

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
)	DECISION OF PARTIAL DISAPPROVAL
DEPARTMENT OF FOOD AND)	OF REGULATORY ACTION
AGRICULTURE)	
)	(Gov. Code, sec. 11349.3)
REGULATORY ACTION:)	
Title 3, California Code of)	
Regulations)	OAL File No. 07-0131-02S
)	
ADOPT SECTIONS 1371, 1371.1, 1371.2)	
)	
)	
)	
_____)	

SUMMARY OF REGULATORY ACTION

Sections 885 and 43003 of the Food and Agricultural Code declare that, in lieu of civil prosecution, the Secretary of Food and Agriculture and the County Agricultural Commissioners are authorized to levy civil penalties against any person violating Division 1, Part 1, Chapter 8, Agriculture Theft Prevention or Division 17, Fruit and Vegetable Standards. The penalties range from \$500 or \$3,000 for first violations, as specified; to penalties up to \$1,000, \$3,000, or \$5,000 for subsequent or other violations as specified. Additionally, they further set forth basic guidelines for the civil penalty and hearing processes. This regulatory action outlines the requirements for the notice of proposed action (civil penalty), provides hearing guidelines, defines “minor”, “moderate”, and “serious” violations, and provides a listing specifying the type of violation, associated section of the Food and Agricultural Code, the severity of the violation, and gives a penalty range.

DECISION

On March 15, 2007, the Office of Administrative Law approved the above referenced regulatory action except for subsection (d) of section 1371. Subsection (d) of section 1371 was disapproved for failure to comply with the “consistency” standard of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the Department of Food and Agriculture (“Department”) must satisfy requirements established by the part of the California Administrative Procedure Act (“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 the Office of Administrative Law (“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.

OAL is required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “consistency” standard. (Gov. Code, sec. 11349.1(a)(4).) “‘Consistency’ means ‘being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.’” (Gov. Code, sec. 11349(d).)

Section 43003 of the Food and Agricultural Code provides that, in lieu of civil prosecution, the Secretary of Food and Agriculture and the County Agricultural Commissioners are authorized to levy civil penalties against any person violating Division 17, Fruit and Vegetable Standards, or any regulation adopted pursuant to its provisions. New regulation section 1371 is intended to implement section 43003 of the Food and Agricultural Code. The only language in new regulation section 1371 providing for appeal rights is contained in subsection (d):

“If the person upon whom the commissioner levied a civil penalty requested and appeared at a hearing, the person may appeal the commissioner’s decision to the secretary within 10 days of the date of receiving a copy of the commissioner’s decision, pursuant to the procedures provided in Section 43003(e) of the California Food and Agricultural Code.”

However, subdivision (e) of section 43003 of the Food and Agricultural Code provides in pertinent part:

“The person fined may appeal to the secretary within 10 days of the date of receiving notification of the fine. The following procedures apply....”

There is no language in subdivision (e) of Food and Agricultural Code section 43003 that would require persons fined to first request and appear at a hearing before the County Agricultural Commissioner in order to have the right to appeal the fine to the Secretary of Food and Agriculture. No regulation adopted is valid or effective unless consistent and not in conflict with the statute implemented. (Gov. Code, sec. 11342.2.)

CONCLUSION

For this reason, OAL has disapproved subsection (d) of section 1371 of this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: March 20, 2007

CRAIG S. TARPENNING
Senior Staff Counsel

for: LINDA C. BROWN
Deputy Director

Original: A.G. Kawamura, Secretary
cc: Susan Shelton/Kevin Masuhara