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BY ELECTRONIC MAIL

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RE: Comments of the National Pork Producers Council to Proposed Chapter 10 of Division 2 of Title 3 of the California Code of Regulations: Article 3, Breeding Pigs; Article 4: Exceptions; Article 5 Certification and Accreditation.

The National Pork Producers Council (“NPPC”) submits these comments to the California Department of Food & Agriculture (“CDFA”) in response to its proposed rules to implement Proposition 12 (“Prop 12”), the “Prevention of Cruelty to Farm Animals Act” at Chapter 10 of Division 2 of Title 3 of the California Code of Regulations.

NPPC is a national association representing 42 affiliated state associations and America’s approximately 67,000 hog farmers, who annually generate approximately \$23 billion in farm gate sales. The U.S. pork industry supports more than 500,000 domestic jobs, generates more than \$39 billion in gross national product, and exports an increasing volume of product, which in 2020 was valued at more than \$7.7 billion. NPPC’s members are the farmers who care for and raise pigs, which are processed into pork and feed tens of millions of Californians every year.

Prop 12 prohibits the sale in California of “whole pork meat” products derived from animals not raised under the arbitrary space requirements that it mandates. Many aspects of these proposed rules mirror the draft proposed rules CDFa posted last July. However, as the Notice of Proposed Action (notice) and Initial Statement of Reasons (statement) accompanying the rules acknowledge, the law provides no food safety or animal welfare benefit (and in fact will lead to a significant increase in animal suffering), provides no meaningful benefit to California, and will impose substantial burdens on interstate commerce.

The rules, if finalized, would create a burdensome, bureaucratic labyrinth of regulatory provisions:

- requiring a virtually unworkable annual certification of hog farms;
- creating an overly complex accreditation process for entities allowed to certify those farms and the pork production chain;
- imposing overly burdensome and unnecessary recordkeeping requirements on farmers and others throughout the pork supply chain;
- imposing unnecessary and problematic labeling provisions; and
- granting legally questionable enforcement authority that exceeds the scope and authority of Prop 12.

As California has no significant commercial pork production, the burden of complying with Prop 12 – and its harmful ramifications – will be felt by hog farmers across the country. Meantime, Prop 12 will dramatically reduce the supply of pork to Californians, driving up prices for consumers and removing an affordable source of protein for millions of hard-working families in the state. NPPC and its members strongly object to Prop 12.

As NPPC previously stated to CDFA in June 2019:

- Prop 12 is an unconstitutional regulation imposed by California on livestock production practices in other states and imposes extraordinary burdens to interstate commerce, while providing no actual benefits to California.
- Prop 12 sets arbitrary standards that lack any scientific, technical or agricultural basis. It provides no actual improvement to the welfare of pigs. These standards were drafted by activists whose goal is the elimination of pork (and ultimately all animal protein) from U.S. diets and who lack any expertise or experience raising pigs.
- Prop 12 will impose staggering, destructive costs on the U.S. pork industry (and rural communities across America), an industry that has virtually no presence in California.
- Prop 12 is an environmental disaster. It sets back decades of environmental and production efficiency progress in the U.S. pork industry and will significantly increase the industry's environmental footprint.
- Prop 12 is a human disaster. It will dramatically reduce the supply of wholesome, affordable and nutritious pork available to California consumers. The state with the nation's highest poverty rate is now set to impose these staggering costs on its most at-risk citizens, including the more than four million Californians who receive assistance purchasing food and the shockingly high 18.1 percent of California children who live in poverty.

As a result, NPPC is currently litigating a challenge to Prop 12 before the United States Court of Appeals for the Ninth Circuit (No. 20-55631). While litigation is pending (and NPPC still maintains its opposition to Prop 12), we submit these comments in the interest of reducing the burdens and impacts of the regulation. NPPC's support for some of CDFA's proposed regulatory approaches, or suggestions for improvements, should not be construed as the pork industry's acquiescence or support of Prop 12, or its illegal and unconstitutional mandates on out-of-state hog farmers.

NPPC submits these comments to minimize the extreme burden that Prop 12 places on hog farmers and the entire pork chain, and to ensure as much clarity as possible for hog farmers to continue to supply pork to California consumers. NPPC looks forward to

working cooperatively with CDFA and its staff as they continue to work on these proposed regulations.

Delay the January 1, 2022 Implementation Date

Prop 12 clearly stated that the “Department of Food and Agriculture and the State Department of Public Health **shall** jointly promulgate rules and regulations for the implementation of this act **by September 1, 2019.**” Cal. Health & Saf. Code § 25993(a) (emphasis added).

This deadline, 28 months prior to the Jan. 1, 2022 compliance date, is an essential component of Prop 12 and necessary to provide time for hog farmers to understand and comply with the regulations, undertake any necessary conversions, and work to provide certification that the animals they raise are compliance with Prop 12’s arbitrary mandates. As the California Legislative Analyst noted in the voter information guide, “it could take several years for enough farmers in California and other states to change their housing systems to meet the measure’s requirements.”¹

Prop. 12 thus provided significant lead time for the new rules to be adopted and for farmers, distributors, and retailers to adapt an inspection, compliance, and audit system before any penalties would be effective. The failure to timely promulgate these rules and regulations means hog farmers will be unable to make the significant changes to their operation before Prop 12’s date of implementation. To correct this error and maintain the necessary window for compliance that Prop 12 contemplated, CDFA should delay the Jan. 1, 2022 compliance date at least two years from the date when its regulations are finally promulgated.

Request for Public Hearing, Further Stakeholder Engagement and Development of Clear Industry Guidance

On June 25, 2021, NPPC filed a timely request with CDFA for a public hearing on the proposed rules. We again request that CDFA hold this hearing, providing an opportunity for all parties impacted by Prop 12 to comment on the proposed rules in a public forum.

Additionally, NPPC strongly encourages CDFA to host stakeholder workshops to better understand the impacts of its proposals and how best to achieve the mandates of Prop 12 if it is ultimately enforced.

Finally, in addition to the eventual publication of final regulations, NPPC strongly encourages CDFA to produce clear, user friendly guidance, to assist hog farmers in understanding what the regulations require as they undertake the costly process to convert their farms to meet the requirements of Prop 12.

¹ Ballot Pamp., Gen. Elec., Nov. 2018 at p. 69.

CDFA Should Re-Evaluate and Re-Draft Its Economic Assumptions

Throughout its Notice of Proposed Action, and further in its Initial Statement of Reasons, CDFA significantly underestimates the impact that Prop 12 will have on California consumers and the farms that supply pork to the California market. This includes the cost of conversion and new construction for farmers as well as the expected price impacts on consumers. As explained in further detail in the attached economic reports by Dr. Barry Goodwin² and Rabobank³, Prop 12 and its associated implementation will cause significantly more disruption than CDFA's economists acknowledge. CDFA's estimate of the burden imposed by the paperwork and recordkeeping required by its regulations are also underestimated. Indeed, the fact that the bulk of this burden falls entirely outside of California is almost entirely absent from the economic assessment.

CDFA Must Ensure Prop 12 and Its Implementing Regulations Are Consistent with U.S. Trade Obligations

It is widely known that virtually the entire burden of Prop 12 will fall on hog farmers outside of California. While most assume this burden will be born solely by U.S. based producers, the reality is the financial impact of Prop 12 will be felt worldwide, including by U.S. trading partners who ship significant levels of pork into the United States every year. These imports range from piglets, born to breeding pigs in Canada and shipped south to be finished in the United States, to whole pork meat produced in a variety of countries including Canada, Mexico, Denmark, Italy, Poland, and Spain. These and other trading partners will be subject to, and impacted by, the provisions of Prop 12. In light of this, the potential exists for conflicts and inconsistencies between Prop 12, CDFA's proposed regulations, and ongoing U.S. international trade obligations, including those under the World Trade Organization (WTO) agreements (the Technical Barriers to Trade Agreement (TBT Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the General Agreement on Tariffs and Trade (GATT) 1994, as well as the recently completed U.S.-Mexico-Canada Agreement (USMCA). As a result, we strongly encourage California to reconsider Prop 12 and its implementing regulations to ensure they are promulgated in a manner that doesn't trigger an international dispute and costly retaliation from U.S. trading partners.

CDFA's Draft Regulations Remain Vague and Fail to Provide Sufficient Clarity for Compliance

CDFA's proposed regulations are incomplete and vague. They simply do not provide the clarity necessary for producers to adequately understand how to comply with the law, especially for purposes of constructing and designing their farms and seeking certification. For instance, while the regulations address some aspects of the requirement under Cal. Health & Saf. Code § 25991(e)(3) that after Dec. 31, 2021, breeding pigs must be provided at least 24 square feet, they

² May 13, 2021 report of Dr. Barry Goodwin, "California's Proposition 12 and its Impacts on the Pork Industry".

³ Rabobank, Rabobank Research, "US Pork Supply Chain Locked in Limbo as Producers Await Legal Ruling," February 2021.

remain silent on requirements of § 25991(e)(1), which requires breeding pigs not be prevented from “lying down, standing up, fully extending the animals limbs, or turning around freely.” As the associated definition at Cal. Health & Saf. Code § 25991(k) indicates, the term “fully extending the animal’s limbs” means “fully extending all limbs without touching the side of an enclosure or another animal.” Since swine are inherently pack animals, they naturally bunch in close proximity and rest against the side of the enclosures they reside in. Far more clarity is required from CDFA on how producers are expected to comply with this provision. For example, is contact with other animals allowed? Is incidental contact of other animals or the sides of the enclosure allowed? Does it matter if contact with other pigs is the free choice of the animals? Do producers need to actively manage their herds to prevent contact with each other or the sides of their pens?

Furthermore, there is a tremendous amount of uncertainty throughout the pork supply chain as to the effective date of these provisions. As discussed further below, the lack of clarity on an effective date is a source of great confusion and will prevent producers’ from understanding the self-certification options that CDFA has proposed. This will only further exacerbate the disruptions that Prop 12’s implementation will cause.

NPPC strongly urges CDFA to draft final regulations that both clearly define its expectations and compliance requirements, including Prop 12’s effective date. In addition, CDFA should also develop clear guidance documents and offer extensive compliance assistance for producers seeking to invest in Prop 12-compliant facilities.

Specific Comments on Article 3. Breeding Pigs

Section 1322 Definitions

The definition of “**audit trail**” as proposed will impose onerous requirements across the pork supply chain. Requiring a distributor to have documents addressing “the identification, source, supplier, transfer of ownership, transportation, storage, segregation, handling, packaging and distribution” is unnecessary, excessively complex, and overbroad. Distributors, and retailers, are likely to be several steps removed from farms.

The requirements imposed by the law are clear:

It shall be a defense to any action to enforce subdivision (b) of Section 25990 that a business owner or operator *relied in good faith upon a written certification by the supplier that the* ... whole pork meat ... at issue was not derived ... from the immediate offspring of a breeding pig who was confined in a cruel manner.

This statutory mandate for certification does not require the complex and excessively burdensome audit trail that is proposed by CDFA. An individual business owner or operator who sells whole pork meat merely needs to rely “in good faith upon a written certification” by the supplier that the whole pork meat complies with the requirements of Prop 12. This same approach can be applied throughout the pork supply chain. For example, a distributor can be required to have information from its supplier that the product offered is Prop 12 compliant.

However, it's unnecessary for that individual distributor to have on file the names, addresses, *etc.* of the hog farmers that supplied hogs to a processor. Nor should a distributor be required to keep records showing how a processor that harvests hogs segregates the carcasses (if necessary), transports the pork, *etc.* It should be sufficient for a supplier to certify the animal or product it is providing is Prop 12 compliant. Additionally, and as discussed further below, for some distributors this might be accomplished with alternative means such as the use of stock keeping units (SKUs), bar codes or other electronic tracking systems, rather than the volumes of unnecessary paperwork CDFA is proposing. However, as part of Prop 12, even a written contractual statement should be sufficient. NPPC encourages CDFA to re-evaluate what it requires, reduce what is necessary, provide maximum flexibility for the supply chain to comply, and allow for the use of new technologies for documenting compliance as they emerge.

The definition of “**Breeding Pig**” fails to adequately define what it means by the phrase “for the purposes of commercial breeding.” NPPC strongly encourages CDFA to clarify what this phrase means. For most farmers, the determination to keep a sow for breeding purposes is not a static event, but instead occurs throughout the period when the animal is in its care. From the moment a female pig arrives on a farm, it is subject to evaluation. Initially, a determination to breed any animal is not made until after the initial estrus cycle. Many farmers would wait to make a final determination to keep a female pig as a breeding animal until the second cycle, at which point they would decide whether to breed the animal or send it to market. Further, post weaning, sows will constantly be re-evaluated and their status as a “breeding pig” will change.

CDFA should redraft its regulations to clarify that a sow's status as a “breeding pig” can and will change depending on the circumstances on the farm. At a minimum, the term “breeding pig” should not include animals which have not been bred yet, nor animals which have been removed from a farm's breeding program and are awaiting transportation to cull markets.

Likewise, CDFA's definition of “**commercial sale**” is overly broad. Under Cal. Health & Saf. Code § 25991(o), a “commercial sale” is an element of a “sale” for purposes of Prop 12's application. Further, the statutory definition makes clear that a sale doesn't occur until a “buyer takes physical possession of” whole pork meat. Yet, CDFA seeks to dramatically expand what the law provides, and allows the scope of “commercial sale” to be broader than that of Prop 12 itself. CDFA cannot unilaterally expand Prop 12's scope by having it apply to circumstances that the underlying statute simply doesn't cover. For example, the mere possession of pork in California by a commercial entity is not a sale. Furthermore, the purchase of pork outside of California, and then subsequent transport of pork into the state, is not a sale for purposes of Prop 12 that would fall under CDFA's jurisdiction. This is especially important for restaurants that might decide to procure uncooked pork outside of California with the intention of selling cooked product within the state. Since there is no sale of uncooked pork within California, the state simply lacks any jurisdiction to regulate that pork under Prop 12. The claim by CDFA that it must dramatically expand the scope of its jurisdiction for mere enforcement efficiency is simply not valid.

For purposes of the definition of “**cut**,” NPPC encourages CDFA to expand the exclusion of ground or comminuted meat products to also include diced or otherwise sliced products. There is a fine line between a diced and a ground product. These products are often handled and

processed similarly and are not sold as whole muscle cuts. They are often packaged as a mixed product with multiple sources of pork that are combined when placed in a final package. Finally, they are clearly “processed and prepared”, and can be excluded without undermining the intent or scope of Prop 12.

The definition of “**whole pork meat**” should also be more thoroughly defined. In particular, while CDFA’s proposed regulations define “cut,” “seasoning,” and “uncooked” among other terms, they do not clarify what is meant by “processed or prepared food products.”

Section 1322.1 Breeding Pig Confinement

As previously addressed, CDFA’s proposed regulation on breeding pig confinement is inadequate. For “whole pork meat” there are essentially two operative provisions that a farm owner must comply with:

- 1) Confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely; and
- 2) After Dec. 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig.

While the proposed regulations at 1322.1 aim to address the second step of this test, they fail to provide any regulatory clarity for the first, including when the provision became effective or what is meant by “fully extending the animal’s limbs” or “turning around freely.” The vague nature of this statutory language, and the failure of CDFA to clarify the terms, remains a significant hurdle to effective implementation of these regulations and Prop 12.

Because of CDFA’s failure to include this clarification in either its initial draft regulatory language or the proposed regulatory language, pork producers lack the clarity required to comply with the first step. Many believe that Prop 12 only requires they provide 24 square feet of space. This common misperception will be exacerbated by the absence of any direction in the proposed regulations of the requirements of step one. Furthermore, there is uncertainty throughout the supply chain – from the farm to the retail level – on when the requirements of the first step became effective. Some believe they are currently in place, while others believe they won’t be in place until Jan. 1, 2022, when the 24 square foot space requirement takes effect.

Clarity in this matter is especially important because the requirements of Prop 12, especially during the period post-weaning and before confirmation of pregnancy, differ dramatically from what is expressly allowed in other states. For example, while both Michigan and Ohio have provisions requiring the use of group housing (though not at the arbitrary 24 square feet per sow under Prop 12), they allow the use of breeding pens to protect breeding pigs while they recover from their previous pregnancy and until they are confirmed to be pregnant. Pork producers in these states, and many of those who have converted their operations to include some form of group sow housing, are likely most at risk. Due to existing confusion, many farmers have focused on expanding group housing to 24 square feet without regard for the first step.

We strongly encourage CDFA to draft regulatory text that provides adequate guidance on what is required, the effective date of these provisions, and how CDFA intends for farms to comply with both provisions. In particular, CDFA should make clear that the effective date for both steps is the same.

Proposed paragraph (a)(2) outlines how CDFA intends to calculate useable floorspace. We would encourage CDFA to consider more clarity in this regulatory language. For instance, the total number of sows in a barn at any time is fluid and influenced by many factors – most related to biology – including parities, delivery dates, and weaning dates. At any point, the number of pigs in gestation, or being managed post-weaning, can vary. While this proposed language includes an absolute limit, NPPC suggests that CDFA consider including in the calculation an average based on a rolling time frame. This approach would provide appropriate flexibility for farms in calculating the minimum of 24 square feet of useable floorspace per breeding pig. This would allow, for instance, stocking densities to exceed the 24 square foot restrictions for brief periods of time – a few hours or even a day or two – while waiting for additional farm space to free up as animals are moved and decisions are made on whether to continue breeding individual sows.

In proposed paragraph (b), NPPC suggests that the Jan. 1, 2023 date for pork producers or others in the supply chain to hold valid certifications be extended considerably, at least two years from the promulgation of final regulations. There are simply insufficient resources available for the pork industry to accomplish this overly ambitious timeline.

We appreciate CDFA’s recognition that certification is impossible to achieve by Jan. 1, 2022, and that it will allow producers to self-certify. However, without more clarity as previously noted, producers will have a difficult time self-certifying with any reliability. Furthermore, any provisions on self-certification need to provide producers considerably more legal protection if, subsequently, a determination is made that despite good faith efforts their farm is determined to be non compliant. Given the vague nature of Prop 12’s underlying provisions and the lack of clarity in CDFA’s proposed regulations and the how accredited certification agents will review farms, this is a significant risk that must be addressed.

Since CDFA simply will not have a system in place to conduct the certification it contemplates prior to January 1, 2022, basic due process concerns dictate that CDFA delay the date for certification of farms and implementation of Prop 12.

In its proposal statement, CDFA

“estimates third-party certifiers pursuant to this proposal will potentially need to annually certify as compliant with the Act:

- Approximately 6,000 distributors selling covered product in California;*
- 1,100 in-state egg and pork producer operations; and*
- 12,750 out-of-state, including out-of-country, egg, pork, and veal producer operations raising animals for covered product destined to be sold in California.”*

Simple math makes clear that this many entities cannot be certified by Jan. 1, 2023.

CDFA's comment period closed July 12, 2021. However, CDFA must still hold the public hearing that has been requested by numerous stakeholders including NPPC. It must then review the comments filed by the July 12, 2021 deadline as well as those made at the public hearing, and prepare final rules, and issue a preamble responding to the issues raised in the comments. CDFA is already nearly two years behind schedule. It is simply not realistic to believe that CDFA can complete this work in essentially two months and have final rules promulgated by the end of September 2021. Even assuming CDFA can move this fast, this scenario still leaves only 15 months before 19,850 distributors and producer operations need to be certified. These operations cannot become certified on, for example, September 30, 2021, because the only entity accredited to certify on that date will be CDFA.

In its proposal statement, CDFA concedes it cannot "manage the oversight of this volume of entities participating in the raising and sale of covered animals and covered product in the State" and so the agency chose to allow third-party certifiers. However, the accreditation process CDFA hopes to establish in Article 5 is complex. Entities that wish to be accredited cannot begin that process until final rules are published, much less go through the accreditation process. It is simply unrealistic to believe this system will be operational and capable of providing the certifications in a timely manner.

Setting aside the challenges with entities becoming accredited, assuming there is a "sufficient" number of accredited entities on Dec. 31, 2021, based on the agency's own numbers, at least 54 distributors and producer operations would be required to be certified each day in order to certify the estimated 19,850 entities CDFA assumes. As discussed in greater detail below, critical biosecurity practices in place to protect animal health and ensure food safety make it impossible to certify the necessary number of farms.

As such, the proposed Jan. 1, 2023, certification date must be delayed substantially.

Furthermore, we suggest the requirement for a valid certificate only apply to farms that routinely supply the California market. Other farms which don't routinely supply Prop 12-compliant pork, but might otherwise be able to, should be able to supply California on a temporary basis. Rather than require a farm used for a temporary purpose to go through the elaborate certification process, an affidavit of compliance or other written self-certification should be allowed for temporary housing of covered animals.

Section 1322.1 Pork Distributor Registration

CDFA's requirements for the registration of pork distributors are overly burdensome and simply unnecessary. CDFA should reconsider this provision. Requiring annual registration is excessive and will overload the certification system. Since CDFA requires a new certification for any change in ownership, it is especially puzzling that the agency would require annual renewals. Once a distributor is registered, CDFA should allow for an automatic renewal or preferably provide a multiyear term for registration. This especially makes sense for distributors with existing, ongoing businesses. We support the ability of distributors to self-certify.

Furthermore, CDFA should better define who a “person” is for purposes of the distributor registration. As currently drafted, any individual working for a distributor selling pork would need to be registered, an illogical and impractical requirement. Instead, CDFA should require the business to carry the registration. CDFA can easily narrow the scope of this section to improve its clarity.

Section 1322.3. Inspection and Audit of Registered Distributor Facilities

Section 1322.4. Whole Pork Meat Shipping Document Requirements

Section 1322.3 requires a distributor of pork to allow California (or a California-certified third party) to enter its facilities for purposes of a records audit and inspection. Section 1322.4 covers the record-keeping and documents required to be maintained by distributors shipping pork into California. These provisions could be improved, and their burdens reduced, by developing a system for the maintenance of electronic records and allowing the use of remote inspections.

CDFA is strongly encouraged to allow the use of SKUs, bar codes or other means of electronic tracking and maintenance of records and certifications. Rather than requiring extensive paper trails and labeling on all documents, CDFA should establish the ability to use technology to clearly identify products and link to their status rather than imposing new label requirements with dubious legal implications.

As currently proposed, the labeling elements that CDFA contemplates significantly expand what is necessary under the law as well as what is practical and legal. First, Section 1322.4(a)(1) is arguably preempted by the Federal Meat Inspection Act. The requirements in (a)(2) are clearly unnecessary and go beyond the jurisdiction of CDFA, covering products not regulated by Prop 12. They also limit the development of new technologies. Some distributors might want to explore the use of California-specific SKUs or develop other technology-based solutions for the California market that can be used to electronically segregate products and accomplish the goals of the CA24+ mark. Mandating inclusion of the CA24+ mark is therefore wholly unnecessary for that uncooked whole pork meat, which will be subjected to commercial sales in California.

However, whole pork meat which will not be subject to a commercial sale in California, such as product moving through the state for export, is never properly subject to the provisions of Prop 12 or the proposed regulations. Therefore, CDFA’s proposal to require it to carry separate labeling is simply unnecessary and beyond the scope of CDFA or California’s jurisdiction. Not only is it potentially disparaging for export products to carry a “Not for California Consumption” or “Not for California Sale” declaration, it is unnecessary, as those shipments will naturally be segregated and will also likely carry SKUs or other electronic marks indicating they are in commerce with a destination beyond California.

Additionally, as previously addressed, whole pork meat procured outside the state of California by a restaurant or a food service operation will be cooked before being sold in California. Accordingly, it falls outside the scope of Prop 12 and should not be subject to any additional label or inspection requirements.

CDFA must also consider how it will ensure that pork not subject to Prop 12's requirements will move into the state. For example, pork from pigs born before Jan. 1, 2022, from a sow not afforded 24 square feet of usable space complies with Prop 12.⁴ Those pigs will likely not be harvested until September and their meat may not arrive in California until October or even later. Considering that meat can be maintained in cold storage for several months past this date, CDFA must clarify its regulations to ensure enforcement officials and certifying agents understand these grandfathered products are eligible for sale in California regardless even if they don't carry the mandated label.

We strongly encourage CDFA to work with the industry, and the entire supply chain to, further develop regulations to support such a system.

Section 1322.6 Inspection of Conveyances

CDFA's proposed system for the inspection of conveyances is a significant overreach and simply unauthorized by law. Section 25991(o) provides "[F]or purposes of this section, a sale shall be deemed to occur at the location where the buyer takes physical possession of an item covered by Section 25990." It is inappropriate for the state to assert it has the authority to stop a truck, inspect paperwork and maybe even the cargo on the side of the road, and then deny entry or divert a truck absent a sale in California.

Simply put, if no sale has occurred, there can be no violation of the law. Absent a violation, the state cannot justify stopping a truck, denying entry, forcing diversion, or confiscating the meat on the truck. The proposed provisions are inappropriate because there is no threat to the public health or welfare from the covered products. Enforcement should occur where the buyer takes possession, not at the state line. Furthermore, California should not be stopping and inspecting (and potentially confiscating cargo) as trucks cross into the state. CDFA offers no statutory support for its assertion that it can inspect cargo and ultimately divert trucks. The law offers sufficient remedies to California, including the threat of fines or jail time, if there is evidence of a violation of Prop 12. Of course, those remedies would be implemented *after a commercial sale has been made*, and not while the pork is in transit in the state.

In addition to being unjustified under the law, CDFA's proposal is also a public health threat and puts food safety at significant risk. Cargo inspections conducted to verify compliance with a paperwork requirement jeopardize several federal requirements (*e.g.*, the FSIS HACCP/Pathogen Reduction Rule, FSMA Sanitary Transport Rule, and FSMA Intentional Adulteration Rule). Products subject to Prop 12 are refrigerated during transport. Opening refrigerated containers on the side of the road is an unacceptable food safety practice that could cause product spoilage or bacterial growth. More practically, containers may be sealed as part of the chain of custody, and these seals are often required by FSIS (and FDA). California enforcement officers would need to be trained in how to maintain the chain of custody and carry seals to reseal containers to prevent loads from being rejected by receivers.

⁴ https://www.cdfa.ca.gov/AHFSS/pdfs/Prop_12_FAQ_March_2021.pdf. See question 7.

The proposal also ignores the challenges associated with truck drivers likely not being well versed regarding Prop 12 requirements. Given the pressures associated with on-time delivery and compliance with federal Department of Transportation rules for drive time, CDFA should reconsider this section entirely.

Section 1322.7 Tagging and Seizure of Whole Pork Meat

CDFA's proposal would allow enforcement officers to apply a warning tag or notice to documents or containers of pork "produced, packaged, stored, labeled, marked, identified, transported, delivered, or sold in violation" of Prop 12. Similarly, CDFA would allow enforcement officers to "seize and hold any containers, sub-containers, lots or loads" they "have reasonable suspicion to believe is in violation of the provisions of sections 25990-25992 of the Health and Safety Code, or the provisions of this Article."⁵ Prop 12, however, does not authorize CDFA to take these proposed actions. The words "seizure," "tag," and "detain" are absent from Prop 12's text. Further, a violation of the law only occurs when a commercial sale takes place in California. The mere presence of pork on a truck is not sufficient to justify CDFA's disruptive proposal. The remedies available for violating the law are the criminal penalties the state may pursue and the civil relief available to entities put at a competitive disadvantage. Furthermore, if CDFA does intend to develop a system for tagging and seizing pork in transit, it must develop a much more detailed system, including clear procedures, time frames and other basic due process considerations for appealing any determinations or actions by enforcement officers.

NPPC strongly urges CDFA to reconsider, remove or substantially redraft this section.

Specific Comments on Article 4. Exceptions

NPPC strongly supports CDFA's proposed language in Article 4, especially its definition of "Individual Treatment" for purposes of Cal. Health & Saf. Code § 25992 (b). The proposed language allows veterinarians the freedom to use their professional judgment when assessing and addressing the health and welfare of breeding pigs. This flexibility allows for management of breeding pigs, including segregation if sows become injured to allow for their recovery or to prevent fighting that places the sows or farm workers at risk. This flexibility is especially important in the post-weaning phase when sows are first forming new groups or, if sows prematurely return to estrus. Additionally, we support that the proposed definition of "individual treatment" relies on the existing veterinarian-client-patient relationship (VCPR). Under an established VCPR, pork producers and their professional veterinary care staff may administer treatments and otherwise care for animals in their care as indicated and directed by their veterinarian. Inclusion and recognition of the VCPR in the proposed definition would extend the use of this established relationship and allows the necessary flexibility for veterinarians and producers to implement and comply with the regulations.

Nevertheless, we encourage CDFA to develop regulations that provide further clarification on the other exemptions provided under Prop 12.

⁵ Section 1321.7 and Section 1322.7

In particular, Cal. Health & Saf. Code § 25992 (f) provides an exemption for a “breeding pig during the five-day period prior to the breeding pig's expected date of giving birth, and any day that the breeding pig is nursing piglets.” The birth process is based on a variety of biological factors. While it can often be predicted accurately, the potential for some significant variability exists. We would encourage CDFA to define the “expected date of giving birth” to be as flexible as possible and to allow for this necessary variability. For instance, a producer may move a sow into farrowing (the housing system in which breeding pigs will give birth and nurse piglets) expecting delivery five days later. Its possible this breeding pig may deliver piglets two days later or nine days later. We would encourage CDFA to develop regulations to account for this potential variability even as producers make good faith efforts to comply with the regulations.

Specific Comments on Article 5. Certification and Accredited Certifiers

Prop 12 does not necessitate the complex and complicated certification, auditing, inspection and labeling schedule that CDFA has developed. While CDFA believes it is necessary for purposes of enforcement convenience, the reality is that Prop 12’s good faith defense as set out in Cal. Health & Saf. Code § 25993.1 simply requires that “a business owner or operator relied in good faith upon a written certification” from their supplier. What CDFA is proposing is both unnecessary under the law and so complex and cumbersome that it will almost certainly drive many producers away from the California market. From potential threats to on-farm biosecurity to the excessive level of inspections and record keeping, we strongly encourage CDFA to reconsider its approach to Article 5’s Certification System.

In particular, CDFA should ensure that hog farm biosecurity is maintained throughout the system. An easy way to do that, while reducing the burdens to the industry and CDFA, is to work with an existing entity with the right experience such as the Professional Animal Auditor Certification Organization (PAACO). An organization such as PAACO is well positioned to manage all aspects of the farm certification process, ensure the appropriate and adequate training and regulation of auditors, and to recognize appropriate biosecurity practices. With its understanding of hog farm biosecurity and pork production, a group like PAACA will have already established the trust necessary to ensure farmers are comfortable with allowing its inspectors to have access to their farms.

Biosecurity

As it reconsiders its proposed regulations under Article 5, NPPC encourages CDFA to ensure maintenance of on-farm biosecurity as an essential underlying component of any certification program. Biosecurity is a top priority for pork producers; concerns arise when they are faced with non-farm personnel visits to their farm.

Introduction of an animal disease on a sow farm can have devastating effects on animals and those who care for them. They can also contribute to significant economic loss for a farm. For example, porcine reproductive and respiratory syndrome (PPRS) is the costliest disease currently affecting the U.S. swine industry, with losses of more than \$600 million annually. Impacts on pig health and welfare include increased mortality, increased reproductive losses, and decreased growth rates.

Beyond PPRS, producers also worry about the potential for the introduction of a foreign animal disease into the U.S. pig herd, an event that would be economically devastating for all of U.S. agriculture. Studies led by Dr. Dermot Hayes, an economist at Iowa State University, and the Center for Agricultural and Rural Development Food and Agricultural Policy Research Institute, estimate revenue losses across agricultural commodities resulting from the introduction of foot-and-mouth disease (FMD), classical swine fever (CSF), and African swine fever (ASF). The introduction of FMD would result in \$199.9 billion cumulative revenue losses across livestock and crop agriculture modeled over a 10-year period. The first year of an ASF outbreak would see lost revenue of more than \$8 billion for the pork industry alone while corn growers soybean growers would lose \$4 billion and \$1.5 billion, respectively. It would take over 10 years for these impacted farm sectors to approach pre-outbreak commodity prices, a devastating outcome for the entire U.S. farm economy.

Any visit to a farm has the potential to put the biosecurity of animals at risk. People can transfer pathogens on their body and clothing to pigs. Vehicles and equipment can also carry pathogens. Swine facilities are designed specifically to reduce the introduction of pathogens and farms, especially sow farms, have implemented strict protocols that limit who, what, how and when individuals, vehicles, and equipment are allowed to enter a farm. Standard biosecurity operating procedures include these and other requirements for visitors: parking at a distance from the facility; shower before and after entering a barn; wearing farm approved clothing and footwear; the use of washing or other disinfection protocols for vehicles and equipment before it is allowed to enter a farm, and prohibiting farm access to anyone who has recently been exposed to pigs or visited other farms for a defined period of time.

For most farms, biosecurity practices mandate a minimum down time between exposure to pigs of at least 48 hours (but often 72 hours) before entry is allowed. This time can increase if a visitor has traveled internationally or been to a packing or processing plant and depending on the herd health status of the farm. Sow multiplier and nucleus sites require greater downtime while finishers can often require less. With these biosecurity requirements in mind, a single certifying agent could realistically plan to average only a single sow farm visit per week, though they could likely visit a nursery or finisher that receives animals from that sow farm later in the week.

Section 1326.1 General Requirement for Certification

Subparagraph (c) is overbroad. The access of certifying agents should be limited to only those farms, and parts of farms, for which a producer is seeking certification. It is unnecessary, and not required under Prop 12, for certifying agents to have access to any and all portions of a farmer's property. CDFA should redraft this section to clarify that the authority of a certifying agent to inspect a farm is limited to only those locations, and reviewing conditions, that are necessary for compliance with Prop 12's terms. Sections (b)-(d) should be modified to ensure the certifying agent is limited to areas and records that involve products, and the animals that yield them, intended for sale in California. For example, section (d) should be limited to "examine all covered products – for sale or distribution to California." Without this limitation, the regulation could be interpreted to include inspection of pork products not sold into California. Products not destined for sale in California should not require inspection by a certifying agent.

Furthermore, to the extent possible, and as previously addressed, if a producer has in place a system for maintaining electronic records, certifying agents should be authorized to rely on those systems, eliminating unnecessary on-farm visits when record reviews can be conducted remotely.

Section 1326.2 Recordkeeping by Certified Operations

The requirements under subsection (b)(1) are vague. In particular, CDFA should provide more guidance on what it believes is “sufficient detail to document that covered animals were confined in compliance” with Prop 12.

The requirement that these records should be kept for two years is excessive, especially absent further details defining what is required to ensure the “sufficient detail” criteria is met. Additionally, many producers would consider the details required under subparagraph (b)(4) – (7) to be business confidential. Requiring producers to maintain these records is unnecessary, particularly those that don’t apply to products covered by Prop 12. If they are required, CDFA must develop appropriate safeguards to protect the confidentiality of the private and sensitive information in these records.

Pork producers also have significant concerns with the provision in subsection (8)(c) allowing these confidential records to be reviewed by not only CDFA and an established certifying agent known to the producer, but also by any “other certifying agent.” As explained below, the pork industry has significant concern with the universe of potential “certifying agents” under Article 5 and the risk that animal-rights activists and their close associates, could be accredited as “certifying agents.” Not only should these individuals not be allowed anywhere near a farm, but CDFA must redraft these regulations to ensure they do not have access to sensitive, personal, and private or business confidential information.

Section 1326.3 Application for Certification

NPPC strongly encourages CDFA to treat the information in any application as privileged, personal, and private or business confidential, especially with regard to the name and address of a farm (especially if an individual lives on the farm site), its phone number (especially if it is an individual’s personal phone number), and financial information of an individual’s farm. Further, much of the information required in this section is simply unnecessary for compliance with the requirements of Prop 12 and the regulations should clarify that the only information necessary is limited to compliance with Prop 12’s mandates.

Section 1326.5 On-Site Inspections

(a) On-Site Inspections

Requiring certified sites to have both initial as well as annual on-farm inspections, as contemplated by CDFA in Section 1326.5(a)(1), is simply unrealistic given the size of the current workforce of certifying agents and the biosecurity restrictions they would encounter. Furthermore, the need for an on-farm inspection every 12 months is unnecessary, as the physical

changes in steel and concrete and building design that are necessary for a farm to comply with Prop 12's requirements simply aren't going to be changed annually. As a result, NPPC would strongly encourage CDFA to reconsider the annual inspection requirement and replace it with a requirement that farms be re-inspected every five or seven years unless circumstances dictate otherwise. As an alternative to physical site visits – and to the extent that a farm can and is willing to accommodate them - CDFA should allow for virtual inspections or remote video monitoring, to minimize disruptions and biosecurity risk.

Unannounced visits, as contemplated in Section (a)(2), also raise serious concerns and will not be allowed. Each farm establishes their unique biosecurity protocols and downtimes based on the health status of the herd. Certifying agents must contact the farms they intend to visit prior to arrival in order to comply with biosecurity protocols. This cannot be accomplished with unannounced inspections. An additional concern with unannounced inspections of nursery and grow-finish sites is the ability of owners or caretakers to be on the site during the visit. It is not uncommon for farm personnel to only be present at the site a few hours during the day to conduct daily animal care duties and facility maintenance. For biosecurity and other reasons, a certifying agent will not be granted unsupervised access to a facility for inspections.

This is especially true if the certifying agent does not have an established relationship with the farm. As previously addressed, CDFA's proposed rule for certifying agents could allow individual activists and their close associates, many based in California and with long histories of biosecurity violations as well as violence, theft, and other criminal behavior directed at our farmers to be accredited as "certifying agents." Under subsection (a)(2), as currently drafted, these activists may be allowed to perform required additional "unannounced" inspections as accredited certifying agents. Producers will simply not allow this to happen, and neither should CDFA. Not only should these animal activists be prohibited from serving as accredited certifying agents, but there should be no unannounced inspections or visits to bio-secure farms.

(b) Scheduling

As previously stated, the pork industry is adamantly opposed to the possibility of unannounced inspections, especially unannounced inspections without any representative of the farm on site. As such, we insist CDFA remove the provisions in section (b)(2) allowing for unannounced on-site inspections to take place, including those without the presence of an authorized farm representative. Any facility requiring a more periodic inspection (because of an allegation of violating the law, for instance) should still not be subject to surprise inspections. Due to biosecurity concerns, and real potential for animal-rights activists to trespass, all inspections must be announced. Inspectors must also be required to comply with each farm's biosecurity protocols.

Section 1326.9 – 15 Accreditation of Certifying Agent

NPPC strongly encourages CDFA to work closely with an existing, recognized and reputable certification organization that has existing industry relationships and experience, such as PAACO, to handle accreditation of agents. These organizations already have extensive experience in the animal production systems covered by the proposed regulations and understand

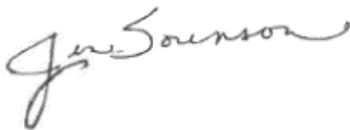
the background and experience necessary to successfully review and certify an operation. Furthermore, they have relationships with the existing pool of potentially qualified certified agents and are best positioned to identify, engage, and train those agents in the expedited timeframe required by Prop 12.

Section 1326.9 – We support an accreditation term of five years from the date of approval of accreditation. As previously noted, there is no need to require applications every year. It is unnecessary and unduly burdensome. As such, NPPC supports CDFA’s proposed five-year accreditation.

Section 1326.10 – CDFA must ensure that conflicts of interest do not exist and that accredited certifying agents do not have a past or existing relationship with animal-rights’ activists or other associations with individuals and/or organizations with a history of biosecurity violations or violence, theft, trespass or other criminal behavior directed at livestock farms. These individuals have clear conflicts of interest. The proposed regulations must be redrafted to prevent these individuals from becoming accredited certifying agents and to prohibit unannounced on-farm inspections.

Thank you for the opportunity to submit these comments. We look forward to continuing to work with CDFA as it works on revising its proposed regulations. If you have any questions or need additional information on any issues raised in either these or other NPPC comments submitted, please do not hesitate to reach out to Michael Formica, NPPC’s General Counsel and Assistant Vice President for Domestic Policy. He can be reached at 202-347-3600 or by email at formicam@nppc.org.

Sincerely,



Jen Sorenson
President
National Pork Producers Council