department will then rate the pest based upon its distribution within the state, the risk it poses to agriculture, and other factors. The pest rating will then dictate the general plan for action pertaining to the specified pest. Currently there is no regulatory mechanism that provides notice to the public of this process, public participation in the process (comments, hearings, and appeals), or access to the criteria that the Department will use to determine how a pest is rated.

Specific Purpose and Factual Basis

Section 3162(a) establishes the definitions for terms used in the regulation. Definitions are needed to ensure all interested parties understand the use of the terms. The defined terms are: "Commissioner," "Endangered Area," "General Distribution," "Limited Distribution," "Known Not to Occur," "Not Known to Occur," "Official Control," "Pest Rating," "Pest Mitigating Measures" and "Quarantine."

Section 3162(b) establishes the "California Pest Rating Proposal Form." In order to have a plan of action involving appropriate mitigation actions for an introduced invasive species, the seriousness of the potential impacts of the pest needs to be established along with scientific background and distribution information. Additionally, the process for this evaluation should be standardized to ensure uniformity and transparency for all interested parties. One way to establish and communicate a general plan of action which can be easily understood is through a pest rating which is then linked to appropriate mitigating actions. This form is being established to propose a pest rating for any pest which the Division has authority over. It establishes the identity of the organism and the event(s) that triggered the proposal; the pest's biology, worldwide distribution, if it is under official control, California distribution, number and location of California interceptions, a numerical score of consequences of introduction (including climate/host interaction, known pest host range, pest dispersal potential, economic impacts, significant impacts to cultural practices, home/urban gardening or ornamental plantings), evaluation of the post entry distribution and survey information, an evaluation of uncertainty versus risk, a conclusion and rating justification, references and responsible party completing the form and contact information. The Department has determined that all of this information is critical for arriving at an appropriate pest rating.

Section 3162(c) provides the process by which a pest is rated. Currently there is no regulatory process that provides notice to the public, an opportunity for public participation in the process (comments, hearings, and appeals), or access to the criteria that the Department will use to determine how a pest is rated. This section meets those needs. It establishes that any interested party may use the "California Pest Rating Proposal Form (Form)" and that it is available from a website link with instructions for submission, after completing the Form it will be posted to the website within 30 days for a 45 day public comment period, that Department shall respond to any posted comments within 30 working days and make the final pest rating

determination and post it at the following Website: http://cdfa.ca.gov/plant/regs_pestrating.html. The Department has multiple scientists and an unknown number of outside interested parties that may be submitting completed Forms to the Department. The Department does not know how many completed Forms will be submitted at any given time. The Department determined that posting the completed Form within 30 days to its website was a reasonable timeframe to deal with this unknown workload. Under the California Administrative Procedure Act, regulations have to be available for at least a 45 day public comment period. The Department has chosen an equivalent comment period for a proposed pest rating. Again, due to the unknown potential workload, the Department chose 30 working days to respond to any comments to ensure it will comply with its obligations.

Section 3162(d) will establish a process to review existing pest ratings. As additional scientific information becomes available or if the status of the distribution of the pest in California significantly changes, there needs to be a process to change a pest rating or reconfirm it to ensure it is still an appropriate pest rating. This section meets those needs and establishes that the Department shall review all "Q" temporary pest ratings and propose a permanent rating within one year of assigning the temporary rating and review all other ratings every two years to ensure they are still valid. The Department determined that a temporary pest rating should be reexamined more frequently than a permanent pest rating. This is because there is less known scientific information for a temporary pest rating and the permanent pest rating is likely to remain more stable. The Department chose the one year and two year timeframes to ensure there was adequate time for any new science to develop pertaining to the targeted pest and that the Department's scientific staff would have adequate time to review the science and meet its obligations with the unknown workload.

Section 3162(e) will establish the "A"-rating for pests which score high as a pest of agriculture or the environment and are not known to occur or are under official control and the authorized mitigating regulatory actions, that the destruction, quarantine, treatment or return of a shipment shall be under the direction of Department or the Commissioner and at the expense of the owner and that any costs incurred need to be paid before shipping can resume; a "Notice of Rejection," a form used to notify the affected parties why the shipment is being refused entry, returned to the owner, quarantined, treated or destroyed by Department or the California County Agricultural Commissioner and the needed data to complete the form; and, a "Hold Notice," a

form prescribed by Department for all shipments being held but not rejected and the associated data needed and the reason for the hold. Not all invasive species are created equal in the potential harm they may cause. Some invasive species may be very harmful but already be established to varying degrees within the State. The pest rating is needed in order to communicate the general plan of action in a transparent manner which can be easily understood. Therefore, the appropriate plan of action for mitigating actions associated with the pest rating need to be known along with the process for implementing them. This section is needed to establish that "A" rated pests are the most seriously known invasive species, the appropriate pest mitigation actions to take when they are detected, the process to implement those actions and a method to notify an affected party that a pest has been detected and any options available to mitigate the impacts of the pest. Additionally, the expense for dealing with pest infested shipments, etc., should not fall on the Department or the Commissioner, it needs to be the responsibility of the party who shipped or has in their possession the infested commodity, appliance, means of conveyance, etc. This section also meets this need.

Section 3162(f) will establish the "B"-rating for pests which score medium as a pest of agriculture or the environment and which are of limited distribution and the same authorized mitigating regulatory actions under section 3162(e). Invasive species which do not score high as a pest of agriculture or the environment or which may be of limited distribution within the State need to be noted through a separate pest rating even though the appropriate mitigating actions may be the same as for an "A"-rated pest. The "B"-rating establishes this and the appropriate mitigating actions and processes are the same as under section 3162(e).

Section 3162(g) will establish the "C"-rating for pests which score medium to low as a pest of agriculture or the environment and which are of general distribution and that there are no State authorized mitigating regulatory actions under section 3162(e) to be taken. Invasive species which score medium to low as a pest of agriculture or the environment and which are of general distribution within the State need to be noted through a separate pest rating. The "C"-rating establishes this and that there are no appropriate State authorized pest mitigating actions for these pests. It should be noted that a serious pest may score medium to low based upon its general distribution.

Section 3162(h) will establish the “D”-rating for pests which score low as a pest of agriculture or the environment and that there are no State authorized mitigating regulatory actions under section 3162(e) to be taken. Invasive species which score low as a pest of agriculture or the environment need to be noted through a separate pest rating. The “D”-rating establishes this and that there are no appropriate State authorized pest mitigating actions for these pests.

Section 3162(i) will establish the “Q”-rating for pests which score high as a pest of agriculture or the environment and which are not known to occur or the distribution is unknown and for which there may be inadequate scientific information. Taxonomic scientists may not be able to completely identify an invasive species to genus and species because of the life stage detected or there may be a lack of peer reviewed literature specific to the detected invasive species. In these cases there needs to be a process to establish a temporary pest rating and appropriate pest mitigating actions. It will also establish that the Department, at its discretion, may only conduct surveys or the Department and Commissioner may implement the authorized mitigating regulatory actions and processes under section 3162(e) to be taken.

Section 3162(j) will establish that the pest ratings shall be used in the enforcement of the nursery stock standards of cleanliness under Title, 3, California code of Regulations, section 3060.2. For enforcement purposes, the nursery stock standards of cleanliness regulation uses the terms not known to occur, limited distribution and general distribution. However, these terms are not defined in the related regulations and there is a need to clearly communicate what each term means. The adoption of this section will achieve that.

The factual basis for the determination by Department that the amendment of this regulation is necessary is as follows:

The adoption of Section 3162 is necessary to provide a process for Department to determine a pest rating and communicate the authorized pest mitigations associated with that pest rating to all interested parties. The Department is the only agency with the legal jurisdiction to implement the pest rating system and plan quarantines. The process also allows for public participation to understand and participate in the process of rating the pest and to be able to share factors considered in determining the pest rating with any interested party, not just internally.

California Environmental Quality Act (CEQA)

CEQA requirements are triggered by agency activities (projects) which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. This regulation only establishes a process for pest rating. No activity which may cause a physical change in the environment takes place until a pest is actually rated. Therefore it is not subject to CEQA requirements. As pests are rated, the Department will fulfill its obligations under CEQA.

Results of Economic Impact Analysis

The adoption of this regulation would have no fiscal impact on the Department, general public, or agriculture industry because it establishes processes for establishing pest ratings and mitigating actions and does not require current or future budget as it relates to the statewide pest prevention. The Department is not aware of any specific economic impacts associated with the adoption of these processes.

Anticipated Benefits from This Regulatory Action

The implementation of this regulation will ensure:

- A uniform and efficient process for determining pest rating
- Participation for/by the public
- Uniform rating criteria
- Appeal process
- Ability to comment
- Ability to regularly update the list

As required by Government Code Section 11346.5(a)(3)(D), the Department has conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing state regulations.

Estimated Cost of Savings to Public Agencies or Affected Private Individuals or Entities

Section 3162 does not impose a new mandate on local agencies or school districts and no reimbursement is required under Section 17561 of the Government Code.

No savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or

school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the adoption of 3162.

The proposed actions will not have a significant adverse economic impact on housing costs or California business, including the ability of California businesses to compete with businesses in other states. The Department's determination that the action will not have a significant statewide adverse economic impact on business was based on the following:

This regulation establishes a process for rating pests and any cost impacts to private persons or businesses will be evaluated as pest ratings are submitted. The agency is aware that there may be cost impacts that a representative private person or business would necessarily incur in reasonable compliance after the pest is rated. For example, depending on the rating assigned and under the authority of the Department, a private person or business entity may be required to treat their plant material. However, at this time the agency has no way to determine what these costs impacts would be. Impact analysis will include the specific pest, authorized mitigating actions for that pest being exercised, where the pest was intercepted, what were the circumstances of the interception, did the pest infest a private or commercial shipment or is it a solitary find with no associated host material, etc.

Assessment

Based upon the economic analysis the Department has made an assessment that adopting the regulation would not 1) create or eliminate jobs within California; 2) create new business or eliminate existing businesses with California; or 3) affect the expansion of businesses currently doing business with California.

Alternatives Considered

The Department of Food and Agriculture must determine that no alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

- I. The Department considered not adopting regulations; however this is not a viable alternative because the Department is mandated to develop a list of invasive species, have a plan for action and makes it available to the public.

- II. The Department considered establishing each pest's rating through regulation. This would require the Department to submit a separate regulation for each pest. During the time it takes for the regulation to be established, the pest could cause catastrophic damage to the agriculture industry. Additionally, this would be time consuming for the Department's staff and an inefficient use of resources.

Information Relied Upon

The Department relied upon the following studies, reports, and documents in the proposed adoption of Section 3162:

"Economic Impact Analysis For Section 3162," California of Food and Agriculture, Permits and Regulations, October 2, 2013.