

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF FOOD AND  
AGRICULTURE

REGULATORY ACTION:  
Title 3, California Code of  
Regulations  
ADOPT SECTION 1392.4.1  
AMEND SECTIONS 1392, 1392.1,  
1392.2, 1392.4, 1392.6, 1392.8.1,  
1392.9, AND 1392.11

DECISION OF DISAPPROVAL  
OF REGULATORY ACTION  
(Gov. Code, sec. 11349.3)

OAL File No. 2011-0106-02S

**SUMMARY OF REGULATORY ACTION**

The Department of Food and Agriculture (Department) proposed to adopt section 1392.4.1 and amend sections 1392, 1392.1, 1392.2, 1392.4, 1392.6, 1392.8.1, 1392.9, and 1392.11 of title 3 of the California Code of Regulations to implement the provisions of Assembly Bill 2168 (ch. 447, Stats. of 2008) and provide enforcement mechanisms for the Certified Farmers' Market Program. On January 6, 2011, the Department submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On February 18, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action for failure to comply with the clarity and necessity standards of Government Code section 11349 and for a defective initial statement of reasons.

**DISCUSSION**

The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted 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.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or 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 with regard to 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 rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

### 1. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a

regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The initial statement of reasons submitted with this proposed regulatory action skipped over proposed new regulation section 1392.4.1 and for proposed changes to, or proposed new, subdivisions 1392.2(b), (j), (u)-(z), 1392.4(l) and (m), 1392.6(b), and 1392.8.1(h), simply described what the new regulatory changes/provisions did rather than explaining the need for the particular provisions chosen. For example, subdivision (d) of section 1392.1 of title 3 of the California Code of Regulations would be amended by this rulemaking to provide that fresh fruits, nuts, and vegetables sold directly to consumers by the producer of the agricultural products at a field retail stand or farm stand located at or near the point of production are exempt from the size, standard pack, container, and labeling requirements. This is consistent with section 47030 of the Food and Agricultural Code which defines “field retail stands” to mean “...producer-owned and operated premises located **at or near the point of production** established in accordance with local ordinances and land use codes.” (Emphasis added.) New subdivision (z) of section 1392.2 as proposed by this rulemaking would define the term “At or Near the Point of Production” to mean “...not beyond the first paved county or primary road.” The initial statement of reasons included in this rulemaking says only that the “...purpose of adopting Section 1392.2(z) is to give a definition to the term ‘at or near the point of production’”. It does not explain why the term was defined in the manner chosen. Nine comments were submitted during this rulemaking opposing this definition as too restrictive and threatening the income of small businesses and farms. Since the initial statement of reasons did not provide an explanation of why the term was defined in this manner, these commenters and anyone else who might be affected by proposed subdivision 1392.2(z) were not privy to the Department’s reasoning for adopting this particular regulatory provision as required by the Administrative Procedure Act. In that the initial statement of reasons is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations and this document is required to be made available to the public with the 45 day notice, any addition to the statement of reasons now providing the necessity missing from the existing initial statement of reasons must be made available to the public for at least 15 days prior to resubmission to OAL pursuant to Government Code section 11347.1.

## 2. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

Proposed new subdivision (m) of section 1392.4 provides in part:

A seller of processed agricultural products shall document compliance with the **production requirements** referenced in Section **1392.2(k)**.... (Emphasis added.)

However, subdivision (k) of section 1392.2 is simply a definition for the term "Agricultural Products". It would appear from a discussion with Department staff that the production requirements intended to be referred to are located in subdivision (k) of section 1392.4.

Any changes made to the regulations to address the clarity concern discussed above must be made available to the public for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

### CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note the following: the text submitted to OAL in this rulemaking file at Tab 7 as the text attached to the Notice of Modifications to Text of Proposed Regulations does not show the additional changes being made to subdivision (w)(1) of section 1392.2; the minutes of the Certified Farmers' Market Advisory Committee meetings of March 4, 2009, December 16, 2009, January 20, 2010, and April 14, 2010 included in the rulemaking file as documents relied upon should be specifically identified and made available to the public in the 15 day notice described in issue #1 above; the text of the regulations submitted with the STD 400 for review by OAL and filing with the Secretary of State has a minor discrepancy in its depiction of existing subdivision (b) of section 1392.4; and all 15 day comment periods should be described in box B.4 of the STD 400. If you have any questions, please contact me at (916) 323-6808.

Date: February 16, 2011

**CRAIG TARPENNING**

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