

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
DEPARTMENT OF FOOD)	DECISION OF DISAPPROVAL
AND AGRICULTURE)	OF CERTIFICATE OF COMPLIANCE
)	
REGULATORY ACTION:)	(Gov. Code, sec. 11349.6(d))
)	
Title 3, California Code)	OAL File No. 02-0521-03 C
of Regulations)	
AMEND SECTIONS: 1392.1, 1392.2,)	
1392.4, 1392.9.1)	
_____)	

DECISION SUMMARY

The proposed action would amend the conditions under which certified producers may sell their agricultural products at certified farmers' markets. The amendments would require certified producers who sell products under their own primary certificate and also sell products under a partnership to comply with all requirements with which individual certified producers are required to comply including selling for and/or representing for no more than two other producers on a certified producer's certificate in a 12-month period. On July 3, 2002, the Office of Administrative Law ("OAL") notified the Department of Food and Agriculture ("Department") that the proposed amendment of sections 1392.1, 1392.2, 1392.4, and 1392.9.1 was disapproved for incorrect procedure and inadequate response to comments made regarding the proposed action.

INCORRECT PROCEDURE

Government Code section 11346.4. (a) provides;

“At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be: (1) Mailed to every person who has filed a request for notice of regulatory actions with the state agency. Each state agency shall give a person filing a request for notice of regulatory actions the option of being notified of all proposed regulatory actions or being notified of regulatory actions concerning one or more particular programs of the state agency. (2) In cases in which the state agency is within a state department, mailed or delivered to the director of the department. (3) Mailed to a representative number of small business enterprises or

their representatives that are likely to be affected by the proposed action. “Representative” for the purposes of this paragraph includes, but is not limited to, a trade association, industry association, professional association, or any other business group or association of any kind that represents a business enterprise or employees of a business enterprise. (4) When appropriate in the judgment of the state agency, mailed to any person or group of persons whom the agency believes to be interested in the proposed action and published in the form and manner as the state agency shall prescribe. (5) Published in the California Regulatory Notice Register as prepared by the office for each state agency’s notice of regulatory action”

The rulemaking record indicates that the notice of the proposed action was mailed and published on March 8, 2002. The hearing was held on March 25, 2002. Because there were not at least 45 days between the publication and mailing of the notice and the hearing, the procedural requirements have not been fulfilled.

INADEQUATE RESPONSE TO COMMENTS

OAL must review rulemaking records submitted to it in order to determine whether the rulemaking has satisfied the procedural requirements of the Administrative Procedure Act (“APA”). Every agency subject to the APA shall prepare and submit to OAL with the adopted regulation a Final Statement of Reasons (“FSR”). (Gov. Code, sec. 11346.9(a).)

Government Code section 11346.9, subdivision (a)(3) requires that the FSR include:

“A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is ‘irrelevant’ if it is not specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action.”

The Department’s FSR summarized two comments made by the San Louis Obispo County Farmers’ Market Association as follows:

“The proposal makes it difficult for market operators to enforce CDFA regulations because market managers are not given authority to obtain certain records under Section 1392(f)(10). They recommend market managers be given authority under this section.

“There are no provisions requiring names of individuals making up an entity to appear on the CPC obtained by the entity making it difficult for the manager to ensure that each person participating in the sale of agricultural products is the appropriate person.

The Department responded;

“The following comments are not relevant to the proposal; therefore, the Department cannot accommodate the respondents’ recommendations. Further as the respondents’ [sic] point out, the market manager has broad authority to demand documentation under existing 1392.5(c).”

Because the comments are directed at the Department’s proposed action, the Department should either explain how the proposed action has been changed to accommodate each objection or recommendation or give the reasons for making no change.

CONCLUSION

For the reasons set forth above, OAL has disapproved the amendment of sections 1392.1, 1392.2, 1392.4, 1392.9.1 Title 3 of the California Code of Regulations. If you have any questions, please contact me at (916) 324-1921.

July 10, 2002

SHERRY KAUFMAN
Staff Counsel

For:

DAVID B. JUDSON
Deputy Director/Chief Counsel

Original: William Lyons, Jr., Agency Secretary
Cc: Sonja A. Dame