

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists due to the United States Department of Agriculture's (USDA) issuance of a new Federal Order, Domestic Quarantine for *Lobesia botrana*, (European Grapevine Moth [EGVM]). EGVM is a serious pest and host material is subject to State regulation for intrastate movement and federal regulation for interstate movement. If a state agency makes a finding that the adoption (or amendment) 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). "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.

The USDA is proposing to deregulate the entire counties of Fresno, Mendocino, Merced and San Joaquin; reduce the quarantine areas in the counties of Napa, Nevada, Santa Clara, Santa Cruz, Solano and Sonoma and remove *Rubus* as a host through the issuance this federal order which will become effective on March 8, 2012.

Emergency Rulemaking Procedures

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).

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. 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. The Secretary believes that this emergency clearly poses such an immediate, serious harm that delaying action by the Office of Administrative Law providing five working days advance notice to allow public comment would also be inconsistent with the public interest, within the meaning of Government Code Section 1349.6(b).?

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.

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 Emergency

The EGVM regulated products include grapes, olives, stone fruits, kiwifruits, pomegranates, and persimmons. California’s 844,000 acres of grapes (526,000 acres of wine grape, 93,000 acres of table grape and 225,000 acres of raisin-type grapes) leads the nation in grape production with 89% of the total. In 2007, grapes were the number two commodity in the state, based on a dollar value of \$3.08 billion dollars, and were

among the top three commodities produced in 15 California counties. The retail value of California grapes was valued at \$16.5 billion in 2006. The United States Department of Agriculture's (USDA) November 2010 economic analysis estimates the EGVM regulated products were valued in 2008 at \$2.7 billion in the existing quarantined counties California. More information regarding potential economic impact in California may be found in the economic analysis prepared by USDA at: http://www.aphis.usda.gov/plant_health/plant_pest_info/eg_moth/downloads/EGVM-EconomicAnalysis-Nov2010.pdf

EGVM is known to feed on close relatives of plants listed as threatened or endangered in the United States and presents a potential threat to perhaps 24 species, some of which are known to occur only in California. To protect this source of revenue and the environment, California must do everything possible to prevent the spread of EGVM in the State.

The EGVM has the capability of causing significant irreparable harm to California's agricultural industry and some possible adverse environmental/urban impacts. Should the Department not take these actions; the EGVM could cause catastrophic losses to not only California's table and wine-grape industries but the industries which rely on the regions scenic beauty and international reputation as a tourist destination.

The Secretary finds that the immediate amendment of a regulation to deregulate the entire counties of Fresno, Mendocino, Merced and San Joaquin; reduce the quarantine areas in the counties of Napa, Nevada, Santa Clara, Santa Cruz, Solano and Sonoma and remove *Rubus* as a host and have it be effective by March 8, 2012, to ensure the State's regulation is parallel with the federal order which will become effective on March 8, 2012. It is no longer necessary to quarantine these areas and the removal of these unnecessary State restrictions is necessary to prevent serious harm to the

general welfare and economy of the State and the economic well-being of agriculturally dependent rural communities.

One federal order will remove four counties from federal regulation. This alone reduces the overall size of the California EGVM quarantine area by 20 per cent or approximately 479 square miles and allows for unrestricted movement of grapes and other host commodities from these four counties.

In these four counties there were a total of 3,001 affected businesses/private people under compliance agreements stipulating the restrictions they needed to comply with to move and receive regulated host material. The types of businesses affected included production and retail nurseries, host commodity haulers, harvesters and receivers, and growers of host commodities. The total estimated annual cost for compliance for these businesses/private parties was \$658,118, annually. The cost of compliance by county was Fresno-\$253,880; Mendocino-\$184,435; Merced-\$2,856; and, San Joaquin-\$216,947.

The second federal order lists the quarantine area each state or each portion of a state, in which EGVM has been found. The federal order will designate as a quarantine area any location where EGVM is detected and a three-mile radius around each such location in which:

- (a) A total of two or more adult EGVM are trapped within three miles of each other and within the timeframe of one lifecycle as determined by the degree day model;
- or
- (b) DNA analysis on pest detections confirms the presence of one or more immature EGVM's.

Less than an entire state will be designated as a quarantine area only if the USDA determines that:

- (a) The State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed by the federal order on the interstate movement of regulated articles; and,
- (b) The designation of less than the entire state as a quarantine area will prevent the interstate spread of EGVM.

A previous federal order had required a minimum of a five mile “buffer” radius be used. The other federal order shrinks the required buffer area from five miles surrounding each find to three miles surrounding each find. This results in a reduction of the quarantine area in Napa County by approximately 22 square miles, in Nevada County by approximately 102 square miles, in Santa Clara County by approximately 56 square miles, in Santa Cruz County by approximately 53 square miles, in Sonoma County by approximately 436 square miles and in Solano County approximately 113 square miles for a total of approximately 816 square miles. The grand total reduction will be almost 50 percent or approximately 1,031 square miles.

The total remaining quarantine area will be approximately 1,303 square miles. The contiguous quarantine area in the counties of Napa (approximately 575 square miles), Sonoma (approximately 228 square miles) and Solano (approximately 124 square miles) will be approximately 927 square miles; Santa Clara will be approximately 38 square miles; Santa Cruz will be approximately 34 square miles; and, Nevada County will be approximately 74 square miles (Grass Valley area approximately 34 square miles and Nevada City area approximately 40 square miles).

At this time, the Department is unable to determine the total number of businesses being removed as a result of this action.

Project Description

EGVM is a pest of quarantine concern to the USDA and they have issued a federal order governing the interstate movement of host material. Unless the State's EGVM regulation is substantially the same as the latest EGVM federal order, the USDA cannot regulate less than the entire State. The current federal order requires the State to regulate at least a three mile radius (this includes a buffer area) surrounding an EGVM infestation as defined under the regulatory protocol. Minimally, the State's regulation has to prevent the intrastate movement of regulated articles and commodities which do not qualify for certification from the infested area and the surrounding buffer area. This is to ensure that such articles and commodities are not subsequently moved from a non-regulated area of California into interstate commerce. More information regarding EGVM including all issued federal orders may be accessed at:

http://www.aphis.usda.gov/plant_health/plant_pest_info/eg_moth/index.shtml

This proposed emergency action will reduce the quarantine area for EGVM by including the 2010 and 2011 detection sites as epicenters and a buffer zone which extends approximately three miles in each direction from the epicenters. A buffer zone is necessary because the moth can spread naturally (as well as being spread artificially on infested hosts). The proposed boundary lines were drawn jointly by the United States Department of Agriculture, the California Department of Food and Agriculture, and the affected agricultural commissioners. The criteria for determining quarantine boundaries around an epicenter was based upon the information contained in the Report of the International Technical Working Group for the European Grape Vine Moth in California, dated December 13-15, 2011. An epicenter is defined as an egg, larva or pupa found in the environment, or two male moths trapped within three miles of one another and within one life cycle.

The proposed quarantine area is considered the minimum area around the initial detection sites which should be regulated to prevent artificial spread of EGVM to noninfested areas.

The effect of the amendment of this regulation will be to remove the State's authority to perform quarantine activities against the EGVM in the deregulated areas. Quarantine activities consist of limiting the movement of EGVM host articles within or from the area under quarantine. Any quarantine actions undertaken by the Department will be in cooperation and coordination with the USDA and the county agricultural commissioners.

Background

In addition to California, EGVM are found in southern Asia, Europe, North Africa, Anatolia, the Caucasus and in South America (Chile where it was first identified in 2008). Adult EGVM are 6 to 8 mm long with a wingspan of about 10 to 13 mm. However, their size is greatly affected by larval food quality. The first flight of adults occurs in spring when daily average air temperature is above a minimal threshold temperature of 10°C for 10 to 13 days. High temperature (over 20°C) and low humidity (40-70% relative humidity) provide optimal conditions for moth activity – conditions that prevail in much of California's grape production areas. The second flight period begins in summer. Adults may be hard to discover during the day and may be noticed only when they take flight after being disturbed. Within a day or two of mating, females begin to oviposit on the blossoms, leaves, and tender twigs of grapevines. The female lays 300 or more eggs at a rate of 35 per day. First generation eggs are laid on the flower buds or pedicels of the vine while second generation eggs are laid on individual grapes. Eggs hatch in seven to eleven days in spring and three to five days in summer. The number of generations in a given area is fixed by photoperiod together with temperature. The moth achieves two generations in northern cold areas and usually three generations in southern temperate areas, but as many as five generations have been reported.

Larvae develop in four to five weeks in spring and two to three weeks in summer. Pupation lasts nine to twelve weeks in spring, five to seven days in summer, and up to six months in winter.

The EGVM is a serious pest in warm vine-growing areas, such as California. Damage by EGVM makes berries attractive to other insects and predisposes the fruit to fungal infection. Larval boring may promote a number of fungal rots, including *Aspergillus*, *Alternaria*, *Rhizopus*, *Cladosporium*, *Penicillium* and especially, grey rot caused by *Botrytis cinerea*. Loss of up to one-third of the vintage has been reported in areas of the Soviet Union, Syria and Yugoslavia. Losses in Israel sometimes reach 40 to 50 percent among table grapes and up to 80 percent for wine grapes. Further loss is due to the time and labor spent in cleaning the grape bunches. When infestations are heavy, work days spent in cleaning the fruit account for 30 to 40 percent of the time of those involved in harvesting.

First generation EGVM larvae feed on bud clusters or flowers and spin webbing around them before pupating inside the web or under a rolled leaf. If heavy flower damage occurs during the first moth generation, the affected flowers will fail to develop and yield will be low. Second generation larvae enter the grapes and feed before pupating inside the grape. Larvae of the third generation, the most damaging, feed on ripening grapes, migrating from one to another and spinning webs. When berries are a little desiccated, the larvae penetrate them, bore into the pulp, and remain protected by the berry peel. Larvae secure the pierced berries to surrounding ones by silk threads in order to avoid falling. Each larva directly damages several berries (one to six), but if the conditions are suitable for fungal or acid rot development, a large number of surrounding berries may also be affected. The third generation larvae leave the fruit and seek shelter under the bark, among dead leaves, or between clods of earth, where they pupate before overwintering.

The most probable method of EGVM movement within California is human-aided on equipment, fruit or infested propagative material. Though larvae are active, their movement is usually limited to between berry clusters, and virgin females' movement rarely exceeds 80 m.

EGVM detections in California have led to several expansions of the original quarantine areas in Napa and Sonoma counties; as well as creating new quarantine areas in Fresno, Lake, Mendocino, Merced, Nevada, Santa Clara, San Joaquin and Solano counties.

Information Relied Upon

For Information and Action, DA-2012-07, dated February 27, 2012, from Animal and Plant Health Inspection Service and its attachment.

Email dated February 1, 2012, from Melinda Mochel to Stephen Brown and its attachments.

Report of the International Technical Working Group for the European Grape Vine Moth in California, dated December 13-15, 2011.

Pest and Damage Records:

Napa/Solano/Sonoma Counties

1615821, 1586945, 1586930, 1586929, 1611343, 1615760, 1586354, 1615233,
1588070, 1597130, 1597438, 1615850, 1615151, 1615525, 1602983, 1602526,
1615594, 1615470, 1602525, 1588035, 1643916, 1615872, 1615587, 1490387,
1629423 and 1602884

Nevada County

1585400, 1402320 and 1402319

Santa Clara County

1512021, 1512022, 1512020, 1483678, 1483676 and 1483677

Santa Cruz County

1549662

Sonoma County

1597129, 1586323, 1586336, 1586335, 1586317, 1586303, 1586325, 1598627 and 1586210

“Movement of Grapes and Other Regulated Articles from the European Grapevine Moth (*Lobesia botrana*) Quarantine Zone,” Environmental Assessment dated June 2010, Animal & Plant Health Inspection Service, United States Department of Agriculture.

“ECONOMIC IMPACTS OF THE EUROPEAN GRAPEVINE MOTH (*LOBESIA BOTRANA*) IN CALIFORNIA,” dated November 2010, Policy Analysis & Development Policy & Program Development, Animal & Plant Health Inspection Service, United States Department of Agriculture.

Authority and Reference Citations

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

Reference: Sections 407 and 5322, 5761, 5762 and 5763, Food and Agricultural Code.

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 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 (FAC, Sections 401, 401.5 403, 407 and 5322).

Existing law also provides, “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” (FAC Section 401.5)

Section 3437. European Grapevine Moth Interior Quarantine

The effect of the amendment of this regulation will be to remove the State’s authority to perform quarantine activities against the EGVM in the areas being removed from regulation and cease any quarantine activities directed towards *Rubus* which is being removed as a host. Within the remaining regulated areas, any quarantine actions undertaken by the Department will be in cooperation and coordination with the USDA and the affected county agricultural commissioners. It is immediately necessary to remove these areas and this host from regulation in order to remove unnecessary regulatory restrictions which are no longer necessary in order to prevent the artificial spread of EGVM to the uninfested areas of California. The amendment will remove approximately 1,031 square miles leaving a total of approximately 1,303 square miles in the State.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3437 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 commissioners requested that these changes to the regulation be made and these proposed emergency amendments remove areas from the regulation and remove a host.

Cost Estimate

The Department has also determined that the regulations 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.