

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists, and that the foregoing adoption of a regulation is necessary for an immediate action to avoid serious harm to the public peace, health, safety or general welfare, within the meaning of Government Code Section 11342.545 and Public Resources Code Section 21080. The Secretary has also determined that this emergency clearly poses such an immediate, serious harm that delaying action by providing five working days advance notice to allow public comment would be inconsistent with the public interest, within the meaning of Government Code Section 11346.1(a)(3). Further, the Secretary believes that this emergency clearly poses such an immediate, serious harm that delaying action by the Office of Administrative Law providing five calendar days advance notice to allow public comment would also be inconsistent with the public interest, within the meaning of Government Code Section 11349.6(b).

Description of Specific Facts Which Constitute the Emergency

The light brown apple moth (*Epiphyas postvittana*) was first detected in California on February 27, 2007 in Alameda County and on March 7, 2007, the light brown apple moth (LBAM) was first detected in Contra Costa County. Through the deployment of delimiting detection traps, numerous additional adult male moths were trapped in both counties. As a result, the Department adopted an emergency regulation, Section 3591.20, which became effective on March 21, 2007. The Department continued to deploy detection traps in additional counties. As a result of multiple detections of LBAM, the Department amended Section 3591.20 to add the counties of Marin and San Francisco (effective April 3, 2007); Santa Clara County (effective April 20, 2007); Monterey, San Mateo and Santa Cruz counties (effective April 23, 2007); and, Napa County (effective June 5, 2007). The Department also proposed the emergency adoption of Section 3434, Light Brown Apple Moth Interior Quarantine (effective April 20, 2007). Emergency amendments to Section 3434 were subsequently made adding portions of Alameda, Contra Costa, Marin, Monterey, San Benito, San Mateo and Santa Cruz counties (effective June 6, 2007) and Napa County (effective June 7, 2007).

On May 2, 2007, the United States Department of Agriculture (USDA) issued a federal order regulating the interstate movement of host material from the infested areas of California and all of Hawaii. On June 21, 2007, emergency amendments were effective adding portions of Alameda, Monterey and Santa Cruz counties; and, including all harvested fruits and vegetables as regulated commodities. On July 18, 2007, emergency amendments were effective adding portions of Alameda, Contra Costa, Los Angeles, Marin, Monterey, San Francisco, San Mateo, Santa Clara, Santa Cruz and Solano counties. On August 21, 2007, emergency amendments were effective adding additional portions of the counties of Alameda, Monterey, San Francisco, San Mateo, Santa Clara, Santa Cruz and Solano. On September 28, 2007, emergency amendments were made, primarily to merge some of the regulated areas of Alameda, Contra Costa, Marin, San Francisco, San Mateo and Santa Clara counties into one regulated area. On November 8, 2007, the last emergency amendment became effective that which increased the regulated areas of Half Moon Bay and Pescadero, San Mateo County; and, the jointly regulated areas of Monterey and Santa Clara counties.

In late October 2007, the USDA established a new regulatory protocol which was distributed to county agricultural commissioners as "Phytosanitary Advisory No. 31-2007. This regulatory protocol was adopted based upon the recommendations of the LBAM Technical Working Group (TWG). The purpose of the protocol is to determine when it is appropriate to initiate or remove interstate regulatory restrictions pertaining to LBAM in response to new detections or the elimination of incipient LBAM populations. A key component of this regulatory protocol is the revision of the triggers for initiating a regulated area. Under the recommendations of the TWG, a single detection (trapping) of a male LBAM more than three miles from another male LBAM, no longer warrants a quarantine response. This is contingent upon the deployment of LBAM traps at the appropriate delimitation levels in buffer areas surrounding the single detection. Prior to this regulatory protocol, the detection of a single LBAM was the agreed upon trigger for initiating a quarantine area. The Department reviewed and concurs with this new protocol and is applying the same criteria contained in it to initiate or remove LBAM regulatory restrictions pertaining to the intrastate movement of regulated articles and commodities.

The Department has used Geographic Information Systems (GIS) mapping programs to plot the locations of all the detections of LBAM. As a result, based upon the criteria contained in the USDA regulatory protocol, the Department determined several existing regulated areas that should be able to be removed or reduced. Based upon the October 2007 regulatory protocol, the Department is proposing to remove/reduce the following existing regulated areas from Section 3434:

1. The Novato area of Marin County;
2. Both of the Napa areas of Napa County;
3. A portion of the Santa Clara area of Santa Clara County;
4. Portions of the San Jose area of Santa Clara County;
5. The Sherman Oaks area of Los Angeles County; and,
6. The Greenfield area of Monterey County.

Additionally, as this proposed action has an impact on the intrastate and interstate regulatory restrictions, the Department submitted the proposed changes to the USDA for their consideration. The USDA concurred that these areas should be removed on November 8, 2007.

Unfortunately, there have also been additional adult male LBAM recently trapped. Following the new regulatory protocol, the Department has established the need to expand a regulated area in two places. On November 1, 2007, an LBAM was trapped in the South San Francisco area of San Mateo County. On November 7, 2007, an LBAM was trapped in the Menlo Park area of San Mateo County. Both of these LBAM were detected within a three mile radius of other LBAM. The detection of LBAM in these areas is indicative of additional incipient infestations necessitating the expansion of the affected regulated area. Additional emergency quarantine responses are now necessary to eliminate unnecessary regulatory restrictions and to help ensure the LBAM does not continue to spread to other uninfested areas of the State. These emergency amendments to Section 3434 are necessary to ensure the State's regulation continues to be substantially the same as required by the federal order, rule and October 2007 regulatory protocol. Additionally, if the State's regulation is not substantially the same as the federal order and rule, the USDA

cannot regulate less than the entire State.

The adult LBAM will continue to emerge and is not known to be a long distance flyer. These types of moths generally only fly up to approximately one-half mile and the current traps will attract a male moth within 100 meters. The real threat of long distance spread is through the human-assisted movement of infested plants and plant parts, including green waste, and other possible carriers such as contaminated equipment or appliances.

The proposed emergency amendments to expand the regulated area include the initial detection sites as the epicenter and a buffer zone which extends approximately one and one-half mile in each direction from the epicenter. A buffer zone is necessary because the LBAM can spread naturally (as well as being spread artificially in 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 county agricultural commissioners. The proposed additional quarantine area is considered the minimum area around the initial detection sites which should be regulated to prevent artificial spread of LBAM to noninfested areas.

The LBAM has the capability of causing significant irreparable harm to California's agricultural industry and some possible adverse environmental impacts. While the Department's compliance with the California Administrative Procedure Act and the California Environmental Quality Act (CEQA) are separate actions, they can be interrelated. Although adoption of specific regulatory authority can be the beginning of a project and therefore covered by CEQA, this regulation, for the reasons already set forth, constitutes a specific act necessary to prevent or mitigate an emergency as authorized by Public Resources Code Section 21080, subdivision (b) (4) and Title 14, California Code of Regulations Section 15269, subdivision (c). The regulation is also an action required for the preservation of the environment and natural resources as authorized by Title 14, California Code of Regulations, sections 15307 and 15308.

LBAM is a highly polyphagous pest that attacks a wide number of fruits and other plants.

Hosts occurring in California that are of significant agricultural or environmental concern include, but are not limited to: alder, alfalfa, apple, apricot, avocado, blueberry, blackberry, broccoli, cabbage, camellia, cauliflower, ceanothus, chrysanthemum, citrus, clematis, clover, columbine, cottonwood, currant, cypress, dahlia, ferns, fir, geranium, grape, hawthorn, honeysuckle, kiwi, lupine, madrone, mint, oak, peach, pear, peppers, persimmon, poplar, potato, raspberry, rhododendron, rose, sage, spruce, strawberry, walnut and willow. It is an insect species that feeds upon over 250 species of native and ornamental plants. The general area of infestation contains numerous sensitive plant species and habitats. There is an imminent threat for adverse consequences and ultimate extinction to some of these sensitive species if LBAM becomes permanently established in California.

Currently, this species has a relatively restricted geographic distribution, being found only in portions of Europe and Oceania. The pest is native to Australia but has successfully invaded other countries. The likelihood and consequences of establishment by LBAM have been evaluated in pathway initiated risk assessments. LBAM was considered highly likely of becoming established in the United States and the consequences of its establishment for United States agricultural and natural ecosystems were judged to be severe. The United States Department of Agriculture, Animal Plant and Health Inspection Service (USDA, APHIS) estimated that approximately 80 percent of the continental United States may be climatically suitable for LBAM.

In its native habitat of Australia, LBAM generally completes three generations annually. More than three generations can be completed if temperatures and host plants are favorable. In southeastern Australia where it is warmer, four generations can be completed. In contrast, two generations occur in Tasmania, New Zealand and in Great Britain. In Australia, generations do not overlap, but they do in Great Britain. As the population builds, LBAM is more abundant during the second generation. Therefore, the second generation causes the most economic damage as larvae move from foliage to fruit. The size of the third generation is typically smaller than the previous two due to leaf fall (including attached larvae) as temperatures decline in autumn. LBAM does not diapause

and its continued development is slowed under cold winter temperatures. In cold climates, the pest overwinters as larvae. Because LBAM causes damage in a wide range of climate types in Australia, pest status is not dictated by climate.

LBAM causes economic damage from feeding by caterpillars, which may:

- destroy, stunt or deform young seedlings;
- spoil the appearance of ornamental and native plants; and
- injure deciduous fruit-tree crops, citrus and grapes.

Based upon losses in Australia, annual losses in California are expected to be much higher as the agricultural sector is larger and more variable. Additionally, LBAM, if not eradicated, will cause economic damage to California's export markets due to the implementation of quarantines by foreign and state governments.

Where it occurs, LBAM is difficult to control with sprays because of its leaf-rolling ability, and because there is evidence of resistance due to overuse of the same insecticides. Conifers are damaged by needle-tying and chewing. Larvae have been found feeding near apices of Bishop Pine seedlings where they spin needles down against the stem and bore into the main stem from the terminal bud. LBAM constructs typical leaf rolls (nests) by webbing together leaves, a bud and one or more leaves, leaves to a fruit, or by folding and webbing individual mature leaves. During the fruiting season, they also make nests among clusters of fruits, such as grapes, damaging the surface and sometimes tunneling into the fruits. During severe outbreaks, damage to fruit may be as high as 85 percent.

Egg masses are most likely to be found on leaves. The larvae are most likely to be found near the calyx or in the endocarp; larvae may also create "irregular brown areas, round pits, or scars" on the surface of a fruit. Larvae may also be found inside furled leaves, and adults may occasionally be found on the lower leaf surface.

LBAM is an actionable pest for the USDA, APHIS and requires the Australian Quarantine

and Inspection Service to take corrective actions to prevent this pest from being associated with apple, citrus, pear fruits and other host commodities being exported to the United States. Host fruit exported from New Zealand faces similar restrictions by USDA, APHIS and the New Zealand Ministry of Forestry and Fisheries is responsible for any corrective actions at origin. Any host commodity arriving in the United States that is infested with or contaminated by LBAM is issued a Federal Emergency Action Notice and must be either destroyed, reexported or undergo an appropriate quarantine treatment prior to its release into the United States commerce. Canada and Japan also treat LBAM as a quarantine action pest. The People's Republic of China requires all host fruit imported to originate from orchards that are free from LBAM.

Wherever LBAM occurs in association with vineyards, it is considered to be a very important agricultural pest. Unless properly managed, LBAM causes substantial risk to crop yield and quality by causing both direct and indirect damage. Emerging larvae in the spring may feed upon both the flowers and newly set fruitlets causing a direct loss in yield. Later in the year, LBAM larvae feeding on maturing fruit can cause indirect loss by introducing botrytis infections into the grape bunches. As an example, in 1992 in Australia, 70,000 larvae per hectare were documented and caused a loss of 4.7 tons of Chardonnay fruit. Damage in the 1992-93 Chardonnay season at Coonawarra, southern Australia, cost \$2,000 per hectare.

In South Australia, LBAM is also a significant pest of apricots and can attack other stone fruit. Peaches are also damaged by feeding that occurs on the shoots and fruit.

The first generation (in spring) causes the most damage to apples while the second generation damages fruit harvested later in the season. Some varieties of apples such as 'Sturmer Pippin' (an early variety), 'Granny Smith' and 'Fuji' (late varieties) can have up to 20 percent damage while severe attacks can damage up to 75 percent of a crop.

In Australia, when insecticides are not applied, typically between 5 percent to 20 percent of

fruit is damaged, but this can exceed 30 percent. In New Zealand, damage to unsprayed crops commonly reaches 50 percent (Wearing et al., 1991). More information regarding potential economic impact in California may be found in the environmental assessment prepared by USDA at www.aphis.usda.gov/plant_health/ea/downloads/lbam_ea_sc.pdf. In 10 of California's affected counties, it is estimated that LBAM could cause \$160 to \$640 million in losses. These estimates were derived from the agricultural impacts in Australia and New Zealand. This estimate does not include economic costs to the nursery industry nor to other significant host crops in California such as apricots, avocados, kiwifruit, peaches, etc., grown in other counties.

Exact economic impacts on international and domestic exports are uncertain at this time. California is the nation's leader in agricultural exports and in 2003 shipped more than \$7.2 billion in both food and agricultural commodities around the world. Some countries have specific regulations against this pest, and many others consider it a regulated pest that would not be knowingly allowed to enter. Additional measures, such as preharvest treatments and postharvest disinfestation, would likely have to be taken to ensure that shipments to these countries are free from LBAM. In addition, LBAM is an exotic pest, i.e., it is not established in the continental United States, and therefore other states within the United States would likely impose restrictions on the movement of potentially infested fruits, vegetables and nursery stock. These restrictions could severely impact the domestic marketing of California agricultural products.

The majority of California does have a climate which would favor the LBAM. Additionally, LBAM may have seven or more generations under some California climatic conditions. If unchecked, this would enable LBAM to build higher population levels in California. Given the known economic damages occurring in LBAMs present range, its potential damage to California's environment and agricultural industry could be devastating, especially without adequate control measures.

The Department has determined that to ensure it conducts the most efficient and effective

quarantine project with the greatest chances of success, quarantine regulatory activities need to begin as soon as possible. The immediate implementation of this proposed regulatory action is also necessary to prevent the USDA, APHIS from considering the entire state as infested with LBAM, rather than just the current areas of Alameda, Contra Costa, Los Angeles, Marin, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Solano counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California host commodities by the USDA, APHIS and our concerned international trade partners.

As an interim solution, the Department has relied on its statutory authority contained in California Food and Agricultural Code (FAC) Section 5701 to prevent the artificial spread of this pest from these new find sites. FAC Section 5701(a) states, "If any pest exists on any premises, the director or the commissioner may hold any plant or other host or possible carrier which is, or may be, capable of disseminating or carrying the pest. The director or the commissioner also may hold the plants, other hosts, or other possible carriers on any premises within five miles of the premises on which the pest was found to exist. The director or commissioner shall notify the owner of the plant or other host or possible carrier, or his or her agent, of this action, and the issuance of any shipping permit or nursery stock certificate with respect to the plant or other host or possible carrier shall be refused and any such permit or certificate which has been previously issued shall be revoked.

(b) The distance from the premises at which a pest is found that the director or commissioner may hold plants, other hosts, or other possible carriers shall be the maximum distance that the director or commissioner determines the pest is likely to travel, but not to exceed five miles."

During the delimitation trapping activities, the Department has targeted the highest risk facilities located within one and one-half mile of a trapped moth by placing a hold notice on the affected property to prevent the long distance movement of LBAM. This will continue to be done as an interim solution until the necessary emergency amendments are able to be made to Section 3434, which compliments our eradication regulation and targets LBAM. The proposed amendments of Section 3434(b) will delete the regulated areas under

subsections:

1. 3434(b)(5), the Sherman Oaks area of Los Angeles County (approximately 11 square miles);
2. 3434(b)(6), the Novato area of Marin County (approximately eight square miles);
3. 3434(b)(7), the Greenfield area of Monterey County (approximately 21 square miles);
4. 3434(b)(9), the North and South Napa areas of Napa County (approximately 22 square miles); and,
5. 3434(b)(11), the South San Jose area of Santa Clara County (approximately 12 square miles).

As a result of deleting these subsections, other subsections that follow will need to be appropriately renumbered. Existing subsection 3434(b)(8) will become subsection 3434(b)(5). Existing subsection 3434(b)(10) will become subsection 3434(b)(6). Existing subsection 3434(b)(12) will become subsection 3434(b)(7). Existing subsection 3434(b)(13) will become subsection 3434(b)(8).

The proposed amendment of Section 3434(b) will also decrease the regulated area under existing subsection 3434(b)(12) in the Santa Clara and San Jose areas of Santa Clara County by approximately 33 square miles. The total area proposed to be removed from the regulation is approximately 107 square miles.

The proposed amendments of Section 3434(b) will also expand the regulated areas under subsections:

1. 3434(b)(3) by approximately one square mile in the South San Francisco area of San Mateo County; and,
2. Existing 3434(b)(12) by approximately four square miles in the Menlo Park area of San Mateo and Santa Clara counties.

Approximately five total square miles are being proposed to be added to the current regulated area. As a result of these proposed changes, the total proposed regulated area would decrease by approximately 102 square miles to approximately 1,153 square miles.

The effect of these proposed changes to the regulation will be to provide or remove authority for the State to perform quarantine activities against LBAM (*Epiphyas postvittana*) in these additional areas.

To prevent the spread of the LBAM to non-infested areas in order to protect California's agricultural industry and environment, it is necessary to begin quarantine activities against the LBAM immediately. To remove unnecessary quarantine restrictions it is necessary to remove some regulated areas immediately. Therefore, it is necessary to amend this regulation as an emergency action.

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).

Section 3434. Light Brown Apple Moth Interior Quarantine.

The proposed amendment of Section 3434(b) will establish additional portions of San Mateo and Santa Clara counties as additional areas under quarantine. The effect of these amendments of the regulation is to provide authority for the State to perform quarantine activities against LBAM in these regulated portions of the counties. The proposed amendment of Section 3434(b) will remove the regulated area in Los Angeles and Napa counties; and reduce the regulated areas in Marin, Monterey and Santa Clara counties. The effect of these amendments of the regulation is to remove authority for the State to perform quarantine activities against LBAM in these counties or portions of the counties.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture 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 agricultural commissioners of all affected counties requested the changes in the regulation.

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.