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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS-2017-0056]

RIN 0579-AE42

Removal of Emerald Ash Borer Domestic Quarantine Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to remove the domestic quarantine regulations for the plant pest emerald ash borer. This action would discontinue the domestic regulatory component of the emerald ash borer program as a means to more effectively direct available resources toward management and containment of the pest. Funding previously allocated to the implementation and enforcement of these domestic quarantine regulations would instead be directed to a nonregulatory option of research into, and deployment of, biological control agents for emerald ash borer, which would serve as the primary tool to mitigate and control the pest.

DATES: 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#!/docketDetail;D=APHIS-2017-0056>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2017-0056, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2017-0056> or in our reading room, which 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) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Robyn Rose, National Policy Manager, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1231; (301) 851-2283; Robyn.I.Rose@aphis.usda.gov.

SUPPLEMENTARY INFORMATION:

Background

Emerald ash borer (EAB, *Agrilus planipennis*) is a destructive wood-boring pest of ash (*Fraxinus* spp.) native to China and other areas of East Asia. First discovered in the United States in southeast Michigan in 2002, EAB is well-suited for climatic conditions in the continental United States and is able to attack and kill healthy trees in both natural and urban environments. As a result, EAB infestations have been detected in 31 States and the District of Columbia, with additional infestations that have not yet been detected likely. The Animal and Plant Health Inspection Service (APHIS) instituted a domestic quarantine program for EAB that has been in place since 2003.

The regulations in “Subpart—Emerald Ash Borer” (7 CFR 301.53-1 through 301.53-9, referred to below as the regulations) list quarantined areas that contain or are suspected to contain EAB, and identify, among other things, regulated articles and the conditions governing the interstate movement of such regulated articles from quarantined areas in order to prevent the spread of EAB more broadly within the United States. Since the implementation of the domestic quarantine program, several factors have adversely affected its overall effectiveness in managing the spread of EAB.

First, during the Midwestern housing boom that began in the 1990s, ash trees often were planted in new housing developments because of their hardiness and general resistance to drought conditions; however, developers frequently sourced these trees from nurseries that were later determined to be heavily infested with EAB and that were subsequently put under quarantine. It was several years after the issuance of domestic quarantine regulations before surveys identified many long-standing infestations of EAB in residential areas, leading to a substantial increase in the number of counties under quarantine.

Second, the regulations cannot preclude the spread of EAB throughout its geographical range, which has expanded over time. In recent years, this has led to a significant number of regulatory actions to place additional counties under quarantine. In fiscal year (FY) 2016 alone, APHIS issued 16 Federal Orders designating additional quarantined areas for EAB, and many of these designated multiple quarantined areas.

In light of these difficulties, we propose to remove the domestic quarantine regulations for EAB. Funding previously allocated to the implementation and enforcement of the regulations would instead be directed toward nonregulatory efforts involving research into, and release of, biological control (biocontrol) agents. Emphasis in the EAB program on the

development and deployment of biocontrol agents in this way provides a promising approach to mitigate and control infestations by focusing directly on the pest and, ultimately, its ability to spread.

The ongoing monitoring of current EAB biocontrol measures shows encouraging results in protecting ash regrowth in areas that had been previously affected by EAB. For example, a biocontrol agent released in urban quarantined areas has shown significant population growth and has spread throughout urban communities, demonstrating preliminary evidence of the efficacy of biocontrol for EAB in areas that have experienced significant tree loss due to infestation. Reallocating funding from regulatory to nonregulatory control measures also would facilitate achievement of the Agency goal to release and establish biocontrol agents in every known EAB-infested county where the agent populations can be sustained.

Accordingly, we are proposing to remove the EAB domestic quarantine regulations to more effectively direct available resources toward management and containment of the pest.

Executive Orders 12866 and 13771 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. This proposed rule, if finalized as proposed, is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is summarized below, regarding the economic effects of this proposed rule on small entities. Copies of the full analysis are available by contacting the person listed under

FOR FURTHER INFORMATION CONTACT or on the Regulations.gov website (see ADDRESSES above for instructions for accessing Regulations.gov).

Based on the information available to APHIS, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

APHIS is proposing to remove the domestic quarantine regulations for EAB. This action would discontinue the domestic regulatory component of the EAB program. Funding allocated to the implementation and enforcement of these quarantine regulations would instead be directed to a nonregulatory option of research and deployment of biocontrol agents for EAB. Biocontrol would be the primary tool used to control the pest and mitigate losses.

There are currently more than 800 active EAB compliance agreements, covering establishments that include sawmills, logging/lumber producers, firewood producers, and pallet manufacturers. The purpose of the compliance agreements is to ensure observance of the applicable requirements for handling regulated articles. Establishments involved in processing, wholesaling, retailing, shipping, carrying, or other similar actions on regulated articles require a compliance agreement to move regulated articles out of a Federal quarantine area.

Under this proposal, establishments operating under EAB compliance agreements would no longer incur costs of complying with Federal EAB quarantine regulations, although States could still impose restrictions. Businesses would forgo the paperwork and recordkeeping costs

of managing Federal compliance agreements. However, some businesses may still bear treatment costs, if treatment is for purposes besides prevention of EAB dissemination. Costs avoided under the proposed rule would depend on the type of treatment and whether treatment would still occur for purposes other than those related to the Federal EAB regulatory restrictions on interstate movement.

Articles currently regulated for EAB include hardwood firewood, chips, mulch, ash nursery stock, green lumber, logs, and wood packaging material (WPM) containing ash. Articles can be treated by bark removal, kiln sterilization, heat treatment, chipping, composting, or fumigation, depending on the product.

For affected industries, we can estimate the cost savings if treatment were to cease entirely. Currently, there are 166 active EAB compliance agreements where sawmills and logging/lumber establishments have identified kiln sterilization as a method of treatment. If all of these producers stop heat treating ash lumber or logs as a result of this rule, the total cost savings for producers could be between about \$920,000 and \$1.6 million annually. There are 103 active EAB compliance agreements where heat treatment of firewood is identified as a treatment. If all of these firewood producers stop heat treating firewood as a result of this rule, the total cost savings for producers could be between about \$99,400 and \$746,000 annually.

There are 70 active EAB compliance agreements where heat treatment is identified as the pallet treatment. If all of these producers are producing ash pallets and stop heat treating as a result of this rule, the total cost savings for producers could be between about \$8.8 million and \$13.2 million annually. If all 349 establishments with compliance agreements where debarking is identified as a treatment stop their secondary sorting and additional bark removal in the absence of EAB regulations, the total annual labor cost savings for producers could be about

\$1.7 million annually. If all 397 establishments with compliance agreements where chipping or grinding is identified as a treatment stop re-grinding regulated materials in the absence of EAB regulations, the total annual cost savings for producers could be about \$10.6 million annually. The annual cost savings for these various entities could total between about \$9.8 million and \$27.8 million annually.

Since no effective quarantine treatments are available for ash nursery stock, there are no compliance agreements issued for interstate movement of that regulated article. In 2014, there were 316 establishments selling ash trees, 232 with wholesale sales, operating in States that are at least partially quarantined for EAB. Sales volumes for at least some of these operations could increase if their sales are constrained because of the Federal quarantine.

Internationally, deregulation of EAB may affect exports of ash to Norway and Canada, the two countries that have import restrictions with respect to EAB host material. Norway uses pest-free areas in import determinations. With removal of the domestic quarantine regulations, it is unlikely that Norway would recognize any area in the United States as EAB free. All exports of ash logs and lumber to Norway would likely be subject to debarking and additional material removal requirements. From 2013 through 2017, exports to Norway represented less than one-tenth of 1 percent of U.S. ash exports. We estimate that labor costs for overseeing the debarking on these exports would total less than \$500.

The United States also exports to Canada products such as hardwood firewood, ash chips and mulch, ash nursery stock, ash lumber and logs, and WPM with an ash component from areas not now quarantined. New Canadian restrictions would likely depend on the product and its destination within Canada. From 2013 through 2017, Canada received about 3 percent of U.S. ash lumber exports, and about 9 percent of U.S. ash log exports. Of about 72,000 phytosanitary

certificates (PCs) issued from January 2012 through August 2017 for propagative materials exported to Canada, a little more than 1 percent was specifically for ash products. Although APHIS does not have sufficient data to fully evaluate the costs of additional mitigations on all ash materials and welcomes public comment to help determine these costs, we estimate that additional heat treatment costs and labor costs for overseeing debarking of ash lumber and logs exported to Canada would range from about \$54,000 to \$90,700.

Taking into consideration the expected cost savings shown in table A of the full analysis and these estimated costs of exporting ash to Norway and Canada following deregulation, and in accordance with guidance on complying with EO 13771, the single primary estimate of the cost savings of this proposed rule is \$18.8 million, the mid-point estimate annualized in perpetuity using a 7 percent discount rate.

EAB is now found in 31 States and the District of Columbia and it is likely that there are infestations that have not yet been detected. Newly identified infestations are estimated to be 4 to 5 years or more in age. Known infestations cover about 27 percent of the native ash range within the conterminous United States.

It is probable that without the EAB program, human-assisted dispersal of EAB would have extended to areas that are not yet infested, that is, regulatory activities have slowed the spread of EAB, delaying losses. However, the volume of regulatory activities needed to effectively contain EAB depends on the size of the quarantined area.

Any delay in EAB spread attributable to the quarantine regulations would end with the proposed rule. EAB program emphasis and resources would turn to the development and release of biocontrol agents to control infestations and mitigate losses. Ongoing monitoring and evaluation of EAB biocontrol methods are showing promising results in protecting ash regrowth

in areas previously affected by EAB. For example, a biocontrol agent released in urban quarantined areas has spread significantly throughout these communities. Reallocation of program funds to biocontrol would support the goal of establishing biocontrol agents in every EAB-infested county where control agent populations can be sustained. Still, we are unable to evaluate the change in EAB risk, by using biocontrol in place of regulatory quarantines, for operations not yet affected by this pest. Public outreach activities outside the EAB regulatory program would continue, such as the “Don’t move firewood” campaign which focuses on a significant pathway for EAB and other forest pests.

In sum, elimination of compliance requirements under the proposed rule would yield cost savings for affected entities within EAB quarantined areas. Moreover, sales volumes for at least some of these operations could increase if their sales have been constrained because of the Federal quarantine. Costs avoided would depend on the type of treatment and whether treatment would still occur for non-quarantine purposes. Costs ultimately borne also would depend on whether States decide to continue to enforce their own EAB quarantine programs. We anticipate States will continue to impose movement restrictions on firewood and the regulatory requirements vary from State to State. Strategies to address firewood as a pathway for forest pests are being developed. Internationally, the proposed rule may affect exports of ash products to Norway and Canada. Longer term, the impact of the proposed rule on ash populations in natural and urban environments within and outside currently quarantined areas—and on businesses that grow, use, or process ash—is indeterminate.

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 2 CFR chapter IV.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) State and local laws and regulations will not be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

APHIS has assessed the impact of this rule on Indian tribes and determined that this rule does have tribal implications that require tribal consultation under EO 13175. In January 2018, APHIS State Plant Health Directors sent a letter to the leaders of all federally recognized Tribes in their States informing them of the agency's intent to publish a proposed rule to remove the EAB domestic quarantine and inviting tribal members to provide comments. In May 2018,

consultations were held with the four federally recognized Tribes in Maine; all four Tribes expressed concern with the proposed action and requested APHIS delay deregulating the EAB until more work can be done to lessen the impact of the pest on native ash in the State. We will consider these requests, as well as any additional information received during the comment period for this proposed rule, as we determine whether or how to proceed with this rulemaking. If these or other Tribes request new or additional consultation, APHIS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

This proposed rule contains no reporting, recordkeeping, or third party disclosure 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 propose to amend 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—Emerald Ash Borer [Removed]

2. Subpart—Emerald Ash Borer, consisting of §§ 301.53-1 through 301.53-9, is removed.

Done in Washington, DC, this 12th day of September 2018.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

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