

## FINDING OF EMERGENCY

The Secretary of the California Department of Food and Agriculture (Department) determined that an emergency exists and that the foregoing amendment to Title 3 of the California Code of Regulations (CCR) Section 3591.2, Oriental Fruit Fly Eradication Area is necessary to avoid serious harm to the public peace, health and safety, or general welfare. On August 7, 2023, an adult OFF was taken from a trap in the Bakersfield area of Kern County. A second adult OFF was found in a trap two days later on August 9, 2023. The detection of two OFF is indicative of an incipient infestation of OFF in this area. Therefore, the Department proposes to adopt this emergency amendment to address this issue immediately and allow for eradication of this pest.

### 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. 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 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.

The Secretary is proposing to implement 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 she 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

OFF is a destructive insect pest of a large number of commercial agricultural crops. 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 OFF. 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. It has been estimated that the cost of not eradicating OFF in California would be at least \$44 million in crop losses, additional pesticide use, and quarantine requirements (“Action Plan for Methyl Eugenol Attracted Fruit flies, including the Oriental Fruit Fly, *Bactrocera dorsalis*” (Hendel)) California Department of Food and Agriculture). Thus, this incipient infestation presents a clear, imminent danger to the agricultural industry in California.

Until now, OFF has never been detected in Kern County. If the fly is allowed to spread and become established in host fruit production areas, California's agricultural industry would suffer losses due to decreased production of marketable fruit, increased pesticide use, and loss of markets if other states or countries enact quarantines against California products. Therefore, the Department is proposing to amend 3591.2, Oriental Fruit Fly Eradication Area, to include Kern County.

The survey, fruit removal, and treatment activities authorized under this regulation must begin immediately to ensure that the fly is contained and this infestation does not grow and cause additional significant damage to the growers in the immediate and adjacent areas. Therefore, the Secretary believes that the five-calendar-day public comment period should be waived.

### Background

Under Section 14.5 of the State of California Emergency Plan, dated July 1, 2009, the Department is responsible for coordinating integrated federal, state and local preparedness for response to, recovery from, and mitigation of plant diseases and pests, and overseeing the control and eradication of outbreaks of harmful or

economically significant plant pests and diseases. The Department is also charged with leading the administration of programs to detect, control, and eradicate pests affecting plants.

OFF has the capability of causing significant irreparable harm to California's agricultural industry and adverse environmental impacts. Should the Department not take action, OFF 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.

If the fly is allowed to spread and become established in host fruit production areas, California's agricultural industry would suffer losses due to increased pesticide use and decreased production of marketable fruit. In addition, there could be loss of markets if the United States Department of Agriculture (USDA) or other states or countries enact quarantines against California products that are hosts for the fly.

Under international trade agreements, the USDA is obligated to notify any trading partner that has concerns regarding the quarantine status of OFF in the United States. Trade impacts may not be limited to host commodities produced within the regulated area or even in California. The introduction of exotic fruit flies, such as OFF, is always the subject of the regional and specific bilateral trade discussions that 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 or packed anywhere in California can continue to move freely in international trade. California's 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. Therefore, it is necessary to amend Section 3591.2 on an emergency basis.

### Project Description

This amendment will provide authority for the State to perform specific detection, control, and eradication activities against OFF in Kern County. It is necessary to immediately perform these activities and eradication treatments within Kern County to prevent spread of the fly to non-infested areas and to protect California's agricultural industry and urban environment. Treatment activities against the fly will begin upon the notification of affected parties.

The proposed amendment of this eradication regulation will proclaim Kern County as an eradication area. The entire county of Kern is proposed as an eradication area because it is the political division that provides the most workable eradication area boundary for determining if an infestation exists and exterminating an established OFF infestation. Fruit may have already been moved from an infested area to another portion of the county. To enable rapid treatment of these small infestations without frequent amendment of the regulation, the entire county of Kern should be established as an eradication area. To prevent spread of the fly to non-infested areas and to protect California's agricultural industry, it is necessary to immediately begin treatment activities against OFF. Therefore, it is necessary to implement this regulation as an emergency action.

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

Email from Andrew Rickards on Monday, August 14, 2023 “OFF Kern County Initial Incident Meeting”

California Department of Food and Agriculture. Pest profile: Oriental fruit fly. Accessed July 2, 2023:

[https://www.cdffa.ca.gov/plant/factsheets/OFF\\_FactSheet.pdf](https://www.cdffa.ca.gov/plant/factsheets/OFF_FactSheet.pdf)

“Action Plan for Methyl Eugenol Attracted Fruit flies, including the Oriental Fruit Fly, *Bactrocera dorsalis* (Hendel),” April 2000, California Department of Food and Agriculture, Plant Health and Pest Prevention Services.

#### Authority and Reference Citations

Authority: Sections 407 and 5322 Food and Agricultural Code

Reference: Sections 5761, 5762, 5763, and 5764 Food and Agricultural Code

#### Informative Digest

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 that the Secretary is directed or authorized to administer or enforce.

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 that is described in FAC Section 5321.

Existing law, FAC Section 5761, provides that the Secretary may proclaim any portion of the state to be an eradication area with respect to the pest, prescribe the boundaries of such area, and name the pest and the hosts of the pest which are known to exist within the area, together with the means or methods which are to be used in the eradication or control of such pest.

Existing law, FAC Section 5762, provides that the Secretary may proclaim any pest with respect to which an eradication area has been proclaimed, and any stages of the pest, its hosts and carriers, and any premises, plants, and things infested or infected or exposed to infestation or infection with such pest or its hosts or carriers, within such

area, are public nuisances, which are subject to all laws and remedies which relate to the prevention and abatement of public nuisances.

Existing law, FAC Section 5763, provides that the Secretary, or the commissioner acting under the supervision and direction of the director, in a summary manner, may disinfect or take such other action, including removal or destruction, with reference to any such public nuisance, which he thinks is necessary.

Existing law, FAC Section 5764, provides that if an eradication area has been proclaimed with respect to a species of fruit flies and the removal of host plants of such species is involved, the director may enter into an agreement with the owner of such host plants to remove and replace them with suitable nursery stock in lieu of treatment.

Expenditures, if any, allocated for the replacement nursery stock shall not exceed an amount which is budgeted for the purpose or approved by the Director of Finance.

The existing laws 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.

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

#### Oriental Fruit Fly Eradication Area.

This amendment will establish Kern County as an eradication area for OFF. The effect of the regulation is to provide authority for the State to perform control and eradication activities against OFF in Kern County to prevent spread of the fly to non-infested areas and to protect California's agricultural industry.

### Anticipated Benefits from This Regulatory Action

Adding Kern County to the eradication area will help prevent the spread of OFF, which will benefit.

- the general public
- homeowners and community gardens
- agricultural industry
- California's natural environment
- the State's general fund.

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.

### Estimated Cost or Savings to Public Agencies or Affected Private Individuals or Entities

The Department has determined that the amendment of Section 3591.2 does not impose a mandate on local agencies or school districts and no reimbursement is required under Section 17561 of the Government Code.

The Department also has 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 amendment of Section 3591.2.