

EXPRESS TERMS

A new Part 128 of 1 NYCRR is added to read as follows:

PART 128

CONTROL OF THE EUROPEAN CHERRY FRUIT FLY

(Statutory Authority: Agriculture and Markets Law §§18, 164 and 167)

Sec.

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§ 128.1 Definitions.

For the purpose of this Part, the following words, names and terms shall be construed respectively, to mean:

(a) AML. The Agriculture and Markets Law.

(b) Authorized holder. Any person who is granted a limited permit by the Department or enters into a compliance agreement with the Department.

(c) Commissioner. The Commissioner of the Department of Agriculture and Markets or the Commissioner's duly authorized representative.

(d) Compliance agreement. The document issued by the Department which permits the authorized holder of the compliance agreement to issue a limited permit pursuant to the terms of the document and this Part without a Department inspection prior to each movement, and which sets forth the requirements covering restricted movement, processing, handling or utilization of a regulated article not otherwise eligible for certification for intrastate movement.

- (e) Department. The Department of Agriculture and Markets.
- (f) Dripline. The line around the canopy of a plant.
- (g) European cherry fruit fly or ECFF. The insect known as the European cherry fruit fly, *Rhagoletis cerasi*, in any life stage.
- (h) Infestation. The presence of the *European cherry fruit fly* in any life stage, in any regulated article.
- (i) Inspector. Any inspector of the Department, or cooperator from the United States Department of Agriculture (USDA), when authorized by the Department to act in that capacity.
- (j) Limited permit. The document issued under the authority of or by the Department permitting the one-time restricted movement of a regulated article from a regulated or quarantined area to a specified destination for specified processing, handling or utilization.
- (k) Moved and Movement. Shipped, offered or received for shipment, carried, transported, or relocated into or through any area of the State.
- (l) Nursery stock. All trees, shrubs, plants and vines and parts thereof.
- (m) Person. An individual, organization, corporation or partnership, public authority, county, town, village, city, municipal agency or public corporation, or any other legal entity other than the Department or its respective authorized agents including the United States Department of Agriculture.
- (n) Quarantine Area. The geographic area of the state delineated on the ECFF regulated and quarantine area map in section 128.2 of this Part, surrounding the regulated area of ECFF infestation which begins at the outside boundary of the regulated area and extends outward for a distance of approximately four miles, establishing the boundaries of the area within the state which are subject to the requirements set forth of this Part.
- (o) Regulated area. The geographic area of the state delineated on the ECFF regulated and quarantine area map in section 128.2 of this Part, starting from the location of a detection of the ECFF confirmed by the Department and extending outward a distance of approximately one half mile, establishing the boundaries of the area within the state which are subject to the requirements set forth in this Part.
- (p) Regulated article.
 - (1) Fruit of ECFF host plants listed below including all cultivars of:

<u>Scientific Name</u>	<u>Common Name</u>
<u><i>Berberis aquifolium</i> Pursh</u>	<u>Holly barberry</u>
<u><i>Berberis heteropoda</i> Schrenk ex Fisch. & C. A. Mey.</u>	<u>N/A</u>
<u><i>Berberis vulgaris</i> L.</u>	<u>Common barberry</u>
<u><i>Cornus sanguinea</i> L.</u>	<u>Common dogwood</u>
<u><i>Lonicera alpigena</i> L.</u>	<u>Alpine honeysuckle</u>
<u><i>Lonicera</i> spp.</u>	<u>N/A</u>
<u><i>Lonicera tatarica</i> L.</u>	<u>Tatarian honeysuckle</u>
<u><i>Lonicera xylosteum</i> L.</u>	<u>European fly honeysuckle</u>
<u><i>Prunus avium</i> (L.) L.</u>	<u>Sweet cherry</u>
<u><i>Prunus cerasus</i> L.</u>	<u>Sour cherry</u>
<u><i>Prunus mahaleb</i> L.</u>	<u>Mahaleb cherry</u>
<u><i>Prunus serotina</i> Ehrh.</u>	<u>Black cherry</u>
<u><i>Prunus</i> spp.</u>	<u>Cherries¹</u>
<u><i>Symphoricarpos albus</i> (L.) S. F. Blake</u>	<u>Common snowberry</u>
<u><i>Symphoricarpos orbiculatus</i> Moench</u>	<u>Coralberry</u>

¹ All cherry species are regulated

(2) For the purposes of this Part, fruit of the following species of the *Prunus* genus are not regulated articles: *Prunus americana*, *Prunus armeniaca*, *Prunus cerasifera*, *Prunus domestica*, *Prunus dulcis*, *Prunus persica*, *Prunus salicina*.

(3) Soil underneath the dripline of an ECFF host plant in the regulated area.

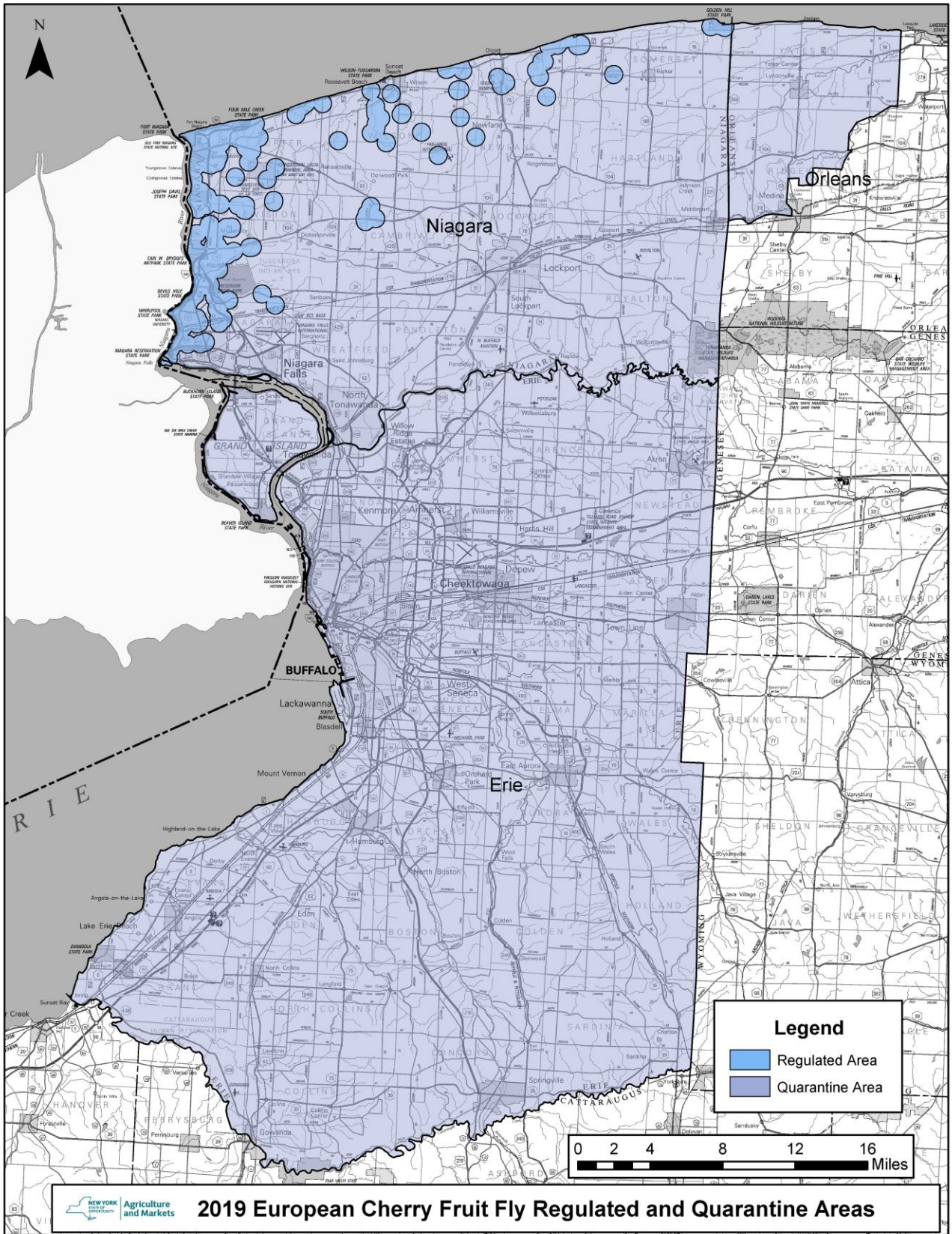
(4) Nursery stock of the ECFF host species listed in this subdivision that has fruit attached or with soil (container or balled & burlapped) if fruit was allowed to form on the plants, unless the conditions for movement of regulated articles in 128.4 (a) (1) of this Part are met.

(q) Systems Approach. A set of criteria which, when followed, minimize the spread of a pest and are prescribed by the Department.

§ 128.2 Establishment and amendment of regulated and quarantine areas map.

(a) Establishment of regulated and quarantine areas. The regulated and quarantine areas are set forth on the regulated and quarantine area map below.

European cherry fruit fly Regulated and Quarantine Areas



(b) The map depicts the creation of the quarantine area as follows:

(1) Niagara County, in its entirety;

(2) Erie County, in its entirety; and

(3) that area of Orleans County that is bordered on the North by Lake Ontario and bordered on the West by Niagara County, heading East on Route 31 E from the Niagara County and Orleans County line continue east on 31E (also called State Road, Telegraph Road, West Center Road in that order) to its intersection of Prospect Avenue continue North on Prospect Avenue to its intersection with State Route 63 continue North on State Route 63 (North Gravel Road) to its intersection with Slade Road continue East on Slade Road to its intersection with Horan Road continue South on Horan Road to its intersection with Portage Road continue East on Portage Road to its intersection with Bates Road continue North on Bates Road to its intersection with East Scott Road continue East on East Scott Road to its intersection with Culvert Road continue East on Culvert Road to its intersection with Porter Road continue North on Culvert Road to its intersection with Ridge Road (State Route 104) continue West On Ridge Road (State Route 104) to its intersection with Oak Orchard River Road continue North on Oak Orchard River Road to its intersection with Townline Road continue East/North East on Oak Orchard River Road to its intersection with Platten Road continue East on Oak Orchard River Road to its intersection with Harris Road (called Kenyonville Road heading South) continue North on Harris Road to its intersection with Lakeshore Road (State Route 93) at the intersection of Harris Road and Lakeshore Road (State Route 93) GPS N43.36677, W78.27983 an imaginary line running North to Lake Ontario.

(c) The requirements in this Part shall not include the Cattaraugus, Tonawanda and Tuscarora Indian Reservations.

(d) Any amendment of or addition to the map delineating the regulated and quarantine areas shall be made by regulation.

§ 128.3 Movement of regulated articles within regulated and quarantine areas.

(a) A regulated article may be moved within a regulated area, provided the regulated article is otherwise eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

(b) A regulated article may be moved within a quarantine area, provided the regulated article is otherwise eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

§ 128.4 Restrictions on intrastate movement of regulated articles originating within or traveling through regulated or quarantine areas.

- (a) No person shall move a regulated article from any regulated or quarantine area to or through any point outside the quarantine or regulated area, unless: (i) accompanied by a limited permit authorizing such movement under administrative instructions of the Commissioner; or (ii) destined for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by the Commissioner.
- (b) Notwithstanding the provisions of subdivision (a) of this section, a regulated article originating from within New York, but outside any regulated or quarantine area in New York, may be moved through any regulated area in the state, provided that:
 - (1) The points of origin and destination of the regulated article is indicated on a waybill accompanying the regulated article; and
 - (2) The regulated article is moved directly through the regulated or quarantine area without stopping, except for refueling and traffic conditions.

§ 128.5 Conditions governing compliance agreements for movement of regulated articles out of regulated or quarantine areas.

- (a) A person engaged in growing, handling, or moving a regulated article intrastate may apply for a compliance agreement with the Department to authorize the authorized holder of a compliance agreement to issue limited permits which allow movement of a regulated article without a Department inspection prior to each movement.
- (b) Any authorized holder of a compliance agreement must agree to comply with the provisions of this Part and any conditions imposed under the compliance agreement.
- (c) A compliance agreement shall be subject to the Department's acceptance in its sole discretion.
- (d) Any compliance agreement may be cancelled by the Department, either orally or in writing, whenever an inspector determines, in his or her sole discretion, that the authorized holder of the compliance agreement has not complied with this Part or the conditions imposed under the compliance agreement. The cancellation shall take effect immediately upon providing oral notice or the delivery of the written notice. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing.

§ 128.6 Conditions governing limited permits for movement of regulated articles out of regulated or quarantine areas.

(a) Regulated Area.

An inspector or an authorized holder of a compliance agreement may issue a limited permit for the movement of a regulated article out of a regulated area, provided that the regulated article:

- (1) Is grown under the Systems Approach for the control of the ECFF recognized by the Department and outlined in the compliance agreement;
- (2) Is not moved to counties in New York prohibited for such movement under the Systems Approach and listed in the Compliance Agreement; and
- (3) Is otherwise eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

(b) Quarantine Area.

An inspector or an authorized holder of a compliance agreement may issue a limited permit for the movement of a regulated article out of a quarantine area, provided that the regulated article:

- (1) Is grown under the Systems Approach for the control of the ECFF recognized by the Department and outlined in the compliance agreement; and
- (2) Is otherwise eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

(c) An inspector or authorized holder of a compliance agreement may provide additional limited permits pursuant to the terms of a compliance agreement or authorize, in writing, reproduction of the limited permits on shipping containers, or both, as requested by the person operating under the compliance agreement. These limited permits may then be completed and used, as needed, for the movement out of a quarantine or regulated area of a regulated article that has met all of the requirements of this Part.

(d) Any limited permit may be cancelled by the Department or an inspector, either orally or in writing, whenever an inspector determines, in his or her sole discretion, that the authorized holder of the limited permit has not complied with this Part. The cancellation shall take effect immediately upon providing oral notice or the delivery of written notice. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing.

§ 128.7 Shipments of regulated articles for experimental and scientific purposes.

A regulated article may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by the Department. The container of the article so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the Department showing compliance with such conditions.

§ 128.8 Marking requirements.

Every container of a regulated article intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid limited permit issued in compliance with this Part, provided, that:

- (a) For lot freight shipments, other than by road vehicle, one limited permit may be attached to one of the containers and another to the waybill; and for carlot freight or express shipments, either in containers or in bulk, a limited permit may be attached to the waybill only and a placard to the outside of the car, showing the number of the valid limited permit accompanying the waybill; and
- (b) For movement by road vehicle, the limited permit shall accompany the vehicle and be surrendered to consignee upon delivery of the shipment.

§ 128.9 Inspection and disposition of shipments.

Any vehicle or other conveyance, any package or other container, and any item to be moved, which is moving, or which has been moved intrastate from regulated or quarantine areas which may contain a regulated article may be examined by an inspector. When items are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as deemed necessary to eliminate the danger of dissemination of ECFF. If found to be moved in violation such items must be rendered free of infestation, without cost to the state other than services of the inspector.

§ 128.10 Other laws and regulations; interstate movement of regulated articles.

No provision of this Part relieves any person from the obligation to comply with any other applicable federal, state, county, regional or local law or regulation. This Part only applies to the intrastate movement of regulated articles. The interstate movement of regulated articles must comply with applicable federal laws and regulations.

§ 128.11 Effective date.

This regulation shall take effect immediately.