

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF
NEW YORK

TITLE 1. DEPARTMENT OF AGRICULTURE AND MARKETS

CHAPTER III. PLANT INDUSTRY

SUBCHAPTER C. PREVENTION AND CONTROL OF DISEASE IN TREES AND PLANTS;
INSECT PESTS; SALE OF FRUIT-BEARING TREES (ARTICLE 14, AGRICULTURE AND
MARKETS LAW)

PART 128. CONTROL OF THE EUROPEAN CHERRY FRUIT FLY

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Section 128.1. 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 holder. Any person who is granted a limited permit or certificate of inspection by the Department or enters into a compliance agreement with the Department.
- (c) Certificate of inspection. The document issued under the authority of or by the Department, which affirms that a regulated article is free of ECFF for the purposes of intrastate movement.
- (d) Commissioner. The Commissioner of the Department of Agriculture and Markets or the Commissioner's duly authorized representative.
- (e) Compliance agreement. The document issued by the Department which permits the authorized holder of the compliance agreement to issue a limited permit or certificate of inspection pursuant to the terms of the document and this Part without a Department inspection prior to each movement, and which sets forth the requirements covering restricted movement, processing, handling or utilization of a regulated article not otherwise eligible for certification for intrastate movement.
- (f) Department. The Department of Agriculture and Markets.
- (g) Dripline. The line around the canopy of a plant.
- (h) European cherry fruit fly or ECFF. The insect known as the European cherry fruit fly, *Rhagoletis cerasi*, in any life stage.
- (i) Infestation. The presence of the European cherry fruit fly in any life stage, in any regulated article.
- (j) Inspector. Any inspector of the Department or cooperator from the United States Department of Agriculture (USDA), when authorized by the Department to act in that capacity.
- (k) Limited permit. The document issued under the authority of or by the Department permitting the one-time restricted movement of a regulated article from the quarantine area to a specified destination for specified processing, handling or utilization.
- (l) Moved and Movement. Shipped, offered or received for shipment, carried, transported, or relocated into or through any area of the State.
- (m) Nursery stock. All trees, shrubs, plants and vines and parts thereof.
- (n) Person. An individual, organization, corporation, 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 the United States Department of Agriculture.
- (o) Quarantine Area. The geographic area of the state defined in and delineated on the ECFF quarantine area map in section 128.2 of this Part.

(p) Regulated article.

(1) Fruit of ECFF host plants listed below including all cultivars of:

Scientific Name	Common Name
<i>Berberis aquifolium</i> Pursh	Holly barberry
<i>Berberis heteropoda</i> Schrenk ex Fisch. & C. A. Mey.	N/A
<i>Berberis vulgaris</i> L.	Common barberry
<i>Cornus sanguinea</i> L.	Common dogwood
<i>Lonicera alpigena</i> L.	Alpine honeysuckle
<i>Lonicera</i> spp.	N/A
<i>Lonicera tatarica</i> L.	Tatarian honeysuckle
<i>Lonicera xylosteum</i> L.	European fly honeysuckle
<i>Prunus avium</i> (L.) L.	Sweet cherry
<i>Prunus cerasus</i> L.	Sour cherry
<i>Prunus mahaleb</i> L.	Mahaleb cherry
<i>Prunus serotina</i> Ehrh.	Black cherry
<i>Prunus</i> spp.	Cherries ¹
<i>Symphoricarpos albus</i> (L.) S. F. Blake	Common snowberry
<i>Symphoricarpos orbiculatus</i> Moench	Coralberry

¹ All cherry species are regulated

(2) For the purposes of this Part, fruit of the following species of the *Prunus* genus are not regulated articles: *Prunus americana*, *Prunus armeniaca*, *Prunus cerasifera*, *Prunus domestica*, *Prunus dulcis*, *Prunus persica*, *Prunus salicina*.

(3) Soil underneath the dripline of an ECFF host plant in the quarantine area.

(4) Nursery stock of the ECFF host species listed in this subdivision that has fruit attached or with soil (container or balled & burlapped) if fruit was allowed to form on the plants, unless the conditions for movement of regulated articles in section 128.4(a)(1) of this Part are met.

(q) Ripe Fruit: For the purposes of this part ripe fruit is defined as fruit that has reached maturity and has been harvested for fresh consumption or further processing.

(r) Systems Approach. A set of criteria which, when followed, minimize the spread of a pest and are prescribed by the Department.

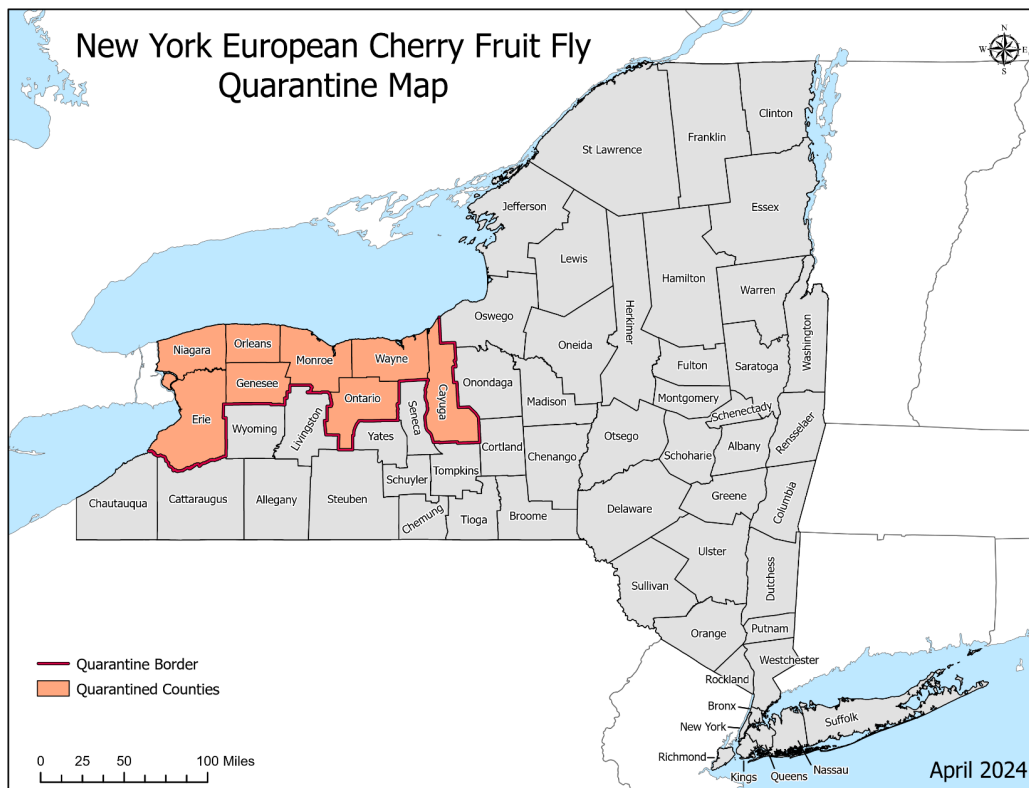
(s) USDA APHIS, PPQ. The Animal and Plant Health Inspection Service, Plant Protection and Quarantine Service of the United States Department of Agriculture.

Section 128.2. Establishment and amendment of the quarantine area.

(a) Establishment of the quarantine area. The quarantine area is set forth on the map below and is designated to include the following areas:

- (1) Erie County, in its entirety;
- (2) Monroe County, in its entirety;
- (3) Niagara County, in its entirety;
- (4) Orleans County, in its entirety;
- (5) Wayne County, in its entirety;
- (6) Ontario County, in its entirety;
- (7) Cayuga County, in its entirety; and
- (8) Genesee County, in its entirety.

European cherry fruit fly Quarantine Area



(b) The requirements in this Part shall not apply to the Cattaraugus, Tonawanda and Tuscarora Indian Reservations.

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

Section 128.3. Movement of regulated articles within the quarantine area.

A regulated article may be moved freely within the quarantine area, provided the regulated article is otherwise eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

Section 128.4. Intrastate movement of regulated articles originating within or traveling through the quarantine area to or from points outside the quarantine area.

(a) The intrastate movement of regulated articles, as defined in this Part, whether moved independent of, or in connection with any other article, is prohibited except as established in this section and/or in sections 128.5, 128.6, and 128.7 of this Part.

(b) No person shall move a regulated article from any point within the quarantine area to or through any point outside the quarantine area, unless:

(1) accompanied by a limited permit or certificate of inspection authorizing such movement under administrative instructions of the Commissioner; or

(2) subject to an exemption as described in Section 128.7 of this Part.

(c) Notwithstanding the provisions of subdivision (b) of this section, a regulated article originating from within New York, but outside the quarantine area in New York, may be moved through the quarantine area in the state, provided that:

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

(2) The regulated article, if moved through the quarantine area during the months of June through and including August, is either moved in a completely enclosed portion of a vehicle or other conveyance, or is completely enclosed by a covering adequate to prevent access by ECFF, such as canvas, plastic, or other closely woven cloth; and

(3) The regulated article is moved directly through the quarantine area without stopping, except for refueling, and as required by traffic conditions.

Section 128.5. Conditions governing compliance agreements for movement of regulated articles out of the quarantine area.

(a) A person engaged in growing, handling, or moving a regulated article intrastate may apply for a compliance agreement with the Department, pursuant to which such person is authorized

to issue limited permits or certificates of inspection, which allow movement of a regulated article without a Department inspection prior to each movement.

(b) Any authorized holder of a compliance agreement 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 or an inspector, either orally or in writing, whenever an inspector determines, in his or her sole discretion, that the authorized holder of the compliance agreement has not complied with this Part or the conditions imposed under the compliance agreement. The cancellation shall take effect immediately upon providing oral notice or the delivery of the written notice, whichever occurs first. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing at a date no later than three days after such oral cancellation. The cancellation of the compliance agreement shall be deemed final unless within seven days from the date of cancellation, the Department receives notice from an authorized holder in writing of its intention for a proceeding to review such action.

Section 128.6 Conditions governing limited permits and certificates of inspection for movement of regulated articles out of the quarantine area.

(a) Limited Permits. An inspector or an authorized holder of a compliance agreement may issue a limited permit for the movement of a regulated article out of the quarantine area, provided that the regulated article meets the following requirements.

(1) Limited permits for regulated articles intended to be sold without further processing. Limited permits for regulated articles that are intended for sale without further processing outside the quarantine area may be issued, provided that each of the following conditions are met:

- (i) the regulated articles are grown under the systems approach, as outlined in the applicable compliance agreement, issued annually by the department; and
- (ii) shall not be moved Columbia and Ulster counties in New York, which are prohibited for such movement, under the systems approach and as listed in the compliance agreement; and
- (iii) the regulated article was inspected utilizing float test or other means authorized by the department and specified in any applicable compliance agreement and was determined to be free of ECFF larvae by the authorized holder of the compliance agreement or an inspector.

(2) Limited permits for regulated articles intended to be sold or transferred to a processing facility. Processing facilities located outside the quarantine area may accept a regulated article originating from the quarantine area, provided the following conditions are met:

- (i) the regulated article is accompanied by a valid limited permit or certificate of inspection; and
- (ii) such processing facility has been approved for such activity as an authorized holder of a compliance agreement

(3) An inspector or authorized holder of a compliance agreement may issue additional limited permits pursuant to the terms of a compliance agreement, or may authorize, in writing, the reproduction of an issued limited permit in order to be placed on shipping containers, as requested by an authorized holder of a compliance agreement. Such limited permits may be completed and used, as needed, for the movement of a regulated article out of the quarantine area, provided such articles have met all requirements of this Part.

(4) All issued limited permits shall accompany the corresponding shipment of any regulated article leaving the quarantine area as specified in section 128.9 of this Part.

(b) Certificates of inspection.

(1) An inspector or an authorized holder of a compliance agreement may issue a certificate of inspection permitting the intrastate movement of a regulated article, provided such article has been duly inspected and determined to be:

- (i) inspected using the float test specified in any applicable compliance agreement and has been determined by the authorized holder of the compliance agreement or an inspector to be free of ECFF larvae; or
- (ii) treated, fumigated or processed by methods which render ECFF non-viable, which have been approved by the Department, or outlined in the compliance agreement; or
- (iii) grown, produced, manufactured, stored or handled in such manner that, in the judgment of the inspector, transmission of infestation would be controlled or limited, provided that, subsequent to the issuance of a certificate of inspection, such regulated article shall be loaded, handled, and shipped under such protection and safeguards against ECFF infestation, as established by an inspector or otherwise established by the Department.

(2) An inspector or authorized holder of a compliance agreement may issue additional certificates of inspection, pursuant to the terms of a compliance agreement, or may authorize, in writing, the reproduction of an issued certificate of inspection in order to be placed on shipping containers, as requested by a person operating under a compliance agreement. Such certificates of inspection may then be completed and utilized as needed, for the movement of a regulated article to points outside the quarantine area, provided such regulated article otherwise meets all requirements of this Part.

(3) All issued certificates of inspection shall accompany the corresponding shipment of any regulated article leaving the quarantine area as specified in section 128.9 of this Part.

(4) Any certificate of inspection may be cancelled by the Department or an inspector, either orally or in writing, whenever an inspector determines, in his or her sole discretion, that the authorized holder of the certificate of inspection has not complied with this Part or the conditions imposed by a compliance agreement. The cancellation shall take effect immediately upon providing oral notice or the delivery of the written notice, whichever occurs first. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing at a date no later than three days after such oral cancellation. The cancellation of the certificate of inspection shall be deemed final unless within seven days from the date of cancellation, the Department receives notice from an authorized holder in writing of its intention for a proceeding to review such action.

Section 128.7 Exemptions.

(a) Shipments of regulated articles for experimental and scientific purposes.

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

(b) Commissioner Administrative Exemption.

(1) A regulated article may be moved intrastate pursuant to an administrative exemption issued by the Commissioner. The container of the article so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the department evidencing the issuance of such administrative exemption.

(2) An application for an administrative exemption shall be made in writing to the duly authorized Department representative. The issuance or denial of an administrative exemption under this Section, either orally or in writing, shall be final unless within seven days from the date of denial thereof, the Department receives notice from applicant in writing of its intention for a proceeding to review such action.

(c) Ripe fruit exemption.

(1) Ripe fruit originating from outside the quarantine area may freely move into the quarantine area for sale at farm markets, auctions or other venues, and will not be considered a regulated article when leaving the quarantine zone.

(2) Ripe fruit imported into the quarantine for retail or wholesale from outside the quarantine area must be accompanied by bills of lading or other documents which establish the point of origin and final destination for each lot of fruit.

Section 128.8. Assembly of Regulated Articles for Inspection.

(a) All persons intending to conduct intrastate movement of a regulated article, except as provided in Sections 128.4, 128.5, 128.6, and/or 128.7 of this Part, shall make an application for inspection as far in advance as possible, in writing to the inspector, and will be required to prepare and assemble materials at such locations, and in such manner, as the inspector shall designate, to allow for the thorough inspection of such article, or to allow the application of treatments approved by the Department in order to render ECFF non-viable. Any article which requires inspection under this Section shall, as a basis for the issuance of a certificate of inspection, be free from matter or other condition that makes inspection impracticable or infeasible.

(b) The Department shall not be responsible for any cost incident to inspections or certification, other than the cost of providing the designated inspector.

(c) Any determination which prohibits the movement of a regulated article pursuant to subsection (a) of this Section, whether oral or in writing, shall be final unless within seven days from the date of such determination, the applicant notifies the Department in writing of its intention for a proceeding to review such action.

Section 128.9 Marking requirements.

Every container being utilized to hold or contain a regulated article, and 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 limited permit or certificate of inspection issued in compliance with this Part, provided, that:

(a) For movement by lot freight shipment, other than by road vehicle, one limited permit or certificate of inspection may be attached to one of the containers and another to the waybill; and for carlot freight or express shipments, either in containers or in bulk, a limited permit or certificate of inspection may be attached to the waybill only and a placard to the outside of the car, showing the number of the valid limited permit or certificate of inspection accompanying the waybill; and

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

(c) For movement of all regulated articles leaving the quarantine area, such regulated articles shall be accompanied by a limited permit or certificate of inspection as specified in the applicable compliance agreement, except where moved to Columbia and Ulster counties in New York. Notwithstanding the above, movement of regulated articles to Columbia and Ulster Counties is prohibited. All containers intended to be shipped outside the quarantine area must have affixed a document which states the following, according to the applicable compliance agreement:

“No movement of regulated fresh (sweet or tart/sour) cherry fruit into the restricted areas.

Restricted areas are: Columbia and Ulster Counties, New York”

Section 128.10. 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 intrastate from the quarantine area which may contain a regulated article is subject to be examined by an inspector. 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 he or she deems necessary to eliminate the danger of dissemination of ECFF. If found to be moved in violation such items must be rendered free of infestation without cost to the State other than services of the inspector.

Section 128.11. 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.

Section 128.12. Effective date

This regulation shall take effect immediately.