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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 05-067-1]

Emerald Ash Borer; Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the emerald ash borer regulations by adding areas in Indiana, Michigan, and Ohio to the list of areas quarantined because of emerald ash borer. As a result of this action, the interstate movement of regulated articles from those areas is restricted. This action is necessary to prevent the artificial spread of the emerald ash borer from infested areas in the States of Indiana, Michigan, and Ohio into noninfested areas of the United States.

DATES: This interim rule was effective [upon signature]. We will consider all comments that we receive on or before [Insert date 60 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and, in the "Search for Open Regulations" box, select "Animal and Plant Health Inspection Service" from the agency drop-down menu, then click on "Submit." In the Docket ID column, select APHIS-2005-0099 to submit or view public comments and to view supporting and

related materials available electronically. After the close of the comment period, the docket can be viewed using the "Advanced Search" function in Regulations.gov.

- **Postal Mail/Commercial Delivery:** Please send four copies of your comment (an original and three copies) to Docket No. 05-067-1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. 05-067-1.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah McPartlan, Operations Officer, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1236; (301) 734-4387.

SUPPLEMENTARY INFORMATION:

Background

The emerald ash borer (EAB) (*Agrilus planipennis*) is a destructive wood-boring insect that attacks ash trees (*Fraxinus* spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, Taiwan, and Canada, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues.

Quarantined Areas

The EAB regulations in 7 CFR 301.53-1 through 301.53-9 (referred to below as the regulations) restrict the interstate movement of regulated articles from quarantined areas to prevent the artificial spread of EAB to noninfested areas of the United States. Portions of the States of Indiana, Michigan, and Ohio are already designated as quarantined areas.

Recent surveys conducted by inspectors of State, county, and city agencies and by inspectors of the Animal and Plant Health Inspection Service (APHIS) have revealed that infestations of EAB have occurred outside the quarantined areas in Michigan, Indiana, and Ohio. Specifically, infestations of EAB have been detected in Grand Traverse and Montcalm Counties, MI; Lima and Newbury Townships in LaGrange County, IN; and Auglaize, Fulton, Hancock, Henry, Lucas, Ottawa, Sandusky, and Wood Counties, OH. Officials of the U.S. Department of Agriculture and officials of State, county, and city agencies in Indiana, Michigan, and Ohio are conducting intensive survey and eradication programs in the infested areas. Indiana, Michigan, and Ohio have quarantined the infested areas and have restricted the intrastate movement of regulated articles from the quarantined areas to prevent the spread of EAB within each State. However, Federal regulations are necessary to restrict the interstate movement of regulated articles from the quarantined areas to prevent the spread of EAB to other States.

The regulations in § 301.53-3(a) provide that the Administrator of APHIS will list as a quarantined area each State, or each portion of a State, where EAB has been found by an inspector, where the Administrator has reason to believe that EAB is present, or where the Administrator considers regulation necessary because of its inseparability for quarantine enforcement purposes from localities where EAB has been found.

Less than an entire State will be designated as a quarantined area only under certain conditions. Such a designation may be made if the Administrator determines that: (1) The State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed by the regulations on the interstate movement of regulated articles; and (2) the designation of less than an entire State as a quarantined area will be adequate to prevent the artificial spread of the EAB.

In accordance with these criteria and the recent EAB findings described above, we are amending § 301.53-3(c) to add portions of Grand Traverse and Montcalm Counties, MI; Lima and Newbury Townships in LaGrange County, IN; and Auglaize, Fulton, Hancock, Henry, Lucas, Ottawa, Sandusky, and Wood Counties, OH, to the list of quarantined areas. An exact description of the quarantined areas can be found in the rule portion of this document.

Emergency Action

This rulemaking is necessary on an emergency basis to help prevent the spread of EAB to noninfested areas of the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the Federal Register.

We will consider comments we receive during the comment period for this interim rule (see DATES above). After the comment period closes, we will publish another document in the Federal Register. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

We are amending the EAB regulations by adding areas in Indiana, Michigan, and Ohio to the list of quarantined areas. As a result of this action, the interstate movement of regulated articles from those areas is restricted. This action is necessary to prevent the artificial spread of this plant pest into noninfested areas of the United States.

The following analysis addresses the economic effects of the interim rule on small entities, as required by the Regulatory Flexibility Act. The businesses potentially affected by this interim rule are nurseries, arborists, tree removal services, firewood dealers, garden centers, landscapers, recyclers of waste material, and lumber and building material outlets. We do not currently have information as to the actual number of such businesses in the quarantined areas added by the interim rule, nor do we have information that would indicate the percentage of those businesses that engage in the interstate movement of regulated articles and would thus be directly affected by this interim rule. It is reasonable to assume that most of the potentially affected businesses in the newly quarantined areas can be classified as small entities based on the Small Business Administration's size standards.¹

¹ The overwhelming majority of entities are considered small by SBA standards.

Under the regulations, regulated articles may be moved interstate from a quarantined area into or through an area that is not quarantined if they are accompanied by a certificate or limited permit. An inspector or a person operating under a compliance agreement will issue a certificate for interstate movement of a regulated article if certain conditions are met, including that the regulated article is determined to be apparently free of EAB.

Businesses could be affected by the regulations in two ways. First, if a business wishes to move regulated articles interstate from a quarantined area, that business must either: (1) Enter into a compliance agreement with APHIS for the inspection and certification of regulated articles to be moved interstate from the quarantined area; or (2) present its regulated articles for inspection by an inspector and obtain a certificate or a limited permit, issued by the inspector, for the interstate movement of regulated articles. The inspections may be inconvenient, but they should not be costly in most cases, even for businesses operating under a compliance agreement who would perform the inspections themselves. For those businesses that elect not to enter into a compliance agreement, APHIS would provide the services of the inspector without cost. There is also no cost for the compliance agreement, certificate, or limited permit for the interstate movement of regulated articles.

Second, there is a possibility that, upon inspection, a regulated article could be determined by the inspector to be potentially infested with EAB, and, as a result, the article would be ineligible for interstate movement under a certificate. In such a case, the entity's ability to move regulated articles interstate would be restricted. However, the affected entity could conceivably obtain a limited permit under the conditions of § 301.53-5(b).

Our experience with administering the EAB regulations and the regulations for other pests, such as the Asian longhorned beetle, that impose essentially the same conditions on the interstate movement of regulated articles lead us to believe that any economic effects on affected small entities will be small and are outweighed by the benefits associated with preventing the spread of EAB into noninfested areas of the United States.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This interim rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75-15 also issued under Sec. 204, Title II, Pub. L. 106-113, 113 Stat. 1501A-293; sections 301.75-15 and 301.75-16 also issued under Sec. 203, Title II, Pub. L. 106-224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. In § 301.53-3, paragraph (c) is amended as follows:

a. Under the heading Indiana, by revising the entry for LaGrange County to read as set forth below.

b. Under the heading Michigan, by adding, in alphabetical order, entries for Grand Traverse County and Montcalm County to read as set forth below.

c. Under the heading Ohio, by revising the entries for Fulton County, Henry County, and Lucas County, and by adding, in alphabetical order, entries for Auglaize County, Hancock County, Ottawa County, Sandusky County, and Wood County to read as set forth below.

§ 301.53-3 Quarantined areas.

* * * * *

(c) * * *

Indiana

LaGrange County. Clay Township, Lima Township, Newbury Township, Van Buren Township.

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Michigan

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Grand Traverse County. Peninsula Township.

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Montcalm County. Crystal Lake area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of East Klees Road and North Vickeryville Road; then south on North Vickeryville Road to East Stanton Road; then west on East Stanton Road to South Tow Road; then south on South Tow Road to East Sidney Road; then east on East Sidney Road to South Vickeryville Road; then south on South Vickeryville Road to East Holland Lake Road; the east on East Holland Lake Road to South Bollinger Road; then north on South Bollinger Road to East Sidney Road; the east on East Sidney Road to South Mount Hope Road; then north on South Mount Hope Road to East Pakes Road; then west on East Pakes Road to North Blakmer Road; then north on North Blakmer Road to East Kimball Road; then west on East Kimball Road to North Crystal Road; then north on North Crystal Road to East Willard Road; then west on East Willard Road to North Waldron Road; then south on North Waldron Road to East Klees Road; then west on East Klees Road to the point of beginning.

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Ohio

Auglaize County. Duchouquet Township.

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Fulton County. That portion of the county east of State Route 108.

Hancock County. Allen Township.

Henry County. That portion of the county east of State Route 108 and north of the Maumee River.

Lucas County. The entire county.

Ottawa County. That portion of the county north of State Route 163 and State Route 105.

Sandusky County. That portion of the county north of U.S. Highway 20.

Wood County. (1) That portion of the county north of State Route 582.

(2) Bloom Township.

(3) Henry Township.

Done in Washington, DC, this _____ day of _____ .

Administrator, Animal and Plant Health Inspection Service.

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