

# Proposed Rules

Federal Register

Vol. 72, No. 237

Tuesday, December 11, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS-2007-0116]

RIN 0579-AC64

#### Importation of Fruits and Vegetables

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations pertaining to the importation of fruits and vegetables to eliminate a treatment requirement for Ya pears imported from Shandong Province, China; to clarify the conditions that apply to the importation of sand pears from the Republic of Korea and Japan; and to clarify the distinction between plant parts that would be considered to be plant litter or debris and those that would not. These proposed changes would eliminate a treatment requirement that no longer appears to be necessary and would clarify some existing provisions in order to make the regulations easier to understand and implement.

**DATES:** We will consider all comments that we receive on or before January 10, 2008.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>, select "Animal and Plant Health Inspection Service" from the agency drop-down menu, then click "Submit." In the Docket ID column, select APHIS-2007-0116 to submit or view public comments and to view supporting and related materials available electronically. Information on using [Regulations.gov](http://www.regulations.gov), including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. APHIS-2007-0116, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2007-0116.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Alex Belano, Import Specialist, Commodity Import Analysis and Operation, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-5333.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction of plant pests. Under the regulations in "Subpart—Fruits and Vegetables" (7 CFR 319.56-1 to 319.56-47, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States. In this document, we are proposing to make several amendments to the regulations. The proposed amendments are discussed below by topic.

##### Definition of Plant Debris

In § 319.56-3, "General requirements for all imported fruits and vegetables," paragraph (a) requires that "All fruits and vegetables imported under this subpart, whether in commercial or noncommercial consignments, must be

free from plant debris, as defined in § 319.56-2." In § 319.56-2, *plant debris* is defined as "Detached leaves, twigs, or other portions of plants, or plant litter or rubbish as distinguished from approved parts of clean fruits and vegetables, or other commercial articles." While that definition does make reference to "approved parts of clean fruits and vegetables," the definition and the regulations in § 319.56-3(a) may not adequately communicate the fact that there are also parts of clean fruits and vegetables that are not approved for entry.

In order to make that distinction clear, we are proposing to remove the current definition of *plant debris* and replace it with separate definitions of *plant litter and debris* and *portions of plants*. *Plant litter and debris* would be defined as: "Discarded or decaying organic matter; detached leaves, twigs, or stems that do not add commercial value to the product." *Portions of plants* would be defined as: "Stalks or stems, including the pedicel, peduncle, raceme, or panicle, that are normally attached to fruits or vegetables." At the same time, we would amend § 319.56-3(a) so that it requires all imported fruits and vegetable to be free of plant litter or debris and free of any portions of plants that are specifically prohibited in the regulations. We believe these amendments would make our requirements clearer and more enforceable.

##### Importation of Ya Pears From China

The regulations in § 319.56-29 govern the importation of Ya variety pears from China. Under the regulations in that section, Ya pears may be imported from the Hebei and Shandong Provinces of China if they have been grown, harvested, and packed for export under certain conditions, and if the national plant protection organization (NPPO) of China certifies that those conditions have been met. Ya pears from Shandong Province are also required to undergo cold treatment for the Oriental fruit fly (*Bactrocera dorsalis*).

The regulations had previously required that Ya pears from Hebei Province also undergo cold treatment, but we removed that requirement in a final rule published in the **Federal Register** on June 10, 2003 (68 FR 34517-34519, Docket No. 02-084-2). Our removal of the cold treatment

requirement for Ya pears from Hebei Province was based on trapping results and on climatological and biological considerations. In that June 2003 final rule, in response to a comment, we stated that we would consider removing the cold treatment requirement for Ya pears from Shandong Province if China provided APHIS with data similar to the data submitted for Hebei Province indicating that Oriental fruit fly is not present in Shandong Province.

China has now requested that we amend the regulations to remove the cold treatment requirement for Ya pears from Shandong requirement. China has conducted fruit fly trapping in Shandong Province to monitor for the presence of fruit flies. A total of 943 traps were used to survey a variety of areas including orchards, fruit markets, seaports, airports, etc. Trapping data for 3 years, from 2000 to 2002, show that no fruit flies were trapped. In addition to the trapping data, China's NPPO provided us with published research<sup>1</sup> showing that, based on developmental biology of *Bactrocera dorsalis* and because of low winter temperatures, large areas of China, including Shandong Province, are unsuitable habitat for the Oriental fruit fly.

The evidence supporting the removal of the cold treatment requirement is discussed in more detail in a risk management document that has been prepared in response to China's request. The document may be viewed on the Regulations.gov Web site or in our reading room (see ADDRESSES above), and copies may be obtained by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Based on our consideration of the information provided by China and the analysis provided in our risk management document, we are proposing to amend § 319.56–29 to remove the cold treatment requirement for Ya pears from Shandong Province.

#### **Importation of Sand Pears From the Republic of Korea and Japan**

The regulations in paragraph (a) of § 319.56–13 list a number of fruits and vegetables that may be imported from various countries subject to the specific requirements listed in paragraph (b) of that section as well as the general requirements in § 319.56–3 that apply to all imported fruits and vegetables. Among the articles listed in the table is sand pear (*Pyrus pyrifolia* var. *culta*) from Japan and the Republic of Korea.

<sup>1</sup> Zhan, K., S. Zhao, S. Zhu, W. Zhou, and N. Wang (2006). "Study on the viability of *Bactrocera dorsalis* in China." J. of S. China Agricultural University 27(4): 21–25.

The entries for sand pears from each country were added when we reorganized the regulations in a final rule published in the **Federal Register** on July 18, 2007 (72 FR 39482–39528, Docket No. APHIS–2005–0106).

Prior to that final rule, the importation of sand pears from Japan and the Republic of Korea had been authorized under permit and the conditions of their entry were listed in the fruits and vegetables manual.<sup>2</sup> Under the approach we used in revising the fruits and vegetables regulations, however, we listed the sand pears in the regulations because consignments of sand pears, except sand pears imported into Hawaii, were required to be precleared in Japan and the Republic of Korea prior to their exportation to the United States.

When we added the listings for sand pears from Japan and the Republic of Korea to the table in § 319.56–13(a), we neglected to include a note that the preclearance requirement does not apply to sand pears imported into Hawaii from Japan or the Republic of Korea. While the fruits and vegetables manual continues to list the non-precleared sand pears as eligible for importation into Hawaii, the lack of a reference to that exception in the regulations has caused some confusion. Therefore, we are proposing to amend § 319.56–13(b)(5)(ix) so that it clearly states that the preclearance requirement does not apply to sand pears imported into Hawaii from Japan or the Republic of Korea.

We are also proposing to amend the entry for the Republic of Korea in the table in § 319.56–13(a) so that it appears as "Korea, Republic of." This change would make the manner in which we list that country consistent with the manner in which the other countries are listed in the table.

#### **Executive Order 12866 and Regulatory Flexibility Act**

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In this document, we are proposing to amend the regulations pertaining to the importation of fruits and vegetables to eliminate a treatment requirement for Ya pears imported from Shandong Province, China; to clarify the conditions that apply to the importation of sand pears from the Republic of

Korea and Japan; and to clarify the distinction between plant parts that would be considered to be plant litter or debris and those that would not. Of these proposed changes, only the elimination of the treatment requirement would be expected to result in any economic effects.

Removing the cold treatment requirement for Ya pears imported from Shandong Province would reduce importers' shipping expenses and may also affect domestic pear growers, especially those who produce Ya and other Asian pears, and the wholesalers and distributors of these commodities. However, for both foreign and domestic pear producers, the proposed change in requirements is expected to have a very limited effect on the supply and demand for pears overall.

China is the world's largest producer of pears and accounts for 65 percent of world pear production. According to statistics for marketing year 2005 for three varieties of Chinese pears, including the Ya variety, Hebei Province produced the largest volume of pears, accounting for about 29 percent of pear production in China. Shandong Province produced about 9 percent of China's pears during this time. Although China's Ya pear exports are not classified by the originating province, the removal of the cold treatment requirement of Ya pears produced in Shandong Province may be expected to affect about 25 percent of total U.S. imports of Ya pears from China, assuming that the quantities exported to the United States from the two provinces reflect their relative levels of production.

The shipping expenses of importers seeking to import Ya pears from Shandong Province would, under this proposed rule, be reduced by the amount of the expense of the cold treatment. This amount is estimated to be approximately \$0.06 per kilogram of pears. Since the number of Ya pears imported from Shandong Province is estimated to be approximately one-fourth of total Ya pear imports from China, the net impact on the average price of Ya pears would be considerably smaller than \$0.06 per kilogram. If the cost reduction associated with the removal of the cold treatment requirement affects the retail price of Ya pears in the United States, it would be minimal.

Under the criteria established by the Small Business Administration, fruit merchant wholesalers (North American Industry Classification System code 424480) must have 100 or fewer employees to be considered small entities. In 2002, there were 5,376 fresh

<sup>2</sup> See [http://www.aphis.usda.gov/import\\_export/plants/manuals/ports/downloads/fv.pdf](http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/fv.pdf).

fruit and vegetable merchant wholesalers in the United States with a total of 110,578 paid employees, or, on the average, 21 paid employees per establishment. Therefore, domestic fruit merchant wholesalers that may be affected by the proposed rule are predominantly small entities.

The 2002 Census of Agriculture estimates that there are approximately 11,000 pear growers distributed throughout the United States, and that the vast majority of pear growers operate in orchards smaller than 250 acres, and with less than \$750,000 in annual receipts. The average annual sales value of pear growers is estimated to be approximately \$24,416 per grower. Based on this data, it is most likely that pear growers in the United States are predominantly small entities.

In the United States, Asian pears represent a small share of the pear industry. In California, which contains the largest number of Asian pear growers in the country, Asian pears constituted about 7 percent of the total harvested acreage in 2006. Of the Asian pear varieties produced in the United States, Ya pears are estimated to make up a very small percentage of the total number. The value of domestic Ya pears is estimated at less than \$1 million.

The expected economic effect of removing the cold treatment requirement for Ya pears from Shandong Province is minor. Therefore, this proposed rule is expected to have little effect on importers or producers of Ya pears in the United States.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

**Executive Order 12988**

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

**Paperwork Reduction Act**

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

**List of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant Diseases and Pests, Quarantine, Reporting and Recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

**PART 319—FOREIGN QUARANTINE NOTICES**

1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. Section 319.56–2 is amended as follows:

a. By removing the definition of *plant debris*.

b. By adding, in alphabetical order, definitions of *plant litter and debris* and *portions of plants* to read as set forth below.

**§ 319.56–2 Definitions.**

\* \* \* \* \*

*Plant litter and debris.* Discarded or decaying organic matter; detached leaves, twigs, or stems that do not add commercial value to the product.

\* \* \* \* \*

*Portions of plants.* Stalks or stems, including the pedicel, peduncle, raceme, or panicle, that are normally attached to fruits or vegetables.

\* \* \* \* \*

3. In § 319.56–3, paragraph (a) is revised to read as follows:

**§ 319.56–3 General requirements for all imported fruits and vegetables.**

\* \* \* \* \*

(a) *Freedom from unauthorized plant parts.* All fruits and vegetables imported under this subpart, whether in commercial or noncommercial consignments, must be free from plant litter or debris and free of any portions of plants that are specifically prohibited in the regulations in this subpart.

\* \* \* \* \*

4. Section 319.56–13 is amended as follows:

a. In the table in paragraph (a), by removing the entry for “Republic of Korea” and by adding, in alphabetical order, an entry for “Korea, Republic of” to read as set forth below:

b. In paragraph (b), by revising paragraph (b)(5)(ix) to read as set forth below.

**§ 319.56–13 Fruits and vegetables allowed importation subject to specified conditions.**

(a) \* \* \*

Country/locality of origin	Common name	Botanical name	Plant part(s)	Additional requirements
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Korea, Republic of .....	Dasheen .....	<i>Colocasia</i> spp., <i>Alocasia</i> spp., and <i>Xanthosoma</i> spp. ....	Root .....	(b)(2)(iv).
	Sand pear .....	<i>Pyrus pyrifolia</i> var. <i>culta</i> .....	Fruit .....	(b)(5)(ix).
	Strawberry .....	<i>Fragaria</i> spp. ....	Fruit .....	(b)(5)(i).
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

\* \* \* \* \*  
(b) \* \* \*  
(5) \* \* \*

(ix) Except for sand pears entering Hawaii, only precleared consignments are authorized. The consignment must be accompanied by a PPQ Form 203

signed by the APHIS inspector on site in the exporting country.

\* \* \* \* \*

**§ 319.56–29 [Amended]**

4. Section 319.56–29 is amended by removing paragraph (b) and

redesignating paragraph (c) as paragraph (b).

Done in Washington, DC, this 6th day of December 2007.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E7-23957 Filed 12-10-07; 8:45 am]

BILLING CODE 3410-34-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. AMS-FV-07-0119; FV07-930-3 PR]

#### Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2007-2008 Crop Year for Tart Cherries

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule invites comments on the establishment of final free and restricted percentages for 2007-08 crop year tart cherries covered under the Federal marketing order regulating tart cherries grown in seven states (order). The percentages are 57 percent free and 43 percent restricted and will establish the proportion of cherries from the 2007 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions. The percentages were recommended by the Cherry Industry Administrative Board (Board), the body that locally administers the order. The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

**DATES:** Comments must be received by January 10, 2008.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237; Fax: (202) 720-8938, or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G.

Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; telephone: (301) 734-5243, Fax: (301) 734-5275; e-mail [Patricia.Petrella@usda.gov](mailto:Patricia.Petrella@usda.gov) or [Kenneth.Johnson@usda.gov](mailto:Kenneth.Johnson@usda.gov), or Internet at <http://www.regulations.gov>.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this proposed rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This proposed rule establishes final free and restricted percentages for tart cherries for the 2007-2008 crop year, beginning July 1, 2007, through June 30, 2008. This proposed rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposed rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the

petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. The regulations apply to all handlers of tart cherries that are in the regulated Districts within the production area. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with § 930.59 of the order and § 930.159 of the regulations, or used for exempt purposes (to obtain diversion credit) under § 930.62 of the order and § 930.162 of the regulations. The regulated Districts for the 2007-08 season are: District one—Northern Michigan; District two—Central Michigan; District four—New York; District seven—Utah; and District eight—Washington. Districts three, five, and six (Southwest Michigan, Oregon, and Pennsylvania, respectively) will not be regulated for the 2007-2008 season.

The order prescribes under § 930.52 that those districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded six million pounds. A district not meeting the six million-pound requirement shall not be regulated in such crop year. Because this requirement was not met in the Districts of Southwest Michigan, Oregon, and Pennsylvania, handlers in those districts would not be subject to volume regulation during the 2007-2008 crop year.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. Demand for tart cherries and tart cherry products tend to be relatively stable from year to year. The supply of tart cherries, by contrast, varies greatly from crop year to crop year. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from crop year to crop year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely balanced. The