DEPARTMENT OF FOOD AND AGRICULTURE

PROPOSED ADOPTION OF REGULATIONS

Title 3, California Code of Regulations

Subchapter 2

Sections 4700, 4701, 4702, 4703, 4704, 4705,

4706, 4707, 4708 and 4709, Appeals to the Secretary

INITIAL STATEMENT OF REASONS/

POLICY STATEMENT OVERVIEW

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

These regulations are intended to address the obligation of the Secretary of Food and Agriculture to hear appeals from any interested party that pertain to any action or order of a California County Agricultural Commissioner (Commissioner).

Specific Purpose and Factual Basis

The specific purpose of sections 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708 and 4709, Appeals to the Secretary, are to establish a specific transparent process for the appellant to follow; clarity regarding the effect of the Commissioner's current action or order, the conduct of the hearings, the sole issue of the hearing, the form of decision and its effective date, the right to judicial review, burden of proof and evidence related to the hearing; and, how to request a continuance.

The factual basis for the determination by the Department that the adoption of sections 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708 and 4709 are necessary is as follows:

California Food and Agricultural Code (FAC) section 5103 states: "Any interested person that is aggrieved by any action or order of a commissioner may appeal in writing to the director within five days after notice of action or order if no other time limit is prescribed

within which to appeal from such action or order. No appeal may be taken from any authorized summary action of the commissioner."

FAC section 5104 states: "The director shall hear any appeal from an action or order of a commissioner within 10 days after the receipt of the appeal upon notice to all interested parties. His decision shall be final."

The Department's Division of Plant Health and Pest Prevention Services (PHPPS) received an appeal regarding a Commissioner's order pertaining to nursery stock standards of cleanliness. The appellant was granted their appeal because PHPPS did not have an established process to ensure the appeal was heard within 10 days after it was received. To solve this problem, PHPPS, in consultation with the Department's General Counsel, concluded that it needed a more specific effective and efficient responsive approach to ensure any future appeals to the Secretary could be heard within the required timeframe. Additionally, PHPPS concluded that the appellant needed to know more specific information about the appeals process too as the statutory authority is not very specific.

Section 4700, General Provisions, establishes which statutory and regulatory authorities may be appealed, the time frame within which to appeal, that failure to appeal within a timely manner shall be cause to deny the request for a hearing, appeals shall be in writing and sent to the Director of PHPPS, where to send the appeals and the timeframe for when an appeal is considered effectively filed. The Department has several Divisions and the California County Agricultural Commissioners (commissioners) implement actions or issue orders for other Divisions besides PHPPS. PHPPS only wants to be involved with appeals to the Secretary which arise from the commissioners' actions or orders that pertain to the statutory or specific regulatory authority for which PHPPS has oversight. Additionally, to avoid delays in routing to the Director of PHPPS, the Secretary determined it would be more efficient for appeals involving PHPPS be routed to its Director for review and action. As there is a statutory need to hear the appeal within 10 days after it is filed, it is necessary to determine when an appeal has been successfully filed. The appellant also needs to

know the consequence of not filing the appeal in the required timeframe. Therefore, it is necessary to establish this in regulation.

Section 4701, Effect of Commissioner's Action or Order of Required Action, establishes the commissioner's action or order shall be suspended after the appeal has been filed with the Director with the exception that if any articles, containers, means of conveyance, farm machinery or farm implements or plant material or any other thing is on hold due to being infested, contaminated or associated with a quarantine pest of concern to the commissioner or Department, the hold shall remain in effect during the appeal period and pending the outcome of the hearing. Under its statutory obligations, California Food and Agricultural Code section 403, the Department shall prevent the introduction and spread of injurious insect or animal pests, plant diseases, and noxious weeds. Suspending many of the commissioner's actions or orders during the appeal process will generally not result in any harm to the agriculture, public health and welfare or the environment. However, an exception is when the hold is preventing the artificial spread of a pest of local or statewide quarantine concern. Suspending the hold order in this case would enable the pest problem to artificially move and provide the opportunity to establish new infestations elsewhere. Therefore it is necessary to establish this exception in regulation.

Section 4702, Conduct of Hearings, establishes hearings shall be presided over and conducted by a Hearing Officer designated by the Secretary, may be based upon the written record or telephonic or oral testimony, hearings not held solely on the written record shall be recorded, the appellant may submit any documentation or evidence in support of their objections by facsimile, e-mail, personal delivery or U.S. mail and it is the responsibility of the appellant to ensure that the materials are sent in a manner so as to arrive prior to the hearing. Existing law requires the Secretary to hear the appeal within 10 days of receiving it. The Secretary determined that this will not always be feasible based upon her current responsibilities. As an example, the Secretary has been on several out-of-country trade missions lasting two weeks and if an appeal was filed during this period, unavailable to hear the appeal within the required timeframe. Therefore, the Secretary

needs to be able to delegate her authority and is accomplishing this through the use of a Hearing Officer. Existing law does not specify the hearing format or how information can be presented by the appellant for the hearing. Some appellants may not be able to travel to a hearing, may believe they can present their case orally better than in writing or vice versa. An appellant needs to know it is their responsibility to have documentation or evidence available prior to the hearing date and time. It is necessary to establish what options the appellant has for presenting their appeal. In order to ensure accuracy, if the hearing is oral it is necessary it be recorded.

Section 4703, Sole Issue of Hearings under this Section, establishes the only issue before the Hearing Officer shall be whether, when the commissioner imposed the specified action or order there was reason to believe, upon any basis reasonably supportable by standard epidemiological evidence or credible scientific research or facts or regulation or statute, the action or order was legally and biologically appropriate and, the appropriateness of the action(s) (including its time and place and method) required by the action or order is not before the Hearing Officer, but only whether or not there was an adequate basis for imposition of the action or order. Hearings need to be focused on the appropriate issue related to the commissioner's action or order. It is necessary to establish what the issue before the Hearing Officer is in regulation to ensure the appellant understands this.

Section 4704, Form of Decision, establishes the decision of the Hearing Officer shall be in writing, in minute order form, containing only a brief statement of the conclusion and findings to support the conclusion, may be handwritten and issued within 10 business days after the conclusion of the hearing and mailed within 10 business days to all appellants who did not consent to the action or order by the commissioner and may contain an explanation of the commissioner's warrant and abatement authority. Existing law does not specify the form the decision will be in after the hearing is held or how soon it will take a decision to be rendered. An appellant also has a reasonable expectation to understand what the decision's content will be when it is received, how long it will take to render a decision and when they can expect to receive the decision. In the California Food and

Agricultural Code, extensive pest abatement authority exists and can be used by the commissioners. It may be beneficial to explain this in some rendered decisions. Therefore it is necessary to establish this in regulation.

Section 4705, Effective Date of Decision, establishes the Hearing Officer's decision shall be effective immediately upon its first articulation under section 4704. Existing law does not specify when a decision is effective. After a decision is rendered, it is necessary that the appellant understands when it is effective. Therefore it is necessary to establish this in regulation.

Section 4706, Judicial Review, establishes the appellant may challenge the Hearing Officer's decision by filing a writ of administrative mandamus within 90 days of the date the written decision is mailed to the appellant in the appropriate court pursuant to Code of Civil Procedure section 1094.5 and that such proceedings shall not stay the action or order specified by the commissioner. Appellants may want to challenge the Hearing Officer's decision. It is necessary to inform the appellant they are entitled to the right of judicial review and the timeframe to seek it in.

Section 4707, Continuance, establishes that a request for continuance of a hearing, by the appellant, must be submitted to the Director as soon as practicable prior to the scheduled hearing, may be granted if good cause exists and shall be granted upon a determination by the Director of PHPPS that such continuance is epidemiologically feasible and not inconsistent with the public health safety and welfare. Existing law does not provide for a continuance of a hearing. An appellant may have an event happen which precludes them from being able to attend the scheduled hearing on the date and time specified. However, the Director of PHPPS does not want to schedule and reschedule hearings without good cause. Additionally, if a pest problem was on hold to prevent the opportunity for it to artificially move, there may be a point where it could over time build up its population and naturally move and expand an infestation on the existing property or to adjacent properties. A continuance under these circumstances would be inconsistent with PHPP's mandate to

stop the spread of pests. This proposed regulation provides the necessary process for the appellant to follow and what criteria will be used by PHPPS to evaluate a request for continuance.

Section 4708, Burden of Proof, establishes the standard of proof to be applied by the Hearing Officer shall be the preponderance of the evidence and that the burden of proof shall be on the appellant. Existing law does not specify the standard of proof to be used by the Secretary in a hearing. An appellant has a reasonable expectation to know the standard of proof. It is also the responsibility of an appellant to "make their case." Therefore it is necessary that the appellant understands the burden of proof and their responsibility.

Section 4709, Evidence, establishes all evidence related to the issue of the hearing will be admitted regardless of any civil rule which would otherwise bar its admission and those objections to and arguments about evidence may be considered by the Hearing Officer when determining the weight to be given to the evidence. Existing law does not specify what evidence may be presented to the Secretary or how such evidence may be considered. It is necessary to establish what evidence may be presented at the hearing and the weight it will be given.

Economic Impact Analysis

These proposed regulations establish the necessary regulatory framework for the right of an aggrieved party appealing a commissioner's order or action to the Secretary and the procedures and processes for resolving the appeal. There are no known economic impacts.

Anticipated Benefits from This Regulatory Action

Currently there are no regulations related to FAC section 5103. These regulations establish the transparent regulatory framework for the processes and procedures for such appeals. This will ensure that an appellant has a clear understanding of their and the Department's

responsibilities, how and where to appeal, timeframes involved, form and effective date of the decision rendered, etc. Therefore, the public is aware of the appeals process to the Secretary when finding resolution of an unsatisfactory order/action given by the Commissioner, in order to promote fairness and social equity in the justice system.

Assessment

Based upon the Economic Impact Analysis, the Department has made an assessment that the amendment of 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.

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. The Department is the only agency to which an aggrieved party may appeal a commissioner's action or order to.

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

The Department of Food and Agriculture has determined that sections 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708 and 4709 do not impose a mandate on local agencies or school district. No reimbursement is required under Section 17561 of the Government Code.

The Department also has determined that 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 proposed action.

The cost impact of the changes in the regulations on private persons or businesses is not expected to be significant; this regulation only establishes the processes and procedures for appealing a commissioner's order or action.

The Department has determined that the proposed action will not have a significant adverse economic impact on housing costs or California businesses, including the ability of California businesses to compete with businesses in other states. The Department's determination that this action will not have a significant adverse economic impact on businesses was based on this regulation only establishes the processes and procedures for appealing a commissioner's order or action.

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.

Information Relied Upon

The Department is relying upon the following studies, reports, and documents in the adoption of sections 4700, 4701, 4702, 4703, 4704, 4705,
4706, 4707, 4708 and 4709:

none