

# Rules and Regulations

Federal Register

Vol. 71, No. 190

Monday, October 2, 2006

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. APHIS–2006–0131]

#### **Emerald Ash Borer; Quarantined Areas; Michigan**

**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 Michigan 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 State of Michigan into noninfested areas of the United States.

**DATES:** This interim rule became effective September 25, 2006. We will consider all comments that we receive on or before December 1, 2006.

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

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>, select “Animal and Plant Health Inspection Service” from the agency drop-down menu, then click “Submit.” In the Docket ID column, select APHIS–2006–0131 to submit or view public comments and to view supporting and related materials available electronically. Information on using [Regulations.gov](http://www.Regulations.gov), including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site’s “User Tips” link.

- Postal Mail/Commercial Delivery: Please send four copies of your

comment (an original and three copies) to APHIS–2006–0131, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to APHIS–2006–0131.

**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 spot infestations of EAB have occurred

outside the quarantined areas in Michigan. Specifically, spot infestations of EAB have been found to be prevalent throughout the Lower Peninsula of Michigan. Officials of the U.S. Department of Agriculture (USDA) and officials of State, county, and city agencies in Michigan are conducting intensive survey and eradication programs in the infested areas. Michigan has quarantined the infested areas and has restricted the intrastate movement of regulated articles from the quarantined areas to prevent the spread of EAB to noninfested areas in the Upper Peninsula of Michigan. 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 the areas in the Lower Peninsula of Michigan that had not previously been quarantined to the list of quarantined areas. A list of the counties in Michigan that have been designated as quarantined areas can be found in the regulatory text at the end 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 Michigan 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.

Ash trees are valuable to the commercial timber industry and are commonly planted in urban areas. According to the Forest Inventory and Analysis data collected by the USDA's Forest Service, there are approximately 850 million ash trees in Michigan forests that are at risk. These quantities do not include the millions of ash trees extensively planted in communities, in yards, and along public rights-of-way.<sup>1</sup>

If EAB were to spread from infested areas to the surrounding forests of the northeastern United States, where nursery, landscaping, and timber industries and forest-based recreation and tourism industries play a vital economic role, the economic impact would be severe. In addition, the cost to Federal and State agencies for EAB eradication programs would increase significantly.

This interim rule will affect business entities located within the newly quarantined areas of Michigan.

Although more than 7,000 nursery operations are located within the quarantined areas of Michigan, the rule only affects the movement of nursery

stock composed of deciduous shade trees of an ash species. It is also estimated that approximately 5,000 to 6,000 sawmills and firewood dealers are located within or near quarantined areas of the State. The Michigan EAB survey program is currently a statewide effort. Estimates indicate that as many as 15,000 firms and businesses located in quarantined areas may be affected. We do not have information on the exact number of operations that will be regulated in the areas in Michigan that will be newly quarantined for EAB, although we can estimate that there were around 481 nurseries in those areas in 2002.

The Small Business Administration (SBA) has established size criteria based on the North American Industry Classification System (NAICS) for determining which economic entities meet the definition of a small firm. The SBA classifies nursery and tree production businesses (NAICS category 111421) as small entities if their annual sales receipts are \$750,000 or less. The SBA classifies forest nursery and gathering of forest products businesses (NAICS category 113210) as small entities if their annual sales receipts are \$6.5 million or less. The SBA classifies logging operations (NAICS category 113310) and sawmills (NAICS category 321113) as small entities if they employ 500 or fewer persons.

The exact number and size of newly affected entities is unknown. The Michigan Department of Agriculture estimates that more than 90 percent of nursery operations located in Michigan's Lower Peninsula counties are small operations with annual receipts of less than \$750,000 (including nursery operations that sell deciduous shade trees).<sup>2</sup> It is reasonable to assume that nearly all sawmills and logging operations have 500 or fewer employees, since more than 80 percent of the sawmills located in Michigan have fewer than 20 employees, with an average of 14–15 employees per operation.<sup>3</sup>

The percentage of annual revenue attributable to ash species alone for affected entities is unknown. However, by way of comparison, we estimate that only about 10 to 20 of the nurseries in the original quarantined area in Michigan (6 counties), or 0.2 to 0.5 percent of all nurseries in those counties, were expected to be affected by the rule that quarantined that area. It

is possible that a similarly small percentage of nurseries will be affected in the areas quarantined under this rule.

Under the regulations, regulated articles may be moved interstate from a quarantined area into or through an area that is not quarantined only 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

<sup>2</sup> Personal communication, Tom Rose, Plant and Pest Management, Michigan Department of Agriculture.

<sup>3</sup> "2002 Economic Census: Manufacturing" U.S. Census Bureau, July 2005 (Michigan Geographical report).

<sup>1</sup> McPartlan, Deborah. USDA, APHIS, PPQ, "Eradication of emerald ash borer in Michigan, Ohio, and Indiana: Implementation of the Strategic Plan." April 2003.

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

■ 2. In § 301.53–3, paragraph (c), the entry for Michigan is revised to read as follows:

#### § 301.53–3 Quarantined areas.

\* \* \* \* \*

(c) \* \* \*

Michigan

Upper Peninsula: *Chippewa County*. Brimley area. That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Michigan Route 28 and Crawford Street; then north on Crawford Street to Irish Line Road; then north on Irish Line Road to its end and continuing north

along an imaginary line to the Bay Mills/Superior Township line; then north and east along the Bay Mills/Superior Township line to the Lake Superior shoreline; then east along the Lake Superior shoreline to the Bay Mills/Soo Township line; then south on the Bay Mills/Soo Township line to the intersection of the Dafter and Superior Township lines at 6 Mile Road; then south along the Dafter/Superior Township line to Forrest Road; then south on Forrest Road to Michigan Route 28; then west on Michigan Route 28 to the point of beginning. [Note: This quarantined area includes tribal land of the Bay Mills Indian Community. Movement of regulated articles on those lands is subject to tribal jurisdiction.]

Lower Peninsula: All counties, in their entirety (i.e., Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Macomb, Manistee, Mason, Mecosta, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, Sanilac, St. Clair, St. Joseph, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties).

\* \* \* \* \*

Done in Washington, DC, this 25th day of September 2006.

**W. Ron DeHaven,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 06–8424 Filed 9–29–06; 8:45 am]

**BILLING CODE 3410–34–P**

#### DEPARTMENT OF JUSTICE

#### 8 CFR Part 1003

[EOIR Docket No. 143F; AG Order No. 2838–2006]

RIN 1125–AA47

#### Review of Custody Determinations

**AGENCY:** Executive Office for Immigration Review, Justice.  
**ACTION:** Final rule.

**SUMMARY:** This rule adopts, with changes, an interim rule published in the **Federal Register** on October 31, 2001, by the Department of Justice, pertaining to the review of custody decisions by the Executive Office for

Immigration Review (EOIR) with respect to aliens being detained by the Immigration and Naturalization Service (INS), now the Department of Homeland Security (DHS). This rule retains the existing regulatory provision for DHS to invoke a temporary automatic stay of an immigration judge's decision ordering an alien's release in any case in which a DHS official has ordered that the alien be held without bond or has set a bond of \$10,000 or more, in order to maintain the status quo while DHS seeks expedited review of the custody order by the Board of Immigration Appeals (Board) or the Attorney General. However, this rule clarifies the basis on which DHS may invoke the automatic stay provision, and limits the duration of the automatic stay.

**DATES:** This final rule is effective November 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

#### SUPPLEMENTARY INFORMATION:

#### Introduction

On October 31, 2001, the Attorney General published an interim rule to amend the regulations relating to review of custody determinations by immigration judges. The interim rule expanded a preexisting provision first adopted in 1998 for a temporary automatic stay of an immigration judge's decision ordering the release of an alien in certain cases where the INS had determined that no conditions of release were appropriate for an alien or had set an initial bond of \$10,000 or more. 66 FR 54909 (Oct. 31, 2001). The purpose of the 2001 interim rule was to provide a means for the INS to maintain the status quo in those cases where it chose to invoke the automatic stay while it was seeking an expedited review of the custody order by the Board. The 2001 interim rule also provided for a temporary automatic stay in those cases where the Commissioner of INS, within five days of the Board's decision, refers a custody decision by the Board to the Attorney General for review.

The Department explained when the interim rule was published that "This stay is a limited measure and is limited in time—it only applies where the Service determines that it is necessary to invoke the special stay procedure pending appeal, and the stay only remains in place until the Board has had the opportunity to consider the matter." 66 FR at 54910. The Department at that time also explained that it was merely