APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 16-2423

[Filed December 4, 2017]

GEORGE EVANS,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee,

CRYSTAL FRANCIOSI, an Employee of the Department of Agriculture, sued in her Individual Capacity; UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. David H. Hennessy, U.S. Magistrate Judge]

Before
Lynch and Selya, Circuit Judges,
and Levy, District Judge.*

* Of the District of Maine, sitting by designation.

Michael J. O'Neill and McGregor & Legere, P.C. on brief for appellant.

William D. Weinreb, Acting United States Attorney, and Shelbey D. Wright, Assistant United States Attorney, on brief for appellee.

December 4, 2017

SELYA, **Circuit Judge**. In this case, a small bug incited a lawsuit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. The district court, acting through a magistrate judge, ruled that the FTCA's discretionary function exception barred the maintenance of the action. See Evans v. United States, No. 14-cv-40042, 2016 WL 5844473, at *8 (D. Mass. Sept. 30, 2016) (citing 28 U.S.C. § 2680(a)). After careful consideration, we affirm.

THE BEETLES

We first rehearse the background of the case dividing our account into four movements.

Norwegian Wood

The Asian Longhorned Beetle (ALB) is an invasive pest that arrived in the United States from Asia, concealed in wooden shipping crates and pallets. According to the United States Department of Agriculture (USDA), the ALB has the grim potential to be "one of the most destructive and costly invasive species ever to enter the United States." It bores into (and reproduces within) deciduous hardwood trees, such as maple, elm, ash, birch, poplar, and willow trees. These trees, collectively called "host trees," are especially vulnerable to ALB infestation, which

generally proves fatal to them. Consequently, ALB infestation poses a severe threat not only to all host-tree species (ranging from shade trees to forest resources worth billions of dollars) but also to a multitude of industries that depend on the availability of hardwood. As a result, the USDA has declared ALB infestation an emergency and has begun working with state and local governments to eradicate this pest before it causes lasting economic damage.

In 2008, ALB infestations were first detected in Massachusetts. That August, the Massachusetts Department of Conservation and Recreation (DCR) issued a quarantine order under its authority, see Mass. Gen. Laws ch. 132, §§ 8, 11, 12; Mass. Gen. Laws ch. 132A, § 1F, to suppress and control nuisance conditions and regulated articles (including living, dead, cut, or fallen host trees). The state quarantine area included much of the City of Worcester, and the state quarantine order authorized DCR to use all lawful means to suppress, control, and eradicate ALB infestation (including the removal of all trees that could become infested). The state quarantine order also authorized DCR to enter upon lands as might be necessary either to implement the order or to conduct activities thereunder. Finally, the quarantine order authorized DCR to invest a federal agency, the Animal and Plant Health Inspection Service (APHIS), with the same array of powers.[1]

The following month (September of 2008), the USDA issued an order to include portions of Massachusetts within the sweep of preexisting federal

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[1] APHIS is a sub-agency within the USDA.

ALB quarantine regulations. See 7 C.F.R. § 301.51—1-9. These regulations impose strict requirements on the interstate movement of any trees or wood products susceptible to ALB infestation. In January of 2009, this federal quarantine was expanded to include the Worcester area. See id. § 301.51—3.

Come Together

Toward the end of 2008, DCR entered into a cooperative agreement (the Agreement) with APHIS to jointly combat the ALB infestation. The Agreement created the ALB Cooperative Eradication Project (the Project), a partnership marshaling federal, state, and local resources and aimed at eradicating the ALB through, inter alia, host-tree removal. The stated goal of the Agreement was that "[a]ll infested and certain high risk host trees will be removed and destroyed in order to eradicate the ALB from Massachusetts." In furtherance of this goal, APHIS agreed to develop and deliver "an effective public relations program," to provide funds to DCR for host-tree removal contracts, and to furnish support personnel, equipment, and facilities.

With the Agreement in place, the Project began to tackle ALB infestation one tree at a time. Typically, Project staff would visually survey trees to determine if they were infested with ALB. Infested trees were marked with red paint, indicating that their removal was obligatory. Uninfested trees that belonged to a host species were marked with blue paint, indicating that their removal was encouraged (though not required).

DCR proceeded to write to property owners within the quarantine areas to inform them that, in consultation with APHIS, it had determined that it was necessary to take steps to eradicate ALB. Its letter explained that "the hardwood trees that have previously been marked with red paint . . . are to be cut, removed, and destroyed," while "[a]dditional hardwood trees marked with blue paint . . . may need to be removed and destroyed." The letter further advised property owners that if trees in this latter category were going to be cut down, "notice will be provided in advance." Along with each letter, DCR mailed a form, which gave property owners an option: "the undersigned ___DOES/___DOES NOT request and authorize host trees to be cut and removed from the premises and destroyed." The form also requested a property owner's signature to authorize DCR's contractors to cut, remove, or destroy any trees. The property owner was advised that, even if he did not consent, "failure to permit authorized contractors to perform the removal actions at the premises . . . will result in DCR seeking enforcement of this Order in Superior Court."

The Project maintained maps and charts indicating which property owners had authorized all host-tree removal, which had authorized only the removal of infested trees, and which had not yet signed and returned the form. Ordinarily, an APHIS representative would go into the field with the tree-removal contractors hired by DCR and point out which trees they should cut. Standard practice was that the APHIS representative would not instruct a contractor to enter a parcel of land unless the Project's records indicated that the owner had authorized such an entry.

Here Comes the Sun

Against this backdrop, we turn to the facts giving rise to the underlying claim. Plaintiff-appellant George Evans owns an interest in property in Worcester,[2] within both the state and federal quarantine areas. The appellant's half-acre parcel is located within a 2.2 square-mile area identified as the epicenter of the ALB infestation and specially targeted for removal of high-risk host trees. A survey conducted on December 8, 2008, disclosed that no fewer than thirty-six shade trees on the appellant's property were host species (although not then infested). Approximately ten of these trees were daubed with blue paint. Neither the appellant nor his wife authorized contractors to enter onto their property for the purpose of tree removal, and Evans claims — and the government does not dispute — that he did not receive the letter and authorization form from DCR until after his trees had been cut down.

In mid-February of 2009, contractors nonetheless entered the appellant's property and cut down twenty-five maple trees. Crystal Franciosi, an APHIS technician, stated that no fewer than twenty-one of these trees were infested with ALB.[3]

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[2] The appellant's wife, Katherine Evans, is a joint owner of the property. She has not proffered a claim against the government, though, and she is not a party to this appeal.

[3] Franciosi thought that her map showed the property owners had given permission for the removal of all host trees. A subsequent investigation found no record that any such permission had been granted. For summary judgment purposes, we assume, favorably to the appellant, that the trees were cut down without his prior authorization. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822

The Long and Winding Road

The appellant filed an administrative claim with USDA, alleging that twenty-five of his shade trees had been chopped down without his permission. The USDA rejected this claim on January 26, 2012. The appellant countered by instituting this FTCA action.[4] The parties consented to proceed before a magistrate judge, see 28 U.S.C. § 636(c); Fed. R. Civ. P. 72, and engaged in extensive pretrial discovery. At the close of discovery, the government moved for summary judgment. See Fed. R. Civ. P. 56(a). The appellant opposed the motion. In a thoughtful rescript, the magistrate judge entered summary judgment in favor of the government, concluding that the discretionary function exception to liability under the FTCA barred the appellant's suit. See Evans, 2016 WL 5844473, at *8. This timely appeal ensued.

WE CAN WORK IT OUT

We first discuss the discretionary function exception and how it is designed to operate. We then apply that exception to the case at hand.

(1st Cir. 1991) (holding that, for summary judgment purposes, factual disputes must be resolved in favor of the nonmovant). For the same reason, we also assume — consistent with the appellant's version of the facts but contrary to the stated observations of APHIS personnel — that the appellant's trees were not already infested when they were chopped down.

[4] The appellant also sued the contractor who removed the trees in a Massachusetts state court. See Evans v. Mayer Tree Serv., Inc., 46 N.E.3d 102 (Mass. App. Ct. 2016). That state court suit has no bearing on the issues before us.

Her Majesty

As a sovereign, the United States is immune from suit without its consent. See Shansky v. United States, 164 F.3d 688, 690 (1st Cir. 1999). The FTCA provides for a limited waiver of this sovereign immunity and authorizes suits against the United States for certain torts. See 28 U.S.C. § 1346(b)(1). Broadly speaking, the FTCA allows "civil actions on claims against the United States" for "injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . where the United States, if a private person, would be liable" under local law. Id.

The FTCA must be "construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires." Bolduc v. United States, 402 F.3d 50, 56 (1st Cir. 2005) (quoting United States v. Horn, 29 F.3d 754, 762 (1st Cir. 1994)). In addition, the FTCA's waiver of sovereign immunity is narrowed by exceptions. One such exception, commonly called the discretionary function exception, bars liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The analytic framework for use in connection with the discretionary function exception is familiar. The court must initially "identify the conduct that is alleged to have caused the harm." Fothergill v. United States, 566 F.3d 248, 252 (1st Cir. 2009). It must "then determine whether that conduct can fairly be described

as discretionary." Id. If so, it must proceed to "decide whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations." Id. In sum, as long as the challenged conduct involves "the exercise of discretion in furtherance of public policy goals," claims under the FTCA are foreclosed by the discretionary function exception. United States v. Gaubert, 499 U.S. 315, 334 (1991). Because this is so "whether or not the discretion involved be abused," 28 U.S.C. § 2680(a), the presence or absence of negligence is irrelevant to the applicability of the discretionary function exception, see Lopez v. United States, 376 F.3d 1055, 1057 (10th Cir. 2004); Rosebush v. United States, 119 F.3d 438, 442 (6th Cir. 1997).

We afford de novo review to the question of whether the discretionary function exception shields the government from liability in any given set of circumstances. See Irving v. United States, 162 F.3d 154, 162 (1st Cir. 1998) (en banc).

Tell Me Why

In this instance, the challenged conduct is the destruction of the twenty-five maple trees without first securing the permission of either the appellant or his wife.[5]

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[5] It is clear beyond peradventure that DCR had the authority under state law to order that the trees be cut down and removed. See Mass. Gen. Laws ch. 132, §§ 8, 11, 12. Thus, the crux of the harm is not that the appellant's trees were destroyed but, rather, that they were destroyed without first obtaining his permission.

With the conduct defined, the next question becomes whether that conduct was discretionary. The appellant argues that DCR's letter made securing property owner permission obligatory. He adds that the practice of seeking property owner permission was taken so seriously by the various governmental actors that it amounted to a nondiscretionary requirement for federal officials. We find these arguments unpersuasive.

The conduct of federal employees is generally held to be discretionary unless "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Berkovitz ex rel. Berkovitz v. United States, 486 U.S. 531, 536 (1988). State law will not suffice: only federal statutes, regulations, or policies will suffice to remove the discretion of a federal official for purposes of the discretionary function exception. See Carroll v. United States, 661 F.3d 87, 101 (1st Cir. 2011).

In this instance, DCR's quarantine order authorized APHIS to "undertake activities necessary [for stopping the spread of ALB,] including removing or causing to be removed . . . all [trees] that may be or have the potential to be infested or infected by ALB." The appellant does not deny that his trees were host trees, that is, trees that had the potential to be infested. He nonetheless argues that the letter that DCR sent to property owners requesting permission to enter onto their property and cut down trees announced an official state policy and thus imposed an obligation on cooperating federal officials to follow it. APHIS had no discretion, the appellant's thesis runs, to violate this mandatory state policy.

We do not agree. The appellant's thesis "conflates the merits of [his] claims with the question whether the United States has conferred jurisdiction on the courts to hear those claims in the first place." Carroll, 661 F.3d at 102 (quoting Sydnes v. United States, 523 F.3d 1179, 1184 (10th Cir. 2008)). A state policy promulgated by a state agency, without more, cannot divest the federal government of its sovereign immunity. See id. at 101-02.

Here, there was no "more." All of the sources of federal authority that allowed APHIS to partner with DCR (such as the Plant Protection Act, 7 U.S.C. § 7751, federal regulations, 7 C.F.R. § 301.51—1-9, and the Agreement) are completely silent about any requirement of property owner permission as a condition precedent to tree removal. Indeed, the Agreement gave federal employees discretion to "apply appropriate control measures utilizing host removal" as they deem necessary to halt the ALB epidemic. No mention was made of any need for property owner permission.

The record makes manifest that, from APHIS's point of view, the decision about whether to remove a host tree without property owner permission was a judgment call — a judgment call that depended upon several interrelated factors, including the level and timing of infestation. At bottom, this decision was to be based on scientific knowledge about the beetle and an informed assessment of what was at risk. Property owner permission simply was not a determinative consideration in the decisional calculus. State pronouncements aside, there was no federal requirement that APHIS personnel secure (or even

seek) such permission before taking action to curb the infestation.[6]

To be sure, APHIS tried to be respectful of the wishes of property owners. APHIS, however, had no binding policy to that effect: its overriding goal was to do whatever was necessary to prevent the spread of ALB. From a scientific standpoint, the best option often was to remove all host trees, regardless of whether they were already infested and regardless of whether property owner permission had been obtained. APHIS's decision to employ that option was squarely within the compass of its discretion. See Attallah v. United States, 955 F.2d 776, 783 (1st Cir. 1992) (concluding that discretionary function exception applies "where there is room for choice" in federal employee decisionmaking).

Seen in this light, property owner permission was a non-issue for APHIS. If host trees were infested, the destruction of those trees was required by law, whether or not the property owner consented. See Mass. Gen. Laws ch. 132, §§ 11, 12. If, however, host trees were only at risk of infestation, no federal law, regulation, or policy constrained APHIS' discretion by requiring the

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[6] The fact that private contractors hired by DCR to remove trees were contractually bound to obtain property owner permission before entering onto private property does not rise to the level of a federal law, regulation, or policy. And to the extent (if at all) that APHIS had an obligation to supervise those private contractors, "[w]hen an agency determines the extent to which it will supervise the . . . procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." United States v. Varig Airlines, 467 U.S. 797, 819-20 (1984).

agency to obtain a property owner's permission before removing them.

As a fallback, the appellant argues that the Project's practice of obtaining property owner permission and keeping track of whether such permission had been received was taken so seriously that APHIS personnel had no discretion to disregard it. This is whistling past the graveyard. While APHIS personnel testified that they consistently made good-faith efforts to secure property owner permission prior to cutting down trees, their approach was a courtesy — not the product of any official federal policy. A federal bureaucrat's well-intentioned effort to employ best practices will not suffice to convert a discretionary act into a non-discretionary act. In this case, APHIS personnel had discretion about whether to seek property owner permission before removing host trees — and the fact that they frequently opted to seek such permission did not make their tree-removal decisions any less discretionary. See Gaubert, 499 U.S. at 334 ("If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the [discretionary function] exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable.")

Nor does the Agreement change this dynamic. In that document, APHIS agreed to launch an "effective public relations program" and keep the "public informed of the status of the eradication program." Nothing in the Agreement, though, limited federal employee discretion about how to implement this lofty goal. Such general guidelines are "insufficient to deprive the federal government of the protection of the

discretionary function exception." Autery v. United States, 992 F.2d 1523, 1529 (11th Cir. 1993) (concluding that Park Service hazardous tree elimination program involved exercise of discretion in targeting trees for removal); see Shansky, 164 F.3d at 691 (finding statement in Park Service manual that "[t]he saving of human life will take precedence over all other management actions" left employees with discretion as to how to apply "aspirational goal"). Trying another tack, the appellant suggests that, at the time that his trees were cut down, the responsible contractor (hired by DCR) had not yet signed a compliance agreement with APHIS and, thus, had not agreed to comply with federal quarantine regulations governing interstate movement of regulated articles. See 7 C.F.R. § 301.51—6. This suggestion goes nowhere. Given that there was no evidence that the contractor intended to transport wood products across state lines, the absence of a signed compliance agreement simply has no bearing on the appellant's complaint that his trees were removed without his permission.

That ends this aspect of the matter. We conclude that APHIS was exercising discretion when it acted to remove twenty-five host trees from the appellant's property without first securing his permission.

Despite this conclusion, our inquiry must continue. The discretionary function exception protects only those discretionary choices that are "grounded in social, economic, and political policy." United States v. Varig Airlines, 467 U.S. 797, 814 (1984). We therefore turn to that question.

"Because the law presumes that the exercise of official discretion implicates policy judgments," the appellant bears the burden of demonstrating that the discretion exercised by APHIS in this instance was not susceptible to policy analysis. Shansky, 164 F.3d at 692. As we explain below, the appellant has failed to carry that burden.

We begin with bedrock. Even if the on-the-ground decision to order the removal of the appellant's trees without first securing his permission was the product of either human error or faulty recordkeeping, "[t]he critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis." Id. (emphasis supplied). Here, APHIS' choice among potential courses of action was plainly susceptible to a policy analysis.

In this regard, it is important to note that any decision about whether to require federal personnel to obtain property owner permission prior to removing host trees was necessarily "informed by a need to balance concerns about a myriad of factors." Fothergill, 566 F.3d at 253. APHIS scientists recognized that an uncontrolled ALB infestation could be devastating to local economies and environments, so they worked with DCR to devise a policy that would empower APHIS personnel to take appropriate steps to try and avert the harm. Consistent with this policy, APHIS adopted a practice of making a good-faith effort to seek property owner permission before removing trees, but stopped well short of making such permission a condition precedent to any tree removal. In other words, APHIS made a policy determination, based on studies of

previous infestations and the biological characteristics of the ALB, to allow its employees more latitude in order to improve the chances of stemming the infestation — and as part of this policy determination, APHIS chose not to require property owner permission as an invariable condition to the removal of host trees (whether or not already infested). This choice was a quintessential policy decision of the kind that the discretionary function exception was designed to protect. See Autery, 992 F.2d at 1531.

To say more would be supererogatory. As the magistrate judge ruled, APHIS's decision to cut down the appellant's trees without first securing his permission constituted a policy-driven exercise of discretion and, thus, falls under the protective carapace of the discretionary function exception. It follows that the entry of summary judgment in favor of the government must stand.

LET IT BE

We need go no further. While we are not without sympathy for the appellant's plight — the unexpected loss of twenty-five majestic shade trees must have been a bitter pill to swallow — Congress has been clear about the federal government's sovereign immunity. That immunity, as exemplified by the discretionary function exception, pretermits the appellant's effort to recover damages under the FTCA. We therefore affirm the decision of the magistrate judge.

Affirmed. No costs.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-40042-DHH

[Filed September 30, 2016]

GEORGE EVANS, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant.	)

ORDER

September 30, 2016

Hennessy, M.J.

This matter is before the Court on the Defendant the United States of America's Motion for Summary Judgment. (Docket #25). The Plaintiff George Evans has filed a response (docket#35), and the motion is now ripe for adjudication. For the reasons that follow, the Motion for Summary Judgment is ALLOWED.

I. BACKGROUND[1]

On August 8, 2008, the Massachusetts Department of Conservation and Recreation ("DCR") issued an order of quarantine for several towns in central Massachusetts to prevent the human-assisted spread of Asian Longhorn Beetle ("ALB"), a destructive insect known to infest, among other species, maple trees.[2] (DF 1, 4).[3] The DCR quarantine prohibited any person from harvesting, cutting, moving, carrying, transporting, or shipping "regulated articles" (i.e. trees and tree products) within or outside the affected area. (Docket #27-4 at 3-4). The regulated area included a portion of the City of Worcester. (DF 4). DCR periodically issued orders expanding the area of the quarantine along with maps of the regulated areas. (DF 5; Docket #27-4).

On December 22, 2008, the United States Department of Agriculture ("USDA"), through its agency, the Animal Plant Health Inspection Service ("APHIS"), entered into an agreement, the ALB Cooperative Eradication Program Cooperative

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[1] The following recitation of facts is assumed as true only for purposes of the instant motion.

[2] ALB, which is not native to the United States, was transported to this country by burrowing within hardwoods that were cut into crates and pallets used to import goods into the United States from Asian countries. (DF 1). ALB was first reported in Massachusetts in August 2008. (DF 3).

[3] The term "DF" refers to Defendant United States' facts. The United States' facts can be found in its Statement of Undisputed Facts. (Docket #27).

Agreement (the "Cooperative Agreement"), with the DCR codifying a joint action plan to eradicate ALB from the quarantine zone.[4] (DF 6-7). The Cooperative Agreement indicated that APHIS and the DCR would be involved with "[t]he destruction of infested and high risk host trees" and the "[r]eplacement of trees lost to ALB with non-host species on public and private property." (DF 8). Pursuant to the Cooperative Agreement, APHIS agreed to "[p]rovide personnel to accomplish operational activities" as well as "a project manager who shall be responsible for coordinating project activities with [DCR] including planning, decision-making, management, implementation and execution" and "any other activity leading to the control and eradication of the ALB." (Id.). DCR agreed to "[s]ecure a cost competitive tree removal contract" and "[p]rovide the resources and management to administer the contract." (Id.).

DCR solicited bids and entered into contracts with private contractors to cut down trees designated as ALB host or infected trees. (DF 9). A "host tree" is a member of a certain species of tree that is susceptible to infestation by ALB, including elm, ash, and all sub-species of maple. (DF 13). On December 10, 2008, the DCR promulgated bid specifications for these contracts (the "FAC 47"). (Docket #27-8). Under the FAC 47, tree cutting contractors and their employees "shall not enter any private property unless [it] is in

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[4] Although not all signatories to this agreement, the ALB Cooperative Eradication Program is a partnership between APHIS, the United States Forest Service, the DCR, the Massachusetts Department of Agricultural Resources, and the City of Worcester. (Docket #27-1).

receipt of a Permission Slip from the property owner . . . prior to . . . any tree removals." (Id. at 11).

As part of the eradication process, the ALB Cooperative Eradication Program sent men and women to visually survey trees in the quarantine area. (DF 16). Pursuant to the survey protocol, the inspectors marked infested trees with red paint and uninfested host trees with blue paint. (Docket #27-2 at 15). Because the community was not in favor of removing uninfested host trees, decisions on whether to remove uninfested host trees were made on a case-by-case basis. (DF 18). Under the ALB Eradication Program protocol, property owners were given the choice of whether to allow removal of uninfested host trees. (DF 21). DCR provided a notice to affected property owners indicating that infected trees, those marked with red paint, were required to be removed; however, uninfested host trees, those marked with blue paint, could be removed upon the property owner's consent, but would not be removed without consent. (Docket 27-2 at 17; Docket #27-10). A form entitled "Acknowledgement and Permission" was attached to the notice which was to be filled out by the property owner to indicate whether the property owner authorized the DCR to remove uninfested host trees on the property. (Docket #27-10).

In December of 2008, the ALB Eradication Program identified a 2.2 square mile area within the City of Worcester which was targeted for removal of infested trees and for seeking permission to remove uninfested host trees. (Docket #27-2 at 13-14). Evans' property was located within this area. (DF 20).

Prior to tree removal, ALB Eradication Program personnel prepared color coded maps of the quarantine area that showed whether individual property owners had given written permission for their uninfested host trees to be removed. (Docket #27-2 at 23; Docket #27-9 at 9-10). Properties marked in red indicated that the property owner had not given permission to remove uninfested host trees, properties marked in blue indicated that the property owner had given permission to remove uninfested host trees, and properties marked in white indicated that the ALB Eradication Program did not have a signed permission form from the property owner. (Docket #27-9 at 11-12). Program monitors and tree cutters used these maps to determine which trees to remove and whether homeowner permission had been obtained. (DF 25). According to the procedure in place during the relevant time period, no action would be taken if a signed permission form had not been obtained. (Docket #27-9 at 12). In addition to the maps, Program monitors were given a listing of properties within the area they were overseeing that included notes on the permission status of the property. (Id. at 17-20).

On December 31, 2008, DCR entered into a tree removal contractor with Mayer Tree Service, Inc. (Docket #35-8). Mayer entered into a tree removal subcontract with Marquis Tree Service on January 5, 2009. (Docket #35-9).

On January 9, 2009 APHIS issued a federal order quarantining a portion of Worcester County, Massachusetts. (DF 6). Unlike the DCR quarantine, the APHIS quarantine mandated regulation of interstate movement of ALB "regulated articles" (i.e.

trees and tree products). (Id.). The order described the boundaries of the regulated area. (Id.).

Crystal Franciosi was a Plant Protection and Quarantine technician with APHIS who oversaw tree removal on February 9, 10, and 11, 2009. (DF 26). On February 10 and 11, 2009, twenty-two Norway Maple trees were removed from Evans' property by Marquis.[5] (DF 26, 27). Franciosi reported that she had map permission to remove the trees from Evans' property. (DF 28). However, the listing of properties included the notation, "need release," with respect to Evans' property. (DF 29). After an investigation by a supervisory investigator with APHIS Investigative and Enforcement Services, no records were found that would indicate that Evans ever signed a form giving permission for the removal of his host trees. (DF 30). On February 20, 2009, after the host trees had already been removed, DCR sent Evans a written notice of the removal and an attached permission form. (DF 31). The notice was dated December 10, 2008. (Docket #27-10 at 4).

II. STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once a party has properly supported its motion for summary judgment, the burden shifts to the

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[5] There is some dispute as to the number of trees that were removed from Evans' property. However, for purposes of this motion, that dispute is not material. It is undisputed that a certain number of trees were removed from Evans' property without his permission.

non-moving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." Barbour v. Dynamics Research Corp., 63 F.3d 32, 37 (1st Cir. 1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). Moreover, the Court is "obliged to []view the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993). Even so, the Court is to ignore "conclusory allegations, improbable inferences, and unsupported speculation." Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009) (quotation omitted).

III. ANALYSIS

"The United States as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941) (internal citations omitted). The Federal Tort Claims Act ("FTCA") "provides a 'carefully limited waiver' of the federal government's sovereign immunity for certain claims alleging harm caused by United States employees or agents." Carroll v. United States, 661 F.3d 87, 93 (1st Cir. 2011) (quoting Bolduc v. United States, 402 F.3d 50, 62 (1st Cir. 2005)). The FTCA allows civil actions against the federal government

> for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a

> private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). "[T]he FTCA must be 'construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.'" Bolduc, 402 F.3d at 56 (quoting United States v. Horn, 29 F.3d 754, 762 (1st Cir. 1994)).

This statutory waiver of sovereign immunity comes with several exceptions. 28 U.S.C. § 2680. The United States argues that two exceptions to the waiver apply in the instant case – the quarantine exception and the discretionary function exception. (Docket #26 at 7-8).

A. Quarantine Exception

The United States argues that Evans' claims fail because the removal of the trees was performed pursuant to ALB quarantine orders, and, therefore, those claims are barred by 28 U.S.C. § 2680(f). (Docket #26 at 8). Pursuant to 28 U.S.C. § 2680(f), "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States" is specifically exempted from the FTCA. For the quarantine exception to apply, the damages must be proximately caused by the imposition or establishment of a quarantine by the United States. Rey v. United States, 484 F.2d 45, 48 (5th Cir. 1973). Damages incidental to the quarantine itself are not barred by the quarantine exception. Id.

Pursuant to the Plant Protection Act (the "PPA"), the Secretary of Agriculture is authorized to "prohibit or restrict the importation, entry, exportation, or movement in interstate commerce" of plants and plant

products if the Secretary determines that such a prohibition is necessary to prevent the dissemination of a plant pest in the United States. 7 U.S.C. § 7712(a). The United States has promulgated regulations authorizing the Administrator of APHIS to impose quarantines in states in which the ALB has been found or in which the Administrator has reason to believe that the ALB is present.[6] 7 C.F.R. § 301.51-3(a). On January 9, 2009, pursuant to these authorities, APHIS issued a quarantine on the interstate movement of ALB regulated articles from portions of Worcester County. (Docket #27-6).

Evans correctly argues that nothing in the PPA or the ALB quarantine regulations authorizes the United States to regulate living, mature, stationary trees on private property. (See Docket #34 at 10). Instead, the removal of ALB infested or host trees in Worcester County in 2009 was grounded on orders issued by the DCR pursuant to its authority under sections 8, 11, and 12 of chapter 132 and section 1F of chapter 132A of the Massachusetts General Laws.[7] (See Docket #27-4;

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[6] The Administrator may designate less than an entire state as a quarantined area only if the state itself has adopted and is enforcing restrictions on the intrastate movement of regulated articles equivalent to those imposed by the United States on the interstate movement of those same articles. 7 C.F.R. § 301.51-3(a).

[7] Section 1F of chapter 132A of the Massachusetts General Laws provides that the bureau of forestry, a division of the DCR, shall be responsible for the insect suppression of public nuisances. Section 12 of chapter 132 of the Massachusetts General Laws imposes civil liability upon any person who knowingly violates an order of quarantine imposed by the DCR relative to the suppression or eradication of ALB.

Docket #27-10). Section 11 of chapter 132 of the Massachusetts General Laws authorizes the DCR to make rules and regulations for the purpose of suppressing the ALB. Mass. Gen. Laws ch. 132, § 11. Section 8 of that chapter permits DCR employees and agents to enter upon any land within the Commonwealth of Massachusetts to determine the existence of an infestation of ALB and to suppress and control ALB. Mass. Gen. Laws ch. 132, § 8. Pursuant to these authorities, the DCR imposed the August 8, 2008 quarantine and its periodically issued updates which authorized the DCR to make use of "all lawful means of suppressing, controlling and eradicating ALB, including . . . removing or causing to be removed, and the destruction thereof of all Regulated Articles," including living trees, within the quarantine area "that are, may be or have the potential to be infested or infected by ALB." (Docket #27-4). Consistent with this framework, the notice sent to homeowners indicating that ALB infested trees would be removed and seeking permission to remove host trees indicated that such trees were being removed pursuant to the DCR quarantine. (Docket #27-10).

As the quarantine imposed by the United States was not the proximate cause of the destruction of Evans' trees – because the federal quarantine was a restriction on the movement of articles in commerce, and not a mandate for the destruction of ALB infested or host trees – the quarantine exception to the FTCA does not preclude Evans' claims.

B. Discretionary Function Exception

Alternatively, the United States argues that Evans' claims are barred pursuant to the discretionary

function exception. (Docket #26 at 10). This exception bars liability against the United States for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). "The Supreme Court has observed that the discretionary function exemption 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" Carroll v. United States, 661 F.3d 87, 99 (1st Cir. 2011) (quoting United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984)). The discretionary function exception "immunizes conduct of government employees that arises from 'legislative and administrative decisions grounded in social, economic, and political policy,' protecting against 'liability that would seriously handicap efficient government operations.'" Id. (quoting Wood v. United States, 290 F.3d 29, 36 (1st Cir. 2002)).

The discretionary function exception "poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." Baird v. United States, 653 F.2d 440 (10th Cir. 1981); see Santoni v.

Potter, 369 F.3d 594, 602 (1st Cir. 2004) ("If the discretionary function exception applies, the agency is completely immune from suit, and the claim must be dismissed for lack of subject matter jurisdiction."). Because the exception applies "whether or not the discretion involved be abused," 28 U.S.C. § 2680(a), "the question of negligence is irrelevant to the applicability of the discretionary function exemption." Lopez v. United States, 376 F.3d 1055, 1057 (10th Cir. 2004), accord Valdez v. United States, No. 13-1606(SCC), 2015 U.S. Dist. LEXIS 31425, at *9 (D.P.R. Mar. 12, 2015).

There is a well-established framework used to determine the applicability of the discretionary function exception: "A court must first identify the conduct that is alleged to have caused the harm, then determine whether that conduct can fairly be described as discretionary, and if so, decide whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations." Id. (quoting Fothergill v. United States, 556 F.3d 248, 252 (1st Cir. 2009)). "If the conduct is both discretionary and policy-related, the discretionary function exception bars subject matter jurisdiction." Montijo-Reyes v. United States, 436 F.3d 19, 24 (1st Cir. 2006).

1. The Allegedly Harmful Conduct

At the first step of the inquiry, the court must identify the allegedly harmful conduct, focusing "on the nature and quality of the harm-producing conduct, not on the plaintiff's characterization of that conduct." Fothergill, 566 F.3d at 252-53. The focus of Evans' complaints rests on the removal of his trees without

first obtaining his permission.[8] (Docket #10 at ¶¶ 29-33).

2. The Nature of the Conduct

At the second step of the inquiry, the court must determine whether the allegedly harmful conduct "involves a matter that the political branches have left to the actor's choice." Fothergill, 566 F.3d at 253. "[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Berkovitz v. United States, 486 U.S. 531, 536 (1988), quoted in Sydnes v. United States, 523 F.3d 1179, 1184 (10th Cir. 2008) ("To overcome the discretionary function exception and thus have a chance of establishing a waiver of sovereign immunity, plaintiffs must show that the federal employee's discretion was limited by 'a federal statute, regulation, or policy;' after all, states can't waive the federal government's immunity."); see Carroll, 661 F.3d at 101 ("State law cannot override the FTCA's grant of immunity for discretionary conduct"). "In such circumstances, where 'the employee's conduct cannot appropriately be the product of judgment or choice, there is no discretion in the conduct for the discretionary function exception to protect.'" Carroll, 661 F.3d at 100-01 (quoting Berkovitz, 486 U.S. at 536). However, where "the government actors in question have latitude to make decisions and

[8] While both parties choose to frame the harm around the failure to obtain permission, and the court decides this case based on the parties having framed the issue in that manner, the court also recognizes that the harm here could have simply been the removal of Evans' trees.

choose among alternative courses of action, the conduct is discretionary." Bolduc, 402 F.3d at 61.

In order to implement the PPA, the Secretary of Agriculture "may cooperate with . . . States or political subdivisions of States." 7 U.S.C. § 7751(a). Under the PPA framework, the State "shall be responsible for the authority necessary to conduct the operations or take measures on all land and properties within the . . . State, other than those owned or controlled by the United States[.]" 7 U.S.C. § 7751(b)(1). Evans argues that this federal statute bound the United States to follow whatever procedures the Commonwealth of Massachusetts enacted under its statutory authority, including the requirement that the property owner's permission be obtained prior to removing uninfested host trees, and, hence, the conduct of the United States that caused the removal of his trees was not discretionary. (Docket #34 at 14-15).

In Lopez v. United States, the Tenth Circuit considered whether the court had subject matter over plaintiffs' claim that the United States Postal Service ("USPS") negligently failed to take account of the driving public when locating a row of mailboxes on the shoulder of a highway or whether such claims were barred by the discretionary function exception to the FTCA. Lopez, 376 F.3d at 1057. The plaintiffs argued that USPS regulations and administrative policy removed discretion from USPS employees to situate the mailboxes at the location in question because Section 632.524 of the Postal Operations Manual stated that mailboxes "must be placed to conform to state laws and highway regulations." Id. at 1057-58. This requirement was reiterated in the Domestic Mail Manual, which

provided that mailboxes must be placed "subject to state laws and regulations." Id. at 1058. The Tenth Circuit found that these regulations demanded that applicable state highway safety regulations be followed when determining mailbox locations, and, therefore, if mailboxes were placed in violation of state law or regulations, the USPS was compelled by its own regulations to relocate them. Id. The Tenth Circuit held that this was a nondiscretionary mandate. Id.

Unlike the postal regulations in Lopez which affirmatively required the USPS to act in conformity with state law, the statute here, 7 U.S.C. § 7751(b)(1), does not limit or remove the discretion of the USDA. Far from it, the statute places all responsibility for "the authority necessary to conduct the operations or take measures on all land and properties" on the entity cooperating with the USDA, here the Commonwealth. The statute does not place any affirmative, nondiscretionary duty on the United States. Cf. Lopez, 376 F.3d at 1058 (holding that USPS regulations compelled USPS to relocate mailboxes placed in violation of state law or regulations where USPS manual stated mailboxes "must be placed to conform to state laws and highway regulations") (emphasis added). If the Commonwealth failed to obtain the permission it unilaterally agreed it would obtain before removing trees, then, under federal law, "responsibility" lies with the Commonwealth.[9] Evans'

[9] I note that the issue of whether this practice was binding on the DCR is currently being litigated at the state level. See Evans v. Mayer Tree Serv., Inc., 89 Mass. App. Ct. 137, 149-50 (2016). The court need not reach that issue here as it finds that the discretionary function exemption is applicable.

argument is predicated on a reading of the statute that the Commonwealth's responsibility ends when it adopts a protocol to obtain authority to enter on land within the Commonwealth. But the statute does not so limit the responsibility of the Commonwealth. Without exception, it places responsibility for the authority necessary to conduct operations on the Commonwealth. Hence, this court finds that the United States did not adopt DCR's practice of obtaining property owners' written consent prior to removing uninfected host trees so that this practice had the effect of a federal statute, regulation, or policy. This reading of the statute is consistent with the court's obligation to "construe [] waivers [of sovereign immunity] narrowly and to resolve any ambiguity or uncertainty in favor of immunity. Abreu v. United States, 468 F.3d 20, 30 (1st Cir. 2006).

While it finds the analysis above dispositive on the issue, the court also rejects Evans' argument that, by entering into the Cooperative Agreement, APHIS became an agent of the Commonwealth, and was thereby bound by any obligation the DCR unilaterally undertook. (Docket #34 at 13-15). While 7 U.S.C. § 7751(a) provides that the USDA may cooperate with a State to carry out the PPA, as stated above, there is no mention in the statute of any agency relationship. The court notes that the Cooperative Agreement itself never uses the word "agent." Instead it describes the relationship as "cooperative," noting that "[e]radication is achieved through the cooperative efforts of federal, state and local governments," and that "[t]hrough this mutually beneficial cooperative effort, MDCR and APHIS endeavor to identify where ALB is present[.]" (Docket #27-7 at 2). Pursuant to the Cooperative

Agreement, APHIS agreed to "[p]rovide personnel to accomplish operational activities and objectives." (Id. at 4). The Cooperative Agreement states that these "[f]ederal personnel will be deployed to assist in related program activities as determined and agreed to by MDCR and APHIS." (Id.) (emphasis added). The Cooperative Agreement clearly contemplates a cooperative venture, rather than one in which the DCR has any right to control the actions of APHIS. Thus, the essential element of an agency relationship is missing. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2666 (2013) ("An essential element of agency is the principal's right to control the agent's actions.") (quoting 1 Restatement (Third) of Agency § 1.01, Comment f (2005)).[10] Evans' construction of the Cooperative Agreement, while suiting his theory of liability, would, in effect, allow a state government to limit the scope of the United States' sovereign immunity. Case law clearly holds that the states do not possess such power. See Sydnes, 523 F.3d at 1184; Carroll, 661 F.3d at 101.

Evans also argues that, because Marquis had yet to complete a compliance agreement prior to removing his trees, the United States did not have the authority to direct Marquis to remove those trees. (Docket #34 at 15-16). However, in accordance with the plain language of 7 U.S.C. § 7751(b), discussed above, even if Marquis was not authorized to remove trees, Section 7751 makes clear that responsibility for the authority to

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[10] While Hollingsworth quotes the Third Restatement of Agency, this principal is equally applicable under the Second Restatement of Agency which Massachusetts follows. See CNE Direct, Inc. v. Blackberry Corp., 821 F.3d 146, 150 (1st Cir. 2016).

conduct operations lies with the Commonwealth. Ensuring that tree removal contractors are qualified falls squarely within that requirement. Moreover, the Cooperative Agreement places responsibility on the Commonwealth to "award and administer host tree removal contracts." (Docket #27-7 at 6). The responsibility of the United States, insofar as tree removal contractors are concerned, is only to provide the funds that the Commonwealth will utilize to award and administer those contracts. (Id.).

Nothing in 7 C.F.R. § 301-51 requires a contrary result. 7 C.F.R. § 301-51-6 provides that:

> Persons engaged in growing, handling, or moving regulated articles interstate may enter into a compliance agreement if such persons review with an inspector each stipulation of the compliance agreement. Any person who enters into a compliance agreement with APHIS must agree to comply with the previsions of this subpart [the regulations dealing with ALB] and any conditions imposed under this subpart.

A compliance agreement is defined as "[a] written agreement between APHIS and a person engaged in growing, handling, or moving regulated articles that are moved interstate, in which the person agrees to comply with the provisions of this subpart [the regulations dealing with ALB] and any conditions imposed under this subpart." 7 C.F.R. § 301-51-1. Pursuant to the FAC 47, tree cutting contractors and their employees were to perform all work and services to eradicate the ALB in accordance with the Compliance Agreement. (Docket #27-8 at 3). Marquis signed a compliance agreement with APHIS and the

DCR on February 18, 2009, after the trees at issue were removed from Evans' property. (Docket #35-2). As an initial matter, there is no indication in the record that Marquis, which is located in Burlington, Massachusetts, handled or moved the trees interstate. (See id.). Hence, there is no independent requirement under 7 C.F.R. § 301-51-6 for the United States to enter into a compliance agreement with Marquis. Even if it did handle or move regulated articles interstate, 7 C.F.R. § 301-51-6 places no affirmative requirement upon APHIS to enter a compliance agreement with Marquis. The regulation is not directed at APHIS but rather those who seek to enter an agreement with APHIS and contains only permissive language, stating that such persons "may enter into a compliance agreement[.]" 7 C.F.R. § 301-51-6 (emphasis added). Nor, for the same reasons explained above with respect to the permission provision, can the fact that the FAC 47 required tree cutting employees to perform all work and services in accordance with the Compliance Agreement override the FTCA's grant of immunity for discretionary conduct.

Pursuant to the FAC 47, tree cutting contractors and their employees were also required to perform all work and services to eradicate the ALB in accordance with the DCR quarantine order. (Docket #27-8 at 3). The DCR quarantine provides: "No person shall harvest, cut, move, carry, transport or ship (or authorize or allow any other Person to do the same) Regulated Articles [i.e. trees and tree products] within or outside of the Affected Area during the Quarantine Period unless specifically authorized in writing by the Commissioner of the [DCR]." (Docket #27-4 at 4). Evans asserts that this provision precluded the United

States from directing Marquis Tree to remove any trees unless and until Marquis Tree was specifically authorized to so in writing by DCR. (Docket #34 at 15). As explained previously, however, state law cannot override the FTCA's grant of immunity for discretionary conduct. See Sydnes, 523 F.3d at 1184; Carroll, 661 F.3d at 101

3. Policy Considerations

At the final step of the inquiry, the court must determine whether Franciosi's decision to remove Evans' uninfested host trees without first obtaining his permission was arguably based on considerations of public policy. "[T]he actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected." United States v. Gaubert, 499 U.S. 315, 317 (1991). "Where 'a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.'" Limar Shipping Ltd. v. United States, 324 F.3d 1, 8-9 (1st Cir. 2003) (quoting Gaubert, 499 U.S. at 317). First Circuit precedence places the burden on the plaintiff to show "that discretionary conduct was not policy-driven and, hence, falls outside the exception." Carroll, 661 F.3d at 100 n.15. But see Hart v. United States, 630 F.3d 1085, 1089 n.3 (8th Cir. 2011) (noting circuit split on whether the plaintiff or the government bears the burden of proof).

> The law imposes no requirement that the government, as a prerequisite to invoking the

> discretionary function exception, demonstrate that a policy judgment actually was made. The discretionary function exception applies to all acts and omissions that are susceptible to policy analysis, whether or not that analysis has been performed on a given occasion.

Fothergill, 566 F.3d at 253.

Here, Evans makes no showing as to whether the conduct at issue was susceptible to policy analysis. (Docket #34 at 15). On this basis alone, having already found that the conduct was discretionary, summary judgment is granted and the case dismissed. However, even if the court goes a step further, it still finds that summary judgment is appropriate. The fact that there is no federal statute, regulation, or policy requiring property owner permission prior to removing ALB uninfested host trees is, arguably, a policy decision to expedite the tree removal process thereby preventing the spread of ALB. As recognized in the Cooperative Agreement, spread of the ALB has the potential to cause extensive losses to ornamental and commercial tree species. (Docket #27-7 at 2). Likewise, the lack of a federal statute, regulation, or policy requiring that tree removal contractors complete a compliance agreement or be authorized by the DCR is also an arguable policy decision made to expedite the tree removal process thereby preventing the spread of ALB.

Therefore, because the challenged conduct is both discretionary and policy-related, the discretionary function exception bars subject matter jurisdiction over this action. See Montijo-Reyes, 436 F.3d at 24.

IV. CONCLUSION

For the foregoing reasons, the United States' Motion for Summary Judgment (Docket #25) is hereby ALLOWED.

/S/ David H. Hennessy
David H. Hennessy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-40042-DHH

[Filed September 30, 2016]

George Evans, Plaintiff,	)
v.	)
United States of America, Defendant.	)

JUDGMENT

HENNESSY, M.J.

__ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury
has rendered its verdict.

X DECISION BY THE COURT. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the Order Granting Defendant's Motion for Summary Judgment entered on September 30, 2016, Judgment is entered for the Defendant.

SO ORDERED.

By the court,

/s/Lisa Belpedio
Deputy Clerk

Date: September 30, 2016

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 16-2423

[Filed February 6, 2018]

GEORGE EVANS
Plaintiff - Appellant

v.

UNITED STATES
Defendant - Appellee

CRYSTAL FRANCIOSI, an employee of the Department of Agriculture sued in her individual capacity; UNITED STATES DEPARTMENT OF AGRICULTURE
Defendants

Before

Lynch and Selya, Circuit Judges,
and Levy, District Judge*

ORDER OF COURT

Entered: February 6, 2018

* Of the District of Maine, sitting by designation.

Appellant George Evans' Petition for Rehearing is denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Michael J. O'Neill
Ernest Douglas Sederholm
Mary Beth Murrane
Dina Michael Chaitowitz

APPENDIX D

FEDERAL ORDER

Domestic Quarantine of a Portion of Worcester County, Massachusetts, for Asian Longhorned Beetle *(Anoplophora glabripennis)*
January 9, 2009

This Federal Order is issued pursuant to the regulatory authority provided by the Plant Protection Act of June 20, 2000, as amended, Section 412(a), 7 U.S.C. 7712(a), which authorizes the Secretary of Agriculture to prohibit or restrict the movement in interstate commerce of any plant, plant part, or article, if the Secretary determines the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States and is likewise issued pursuant to the regulations promulgated under the Plant Protection Act found at 7 CFR 301.51.

This Federal Order quarantines, effective immediately, a portion of Worcester County, Massachusetts, for Asian longhorned beetle (ALB), *Anoplophora glabripennis.* This action is in response to a confirmed detection of ALB in this area of Massachusetts. Thus, the Administrator of the Animal and Plant Health Inspection Service (APHIS) has determined that it is necessary to quarantine this area in order to prevent the spread of ALB. Therefore, effective immediately, all interstate movement of ALB regulated articles from the area within the boundaries listed below must be done in accordance with the regulations promulgated

pursuant to the Plant Protection Act found at 7 CFR 301.51 et seq. and any applicable provisions of this Federal Order.

The boundaries of the regulated area are as follows:
The portion of Worcester County, including the municipalities of Worcester, Holden, West Boylston, Boylston, and Shrewsbury, that is bounded by a line starting at the intersection of Route 140 (Grafton Circle) and Route 9 (Belmont Street) in Shrewsbury; then north and northwest on Route 140 through Boylston into West Boylston until it intersects Muddy Brook (body of water), then east along Muddy Brook to the Wachusett Reservoir, then along the Wachusett Reservoir in a northwest direction until it intersects Worcester Street, then southwest on Worcester Street to Goodale Street; then southwest and west on Goodale Street, which becomes Malden Street at the Holden town line; then west and southwest on Malden Street to Main Street (Route 122A) in Holden; then west on Main Street to Salisbury Street; then south on Salisbury Street to Fisher Road; then southwest on Fisher Road to Stonehouse Hill Road; then south on Stonehouse Hill Road to Reservoir Street; then southeast on Reservoir Street until it intersects the Worcester City boundary, then along the Worcester City boundary until it intersects Route 20 (Hartford Turnpike), then east on Route 20 to Lake Street, then north and northeast on Lake Street to Route 9 (Belmont Street), then east on Route 9 to the point of beginning.

On September 4, 2008, APHIS issued a Federal Order (DA-2008-59) to add a portion of Worcester County to the ALB quarantined areas. On November 10, 2008, a second Federal Order (DA-2008-72) was issued to

expand the quarantine areas in Massachusetts. Other States and areas of the country are also quarantined for ALB. These include areas of Queens, Brooklyn, Manhattan, Staten Island, and Long Island, New York, and portions of Middlesex and Union Counties, New Jersey. The existing boundaries for the quarantines in New York and New Jersey can be found in 7 CFR 301.51.

7 CFR 301.51-3(a) allows the designation of less than an entire State as a ALB quarantined area only when the Administrator of APHIS has determined, as in this case, that the designation of less than an entire State as a quarantined ALB area is adequate to prevent the interstate spread of infestations of this pest. In addition, 7 CFR 301.51-3(a) requires that the State enforces an intrastate ALB quarantine that is equivalent to the Federal ALB regulations. The Massachusetts Department of Conservation and Recreation has established an intra-state quarantine for a portion of Worcester County that mirrors the Federal Regulatory requirements as specified in 7 CFR 301.51.

7 CFR 301.51-3 (b) provides for the temporary designation of new quarantined areas pending publication of a rule to add areas to the list shown in 7 CFR 301.51-3(c). 7 CFR 301.51-3 (b) further requires written notification be given to the owner or person in possession of a newly quarantined area. This is the responsibility of the Federal and/or State regulatory personnel responsible for the ALB program in the affected State.

The Federal Orders quarantining areas of Massachusetts have been necessary due to the ongoing delimitation of the ALB infestation in Massachusetts. This January 9, 2009, Federal Order updates and replaces all previous versions of Federal Orders pertaining to the expansion of quarantined areas in the ALB domestic regulations.

If you wish more details on the Federal ALB regulatory program, you may contact Christine Markham, APHIS' National ALB Program Director at (919) 855-7328 or Julie Twardowski, APHIS' National ALB Program Coordinator, at (301) 734-5332.

We appreciate the cooperative relationship with the State of Massachusetts in our effort to prevent the spread of ALB.

APPENDIX E

dcr
Massachusetts

NOTICE OF INFESTATION AND TREATMENT ORDER REGARDING ASIAN LONGHORNED BEETLE (TREE REMOVAL)

[Dated December 10, 2008]

NOTICE

The Massachusetts Department of Conservation and Recreation (DCR), in consultation with the United States Department of Agriculture's (USDA) Animal Plant Health Inspection Service (APHIS) and the Massachusetts Department of Agricultural Resources (DAR), hereby issues this notice of determination that the presence of the Asian Longhorned Beetle (*Anoplophora glabripennis*) ("ALB") in trees on or near the premises of 14 Randolph Rd. in Worcester poses an imminent threat to hardwood trees in the Commonwealth of Massachusetts. DCR has further determined that it is necessary to remove, destroy and dispose of the trees infested, or exposed to potential infestation, by these insects on this premises in order to eradicate this nuisance, and prevent its spread to additional trees or areas of the Commonwealth.

FINDINGS

Consistent with M. G. L. c. 132, §§ 8, 11, and 12 and M. G. L. c. 132A, § 1F, DCR has declared the ALB to be a public nuisance and has instituted a quarantine

pursuant to an Order (August 8, 2008), an Amended Order (August 20, 2008), a Second Amended Order (September 28, 2008), and a Third Amended Order (November 24, 2008) issued for parts of Worcester County. DCR has issued these orders to prevent the spread of this destructive invasive insect and/or pest. The ALB has also been the subject of a Declaration of Emergency and quarantine by USDA pursuant to the Federal Domestic Quarantine Orders dated September 4, 2008, and November 10, 2008 and 7 C.F.R. § 301.51. USDA/APHIS has also instituted programs for eradication of the ALB. Finally, the destruction of the trees which are the subject of this Notice and Order, and disposal of the wood, is necessary to eradicate the ALB and abate this nuisance.

ORDER

Pursuant to the Third Amended Order, DCR hereby orders that:

1. The hardwood trees that have been previously marked with red paint (indicating an infested tree) on the above-referenced Premises are to be cut, removed and destroyed in the following manner. Additional hardwood trees marked with a blue paint (indicating a host tree that could become infested) on the Premises, may need to be removed and destroyed. If such a determination is made by USDA or DCR, notice will be provided in advance that such additional hardwood trees are subject to this Order.

2. 7 – 10 business days prior to the arrival of contractors on your street, you will be notified by duly authorized DCR and/or United States Department of Agriculture (USDA) personnel with visible credentials to make you aware of the plans for work on the Premises to remove and destroy hardwood trees. If no person is available at the Premises, a door hanger will be left with a phone number for you to call with questions.

Neither the Owner/Landlord nor the Tenant of the Premises shall be responsible for the cost to remove or destroy the marked trees.

MA ALB Eradication Program
c/o Worcester DPW+ Parks
50 Skyline Dr. Meeting Room B
Worcester, MA 01605-2898
Toll Free: 866-702-9938
508-799-8330

COMMONWEALTH OF MASSACHUSETTS •
EXECUTIVE OFFICE OF ENERGY &
ENVIRONMENTAL AFFAIRS

Department of Conservation and Recreation
251 Causeway Street, Suite 500
Boston MA 02114-2119
617-626-1250 617-626-1351 Fax
www.mass.gov/dcr

Deval L. Patrick
Governor

Ian A. Bowles, Secretary, Executive
Office of Energy & Environmental Affairs

NOTICE

Failure to permit authorized contractors to perform the removal actions at the Premises, and any failure to otherwise comply with this Order, will result in the DCR seeking enforcement of this Order in Superior Court. DCR reserves the right to require further treatment or action to abate this nuisance, and to issue further orders to authorize and require such actions.

Further information may be obtained by contacting DCR by telephone at 508-799-8330 or by Fax at 508-799-8321.

So Ordered: December 10, 2008

/s/ James DiMaio
James DiMaio, Chief
Bureau of Forestry

APPROVED:

/s/ Richard Sullivan
Richard K. Sullivan, Jr., Commissioner
Department of Conservation and Recreation
251 Causeway Street, Suite 600
Boston, MA 02114

Zone ___ Unit ___

Acknowledgement and Permission

The undersigned declares and warrants to be the sole and lawful owner(s) of the Premises at 14 Randolph Rd., in the city or town of Worcester, that is the subject of the "NOTICE OF INFESTATION AND TREATMENT ORDER REGARDING ASIAN LONGHORNED BEETLE (TREE REMOVAL)" (the "Removal Order") issued by the Commissioner of the Department of Conservation and Recreation (DCR) regarding the Premises, a copy of which is attached hereto or on the reverse side hereof.

The undersigned has read and understands the Removal Order and authorizes DCR and the United States Department of Agriculture (USDA), their employees or agents, to enter the Premises for the sole and exclusive purpose of undertaking any and all actions to cut, remove and destroy the hardwood trees, including stumps that are the subject of the Removal Order. The undersigned acknowledges that all work will be conducted pursuant to eradication plans and specifications approved by USDA or DCR.

The undersigned agrees that all hardwood trees, including stumps, determined by USDA or DCR to be infested with the Asian Longhorned Beetle (ALB), and which have been previously marked with red paint on the above-referenced Premises shall be cut, removed and destroyed. The undersigned acknowledges that hardwood trees not determined to be infested, but which could be exposed and become infested by ALB (so called "host trees", which are marked with blue paint), are not required to be cut and removed at this time from the Premises. However, the undersigned also

acknowledges that such host trees may be cut, removed and destroyed at this time at no cost to the lawful owners or tenants if the undersigned so chooses, and in that regard

> the undersigned ___ DOES / ___ DOES NOT request and authorize host trees to be cut and removed from the Premises and destroyed.

The undersigned further authorizes any contractor duly authorized by DCR pursuant to the authority referenced in the Removal Order to enter upon the Premises to undertake all actions to cut, remove and destroy the hardwood trees, including stumps, that are the subject of the Removal Order; and to undertake all actions to cut, remove and destroy the host trees if the undersigned has so requested and authorized such above.

The undersigned agrees that any removed hardwood trees, including stumps, have no monetary value and that no financial compensation will be provided to the undersigned for such. The undersigned agrees that any removed hardwood trees will not be replaced with a hardwood tree, and that a program of tree replacement will be implemented, at a later date, within the areas affected in Worcester County, with species of trees not subject to re-infestation by Asian Longhorned Beetle, as determined to be appropriate by the USDA and DCR and not necessarily at a 1 to 1 replacement ratio for trees removed on the Premises, but in any event at no cost to the lawful owners or tenant.

_____ Date: _____

Sign name:

_____ Phone: _____

Print name:

Address of Premises: _____