

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice.
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Agriculture and Markets

NOTICE OF ADOPTION

Species of Ash Tree, Parts Thereof and Products and Debris Therefrom, Which Are at Risk for Infestation by the Emerald Ash Borer

I.D. No. AAM-21-15-00004-A

Filing No. 632

Filing Date: 2015-07-22

Effective Date: 2015-08-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Repeal of Part 141; and addition of new Part 141 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

Subject: Species of ash tree, parts thereof and products and debris therefrom, which are at risk for infestation by the emerald ash borer.

Purpose: To limit the emerald ash borer quarantine to 14 restricted zones where infestation exists.

Text of final rule: 1 NYCRR Part 141 is repealed and a new Part 141 is added to read as follows:

PART 141

CONTROL OF THE EMERALD ASH BORER

§ 141.1 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 Handler. Any person who is granted a limited permit or certificate issued by the Department or enters into a compliance agreement with the Department.*

(c) *Ash. All Fraxinus species including green ash (Fraxinus pennsylvanica), white ash (Fraxinus americana), black ash (Fraxinus nigra), blue ash (Fraxinus quadrangulata) and any horticultural cultivar of these species.*

(d) *Buffer Area. The zone surrounding the core area of EAB infestation, which begins at the outside boundary of the core area of infestation and extends outward for a distance of five miles.*

(e) *Certificate of inspection. A document issued by the Department certifying the eligibility of products for intrastate movement under this Part.*

(f) *Commissioner. The Commissioner of the Department of Agriculture and Markets or the Commissioner's duly authorized representative.*

(g) *Compliance agreement. A document issued by the Department setting forth the requirements covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement, which, if followed, permits the persons or firm executing the document to issue an inspection certificate or a limited permit pursuant to the terms of the document and this Part without a Department inspection prior to each movement.*

(h) *"Core Area." The location of an EAB infestation, as determined by the DEC and confirmed by the Department, based upon the detection of the emerald ash borer and/or evidence of its activity in one or more of its life stages at that location.*

(i) *DEC. The Department of Environmental Conservation.*

(j) *Department. The Department of Agriculture and Markets.*

(k) *Emerald ash borer or EAB. The insect known as the emerald ash borer, Agrilus planipennis, in any stage of development.*

(l) *Firewood. With respect to this Part, ash wood, cut or not cut, split or not split, regardless of length, which is either in a form and size appropriate for use as fuel, or intended for use as fuel. Firewood does not include: (1) kiln dried dimensional lumber; (2) wood that has been chipped; and (3) logs or wood being transported to or possessed by the following operations and facilities for use in their primary manufacturing process:*

(1) *sawmills for dimensional lumber;*

(2) *pulp and/or paper mills;*

(3) *wood pellet manufacturing facilities;*

(4) *plywood manufacturing facilities;*

(5) *wood biomass-using refineries or power plants;*

(6) *re-constituted wood or wood composite product manufacturing plants; and*

(7) *facilities treating firewood in accordance with department regulations.*

(m) *Infestation. This term refers to the presence of the emerald ash borer in any life stage or as determined by evidence of activity of one or more of the life stages.*

(n) *Inspector. An inspector of the Department, or cooperator from DEC or the United States Department of Agriculture (USDA), when authorized by the Department to act in that capacity.*

(o) *Limited permit. A document issued under the authority of the Department permitting the one-time restricted movement of regulated articles from a quarantined area to a specified destination for specified processing, handling or utilization.*

(p) *Local government. A village, town, city or county.*

(q) *Moved; movement. Shipped, offered or received for shipment, carried, transported, or relocated into or through any area of the State.*

(r) *Nursery stock. All trees, shrubs, plants and vines and parts thereof.*

(s) *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 DEC.

(t) **Quarantine Area.** The geographic area delineated on the EAB quarantine map in section 141.2 of this Part, establishing the boundaries of the restricted zones within the state which are subject to the requirements set forth of this Part.

(u) **Regulated article.** Any ash material, living, dead, cut or fallen, inclusive of nursery stock, logs, firewood, green lumber, stumps, roots, branches and debris, and any wood material that is commingled and otherwise indistinguishable from the above. Notwithstanding the above, (1) ash bark and mulch are not regulated articles; and (2) ash chips or chips indistinguishable from ash chips, regardless of size, are regulated articles only during the period commencing on April fifteenth and continuing up to and including May fifteenth.

(v) **Restricted zone.** A geographic area of the state delineated on the EAB quarantine map, which includes a core area of infestation, the buffer area and the entire area of any town or city which has thirty (30) percent or more of its total area falling within the respective core area and/or the buffer area.

§ 141.2 Establishment and amendment of quarantine maps.

(a) **Establishment of quarantine area.** The initial quarantine area is set forth on the quarantine map set forth below. See Appendix in the back of this issue.

(b) A copy of the map delineating the quarantine area is maintained in the office of the clerk of each local government in which a restricted zone or a portion thereof is located.

(c) Any amendment of or addition to the map delineating the quarantine area shall be made by regulation.

§ 141.3 Movement of regulated articles within restricted zones.

Regulated articles, including emerald ash borer infested material, may be moved, by any person, at any time, within a restricted zone, for processing, treatment, use or disposal at any other location within that same restricted zone provided the regulated article is eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

§ 141.4 Restrictions on intrastate movement of regulated articles originating within or traveling through restricted zones.

(a) No person shall move:

(1) Ash nursery stock from any restricted zone;

(2) Chips larger than one inch in two dimensions from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year; and

(3) Regulated articles (other than ash nursery stock) from any restricted zone to or through any point outside the restricted zone, unless: (i) accompanied by a valid certificate of inspection; limited permit authorizing such movement; or administrative instructions of the Commissioner; or (ii) for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by the Department.

(b) Notwithstanding the above, regulated articles originating from within New York but outside any restricted zone in New York State may be moved through any restricted zone in the state, provided that:

(1) The points of origin and destination of the regulated articles are indicated on a waybill accompanying the regulated article; and

(2) Regulated articles are moved directly through the restricted zone without stopping, except for refueling and traffic conditions.

§ 141.5 Conditions governing compliance agreements for movement of regulated articles out of a restricted zones.

(a) Persons engaged in growing, handling, or moving regulated articles intrastate may apply for a compliance agreement with the Department, which agreement will authorize the person executing the agreement to issue certificates of inspection and 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.

§ 141.6 Conditions governing certificates of inspection and limited permits for the movement of regulated articles out of restricted zones.

(a) An inspector or an authorized holder of a compliance agreement may issue a certificate of inspection for the movement of a regulated article out of a restricted zone, provided that the regulated article:

(1)(i) is apparently free of emerald ash borer, based on inspection by an inspector; or (ii) has been grown, produced, manufactured, treated, stored, or handled in a manner that, in the judgment of the inspector, prevents the regulated article from presenting a risk of spreading emerald ash borer; and

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

(b) If the regulated article is not eligible for a certificate of inspection, an inspector or authorized holder of a compliance agreement can issue a limited permit for the movement of the regulated article out of a restricted zone upon the following conditions:

(1) the inspector or authorized holder of a compliance agreement determines that the regulated article: (i) is to be moved intrastate to a specified destination; (ii) for specific processing, handling, or utilization; and (iii) this intrastate movement will not result in the spread of emerald ash borer because emerald ash borer will be destroyed by the specific processing, handling, or utilization;

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

(3) the destination of the regulated articles and other conditions determined by the inspector are stated in the limited permit.

(c) An inspector or authorized holder of a compliance agreement may provide additional certificates of inspection or limited permits pursuant to the terms of a compliance agreement or authorize, in writing, reproduction of the certificates of inspection on shipping containers, or both, as requested by the person operating under the compliance agreement. These certificates of inspection and limited permits may then be completed and used, as needed, for the movement out of a restricted zone of regulated articles that have met all of the requirements of this Part.

(d) Any certificate of inspection or limited permit may be cancelled orally or in writing by an inspector whenever the inspector determines that the holder of the certificate of inspection or 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.

§ 141.7 Shipments for experimental and scientific purposes.

Regulated articles 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 articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the Department showing compliance with such conditions.

§ 141.8 Marking requirements.

Every container of regulated articles 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 certificate (or limited permit) issued in compliance with this Part, provided, that:

(a) For lot freight shipments, other than by road vehicle, one certificate 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 certificate may be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) For movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of the shipment.

§ 141.9 Assembly of regulated articles for inspection.

(a) Persons intending to move intrastate any regulated articles shall make application for certification as far in advance as possible, and will be required to prepare and assemble materials at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments applied. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The Department will not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

§ 141.10 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 intra-

state from the restricted zone, which may contain regulated articles or which may contain, infestations of the emerald ash borer, may be examined by an inspector at any time or place. 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 emerald ash borer. If found to be infested, such items must be rendered free of infestation without cost to the state other than services of the inspector.

§ 141.11 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.

§ 141.12 Effective date.

This part shall become effective in a particular county on and after the tenth day from the filing of a certified copy in the office of the clerk of that county.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 141.4(a)(2).

Text of rule and any required statements and analyses may be obtained from: Christopher A. Logue, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

Revised Regulatory Impact Statement

Since the change in the rule is nonsubstantive, the change does not necessitate the revision of the previously published Regulatory Impact Statement. The change does not materially alter the purpose, meaning or effect of the text, and actually lessens a regulatory burden by allowing movement during flight season of chips one inch or smaller in two dimensions.

Revised Regulatory Flexibility Analysis

Since the change in the rule is nonsubstantive, the change will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. The change does not materially alter the purpose, meaning or effect of the text, and actually lessens a regulatory burden by allowing movement during flight season of chips one inch or smaller in two dimensions.

Revised Rural Area Flexibility Analysis

Since the change in the rule is nonsubstantive, the change will not impose any adverse impact on reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The change does not materially alter the purpose, meaning or effect of the text, and actually lessens a regulatory burden by allowing movement during flight season of chips one inch or smaller in two dimensions.

Revised Job Impact Statement

Since the change in the rule is nonsubstantive, the change will not impose a substantial impact on jobs or employment opportunities. The change does not materially alter the purpose, meaning or effect of the text, and actually lessens a regulatory burden by allowing movement during flight season of chips one inch or smaller in two dimensions.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department received comments on the repeal of Part 141 of 1 NYCRR and the addition of a new Part 141 of 1 NYCRR, which would help control the spread of the emerald ash borer (EAB) in New York State. The Department received two comments during the public comment period.

First Comment:

The first comment was submitted by Eric Carlson, President and CEO of the Empire State Forest Products Association. Mr. Carlson raises four issues and concerns in his comments, as follows:

Issue/Concern: Mr. Carlson expresses the view that the past regulatory framework has done very little to slow the spread of EAB and that except for the Adirondacks, EAB is in every region of the State.

Response: The Department disagrees. Surveys reveal that EAB is not in every region of the State and in fact, only approximately 7.3 percent of New York State has been found to be infested with the pest. The Department believes that its EAB quarantines, coupled with the New York State Department of Environmental Conservation's (DEC's) regulations restricting movement of untreated firewood, have significantly slowed the spread of EAB in New York State.

Issue/Concern: Mr. Carlson expresses the view that EAB infestations have spread due to local concentrations of ash trees, and expects the pattern to continue under the new regulations. He also indicates that the regulations would impact local wood harvesting entities and consumers, since extra handling to separate ash from other wood species would be necessary and would limit sales of untreated ash firewood. Mr. Carlson says that although the restrictions in the regulations would not be a large factor in firewood availability, the restrictions would contribute to local shortages of firewood in certain regions of New York State. Finally, Mr. Carlson indicates that firewood producers in any of the restricted zones set forth in the regulations would be placed at a competitive disadvantage in supplying local markets.

Response: Notwithstanding local concentrations of ash trees, evidence suggests that the quarantines have slowed the spread of EAB, particularly in the case of human-assisted movement which allows the pest to infest areas far beyond its point of origin. The Department agrees (as Mr. Carlson notes) that market factors other than the restrictions in the regulations have contributed to firewood shortages in some areas. The Department believes that the economic and environmental benefits of the regulation in protecting New York State's natural resources from the spread of EAB outweighs the costs to regulated parties. In any event, these costs to firewood producers are mitigated by the fact that the regulations allow for the sale of ash firewood within a restricted zone; allow for the sale and movement of firewood other than ash outside a restricted zone; and allow any heat-treated firewood to be sold and moved throughout New York State.

Issue/Concern: Mr. Carlson questions the overall benefit of separating logs by species and restricting movement of infested ash wood in more populated areas where expensive trees being used along public roads and in public parks are being impacted. He recommends that the Department reconsider the regulations and possibly eliminate them, while continuing outreach to populated regions to assist communities in understanding measures to consider in implementing practical, cost-effective strategies.

Response: The regulations are but one component of the State's overall response to EAB. Other aspects include ongoing outreach and educational efforts aimed at reducing the human-assisted spread of EAB; technical and financial assistance to communities in preparing for and responding to EAB; and participation in biocontrol research. Outreach efforts with communities and regulated parties are ongoing. The Department and DEC are monitoring the status of the EAB infestations as well as new detections. Amendments to the regulations are possible if circumstances so warrant.

Issue/Concern: Mr. Carlson argues that the likelihood of EAB surviving the chipping operations at a mill is very low and urges that the restriction concerning the transport of ash wood chips during EAB flight season be removed. He says that the restriction "imposes serious material handling problems while creating new worker safety concerns." He also says that the restriction diminishes the value of the chips for other wood products.

Response: Section 141.4(a)(2) of the regulations provides that no person shall move "Chips of any size from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year ..." The Department has considered Mr. Carlson's comment as well as applicable federal protocols. In an effort to clarify the regulations, the Department is making a nonsubstantial change to section 141.4(a)(2) to read that no person shall move "Chips larger than one inch in two dimensions from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year ..."

This change eases a regulatory burden and addresses Mr. Carlson's concern at least in part, by allowing movement of very small chips (one inch or less in two dimensions) during flight season.

Second Comment:

The second comment was submitted by Thomas Gerow of the Wagner Companies in Owego, New York. He raises the following issue/concern:

Issue/Concern: Like Mr. Carlson, Mr. Gerow questions the need for the prohibition against the movement of wood chips during the EAB flight season (April 15th - May 15th). He believes it is "not impossible, just extremely unlikely" that EAB could survive the chipping process.

Response: As noted above, the Department has changed Section 141.4(a)(2) to allow the movement during flight season of chips which are one inch or less in two dimensions.