

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. APHIS–2008–0072]

#### **Emerald Ash Borer; Quarantined Areas; Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin**

**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 Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin 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 Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin into noninfested areas of the United States.

**DATES:** This interim rule is effective September 21, 2009. We will consider all comments that we receive on or before November 20, 2009.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/>

*main?main=DocketDetail&d=APHIS-2008-0072* to submit or view comments and to view supporting and related materials available electronically.

- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0072, 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 Docket No. APHIS–2008–0072.

**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:** Mr. Paul Chaloux, National Program Coordinator, Emerald Ash Borer Program, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road, Unit 137, Riverdale, MD 20737–1231; (301) 734–0917.

#### **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.

Although EAB adults have been known to fly as much as one-half mile from one tree to the next, the pest can also spread when infested nursery trees, logs, or firewood are transported from one region to the next. Ash trees are valuable to the commercial timber industry and are commonly planted in urban areas.

##### *Quarantined Area*

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. The entire States of Illinois, Indiana, and Ohio and

portions of Maryland and Michigan have already been designated as quarantined areas.

Surveys conducted by inspectors of State, county, and city agencies and by inspectors of the Animal and Plant Health Inspection Service (APHIS) have confirmed new infestations of EAB in Charles County, MD; Delta, Houghton, Keweenaw, Mackinac, and Schoolcraft Counties in the Upper Peninsula of Michigan; Houston County, MN; Wayne County, MO; Allegheny, Beaver, Butler, Lawrence, Mercer, and Mifflin Counties, PA; Arlington, Fairfax, Fauquier, Loudon, and Prince William Counties and the independent Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park, VA; Fayette County, WV; and Crawford, Fond du Lac, Ozaukee, Sheboygan, Vernon, and Washington Counties, WI. Officials of the U.S. Department of Agriculture (USDA) and officials of State, county, and city agencies are conducting intensive surveys in and around the infested areas. The States of Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin 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 EAB.

In accordance with these criteria and the recent EAB findings described above, we are amending § 301.53–3(c) to add Charles County, MD; Delta, Houghton, Keweenaw, Mackinac, and Schoolcraft Counties, MI; Houston County, MN; Wayne County, MO; Allegheny, Beaver, Butler, Lawrence, Mercer, and Mifflin Counties, PA; Arlington, Fairfax, Fauquier, Loudon, and Prince William Counties and the independent Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park, VA; Fayette County, WV; and Crawford, Fond du Lac, Ozaukee, Sheboygan, Vernon, and Washington Counties, WI, to the list of quarantined areas.

#### 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.

#### Miscellaneous Change

In an editorial change not directly related to this interim rule, we are updating the title of “Subpart—Special Need Requests” (§§ 301.1 through 301.1–3). In § 301.1 of those regulations, paragraph (a) sets out the provisions of section 436 of the Plant Protection Act (7 U.S.C. 7756), which states that a State or political subdivision of a State may not impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States. The only exceptions to this are (1) if the prohibitions or restrictions issued by the State or political

subdivision of a State are consistent with and do not exceed the regulations or orders issued by the Secretary; or (2) if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment. The regulations in “Subpart—Special Need Requests” provide the criteria to be addressed and process to be followed by States or political subdivisions of States that wish to submit a special need request for consideration. Because those regulations also provide a clear statement as to the preemptive effect of APHIS’ domestic quarantine regulations in part 301, we are changing the title of the subpart to “Subpart—Preemption and Special Need Requests” to make its purpose clearer.

#### Executive Order 12866 and Regulatory Flexibility Act

This interim 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 Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin to the list of areas quarantined because of EAB. 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 EAB from infested areas in the States of Maryland, Michigan, Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin into noninfested areas of the United States.

We have prepared an economic analysis for this interim rule. The analysis, which considers the number and types of entities that are likely to be affected by this action and the potential economic effects on those entities, provides the basis for the Administrator’s determination that the rule will not have a significant economic impact on a substantial number of small entities. The economic analysis may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov). Copies of the economic analysis are also available from the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### 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).

#### Subpart—Preemption and Special Need Requests

■ 2. The heading of Subpart—Special Need Requests, consisting of §§ 301.1 through 301.1–3, is revised to read as set forth above.

■ 3. In § 301.53–3, paragraph (c) is amended as follows:

■ a. Under the heading Maryland, by adding, in alphabetical order, an entry for Charles County to read as set forth below.

■ b. Under the heading Michigan, under Upper Peninsula, by adding, in alphabetical order, entries for Delta, Houghton, Keweenaw, Mackinac, and Schoolcraft Counties to read as set forth below.

■ c. By adding, in alphabetical order, new entries for Minnesota, Missouri, Pennsylvania, Virginia, West Virginia, and Wisconsin to read as set forth below.

#### § 301.53–3 Quarantined areas.

\* \* \* \* \*

(c) \* \* \*

**Maryland***Charles County.* The entire county.

\* \* \* \* \*

**Michigan**

Upper Peninsula: \* \* \*

*Delta County.* The entire county.*Houghton County.* The entire county.*Keweenaw County.* The entire county.*Mackinac County.* The entire county.*Schoolcraft County.* The entire county.

\* \* \* \* \*

**Minnesota***Houston County.* The entire county.**Missouri***Wayne County.* The entire county.

\* \* \* \* \*

**Pennsylvania***Allegheny County.* The entire county.*Beaver County.* The entire county.*Butler County.* The entire county.*Lawrence County.* The entire county.*Mercer County.* The entire county.*Mifflin County.* The entire county.**Virginia***City of Alexandria.* The entire city.*City of Fairfax.* The entire city.*City of Falls Church.* The entire city.*City of Manassas.* The entire city.*City of Manassas Park.* The entire city.*Arlington County.* The entire county.*Fairfax County.* The entire county.*Fauquier County.* The entire county.*Loudon County.* The entire county.*Prince William County.* The entire county.**West Virginia***Fayette County.* The entire county.**Wisconsin***Crawford County.* The entire county.*Fond du Lac County.* The entire county.*Ozaukee County.* The entire county.*Sheboygan County.* The entire county.*Vernon County.* The entire county.*Washington County.* The entire county.

Done in Washington, DC, this 15th day of September 2009.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E9-22635 Filed 9-18-09; 8:45 am]

**BILLING CODE 3410-34-P**

**DEPARTMENT OF AGRICULTURE****Animal and Plant Health Inspection Service****7 CFR Part 301**

[Docket No. APHIS-2008-0083]

**Gypsy Moth Generally Infested Areas; Illinois, Indiana, Maine, Ohio, and Virginia**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the gypsy moth regulations by adding areas in Illinois, Indiana, Maine, Ohio, and Virginia to the list of generally infested areas based on the detection of infestations of gypsy moth in those 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 the gypsy moth to noninfested areas of the United States.

**DATES:** This interim rule is effective September 21, 2009. We will consider all comments that we receive on or before November 20, 2009.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0083> to submit or view comments and to view supporting and related material available electronically.

- *Postal/Mail/Commercial Delivery:* Please send two copies of your comments to Docket No. APHIS-2008-0083, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket APHIS-2008-0083.

*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:** Dr. Weyman Fussell, Program Manager,

Gypsy Moth, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road, Unit 134, Riverdale, MD 20737-1236; (301) 734-5705.

**SUPPLEMENTARY INFORMATION:****Background**

The gypsy moth (*Lymantria dispar*) is a destructive pest of forest and shade trees. The gypsy moth regulations (contained in 7 CFR 301.45 through 301.45-12 and referred to below as the regulations) restrict the interstate movement of regulated articles from generally infested areas to prevent the artificial spread of the gypsy moth.

In accordance with § 301.45-2 of the regulations, generally infested areas are, with certain exceptions, those States or portions of States in which a gypsy moth general infestation has been found by an inspector, or each portion of a State that the Administrator deems necessary to regulate because of its proximity to infestation or its inseparability for quarantine enforcement purposes from infested localities. Less than an entire State will be designated as a generally infested area only if: (1) The State has adopted and is enforcing a quarantine or regulation that imposes restrictions on the intrastate movement of regulated articles that are substantially the same as those that are imposed with respect to the interstate movement of such articles; and (2) the designation of less than the entire State as a generally infested area will be adequate to prevent the artificial interstate spread of infestations of the gypsy moth.

**Designation of Areas as Generally Infested Areas**

Section 301.45-3 of the regulations lists generally infested areas. In this rule, we are amending § 301.45-3(a) by adding 3 counties in Illinois, 1 county in Indiana, 34 townships in Maine, 1 county in Ohio, and 1 county in Virginia to the list of generally infested areas. As a result of this rule, the interstate movement of regulated articles from these areas will be restricted.

We are taking this action because, in cooperation with the States of Illinois, Indiana, Maine, Ohio, and Virginia, the United States Department of Agriculture conducted surveys that detected multiple life stages of the gypsy moth in Cook, Du Page, and McHenry Counties, IL; St. Joseph County, IN; several townships in Aroostook, Franklin, Penobscot, Piscataquis, and Somerset Counties, ME; Morrow County, OH; and Montgomery County, VA. Based on these surveys, we determined that reproducing populations exist at