

## FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that a continued emergency exists due to the unexpected detection of additional Oriental fruit flies, *Bactrocera dorsalis*, in the Stockton area of San Joaquin County. A new emergency exists due to the unexpected occurrence of an Oriental fruit fly infestation in the Anaheim area of Orange County. The Department amended California Code of Regulations, Title 3, Section 3423, Oriental Fruit Fly Interior Quarantine, adding the Stockton area to the regulation on an emergency basis which was effective on September 19, 2011. On September 19 and 20, 2011, a total of two more males were trapped (PDRs 390P06038528 and 390P06038529) in the Stockton area of San Joaquin County. The Department is proposing to expand the quarantine area in the northern area of Stockton by approximately three square miles.

On October 12, 2011 (PDR AM0P06044067), a male Oriental fruit fly was detected in the Anaheim area of Orange County. On October 13, 2011 (PDR AM0P06044094) another male was trapped; on October 14, 2011, a total of five males (PDRs AM0P06044145, AM0P06044146 and AM0P06044148) and one mated female (PDR AM0P06044147) were trapped; and, on October 17, 2011, three males (PDRs AM0P06044173 and AM0P06044174) were trapped in the Anaheim area of Los Angeles County. The detection of 11 Oriental fruit flies is indicative of a new incipient infestation of Oriental fruit fly in the Anaheim area of Orange County. Oriental fruit fly is a destructive insect pest of innumerable commercial agricultural crops. This unexpected occurrence of Oriental fruit flies in Orange County meets the national and international trigger for both eradication and quarantine responses in San Joaquin County. Fruits (including nuts, dates, and berries), many kinds of vegetables, and the fruiting bodies of many wild and ornamental plants are known to be hosts or possible hosts of the Oriental fruit fly. Larval feeding reduces the interior of fruit to a rotten mass. Egg punctures admit decay organisms that cause tissue breakdown. Damaged fruit is generally unfit for human consumption. Movement of hosts infested with the larvae of

the fly can artificially spread the fly. It has been estimated that the yearly cost of not eradicating Oriental fruit fly in California would range from \$44 to \$176 million in crop losses, additional pesticide use, and quarantine requirements. Thus, this presents a clear, imminent danger to the agricultural industry in California.

Like all quarantine actions, the intended effect of the emergency amendment of California Code of Regulations, Title 3, Section 3423, Oriental Fruit Fly Interior Quarantine is to provide the necessary regulatory authority to prevent the human-assisted artificial spread of this exotic pest. Artificial spread, such as Oriental fruit flies being moved in infested host commodities from infested areas to uninfested areas has the potential to spread the pest rapidly throughout the State or to other states, whereas the natural spread of the pest would be gradual.

To prevent artificial spread of the fly to noninfested areas to protect California's agricultural industry, it is necessary immediately to regulate the human assisted movement of hosts that can carry the fly from, into and within the infested area and a surrounding buffer area.

The Secretary is proposing to amend this regulation pursuant to the authority in Food and Agricultural Code (FAC) Section 407, "the director may adopt such regulations as are reasonably necessary to carry out the provisions of this code which he is directed or authorized to administer or enforce," and FAC Section 5322, "the director may establish, maintain, and enforce quarantine, eradication, and such other regulations as are in his or her opinion necessary to circumscribe and exterminate or prevent the spread of any pest which is described in FAC Section 5321.

### Emergency Rulemaking Procedures

“Emergency” means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare,” Government Code Section 11342.545 and Public Resources Code Section 21080(b)(4). If a state agency makes a finding that the adoption of a regulation is necessary to address an emergency, the regulation may be adopted as an emergency regulation. Government Code Section 11346.1(b)(1).

In this document the Department is providing the necessary specific facts demonstrating the existence of an emergency and the need for immediate action to prevent serious harm to the general welfare of the citizens of California, pursuant to Government Code Section 11346.1(b)(2).

Government Code Section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency.

Government Code Section 11346.1(a)(3) provides that if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest, an agency is not required to provide notice pursuant to Government Code Section 11346.1(a)(2) (See Evidence of Emergency).

After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Further, the Secretary believes that this emergency clearly poses such an immediate, serious harm that delaying action to give the notice pursuant to Government Code Section 11346.1(a)(92) or allow five calendar days to allow public comment pursuant to Government Code Section 11349.6 would be inconsistent with the public interest, within the meaning of Government Code Section 11349.6(b).

The information contained within this finding of emergency also meets the requirements of Government Code Sections 11346.1 and 11346.5.

#### California Environmental Quality Act

“Specific actions necessary to prevent or mitigate an emergency” are exempt from the California Environmental Quality Act [CEQA]. Public Resources Code Section 21080(b)(4). “Emergency means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.” Public Resources Code Section 21060.3.

#### Statutory Exemption

Title 14, California Code of Regulations Section 15269, subdivision (c) “Specific actions necessary to prevent or mitigate an emergency.”

#### Categorical Exemption

Title 14, California Code of Regulations, Section 15308. “Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.”

For the reasons set forth in this document, this constitutes a specific act necessary to prevent or mitigate an emergency and is also an action required for the preservation of the environment.

### Evidence of Emergency

The Oriental fruit fly has the capability of causing significant irreparable harm to California's agricultural industry and some likely adverse environmental impacts. Should the Department not take these actions; the Oriental fruit fly could cause direct catastrophic losses to California's affected agricultural industries and significant harm to the State's economy through cost impacts or prohibitions to interstate commerce and exports of host commodities. San Joaquin County host crop value includes but is not limited to: \$54.5 million-apples, \$2.8 million-apricots, \$250 million-grapes, \$14 million-peaches, \$207 million-walnuts, \$3.6 million-cucumbers, \$12 million-peppers and \$116 million-tomatoes.

Although there are no known commercial host crops being produced in the Anaheim area, there are containerized transfer stations used in international trade which will be included within the regulated area. When handling any host material, the either have to have the operations completely enclosed or only operate at night when the fly is inactive. Additionally, US Interstate 5 bisects the proposed area and many trading partners require the trucks hauling host commodities to transit through the regulated area with all vents closed or screened without any undue delay. Additionally, there are likely to be Farmers Markets and swap meets, community and backyard gardens and other sources of host commodities located within the proposed quarantine area. The movement of once piece of infested fruit can result in a new incipient infestation.

Each day that the Department cannot conduct the necessary quarantine project activities significantly increases the immediate threat that the infestation will grow through artificial spread by human assisted movement of infested commodities. While the continued unabated natural spread from this incipient infestation may be confined to San Joaquin County for a period of time, human assisted artificial spread could occur to anywhere in California or to other states. If the fly were allowed to spread and become established in other host fruit production areas, California's agricultural industry would suffer losses due to increased pesticide use, decreased production of marketable fruit,

and loss of markets if the United States Department of Agriculture or other states or countries enact quarantines against California products which can host and carry the fly.

In addition to the economic impacts on the agricultural industry, this would result in consumers suffering by facing higher prices for the affected host commodities. The spread to other urban areas would also have negative impacts on homeowners and community gardens. The natural reaction of the general public to finding larvae damaging their crops would also be to increase the use of pesticides. Pesticides used in compliance with all label requirements do not have a significant impact on the environment or waterways. However, there would likely be an element of the general public which may misuse the pesticides. The widespread misuse of pesticides in our urban areas, including properly disposing containers, could cause damage to the environment and our waterways.

Under international trade agreements, the USDA is obligated to notify any trading partner which has concerns regarding the quarantine status of Oriental fruit fly in the United States. Examples of countries which have specific concerns pertaining to Oriental fruit fly include Argentina, Australia, Brazil, Chile, Costa Rica, Japan, Mexico, New Zealand, South Africa and South Korea. Some of these countries are major trading partners involving California produced host commodities. Trade impacts may not be just limited to host commodities produced within the regulated area or even in California. For instance, Japan, Mexico and South Korea will not accept any Oriental fruit fly host material produced in, packed or repacked within a regulated area even if it originated in another state. Additionally, any host commodities transiting a regulated cannot unnecessarily stop and must be sealed and enclosed in a manner to exclude the possible entry of the fly into the host shipment. In order not to interrupt trade, our trading partners want assurances that these quarantine requirements are immediately implemented.

The introduction of exotic fruit flies such as Oriental fruit fly is always the subject of the regional and specific bilateral trade discussions which occur between the USDA and our trading partners. The expeditious implementation of exotic fruit fly quarantines is a key to ensure qualifying host commodities produced in or packed anywhere in California can also continue to move in international trade. Our trading partners are astute and have used the internet in the past to review our State regulations and compare them to the information they receive from the USDA.

The immediate implementation of this proposed regulatory action is also necessary to prevent the USDA from considering the entire State as infested with Oriental fruit fly. The USDA is in the process of revising a federal domestic regulation and cannot regulate less than the entire State unless it has a parallel State regulation. If the USDA were to regulate the entire State, there would be additional detrimental quarantine requirements directed against California host commodities by the USDA and our concerned international trade partners.

Therefore, it is necessary to amend this regulation to establish a quarantine area in the Anaheim area of Orange and Los Angeles counties and expand the quarantine area in the Stockton area of San Joaquin County as emergency actions.

#### Project Description

This proposed amendment of Section 3423(b) will add approximately three square miles surrounding the infestation in the Stockton area of San Joaquin County and establish approximately 75 square miles in the Anaheim area of Los Angeles and Orange counties as the areas under quarantine for Oriental fruit fly. To prevent artificial spread of the fly to noninfested areas to protect California's agricultural industry, it is necessary immediately to regulate movement of hosts that can carry the fly from, into and within the infested area and a surrounding buffer area.

The goal of quarantine activities is the prevention of human-assisted dispersal of the Oriental fruit fly from infested to uninfested areas. In the case of Oriental fruit fly, the buffer area, which is a minimum of 4.5 miles surrounding each detection of Oriental fruit fly, is three times the distance of any anticipated natural spread. It is a result of this buffer area that a northwestern portion of Los Angeles County needs to be included in the regulated area. The real threat of long distance spread is from human-assisted movement of infested host material.

The proposed quarantine area is considered the minimum area surrounding the initial detection site which should be regulated to prevent artificial spread of Oriental fruit fly to uninfested areas. The effect of the amendment of this regulation will be to implement the State's authority to perform quarantine activities against the Oriental fruit fly in these areas of Los Angeles, Orange and San Joaquin counties. Any quarantine actions undertaken by the Department will be in cooperation and coordination with the USDA and the affected county agricultural commissioners.

Quarantine activities include the establishment of the boundary, notification of affected residences and businesses, monitoring and regulation of susceptible commodities and articles covered. This may include soil, raw cannery waste, fruits, host nursery stock, etc., which have been exposed to infestation by the Oriental fruit fly. Sellers and transporters of host commodities and articles are required to implement measures to protect their commodities and articles from infestation. Protective measures include but are not limited to, refrigeration of host commodities, enclosure in fly proof packaging or containers, the use of air screens, automatic doors or screening to exclude Oriental fruit fly from areas where hosts are present and are intended to be subsequently moved either within or from the quarantine area. Growing season protective or post-harvest treatments of exposed host commodities may be required prior to movement from or within the quarantine area and be monitored by regulatory officials.



## Background

Oriental fruit fly has been established in Hawaii, since 1976, where it is a major pest of agriculture and is particularly attracted to mangoes, avocados and papayas. Maggots have been found in over 125 kinds of fruits and vegetables in Hawaii alone. The introduction of this pest threatens numerous crops in California, including apples, apricots, avocados, cherries, citrus, figs, nectarines, peaches, pears, plums and tomatoes. It has been estimated that the cost of not eradicating Oriental fruit fly in California would range from \$44 to \$176 million in crop losses, additional pesticide use, and quarantine requirements. Oriental fruit fly has been introduced into California a number of times, through the movement of prohibited host fruits and vegetables into the State, and has been eradicated.

Females lay eggs in groups of three to 30 under the skin of host fruits and vegetables; the female can lay more than 1,000 eggs in her lifetime. Time taken for development depends on the ambient temperature. Larvae tunnel through the fruit feeding on the pulp, shed their skins twice, and emerge through exit holes in approximately 10 days. The larvae drop from the fruit and burrow two to three cm. into the soil to pupate. In 10 to 12 days, adults emerge from these puparia. The newly emerged adult females need eight to 12 days to mature sexually prior to egg laying. Breeding is continuous, with several annual generations. Adults live 90 days on the average and feed on honeydew, decaying fruit, plant nectar, bird dung, and other substances. The adult is a strong flyer recorded to travel up to 30 miles in search of food and sites to lay eggs. Transport of fruit infested with eggs or larvae also allows the fly to spread artificially and infest new areas very quickly.

The Department also relied upon the following documents for determining this proposed emergency rulemaking:

Letter dated October 17, 2011 from Kurt Floren to Karen Ross.

Letter dated October 14, 2011 from Rick Le Feuvre to Karen Ross.

Letter dated September 15, 2011, from Scott Hudson to Karen Ross.

“Action Plan for Methyl Eugenol Attracted Fruit Flies, including Oriental Fruit Fly, *Bactrocera dorsalis* (Hendel),” revised April 2000, California Department of Food and Agriculture.

“Action Plan, Oriental Fruit Fly, *Bactrocera dorsalis* (Hendel),” October 1989, United States Department of Agriculture, Animal and Plant Health Inspection Service, Cooperating State Departments of Agriculture.

#### Authority and Reference Citations

Section 3423(b), Oriental Fruit Fly Interior Quarantine:

Authority: Sections 407, 5301, 5302, and 5322, Food and Agricultural Code.

Reference: Sections 5301, 5302, and 5322, Food and Agricultural Code.

#### Informative Digest

Existing law provides that the Secretary may establish, maintain, and enforce such regulations as he deems necessary to protect the agricultural industry of California from the spread of pests. The Secretary may make and enforce such regulations as he deems necessary to prevent any plant or thing which is, or is liable to be, infested by or which might act as a carrier of any pest, from passing over any quarantine boundary which is established.

Section 3423. Oriental Fruit Fly Interior Quarantine.

These amendments will add approximately three square miles surrounding the Stockton area of San Joaquin County and approximately 75 square miles surrounding the Anaheim area of Los Angeles and Orange counties to the regulation as the areas under quarantine for Oriental fruit fly. The effect of the change is to provide authority for the

State to regulate movement of hosts of Oriental fruit fly from, into and within this area to prevent the artificial spread of the fly to noninfested areas to protect the public and California's agricultural industry.

#### Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3423 does not impose a mandate on local agencies or school districts, except that agricultural commissioners of counties under quarantine have a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the affected county agricultural commissioners requested the change in regulations.

#### Cost Estimate

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.