FINAL STATEMENT OF REASONS

DEPARTMENT OF FOOD AND AGRICULTURE

SUBMISSION OF REGULATIONS PERTAINING TO

Title 3, California Code of Regulations

Sections 3407, 3701, 3701.1, 3701.2, 3701.3, 3701.4, 3701.5, 3701.6, 3701.7 and 3701.8

Update of Initial Statement of Reasons

The initial statement of reasons pertaining to Section 3407 is still valid.

In response to comments received regarding Section 3701, et. seq., during the 45- and 15-day comment periods, the public hearings held September 15 and September 17, 2010 and the public meeting held December 1, 2010, the Department has made several revisions to the regulations.

Section 3701:

1. The Department amended the definition of "breach". Subsequent to the second 15-day comment period, the Department discovered that the mesh size description of 0.3mm squared should be corrected to 0.3 square millimeters and has made that correction. This is in line with the Federal Order on movement of citrus nursery stock from areas regulated for the Asian Citrus Psyllid. See 45-day commenter number four.
2. The Department added definitions for micro-propagation, registered mother line, retesting and target vector.

Section 3701.1(a) has been revised to more accurately reflect the language of Sections 6940 and 6941(c)(1) of the enabling statute.

Section 3701.1(b) has been deleted since the Department has determined that it lacks authority under the enabling statute to destroy trees.

Section 3701.2: The Department has amended this section to include 'mother lines' where appropriate as well as several other revisions addressing recordkeeping and reporting requirements, provisions for re-testing and time frames for reporting disease test results.

Section 3701.3: The Department has amended this section to include ‘mother lines’ where appropriate, to add provisions for grandfathering in mother trees and mother lines and to provide for topworking a mother tree to establish an increase tree.

Section 3701.4:

1. The Department has amended this section so that the requirements for rootstock to be maintained in insect-resistant structures apply only to rootstock used in the production of mother or increase trees.
2. The requirement for growing seed trees under screen has been deleted.
3. A provision has been made to allow movement of material between structures. Subsequent to the second 15-day comment period, the Department discovered that the mesh size description of 0.3mm squared should be corrected to 0.3 square millimeters and has made that correction. This is in line with the Federal Order on movement of citrus nursery stock from areas regulated for the Asian Citrus Psyllid. See 45-day commenter number 4.
4. The provisions for growing and/or maintaining nursery stock in the same structures as registered trees has been amended.
5. The elements of the compliance agreement have been amended.

Section 3701.5: The performance standard has been amended to remove elements that were prescriptive.

Section 3701.6:

1. The name of the authorized agent, “Citrus Research Board” has been revised to the “Jerry Dimittman Laboratory”.
2. Testing requirements have been revised to allow phase-in periods and also to provide for decreasing the frequency of testing based on an established period of negative test results. To simplify and clarify the testing requirements, the separate provisions for field-grown material have been deleted.
3. The requirements for seed tree testing have been revised.

4. The concept of “increase tree lot” has been deleted and provisions made to allow increase trees to be used as propagative sources for a period of 48 months from date of propagation.
5. A provision has been added to allow the Department to require additional testing in the event of detecting a disease within the structure. This decision will be based upon a risk assessment to be conducted by the Department, elements of which are also included.
6. A provision has been made to allow for re-testing.

Section 3701.7: A provision has been made for a risk assessment to be performed by the Department prior to suspending, refusing or canceling registration of a tree.

Summary and Response to Comments Received During the Notice Period of July 30, 2010 through September 13, 2010

Comments not included and/or responded to were outside the scope of this rulemaking.

Comments 1.1, 7.1, 8.3, 10.10, 10.11, 10.13, 10.24, 10.48 and 10.61

The proposed regulation deletes the definition of a registered increase tree lot and all references to registered increase tree lots, including the use of statistical sampling tied to registered increase tree lots. The citrus nursery industry would like to retain the use of statistical sampling of increase trees and proposes that registered increase tree lot be defined as, “the set of all increase trees of all varieties produced by a nursery in a given calendar year.”

I suggest we consider the alternative of an increase tree bud cutting period of 4 years with no extensions. No new concept of “lots”, no additional testing, no new administrative records, just the same system that citrus nurseries and the Department have utilized for years for the nursery increase bud cutting program. Allowing a longer cutting period is justified because we are growing trees under protection and limiting cutting to 4 years will ally some fears about trueness to type.

In Sections 3701.6(d)(3) and 3701.87(b)(4)(B), strike text. Replace with, “increase tree(s) may be used as a propagative source for a maximum of four years from date of propagation.”

Response to Comments 1.1, 7.1, 8.3, 10.10, 10.11, 10.13, 10.24, 10.25, 10.48 and 10.61

The Department amended the regulations to allow increase trees to be used as propagative sources for up to four years with no testing. Therefore, there was no need to retain the use of statistical sampling for increase trees. This does not prevent the Department from using a statistical sampling method should additional testing be required.

Comment 1.2

Section 3701.6(a) refers to facilities that are *accredited* by The United States Department of Agriculture (USDA). The USDA does not accredit facilities and propose that the regulations be revised to use the term "approved" rather than "accredited" and define the term "approved" to include what method the USDA actually uses for vetting disease testing laboratories.

Response to Comment 1.2

Section 3701.6(a) has been amended to read, "a facility that is certified by the United States Department of Agriculture" – to reflect the actual status conferred by USDA. The Department did not include USDA's certification method(s) because these may change from time to time without the Department being aware of procedural changes made at the Federal level.

Comments 1.3, 10.2 and 10.29, 10.41 and 10.53

We oppose the use of the term "compliance agreement". The Food and Agricultural Code provides that anyone who violates a requirement of a "compliance agreement" is subject to a $10,000 civil penalty. The severest extent of a penalty for a violation of any operational standard should not exceed suspension of the facility and cancellation of eligibility of the stock maintained within it. These facilities cost hundreds of thousands of dollars to construct and operate. These costs and other business considerations are ample motive for the operator to take every step possible to ensure that operational standards are met.

Response to Comments 1.3, 10.2 and 10.29, 10.41 and 10.53

The Department concurs that anyone who violates the terms of a compliance agreement may be liable to a penalty not to exceed $10,000 (Section 5705, FAC). However, Section 5310, FAC, also provides for a civil penalty of up to $10,000 for anyone who violates Division 4 or any regulation adopted pursuant to that Division (the authorizing statutes, Section 6940-6946 are in

Division 4). Therefore, replacing the term, “compliance agreement” with “program agreement” would not alter the penalty for which a producer of citrus propagative material may be liable.

Additionally, while Section 5705, FAC, provides authority for the director to enter into compliance agreements, there is no authority provided in the FAC to enter into “program agreements”. Therefore, the Department is retaining the term, “compliance agreement” in the regulations.

Comments 1.4, 10.23 and 10.59

The Department continues to use the term “fees” to describe the rates or prices it has set to recover its costs for administration of the program. We request that the Department comply with FAC, Section 6944 by establishing “rates” or “prices” instead of “fees” for the services it renders.

This is a critical issue. Industry representatives called attention to it during the scoping meetings conducted by the Department. Departmental representatives responded that the OAL directed use of the term “fees”. However, Section 6944, FAC, mandates that the Department “*shall issue orders establishing rates or prices* to cover the Department’s costs for its administration, testing, inspection, private laboratory approval and accreditation, and other services under the program established pursuant to this article.” [emphasis added] The citrus industry was very clear on this issue during the two-year long legislative process for SB 140. The OAL could have, but did not take issue with the language during that time period.

Government Code Section 11340.9 provides, “This chapter *does not apply* to any of the following . . . (g) *A regulation that establishes or fixes rates, prices*, or tariffs.” [emphasis added] Furthermore, Government Code Section 11340.1(a) provides: “It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.”

Response to Comment 1.4, 10.23 and 10.59

It is the Department’s understanding that this request is being made because participants would like the Department to have the ability change the fee schedule without being subject to the

requirements of the Administrative Procedures Act (APA) (see Response to15-day comments, Comment 2.26). This issue was raised during the emergency comment period at which time the Department consulted with the reference attorney at the Office of Administrative Law (OAL). His response was, "Despite the statute using the terms rate and price (in addition to fee), what you describe looks like a fee. A fee does not fall within the "rate, price or tariff" exemption. A fee is established by the state agency to be paid by the regulated public "in return for a specific benefit conferred or privilege granted" or "in response to a voluntary decision to develop or to seek other government benefits or privileges." (*California Association of Professional Scientists v. Department of Fish and Game*) (2000) 79 Cal.App.4th 935, 944, 94 Cal.Rptr.2d 535,541.) "A fee . . . funds a regulatory program or compensates for services or benefits provided by the government." (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.*) (2008) 159 Cal.App.4th 841, 854, 71 Cal.Rptr 3rd 642.). The Department is retaining the use of the term "fees".

Elsewhere in their comments, participants have expressed concern over the proposed fee schedule and their ability to monitor the state's use of these funds. However, they seem unaware that, were the fee schedule exempted from the provisions of the APA, the Department would not be required to provide notice to the affected public (them) of any proposed changes in the fees, and they would not have the opportunity to provide comment on fee changes. The provisions of the APA were adopted for the protection of the affected public and to allow them to have input on regulations that would impact them.

The commenter also states that OAL did not take issue with the language during the legislative process for SB 140. The OAL does not review statutes during the legislative process. The OAL's responsibility is to ensure that the provisions of the APA are followed when state agencies and departments *enact regulations.*

Comments 1.5, 3.2 and 6.5

The Department proposed to repeal Sections 3000-3004 pertaining to the Registration and Certification of Citrus Trees. The citrus industry is asking the Department not to repeal the provisions in these sections that provide for the certification of nursery stock as it is simpler to retain regulations than to create entirely new ones.

Response to Comments 1.5, 3.2 and 6.5

The Department had to repeal Sections 3000-3004 as they would have conflicted with or been duplicative of these regulations. The Department completed the rulemaking process to repeal Section 3000-3004, but has also held the first meeting (February 11, 2011) with citrus nurseries to begin developing a voluntary certification program.

Comments 1.6, 4 and 8.12

All references in the regulations to screen openings of 0.3mm should be revised to $0.3mm^2$.

Response to Comment 1.6, 4 and 8.12

The Department concurs with these commenters and has made the requisite changes in the regulations.

Comments 1.7 and 10.3

Defining a breach as any opening of a size larger than $0.3mm^2$ is unenforceable. Such a definition means that a single break in a single strand of a screen constitutes a breach. However, a single break in a single strand is practically undetectable by a visual survey. We recommend that the Department evaluate the minimum amount of screen breakage that can be reliably detected by visual survey and use that as the enforceable definition of a breach. We recommend that the Department evaluate the minimum amount of breakage reliably detected by visual survey as the enforceable definition of a breach.

Response to Comment 1.7 and 10.3

The Department revised the definition of breach to state that it must be a “detectable” opening.

Comment 1.8

Due to previous problems with the reporting of false positive disease test results, we request that the Department include a requirement that the facilities performing the diagnostics include in their protocols a procedure that any positive test result is confirmed using effective diagnostic measures.

Response to Comment 1.8

The Department amended Section 3701.2(b), Department responsibilities, to add that the Department will require a diagnostic facility to include a method of conducting additional diagnostic procedure(s) for any inconclusive or positive test results.

Comments 1.9, 9 and 10.15

We recommend that the Department amend Section 3701.4(a)(2) to require that: "To be eligible for use after January 1, 20102, all rootstock for propagation of registered scion mother trees and registered increase trees shall be maintained . . ."

Response to Comments 1.9, 9 and 10.15

The commenter's concerns centered on the fact that 3701.4(a)(2) would have required that all rootstock be maintained in insect-resistant structures. The Department has deleted that language and revised 3701.4(a)(1) and 3701.4(a)(2) to clearly indicate that it is the rootstock used in the production of mother and/or increase trees that must meet this requirement.

Comment 2

My grandfather started this business in 1930. Some of my employees have been here 60 years. I love growing citrus. It's all I've done for over 50 years. I wanted to see it continue on into more generations. However if the proposed regulations go into effect the way they stand we will have to close our doors. First of all our properties are very hilly and our nursery is laid out in between existing older fruit trees. I don't believe it would be structurally feasible to build these structures and financially it wouldn't be possible either. I know of one other citrus nursery that has already quit and others have said that that they were going to have to quit growing citrus.

It's been my experience that if you're diligent with a good spray program you can control pests and diseases. I would prefer a diligent, aggressive spray program as opposed to screen houses and I think growers should have that option. Another aspect of the screen house that won't work for us is that we would have to leave the doors open all day because of our retail nursery.

I have other questions as to why we are being punished the most. The Department is not being fair to put citrus nurseries under this program when all the groves and backyard citrus, which

outnumber the nurseries, many times don't have to do anything. I'm asking that you reconsider these regulations to make them more fair and practical for the nurseries.

Response to Comment 2

This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comment 3.1

We find serious flaws in the way the Department has amended the Tristeza quarantine. Section 3407(f)(1)(B) authorizes movement of "propagative parts from registered source or registered increase trees that are maintained in departmentally approved insect-resistant structures and that meet the record-keeping requirements in Section 37012.(a)(9). The succeeding subsection 3407(f)(1)(C), on the other hand, authorizes the agricultural commissioner at origin to "issue moving permits for trees produced from buds, cuttings, or scions taken from registered source trees or registered increase trees as described in subsection B, provided that the trees were propagated and continuously maintained within a departmentally approved insect-resistant structure and the commissioner has a caused a record to be kept of each source tree listed in subsection (e)(1), the kind and amount of buds, cuttings, or scions, taken from each source tree . . ."

The Department declares that the additional record-keeping is necessary "to enable the Department to conduct trace-backs and trace-forwards in case a disease is detected in the stock. However, no reason is given for the issuance of moving permits. We do not believe that there is a sound biological or pest risk justification for imposing the more restrictive moving permit and record-keeping requirements on citrus trees. Why do the record-keeping requirements of Section 3701.2(a)(9) not enable trace-backs and trace-forwards? Furthermore, if trace-backs and trace-forwards were needed, wouldn't the same needs exist for citrus propagative stock? The inconsistency and unjustified additional moving permit and record-keeping requirements must be corrected before the Department files the amended regulations with the Office of Administrative Law.

Response to Comment 3.1

The Department does not concur with this comment. The enabling statute limits the authority of the Department to citrus nursery source propagative trees, thus excluding nursery stock from the provisions of the statute. The Citrus Tristeza Virus (CTV) Interior Quarantine governs the movement of material from within areas quarantined for CTV. The Department has determined that nursery source propagative trees that meet the requirements of this program also meet the requirements of the CTV quarantine. However, since nursery stock is exempt, the record-keeping requirements in 3701.2(a)(9) do not apply and the requirements for moving permits for this stock must be retained in the quarantine. The Department met with citrus nursery industry representatives on February 11, 2011 to initiate the process of developing a voluntary certification program for nursery stock. All parties agreed that this voluntary program would be structured to meet the CTV quarantine requirements as well as other quarantines and/or county codes that restrict the movement of citrus nursery stock.

Comment 3.3

While we do understand that the USDA's Asian Citrus Psyllid quarantine restrictions limit the movement of citrus nursery stock to location within areas under quarantine, provisions must be made to allow the movement of citrus nursery stock out of insect-resistant structures located within ACP quarantine areas to non-regulated areas. Otherwise, the hundreds of thousands of dollars spent for the construction, operation and maintenance of such structures cannot be justified.

Response to Comment 3.3

This comment refers to a quarantine regulation and is outside the scope of these regulations.

Comment 4

The document now mentions a minimum 3 mm hole opening. The APHIs document for the interstate movement of citrus uses mm^2 nomenclature. For consistency purposes I believe we should use their wording.

Response to Comment 4

The Department concurs and has made that revision.

Comment 5.1

We would like to thank CDFA for their efforts in trying to protect the California citrus industry from pests and diseases. We would also like to say that overall we support the new regulations and the need for insect resistant structures, as well as testing for new disease threats such as HLB.

Response to Comment 5.1

The Department thanks the commenter for the expression of support.

Comment 5.2

We have been working on establishing both rootstock and scion varieties of citrus in vitro. Our plan is to maintain a germplasm bank of varieties in vitro that would provide a collection of clean mother stock in an environment that we consider more secure than a screenhouse. We want to be able to use the material from the scion varieties we are establishing in vitro for production of budwood. Our concern with the new regulations is that they do not address protocols for production of citrus nursery stock by in vitro propagation methods specifically. We would like to see inclusion of text in the regulations with regards to the use of micropropagation in the production of citrus trees. At the very least we would like to see language in the regulations that would (1) equate a tissue culture facility/laboratory with an insect-resistant structure and (2) wording in the regulations that more specifically equates propagative material maintained in vitro with material maintained in an insect-resistant structure at various stages of production.

Response to Comment 5.2

(1) In Section 3701.5, the Department established a performance standard for insect-resistant structures, rather than mandating the use of specific building materials. Any tissue culture facility/laboratory meeting this performance standard is eligible to be an “insect-resistant structure.”

(2) The Department has amended the regulations to add a definition for “registered mother line” and included that term wherever mother trees are mentioned in the regulations.

Comment 5.3

We had previously submitted comments (via email on 6/9/10 concerning what we feel is inadequate inclusion of micropropagation as a useful, and much cleaner propagation method in the current regulations. While we appreciate your response to our concerns we still feel that the industry would be better served if language covering micropropagation was included in the regulations rather than by issuance of a permit to allow its use. The issuance of a permit, while a workable solution, would still leave a void in the new regulations with regard to a method of propagation that has become common in other crops and which we think will eventually be common in the citrus industry as well. Also, please keep in mind that not only are we looking to micropropagation as a cleaner and much more protective propagation method, we are also looking at it as a method to maintain a citrus germplasm bank that has a much higher level of protection than an insect resistant structure. Which also raises the question of how our currently banked germplasm collection will be incorporated under the new regulations.

Micropropagation is basically equivalent to propagation by cuttings but much cleaner since the plants are maintained in an aseptic environment until they are sent to the green house, or insect resistant structure, to be grown out for production of increase trees or rootstocks. So the level of protection from pests and diseases is much greater during the part of the production process where micropropagation is used. Wording in the regulations that would set equivalency standards between conventionally propagated and micropropagated materials would make things a lot easier as far as determining what material need to be tested, for what disease and how often.

Response to Comment 5.3

The Department has amended the regulations to add a definition for “registered mother line” and included that term wherever mother trees are mentioned in the regulations, and has added a definition for “micro-propagation” (Section 3701(l)) and included the term where appropriate in the regulations. Additionally, the Department amended the regulations to indicate that mother lines are subject to the same testing requirements as mother trees.

Comment 5.4

If material is introduced directly from the Citrus Clonal Protection Program into the *in vitro* process, would the *in vitro* material then be considered a mother tree?

Response to Comment 5.4

The Department has amended the regulations to add a definition for "registered mother line" to clarify the eligibility requirements.

Comment 6.1

Not clear about Section 3701.2, it states that the article be construed liberally. It tries to imply faulty record keeping as if we never had any.

Response to Comment 6.1

The Department does not concur with this comment. "Construed liberally" is part of the language of the enabling statute, not Section 3701.2. Neither does this section refer to previous recordkeeping practices on the part of nursery operators. Instead, it states their responsibilities under the new program.

Comment 6.2

The CDFA needs a protocol and procedure to ensure that safeguards are met in screen houses. The nursery needs to take responsibility to provide safe growing environments for the trees but must not be held to superfluous costly inspections.

Response to Comment 6.2

The Department concurs with this comment and has adopted a performance standard for nurseries to meet and nursery operators will be obliged to sign compliance agreements ensuring that their facility meets this standard.

Comments 6.3 and 8.9

This (Section 3701.7) is a moving target and we must be ready to find a breach of disease incidence. A breach of a screenhouse does not automatically cause a breach of disease.
The provision that allows CDFA to suspend registration of trees if a breach is discovered in an insect-resistant structure must be revised. Just because an opening of $0.3mm^2$ was created, doesn't mean an insect entered the opening. This item should say something about a risk assessment, not just "may be suspended."

Response to Comments 6.3 and 8.9

The Department amended Section 3701.7 to include the risk assessment that the Department will conduct prior to making a decision on its response to any breach in an insect-resistant structure.

Comments 6.4, 6.9, 7.2 and 8.11

How do we know the costs of the CDFA's inspection fees are reasonable? Who will hold them fiscally responsible? The program costs, including the proposed $35 fee for sample collection, are too high and don't represent the real cost to the Department.

Response to Comments 6.4, 6.9, 7.2 and 8.11

Under the previous voluntary program, the Department charged $20/sample collection. This fee covered collecting samples from all registered trees in spring for CTV and collecting samples from 20% of the trees in fall for psorosis and viroids. Under the new program, 100% of the trees will need to be sampled in both spring and fall (CTV in spring and HLB in fall) as well as collecting samples from 20% of the trees in fall for psorosis and viroids. The $35/tree fee was based on this additional workload as well as additional administrative costs that will be incurred in the program, including records inspections, working with nurseries to develop compliance agreements and periodic review of these agreements.

Comment 6.6

Regarding Section 3701.1, why is the Citrus Clonal Protection Program not required to meet the at least the same standards as are citrus nurseries?

Response to Comment 6.6

Section 6941, FAC, specifically excludes any citrus nursery source propagative tree planted, grown or maintained by the Citrus Clonal Protection Program.

Comments 6.7 and 8.6

Once citrus source trees are under protection, it will no longer be necessary to test annually for Tristeza. Trees should only have to be tested every three years for Tristeza.

Response to Comments 6.7 and 8.6

The Department has amended Section 3701.6 to require initial testing for three consecutive years. Thereafter the requirement is that mother trees will be tested at least every three years for Tristeza.

Comments 6.8 and 8.4

What difference does the length of time that a plant is present in a structure make? The vulnerability threat is a function of structure security, not time. 3701.3(b)(5) should be deleted. It is a provision that does not acknowledge the ability of insect resistant structures to work and creates possible undue hardships that are not necessary. If a nursery wants to maintain a tree for a few years without testing it, it should be allowed to do so.

Response to Comment 6.8 and 8.4

The Department amended Section 3701.3 to allow for the maintenance of tree(s) within the structure as long as the tree(s) are tested at least every six years for Tristeza and Huanglongbing.

Comment 7.3

This regulation needs to address enforcement of non-compliant nurseries. Is it possible to include contact information as to who is responsible for investigation and enforcement of the rules for suspected violators of the regulation?

Response to Comment 7.3

This comment is outside the scope of these regulations. However, participants may contact CDFA at any time to report non-compliant nurseries.

Comment 7.4

There should be a mechanism by which the regulation can be changed or amended and still achieve the goal of producing clean plants. For example a track record over time of negative tests may point to increasing the period of time between tests.

Response to Comment 7.4

The regulations may be amended as provided in the Administrative Procedures Act. The Department has amended the testing requirements to provide for decreased testing frequency based on negative test results.

Comment 7.5

It should be remembered that there are other rules and regulations in place to prevent the artificial movement of citrus pests and diseases. SB 140 is just one of many tools in the box.

Response to Comment 7.5

The Department concurs with this comment.

Comment 8.1

Under 3701.2(b) there should be a "responsibility of the department" to insure ALL citrus nursery producers are educated on these regulations.

Response to Comment 8.1

The enabling statute (Sections 6940-6946, FAC) makes no provisions for funding an education component of the program. However, the Department has and will continue to work closely with citrus nursery participants in this program.

Comment 8.2

Under 3701.2(b) there is no commitment of the department to provide inspection resources to insure provisions are enforced. This should be clearly stated.

Response to Comment 8.2

The Department does not concur with this comment. Section 3701.1(d) states that "inspections . . . shall be conducted by the Department."

Comment 8.5

CDFA should furnish a Compliance Agreement instead of assuming each nursery will write up its own.

Response to Comment 8.5

The Department has completed a draft compliance agreement and will assist affected nurseries to put the agreements in place.

Comment 8.7

Huanglongbing (HLB) has a long latency period, during which the disease may not be detectable, so annual testing makes sense only if the disease is established in California. It makes no sense to test for HLB if the disease hasn't been found in California, let alone inside an insect resistant structure in California where trees came directly from CCPP sources and in areas where the vector, ACP, has not been found. A tree should be tested for HLB every three years. If HLB is detected in the area a switch to annual testing can be initiated at that time.

3701.5(d)(1)(B)1. As well as other provisions after it states that trees not tested for CTV or HLB once every three years are "no longer eligible to be in the program." This makes sense in an unprotected setting, but not in a "CDFA approved insect resistant structure". The budwood collections being amassed in screened structures today will be very expensive to keep in registration for the random chance an order will be placed for it. It will be common to drop from re-testing a scion that is out-of-favor for a time. Forcing a nursery to test trees in a protected structure within a specified date needs to be deleted from this protocol. The structure is supposed to work, not be expected to fail. This provision is too onerous and will require more recordkeeping than is necessary. In the past, outdoor trees were allowed back into the program with no restrictions besides passing testing requirements. It doesn't make sense to tighten the requirement with trees grown in a protected structure that originally came from CCPP.

Response to Comment 8.7

The Department amended the HLB testing requirements in Section 3701.6 to allow for decreased frequency of testing in the continued absence of HLB detection in California.

Comment 8.8

Why is January 1, 2013 the date that HLB testing is scheduled to begin? What if HLB is still no further north than Mexico and ACP hasn't moved north of Los Angeles? There should be a way to delay HLB testing if no threat of HLB exists.

Response to Comment 8.8

As this commenter noted in the previous comment, HLB has a long latency period, which means that by the time the existence of HLB is confirmed in California, it could already have had time to spread. Upon the recommendation of representatives from areas where ACP and HLB are established and in consultation with scientists, the Department has determined that testing for HLB should begin as soon as feasible.

Comment 8.10

I don't understand the reasons behind Section 3701.7(c)(5), "trees maintained in insect resistant structure, for which registration has been canceled but which have not tested positive for the diseases listed in Section 3701.6(d), shall be removed by the participant within one month of being notified of the cancellation by the Department." Does the Department assume the trees are in pots, or that one infected tree dooms the whole facility?

Response to Comment 8.10

Section 3701.7(c)(5) has been deleted.

Comments 10.1 and 10.31

Revise Section 3701.2 to require that records be kept on propagative materials "propagated or sold" instead of requiring records on the propagative materials "produced". Many buds or sticks may be cut but not used.

Response to Comments 10.1 and 10.31

The Department has made that amendment in Section 3701.2(a)(9)(B).

Comment 10.4

The additional fees to cover lab costs (Section 3701.8(b)(4)(D)) could easily have been included, since, except for HLB testing, which could be estimated, the other lab costs are all part of our current required and voluntary testing.

Response to Comment 10.4

The Department does not concur with this comment. During the meetings held with nursery industry representatives, they indicated to the Department that it was important to build

flexibility into the regulations whenever possible, including the possibility of selecting alternate diagnostic facilities on short notice if need be to perform the necessary diagnostics. Should the testing fees for the diagnostic facilities currently being used be stated in the regulations, it could prevent the Department from choosing an alternate facility should the need arise. The Administrative Procedures Act does not allow for an estimated fee to be put in regulation.

Comment 10.5

The costs for construction presented may represent basic structural material costs, but are grossly underestimated for a finished structure. Actual cost will realistically be twice as much, when permitting, land prep, construction, equipping and other costs associated with having a structure operational are considered.

Response to Comment 10.5

The Department does not concur with this comment. As required by Government Code, Section 11346.5, the Department included in the notice a description of all cost impacts known to the Department at the time the notice was submitted to the OAL.

Comment 10.6

CDFA states that these regulatory actions will not eliminate jobs or businesses within California or affect the expansion of businesses currently doing business in California. There is compelling and widely available evidence that everywhere else in the world where these kind of citrus nursery regulations have been enacted, the number of nurseries that continue in business dramatically decreases and that nursery operations are seriously affected.

Response to Comment 10.6

The Department does not concur with this statement. It is not the establishment of this type of regulation that dramatically decreases the number of nurseries. Rather, it is the impact that the establishment of ACP and HLB, particularly the latter, has in an area that seriously impacts the ability of a citrus nursery to continue its operations.

Comment 10.7

The citrus nursery industry included the urgency statute clause into the bill not because of disease concerns, which we felt would be adequately dealt with by the regulations and efforts by growers, but because of our concerns that the Department would not enact the regulation in a timely manner. HLB is a serious, but not necessarily immediate concern. Current nursery regulations, grower efforts and the ACP eradication programs can afford us enough time to establish a citrus nursery industry advisory committee to help formulate much more effective and reasonable regulations.

Response to Comment 10.7

The Department adopted these regulations as an emergency action for the reasons set forth in the finding of emergency filed with the OAL on May 6, 2010.

Comment 10.8

In August of 2005 the citrus nursery industry began an exhaustive effort including public and industry meetings, industry wide review and consensus and labored two years to develop a set of draft regulations that were presented to the Department with the hope we could complete a final set of mandatory regulations. We exhausted every means at both our and the growers disposal to get the Department to implement a mandatory program. We approached Senator Corbett only because the Department insisted they needed legislative authority to enable making our proposed regulations mandatory. Scoping meetings were scheduled by the Department in spring 2009 to assure them that the draft regulations we presented to them were actually the will of the industry. Input from those meetings thoroughly validated that they were. Discussions did continue at the workshop, but there was never any prior indication that our draft regulation proposal would be abandoned and that we would be excluded from direct discussion and participation in the actual writing of the regulations, once SB 140 was passed.

Response to Comment 10.8

This is a general objection to the adoption of these regulations. The regulations were adopted as an emergency action for the reasons set forth in the finding of emergency filed with the Office of Administrative Law on May 6, 2010. The Department is continuing with the adoption and plans to complete the rulemaking for the reasons set forth in the initial and final statements of reasons.

Comment 10.9

FAC, Section 6940 states that the article only applies to "citrus nursery source propagative trees". The Department, by including anything but mother trees in these regulations has violated both the intent and the wording of the enabling legislation. A nursery source propagative tree by definition means a tree that can be traced back individually to an identifiable source. Buds cut from increase trees cannot be traced back to individual trees. Traditionally, the concept and definition of source tree in the industry has referred to mother trees. Increase trees were never considered or referred to as source trees. The Department affirms this in their own definitions. Note that 3701(p) makes no indication that a registered increase tree is source material yet clearly defines (q) Registered scion mother tree "as a source of vegetative propagating material".

Response to Comment 10.9

While Section 6940, FAC, states that the "article shall apply only to citrus nursery source propagative trees, Section 6941(c)(1) states that it shall apply to "anyone who, by any method of propagation, produces any citrus nursery stock". Furthermore, Section 3701(p) clearly indicates that an increase tree is a source of propagative material when it defines a registered increase tree as "a citrus tree propagated . . .for the purpose of rapidly producing budwood". The Department is unaware of a "definition of a source tree in the industry [referring] to a mother tree". The regulations governing the voluntary registration and certification program for citrus, Section 3000, et. seq., (effective 7/9/62 and repealed effective 5/17/10) did not include a definition for "nursery source propagative tree" but did include a definition for "registered increase stock" to mean, "propagating material from a nursery increase block", indicating that nursery increase blocks were considered citrus nursery source propagative trees for many years.

Comments 10.12, 10.26, 10.39 and 10.58

By requiring testing nursery stock, the Department is clearly exceeding the authority of SB 140.

Response to Comments 10.12, 10.26, 10.39 and 10.58

The Department's requirements for testing nursery stock apply only when that stock is maintained within the same structure as registered material. Section 6941, FAC, states that the Department shall establish a program "to protect citrus nursery source propagative trees from harmful diseases, pests, and other risks and threats." The Department has determined that this

provides authority for the Department to regulate any and all materials maintained within the same structures as citrus nursery source propagative trees.

Comment 10.14

Citrus nurseries certainly do not minimize the threat of ACP and HLB. However, the Department has seriously minimized the costs and effects these regulations will have on current citrus nurseries. We are being pressed immediately into business busting facilities and exorbitantly expensive testing or a disease that has not been found any closer than nearly 1000 miles away. We cannot be sure this mandatory testing will reliably find disease in samples from our trees at this point. Certainly we should prepare for HLB and other disease of concern. But nurseries must not be regulated out of business or face unjustifiable procedures and be subjected to expenses for no good effect. Remember we initiated the progression to a mandatory program to protect our nursery stock. But we wanted a program that was effective, efficient, and feasible. We included provisions to ensure for that in the SB 140 legislation, but that is certainly not what is presented here.

Response to Comment 10.14

This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comments 10.16 and 10.45

In Section 3701.5(b)(2), strike “0.3 mm in size”. Replace with performance standard to exclude targeted pests.

There are many approaches to screen meshes, not all being square, so that a particular screen size requirement of $0.3mm^2$ may not serve the intended purpose. The Department has moved away from prescriptive standards in all other instances (for screenhouses) but now they have moved back to a prescriptive standard in this instance.

In Section 3701.5(b)(2), strike “0.3 mm in size”. Replace with performance standard to exclude targeted pests.

Response to Comments 10.16 and 10.45

The Department concurs that "0.3 mm squared" is a prescriptive, not a performance standard and has revised 3701.5(b)(2) accordingly.

Comments 10.17, 10.37 and 10.46

The protocols for HLB sampling in California conditions have not yet been developed. Without these protocols there is low confidence that one can reliably detect HLB infections. Until the tools are developed it is premature to require a test that does not meet a reliable standard.

In Section 3701.3(a)(2) and in 3701.6(d), strike " Huanglongbing". FAC 6942(a) and (b) requires that the testing and protocols and the proven efficiency and effectiveness of disease diagnostics, economic feasibility and practicality must have been developed.

Response to Comments 10.17, 10.37 and 10.46

The Department continues to work with the nursery industry and scientists to optimize the testing protocols. However, current testing methods are reliable when infected material is sampled.

Comment 10.18

(a) How will we be able to monitor or challenge the accredited status of a facility? We have had numerous problems in the past with reliability of testing and test results performed by the Department. Recent problems with CDFA lab testing included erroneous reporting of both false negatives and false positives.

(b) The Department continues to resist adopting the tissue printing technique, even though our own independent testing using this technique has been able to correctly contradict CDFA official testing on both false negatives and false positives. Under the new mandatory program, the Department will have more control over the testing procedures.

(c)The Department is also opposing confirmatory testing of any positive result, proposing only 48 hours for removal of any trees with the first positive results. I have seen no evidence that the Department can dependably provide accurate, reliable and verifiable regulatory testing. The regulations must provide nurseries the means to monitor and a voice in selecting the testing agencies.

Response to Comment 10.18

(a) Section 6943, FAC provides authority for the Department to designate diagnostic facilities. It does not provide authority for the participants to "monitor or challenge" the accreditation status of these facilities. The Department does not concur that there have been numerous problems with the reliability of testing in the past. In 2010, 7,500 trees were tested for CTV and there were 14 positives (0.19%). In 2009, 4,081 trees were tested with 6 (or 0.15%) testing positive. In 2008, 2,370 trees were tested and 18 (0.76%) were positive. In 2007, 3,697 trees were tested and 4 (0.11%) were positive. These numbers are similar to the results from previous years. In the last five years, the Department is aware of one CTV test out of the 18,067 tests performed which resulted in a false negative.

(b) As of February 22, 2011, the Department has not received a formal request from the industry, including supporting data, to adopt the tissue printing technique.

(c) The Department has added subsections (5), (6) and (7) in Section 3701.2 (b) to address participant's concerns about inconclusive and positive test results. Section 6943, FAC, provides authority for the Department, not the participants to monitor and/or select testing agencies.

Comments 10.19 and 10.52

Visual inspections could be a reason to run a test, but should never be grounds for suspension. In Section 3701.7(a)(1), strike "or visual inspection."

Response to Comments 10.19 and 10.52

The Department intends to retain this language. Visual inspections may indicate the presence of a disease. Therefore, the tree could be suspended while testing is conducted.

Comments 10.20 and 10.54

Breach, as defined by the Department, should not be ground for suspension or cancellation (Section 3701.7). In Section 3701.7(a)(6), add "substantial" before breach.

Response to Comments 10.20 and 10.54

The Department has revised the definition of a breach and amended the regulations to add a description of the risk assessment procedure the Department will follow when making a determination to suspend or cancel registration as a result of a breach.

Comment 10.21

Most of the criteria listed for cancellation or refusal should only be criteria for suspension. As written, all mother trees could be canceled or refused registration when, at the time of regular registration testing, any one mother tree tests positive, or when any tree in any structure containing mother or increase trees tests positive. This is not how our registration testing program is supposed to operate. Certainly, if a tree and its progeny are tested positive that would be grounds for cancelation, but the other provisions in this section should only apply to the possibility of suspension.

Response to Comment 10.21

The Department has amended the regulations to add a description of the risk assessment procedure the Department will follow when making a determination to suspend or cancel registration.

Comment 10.22

Appropriate confirmatory testing must be built into the regulatory protocols and trees must never be subject to removal without confirmation.

Response to Comment 10.22

The Department has amended the regulations to add provisions for conducting additional testing when a diagnostic facility reports an inconclusive or positive test result, or at the request of the participant.

Comment 10.25

If nursery trees remain subject to these regulations, a statistical sampling method must be developed for testing these trees. A single test before 36 months, based on a statistical sample, should be sufficient.

Response to Comment 10.25

The Department has amended Section 3701.3 to allow nursery trees to remain in an insect-resistant structure for up to six years with no testing required.

Comment 10.27

The definition for CCPP in Section 3701 is not accurate

Response to Comment 10.27

The Department concurs with this comment and has amended the definition for CCPP.

Comment 10.28

In Section 3701, strike "Department tag number" and replace with "registration number". Much less confusing and there are many instances in these regulations where "Department tag number", "tag number" and "registration number" are mixed.

Response to Comment 10.28

The Department concurs with this comment and the regulations have been amended to make the suggested changes.

Comment 10.30

In Section 3701.2(a)(8), provide reference for "when no longer eligible to be in the program"

Response to Comment 10.30

Section 3701.2(a)(8) has been revised to read, "when no longer eligible to be maintained within the structure."

Comment 10.32

In Section 3701.2(a)(9), strike "number" (in reference to units of propagative material) and replace with "quantity" to eliminate confusion with registration number.

Response to Comment 10.32

The Department has made that revision.

Comment 10.33

In Section 3701.2(a)(9)(B), define "vegetative propagative material" or clarify that seed and rootstock cannot be identified by registration number. "Propagative materials" is defined and includes seed.

Response to Comment 10.33

Seed trees have been deleted from this section. Within the plant industry, "vegetative reproduction", is a term that indicates asexual reproduction and clearly does not include seeds.

Comment 10.34

In Section 3701.2(a)(9)(C), strike "or seed tree".

Response to Comment 10.34

The entirety of Section 3701.2(a)(9)(C) has been struck.

Comment 10.35

In Section 3701.2(a)(13), add "significant" before breach. Alternatively strike all text and include in "program agreement" instead.

Response to Comment 10.35

3701.2(a)(13) has been deleted.

Comments 10.36 and 10.60

In Section 3701.2(b), add (as authorized by FAC 6941(c)(2):

1. "Provide assurances of accuracy of test results including performing appropriate confirmatory retesting."
2. "Provide timetable for timely reporting of test results."
3. "Provide appropriate and annual training of staff members performing functions specified in these regulations."
4. "Provide annual audit of costs associated with the program."

Response to Comments 10.36 and 10.60

The Department does not concur with this commenters' interpretation of FAC, Section 6941(c)(2). The text of Section 6941(c)(2) states that the program shall include establishing "inspection requirements and testing standards, including retesting and other measures to ensure the accuracy and timeliness of test results."

1. The Department has amended Section 3701.2(b) to address conducting additional diagnostic procedures for any samples for which the results are inconclusive or positive. Furthermore, the diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.
2. The Department has amended Section 3701.2(b) to provide a time frame for reporting test results to participants.
3. Training requirements are not addressed Section 6941, FAC, or elsewhere in the enabling statute. However, the Department does provide training to staff in all of its programs.
4. The enabling statute for the Citrus Nursery Stock Pest Cleanliness Program, Sections 6940-6946, FAC, contains no provisions for an annual audit of the program.

Comment 10.38

In Section 3701.3(b)(2), retain "scion mother or". There are two different circumstances. 3701.3(a)(4) is for changing the variety of a mother tree. This requirement refers to increase trees where a registered scion mother tree would be topworked to rapidly produce increase budwood, and later may or may not be re-registered as a mother tree.

Response to Comment 10.38

The Department has amended Section 3701.3(b)(2) to allow mother trees to be topworked to establish an increase tree.

Comment 10.40

Strike text in Section 3701.4(a)(2). SB140 clearly does not extend CDFA's authority to testing and regulation of rootstock.

Response to Comment 10.40

Section 3701.4(a)(2) has been struck.

Comment 10.42

In Section 3701.4(c)(3)(D), add "plan" to read "Participant's response plan to structural breach.

Response to Comment 10.42

Section 3701.4 (c)(3) states that the compliance agreement shall include a plan developed by the participant. One of the elements of the plan is the participant's response to a structural breach.

Comment 10.43

In Section 3701.4(c)(3)(H), strike this provision as it is not part of a plan and is already covered in 3701.6(d)(3)(g).

Response to Comment 10.43

Section 3701.4(c)(3)(H) has been deleted.

Comment 10.44

In Section 3701.5(b), strike "to exclude vectors of citrus diseases." Replace with specific vectors.

Response to Comment 10.44

The Department amended the regulations to add this definition, "target vector" means an insect vector of Tristeza or Huanglongbing. Wherever appropriate, "target vector" has been substituted for "vector" in the regulations.

Comment 10.47

In Section 3701.6(d)(2)(B), rewrite text so testing seed trees for viroids is not more rigorous than for scion trees.

Response to Comment 10.47

Section 3701.6(d)(2)(B) has been deleted.

Comment 10.49

In Section 3701.6(d)(3), retain sample schedule. Table remains valid for testing that may need to be performed within any protected structure. Correct “number of plants to sample” to “up to 95” and “up to “155.

Response to Comment 10.49

The sample schedule was deleted because, with the deletion of increase tree lots, the sample schedule is no longer used in the regulations. This does not prohibit the Department from using such a sampling schedule should additional testing of any material within an insect-resistant structure be necessary.

Comment 10.50

In Section 3701.6(d)(3)(f), add, “to registration program participants directly and” in front of “on Department’s web site”.

Response to Comment 10.50

Section 3701.6(d)(3)(f) has been renumbered and is now Section 3701.6(d)(3)(h) and has been amended so that participants will be notified as requested.

Comment 10.51

In Section 3701.6(d)(3)(g), strike “shall” and replace with “may” and strike “compliance agreement and replace with “program agreement”.

Response to Comment 10.51

The first part of this comment is referring to the statement, “Each participant shall be subject to an annual inspection of the following . . .” The Department does not concur with the suggested amendment as annual inspections are an integral part of the program.

The Department is retaining the use of the term “compliance agreement” for the reasons set forth in response to comments 1.3, et al.

Comment 10.55

In Section 3701.7(b), strike all except (2) and (4). (b)(3)(5) and (6) should remain only in subsection (a).

Response to Comment 10.55

The Department does not concur with this comment. Section 3701.7(b) provides for the cancellation or refusal of registration and the Department would consider all of the factors in this section when conducting a risk assessment prior to making a decision.

Comment 10.56

In Section 3701.7(b)(1), strike "or any citrus tree(s) within the same structure." As written, if one registered tree tests positive then all of your registered trees in the structure, even though they tested negative, may be canceled or refused registration. That is not how the program is supposed to operate.

Response to Comment 10.56

That text has been struck.

Comment 10.57

In Section 3701.7(c)(6), add "All positive test results must have appropriate confirming positive test, before they are reported as positives."

Response to Comment 10.57

The Department has amended Section 3701.1(b) to require that laboratory protocols provide for additional testing whenever a test results in an inconclusive or a positive.

Comment 10.62

If extending bud cutting with a single test after three years for a maximum of five years, retain fee of $40 per annual lot, but strike "shall be $4 per increase or nursery tree" and add, "sampling to be based on schedule in 3701.6(d)(3)".

Response to Comment 10.62

This section has been deleted and increase trees are now allowed to be used for a period of up to four years with no additional testing.

Comment 10.63

Add provision for immediately establishing an advisory committee of citrus nursery persons, researchers, and growers, for developing and writing regulations and producing components of this program.

Response to Comment 10.63

The Department has and will continue to work with the nursery industry, growers, researchers and scientists as this program evolves. However, the enabling statute, Section 6911-6946, FAC, does not provide for or require the Department to establish an advisory committee.

Comment 10.64

Add provision for allowing for alternative or suspension of testing when capacity for required testing is not available.

Response to Comment 10.64

The Department included phase-in periods for some of the testing requirements in order to ensure that testing capacity would be sufficient and has added a provision in Section 3701.2(b)(11) for issuing permits exempting researchers and others from meeting the requirements of the regulations.

Comment 10.65

Add provision for enforcement and penalties. 3701.1(b), destruction of trees in violation may not be enough deterrent for flagrant and repeated violators.

Response to Comment 10.65

The enabling statute for this program does not provide authority for enforcement or penalties. However, existing law (Section 5310, FAC), provides for a civil penalty of up to $10,000 for anyone who violates Division 4 (the authorizing statute, Sections 6940-6946 are in Division 4) or any regulation adopted pursuant to that Division.

Comment 10.66

Add provision for exemptions for departmentally approved research.

Response to Comment 10.66

The Department amended Section 3701.2(b) to allow for the issuance of special permits by the Department.

Comment 10.67

Add provision for trueness to type. The Department has "construed liberally" other components and this is something the industry both wants and need to protect source and propagative materials, especially in light of growing mother trees in protected structures and longer terms for cutting increase buds.

Response to Comment 10.67

While the Department concurs that trueness to type is a concern to nursery operators and their customers, the intent of SB 140 was to establish a pest cleanliness program for citrus nursery source propagative trees, not a certified nursery stock program. However, the Department held an initial meeting with nursery representatives on February 11, 2011 to begin developing a voluntary program for certifying citrus nursery stock. This certification program could address trueness to type issues.

Comment 11

We support the regulations as amended and agree with CDFA's proposal to continue the regulations and complete the adoption process. Of immediate concern is the presence of the Asian Citrus Psyllid (ACP) and the potential for this pest to transmit the deadly Huanglongbing (HLB), which is now present on the west coast of Mexico south of California. When HLB infects a citrus tree, the tree dies and there is no known cure. HLB is spread by ACP moving it from tree to tree after it feed on an infected host. It is believed that dissemination of HLB throughout Florida was accelerated by the movement of infected nursery stock.

A healthy sustainable citrus industry is dependent upon growers' assurance that the trees they receive from the nursery are of good quality and free from pest and disease.

We appreciate the effort CDFA has made to include the industry in the rule making process and believe these regulations, as currently amended, reflect that cooperation.

Response to Comment 11

The Department concurs with this response and appreciates the expression of support.

Summary and Response to Comments Received During the Public Hearing held on September 15, 2010

Comment 1.1

We'd like to thank CDFA for their efforts in trying to protect the California citrus industry from pests and diseases and the efforts they are making in this direction. Overall, we support the new regulations, the need for insect-resistant structures as well as testing for new diseases such as HLB.

Response to Comment 1.1

The Department thanks the commenter for the expression of support.

Comment 1.2

To us, putting citrus varieties in vitro seems to be a much cleaner way to propagate. We want to use the in vitro varieties for producing citrus nursery stock. Our concern with the new regulations is that they do not address protocols for producing nursery stock by this method. We would like to have more inclusion in the text itself addressing micro propagation.

Response to Comment 1.2

See 45-day comments, Comment 5.3 and response.

Comment 1.3

We made a switch this year and the lines used for rootstock production are being kept in vitro and have registration numbers assigned by CDFA. We would like to see this as an accepted method of production of citrus trees in the regulations.

Response to Comment 1.3

The Department has added definitions for "micropropagation" and "registered mother line" and inserted those terms where appropriate in the regulation text.

Comment 1.4
We would like to see more detail in the regulations as to how micropropagation would be equivalent to different stages of the production process.

Response to Comment 1.4
The Department has added definitions for “micropropagation” and “registered mother line” and inserted those terms where appropriate in the regulation text.

Comment 2.1
There was heavy presence from the political group, California Citrus Mutual, and the California Citrus Research Board Citrus Improvement Program, which is a grower-based, stated-mandated program. Along with scientists who have no stake in the industry, but who are solicited for scientific evidence, and an emergency was declared and the CDFA agreed to a potential threat of Huanglongbing entering into our industry.

Many descriptions of our circumstances were used for influence and decisions and were surmised for the opinions of these groups. Protocols were written for the future plans based on other countries’ situations and on the threat to the California citrus industry due to the presence of the Asian citrus psyllid. I understand the outcome of potential threat of Diaphorina citri and its potential to spread HLB. It’s a real threat, and we need in the California citrus nursery industry to protect against this disastrous disease. We should be thankful for an industry that has foresight to circumvent such - - some of the serious outcomes that took place in citrus industries where the disease showed up and there was no foresight or control or regulation previous to that.

Response to Comment 2.1
This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comment 2.2
There should be a mandatory program to protect the citrus industry in the future through clean citrus stock, pest detection, disease detection and prevention of spread if the disease is ever here.

Response to Comment 2.2
Protecting the citrus industry is the specific purpose of the mandatory program required by these regulations. With the exception of HLB, all of the diseases for which testing is required are

already know to occur in the State. Because of the long latency period of HLB and the presence of the ACP in the state, the Department has determined that the most effective way to combat the entrance and/or spread of HLB in citrus nursery stock is to commence testing nursery propagative materials as soon as possible.

Comment 2.3

Senator Corbett had no idea of the ramification of Senate Bill 140 when he introduced it and he never participated in a citrus and nursery meeting to find out what he was introducing. Certainly, industry leader who had self-interest and not the interest of the California citrus nursery industry had the bill passed. And the influence was very strong from the California Citrus Mutual and Citrus Research Board again, without them thinking about the ramifications.

Response to Comment 2.3

This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons. Furthermore, the Department consulted with citrus nursery operators during the rulemaking process. The Department did not consult with California Citrus Mutual or the Citrus Research Board during this process.

Comment 2.4

Looking at the emergency bill, the CDFA capitulated to the irregularities of the reasoning of the bill. The bill should be dismissed, and we need to rewrite a more reasonable outcome.

Response to Comment 2.4

Revising the requirements of the bill would require an act by the legislature and is outside the scope of these regulations.

Comment 2.5

The intent and proposed sections of regulations are not wrong and most clearly needed. The major contention is the costs and relative responsibilities. Clearly, the CDFA has no idea of the costs from an industry perspective, but place their responsibilities on what appears to be a department profit motive by comparison to private industry. It’s always a problem we have. The laboratory and labor charges are inflated and not responsible. Fiscal responsibility is very imperative to make a program work. This fiscal responsibility emanates from screen house

inspections to disease testing to taking samples to dissemination of results and all on reasonable time frame. The CDFA's track record is not good at present. Now we are in an emergency mode, and we know from the press and earlier examples the government has a right to charge even more and then appear to make it transparent and not admitting to responsibility.

Response to Comment 2.5

The department does not concur with this comment. Under the previous voluntary program, the Department charged $20/sample collection. This fee covered collecting samples from all registered trees in spring for CTV and collecting samples from 20% of the trees in fall for psorosis and viroids. Under the new program, 100% of the trees will need to be sampled in both spring and fall (CTV in spring and HLB in fall) as well as collecting samples from 20% of the trees in fall for psorosis and viroids. The $35/tree fee was based on this additional workload as well as additional administrative costs that will be incurred in the program, including records inspections, working with nurseries to develop compliance agreements and periodic review of these agreements,

Comment 2.6

The effect of HLB on citrus in other countries has been horrible and we need to protect ourselves from the nasty occurrence. Okay, let's build safe propagation houses. No one's disagreeing. We believe insect resistant structures are the answer. No opposition from the industry. Now the department must regulate all the noncompliant propagators. Will there be fines for the violators? Will the department send out investigators to seal the backyard propagators who were either not informed or claim to have no knowledge of the new regulations? When does voluntary become mandatory? If no presence of disease appears in California, can the regulations be enforced?

Response to Comment 2.6

The enabling statute for this program does not provide authority for enforcement or penalties. However, existing law (Section 5310, FAC), provides for a civil penalty of up to $10,000 for anyone who violates Division 4 (the authorizing statute, Sections 6940-6946 are in Division 4) or any regulation adopted pursuant to that Division. The department can put any propagative material on hold that is produced out of compliance with these regulations and can fine illegal propagators per FAC Section 5310. The mandatory program became effective with the emergency adoption of the regulations on May 17, 2010. With the exception of HLB, all of the

diseases covered in the regulations are known to occur in the State, and, yes, the regulations will be enforced even in the continued absence of HLB.

Comment 2.7
Not clear about Section 3701.2, it states that the article be construed liberally. It tries to imply faulty record keeping as if we never had any.

Response to Comment 2.7
The Department does not concur with this comment. "Construed liberally" is part of the language of the enabling statute, not Section 3701.2. Neither does this section refer to previous recordkeeping practices on the part of nursery operators. Instead, it states their responsibilities under the new program.

Comment 2.8
Section 3701.5. The CDFA needs a protocol and procedure that ensures the safeguards are met in screenhouses. This is paramount to the whole project implied. Without the exclusion of the pest, we do not have exclusion of the disease unless it is not present. The fiscal responsibility of this matter will need attention and must be written so that threatening occasions are reported. The nursery needs responsibility to provide safe growing environments for the trees, but let's not be held to superfluous costly inspection. Intention of inspection needs to be clear and more liberal.

Response to Comment 2.8
The Department concurs with this comment and has adopted a performance standard for nurseries to meet, and nursery operators will be obliged to sign compliance agreements ensuring that their facility meets this standard. The intention of Departmental inspections is to ensure compliance with the requirements of the program.

Comment 2.9
Section 3701.7. This is a moving target and we must be ready to find a breach of disease incident. A breach of a screen house does not automatically cause a breach of disease. As we know in all law, there are not perfections, but attempts to control the highest percentage of chance. If this is the intent, let's look at a method that does not shut down a nursery, but includes a solution. The onerous is not on the nursery, but on the supposition of the industry. We should

start this new paradigm with clean industry mother stock, but this may take time, which we have as the disease is not yet here.

Response to Comment 2.9
The Department has amended the section to include the components of a risk analysis to be performed by the Department prior to requiring additional testing, taking action in response to a breach or suspending or canceling registration of trees.

Comment 2.10
Section 3701(a). How do we know the costs of the CDFA's inspection fees are reasonable? We do know that they are more expensive than private enterprise. Who will hold them fiscally responsible? The cost should be precise and truthful with flexibility if the program changes.

Response to Comment 2.10
Under the previous voluntary program, the Department charged $20/sample collection. This fee covered collecting samples from all registered trees in spring for CTV and collecting samples from 20% of the trees in fall for psorosis and viroids. Under the new program, 100% of the trees will need to be sampled in both spring and fall (CTV in spring and HLB in fall) as well as collecting samples from 20% of the trees in fall for psorosis and viroids. The $35/tree fee was based on this additional workload as well as additional administrative costs that will be incurred in the program, including records inspections, working with nurseries to develop compliance agreements and periodic review of these agreements.

Comment 2.11
Sections 3000 – 3006. Registration and certification of citrus trees. It's time to have only one category, either certified, registered, tested. Doesn't matter. We should have one category of nursery stock and give it a title and go on with it. Let's set the requirements and live with a single propagation standard. The rule is so strenuous that we should not be bothered with two definitions.

Response to Comment 2.11
Mother trees, seed trees, increase trees and mother lines are all covered by these regulations and all may eligible to be registered sources. Certification of nursery stock is outside the scope of these regulations.

Comment 2.12
Use or misuse of opinions of the workshop may be one sided, and the best provincial is the users of the program. The consolidation was good and married by dialog, but then the opinions of outside industries have swayed the direction in the writing of the regulation. The nursery industry understands the ramification of this disease and is willing to take steps to prevent the spread of its horrible effects. We on the other hand should not be required to take measures greater than the need of prevention, certainly not greater than the actual or real cost of sampling, testing and reporting.

Response to Comment 2.12
The Department has amended the regulations to provide phase-in periods for disease testing and also to reduce the sampling frequency based on test results – both of these measures were adopted to provide cost savings to the nursery industry.

Comment 2.13
How is the Citrus Clonal Protection Program not required to at least meet our standards? They should at least meet the minimum standards. It is certain that they have the abilities to achieve this high level and higher, but by law they should not be excluded to the minimum requirements.

Response to Comment 2.13
Section 6941, FAC, specifically excludes any citrus nursery source propagative tree planted, grown or maintained by the Citrus Clonal Protection Program.

Comment 2.14
The department may allow other labs to meet similar requirements, but they are not listed and most likely will not be endorsed. With only one guard in the industry, costs can and usually do become larger than if competition is allowed.

Response to Comment 2.14
The Department does not concur with this comment. Other laboratories specifically listed in Section 3701.6 include The Central California Tristeza Eradication Agency, The Jerry Dimittman Laboratory and the Department. In addition, other laboratories that are certified by the United States Department of Agriculture may be eligible.

Comment 3.1
The regulations are putting a lot of added costs to our industry. We all agree that an indoor system is the way to go to protect the grower industry, but there continue to be efforts to add more cots to that. And we're not a big industry. We are relatively small, very hardworking, and we're putting probably most of our profits into these structures. Thankfully, we're having good years to do this, but we don't know when that will end. And they continue to add more costs via regulations and such.

Response to Comment 3.1
The Department considered costs associated with disease-testing and construction of insect-resistant structures and built in phase-in periods for both, adopted a performance, rather than a prescriptive standard for the structures, and provided for decreased frequency of testing once a history of negative results is established in a structure.

Comment 4.1
There have been efforts going back to the late '90s that the citrus nursery industry has been working with these regulations. In August of 2005, we made earnest efforts to amend the voluntary registration program and make it mandatory. We spent two years developing regulations, which we presented to the department in July of 2007. Unfortunately, the process ground to a halt as the department insisted they needed legislative authority to make our proposed regulations mandatory. We were unsuccessful in convincing them otherwise. Later, it was understood that we would write the enabling legislation, which is SB140 so the department could then proceed with making our proposed regulations mandatory. There were last minute changes to SB140 engineered outside the influence and participation of citrus nurseries.

SB140 was enacted with an urgency clause, not because of disease concerns, which we felt would be adequately dealt with by the regulations themselves and the efforts of growers, but because of our concerns that the department would not enact our regulations in a timely manner. After all, our effort had sat for two years as the department insisted on the legislation.

We started this process to impose stricter regulations on ourselves. We had the expertise and experience to devise appropriate regulations and sought out the department to help us formalize an effective set of regulations. However, once the legislation was enacted, the department,

contrary to all previous assurances, abandoned our draft of the regulations and completely shut nurseries out of the actual process of writing the regulations.

A quote from the department: We do not intend to discuss the contents of the draft regulations or our opinion of the extent of our authority under Food and Ag Code Section 6940 through 6946. We will not accept any further input, comments or suggestions regarding the contents of the draft regulation, end quote.

The department proceeded to write regulations that went far beyond both the letter and intent of the legislation. The problems inherent in these regulations stem from the department trying to write regulations on their own with no direct knowledge or true understanding of how citrus nurseries operate.

The scoping meetings which the department felt met their need for industry input and insight into nursery operation instead just highlighted how little the department understood about the processes involved in growing citrus nursery trees. Each subsequent revision only added new problems, complications and expenses without justification.

Response to Comment 4.1
This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comment 4.2
These regulations should not be permitted to exceed the authority legally granted by the legislation. Only the elements of these regulations pertaining to mother trees should be allowed. All other authority claimed in these regulations is baseless.

Response to Comment 4.2
While Section 6940, FAC, states that the "article shall apply only to citrus nursery source propagative trees, Section 6941(c)(1) states that it shall apply to "anyone who, by any method of propagation, produces any citrus nursery stock". Furthermore, Section 3701(p) clearly indicates that an increase tree is a source of propagative material when it defines a registered increase tree as "a citrus tree propagated . . .for the purpose of rapidly producing budwood". The Department is unaware of a "definition of a source tree in the industry [referring] to a mother tree". The

regulations governing the voluntary registration and certification program for citrus, Section 3000, et. seq., (effective 7/9/62 and repealed effective 5/17/10) did not include a definition for "nursery source propagative tree" but did include a definition for "registered increase stock" to mean, "propagating material from a nursery increase block", indicating that nursery increase blocks were considered citrus nursery source propagative trees for many years.

The Department's requirements for testing nursery stock apply only when that stock is maintained within the same structure as registered material. Section 6941, FAC, states that the Department shall establish a program "to protect citrus nursery source propagative trees from harmful diseases, pests, and other risks and threats." The Department has determined that this provides authority for the Department to regulate any and all materials maintained within the same structures as citrus nursery source propagative trees.

Comment 4.3

Drop the urgency. The threat of new diseases is serious, but not immediate. We must not compromise the quality of the regulations that are so potentially overwhelming in expense and implication. We must not adhere to a rush timetable to push through a set of regulations that is a disservice to the entire California citrus industry and will create chaos in the effect and enforcement.

Response to Comment 4.3

This is a general objection to the adoption of these regulations. The regulations were adopted as an emergency action for the reasons set forth in the finding of emergency filed with the Office of Administrative Law on May 6, 2010. The Department is continuing with the adoption and plans to complete the rulemaking for the reasons set forth in the initial and final statements of reasons.

Comment 4.4

Most importantly, appoint an industry-led advisory panel of nursery representatives, researchers and growers approved by the secretary to cooperatively fashion reasonable, reliable and effective regulations. The citrus nursery industry can very competently nominate advisor through the well-represented industry trade group, the California Citrus Society and the California Citrus Nursery Board. The California Citrus Nursery Board is actually a CDFA administrative marketing board whose members are already approved by the secretary and whose charter includes, and I quote:

“The board is hereby authorized to carry on or support a program of variety improvement and ensure the continued freedom of citrus nursery stock from pathologically harmful viruses and other economically undesirable citrus diseases and mutations. The board may assist or otherwise support citrus registration and certification programs.”

Response to Comment 4.4

The Department has and will continue to work with the nursery industry, growers, researchers and scientists as this program evolves. However, the enabling statute, Section 6911-6946, FAC, neither provides for, nor requires the Department to establish an advisory committee.

Comment 4.5

We need to reject the seriously flawed, overreaching effort and utilize our able and experienced resources to produce a proper, effective and feasible document as intended by SB140, the California citrus nursery and, hopefully, by the department as well.

Response to Comment 4.5

This is a general objection to the adoption of these regulations. The regulations were adopted as an emergency action for the reasons set forth in the finding of emergency filed with the Office of Administrative Law on May 6, 2010. The Department is continuing with the adoption and plans to complete the rulemaking for the reasons set forth in the initial and final statements of reasons.

Comment 5.1

The point in Section 3701.4(a)(2) regarding rootstock is vague and undefined. The way - - the use of rootstock in this regulation could - - it is overreaching and could go into production. And what I understood with this regulation was only to deal with propagated material. It’s overreaching to require that rootstock be housed inside a protective structure. A lot of nurseries have made screenhouses for propagated material, it makes it maybe unfeasible if they have to include the production of rootstock inside that facility.

Response to Comment 5.1

The Department has amended this section so that the requirements for rootstock to be maintained in insect-resistant structures apply only to rootstock used in the production of mother or increase trees.

Comment 6.1

These regulations were initially established because growers and nursery men from California went over to Florida to see the devastation that occurred due to HLB and ACP in Florida, and these regulations were pretty much started because of the HLB disease in Florida and what could happen in California. However, in California I think we're very far ahead of the curve as far as the disease and the disease progression.

My need today is to express the need for flexibility and some of the rules and regulations as to allowing nurseries to make their own decisions as to how much protection they want to take for themselves, allowing them to make cost decisions which in turn affect the cost of trees, which in turn affect what growers are going to pay for these tree. That if you allow us some flexibility as to whether HLB or ACP is not in a certain area or certain region, some of the nurseries can be able to control their costs a little bit better. Disease regulations do increase costs to growing trees in general, which will affect the price that growers have to pay.

My suggestion today is to allow use the flexibility as to whether or not there is ACP or HLB in a certain region or area before you put these regulations in place. Yes, they need to be set up and ready to go in case there is a problem, but you don't need to enforce them to the total letter. Let the nurseries decide what they want to do, how many trees they want to keep under screen. Let them take the risk.

Response to Comment 6.1

Subsequent to adopting the regulations as an emergency action, the Department has made extensive changes based on input from the affected industry. The Department has built in some flexibility which will result in lower costs to nurserymen include provisions for decreasing testing frequency after a history of negative test results has been established and establishing a performance, rather than a prescriptive standard, for insect-resistant structures. Wherever possible, the Department has striven to address the concerns of the affected industry relative to costs of the program while at the same time developing a disease-testing program sufficiently rigorous to protect California's citrus industry.

The Department does not concur with the recommendation to wait until HLB is detected before enforcing the requirements of the program. In Florida, ACP was detected seven years prior to the

first detection of HLB. Unfortunately, HLB had spread throughout the citrus producing regions of the state by then.

Comment 7.1

California Citrus Nursery Society identified eight items in the proposed regulations on which we commented in writing. These were:

1. Deletion of the definition of registered increase tree lot and all references to it
2. Defining what is meant by accreditation of testing entities
3. Use of the term, “compliance agreement
4. Use of the term, ”fees”, rather than “prices”
5. Deletion of the voluntary certification program
6. Defining the maximum opening in a protective structure as .3 mm
7. The handling of false positives, and
8. Clarifying the inclusion of rootstock in Section 3701.4(a)(2)

In the interest of time, I will only speak to two of these items. The first is the concept of a registered increase tree lot. The proposed regulation deletes the definition of a registered increase tree lot and all reference to it. The registered increase tree lot allows for a statistical sampling, which we believe is a better approach than 100 percent sampling. The problem of the concept of a registered increase tree lot is in getting a workable definition. We assembled a group of citrus nursery people to develop a workable concept, and ask that the department consider our proposal.

Highlights of our concept are that all of the increase trees of all varieties propagated in the calendar year would be assigned to a single lot corresponding to that year. The trees would remain a member of its lot until, (1) the end of the fifth calendar year when the lot would expire, or (2), the tree is registered as a scion mother tree, or (3) the tree is physically removed from the nursery premises. The number of trees to be sampled from a lot would be calculated based on the number of trees in the lot at the time of sampling.

Response to Comment 7.1

The Department amended the regulations to allow increase trees to be used as propagative sources for up to four years with no testing. Therefore, there was no need to retain the use of statistical sampling for increase trees. This does not prevent the Department from using a statistical sampling method should additional testing of any trees be required.

Comment 7.2

The other item is the handling of false positives. Recognized false positives have occurred in the past and have created problems. We request that the department require that testing entities use testing protocols that include procedures to ensure false positives are not reported. Such procedures could include confirmation testing of all positive results.

Concern has been expressed that focusing on false positives ignores the possibility of false negatives and that both false positives and false negatives must be treated equally. However, the frequency of false negatives and false positives depends on the baseline prevalence, that is, how prevalent is the disease.

Let me give an example to illustrate. Let's say that 10,000 trees are tested for a disease each year. To keep it simple, let's say that the false positive and false negative rates for this test are .1%, that is, 1, in 1,000. Further the prevalence of the disease among registered citrus trees is also .1%. So in a typical year, 10 trees, that is, 10, in 10,000, will actually have the disease and 9,990 will not have the disease. Of those 9,990 trees without the disease, 1, in 1,000 will yield positive results. So that's 1, in 1,000 false positives, or 10 false positives. Of the 10 trees that actually have the disease, 1in 1,000 will yield negative results, that is, about once every 100 years, there will be a false negative.

Response to Comment 7.2

The Department amended Section 3701.2(b), Department responsibilities, to add that the Department will require a diagnostic facility to include a method of conducting additional diagnostic procedure(s) for any inconclusive or positive test results.

Comment 8.1

One of the things that came up during the scoping meetings was that the changes to Section 3407, which has to do with interest phase of interior quarantine allowed for propagating the parts to be moved if they met the requirements of the new regulation. Industry indicated that same provision should be made for citrus trees. And there were a number of arguments for that. Number one, when you have increase trees, which are part of the production process in nurseries, those trees will inside protective structures. And those trees typically are not just thrown away once they're no longer being used as increase tress for purposes of collecting propagated stock. Instead, they're more commonly sold. And so you will have trees inside of structures that meet the requirements and no reason why those trees shouldn't be free to move under 3407 just as the propagated stocks are.

The Department made the change to allow for that; however, they did a couple of things. Number one, if trees are involved, they said that there are recordkeeping requirements that have to be met. And that's not a major argument except that it seems that they could have done with that change the same thing that they did with respect to the propagated parts, and that is to say that the recordkeeping requirements are the same as those in the new regs at 3701.2(a)(9), because they're not really that different.

But the more onerous part of what was done is that even thought the recordkeeping requirements are being met and all other requirements of the new regulations are being met, they're sill requiring that a moving permit be issued. And it doesn't make sense that you don't have moving permit requirements for propagated parts, which are typically sold in much higher quantities than finished trees and moved around than you would for that. And risk-wise, there's no risk factor involved that would justify a moving permit either.

The Department argues that they need the records, but the moving permits seem unnecessary. You heard a lot of comments today already about the cost of the program. Agricultural commissioners (who issue the moving permits) are authorized to charge for their services. And they typically will charge a fee for the permit, including time and mileage. That's another cost factor that if it isn't absolutely necessary, there is no biological reason.

Response to Comment 8.1

The Department does not concur with this comment. The proposed regulations provide for a phase-in period until January 1, 2013 for increase trees to meet the requirement to be grown in insect-resistant structures. Until that time, there is no way to differentiate between field-grown and structure-grown increase trees once they have left the premises. Therefore, it is necessary to retain the moving permit requirements in Section 3407. Once all increase trees are grown in insect-resistant structures, Section 3407 may be amended accordingly.

Comment 9.1

Generally speaking, the regulations reflect the degree of concern that the citrus industry has been dealing with ever since the trip to Florida – that there is a serious threat to the industry. And there is no argument that I have that there is a serious threat to the industry. But what the regulations reflect is that it's not just a threat; it's actually a practical problem that we must do direct response to. I have no problem with that if the threat is real. I do have a problem doing it if it's just a threat.

The nursery industry is responding to the threat from an economic standpoint. We are all making decisions based upon our own risk assessments as to whether it's important for us to protect our mother stock. We're also making decisions that are based upon what these pending regulations are. But where I think we have a disconnect is that the structures that we're building that are being used to be, quoting, they're approved insect-resistant structures, when you read the regulations, it almost seems like those structures don't exist from the standpoint of how we maintain the stuff that's inside those structures. It was mentioned earlier about the tests still having to be done on an annual basis as we've been doing with trees grown in an outdoor environment. Annual testing isn't necessary when trees are grown in protective structures.

Response to Comment 9.1

The Department has amended the regulations to provide phase-in periods for disease testing and also to reduce the sampling frequency once a history of negative test results within a structure is established.

Comment 9.2

We’re also being told that we have to start testing for HLB by a certain date. HLB is not known to exist in California at this time. And the vector that moves it is under quarantine in Southern California. I don’t see a point why Tulare County or any other county that doesn’t have ACP would be required to test for the disease that as far as anybody knows is not even in California yet. I have no problem with it once the disease threat is real and the disease threat is around citrus-growing areas.

Response to Comment 9.2

The Department does not concur with this comment. Because of the long latency period of HLB and the presence of the ACP in the state, the Department has determined that the most effective way to combat the entrance and/or spread of HLB in citrus nursery stock is to commence testing nursery propagative materials as soon as possible.

Comment 9.2

There is a kind of a weakness in the regulations as to what the CDFA’s responsibilities are. The department should also be responsible to ensure that all citrus nursery producers are educated on this regulation. There are a number of people that are not in this room that will not know about the rules and regulations, and they may not even be on a mailing list. There needs to be an effort and understanding at the CDFA level that it’s not just about the people that are part of the process; it’s also the people that are outside the process that need to be aware of what is going on.

Response to Comment 9.2

The enabling statute (Sections 6940-6946, FAC) makes no provisions for funding an education component of the program. However, the Department has and will continue to work closely with citrus nursery participants in this program. Additionally, the Department has worked closely with the California Citrus Nursery Society to ensure that all affected parties would be notified of the proposed program.

Comment 9.3

There's nothing in the regulations that - - there's no commitment on the department to provide inspection resources to ensure provision are enforced. That should be a responsibility of the department. In Florida they have a whole group of people that inspect once a month. I don't have confidence going forward that the state is willing to go through some procedure so that adequate inspection is required, whether it's yearly or bimonthly, or every six months.

Response to Comment 9.3

The Department does not concur with this comment. Section 3701.1(d) states that "inspections . . . shall be conducted by the Department."

Comment 9.4

There is no doubt in my mind that the people at CDFA do their very best with the resources available to them. I have great respect for all of the people that I've interfaced with. But the very weakness of some of our programs that are related to that enormous job puts us at economic difficulty. For example, CTV testing in 2010 was done in April. I didn't get test results until July. As far as I'm aware, CTV tests oftentimes can be finished within a matter of a few weeks, and sometimes if you're using different types of testing, you can actually get it within 24 hours. That difficulty in processing data and getting it to us going forward with more and more tests and things like that. There has to be some commitment on that turnaround and that capability to be able to do it.

Response to Comment 9.4

The Department has amended Section 3701.2(b)(4) to state that a responsibility of the Department is to, "Release results of disease tests to participants within 5 business days of receiving final test results from the facility performing the diagnostics."

Comment 9.5

I think that the regulations are overly complex. I think that the Citrus Nursery Society was doing their best to point out that the nursery increase lot element had kind of gotten chewed on back and forth. The lack of nursery input is likely the result of this difficulty in trying to work with what they had. I believe that there's a lot of stuff that can be dealt with a lot more simply. When

there's an inspector on the ground doing inspections, he can assess on the ground what the circumstances are. He can look at the nursery increase lots, and he's given authority to do a stat survey. There is no need for record keeping. It's just the fact that the opportunity to do statistical survey of nursery increase blocks needs to be extended is in the regulation, and we don't have to go through all this record keeping to try to identify where they are.

And what precedent do I have for that? Currently, there is no requirement in our existing system for where my nursery increase blocks area. A few years ago there was a shortage of Tango budwood and we wanted to extend the cutting period for the budwood by getting extra texting. CDFA complied, and the testing was done on a case-by-case decision. It was a stat survey, it wasn't every single tree. I think that the effort to be so precise in these regulations about things that are very complex has made the regulations overly complex. A more active approach with experts in this industry that have spent 20 years working with these regulations in trying to make them work within a voluntary program and also for the fact that we were trying to make a mandatory program from our own efforts, that experience could have been incorporated more in this regulatory process, and it has now created a more difficult problem for us to deal with because those regulations are not - - we've kind of gotten off the farm and some of the rules.

Response to Comment 9.5

The Department does not concur with this comment. When additional testing was done in the Tango increase trees, each tree was sampled and the samples were composited, four trees per sample. The remainder of the comment is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comment 9.6

I understand that the regulations have to include pricing elements. I also understand that sometime you're putting in language here that tries to cover all bases. For example, there's an item that says fees paid for services that are not rendered shall be refunded. I'm not so sure that I have a great deal of confidence that that would ever happen. We're providing the labor collecting the samples and we're paying the laboratory for the testing. All we're talking about is CDFA providing a supervisor to come to the field to ensure that the crews are doing their job right. I'm

not really sure why we have to charge $35 a sample. And when you're dealing with a nursery that may have 200 samples that you're going to provide and they're going to pull them in today and we're going to provide six or seven people to process it quickly, I don't see the point in saying that it's going to cost $35. Saying "up to $35" makes a lot more sense. The Department has normally been fairly cooperative in making sure that these costs are not onerous, and we just want to make sure that that same spirit of cooperation continues with this industry so we don't have unfair fees that would cause us to raise tree prices to ridiculous levels.

Response to Comment 9.6

Under the previous voluntary program, the Department charged $20/sample collection. This fee covered collecting samples from all registered trees in spring for CTV and collecting samples from 20% of the trees in fall for psorosis and viroids. Under the new program, 100% of the trees will need to be sampled in both spring and fall (CTV in spring and HLB in fall) as well as collecting samples from 20% of the trees in fall for psorosis and viroids. The $35/tree fee was based on this additional workload as well as additional administrative costs that will be incurred in the program, including records inspections, working with nurseries to develop compliance agreements and periodic review of these agreements.

Comment 9.7

Currently, we don't have an emergency. The disease is moving through Mexico, although major efforts with the Mexican government and the United States government and the State of California is planning on having a fire fight at the border to try to keep that disease from coming in. And with our success cooperating with the State of California, with the citrus industry and others, we've had great success in fighting battles with diseases and pests, whether it be measured in fruit fly or whether I be the Pierce's disease with grapes that is caused by the glassy-winged sharpshooter, whether it be the Huanglongbing virus which we put off in California as a threat to our industry for probably two generations longer than the rest of the world. We're going to be able to achieve a lot of delaying tactics for this disease. What you don't want to do is enforce regulations on nurseries that are not timed with the presence of a disease threat. And the legislation that's in place is there as a preventative measure, and we need to make sure the regulations reflect the preventative nature of this threat. We want to be prepared, but we don't need to be moving quicker that we need to. Nurseries will move as quickly as they can

economically do it, and if we are in a situation like Florida where the disease is already there and spread around, it's a different situation. It's not the same situation as us. We have a whole different world here, and we actually have a range of mountains that protects the Central Valley from other disease problems, and we need to be aware of those facts and look at the history of what we've done in the past and recognize that we can survive under different circumstances. My hope is that we will not be in such a hurry and also make these regulations conform to the circumstances of the present, not what we think it will be.

Response to Comment 9.7

Because of the long latency period of HLB and the presence of the ACP in the state, the Department has determined that the most effective way to combat the entrance and/or spread of HLB in citrus nursery stock is to commence testing nursery propagative materials as soon as possible. However, the Department has amended the regulations to provide phase-in periods for disease testing, to reduce the sampling frequency based on test results, and for when trees are required to be maintained within insect-resistant structures.

Comment 10.1

My concern is about the wording in Section 3701.5 which talks about the structures. It mentions that the insect exclusion screen or nonpermeable cover shall cover the entire structure with no openings larger than .3 millimeters in size. I think that may be a typographical error. I believe it should say 3 millimeters square and not 3 millimeters in size. This has already been changed on the APHIS document for interstate movement of citrus. Currently, most of the growers are using a 50 mesh or another product by LS that is a 41 x 43 mesh. Both of those would fit within another criteria of 3 mm^2. The problem is that there hasn't been exact testing to see what size netting should be used. The testing couldn't be done in California. It would have to be done at a place where the pest is endemic like Florida or Texas.

There's a big gap before we get to the next type of netting. There's only one structure we built that I know of that's a passive structure in California that uses thrip netting (basically a 75 mesh)) which is a lot finer and it has a lot less airflow. That's the Lemon Cove Research Station. They have a structure that's very tall, about 4 feet taller than most structures in California. They've added additional fans to help draw the air out of the house, but still it seem to be a house

that 10 degrees warmer than any of these other houses that we've built. So thrip netting is not normally used on passive houses.

Response to Comment 10.1

The Department has revised 3701.5(b)(2) and deleted the mesh-size specifications.

Summary and Response to Comments Received During the Public Hearing held on September 17, 2010

Comment 1

I hope that we can postpone any rulemaking on anything but the mother trees at this particular time to give us more time to work out the particulars of increase trees and to study structures further.

Response to Comment 1

This is a general objection to the adoption of these regulations and the Department is proceeding for the reasons set forth in the finding of emergency and initial statement of reasons.

Comment 2

We know that it's very important to get the mother trees and all that under screened-in enclosure to keep everything safe. We would appreciate if there's a possibility that there could be an extension on having all the increase trees under enclosures, especially until possibly the disease gets closer. It's a huge expense.

Response to Comment 2

HLB has a long latency period, which means that by the time the existence of HLB is confirmed in California, it could already have had time to spread. Upon the recommendation of representatives from areas where ACP and HLB are established and in consultation with scientists, the Department has determined that requiring propagative materials to be grown under screen is essential in order to provide a source of clean material to citrus producers.

Summary and Response to Comments Received During the Period (January 14 – January 29, 2011) the Modified Text was Available to the Public

Comments not included and/or responded to were outside the scope of this rulemaking.

Comment 1

The presence of ACP and the potential for this pest to transmit HLB is of immediate concern to the commercial citrus industry. When HLB infects a citrus tree the tree dies and presently, there is no known cure. It is believed that dissemination of HLB throughout Florida was accelerated by the movement of infected nursery stock. A healthy sustainable citrus industry is dependent upon growers' assurance that the trees they receive from the nursery are of good quality and free from pest and disease. We are appreciative of the effort CDFA has made to work with the industry in the rulemaking process to develop regulations that are applicable and that satisfy the intent of SB 140. We believe that the proposed regulations, with the January 11, 2011 text modifications accomplishes this goal and the rulemaking process should now be concluded and the regulations implemented without further delay.

Response to Comment 1

The Department concurs with this comment and thanks the commenter for the expression of support.

Comment 2.1

I support all of (Commenter #3's) recommendations for the accuracy and reliability of testing and diagnostic procedures. Regulatory testing must be accurate, reliable and verifiable. The Department must dependably provide this.

Response to Comment 2.1

The diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate. Additionally, Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comment 2.2

The regulations must provide nurseries the means to monitor and a voice in selecting the testing agencies.

Response to Comment 2.2

Section 6943, Food and Agricultural Code (FAC), provides authority for the Department, not the participants, to select and monitor diagnostic facilities. This does not preclude the Department from consulting with participants in the selection of diagnostic facilities.

Comments 2.3, 2.26, 3.6 and 3.45

Substitute the following for the text of Section 3701.7 as it is "more clear and concise":

(a) **Refusal—**The Department may refuse:

(1) Any application that is not properly completed and that is not accompanied by payment of the required prices.

(2) To register any tree that is determined not to be in compliance with these regulations.

(b) **Cancellation and suspension**

(1) The registration of any tree(s) may be cancelled as specified in this subsection whenever the Department determines that the risk of pathogen infection and spread is unacceptable and that such risk cannot or will not be mitigated to the degree that is required to protect California's citrus industry.

(2) Suspension is an enforcement measure that is intended to mitigate risk until such time as appropriate risk mitigation measure can be taken. The detection of visual symptoms of a regulated citrus disease may trigger investigation and testing of source citrus tree(s) or mother line(s), or any citrus tree(s) maintained within the same structure that could lead to suspension. The Department may suspend or cancel the registration and use of any source tree(s), including increase tree(s) and mother line(s), when it determines that:

(A) A registered tree or the propagative material that was used to produce it is infected by a pathogenic agent targeted by these regulations; or

(B) The requirements of these regulations have not been met; or

(C) The pest cleanliness requirements for nursery stock in Title 3, Division 4, Section 3060.2 of California Code of Regulations have not been met; or

(D) The integrity of the protective structure in which the trees were planted and

maintained is compromised by a non-design opening in the physical structure of a protective structure that would allow the entry of insects that transmit regulated citrus pathogens and for which corrective measures were not undertaken as quickly as practicable; or

(E) The participant is not complying with his or her departmentally approved performance agreement.

(c) **Disposition of suspended or cancelled trees and/or propagative materials.**

(1) Suspended trees shall be clearly identified and not moved, chemically treated with an Insecticide to prevent acquisition of a potential pathogen; and

(2) Records shall be maintained by the participant for all suspended trees; and

(3) Suspended trees may be retained in the planting or protective structure while risk is being evaluated and appropriate risk mitigation measures are being taken.

(4) Propagative materials may be collected but not used, sold, or distributed for any purpose while testing is in progress to determine whether they are infected by any regulated pathogen.

(5) Trees for which registration is cancelled due to infection with a regulated pathogen shall not be used as propagative source trees. Trees infected with pathogens that can be spread mechanically or spread by insect vectors shall be removed from any planting or protective structure.

(d) **Reinstatement of suspended trees.**

(1) Registration of suspended trees and/or propagative materials may be reinstated if the Department determines that the suspension is no longer necessary. The Department may use testing and/or inspections to make this determination.

(2) Registration may be reinstated for a registered tree that is determined to be negative for regulated pathogens, without regard to whether it was produced using propagative materials from a source that was determined to be positive for a regulated pathogen.

(3) Trees for which registration has been cancelled due to the presence of a regulated, transmissible pathogen or disorder shall be removed by the participant from a protective structure within two working days.”

Response to Comments 2.3, 3.6 and 3.45

The Department does not concur that the proposed language is more clear and concise than that proposed by the Department and is proceeding with the adoption of this section for the reasons set forth in the initial statement of reasons and as proposed during the 15-day comment period.

Phrases such as, “risk of pathogen infection and spread is unacceptable”, “such risk cannot or will not be mitigated” and “corrective measures were not undertaken as quickly as practicable” are open to interpretation and do not meet APA standards of clarity. The proposed text, “Suspension is an enforcement measure that is intended to mitigate risk until such time as appropriate risk mitigation measure can be taken. The detection of visual symptoms of a regulated citrus disease may trigger investigation and testing of source citrus tree(s) or mother line(s), or any citrus tree(s) maintained within the same structure that could lead to suspension.” is explanatory in nature and better suited to a statement of reasons, instead of regulation text.

Additionally, in response to industry requests at the meeting held December 1, 2010, the Department amended this section to include the elements of a risk assessment to be performed by the Department prior to suspending or cancelling the registration of any tree or mother line. In this proposal, the risk assessment has been deleted.

Comments 2.4, 2.17, 3.1 and 3.9 and 3.21

3701.1(c) - Breach. If it refers to an opening then it should remain a performance and not a prescriptive standard and simply state "Any easily detectible, inadvertent opening that is large enough to allow the entry of targeted vectors". Or better, define breach as "Actual occurrence of targeted vector or disease detected inside a protected structure."

The current definition for breach is impractical. Regulations regarding protective structures should be more risk and results oriented than prescriptive. The purpose is to exclude aphid vectors if the Citrus Tristeza Virus and psyllid vectors of Huanglongbing. A breach of a structure’s screening material might or might not compromise the integrity of the structure sufficient to readily allow the entry of a targeted insect vector. A relatively small reach left uncorrected for several days or weeks would not necessarily result in the entry of a target vector.

Years of Florida experience, where insect and disease pressure are high, demonstrates that protective structures perform well even when significant breaches occur.

The regulations require that participants develop performance agreements for their protective structures. These agreements will contain the operational activities and procedures that deal with breaches, insect exclusion, monitoring, corrective measures, maintenance, etc. We believe our recommended definition of breach as meaning "any non-design opening in the physical structure of a protective structure that can be readily detected by visual inspection and which is large enough to allow the entry of insects that transmit regulated citrus pathogens," will enhance our ability to comply with performance standards for insect-resistant structures.

Amend Section 3701.2(a)(13) as follows: ". . . within ~~24 hours~~ three business days of the discovery of a breach ~~in~~ that compromises the integrity of an insect resistant structure as to the exclusion of target vectors.

Response to Comments 2.4, 2.17, 3.1 and 3.9 and 3.21

The Department is retaining the definition of "breach" as proposed in the 15-day comment period. However, the Department has deleted Section 3701.2(a)(13) of the regulations that requires participants to notify the Department within 24 hours of detecting a breach.

Comment 2.5

3701.2 (a)(9)(A)&(B) - Define "vegetative propagative material" or clarify that seed and rootstock cannot be identified by registration number. "Propagative materials" is defined and includes seed.

Response to Comment 2.5

Seed trees have been deleted from this section. Within the plant industry, "vegetative reproduction", is a commonly used term that indicates asexual reproduction and clearly does not include seeds. Since rootstock is grown from seed, it is also excluded from being identified by registration number.

Comment 2.6

3701.2 (a)(13) - change 24 hours to "3 business days". Incorporate new language to require reporting of significant breach only when it truly compromises the integrity of the structure and/or results in actual detection of targeted pest. Breach as defined in these proposed regulations as, 0.3mm sq opening, we would expect to be common, but very unlikely to pose an immediate threat, therefore a 24 hour notification is excessive. It would be better to handle routine or non substantial breaches as a log in the program agreements

Response to Comment 2.6

Section 3701.2(a)(13) has been deleted.

Comment 2.7

3701.2 (b)(3) - Department has 30 days to process applications and requests for records but (a)(9) nurseries have only 5 days to provide records. Need to adjust timeframes to be close to equivalent. I would suggest 10 business days for both.

Response to Comment 2.7

Section 3701.2(b)(3) has been revised to allow the Department 10 business days for processing applications. However, the Department is retaining the 5-day requirement for nurseries to provide records. Should a disease be detected in propagative material, it is important for the Department to move as expeditiously as possible to conduct trace backs and trace forwards to halt the movement of potentially infected material.

Comment 2.8

3701.2 (b)(4) - strike "10 business days" and replace with "5 business days". It is not unreasonable to expect the Department to release results within a single business week. It is essential to provide testing results quickly, especially now with new constraints and rigorous requirements of growing in structures and having trees that have never been tested before.

Response to Comment 2.8

The Department concurs with this comment and has revised Section 3701.2(b)(4) accordingly.

Comment 2.9

3701.2 (b)(5)&(6) - strike "Request" replace with "Require"

Response to Comment 2.9

This section has been amended as suggested.

Comment 2.10

3701.2 (b) (6)&(7) - add "within 24 hours for " in front of "… positive trees results". Of all the time requirements proposed in these regulations the one that should require an immediate response is reporting a positive find to the participant. Allowing the Department 8 days (3 plus 3 business days) to report what is a 100% significant problem, is not advisable.

Response to Comment 2.10

Since it's entirely possible that staff may be absent when the Department is notified of positive test results, requiring a 24-hour turnaround is not feasible. The previous voluntary citrus registration and certification program was in place for 48 years without this short time frame for reporting disease results. The Department intends to retain the language as proposed in the 15-day comment period but will make every effort to provide positive results to participants sooner than the 3-days allowed whenever possible.

Comment 2.11

3701.2 (b)(10) - This is inconsistent with 3701.7 where (a) (4) talks about suspension for "suspected of being diseased" and (b) (4) cancellation where "also determined to be diseased". The terminology in 3701.2 of "highly likely" should not be used.

Response to Comment 2.11

The Department concurs with this comment and has deleted "or are highly likely to be infected because the source tree tested positive for disease using tests prescribed in Section 3701.6" from this section.

Comments 2.12, 3.3 and 3.22

3701.2 (b) - add to Responsibilities of the Department. As authorized by 6941(c)(2):
Add "Provide assurances of accuracy of test results"

Add "Provide appropriate and annual training of staff members performing functions specified in these regulations"
Add "Provide annual analysis of costs associated with the program"
Add "Department will develop and require timetables for testing protocols"

Amend Section 3701.2(b) to add, “Maintain and make available for annual review by September 30 of each calendar year the records of all departmental costs associated with its administration of this program during each fiscal year ending June 30.

Program participants have vested interests in prices, the accuracy and timeliness of testing performed by diagnostic facilities, and the reporting of test results. We believe the Department has corresponding responsibilities regarding these functions. Our recommended revisions include an annual review of the department’s costs for administering the program. We understand that the Department is reluctant to include a requirement for such a review. However, members of our industry are very concerned about how the Department uses the funds the participants will pay into the program and request that the Department reconsider provisions for an annual review.

Response to Comments 2.12 and 3.3 and 3.22

The Department does not concur with this commenter’s interpretation of FAC, Section 6941(c)(2). Section 6941(c)(2) provides that the program shall include establishing “inspection requirements and testing standards, including retesting and other measures to ensure the accuracy and timeliness of test results.”

To ensure the accuracy of testing, the Department has amended Section 3701.2(b) to add that the Department will require that diagnostic facilities include in their protocols a method for conducting additional diagnostic procedures for any samples for which the results are inconclusive or positive. Furthermore, the diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department “may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis.” These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Training requirements are not addressed in the enabling statute. However, the Department does provide training to staff in all of its programs.

The enabling statute for the Citrus Nursery Stock Pest Cleanliness Program does not provide for an annual cost analysis of the program, nor does it require the Department to develop and require timetables for testing protocols. What it does require is that the fees for the program be sufficient to cover the Department's costs and that the Department "establish . . . measures to ensure the . . . timeliness of test results. The Department established the fee schedule based upon its estimation of program costs, and Section 3701(b)(6) and (7) establishes time frames within which the diagnostic facility will report inconclusive or positive test results to the Department and within which the Department will relay this information to the participant. The Department has also established in regulation a time frame for reporting all of the test results to participants (Section 3701.2(b)(4)).

Comments 2.13 and 3.27

3701.3 (a)(3) - insert "derived from" between "…been propagated using scion materials obtained from," and "or tested by CCPP…". Somewhere along the line in these drafts we have lost the derived from or traceable from CCPP sources.

Response to Comments 2.13 and 3.27

The Department intends to retain the language as proposed in the 15-day comment period. The term, "derived from" lacks specificity and could be interpreted to mean that mother trees could be created from nursery stock, as long as the nursery stock was "derived from" CCPP material.

Comments 2.14 and 3.28

3701.3 (b)(2) - Strike "increase". I am not aware of anyone ever proposing that we should topwork an increase tree. Doesn't really make sense. This provision is supposed to provide for topworking a registered tree to use for rapid production of increase buds. With limited space inside structures for source trees we need the flexibility to use registered trees for rapid multiplication of increase buds especially for newly released varieties.

Response to Comments 2.14 and 3.28

The Department has revised Section 3701.3(b)(2) to allow mother trees, instead of increase trees, to be topworked to produce a registered increase tree.

Comments 2.15 and 3.29

3701.3 (b)(4) - strike "four calendar years including the year of propagation" and replace with " four years from date of propagation". This is a very big deal. We need to use "for a period of 4 years from date of propagation", NOT " four calendar years including the year of propagation". The standard has always been from date of propagation so this shouldn't be any new burden for the Department and nurseries must keep the propagation date for required records anyway. Going into structures means we have a very restricted amount of space to produce increase buds and we will need maximum flexibility in order to produce sufficient increase buds. We will have all sorts of challenges with timing of budwood, reduced ability to cut and store dormant buds and a long learning curve on how to accomplish the most efficient year round bud cutting which will likely require complex integrated budding, pruning and bud cutting. Basing it on an arbitrary calendar year will significantly diminish our ability to produce sufficient increase budwood in an already challenging and restrictive environment.

Response to Comments 2.15 and 3.29

The Department concurs with this comment and Section 3701.3(b)(4) has been revised accordingly.

Comments 2.16 and 3.4

3701.4 - Strike all occurrences of "compliance agreement" and replace with "program agreement", here and in all instances in these relations. Compliance agreements have always been specific mandated regulations which can include severe civil and/or criminal penalties. The proposal here is for separate agreements, developed and submitted by the individual nursery utilizing Department guidelines. Noncompliance with these agreements still has severe implications but should not be confused with true compliance agreements.

Response to Comments 2.16 and 3.4

The Department does not concur with this comment. See 45-day comments 1.3, 10.2 and 10.29, 10.41, 10.51 and 10.53 and response.

Comment 2.18

3701.4 (c)(3)(H) - Strike this provision as it is not a performance standard and is already covered in 3701.6(i).

Response to Comment 2.18

The Department concurs with this comment and has deleted Section 3701.4(c)(3)(H).

Comments 2.19, 3.7 and 3.33

3701.5(b) - strike "propagation structures" and replace with "insect resistant structures"

Response to Comments 2.19, 3.7 and 3.33

The Department concurs with these comments has revised this section accordingly.

Comment 2.20

3701.5 (b)(1) - strike "insects" replace with "target vectors"

Response to Comment 2.20

The Department concurs with this comment and has revised Section 3701.5(b)(1) accordingly.

Comment 2.21

3701.5(b)(2) - strike this entirely. Even the title of this section is "Performance Standard" yet the 0.3mm sq screen size is a prescriptive standard. We can't even be assured that the covering industry can or will meet this standard just for us. (b) and (b)(1) are sufficient for the requirement.

Response to Comment 2.21

The Department concurs that “0.3 mm squared” is a prescriptive, not a performance standard and has revised 3701.5(b)(2) accordingly.

Comments 2.22 and 3.39

3701.6 (d)(1)(B) - strike "detected" replace with "established". HLB has already been detected in California in intercepted materials. Also, a detection in a tree without ACP in the area, that is quickly eradicated, should not invoke the extra testing.

Response to Comments 2.22 and 3.39

The Department does not concur with this comment. The words detection and interception have specific meanings in quarantine actions. HLB has not been “detected” in the state but was “intercepted” on a shipment of curry leaves from outside of the United States. Because of the long latency period of HLB and the presence of the ACP in the state, the Department has determined that the most effective way to combat the entrance and/or spread of HLB in citrus nursery stock is to commence testing nursery propagative materials at elevated frequencies if HLB is detected in the state.

Comment 2.23 and 3.42

3701.6 (e) - Unclear on any Department required additional testing. Need to clarify requirement and include risk analysis for determining need for additional testing and provide for statistical sampling when a need for testing is determined.

Response to Comments 2.23 and 3.42

The Department has amended this section to include the elements of the risk assessment to be performed before additional testing would be required. The Department would then make a decision on the rate of sampling required based on the results of the risk assessment.

Comment 2.24

3701.6(f) - strike "may" and replace with "shall". Add "At the request of the affected participant, the Department shall require confirming test of any tree with a positive test result by an approved testing facility of the participant's choice.

Response to Comment 2.24

The Department is retaining “may”. The enabling statute provides authority for the Department, not the participant, to establish testing standards, including retesting and selection of testing facilities.

Comments 2.25 and 3.45

3701.6 (h) - insert "notify all participants in the program and" after "Department shall"
Can not realistically expect participants to know when changes are made without directly informing them. After all it is only a few dozen participants.

Response to Comments 2.25 and 3.45

The Department has amended Section 3701.6(h) to include notifying program participants.

Comment 2.27

3701.8 (a)(2)(F) - strike "increase and/or nursery trees".

Response to Comment 2.27

This comment refers to required information about number of trees to be tested on the application form. There are instances in the regulations where increase and/or nursery trees could be subject to testing requirements. In those instances, the participant would need to include the number of such trees on the application. Section 6941, FAC, states that the Department shall establish a program “to protect citrus nursery source propagative trees from harmful diseases, pests, and other risks and threats.” The Department has determined that this provides authority to regulate any and all materials maintained within the same structures as citrus nursery source propagative trees.

Comments 2.28, 3.7

Replace all occurrences of "fee(s)" with "price(s)". 6944 authorizes establishing rates or prices. We need to correctly define terms on how we pay for services so that they are easily modifiable. There are many new and dynamic components to the program, including testing technologies, protocols and sample collection type and timing. We need to make sure it is easy to adjust prices, whether to recover actual costs or respond to cost savings. Initially administrative costs may be higher as many new trees will be registered, but those costs will quickly diminish. Tissue printing for CTV will offer cost savings associated with testing and with potentially eliminating the necessity for two collection periods and so may offer significant cost savings, as well as increased reliability of detection. We may also find that economy of scale pricing may also offer more economical pricing than has been proposed.

Response to Comment 2.28 and 3.7

See 45-day comments 1.4, 10.23 and 10.59 and response.

Comments 3.1 and 3.9

Add the following term and definition to the regulations: "Breach" means any non-design opening in the physical structure of a protective structure that can be readily detected by visual inspection and which is large enough to allow the entry of insects that transmit regulated citrus pathogens.

Response to Comments 3.1 and 3.9

The Department does not concur with this definition and is proceeding with the definition of breach as proposed in the 15-day comment period. The definition proposed above limits the restrictions of a breach to a "non-design opening". A design opening could conceivably be large enough to allow the entrance of a target vector.

Comments 3.2, 3.8, 3.34 and 3.35

Add the following term and definition to the regulations: "Accurate test results" means that the diagnostic protocols used for testing do not result in the reporting of false positives or false negatives."

Response to Comments 3.2, 3.8 and 3.34, 3.35

This term is being proposed as additional criteria for diagnostic procedures. The Department concurs neither with how 'accurate test results' is defined nor with the need for this definition. Requiring that "no false positives or false negatives" will be reported indicates a system that is 100% accurate, an impossible standard. Furthermore, the diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comments 3.2 and 3.10

Add the following term and definition to the regulations: "Citrus propagative material" means citrus seeds, cuttings, buds, budsticks, tissue-cultures materials, micro-propagated materials or graft sticks grown, maintained, held sold, or used for the propagation of citrus trees.

Response to Comments 3.2 and 3.10

This is virtually the same definition as the definition for "propagative materials" as proposed in the regulation text for the15-day comment period. Since this program is the citrus nursery stock pest cleanliness program, it is clear that the definition for propagative materials refers solely to citrus propagative materials.

Comments 3.2, 3.11, 3.38 and 3.39

Add the following term and definition to the regulations: "Diagnostic protocol" means all the steps taken to produce accurate test results including sampling methods, sample sizes, sample identification, sample handling and transportation, sample processing, laboratory test methods, laboratory confirmation of results that are not conclusive, characterization testing, new pest confirmation, and the reporting of test results.

Response to Comments 3.2, 3.14, 3.38 and 3.39

The Department does not concur with the suggested use of this term in the regulations. The commenters are proposing the use of this term in three places in the regulation (Sections 3701.2(b)(5) and 3701.6(b) and (c)). Each of these sections provide for standards that must be met by a diagnostic facility. Such a facility neither collects nor transports samples for this program. That is the responsibility of CDFA staff. Therefore, CDFA, not the diagnostic facility is responsible for sampling methods, sample size, identification, handling and transportation. New pest confirmation is the joint responsibility of CDFA and USDA, not a diagnostic facility, and is outside the scope of these regulations. Furthermore, the diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comments 3.2 and 3.15

Add the following term and definition to the regulations: "Reliable" means that a test method will produce the same results when it is applied or used repeatedly over time by the same or different investigators under controlled, equivalent conditions.

Response to Comments 3.2 and 3.15

This term is being proposed as additional criteria for diagnostic procedures. The Department does not concur with adding this definition to the regulations. The diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comments 3.2 and 3.16 and 3.45

Add the following term and definition to the regulations: "Re-testing" means testing requested by the participant and for which testing the participant agrees to pay the department's costs."

Response to Comments 3.2, 3.16 and 3.45

The Department does not concur with the proposed definition for "re-testing" or with how the commenter wishes to use the term in regulation. The Department has determined that the decision as to whether or not additional tests will be performed rests with the Department, not with the participant. Factors that might affect the Department's decision are optimal times for disease testing, available manpower and available diagnostic capacity. This does not deny a participant the option of requesting additional re-testing, to be paid for at his or her own expense.

Comments 3.2 and 3.17

Add the following term and definition to the regulations: "Source tree" means a citrus tree that has been planted grown, or maintained to serve as a source of citrus tree propagative material, including seeds, cuttings, buds, budsticks, tissue-cultured materials, or graft sticks.

Response to Comments 3.2 and 3.17

The commenter is proposing the addition of this term because this commenter is using the term in proposed revisions Sections 3701.2(a)(9) and 3701.7. Since the Department is not accepting those revisions (See comment and response numbers 3.22 and 3.48) there is no need for the definition.

Comments 3.2 and 3.18

Add the following term and definition to the regulations: "Timely" means that testing of samples takes place without due delay and that test results are reported to participants at the earliest possible time and by the most expeditious means consistent with accuracy and the urgency of action associated with the nature of the test result.

Response to Comments 3.2 and 3.18

The Department does not concur with the need for this proposed definition. The Department has amended Section 3701.2(b) to address the timeliness of reporting test results to participants.

Comments 3.2, 3.19 and 3.46

Add the following term and definition to the regulations: "'Valid' means that a test method correctly detects the presence of pathogens in samples and that negative results truly are negative."

Response to Comments 3.2, 3.19 and 3.46

This term is being proposed as additional criteria for diagnostic procedures The Department does not concur with adding this definition to the regulations or with the commenter's proposed use of the term in regulation. The diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate, and Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comments 3.2 and 3.20

Add the following term and definition to the regulations: "Vegetative propagative material" means cuttings buds, budsticks, tissue-cultures materials, micro-propagated materials or graft sticks, sold or used as scion or rootstock for the propagation of citrus trees.

Response to Comments 3.2 and 3.20

The Department does not concur with adding this term to the definitions. The only difference between this definition and the definition of "propagative material", already included in the regulations, is that the proposed definition of "vegetative propagative material" excludes seeds. Within the plant industry, "vegetative reproduction", is a commonly used term that indicates asexual reproduction and clearly does not include seeds; therefore, whenever the term, vegetative propagative material, is used, it refers to propagative material other than seeds.

Comment 3.18

Amend Section 3701.1(a) as follows: " . . . produces any citrus ~~nursery stock~~ propagative material."

Response to Comment 3.18

Section 3701.1(a) has been revised to more accurately reflect the language in Sections 6940 and 6941(c)(1), FAC.

Comment 3.19

Amend Section 3701.2(a)(9) as follows: "record of all source trees including; mother trees . . ."

Response to Comment 3.19

The Department does not concur with this comment. Adding the phrase, "all source trees", is redundant as they are all listed immediately following that phrase.

Comment 3.20

Amend Section 3701.2(a)(11) as follows: ". . .~~become diseased~~ determined to be infected with a regulated disease causing agent . . ."

Response to Comment 3.20

Section 3701.2(a)(11) covers the proper use of registration tags and the Department has deleted, "become diseased" from this section as it is redundant. If a tree tests positive for any of the diseases in the program, the Department would cancel the registration of that tree and the participant would have to remove the registration tag from that tree.

Comment 3.26

Amend Section 3701.2(b) to add, "Ensure that test results are accurate and timely."

Response to Comment 3.26

The Department does not concur with the need for this amendment. The diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate. Additionally, Section 3701.6(g) provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Section 3701(b)(6) and (7) establishes time frames within which the diagnostic facility is requested to report inconclusive or positive test results to the Department and within which the Department will relay this information to the participant. The Department has also established a time frame for reporting all of the test results to participants (Section 3701.2(b)(4)).

Comment 3.27

Amend Section 3701.2(b)(5) as follows: "Require facilities performing testing to develop and use a diagnostic protocol that precludes the reporting of false positives or false negatives, including retaining of sample tissue or extracted test materials and retesting to eliminate inconclusive results."

Response to Comment 3.27

The Department does not concur with this suggested amendment. Requiring that "no false positives or false negatives" will be reported indicates a system that is 100% accurate, an impossible standard. The diagnostic tests currently included in the regulation have been accepted by the scientific community as valid, reliable and accurate. Additionally, Section 3701.6(g)

provides that the Department "may approve or require the substitution or addition of other tests, under generally accepted standards of scientific analysis." These generally accepted standards include evidence of the validity, reliability and accuracy of a test method.

Comment 3.28

Delete "inconclusive" from Sections 3701.2(b)(6) and (7).

Comment 3.28

The Department does not concur with this comment. Section 3701.2(b)(6) provides for a diagnostic facility to notify the Department within three business days of any inconclusive or positive test results. There may be times when the diagnostic facility is unable to make a positive or negative determination. In those cases, the Department would be notified and make a decision as to whether or not additional samples would be collected, and when that would occur. The Department has a responsibility to in turn notify the affected participant of the testing status of his or her tree. This is provided for in Section 3701.2(b)(7). Participants have made it very clear to the Department that they should be notified as soon as possible of test results that would impact their ability to propagate from a tree or affect the registration status of that tree. Only trees testing negative for the diseases listed in these regulations may serve as propagative sources and/or remain registered.

Comment 3.29

In Section 3701.3(a), add the word "registered" just prior to "mother lines".

Response to Comment 3.29

The Department concurs with this comment and has amended this section accordingly.

Comment 3.33

Amend Section 3701.3(b)(5) to read, " Notwithstanding ~~the above~~ subsection 3701.3(b)(4), no plant shall be maintained for a period longer than ~~six years~~ 72 months from the date of propagation within an insect-resistant structure . . ."

Response to Comment 3.33

The Department concurs with this comment and has revised this section accordingly.

Comment 3.34

Amend Section 3701.4(b) to read, "Notwithstanding ~~the above~~ subsection 3701.4(a) . . ."

Response to Comment 3.34

The Department concurs with this comment and has revised this section accordingly.

Comment 3.35

Amend Section 3701.4(c)(3)(E) to read, "Ensure appropriate nursery personnel responsible for maintaining the integrity of the structure are trained in plant pest inspection techniques and the methods to be used for the proper collection, handling, and submission of aphid, psyllid and other pathogen vectors."

Response to Comment 3.35

The Department does not concur with this suggested revision. Other nursery personnel in addition to those who have responsibility for maintaining the integrity of the structure should be trained in plant pest identification and plant inspection techniques. Furthermore, CDFA staff, not nursery personnel, are responsible for collecting and submitting plant and insect samples.

Comment 3.37

Amend Section 3701.6(a) as follows: ". . . authorized agents, ~~which~~ that, for the purposes of accurate test results and timely diagnostics . . ."

Response to Comment 3.37

The Department does not concur with this comment for the reasons set forth in response to comments 2.1, 3.2, 3.11, 3.18 and 3.37.

Comment 3.40

Amend Section 3701.6(d)(1)(A) as follows: " . . . no later than ~~six years~~ 72 months from date of propagation . . .", and subsection (d)(1)(B) as follows: ". . . ~~three years~~ 36 months for Tristeza and within the previous ~~six years~~ 72 months . . ."

Response to Comment 3.40

The Department concurs with this comment and has revised those sections accordingly.

Comment 3.42

Amend Section 3701.6(d)(1)(B)(1)(C) to read, "Registered trees not in current use as propagative sources must be tested . . ."

Response to Comment 3.42

The Department concurs with this comment and has revised this section accordingly.

Comment 3.41

Amend Section 3701.6(d)(1)(C) to read, "In addition to the foregoing testing requirements, mother trees or mother lines found to be infected . . . shall be tested to ~~assure~~ ensure the sequence . . ."

Response to Comment 3.41

The Department concurs with this comment and has made the suggested revision.

Comment 4

Duarte Nursery would like to take this final opportunity to state that we have no further questions or suggestions on the wording of the regulations regarding the addition of Micropropagation. That topic has been something we have discussed at every opportunity and the verbiage seems to have settled sufficiently.

I have only one question that may require clarification for the final version. 3701.6 Inspection and Testing Procedures(d) Testing (1)Mother Trees (B)Registered Mother Trees and Mother Lines 1. Tristeza and HLB B….."trees and lines shall have been tested within 3 yrs for CTV and 6 years for HLB. If HLB is detected the trees (and lines) shall have been tested within the previous 3 years for HLB". Or what?.... They are to be destroyed? They need to be tested right away to make sure they are clean or destroyed? They are ineligible to be mother trees or lines but can be sold off?

Response to Comment 4

Section 3701.6 (d)(1)(B)(1)(C) has been amended to allow mother lines not currently used as propagative sources to remain in the structures as long as they are tested at least once every six years.

Summary and Response to Comments Received During the Second Period (April 18 – May 3, 2011) the Modified Text was Available to the Public

Comment 1.1
3701.1 (b) - Previous commenting indicated that for a mandatory program there were already not enough enforcement provisions. How does eliminating the only enforcement written into the regulations serve the responsible participants and discourage non compliance?

Response to Comment 1.1
The Department deleted this section because the enabling statute does not provide for this penalty. However, this deletion does not remove all penalties to which a violator could be subject. Penalties for non compliance can be found in Section 5310, FAC which provides for a civil penalty of up to $10,000 for anyone who violates Division 4 or any regulation adopted pursuant to that Division (the authorizing statute for these regulations, Section 6940-6946 is in Division 4).

Comment 1.2
3701.4 (b) (6) & (7) - Reduce the number of days required to report at least positive, if not also inconclusive test results. Allowing 3 days each for the diagnostic facility and the Department means that the participant may never be notified even in the week a positive was detected and up to 8 to 10 days later. Significant propagations could occur in this time period and what would be onerous for the diagnostic facility or the department to report a positive results on the day they get the result?

Response to Comment 1.2
This comment refers to a requirement that was included in the regulations during the previous 15-day comment period. The Department is required to respond only to those comments on changes made subsequent to the previous comment period.

Comment 1.3
3701.3 (3) - I am confused by the elimination of "sources that were tested by CCPP or whose origin can be traced to CCPP". We do not want to eliminate the use of registered materials that are not directly from CCPP but whose source can be traced to CCPP, nor do we mean to

continue propagating registered trees from registered materials that have never undergone CCPP testing.

The principal is to grandfather in trees that have been registered as long as they meet the testing requirements. The chance of exotic diseases in California registered trees in the past was assumed low. To eliminate future propagations from these unknown sources we specifically wanted to only allow propagation from materials that had gone through the battery of testing performed by CCPP. This can and should include material that may not directly come from CCPP but whose previous source had been tested by CCPP. For instance if I have a registered rootstock source tree propagated from CCPP in my protected structure then I should be able to use buds from that tree to produce registered seed trees. These buds are not directly obtained from CCPP, but can be traced back to their CCPP source. However if I have a grandfathered mother tree that has never been sourced from CCPP, we no longer wanted that tree to be eligible to be used as a source to create more registered trees. The purpose is in the short run to only allow new registered tree propagations from sources that had been through the battery of CCPP testing and in the long run, by attrition, eliminate all sources of mother trees that had not been through this testing from the program.

Response to Comment 1.3
This comment refers to a requirement that was in the regulations during the previous 15-day comment period. The Department is required to respond only to those comments on changes made subsequent to the previous comment period.

Comment 1.4
3701.6 (e) and referencing 3701.3 (b) (5) - Any additional testing, and definitely in increase or nursery trees, should be by statistical sampling.

Response to Comment 1.4
The Department does not concur with this comment. The amount of additional testing required will be determined based on the outcome of the risk assessment as described in 3701.6 (e).

Comment 1.5
3701.8(b) (4)(A) should not include "increase tree".

Response to Comment 1.5

The Department does not concur with this comment. There may be nursery operators who wish to produce only increase trees. If "increase tree" is deleted from this section, those types of nursery operators would be exempt from meeting this requirement.

Summary and Response to Comments Received During the Period (June 7 – June 22, 2011) the Modified Text of Section 3407 was Available to the Public

The Department did not receive any comments during this period.

Alternatives Determination

The Department has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Local Mandate Determination

The proposed regulations do not impose any mandate on local agencies or school districts.