

## 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*. A document issued by the Department setting forth the requirements covering the restricted movement, processing, handling or utilization of a regulated article, not eligible for certification for intrastate movement, which, if followed, permits the persons or firm executing the document to issue a limited permit pursuant to the terms of the document and this Part without a Department inspection prior to each 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*. This term refers to the presence of the *European cherry fruit fly* in any life stage.
- (i) *Inspector*. An 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*. A 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; 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*. A 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.

(p) *Regulated article.*

(1) Fruit of ECFF host plants listed below including all cultivars of:

<b>Scientific Name</b>	<b>Common Name</b>
<i>Berberis aquifolium</i> Pursh	Holly barberry
<i>Berberis heteropoda</i> Schrenk ex Fisch. & C. A. Mey.	N/A
<i>Berberis vulgaris</i> L.	Common barberry
<i>Cornus sanguinea</i> L.	Common dogwood
<i>Lonicera alpigena</i> L.	Alpine honeysuckle
<i>Lonicera</i> spp.	N/A
<i>Lonicera tatarica</i> L.	Tatarian honeysuckle
<i>Lonicera xylosteum</i> L.	European fly honeysuckle
<i>Prunus avium</i> (L.) L.	Sweet cherry
<i>Prunus cerasus</i> L.	Sour cherry
<i>Prunus mahaleb</i> L.	Mahaleb cherry
<i>Prunus serotina</i> Ehrh.	Black cherry
<i>Prunus</i> spp.	Cherries <sup>1</sup>
<i>Symphoricarpos albus</i> (L.) S. F. Blake	Common snowberry
<i>Symphoricarpos orbiculatus</i> Moench	Coralberry

<sup>1</sup> 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.

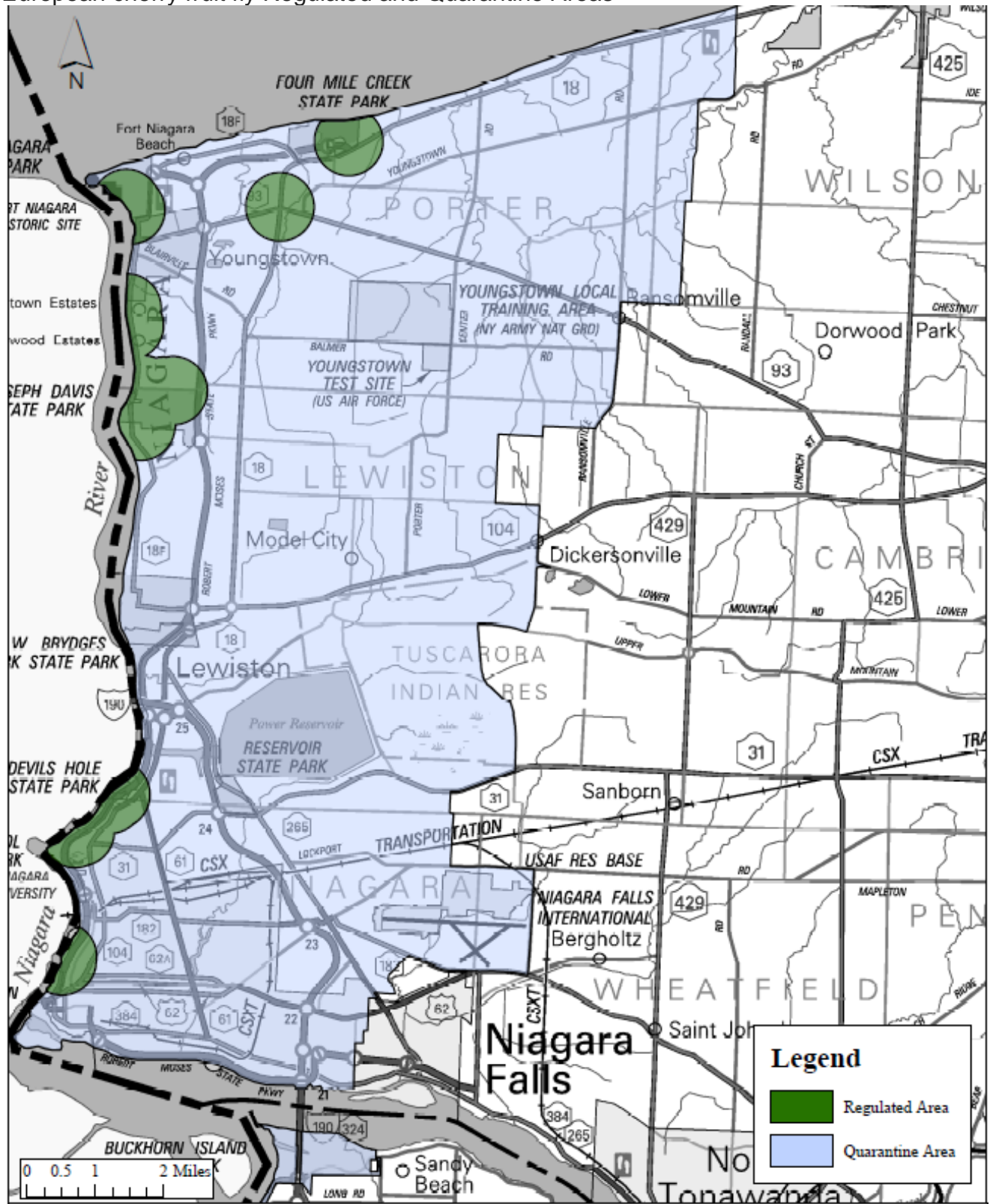
(4) Nursery stock of the ECFF host species listed in this subdivision that has fruit attached or with soil (container or balled & burlapped) if fruit was allowed to form on the plants unless the conditions for movement of regulated articles in 128.4 (a) (1) of this Part are met.

(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: That area of Niagara County which is bordered on the North by Lake Ontario and bordered on the West by the Niagara River (Lower Niagara River) bordered on the South by the Niagara River (upper Niagara River) Eastern border coming out of the Niagara River 0.056289 miles to the intersection of 77<sup>th</sup> Street and Buffalo Avenue (GPS coordinates 43.074026 N, -78.075917 W) continue North on 77<sup>th</sup> Street to the intersection of Lindbergh Avenue continue East on Lindbergh Avenue to its intersection with 79<sup>th</sup> Street continue North on 79<sup>th</sup> Street to its intersection with Girard Avenue continue East on Girard Avenue to its intersection with 80<sup>th</sup> Street continue North on 80<sup>th</sup> street to its intersection with Rick Manning Drive continue East on Rick Manning Drive to its intersection with Military Road (NY-265 ) continue West on Military Road (NY-265) to its intersection with Richmond Avenue continue East on Richmond Avenue to its intersection with Tuscarora Road continue North on Tuscarora Road to its intersection with Porter Road (NY-182) continue East on Porter Road (NY-182) to its intersection with Niagara Falls Boulevard (US-62) continue East on Niagara Falls Boulevard (US-62) to its intersection with Walmore Road continue North on Walmore Road to its intersection with Lockport Road continue West on Lockport Road to its intersection with Tuscarora Road continue North on Tuscarora Road to its intersection with Blank Road continue West on Tuscarora - Blank Road to its intersection with Tuscarora Road continue North on Tuscarora Road to its intersection with Saunders Settlement Road (NY-31) continue East on Saunders Settlement Road (NY-31) to its intersection with Walmore Road continue North on Walmore Road to its intersection with Upper Mountain Road continue East on Upper Mountain Road to its intersection with Black Nose Spring Road (Blacknose Spring on sign) continue North on Black Nose Spring Road to its intersection with Lower Mountain Road continue North West on Lower Mountain Road to its name change/ merge with Dickersonville Road continue North on Dickersonville Road to its intersection with Swann Road continue West on Swann Road to its intersection with Williams Road continue North on Williams Road to its intersection with Langdon Road continue East on Langdon Road to its intersection with Dickersonville Road continue North on Dickersonville Road to its intersection with Schoolhouse Road continue East on Schoolhouse Road to its intersection with Ransomville Road continue North on Ransomville Road to its intersection with New Road continue East on New Road to its intersection with Palmer Road continue North on Palmer Road to its intersection with Braley Road continue East on Braley Road to its intersection with Fitch Road continue North on Fitch Road to its intersection with Youngstown Wilson Road (Wilson-Youngstown Road) continue East on Youngstown Wilson Road (Wilson-Youngstown Road) to its intersection with Hulbert Road continue North on Hulbert Road to its intersection with Lake Road (NY-18) at intersection on Hulbert and Lake Road (NY-18) (GPS coordinates 43.303206 N, -78.879911 W)

0.135391 miles to North Lake Ontario, and in Erie County all of Buckhorn Island State Park (North Grand Island).

- (c) The requirements in this Part shall not include the Tuscarora Indian Reservation.
- (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 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 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 a regulated or quarantine area.

- (a) No person shall move a regulated article from any regulated or quarantine area to or through any point outside the regulated or quarantine area, unless: (i) accompanied by a limited permit authorizing such movement or 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 a compliance agreement for movement of a regulated article out of a quarantine or regulated area.

- (a) A person engaged in growing, handling, or moving a regulated article intrastate may apply for a compliance agreement with the Department, which agreement

will authorize the person executing the agreement to issue limited permits without a Department inspection prior to each movement.

- (b) Any person who enters into a compliance agreement with the Department 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 person who has entered into the compliance agreement has not complied with this Part or the conditions imposed under the compliance agreement. The cancellation shall take effect upon the giving of the 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 the movement of a regulated article out of a quarantine or regulated areas.

(a) 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 a systems approach for the control of the ECFF recognized by the Department and outlined in the compliance agreement; and

(2) Is eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

(b) 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 a 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 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 regulated or quarantine area of a regulated article that has met all of the requirements of this Part.
- (d) Any limited permit may be cancelled orally or in writing by an inspector whenever the inspector determines that the holder of the limited permit has not complied with this Part. The cancellation shall take effect upon the giving of the 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 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 shipment, 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 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 the 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 the 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.