# Proposed Rules

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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. 03–069–1]**

**RIN 0579–AB85**

### Nursery Stock Regulations

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

**ACTION:** Advance notice of proposed rulemaking and request for comments.

**SUMMARY:** We are soliciting public comment on whether and how we should amend the regulations that govern the importation of nursery stock, also known as plants for planting. Under the current regulations, all plants for planting are allowed to enter the United States if they are accompanied by a phytosanitary certificate and if they are inspected and found to be free of plant pests, unless their importation is specifically prohibited or further restricted by the regulations. We are considering several possible changes to this approach, including establishing a category in the regulations for plants for planting that would be excluded from importation pending risk evaluation and approval; developing ongoing programs to reduce the risk of entry and establishment of quarantine pests via imported plants for planting; combining existing regulations governing the importation of plants for planting into one subpart; and reevaluating the risks posed by importation of plants for planting whose importation is currently prohibited. We are also considering how to best collect data on current imports of plants for planting so we can accurately ascertain the volume, type, and origin of such plants entering the United States. We are soliciting public comment on these issues to help us determine what changes we should propose to improve our regulations and which of these changes should be assigned the highest priority for implementation.

**DATES:** We will consider all comments that we receive on or before March 10, 2005.

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

- *EDOCKET:* Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 03–069–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–069–1.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–069–1'' on the subject line.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

*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:* You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Arnold T. Tschanz, Senior Staff Officer, Regulatory Coordination, PPQ, APHIS, 4700 River Road Unit 141, Riverdale, MD 20737–1236; (301) 734–5306.

**SUPPLEMENTARY INFORMATION:**

## Background

*Scope and Approach of the Current Regulations*

Under the Plant Protection Act (7 U.S.C. 7701–7772), *plant pest* is defined as: ''Any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the these articles.'' The Plant Protection Act defines *noxious weed* as: ''Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.'' Under the Plant Protection Act, the Secretary of Agriculture is authorized to undertake such actions as may be necessary to prevent the introduction and spread of plant pests and noxious weeds within the United States. The Secretary has delegated this responsibility to the Administrator of the Animal and Plant Health Inspection Service (APHIS).

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 or spread of plant pests and noxious weeds. The regulations contained in ''Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products,'' §§ 319.37 through 319.37–14 (referred to below as the regulations), restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for or capable of propagation. (The regulations in 7 CFR part 360, ''Noxious Weed Regulations,'' contain restrictions on the movement of noxious weed plants or plant products listed in that part into or through the United States and interstate; the importation of some plants and seeds is subject to both the nursery stock regulations and the noxious weed regulations.) To refer to the articles subject to the nursery stock regulations collectively in this document, we will use the term *plants for planting,* which the International

Plant Protection Convention defines as: ''Living plants and parts thereof, including seeds and germplasm, intended to remain planted, to be planted, or to be replanted to ensure their subsequent growth, reproduction or propagation.'' This definition matches the scope of the articles subject to the nursery stock regulations.

APHIS' nursery stock regulations prohibit or restrict the importation of certain taxa of plants for planting that pose a risk of introducing plant pests of quarantine concern (referred to below as *quarantine pests*) into the United States. We use the word *taxon* (plural: taxa) in this document to refer to any grouping within botanical nomenclature, such as family, genus, species, or cultivar. A *quarantine pest* is defined by the International Plant Protection Convention as: ''A pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.'' (In this definition, *pest* includes ''any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products.'')

Plants for planting that APHIS has determined cannot be feasibly inspected, treated, or handled to prevent quarantine pests that may accompany them from being introduced into the United States are listed in the regulations as prohibited articles. Prohibited articles may not be imported into the United States, unless imported by the U.S. Department of Agriculture (USDA) for experimental or scientific purposes under specified safeguards.

Plants for planting that APHIS has determined can be inspected, treated, or handled to prevent quarantine pests that may accompany them from being introduced into the United States are listed in the regulations as restricted articles. Restricted articles may be imported into the United States if they are imported in compliance with conditions that may include permit and phytosanitary certificate requirements, inspection, treatment, postentry quarantine, or combinations of these safeguards.

Finally, under the regulations in § 319.37–14(a), plants for planting that are required to be imported under a written permit under § 319.37–3(a)(1) through (a)(6) may be imported or offered for importation only at a Federal plant inspection station. Such stations are designated by asterisks in the list of ports of entry in § 319.37–14(b). Plants for planting offered for importation at a Federal plant inspection station are inspected and, if necessary, treated before being allowed entry into the United States. All other plants for planting whose importation is restricted by the regulations must be presented for inspection and may be inspected and treated, if necessary, at any of the ports listed in § 319.37–14(b) or, in certain limited cases, at another Customs designated port of entry.

The importation of plants for planting is further restricted or prohibited if there is specific evidence that such importation could introduce a quarantine pest into the United States. If we have reason to believe that the importation of a currently admissible taxon of plants for planting may pose a risk of introducing a quarantine pest, a pest risk assessment (PRA) is completed to examine the available evidence on the subject; if the PRA indicates that the risk posed by the importation of the taxon warrants restrictions on or the prohibition of its importation, we undertake rulemaking to amend the regulations to impose the necessary restrictions or prohibition.

We estimate that plants for planting from representative species of more than 2,000 genera are being imported or have been imported in the past. Most of the taxa of plants for planting currently being imported have not been thoroughly studied to determine whether their importation presents a risk of introducing a quarantine pest into the United States. We typically rely on inspection at a Federal plant inspection station or port of entry to mitigate the risks of pest introduction associated with the importation of these taxa.

*Conditions of Importation When the Regulations Were Established*

When the regulations were originally established, we believed that most taxa of plants for planting could be imported safely without such thorough study, as the volume and types of plants for planting that were imported and the phytosanitary conditions of their importation were significantly different than they are today. Typically, the permits we issued for the importation of plants for planting limited such importation to either seed or, for cultivars that could not be propagated by seed, small amounts of plant material (usually 100 or fewer plants). The intent was to limit the number of plants for planting imported to the minimum necessary to establish a specific species or cultivar within the United States. The plants for planting that were then imported were thus not intended for immediate sale to U.S. consumers; these imported species or cultivars were only sold to U.S. consumers after they had been established and propagated for sale within the United States. As such, importation of living plant material was limited to species or cultivars that were not grown in the United States and would not breed true from seed or were difficult to establish from seed. Thus, both the quantity of living plant material and the number of types of plants for planting that were imported into the United States were originally very limited.

In addition, when the regulations were originally established, all plants for planting that were imported into the United States were required to be fumigated with methyl bromide or otherwise treated for insect pests as a condition of entry. Fumigation with methyl bromide often has a severe adverse effect on plants for planting in consignments offered for importation into the United States; however, since the plants for planting were being imported to establish specific species or cultivars, the adverse effects were not a concern as long as enough plants for planting survived the treatment to allow for such establishment. Treatment was mandatory and was performed regardless of whether there was evidence that the plants for planting offered for importation could serve as a pathway for the introduction of a quarantine arthropod pest. Because these pests were eliminated by fumigation, the regulations were mainly intended to prevent the introduction of pathogens that fumigation could not control and that were associated with imported plants for planting. When it was determined that the entry of a certain taxon of plants for planting could introduce a pathogen into the United States, regulations were established that prohibited the entry of that taxon, as listed in § 319.37–2, or prescribed specific phytosanitary mitigation conditions, as specified in the regulations in §§ 319.37–3 through 319.37–8 or in departmental permit conditions, that would eliminate the pathogen or allow APHIS inspectors to determine that it was not present in the plants for planting offered for importation. These circumstances prevailed from the first years after the regulations were established until the 1970s.

*Problems for the Regulations Posed by Recent Trends in the Importation of Plants for Planting*

While allowing the importation of most taxa of plants for planting with few restrictions may have been a reasonable course of action when the regulations were established, the circumstances of the importation of plants for planting have since changed greatly. APHIS no

longer limits the number of plants for planting that may be imported to the amount necessary to establish a species or cultivar in the United States, primarily due to industry requests to import large amounts of commercial plants for planting for immediate sale to U.S. consumers rather than for further cultivation within the United States. (As mentioned above, limits on the number of plants for planting had been imposed through the permitting process rather than through the regulations governing the importation of plants for planting.) Since this change was made, importation of plants for planting has steadily increased, as producers have found that many plants for planting can be grown in other countries under more favorable conditions than those available in the United States. In addition, many importers have found that there is a large domestic market for new and rare taxa of plants for planting, further driving increases in the number of taxa imported, the number of foreign areas from which plants for planting are imported, and the overall volume of imported plants for planting.

These increases are reflected in all the data available to us. For example, the Federal plant inspection station at Miami International Airport handles about 76 percent of all plants for planting that are offered for importation into the United States. Between fiscal year 1995 and fiscal year 2002, the total number of plant shipments imported through that inspection station almost doubled, the number of plants imported through that inspection station increased by 250 percent, and the number of quarantine pests found in those shipments increased by 275 percent. While, as noted above, importation of plants for planting was at one time limited to 100 articles of any given taxon, over 1 million apple rootstocks per year were imported through various ports of entry into the State of Washington alone in the early 1990s. The overall volume of imports of field crop, grass, and garden seed for sowing has doubled between 1995 and 2002, to 332,538 metric tons.[1] The recent increases in the volume of imports of plants for planting have been dramatic.

In part due to the fact that plants for planting are now imported for immediate sale to U.S. consumers, imported plants for planting are no longer routinely fumigated with methyl bromide or otherwise treated as a condition of entry; as noted previously in this document, the adverse effects resulting from the fumigation of plants for planting with methyl bromide are quite severe, which means that importing plants for planting for immediate sale to U.S. consumers would be impractical if fumigation were required. We will not resume routine fumigation. Under the Montreal Protocol and Subchapter VI of the Clean Air Act (42 U.S.C. 7671–7671p), the United States is obligated to minimize its use of substances such as methyl bromide that deplete stratospheric ozone. In addition, Article 2 of the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures requires that any restrictions APHIS imposes on the importation of plants for plants be based on scientific principles and is not maintained without sufficient scientific evidence; as mentioned previously, routine fumigation was conducted regardless of whether there was evidence that the plants for planting offered for importation could serve as a pathway for the introduction of a quarantine pest.

As noted previously, the only remaining restriction on the importation of most shipments of plants for planting is that they must enter the United States through a Federal plant inspection station, at which the plants for planting are randomly sampled and visually inspected for quarantine pests. However, this inspection may not always provide an adequate level of protection against quarantine pests, particularly if the pest is rare, small in size, borne within the plant, an asymptomatic plant pathogen, or not yet recognized and regulated as a quarantine pest.

Appropriately mitigating the risks of quarantine pest introduction associated with the importation of plants for planting is especially important because quarantine pests introduced via imported plants for planting are much more likely to become established than quarantine pests introduced via other imported articles, such as fruits and vegetables. The introduced plants for planting themselves may serve as hosts for quarantine pests for months or years, while the shelf life of most fruits and vegetables is days or weeks. In addition, the destinations of imported plants for planting, such as plant nurseries, farms, greenhouses, orchards, and gardens, are likely to be favorable environments for plant growth and pest development in general, which could present problems in the event that a taxon of imported plants for planting turns out to be a carrier of a pathogen or pest or is itself an invasive plant warranting further consideration as a noxious weed. Other host material for quarantine pests is also usually abundant in the environment surrounding imported plants for planting. Under these circumstances, the introduction of even a few individuals of a quarantine pest via imported plants for planting may lead to the establishment of that pest in the United States.

In addition, concern has grown in recent years among national plant protection organizations (NPPOs), State plant protection organizations, and members of the plants for planting industry and the scientific community that there may be many little-known quarantine pests that could be introduced into the United States via the importation of plants for planting or by other articles. In many countries, research capabilities are limited due to a shortage of funds for research as well as a shortage of trained weed scientists, entomologists, plant pathologists, and nematologists. Given this shortage, NPPOs in these countries are likely to concentrate their limited research capabilities on studying crops of local economic importance. Such crops are mostly agronomic crops and fruits and vegetables grown for domestic consumption or export; non-agronomic or ornamental plants are less likely to be studied for possible pest risks. Therefore, quarantine pests of plants for planting in these countries are generally not well known. If research is done on potential pests, it may not be readily available to the international community. Resources in many countries, particularly developing countries, may also be concentrated on locally serious pest problems that may not be of quarantine concern to the United States; conversely, pests that would be of concern to us if they were to be introduced via the importation of plants for planting may not be considered a significant problem in other countries. In addition, pests that may not have serious consequences in one environment may pose great risks in another, and the conditions that increase the risk posed by pests can be difficult to predict.

*Recommendations of the Safeguarding Report With Regard to Plants for Planting*

The National Plant Board's 1999 ''Safeguarding American Plant Resources'' report[2] (referred to below as

[1] More information on the volume of imports of seed and other plants for planting can be found in the Foreign Agricultural Service's U.S. Trade Internet System at *http://www.fas.usda.gov/ustrade.*

[2] ''Safeguarding American Plant Resources: A Stakeholder Review of the APHIS–PPQ Safeguarding System,'' National Plant Board. July 1999. Text available at *http://www.aphis.usda.gov/ppq/safeguarding/.*

the Safeguarding Report) contrasted the approach of the regulations governing the importation of plants for planting with the approach of the regulations governing the importation of fruits and vegetables, which are found in ''Subpart—Fruits and Vegetables'' (§§ 319.56 through 319.56–8) within 7 CFR part 319. While quarantine pests that enter the United States via imported fruits and vegetables are less likely to become established than quarantine pests that enter the United States via imported plants for planting, many of the other problems associated with the importation of plants for planting, such as a lack of research or information concerning the plant pests that may be associated with an article, can be an issue in the importation of fruits and vegetables as well.

However, the importation of fruits and vegetables is generally prohibited under the regulations in ''Subpart—Fruits and Vegetables,'' and the importation of a fruit or vegetable is only allowed if sufficient information is available to prove that its importation is safe. The process of allowing the importation of a fruit or vegetable from a particular area or country begins when APHIS receives an import request from an importer or an exporting country or when there is a request to reconsider the entry status of a commodity previously denied entry. If the request is for a fruit or vegetable for which no previous entry decision has been made, or if new evidence indicates that the previous entry decision may no longer be applicable, then a PRA is performed to determine the sources of pest risk associated with the requested importation. The fruit or vegetable is only allowed to be imported if the PRA indicates that the risk can be effectively mitigated and if notice-and-comment rulemaking to allow the importation is successfully completed. In other words, all commodities whose importation is governed by ''Subpart—Fruits and Vegetables'' are prohibited from importation pending risk evaluation and approval.

By contrast, as described above, the nursery stock regulations do not require that a PRA be completed prior to the importation of a new taxon of plants for planting or prior to the taxon's importation from a new area; most plants for planting are allowed to be imported after visual inspection at a Federal plant inspection station or port of entry. APHIS can take administrative action to prohibit or restrict the entry or subsequent interstate movement of a taxon of plants for planting under the Plant Protection Act if it poses an immediate danger of introducing or spreading a plant pest or noxious weed in the United States; in such an emergency situation, rulemaking may be completed after the prohibition or restrictions are imposed. However, in routine situations, the entry of a taxon of plants for planting is only prohibited or restricted after a PRA and subsequent notice-and-comment rulemaking are completed. This difference between the regulatory approaches for plants for planting and for fruits and vegetables means that the risks associated with the importation of specific taxa of plants for planting are generally much less well known than the risks associated with the importation of taxa of fruits and vegetables under the regulations in 7 CFR part 319.

As the Safeguarding Report states, the regulations' current approach to restricting the importation of plants for planting ''is based solely on known pest and disease problems of the plants on the established lists [of prohibited and restricted articles]. Everything is admissible unless specifically listed as restricted or prohibited. This assumes there is no risk associated with the unknown, an alarming assumption given the resources at stake and the quality of information available.'' It can be assumed that some taxa of plants for planting that are presently being imported pose risks of introducing quarantine pests that are currently unknown to us; as the Safeguarding Report states, ''new species of plant that have not been subjected to risk assessment can enter channels of trade with no regulation. Since these are not listed, they are by default admissible and subject to the least stringent protocol regardless of their potential to carry pests or diseases, or become invasive themselves.''

As the importation of plants for planting has increased dramatically over the last decade, there has not been a commensurate increase in available resources to determine the number and distribution of pests that could be introduced via imported plants for planting, to initiate PRAs, and, when necessary, to amend the regulations to address risks presented by quarantine pests and noxious weeds after their importation. A significant number of pests that could be introduced to the United States via imports of plants for planting need to be evaluated for quarantine significance, but their evaluation has been delayed by this lack of resources. Although we have been able to initiate rulemaking to mitigate risks posed by certain exotic pests, in general our ability to quickly apply new scientific research and information has been hampered by this lack of resources.

These conditions are believed to have led to several pest introductions in recent years. For example, articles of *Pelargonium* spp. that were contaminated with *Ralstonia solanacearum* race 3 biovar 2, a bacterium that is listed in our regulations in 7 CFR 331.3(a) as an agent capable of posing a severe threat to plant health or plant products, have been imported into the United States multiple times, most recently in February 2003. In the February 2003 outbreak, contaminated articles of *Pelargonium* spp. were imported from both Guatemala and, subsequently, Kenya. The articles were required to be inspected at the port of entry, but at the time of their importation they may not have been showing symptoms of the wilt disease that *R. solanacearum* race 3 biovar 2 causes in geraniums. The bacterium was eradicated in greenhouse plants before it could become established in the U.S. environment, where it could have severely affected the U.S. potato crop; more than 2.1 million plants at 471 greenhouses throughout the United States were destroyed as part of the eradication effort. The eradication effort was costly to APHIS, State plant health authorities, and the U.S. plants for planting industry. In response to this outbreak, we amended the regulations by establishing requirements at § 319.37–5(r) for the importation of articles of *Pelargonium* spp. and *Solanum* spp., two hosts of the bacterium. However, it would have been preferable to establish regulations, including conditions of entry, that would have allowed us to avoid the outbreak entirely.

The factors described above led the National Plant Board to recommend in the Safeguarding Report that the plants for planting regulations be revised to better protect U.S. plant resources from quarantine pests. Specifically, the Safeguarding Report recommended that APHIS:

- Review the plants for planting regulations for conformance with the Plant Protection Act and adherence to international standards for quarantine regulations (recommendation E–2);
- Develop a strategy of quarantine development tied to pest risk potential that is reasonable, enforceable, and transparent (recommendation E–3);
- Begin its quarantine revision process with the revision of the fruits and vegetables and plants for planting quarantine regulations (recommendation E–4):
- Consider adopting a modified ''clean list'' approach for propagative material, specifying what is permissible subsequent to risk assessment, rather

than the current ''dirty list'' approach that prohibits or restricts specific articles only (recommendation E–46); and

• Purge lists of ''phantom diseases,'' like the rose wilt virus, that are not recognized by the scientific community (recommendation E–48).

In response to these recommendations, this advance notice of proposed rulemaking solicits public comment on five measures we are considering as part of an effort to revise the regulations. We believe these measures, taken together, would enable APHIS to provide a more appropriate level of protection against the risk of introduction of quarantine pests via imported plants for planting than the current regulations provide. The measures we are considering are: (1) Collecting data on the current importation of taxa of plants for planting; (2) establishing a new category for certain taxa of plants for planting that would be excluded from importation pending risk evaluation and approval; (3) establishing programs to reduce the risk of importation and establishment of quarantine pests; (4) combining existing regulations governing the importation of plants for planting; and (5) reevaluating taxa whose importation is currently prohibited. These measures are described in more detail below.

*Collecting Data on the Current Importation of Taxa of Plants for Planting*

To effectively determine what changes may need to be made to the regulations and the possible impact of those changes, we must have accurate and complete data regarding the volume, types, and origin of plants for planting that are currently being imported into the United States. We do not currently have such data.

Although the regulations in § 319.37–4 require that all imported plants for planting must be accompanied by a phytosanitary certificate, the phytosanitary certificates accompanying these articles often do not contain the data we would need to evaluate current imports of plants for planting. Currently, importers are not required to provide the scientific name or even the genus of the plants for planting being imported on the phytosanitary certificate, and several genera may be included in one broad category (such as ''tropical foliage'') on the certificate, although we anticipate amending the regulations to require that importers provide genus and species information. In addition, estimates of the volume of imports derived from phytosanitary certificates may not be reliable.

The Foreign Agricultural Service (FAS) reports data on imports of plants for planting into the United States according to certain categories developed by FAS, and these data are generally considered to accurately indicate the volume of trade in any given category. However, the categories FAS uses typically include many genera of plants for planting, meaning that the FAS data also do not provide the detailed information about imports of plants for planting that we need.

We are considering what sources to use to acquire data regarding the volume, types, and origin of plants for planting that are currently being imported into the United States and how to use those sources. APHIS records could provide some of the data, although, as noted above, there are gaps in APHIS' data set. We could ask importers to provide data on the volume, types, and origin of past and present importations of plants for planting. Other potential data sources we identified include professional societies, horticultural groups, trade groups, businesses, researchers, universities, arboretums, and individuals. We are also considering making changes to the regulations that would allow us to more easily obtain such data; for example, we could require that, for any consignment of plants for planting offered for importation into the United States, the importer provide or the phytosanitary certificate include the quantity in which the plants for planting are being offered.

Once we collect the data, we would analyze the information to determine what taxa of plants for planting are already being imported in significant amounts. This would allow us to make better informed decisions about whatever changes to the regulations may be necessary.

We invite responses to the following questions in particular on the data collection activities we are considering:

1. Are there any sources other than those listed above from which we should solicit or obtain data?

2. What should we do to ensure that the data we receive accurately reflect actual importations of plants for planting?

3. What are the taxa or types of plants for planting for which obtaining accurate data might be especially difficult?

*Establishing a New Category for Certain Taxa of Plants for Planting That Would Be Excluded From Importation Pending Risk Evaluation and Approval*

As described above under the heading ''Scope and Approach of the Current Regulations,'' the regulations currently either prohibit the importation of plants for planting, allow the importation of plants for planting subject to specific restrictions such as additional declarations on phytosanitary certificates or postentry quarantine, or allow the importation of plants for planting subject to general restrictions such as phytosanitary certificates and inspection at a Federal plant inspection station or port of entry. We plan to retain these categories in the regulations for plants for planting. We are considering adding an additional category for certain taxa of plants for planting that would be excluded from importation pending risk evaluation and approval. These taxa would be listed in the regulations under a heading separate from the prohibited and restricted articles.

A taxon excluded from importation pending risk evaluation and approval could be removed entirely from the list if a PRA was completed and the PRA indicated that the taxon could be imported safely. The PRA would identify any phytosanitary mitigation measures that might be necessary for plants for planting of the taxon to be imported safely; we would then amend the regulations through notice-and-comment rulemaking to require those measures.

While a taxon is excluded from importation pending risk evaluation and approval, we would allow it to be imported into the United States if the producer that wishes to export the taxon to the United States is participating in an approved clean stock program. We would additionally allow the importation of small quantities of such a taxon under the conditions of a best management practices program so that it could be tested within the United States. We would establish a permit system to allow and control such importation. (The clean stock and best management practices programs are another measure we are considering to improve the effectiveness of the regulations. Both programs would be designed to mitigate the risks posed by all types of plant pests, not just the specific plant pests a PRA would identify and address. They are discussed in more detail below under the heading ''Programs To Reduce the Risk of Importation and Establishment of Quarantine Pests.'') Thus, under the

plan we are considering, the exclusion of taxa of plants for planting listed in this category would not be total, nor would it necessarily be permanent.

We are considering two possible options for determining which taxa of plants for planting would be added to this category. In the first option, taxa of plants for planting that are currently being imported in significant amounts and whose importation is subject to general restrictions in the regulations would, in most cases, be presumed to be safe and would not be excluded from importation pending risk evaluation and approval. (We would determine which taxa are currently being imported in significant amounts by analyzing the importation data we are interested in collecting, as described below under the heading ''Collecting Data on the Current Importation of Taxa of Plants for Planting.'') All taxa of plants for planting that are not currently being imported in significant amounts would then be excluded pending risk evaluation and approval.

This first option would allow the continued importation of taxa of plants for planting that are being imported in significant amounts because the risks associated with such taxa are generally better known than the risks associated with taxa that are being imported in smaller amounts. In general, the risks associated with taxa of plants for planting that have not previously been imported into the United States, in small quantities, or from different areas than those from which they have previously been imported are the least well-known risks associated with plants for planting; thus, these are the plants for planting that we would want to exclude pending risk evaluation and approval. For example, if a taxon is being imported in significant amounts, it is more likely that some study of its potential risks has been undertaken in either the exporting country or the United States. In addition, inspectors have more experience with taxa of plants for planting that are being imported in significant amounts, and thus can better recognize potential risks associated with such plants for planting than may be possible with taxa that are being imported in smaller amounts. If other evidence, such as a PRA or evidence required by the second option that is described below, indicated that a taxon of plants for planting that was currently being imported in significant amounts could introduce a quarantine pest, we would reserve the right to restrict or prohibit its importation, perhaps by excluding it pending risk evaluation and approval.

In accordance with the above information, with regard to this option, we are considering whether to treat a taxon of plants for planting that is being imported in significant quantities from one area but is not being imported in significant quantities from another area as two separate taxa for the purposes of exclusion pending risk evaluation and approval. For example, a taxon that is currently being imported in significant quantities from Africa but has never been imported from Asia may pose different pest risks when it is imported from the new area and therefore could be excluded pending risk evaluation and approval.

However, the first option has some potential problems. If this option were implemented without also increasing the resources available to us for conducting and completing PRAs, the volume of requests for importation of new taxa of plants for planting would likely overwhelm our ability to evaluate the new taxa for possible risk in a timely manner. In addition, since we do not currently have detailed data on what taxa of plants for planting are being imported into the United States, implementation of this approach would take some time.

In the second option that we are considering, we would exclude taxa of plants for planting from importation pending risk evaluation and approval when evidence other than a PRA was available that indicated either that the importation of the plant could introduce a quarantine pest into the United States or that the plant itself could be a quarantine pest or a noxious weed. Evidence used in such an evaluation would be drawn from sources such as scientific literature, government reports, professional organizations, and international databases. We would publish criteria regarding the sources of information that could be used and the volume of evidence that would be necessary to exclude a taxon. We anticipate that most taxa of plants presently being imported in significant amounts would continue to be allowed to be imported under the second option, although, for reasons discussed above under the heading ''Collecting Data on the Current Importation of Taxa of Plants for Planting,'' we lack the data to make a definite prediction on this subject.

Although under this option, taxa of plants for planting would be added to this category through notice-and-comment rulemaking, removing the obligation to complete a PRA before such rulemaking could be initiated would allow us to respond more quickly when other evidence indicates that the importation of certain taxa of plants for planting could pose a risk of introducing quarantine pests into the United States. Because it would require fewer resources to exclude a taxon pending risk evaluation and approval under this option than conducting a PRA in order to prohibit or restrict a taxon's importation does under the current regulations, the second option could be implemented with the resources presently available; however, it would be more effective if additional resources were available to search for and evaluate available information.

The two options for adding taxa of plants for planting to the category of excluded pending risk evaluation and approval could be combined to some extent. If the options were combined and implemented, taxa of plants for planting that are currently being imported in significant quantities but whose importation poses an uncertain risk of introducing quarantine pests into the United States could still be excluded from importation pending risk evaluation and approval if evidence other than a PRA supported such an exclusion. For example, a taxon that is currently being imported but which an importer wishes to import from a different area than the area from which it is currently being imported could be placed in the category of excluded pending risk evaluation and approval if we had evidence that a quarantine pest existed in the new area.

We invite responses to the following questions in particular on the ''excluded pending risk evaluation and approval'' category we are considering:

1. How would each of the two options for adding taxa of plants for planting to this category affect the sectors of the horticultural industry that propagate and sell imported plants for planting? Which option would disrupt current trade in plants for planting the least?

2. If the first option were implemented, what should constitute a ''significant'' amount for taxa of plants for planting that are already being imported?

3. If the second option were implemented, what sources of information and what minimum criteria should be used to determine whether a specific taxon should be excluded pending risk evaluation and approval?

4. Should taxa of plants for planting imported from different regions be considered separate regulated articles for the purposes of this category? For example, if a taxon is currently being imported in significant quantities from Africa but has never been imported from Asia, should imports of this taxon from

Asia be excluded pending risk evaluation and approval?

*Programs To Reduce the Risk of Importation and Establishment of Quarantine Pests*

The regulations currently contain a few programs that prescribe procedures for growing establishments in foreign countries that wish to export plants for planting to the United States. For example, § 319.37–4(c) describes a voluntary program for greenhouse-grown plants from Canada that includes requirements for identification of exported plants, recordkeeping, shipping, and pest management practices; if growers in Canada participate in this program, their plants may be offered for importation into the United States without a phytosanitary certificate. Under § 319.37–5(b), to prevent the introduction of certain pathogens of fruit trees into the United States, exporters of various plants for planting in Belgium, Canada, Germany, France, Great Britain, or the Netherlands must present phytosanitary certificates with an additional declaration that the NPPO of the exporting country had examined the stock from which the plants for planting have been derived and found the stock to be free of the pathogens of concern. True seed (botanical seed) of *Solanum tuberosum* imported from Chile under § 319.37–5(o) must be sampled by the NPPO of that country and tested for various diseases before being exported; growers must also agree to undertake various pest management and exclusion practices to be eligible to export *Solanum tuberosum* true seed into the United States. Certain plants for planting may be imported in growing media if they meet the conditions in § 319.37–8(e), which include a mandatory compliance agreement, greenhouse phytosanitary standards, growing requirements, and, for some articles, treatment and inspection requirements. These programs have all been effective at excluding quarantine pests from shipments of these articles that are imported into the United States.

We are considering establishing similar programs that exporters would have to participate in if they wished to export certain plants for planting to the United States. Participants in these programs would follow practices that would be designed to mitigate the risks posed by all pests, whether known or unknown to APHIS, that could be introduced into the United States via imported plants for planting. These programs would be broadly divided into two types. Clean stock programs would establish procedures for foreign exporters to ensure through testing that the stock from which plants for planting are derived is free of disease and to exclude pests from the growing environment of these plants for planting. Best management practices programs would allow U.S. importers to establish methods of excluding quarantine pests from plants for planting that importers test for propagation or propagate within the United States and prevent the establishment of those pests in the United States, or, if the plants for planting themselves appear to be potential noxious weeds, to prevent their establishment in the United States. The regulations in § 319.37–5(b) are an example of a clean stock program; the Draft Voluntary Codes of Conduct developed as part of the Saint Louis Declaration, a product of the Workshop on Linking Ecology and Horticulture to Prevent Plant Invasion held in St. Louis, Missouri, in December 2001, are collectively an example of a best management practices program.[3]

Clean stock programs could be established in countries that wish to export plants for planting to the United States. Many clean stock-type programs already exist in the nursery and floriculture industry; some have been established independently by industry, while others are based on regulatory requirements. In general, the clean stock programs we envision would have several basic elements:

- Production facilities would generate plants for planting from propagative material that is free or nearly free of pests.
- Production facilities would have an International Organization for Standardization-like set of standard operating procedures that include adequate pest control, regular inspection and testing, and detailed recordkeeping of all aspects of plant production, including the origin of plants for planting that are eventually exported so that they may be traced back if necessary.[4]
- The NPPO of the country in which the production facility is located would have oversight over the production facility and perform regular audits to ensure that all elements of the production system were in compliance with program standards.
- APHIS would have the ability to perform on-site audits of the production system as well. APHIS would also perform audits upon importation to ensure that these plants for planting meet the approved standards for the clean stock program. Because these programs would be designed to exclude all pests, the presence of non-quarantine pests above established tolerance levels could be used as an indication of program failure. Such audits could take the form of inspections or laboratory testing.
- Penalties and remedial action would be required in the case of noncompliance. Shipments of plants for planting exported under a clean stock program would be held or rejected if an audit revealed that the plants for planting were not grown in compliance with the clean stock program.

These general standards, if adequately developed, could be used as a template to develop specific regulatory approaches. For example, the regulations in § 319.37–5(r)(3) that govern the importation of articles of *Pelargonium* spp. and *Solanum* spp. from countries where *R. solanacearum* race 3 biovar 2 is known to occur were developed after we had drafted these general guidelines; collectively, the requirements in that paragraph satisfy the basic elements listed above. We believe that, had a clean stock program been in place for the importation of articles of *Pelargonium* spp., it would have excluded *R. solanacearum* race 3 biovar 2 from articles of *Pelargonium* spp. imported into the United States.

While the clean stock programs would allow exporters to address pest risk before plants for planting are offered for importation into the United States, the best management practices programs would be established so that U.S. entities could detect and eliminate quarantine pests that may be associated with imported plants for planting and determine whether an imported plant for planting has the potential to become a noxious weed. Participants in these programs would be domestic producers and importers of plants for planting that wish to grow small amounts of a taxon of plants for planting within the United States to determine the taxon's biological and commercial viability, in addition to the risks its importation may pose.

The best management practices programs would be used within the United States to allow the importation for testing purposes of small quantities of plants and plant parts from taxa that were excluded from importation pending risk evaluation and approval, in tandem with the permit system

[3] *See http://www.fleppc.org/FNGA/St.Louis.htm* for more information on the Workshop and text of the Draft Voluntary Codes of Conduct.

[4] The International Organization for Standardization develops and codifies standard production methods and quality control procedures (such as the ISO 9000 standards) for a variety of industries.

mentioned in the discussion of this possible new category. Following the best management practices prescribed in these programs would greatly reduce the risk that any quarantine pest that might escape detection and enter the United States via the imported plants for planting would then become established in the United States. In the case that the plants for planting themselves proved to be noxious weeds, the best management practices would also reduce the risk that those plants for planting could become established in the United States.

The best management practices programs we envision would include several basic elements, including:

- A code of conduct or documented standard operating procedures that include pest control practices, inspection and testing, and recordkeeping, similar to that described above in the clean stock program;
- Oversight and audits by a professional organization or a State agricultural organization to ensure compliance with the agreed-upon code of conduct or standard operating procedures;
- Some form of Federal oversight; and
- Penalties and remedial action for noncompliance.

General principles under which these programs would operate and performance standards these programs would have to achieve would be specified in the regulations. To develop the clean stock programs, APHIS would consult with the NPPOs of exporting countries to develop workplans that would specify how these principles and standards would be achieved in local conditions for each country or for areas within countries. The NPPO would share with APHIS responsibility for ensuring that participants in the programs comply with the requirements of the program. To develop the best management practices program, APHIS could cooperate with professional organizations or work directly with importers.

Penalties for not complying with the requirements of the programs would be imposed in a graded manner, to encourage compliance. Penalties would ultimately include suspension or removal from the program. Facilities, exporters, importers, and countries could all ultimately be removed from the programs if major or repeated violations of program requirements occurred.

Participants would have a continuing incentive to satisfy the requirements of the programs, as the importation of certain plants for planting would be contingent on satisfying the programs' requirements. For example, taxa of plants for planting that would be excluded from importation pending risk evaluation and approval could be imported if they were exported by producers that participated in a clean stock program or were imported by participants in a best practices program; plants for planting exported by producers in full compliance with the requirements of a clean stock program would likely be free of both pathogens and insect pests upon importation into the United States, while domestic firms participating in a best practices program would minimize the risk that any pathogens or insect pests that might still be present would be introduced into the United States. In addition, it is possible that we could allow importation of plants for planting from countries in which certain pathogens or other pests are prevalent if the specific facility that wished to export such plants for planting participated in a clean stock program.

We invite responses to the following questions in particular on the clean stock programs we are considering:

1. Is it feasible to use this type of program in producing large volumes of taxa of plants for planting other than those that are currently exported to the United States under the programs in our regulations? What additional costs might be associated with growing other taxa of plants for planting under this type of program? What benefits might be associated with implementing such a program?

2. What specific aspects of these programs could prove problematic or would require detailed attention?

3. How could a clean stock program be designed to ensure that quarantine pests are not inadvertently brought to the United States along with plants for planting?

4. Are there any foreign clean stock programs not mentioned in our regulations that could serve as models for a general clean stock program?

We invite responses to the following questions in particular on the best management practices program we are considering:

1. As noted above, draft codes of conduct that could form the core of a best management practices program already exist. Are these codes a feasible starting point from which to develop a best management practices program?

2. Do other applicable best management practices programs exist? Which of these is the best one, and why? What additional costs might be associated with growing plants for planting under this type of program? What benefits might be associated with implementing such a program?

3. What existing industry practices should be incorporated into this program?

4. What permit conditions would help to reduce the risk that quarantine pests associated with plants for planting imported in limited quantities for testing could become established, or that the plants for planting themselves, if the taxon proves to be invasive, could become established?

5. What would be the best way to identify and assess any environmental risks that might be associated with the importation of plants for planting under a best management practices program?

*Combining Existing Regulations Governing the Importation of Plants for Planting*

As described above, the nursery stock regulations restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for planting or propagation. Other subparts in 7 CFR part 319 also contain regulations restricting, among other things, the importation of plants for planting. These subparts address the risks associated with the importation of specific articles or the prevention of the introduction and establishment of specific diseases, as opposed to the more general scope of the nursery stock regulations. Subparts containing such restrictions include ''Subpart—Foreign Cotton and Covers'' (§§ 319.8 through 319.8–26), ''Subpart—Sugarcane'' (§§ 319.15 and 319.15a), ''Subpart—Citrus Canker'' (§ 319.19), ''Subpart—Corn Diseases'' (§§ 319.24 through 319.24–5), ''Subpart—Indian Corn or Maize, Broomcorn, and Related Plants'' (§§ 319.41 through 319.41–6), ''Subpart—Rice'' (§§ 319.55 through 319.55–7), ''Subpart—Wheat'' (§§ 319.59 through 319.59–2), and ''Subpart—Coffee'' (§§ 319.73–1 through 319.73–4). In addition, the regulations in 7 CFR part 361, ''Importation of Seed and Screenings Under the Federal Seed Act,'' requires shipments of imported agricultural and vegetable seeds to be labeled correctly and to be tested for the presence of seeds of certain noxious weed seeds as a condition of entry into the United States, while the regulations in 7 CFR part 360, ''Noxious Weed Regulations,'' contain restrictions on the movement of noxious weed plants and plant parts listed in that part into or through the United States and interstate.

We are considering whether to incorporate all the regulations regarding the importation of plants for planting into a single subpart. We would change the name of this subpart from ''Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products''

to ''Subpart—Plants for Planting'' to reflect this change. We would also include the weed taxa whose importation is restricted by 7 CFR part 360 as restricted articles in the new plants for planting regulations. Our intent in making such a change would be to improve the clarity and transparency of our regulations governing the importation of plants for planting by allowing users of the regulations to find all these regulations in one subpart. By making it easier for users of the regulations to find and follow the regulations relevant to their situation, this action could also improve compliance.

We invite responses to the following questions in particular on the reorganization of the regulations for plants for planting we are considering:

1. Should all the regulations governing the importation of plants for planting in the subparts listed above be incorporated into one subpart? If not, which subparts should be excluded, and why?

2. If we should incorporate the regulations governing the importation of plants for planting in the subparts listed above into one subpart, which subparts should we incorporate first? Should we combine them all at once?

*Reevaluating Taxa Whose Importation Is Currently Prohibited*

The regulations in § 319.37–2(a) list taxa whose importation is prohibited because the importation of plants for planting from these taxa poses a risk of introducing a quarantine pest into the United States. Several of the other subparts listed above also prohibit the importation of certain taxa of plants for planting. Many of these taxa were prohibited from being imported after the discovery of a single quarantine pest as found in a shipment offered for importation into the United States or as reported in the scientific literature. Complete quarantine pest lists are not available for each of these taxa. In addition, the regulations in § 319.37–2(b) prohibit the importation of certain taxa of plants for planting if the plants for planting exceed certain sizes or ages. These limits have not been reviewed recently.

In accordance with recommendation E–48 in the Safeguarding Report, we are considering reviewing the taxa of plants for planting whose importation is currently prohibited to determine whether the pests of concern presently qualify as quarantine pests by the definition cited above. Since the time these plant taxa were designated as prohibited, the pest of concern may have become established in the United States, or scientific evidence may have become available that indicates that the pest of concern does not qualify as a quarantine pest. If we undertake this review, we will begin by conducting a PRA to determine the pests of quarantine concern associated with these taxa and whether prohibition is the only approach to mitigation that would prevent quarantine pests associated with these taxa of plants for planting from becoming established in the United States.

We invite responses to the following question on our potential reevaluation of taxa of plants for planting whose importation is currently prohibited:

1. Which taxa should be candidates for review? Which of these taxa should be assigned the highest priority for review? Please identify the taxa by scientific name and provide scientific information to support your suggestion. Please also provide information, if known, on any quarantine pests other than the pest(s) of concern listed in the regulations that may be associated with the taxa.

2. Which prohibitions on the basis of size or age should be candidates for review? Which of these prohibitions should be assigned the highest priority for review?

We further invite comment on which of the five measures above should be assigned the highest priority for implementation, if any.

*Economic Data About the Plants for Planting Industry*

Except for combining existing regulations governing the importation of plants for planting, which would be an administrative change, all the measures we are considering for revising the regulations would be likely to have an economic impact on numerous entities considered ''small'' according to the size standards established by the Small Business Administration (SBA).[5] After we receive answers to the specific questions listed above regarding the five measures we are considering, we may issue a proposal or proposals with the goal of implementing one or more of these measures. In order to conduct the economic analysis required by the Regulatory Flexibility Act for those potential proposals and assess the impact of any changes we might propose on small entities, we will need more economic data about the plants for planting industry than are currently available to us. Therefore, we invite the public to provide us with data regarding the structure of the plants for planting industry, including the number of firms in the industry, the number of firms that could be considered small according to the SBA's size standards, the number of firms whose business directly involves the importation of plants for planting, and any other data that would assist us in conducting economic analyses associated with these measures.

We would also appreciate any suggestions the public may have for improving other aspects of the regulations to reduce the risk of introducing quarantine pests into the United States.

[5] A guide to SBA's definitions of small business is available on the Internet at *http://www.sba.gov/size/indexguide.html.* A table of small business size standards matched to the North American Industry Classification System is available at *http://www.sba.gov/size/sizetable2002.html.*

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

Done in Washington, DC, this 6th day of December 2004.

**Bill Hawks,**

*Under Secretary for Marketing and Regulatory Programs.*

[FR Doc. 04–27139 Filed 12–9–04; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

## Agricultural Marketing Service

## 7 CFR Part 930

**[Docket No. FV04–930–2 PR]**

## Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2004–2005 Crop Year

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule invites comments on the establishment of final free and restricted percentages for the 2004–2005 crop year. The percentages are 72 percent free and 28 percent restricted and would establish the proportion of tart cherries from the 2004 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, the body that locally administers the marketing order. The marketing 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, 2005.