

FINDING OF EMERGENCY

The Secretary of the California Department of Food and Agriculture (CDFA) determined that an emergency exists; an infestation of the light brown apple moth (LBAM), *Epiphyas postvittana* was unexpectedly detected for the first time in the Oceanside area of San Diego County. The Department is proposing an emergency amendment of the regulation to expand the quarantine area to include this area of San Diego County.

Emergency Defined

“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. 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, per 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).

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)(2) would be inconsistent with the public interest, within the meaning of the 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

A Programmatic Environmental Impact Report (PEIR) was prepared by the Department as the lead agency under the California Environmental Quality Act. The PEIR addresses the potential environmental impacts that would result from implementation of alternatives for the eradication of the light brown apple moth (LBAM) (*Epiphyas postvittana*). The PEIR may be accessed at the following website:

<http://www.cdfa.ca.gov/phpps/PDEP/lbam/envimpactrpt.html>

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.”

Additionally, FAC Section 401.5 states, “the department shall seek to protect the general welfare and economy of the state and seek to maintain the economic well-being of agriculturally dependent rural communities in this state” and Section 403 states, “the department shall prevent the spread of injurious insect pests.”

Evidence of an Emergency

On March 5, 2013 (PDR #SM0P06004315), one adult male LBAM was trapped in the Oceanside area of San Diego County. On April 23, 2013 (PDR #5066565,) two adult male LBAM were trapped in the Oceanside area of San Diego County and were identified on May 1, 2013. On May 7, 2013 (PDR #AM1P06194370) an adult LBAM was trapped in the Oceanside area of San Diego County and it was identified on May 10, 2013. These LBAM were trapped within three miles of each other and within one life cycle. These detections meet the regulatory protocol for establishing a new quarantine area.

The LBAM is a federal action quarantine pest subject to interstate restrictions by the United States Department of Agriculture (USDA). On May 3, 2013, the USDA's California State Plant Health Director requested that the Department establish an LBAM State Interior Quarantine surrounding the affected area of Oceanside as quickly as possible. On May 3, 2013, the Interim Director of the San Diego County Agricultural Commissioner's Office requested the Department establish the regulated area as an emergency action. Both of these requests are to ensure the rest of the State and other states are adequately protected from the spread of LBAM. The current incipient LBAM infestation in San Diego County is subject to a reasonably small proposed quarantine area of approximately 18 square miles. This incipient infestation already impacts numerous citrus and avocado groves, a field cut flower grower and two nurseries one of which is approximately 60 acres. The sooner a regulation can be established through an emergency action the greater the odds of preventing additional artificial spread.

LBAM will infest most types of nursery stock. San Diego County is the number one county in the State for producing nursery stock with the 2011/2012 value placed at approximately \$1.093 billion. A significant amount of this nursery stock is shipped interstate and internationally.

The following commodities are hosts of LBAM and the 2011 value is noted for San Diego County: Avocados (over \$200 million), berries, excluding strawberries (over \$11 million), citrus (over \$76 million), beans (over \$2 million), herbs (approximately \$7 million), persimmons (over \$1 million) and miscellaneous fruits and nuts (over \$7 million).

The USDA cannot regulate less than an entire state unless the state has a quarantine regulation which is substantially the same as what the existing federal rule requires for interstate movement. The Department needs to have the immediate authority to prevent host material from being shipped intrastate outside the proposed quarantine area. This in turn will enable the USDA to amend their federal regulation or issue a new federal order. If the Department fails to implement a quarantine on an emergency basis, the USDA may consider quarantining all of California in order to immediately prevent the affected host material from shipping interstate.

Additionally, both Canada and Mexico consider LBAM a pest of quarantine concern and impose international trade restrictions on host material. It is also immediately necessary to assure our trading partners that the rest of San Diego County is being protected through a quarantine regulation.

The general economic welfare of the State would be harmed if the USDA quarantined the entire State. There are still vast areas of the State which have significant agricultural production and which are not under regulation for LBAM. Unnecessary interstate quarantine restrictions would negatively impact the State's interstate trade. California's unemployment rate in March 2013 dropped to 9.6 per cent. During the preceding 12 months prior to March 2013, agricultural employment was up by 2.8 per cent. The agricultural industry is one of the economic engines which are lowering the State's unemployment rate. Additionally, any job losses in this area would likely be felt by low-skilled workers whose employment options are already limited. The loss of any agricultural jobs would likely result in an increase in the State's public assistance obligations which would negatively impact the State's economic recovery.

If the USDA quarantined the entire State then Canada and Mexico would too. Canada is the State's number one export market and Mexico is the number two export market for our agricultural products. The 2009 value of agricultural exports to Canada was over \$2.5 billion and to Mexico was \$551 million. The following are examples of some of the LBAM hosts 2009 export values to just Canada: cut flowers and nursery stock \$83.4 million, table grapes was \$197.4 million, strawberries \$239 million, raspberries \$75.6 million, oranges \$117.6 million, peaches and nectarines \$52.7 million and cherries \$30.8 million.

Therefore, it is necessary to amend this regulation by adding the Oceanside area of San Diego County to the regulation as an emergency action.

Project Description

This project is being run under the Incident Command System which is used for emergency projects. This proposed emergency action will expand the quarantine area for LBAM by approximately 18 square miles in the Oceanside area of San Diego County. The proposed boundary line was drawn jointly by the USDA, the Department, and the affected San Diego County Agricultural Commissioner. The criterion for determining quarantine boundaries around an epicenter was based upon the information obtained from the USDA. Any quarantine actions undertaken by the Department will be in cooperation and coordination with the USDA and the affected county agricultural commissioner.

The total area under regulation for LBAM would become approximately 6,069 square miles.

The Department also relied upon the following information:

“Pest and Damage Records #s 5066565, SM0P060004315 and AM1P06194370, California Department of Food and Agriculture, Plant Health and Pest Prevention Services.

Letter dated May 3, 2013, from Sandy Parks to Karen Ross.

Email dated May 3, 2013, from Helene Wright to Robert Leavitt.

News Release No: 13-14 dated March 29, 2013, Employment Development Department, State of California.

Nursery Advisory No. 01-2013 dated April 12, 2013, to All County Agricultural Commissioners from California Department of Food and Agriculture , Pest Exclusion-Nursery Services.

Federal Order dated July 25, 2011, *Epiphyas postvittana* (Light Brown Apple Moth), DA-2011-41.

2011 Crop Statistics and Annual Report, County of San Diego, Department of Agriculture, Weights and Measures.

“Pest Profile,” updated March 16, 2007, Kevin Hoffman, California Department of Food and Agriculture.

“Mini Risk Assessment, Light Brown Apple Moth, *Epiphyas postvittana* (Walker), [Lepidoptera: Tortricidae], September 21, 2003, Department of Entomology, University of Minnesota.

Authority and Reference Citations:

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

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Informative Digest

Existing law provides that the Secretary is obligated to investigate the existence of any pest that is not generally distributed within this state and determine the probability of its spread and the feasibility of its control or eradication (FAC Section 5321).

Existing law also provides that the Secretary may establish, maintain and enforce quarantine, eradication and other such regulations as he deems necessary to protect the agricultural industry from the introduction and spread of pests (Food and Agricultural Code, Sections 401, 403, 407 and 5322).

Anticipated Benefits from This Regulatory Action

Existing law, FAC section 24.5. states that “Inasmuch as plants growing in native stands or

planted for ornamental purposes contribute to the environmental and public health and welfare needs of the people of the state, the Legislature hereby finds and declares that such plants shall be considered as a part of the agricultural industry for the purpose of any law that provides for the protection of the agricultural industry from pests.

Existing law, FAC section 407, provides that the Secretary may adopt such regulations as are reasonably necessary to carry out the provisions of this code which she is directed or authorized to administer or enforce.

Existing law, FAC section 5321, provides that the Secretary is obligated to investigate the existence of any pest that is not generally distributed within this State and determine the probability of its spread, and the feasibility of its control or eradication.

Existing law, FAC section 5322, provides that the Secretary may establish, maintain, and enforce quarantine, eradication, and such other regulations as are in her opinion necessary to circumscribe and exterminate or prevent the spread of any pest which is described in FAC section 5321.

The existing law obligates the Secretary to investigate and determine the feasibility of controlling or eradicating pests of limited distribution but establishes discretion with regard to the establishment and maintenance of regulations to achieve this goal. The amendment of this regulation benefits all of the affected businesses located outside the regulated area and the environment by having a quarantine program to prevent the artificial spread of LBAM over long distances. The amendment of this regulation also protects the native plant stands and ornamental plantings in the general environment from damage due to the artificial long distance spread of LBAM.

FAC Section 401.5 states, “the department shall seek to protect the general welfare and economy of the state and seek to maintain the economic well-being of agriculturally dependent rural communities in this state.” The amendment of this regulation protects the agriculturally dependent rural communities located outside the regulated area.

The USDA maintains a federal domestic quarantine and orders regulating the interstate movement of host material. If the State does not have a parallel interior quarantine which is substantially the same as the federal domestic regulation, the USDA cannot regulate less than the entire State. The amendment of this State regulation will prevent the USDA from having to unnecessarily regulate the entire State.

The Department is the only agency which can implement plant quarantines. As required by Government Code Section 11346.5(a)(3)(D), the Department has conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing state regulations.

Section 3434. Light Brown Apple Moth Interior Quarantine.

This proposed emergency action will expand the quarantine area for LBAM by approximately 18 square miles in the Oceanside area of San Diego County. The effect of the amendment of this regulation is to provide authority for the State to perform quarantine activities against LBAM within this additional area. The total area which would be under regulation would be approximately 6,069 square miles.

Mandate on Local Agencies or School Districts

The Department has determined that Section 3434 does not impose a mandate on local agencies or school districts, except that an agricultural commissioner of a county under quarantine has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the affected county agricultural commissioner requested that these changes to the regulation be made.

Cost Estimate

The Department has also determined that the regulation will involve no additional costs or savings to any state agency because initial funds for state costs are already appropriated, no nondiscretionary costs or savings to local agencies or school districts, no reimbursable savings to local agencies or costs or savings to school districts under Section 17561 of the Government

Code and no costs or savings in federal funding to the State.