

## FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture determined that an emergency exists, the light brown apple moth (LBAM), *Epiphyas postvittana* was recently unexpectedly detected for the first time in the Ukiah area of Mendocino County. This area is approximately 40 miles from the nearest known LBAM infestation. This detection is indicative of a possible incipient infestation in this area. It is believed this detection is due to the unexpected long distance artificial spread of LBAM.

### 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>

Additionally, on March 22, 2010, the Department filed a “Notice of Determination that it was compliant with the provisions of CEQA. This document and the CEQA mandated findings for LBAM may be accessed at the following website:

[http://www.cdfa.ca.gov/phpps/PDEP/lbam/lbam\\_main.html](http://www.cdfa.ca.gov/phpps/PDEP/lbam/lbam_main.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 November 5, 2013 (PDR # 230P06006030), one adult male LBAM was trapped in the Ukiah area of Mendocino County. This detection requires that a delimitation array of traps be immediately deployed surrounding the find site to determine if an incipient population of LBAM is present. If intensive delimitation trapping is not immediately deployed then under the United States Department of Agriculture’s regulatory protocol, the entire County of Mendocino will have to be placed under quarantine.

The LBAM is a federal action quarantine pest subject to interstate restrictions by the United States Department of Agriculture (USDA). If the Department does not follow the USDA’s regulatory protocol, then the USDA may place the entire State under quarantine.

This amendment will provide authority for the Department to perform specific delimitation, control or eradication activities against the LBAM in Mendocino County. This authority includes, “The searching for all stages of LBAM by visual inspection, the use of traps, or any other means.” It is immediately necessary to perform delimitation procedures within the Ukiah area of Mendocino County. These delimitation procedures are nationally accepted standards for establishing if there is an incipient infestation of LBAM and exactly where it is. If it is confirmed that an incipient infestation is present, then a quarantine is established using a 1.5 mile radius surrounding the epicenter of the infestation.

The LBAM is a voracious indiscriminate plant feeder. The LBAM has the capability of causing significant irreparable harm to California's agricultural industry and some adverse environmental impacts. The spread of LBAM will likely result in loss of revenue and the possible loss of jobs within California at a time when the State's budget is already under stress. 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. 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](http://www.aphis.usda.gov/plant_health/ea/downloads/lbam_ea_sc.pdf).

Additionally, both Canada and Mexico consider LBAM a pest of quarantine concern and impose international trade restrictions on host material. 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.

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.

LBAM also causes environmental damage which further results in 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.

Therefore, it is necessary to amend this regulation by adding Mendocino County to the regulation as an emergency action.

#### Project Description

The proposed amendment of Section 3591.20(a) would establish Mendocino County as an additional eradication area for LBAM. The entire county is being proposed as an eradication area as the authority for "The searching for all stages of light brown apple moth by visual inspection, the use of traps, or any other means anywhere within the said area" is immediately needed. Additionally, once implemented, delimitation surveys may result in finds of additional small LBAM infestations outside the current suspected infested area of Mendocino County. To enable rapid treatment of newly discovered small infestations without frequent amendment of the regulation, the entire county should be established as an eradication area.

The USDA's delimitation trapping protocol consists of 25 traps deployed in each of four square miles centered on the find site and is applied for three generations. The detection of another LBAM life stage within a three mile radius and one life cycle is the trigger for a quarantine using a 1.5 mile radius surrounding each find site as the epicenter.

### Anticipated Benefits from This Regulatory Action

One of the Department's broad mandates is to prevent the introduction and spread of injurious insect or animal pests, plant diseases, and noxious weeds (California food and Agricultural Code (FAC) section 403) and may adopt regulations to accomplish this (FAC section 407). The Secretary is also 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) and may establish, maintain, and enforce eradication regulations as necessary (FAC section 5322).

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 those agricultural industries which may be harmed by this general feeder including the nursery, fruit and vegetables for domestic use and exports and the environment (urban landscapes, forests, native plants) by having an eradication program to help ensure the artificial spread of the LBAM does not occur by establishing a new uncontrolled infestation in Mendocino County.

This amendment provides the necessary regulatory authority to prevent the artificial spread of a serious insect pest which is a mandated statutory goal.

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 majority of Mendocino County is rural.

The amendment of this regulation benefits homeowners who grow their own host fruits for consumption and host material which is planted as ornamentals in various rural and urban landscapes.

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.

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

Email dated November 5, 2013, from Amber Morris to Stephen Brown.

Pest and Damage Record No. 230P06006030, identification date of November 5, 2013.

“APHIS Plant Protection and Quarantine, Regulatory Protocol,” October 2007; revised December 2012.

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

“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.

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

### Informative Digest

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). Existing law also provides that eradication regulations may proclaim any portion of the State as an eradication area and set forth the boundaries, the pest, its hosts and the methods to be used to eradicate said pest (Food and Agricultural Code Section 5761).

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.

Section 3591.20. Light Brown Apple Moth Eradication Area.

The proposed amendment of Section 3591.20(a) will establish Mendocino County as an additional eradication area with respect to LBAM. The effect of the amendment of this regulation is to provide authority for the State to perform eradication activities against LBAM in Mendocino County.

### Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that the proposed amendment of Section 3591.20 does not impose a mandate on local agencies or school districts and no



reimbursement is required under Section 17561 of the Government Code. All eradication activities will be conducted by the Department.

### 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.