

DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS

Title 3, California Code of Regulations

Section 3288

Emerald Ash Borer Exterior Quarantine

INITIAL STATEMENT OF REASONS/

POLICY STATEMENT OVERVIEW

Description of Public Problem, Administration Requirement, or Other Condition or Circumstance
the Regulation is Intended to Address

This regulation is intended to address the obligation of the Department of Food and Agriculture (Department) to protect the agricultural industry and environment from the introduction and spread of injurious plant pests within California. Specifically, the regulation is intended to prevent the introduction into California of the emerald ash borer (*Agilus planipennis*), a nonnative pest currently spreading through North America.

On 1/14/2021 the Animal and Plant Health Inspection Service (APHIS) removed the emerald ash borer (*Agilus planipennis*) domestic quarantine regulations. Prior to its removal, this regulation listed areas that contained or were suspected to contain emerald ash borer as well as regulated articles. The regulation outlined the conditions governing the interstate movement of regulated articles from quarantined areas. The regulation's removal has left the state of California without means to enforce a quarantine against this pest, so it was necessary to immediately adopt an exterior quarantine against the pest on an emergency basis. The emergency adoption of title 3 California Code of Regulations (CCR) 3288 Emerald Ash Borer Exterior Quarantine went into effect on April 9, 2021. The order allowing the Secretary of the Department to approve and proclaim quarantine regulations involving a state exterior quarantine was signed by the Governor Newsom on January 21, 2021. The order signed by Secretary Ross declaring the Emerald Ash Borer Exterior Quarantine was signed on February 8th, 2022.

This current rulemaking action will adopt the Emerald Ash Borer Exterior Quarantine on a permanent basis.

Purpose

The specific purpose of Section 3288 is to prevent the introduction of live emerald ash borer into California. Emerald ash borer is a wood-boring pest native to Asia that was first found in the United State in 2002. Since the initial find in Michigan the pest has now spread to 30 states.

Factual Basis

The factual basis for the determination by the Department that adoption of these regulations is necessary is as follows:

The Food and Agricultural Code (FAC) Section 403 provides that the department shall prevent the introduction and spread of injurious insect or animal pests, plant diseases, and noxious weeds.

Under FAC Sections 407, 5301, and 5302, the Department is authorized to adopt regulations necessary to prevent the spread of injurious insect pests and animal diseases.

Under FAC Section 5024, the Department shall inspect any plant or thing that is, or is liable to be, infested or infected by, or which might act as a carrier of, any pest.

Under FAC Section 5321, the Secretary is obligated to investigate the existence of any pest that is not generally distributed within this state and determine the probability of its spread and the feasibility of its control or eradication.

The FAC Section 5322, provides that the Secretary may establish, maintain, and enforce quarantine, eradication, and such other regulations as are in their opinion necessary to circumscribe and exterminate or prevent the spread of any pest which is described in FAC Section 5321. The Secretary may make and enforce such regulations as she deems necessary to prevent any plant or thing which is, or is liable to be, infested or infected by, or which might act as a carrier of, any pest, from passing over any quarantine line which is established and proclaimed pursuant to this division

The Department has determined it is necessary to take these steps to protect California agriculture from this injurious insect pest as per FAC 407.

Background

The emerald ash borer's life cycle depends on members of the olive botanical family (Oleaceae), especially ash trees (*Fraxinus* species). Adult emerald ash borers feed on leaves and lay eggs in the bark of ash trees, of which 16 varieties are found in the United States. The eggs hatch in 7 to 10 days and the larvae chews through the outer bark where the eggs were laid and into the inner bark where they feed. This feeding damages and will eventually kill the tree. Larvae emerald ash borer's stay in the tree they hatched in, and adults only fly roughly half a mile after they emerge. In addition, emerald ash borers have been demonstrated to attack olive trees.

The pest is primarily spread throughout the country by the movement of its host material, currently most often when ash is transported as firewood or logs. Movement of emerald ash borers and their host material has been, until recently, regulated by the United States Department of Agriculture under a federal domestic quarantine. This quarantine was repealed in January 2021. Therefore, California currently has no specific protections against the artificial spread of emerald ash borer, although general inspections of firewood at the state border inspection stations continue.

If the emerald ash borer were allowed to spread and become established, California's ash trees and olive groves would be threatened. There are five native ash trees within the state, and ash is a common tree planted and maintained by cities. An ash tree infested with emerald ash borers may need to be removed, a weakened tree can fall or drop branches which is a danger to humans and infrastructure or treated to prevent the infestation from growing. Tree removal costs anywhere from \$200-\$2000 depending on the size of the tree, and treatment for a 14-inch diameter tree would be \$220 every other year.

The state's olive groves would be endangered as well. The state of California produces over 90% of the national annual crop of olives. Although the negative impact of emerald ash borer on olive production is unknown, it is highly damaging to its hosts and is difficult to control. Therefore, emerald ash borer has the potential to become a serious pest of olives if it spreads to California.

Should the Department fail to institute a quarantine against this pest, emerald ash borer could cause direct catastrophic losses to California's affected agricultural industries and its native trees. There could also cause significant harm to the State's economy through cost impacts or prohibitions to interstate commerce and exports of host commodities.

California Environmental Quality Act

A preliminary review pursuant to title 14 CCR section 15060(c) indicates that adoption of this regulation will not cause either a direct physical change to the environment or a reasonably foreseeable indirect physical change to the environment.

Project Description

Section 3288 (a)

Section 3288 (a) establishes that the quarantine is being created against emerald ash borer *Agrilus planipennis*, a beetle in the Order Coleoptera, Family Buprestidae.

Section 3288 (b)

Section 3288 (b) defines terms used in the regulation. These terms are defined within the use of the regulation.

"Infestation" is defined as an established, reproducing population of emerald ash borer as designated or determined by the Department, or when an area has been reported to be infested by the United States Department of Agriculture or a state plant regulatory agency. A reproducing population or infested area would create an ongoing issue, and the state would need to take further actions to eradicate it.

"Living Life Stage" is defined as all life stages of the emerald ash borer, including, but not limited to, adults, larva, pupae, or eggs. These stages could cause a reproducing population, which may lead to an infestation.

"Move; movement" is defined as shipped, received for shipment, carried, transported, or relocated into or through any infested area. Movement through an infested area could transport the emerald ash borer throughout the state.

“Moving through the quarantined area” is defined as moved directly through the quarantined area without stopping (except for refueling or for traffic conditions, such as traffic lights or stop signs), or has been stored, packed, or handled at locations approved by an California State Plant Quarantine Officer as not posing a risk of infestation by emerald ash borer. This definition was previously section (e)(3)(c), it has been moved to the definitions sections so all the defined terms are in one easy to review section.

“Person” is defined as any individual, partnership, association, corporation, and limited liability company. All are capable of moving material with emerald ash borer life stages.

“Regulated Article or Articles” is defined as any object that is covered in subsection d) of CCR 3288. This section outlines what materials are regulated within CCR 3288.

“Reproducing Population” is defined as biological evidence of the emerald ash borer’s ability to successfully reproduce in the environment, which would be the presence of multiple life stages of the emerald ash borer present within one year. This includes adults, larva, pupae, or eggs. A reproducing population may lead to an infestation.

Section 3288 (c)

Section 3288 (c) specifies that an area shall be designated as under quarantine when an infestation, as defined above, is present. After the first readoption of this regulation, the word “comprising” has been added to the phrase “comprising the entire state where an infestation is present” to make clear that the entire state will be considered a quarantine area. Material moving from an infested area may contain various life stages of the emerald ash borer. If detailed information regarding the pest’s distribution within a state is absent the entire state where an infestation is will be designated under quarantine as the Department will have no way of knowing if the material has moved through an infested area or not. However, if the infestation is documented by survey data provided by the state’s plant regulatory agency or the United States Department of Agriculture that allows detailed delimitation of the extent of the infestation within a state the quarantine may be at the county level. The Department shall update the maps of the infested areas as new information arrives and at least once a month to reflect the current quarantine areas. Maps of the infested areas will be updated at least once a month for the

public's use. These maps will be available on the Department's Plant Health and Pest Prevention Services (PHPPS) Pest Exclusion program website, http://maps.cdfa.ca.gov/EmeraldAshBorer/EmeraldAshBorer_US_InfestedArea.pdf.

Section 3288 (d)

Section 3288 (d) lists the articles and commodities declared in the regulation as hosts and possible carriers for emerald ash borer and that are included in the quarantine to protect the state from potential emerald ash borer infestations. These articles are all capable of harboring various life stages of the emerald ash borer. By declaring these hosts and potential carriers the Department is ensuring that there is no introduction into California of emerald ash borer by artificial spread.

Section 3288 (d) (1): Any living life stages of the emerald ash borer. This is to ensure that there is no introduction into California of emerald ash borer by artificial spread.

Section 3288 (d) (2): Firewood of ash trees (*Fraxinus* species) and mixed firewood containing hardwood (non-coniferous) species that likely includes ash wood. These species of plants and plant parts can provide shelter and substance for emerald ash borer egg masses, larvae, and adults.

Section 3288 (d) (3): Nursery stock, green lumber, and other material living, dead, cut, or fallen, including logs, stumps, roots, branches, and composted and uncomposted chips of ash trees. All these plants and plant parts can provide shelter and substance for emerald ash borer egg masses, larvae, and adults.

Section 3288 (d) (4): Any other article when it is determined by a California State Plant Quarantine Officer to present a risk of carrying or spreading any life stage of emerald ash borer. The terms "object, materials, or means of conveyance" were removed from this section as only articles present risk and the other terms should not have been included. Also, the term "an inspector" has been replaced with "California State Plant Quarantine Officer" as the term inspector could be interested to mean someone other than a California State Plant Quarantine Officer. If said officer determines there is risk they must in notify the person in possession that is transporting the article. Other articles could be potential hosts of emerald ash borer or can

harbor nymphs, adults, or egg masses of emerald ash borer. Therefore, they are high risk pathways for the artificial introduction of emerald ash borer into California. Added to this section is that when making this determination a California State Plant Quarantine Officer shall consider, amongst other factors, whether the article originated from an infested area and whether it was exposed outdoors at during the period of May 1 through August 31 or when the ambient air temperature is 40 °F or higher. This has been added so the public know the factors that will be taken into consideration when moving articles.

Section 3288 (e)

Section 3288 (e) prohibits entry into California of all articles and commodities covered in Section 3288 (d) from the area under quarantine with the following exceptions, as these represent a low risk of emerald ash borer introduction.

Section 3288 (e)(1)(A) and (B) states that articles and commodities that are determined to be free of emerald ash borers based on inspection and a California State Plant Quarantine Officer determines that the article has been grown, produced, manufactured, or stored, in a manner that prevents the article from presenting a risk of spreading the emerald ash borer are allowed entry into California. The term “an inspector” has been replaced with “California State Plant Quarantine Officer” as the term inspector could be interested to mean someone other than a California State Plant Quarantine Officer. Not all articles and commodities can harbor emerald ash borer and trained inspectors can identify when articles are safe for entry.

Section 3288 (e)(2) states that articles and commodities that are moved by the United States Department of Agriculture for experimental or scientific purposes are allowed entry into California. These articles and commodities are already subject to standards that lower the risk of them harboring pest.

Section 3288 (e)(3) states that if the regulated articles originate outside the quarantined area and is moved through the quarantined area they can be allowed entry into California under the following conditions if:

- They are moved through the quarantined area and points of origin and destination are indicated on a waybill accompanying the regulated article, and
- The regulated article, if moved through the quarantined area during the period of May 1

through August 31 or when the ambient air temperature is 40 °F or higher, is moved in an enclosed vehicle or is completely covered to prevent access by the emerald ash borer, and

- The article has not been combined or commingled with other articles so as to lose its individual identity.

Section (e)(3)(c) previously defined “Moving through the quarantined area” and was moved to section (b)(4) with the rest of the definitions within this regulation, the current section (e)(3)(c) was previously section (e)(3)(d).

The details of this quarantine are similar to the federal domestic quarantine requirements for emerald ash borer that ended in January 2021 and were effective in preventing infestations within California.

Economic Impact Analysis

The prevention of the introduction of emerald ash borer in California through the adoption and implementation of this regulation prevents economic harm too:

- the general public
- homeowners and community gardens
- agricultural industry
- the State’s general fund.

The Creation or Elimination of Jobs within the State

The adoption of this regulation is designed to prevent the introduction of emerald ash borer from interstate travel and shipping. Inspection activities are currently being performed by existing state and county staff at entry points throughout the State. The Department does not expect that additional review of compliance agreement or certificate would require significantly greater staff time. Therefore, the Department has determined that this regulatory proposal will have no significant impact on the creation or elimination of jobs in the State of California.

The Creation of New Businesses or the Elimination of Existing Businesses within the State

The adoption requires persons to have compliance agreement or certificate if the regulated articles are from or exposed to an infested area. There are no new vendors that will be formed to

provide this service or current vendors may hire new staff. Therefore, the Department has determined that this regulatory proposal will not have an impact on the creation of new businesses in the State.

The Expansion of Businesses Currently Doing Business within the State

The adoption requires persons to have compliance agreement or certificate if regulated articles are from or exposed to an infested area. The certificate is issued by the state of origin. There will be no businesses expanded to provide these services. Therefore, the Department has determined that this regulatory proposal will not have an impact on the creation of new businesses in the State.

Worker Safety

The amendment of this regulation is not expected to have an effect on worker safety.

Anticipated Benefits from This Regulatory Action

The adoption of this regulation benefits homeowners who have ash trees and host material which is planted as ornamentals in various rural and urban landscapes by preventing damage to these hosts and the need for them to be treated to mitigate infestations of emerald ash borer.

The Department is the only agency which can implement a regulation enacting an exterior quarantine. As required by Government Code Section 11346.5(a)(3)(D), the Department has conducted an evaluation of this regulation and has determined that it is not inconsistent or incompatible with existing State regulations.

Existing law, FAC Section 407, provides that the Secretary may adopt such regulations as are reasonably necessary to carry out the provisions of this code that the Secretary is directed or authorized to administer or enforce.

Estimated Cost of Savings to Public Agencies or Affected Private Individuals or Entities

The Department has determined that the adoption of Section 3288 does not impose a mandate on local agencies or school districts and no reimbursement is required under Section 17561 of the Government Code.

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the state will result from the adoption of Section 3288.

The Department has determined that the proposed actions will not have a significant adverse economic impact on housing costs or California businesses, including the ability of California businesses to compete with businesses in other states. The Department's determination that the action will not have a significant statewide adverse economic impact on business was based on the following:

Actions based on this regulation taken by the state or local entities likely would result in net savings to the state in reduced agricultural loss and preventing increased pesticide uses in the event of an infestation.

Based on the preceding information, it was determined that the adoption of CCR Section 3288 does not have a statewide adverse economic impact on a representative business or private party.

Assessment

Based upon the Economic Impact Analysis, the Department has made an assessment that the adoption of the regulation would not (1) create or eliminate jobs within California; (2) create new business or eliminate existing businesses within California; or (3) affect the expansion of businesses currently doing business within California.

Alternatives Considered

The Department has determined that no reasonable alternative has been identified and brought to the attention of the agency that would be more effective in carrying out the purpose for which the action is proposed, or is as effective and less burdensome to affected private persons than the proposed action, or is as cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Information Relied Upon

The Department relied upon the following studies, reports, and documents in the proposed adoption of Section 3288:

“Emerald Ash Borer” California Department of Food and Agriculture Plant Quarantine Manual, 8/17/2011

“Emerald Ash Borer Beetle” USDA, Animal and Plant Health Inspection Service

“Emerald Ash Borer: Biology and Life Cycle” New York Invasive Species Information

“How Much Does Emerald Ash Borer Treatment Cost?” Valley Green Companies; website at <https://valleygreen.net/2019/08/01/how-much-does-emerald-ash-borer-treatment-cost/>
Visited 2/5/2021

Order Adopting Emerald Ash Borer Exterior Quarantine, signed by Secretary Ross February 8th, 2022

Order Signed by the Governor Newsom declaring Quarantine Regulations on January 21, 2021

“Removal of Emerald Ash Borer Domestic Quarantine Regulations” USDA, Animal and Plant Health Inspection Service Plant Protection and Quarantine, 12/15/2020