

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE

**CALIFORNIA CODE OF REGULATIONS
TITLE 3. FOOD AND AGRICULTURE
DIVISION 4. PLANT INDUSTRY
CHAPTER 2. FIELD CROPS
SUBCHAPTER 2. COMMERCIAL FEED
(Notice Published June 25, 2021)**

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Department of Food and Agriculture (Department) proposes to adopt, amend, and change regulations, as described below within the California Code of Regulations, Title 3 (3 CCR), Division 4, Chapter 2, Subchapter 2.

The Department is issuing this notice to meet requirements set forth in Government Code Section 11346.4.

PUBLIC HEARING

Any interested person or his or her duly authorized representative may request a public hearing on this proposed action by submitting a written request no later than 15 days before the close of the written comment period noted below.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department by mail or email. The written comment period will close on Monday, August 9, 2021. The Department will only consider comments received by that date.

Submit written comments to:

Erika Lewis, Research Data Specialist I
California Department of Food and Agriculture
Feed, Fertilizer, and Livestock Drugs Regulatory Services Branch
1220 N Street
Sacramento, CA 95814
Email: feed_lvstk@cdfa.ca.gov

Following the written comment period or public hearing, if one is requested, and after considering all comments, objections, and recommendations regarding the proposed actions, the Department, at its own motion or at the request of any interested person, may adopt the proposal substantially as set forth without further notice.

AUTHORITY AND REFERENCE

The Department is proposing to adopt changes to 3 CCR, Division 4, Chapter 2, Subchapter 2 pursuant to the authority vested by Sections 407 and 14902 of the Food and Agricultural Code (FAC) to adopt, implement, and enforce these regulations. The proposed regulations will implement, interpret, or make specific FAC Sections 14925, 14991, 14992, 15011, 15042, 15051, 15053, 15061, and 15062.

INFORMATIVE DIGEST / POLICY STATEMENT

The Department's Commercial Feed Regulatory Program (CFRP) is responsible for the enforcement of California state law and regulations pertaining to the manufacturing, distribution and labeling of commercial feed while preventing adulterated feed from being consumed by livestock. Inspectors and investigators located throughout the state conduct routine feed sampling and inspections, quality assurance inspections of feed manufacturing facilities, respond to consumer complaints, and enforce the laws and regulations that govern the manufacturing, distribution, and labeling of commercial feed. The work of the CFRP helps to ensure a clean and wholesome supply of milk and meat, as well as providing assurance that the product received by the consumer is the quality and quantity purported by the manufacturer.

California is a uniquely positioned state as it utilizes by-products from human food manufacturing to feed its diverse livestock animal population. The CFRP has overarching regulatory authority over all commercial feed products produced, processed, and sold in the state of California. Manufacturers of human food whose by-products are diverted to commercial feed are currently required to have a Commercial Feed License with the CFRP and are subject to the inspection and labeling requirements in accordance with California Commercial Feed Law and Regulations. The CFRP has authorization to ensure facilities are following good management practices including safe transportation, handling, and storage of commercial feed which includes human food by-products. Human food processing plants and other facilities that are diverting human food by-products to commercial feed are required to obtain a California Commercial Feed License through the CRRP and report their tonnage sold.

Over 12.5 million tons of human food by-products are repurposed for commercial feed in California annually and reported to CFRP; these products can include but are not limited to cull fruits/vegetables, fruit/vegetable pomace, bakery products, wet distillers/brewers grains, whey, or products that are at the end of their shelf life. CFRP and the feed industry see potential to increase the capacity of food by-product diversion to commercial feed and allow for additional diversion from human food manufacturers, restaurants, retail establishments or anywhere that serves food (i.e., hotels and cafeterias). However, current regulations disincentivize companies from participating in diversion and lack clarity on the standards for these products and their handling and transportation.

To address these issues, CFRP is proposing the additions and amendments to Subchapter 2 (commencing with section 2675) of Chapter 2 of Division 4 of Title 3 of the California Code of Regulations described below. The proposed regulations will further support and incentivize human food by-product diversion to commercial feed while ensuring safe handling to prevent contamination, as well as clarifying which licensee is responsible for payment of tonnage tax.

The proposed adoption of Section 2675(j) defines the term by-product.

The proposed adoption of Section 2675.1 General Provisions describes the requirements for by-products used in commercial feed.

The proposed revision to Section 2750(a) clarifies that the commercial feed licensee whose name appears on a commercial feed label shall pay the inspection tonnage tax.

The proposed revision to Section 2750(c) repeals the option for licensees to submit an estimate of the amount of commercial feed sold for the entire year on the first quarter tonnage tax payment.

The proposed adoption of Section 2750(e) clarifies that human food by-products diverted to animal feed without further processing or manufacturing, as defined under proposed Section 2804, are subject to reduced inspection tonnage tax and exempts these firms from paying inspection tonnage tax on the first 1,000 tons of human food by-products diverted to animal feed without further processing or manufacturing during the license period.

The proposed adoption of Section 2751(c) specifies a reduced annual commercial feed license fee of \$100 for firms solely engaged in the diversion of human food by-products without further processing or manufacturing, as defined under proposed Section 2804.

The proposed adoption of Section 2751(d) clarifies that the commercial feed license fee is non-refundable and shall not be reduced to cover a fraction of a year.

The proposed revision to Section 2789(m) corrects a typographical error.

The proposed revision to Section 2802(v) repeals the definition for dehydrated garbage.

The proposed adoption of Section 2804 specifies feed ingredient definitions for human food by-products, including wet food processing waste, restaurant food waste, recovered retail food, and cull fruit or vegetables. The proposed change also includes adding references to existing definitions for wet apple pomace, wet beet pulp, brewers wet grains, condensed whey-product, whey, condensed whey permeate, condensed delactosed whey permeate, dairy food by-products, wet citrus pulp, cereal food fines, and dried bakery product under proposed Section 2804 to ensure these ingredients are categorized as human food by-products.

Anticipated Benefits of the Proposed Regulations:

The additions and amendments in this proposed rulemaking action will clarify which commercial feed licensee is responsible for tonnage tax payment, incentivize the diversion of human food by-products to commercial feed by specifying eligibility requirements for reduced tonnage tax rate and commercial feed license fee, and support feed safety by adding ingredient definitions and handling requirements for human food by-products.

The proposed changes will benefit the commercial feed industry by providing enhanced clarity regarding which licensee is responsible for paying tonnage tax. Commercial feed frequently passes between multiple license holders before sale to the end user; as currently written, the regulations do not specify which of these licensees is responsible for tax payment. Clarifying which licensee is responsible will more equally distribute tax payment across the broader pool of licensees and ensure all licensees are paying their fair share of tax. In addition, the proposed reduced commercial feed license fee and tonnage tax rate will incentivize more companies to become involved in human food by-product diversion by reducing barriers to entry. Providing a tax break for this low margin, high moisture product will encourage more companies to participate in diversion. Incentivizing by-product diversion will benefit the commercial feed industry by reducing reliance on more expensive imported feed ingredients, helping the industry reduce its carbon footprint and enhance the security of the feed supply.

The proposed changes will also provide benefits to consumers and the public. Encouraging the diversion of human food by-products to commercial feed keeps this essential feed source out of landfills and ensures it is repurposed for its highest and best use. The proposed changes will help CFRP better align with the U.S. Environmental Protection Agency's Food Recovery Hierarchy, which classifies recovering food to feed animals as the next best use for food products when they can no longer be used to feed humans. Currently, over 12.5 million tons of human food by-products are diverted to feed each year within California's commercial feed industry. The proposed regulations have the potential to increase the amount of human food by-products diverted to feed that would otherwise be going to landfills by incentivizing the conversion of otherwise unsaleable material into nutritional feedstuff for the livestock that provide us with eggs, meat, and milk.

In addition, the proposed changes will enhance feed safety by adding ingredient definitions for human food by-products and safe handling provisions to prevent contamination, as well as repealing the outdated ingredient definition for dehydrated garbage. This will ensure that ingredients used in feed meet national safety and quality standards and that human food by-products are diverted to feed only if they are properly stored, handled, and have remaining nutritional value for livestock. The proposed regulations will protect the health of the livestock population of the state, which will in turn benefit the general public by maintaining an abundant and safe supply of wholesome food and fiber.

Determination of Inconsistency/Incompatibility with Existing Regulations:

The Department evaluated the proposed regulations and made several determinations required by Government Code Section 11346.5(a)(3)(A) to 11346.5(a)(3)(D). The Department determined that there are no existing state laws or regulations related directly to the proposed action and the effect of the proposed action; the proposed regulations are not inconsistent or incompatible with existing state regulations.

PLAIN ENGLISH REQUIREMENT

The Department prepared the proposed regulations pursuant to the standard of clarity provided in Government Code section 11349 and the plain English requirements of Government Code sections 11342.580 and 11346.2, subdivision (a)(1). The proposed regulations are written to be easily understood by the individuals that will use them.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed upon local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative person or business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant effect on housing costs: None.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

California Government Code section 11346.3 requires state agencies to assess the potential economic impacts on California businesses and individuals when proposing to adopt or amend any administrative regulation.

The following is a summary of results from the economic impact analysis:

- The proposed regulatory action would not have a broad economic or fiscal impact to the commercial feed industry.
- The proposed regulatory action would not require any additional ongoing expenses to individuals or businesses.
- The proposed regulatory action would not result in an increase or decrease in California jobs.
- The proposed regulatory action would not require the creation of new businesses or the elimination of existing businesses.
- The proposed regulatory action would not affect the expansion of businesses currently operating within the state.
- The proposed regulatory action would affect tonnage tax and commercial feed license payments.
 - Clarifying that the licensee named on the commercial feed label is responsible for paying tonnage tax would redistribute the taxes paid among licensees, thereby significantly reducing the burden of tonnage tax on businesses currently paying the majority of the taxes and slightly increasing tax costs on businesses not currently paying the tax.
 - Charging a reduced license fee and tonnage tax rate for human food by-products would create a cost savings for businesses engaged in these activities.
- The proposed regulatory action may result in benefits to the health and welfare of California residents by ensuring that human food by-products are diverted to feed only if they are properly stored, handled, and have remaining nutritional value for livestock. The proposed regulations will protect the health of the livestock population of the state, which will in turn benefit the general public by maintaining an abundant and safe supply of wholesome food and fiber.
- The proposed regulatory action would not affect worker safety but may result in benefits to the state's environment. Encouraging the diversion of human food by-products to commercial feed keeps this feed source out of landfills and ensures it is repurposed for its highest and best use.

SMALL BUSINESS DETERMINATION

The Department has initially determined that the proposed regulations will impact small businesses; however, these costs are not expected to be significant. The Department estimates that a small business could expect to incur \$656 in annual ongoing costs as a result of the proposed changes to Section 2750(a); however, the exact amount is entirely dependent on the tons of feed sold and whether the small business is the licensee named on the commercial feed label. In addition, the proposed changes to

Sections 2750(e) and 2751(c) will result in cost savings for small businesses diverting human food by-products. The Department determined 37 small businesses would be eligible for the reduced tonnage tax rate as a result of the proposed changes to Section 2750(f). The Department determined 66 small businesses would be eligible for the lower license fee as a result of the proposed changes to Section 2751(c), resulting in a cost savings of approximately \$400 per business per year, or approximately \$26,400 total.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Department must determine that no reasonable alternative it has considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Written comments and inquiries concerning the substance of the proposed regulation, initial statement of reasons, proposed actions, location of the rulemaking files, other information upon which the proposed rulemaking is based, or a request for a public hearing should be directed to:

Erika Lewis, Research Data Specialist I
California Department of Food and Agriculture
Feed, Fertilizer, and Livestock Drugs Regulatory Services Branch
1220 N Street
Sacramento, CA 95814
Email: feed_lvstk@cdfa.ca.gov

The backup contact person for these inquiries is:

Ashley James, Research Data Analyst II
California Department of Food and Agriculture
Feed, Fertilizer, and Livestock Drugs Regulatory Services Branch
1220 N Street
Sacramento, CA 95814
Email: feed_lvstk@cdfa.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process. A copy of this notice, the proposed regulation text, and the initial statement of reasons may be obtained by contacting Erika Lewis at the address provided in the “Contact Persons” section.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the notice of proposed action, the initial statement of reasons, and the proposed regulation text in underline and strikethrough can be accessed through the Department’s website: <https://www.cdfa.ca.gov/is/Regulations.html>.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received during the written comment period, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which differ, but are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days prior to amendment. Please send requests for copies of any modified regulations to the attention of Erika Lewis at the address provided in the “Contact Persons” section. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the final statement of reasons may be obtained by contacting Erika Lewis at the address provided in the “Contact Persons” section.