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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. 97-053-3]

#### Black Stem Rust; Identification Requirements and Addition of Rust-Resistant Varieties

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the black stem rust quarantine and regulations to require that persons who request the addition of *Berberis*, *Mahoberberis*, or *Mahonia* spp. plants to the list of rust-resistant varieties in the regulations must provide the Agency with a description of the variety that can be used by inspectors to clearly identify the variety and distinguish it from others. We are also amending the regulations to require that inspectors verify, prior to interstate movement, that varieties match their description. Finally, we are amending the regulations to add 32 new varieties to the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species. This rule will help prevent the spread of black stem rust by providing for and requiring the accurate identification of rust-resistant varieties by inspectors and will provide for the interstate movement of newly developed varieties without unnecessary restrictions.

**EFFECTIVE DATE:** March 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Dr. Vedpal S. Malik, Agriculturist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1231; (301) 734-6774.

#### SUPPLEMENTARY INFORMATION:

##### Background

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis*, *Mahoberberis*, and *Mahonia*. The fungus is spread from host to host by wind-borne spores.

The black stem rust quarantine and regulations, which are contained in 7 CFR 301.38 through 301.38-8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks.

Section 301.38-2 of the regulations includes a listing of regulated articles and indicates those species and varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia* that are known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate.

On April 7, 1998, we published in the **Federal Register** (63 FR 16908-16909, Docket No. 97-053-1) a proposed rule to amend the regulations by adding 15 varieties to the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species. Comments on the proposed rule were required to be received on or before May 22, 1998. We received two comments by that date, which were from the nursery industry and a State government official. One of the commenters opposed the addition of more rust-resistant barberry varieties to the list in § 301.38-2 without the distribution of proper field identification aids to inspectors. After considering that comment, we agreed with the commenter's suggestion that identification aids could be useful for ensuring the accurate identification of the rust-resistant varieties, which would

help to prevent the spread of black stem rust. Because this comment raised an issue we believed warranted further consideration, we withdrew the April 7, 1998, proposed rule, and replaced it with an alternative proposal.

In the alternative proposal, which was published in the **Federal Register** on June 14, 2001 (66 FR 32268-32272, Docket No. 97-053-2), we proposed to amend the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species by adding the 15 varieties listed in our original proposed rule as well as an additional 17 varieties that had been submitted for listing since the publication of the original proposed rule. We also proposed to amend the regulations to require that persons who request the Animal and Plant Health Inspection Service (APHIS) to add a variety to the list of rust-resistant barberry varieties in the regulations must provide APHIS with a description of the variety, including a written description and color pictures that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties. As noted in the proposed rule, the nurseries that developed the 32 new rust-resistant varieties listed in the proposed rule had provided such identification guides to APHIS. Finally, we proposed to require that inspectors who issue certificates for the movement of rust-resistant barberry varieties under the regulations in § 301.38-4(b)(2) must, prior to issuing certificates, verify that the barberry varieties to be shipped match the description of the varieties.

We solicited comments concerning our June 2001 proposal for 60 days ending August 13, 2001. We received two comments by that date. They were from a national nursery and landscape association and a State department of agriculture. These letters fully supported the proposed rule. Therefore, we are not making any changes to the rule based on the comments we received. However, we are making three changes to the rule in order to clarify certain aspects of the regulations.

First, while a footnote in the definition of *rust-resistant plants* in § 301.38-1 provides a description of the testing performed to determine whether a new variety is rust-resistant, the regulations have not specifically provided that a person may request that an additional rust-resistant variety be added to the lists of rust-resistant

varieties in § 301.38–2. Similarly, while our June 2001 proposed rule contained provisions to require that a person requesting a rust-resistant variety be added to the list in § 301.38–2 provide APHIS with certain information regarding the variety, we did not specifically state that a person may request that an additional rust-resistant variety be added to that list. We do, in fact, accept requests for additions to the lists in § 301.38–2, so we have amended § 301.38–2(b) in this final rule to make that clear.

Second, in our June 2001 proposed rule, we proposed to amend § 301.38–5 by adding a new paragraph (b)(3). Under that proposed paragraph, an inspector would have to verify, prior to issuing a certificate for the interstate movement of a rust-resistant variety, that the variety matches the description provided to APHIS by the person who requested the addition of that variety to the list in § 301.38–2. Given that the existing regulations in § 301.38–5(b)(1) already provide that an inspector must determine, upon examination, that the regulated article may be moved in accordance with § 301.38–4, which would include verifying that a particular variety is eligible for movement, we have determined that our proposed amendment to § 301.38–5 is unnecessary and have removed that provision in this final rule. However, we are amending § 301.38–5(b)(1) in this final rule so that it states that an inspector must determine, upon examination, that the regulated article may be moved interstate in accordance with the regulations in the entire subpart, not just § 301.38–4. This amendment is necessary because there are requirements elsewhere in the subpart that apply to the interstate movement of regulated articles.

Third, while our June 2001 proposed rule contained provisions to require that descriptions be provided to APHIS in accordance with § 301.38–2(b) for use by State nursery inspectors as identification aids, those individuals who inspect varieties of black stem rust barberry are simply referred to as inspectors elsewhere in the regulations. The definition of an inspector, which is contained in § 301.38–1, provides that such individuals may be any APHIS employee or other person authorized by the Administrator to enforce this subpart. Because State nursery inspectors are included in this definition, we have amended § 301.38–2(b) in this final rule by removing the reference to “State nursery inspectors” and replacing it with “an inspector” in order to make the regulations more consistent.

Finally, in this final rule we have made several nonsubstantial editorial changes in the regulations for clarity.

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

This 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.

This final rule allows the interstate movement of 32 new varieties of *Berberis*, *Mahoberberis*, and *Mahonia* that have been determined to be resistant to black stem rust into and through States or parts of States designated as protected areas. Based on the information provided to us, we have determined that this rule will affect three or four nurseries that might propagate the new species and numerous retail sales nurseries that might purchase and resell the varieties. This action will enable those nurseries to move the species into and through protected areas and to propagate and sell the species in States or parts of States designated as protected areas.

Prior to this final rule, 123 varieties of barberry plants were listed in the regulations as rust-resistant. Of those 123 varieties, many are no longer propagated for commercial sale, as many consumers are choosing newer varieties that are horticulturally more attractive. This rule adds 32 new varieties to the list. The addition of these 32 new varieties will simply create a greater selection of barberry plant varieties from which consumers can choose. This rule could encourage innovation by allowing nurseries that develop new rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* varieties the opportunity to market those varieties in protected areas; however, there is no indication that the periodic introduction of new varieties to the market has any effect on overall sales volumes. Therefore, we do not anticipate that there will be any significant economic effect on those nurseries that might handle the new varieties.

This rule requires that persons requesting the addition of a barberry variety to the list of rust-resistant varieties in the regulations must first provide APHIS with a description of the variety, including a written description and color pictures that can be used by inspectors to clearly identify the variety and distinguish it from other varieties. This rule also requires that, prior to interstate movement, an inspector must verify that a rust-resistant variety matches the description of the variety

provided to APHIS. However, these requirements are not expected to result in any measurable cost to persons involved in the production or movement of the plants.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will 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 final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0186.

#### **List of Subjects in 7 CFR Part 301**

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are amending 7 CFR part 301 as follows:

#### **PART 301—DOMESTIC QUARANTINE NOTICES**

1. The authority citation for part 301 continues to read as follows:

**Authority:** 7 U.S.C. 166, 7711, 7712, 7714, 7731, 7735, 7751, 7752, 7753, and 7754; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Section 301.38–1 is amended as follows:

a. In the definition for *rust-resistant plants*, by removing the citation “§ 301.38–2(b) and (c)” and adding the

citation “§ 301.38–2 (a)(2) and (a)(3)” in its place.

b. In the definition for *rust-susceptible plants*, by removing the citation “§ 301.38–2(b) and (c)” and adding the citation “§ 301.38–2(a)(2) and (a)(3)” in its place.

c. In the definition for *regulated article*, by removing the citation “§ 301.38–2(a) through (d)” and adding the citation “§ 301.38–2(a)(1) through (a)(4)” in its place, and by removing the citation “§ 301.38–2(e)” and adding the citation “§ 301.38–2(a)(5)” in its place.

3. Section 301.38–2 is revised to read as follows:

### § 301.38–2 Regulated articles.

(a) The following are regulated articles:<sup>3</sup>

(1) All seedlings and plants of less than 2 years' growth of the genus *Berberis*.

(2) All plants, seeds, fruits, and other plant parts capable of propagation from the following rust-resistant *Berberis* species.

*B. aggregata* x *B. wilsoniae* 'Pirate King'

*B. 'Amstelveen'*  
*B. aridocalida*  
*B. beaniana*  
*B. buxifolia*  
*B. buxifolia nana*  
*B. calliantha*  
*B. candidula*  
*B. candidula 'Amstelveen'*  
*B. candidula* x *B. verruculosa* 'Amstelveen'  
*B. cavallieri*  
*B. chenaulti*  
*B. chanaulti* 'Apricot Queen'  
*B. circumserrata*  
*B. concinna*  
*B. coxii*  
*B. darwini*  
*B. dasystachya*  
*B. dubia*  
*B. feddeana*  
*B. formosana*  
*B. franchetiana*  
*B. gagnepainii*  
*B. gagnepaini* 'Chenault'  
*B. gilgiana*  
*B. gladwynensis*  
*B. gladwynensis* 'William Penn'  
*B. gyalaiica*  
*B. heterophylla*  
*B. horvathi*  
*B. hybrido-gagnepaini*  
*B. insignis*  
*B. integerrima* 'Wallichs Purple'  
*B. julianae*  
*B. julianae* 'Nana'  
*B. julianae* 'Spring Glory'

*B. koreana*  
*B. koreana* x *B. thunbergii* hybrid  
*Bailsel*

*B. koreana* x *B. thunbergii* hybrid  
*Tara*

*B. lempergiana*  
*B. lepidifolia*  
*B. linearifolia*  
*B. linearifolia* var. 'Orange King'  
*B. lologensis*  
*B. lologensis* 'Mystery Fire'  
*B. manipurana*  
*B. media* 'Park Jewel'  
*B. media* 'Red Jewel'  
*B. mentorensis*  
*B. pallens*  
*B. poiiretii* 'BJG 073', 'MTA'  
*B. potanini*  
*B. Renton*  
*B. replicata*  
*B. sanguinea*  
*B. sargentiana*  
*B. sikkimensis*  
*B. soulieana* 'Claret Cascade'  
*B. stenophylla*  
*B. stenophylla diversifolia*  
*B. stenophylla gracilis*  
*B. stenophylla irwini*  
*B. stenophylla nana compacta*  
*B. taliensis*  
*B. telomaica artisejala*  
*B. thunbergii*  
*B. thunbergii* 'Antares'  
*B. thunbergii argenteo marginata*  
*B. thunbergii atropurpurea*  
*B. thunbergii atropurpurea erecta*  
*B. thunbergii atropurpurea erecta*

*Marshalli*  
*B. thunbergii atropurpurea* 'Golden Ring'

*B. thunbergii atropurpurea* 'Intermedia'  
*B. thunbergii atropurpurea* 'Knight Burgundy'  
*B. thunbergii atropurpurea nana*  
*B. thunbergii atropurpurea* 'Redbird'  
*B. thunbergii atropurpurea* 'Rose Glow'

*B. thunbergii aurea*  
*B. thunbergii* 'Aurea Nana'  
*B. thunbergii* 'Bagatelle'  
*B. thunbergii* 'Bailgreen' (Jade Carousel™)

*B. thunbergii* 'Bailone'  
*B. thunbergii* 'Bailone' (Ruby Carousel®)  
*B. thunbergii* 'Bailtwo'  
*B. thunbergii* 'Bailtwo' (Burgundy Carousel®)

*B. thunbergii* 'Bonanza Gold'  
*B. thunbergii* 'Concorde'  
*B. thunbergii* 'Crimson Pygmy'  
*B. thunbergii* 'Cruzam' Crimson Ruby™

*B. thunbergii* 'Dwarf Jewel'  
*B. thunbergii erecta*  
*B. thunbergii* 'globe'  
*B. thunbergii* 'golden'  
*B. thunbergii* 'Golden Pygmy'

*B. thunbergii* 'Green Carpet'  
*B. thunbergii* 'Harlequin'  
*B. thunbergii* 'Helmond Pillar'  
*B. thunbergii* 'Kobold'  
*B. thunbergii* 'Lime Glow'  
*B. thunbergii* 'Lustre Green'  
*B. thunbergii maximowiczii*  
*B. thunbergii* 'Midruzam' Midnight

Ruby™  
*B. thunbergii minor*  
*B. thunbergii* 'Monlers'  
*B. thunbergii* 'Monomb'  
*B. thunbergii* 'Monry'  
*B. thunbergii* 'Painter's Palette'  
*B. thunbergii* 'Pink Queen'  
*B. thunbergii pluriflora*  
*B. thunbergii* 'Royal Burgundy'  
*B. thunbergii* 'Royal Cloak'  
*B. thunbergii* 'Sparkle'  
*B. thunbergii* 'Thornless'  
*B. thunbergii* 'Upright Jewell'  
*B. thunbergii variegata*  
*B. thunbergii xanthocarpa*  
*B. thunbergii* x 'Bailsel' (Golden Carousel®)

*B. thunbergii* x 'Tara' (Emerald Carousel®)

*B. triacanthophora*  
*B. triculosa*  
*B. verruculosa*  
*B. virgatorum*  
*B. workingensis*  
*B. xanthoxylon*  
*B. x carminea* 'Pirate King'  
*B. x frikartii* 'Amstelveen'

(3) All plants, seedlings, seeds, fruits, and other plant parts capable of propagation from the following rust-resistant *Mahoberberis* and *Mahonia* species, except *Mahonia* cuttings for decorative purposes:

(i) Genus *Mahoberberis*:

*M. aquicandidula*  
*M. aquifolium* 'Smaragd'  
*M. aquisargentiae*  
*M. miethkeana*  
*M. x 'Magic'*

(ii) Genus *Mahonia*:

*M. amplexans*  
*M. aquifolium*  
*M. aquifolium atropurpurea*  
*M. aquifolium compacta*  
*M. aquifolium compacta* 'John Muir'  
*M. aquifolium* 'Donewell'  
*M. aquifolium* 'Kings Ransom'  
*M. aquifolium* 'Orangee Flame'  
*M. aquifolium* 'Undulata'  
*M. aquifolium* 'Winter Sun'  
*M. 'Arthur Menzies'*  
*M. bealei*  
*M. dictyota*  
*M. fortunei*  
*M. 'Golden Abundance'*  
*M. japonica*  
*M. japonica* x *M. lomariifolia* 'Charity'  
*M. lomariifolia*  
*M. nervosa*  
*M. pinnata*  
*M. pinnata* 'Ken Hartman'

<sup>3</sup>Permit and other requirements for the interstate movement of black stem rust organisms are contained in part 330 of this chapter.

*M. piperiana*

*M. pumila*

*M. repens*

*M. x media* 'Charity'

*M. x media* 'Winter Sun'

(4) All plants, seeds, fruits, and other plant parts capable of propagation from rust-susceptible species and varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, and seedlings from rust-susceptible species and varieties of the genera *Mahoberberis* and *Mahonia*, except *Mahonia* cuttings for decorative purposes.

(5) Any other product or article not listed in paragraphs (a)(1) through (a)(4) of this section that an inspector determines presents a risk of spread of black stem rust. The inspector must notify the person in possession of the product or article that it is subject to the provisions of this subpart.

(b) A person may request that an additional rust-resistant variety be added to paragraph (a)(2) or (a)(3) of this section. The person requesting that a rust-resistant variety be added to paragraph (a)(2) or (a)(3) of this section must provide APHIS with a description of the variety, including a written description and color pictures that can be used by an inspector to clearly identify the variety and distinguish it from other varieties. (Approved by the Office of Management and Budget under control number 0579-0186.)

#### § 301.38-4 [Amended]

4. Section 301.38-4 is amended as follows:

a. In paragraph (b)(2)(i), by removing the citation "§ 301.38-2(b)" and adding the citation "§ 301.38-2(a)(2)" in its place.

b. In paragraph (b)(2)(ii), by removing the citation "§ 301.38-2(c)" and adding the citation "§ 301.38-2(a)(3)" in its place.

#### § 301.38-5 [Amended]

5. In § 301.38-5, paragraph (b)(1), the citation "§ 301.38-4" is removed and the words "this subpart" are added in its place.

Done in Washington, DC, this 19th day of February 2002.

**W. Ron DeHaven,**

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

[FR Doc. 02-4262 Filed 2-21-02; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. 00-006-3]

#### Importation of Fruits and Vegetables; Technical Amendment

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

**ACTION:** Final rule; technical amendment.

**SUMMARY:** In a final rule published in the **Federal Register** on August 28, 2001, we amended the fruits and vegetables regulations to list a number of fruits and vegetables from certain parts of the world as eligible, under specified conditions, for importation into the United States. In that final rule, we also recognized the Department of Petén in Guatemala and all Districts in Belize as areas free of the Mediterranean fruit fly. The final rule contained an error in the rule portion. This document corrects that error. We are also clarifying that peppers imported from Israel under the regulations must be packed in insect-proof packaging prior to movement from approved insect-proof screenhouses in the Arava Valley.

**DATES:** Effective on February 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** Donna L. West, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1236; (301) 734-6799.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR 319.56 through 319.56-8 (referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of fruit flies and other injurious plant pests that are new to or not widely distributed within the United States.

In a final rule published in the **Federal Register** on August 28, 2001 (66 FR 45151-45161, Docket No. 00-006-2), we amended the regulations to list a number of fruits and vegetables from certain parts of the world as eligible, under specified conditions, for importation into the United States. In that final rule, we also recognized the Department of Petén in Guatemala and all Districts in Belize as areas free of the Mediterranean fruit fly (Medfly).

One of the commodities listed as eligible for importation was peppers

from Israel. As a condition of importation, the rule required that the "peppers must be packed in insect-proof containers prior to movement from approved insect-proof screenhouses in the Arava Valley." Some regulated entities have interpreted "containers" to mean the large containers commonly used in the shipping industry. We intended to require peppers to be moved in insect-proof packaging, not shipping containers. Therefore, in order to avoid confusion, we are replacing the term "containers" with the word "packaging."

Also, in the rule portion of the final rule, there was an error in the table in § 319.56-2x, which lists fruits and vegetables for which treatment is required. The table listed papaya from Belize except for papayas grown in a Medfly-free area in Belize. Since the final rule declared all districts in Belize as areas free of Medfly, no papayas from Belize require treatment for Medfly, and there is no need to list papaya from Belize in the table in § 319.56-2x. We are correcting our error in this document.

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

Bees, Coffee, Cotton, Fruits, Honey, Imports, Nursery Stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 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. 166, 450, 7711-7714, 7718, 7731, 7732, and 7751-7754; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

#### § 319.56-2u [Amended]

2. In § 319.56-2u, paragraph (b)(7) is amended by removing the word "containers" and adding the word "packaging" in its place.

#### § 319.56-2x [Amended]

3. In § 319.56-2x, paragraph (a), the table is amended by removing the entry for Belize.

Done in Washington, DC, this 19th day of February 2002.

**W. Ron DeHaven,**

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

[FR Doc. 02-4263 Filed 2-21-02; 8:45 am]

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