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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. APHIS–2006–0153]

RIN 0579–AC25

#### South American Cactus Moth; Quarantine and Regulations

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the domestic quarantine regulations to establish regulations to restrict the interstate movement of South American cactus moth host material, including nursery stock and plant parts for consumption, from infested areas of the United States. This action is intended to help prevent the artificial spread of South American cactus moth into noninfested areas of the United States.

**DATES:** *Effective Date:* July 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Dr. Robyn Rose, National Program Lead, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Rd., Unit 26, Riverdale, MD 20737–1236; (301) 734–7121.

#### SUPPLEMENTARY INFORMATION:

##### Background

The South American cactus moth (*Cactoblastis cactorum*) is a grayish-brown moth with a wingspan of 22 to 35 millimeters (approximately 0.86 to 1.4 inches) that is indigenous to Argentina, southern Brazil, Paraguay, and Uruguay. It is a serious quarantine pest of *Opuntia* spp., and an occasional pest of *Nopalea* spp., *Cylindropuntia* spp., and *Consolea* spp., four closely related genera of the family Cactaceae. After an incubation period following mating, the female South American

cactus moth deposits an egg stick resembling a cactus spine on the host plant. The egg stick, which consists of 70 to 90 eggs, hatches in 25 to 30 days and the larvae bore into the cactus pad to feed, eventually hollowing it out and killing the plant. Within a short period of time, the South American cactus moth can destroy whole stands of cactus.

On February 11, 2008, we published in the **Federal Register** (73 FR 7679–7686, Docket No. APHIS–2006–0153) a proposed rule<sup>1</sup> in which we proposed to establish domestic South American cactus moth regulations by adding a new subpart, “South American Cactus Moth” (§§ 301.55 through 301.55–9) to our regulations in 7 CFR part 301. Our proposed regulations provided for the designation of quarantined areas and restrictions on the interstate movement of regulated articles from quarantined areas into or through noninfested States.

We solicited comments on our proposal for 60 days ending April 11, 2008. In a document published in the **Federal Register** on September 18, 2008 (73 FR 54082–54083), we announced the availability of an environmental assessment (EA) and reopened and extended the deadline for comments until October 20, 2008. The notice also announced that we planned to add Mississippi to the list of quarantined areas because the South American cactus moth had been found in that State. We received a total of 10 comments by the close of the comment period. They were from private citizens, industry groups, a regional plant protection organization, an environmental organization, State Universities, a State department of agriculture, a Federal agency, and a Federal research laboratory. All the commenters supported the proposed rule. However seven commenters raised specific issues or questions regarding certain provisions of the proposed rule.

One commenter stated that APHIS should only quarantine less than an entire State for South American cactus moth if the State has imposed restrictions for the intrastate movement of regulated articles that are at least as stringent as those imposed on the interstate movement of regulated

articles and where APHIS has found that the designation of a more limited range as a quarantined area would effectively prevent the interstate spread of South American cactus moth.

We agree with the commenter. In both the proposed rule and this final rule, § 301.55–3 spells out the criteria that must be met in order to quarantine less than an entire State. These criteria include the considerations raised by the commenter.

One commenter stated that South American cactus moth was found on Petit Bois Island in Mississippi and stated that APHIS should determine quickly whether Mississippi should be designated as a quarantined area. Another commenter mentioned the possibility that other States may need to be quarantined for South American cactus moth in the future if the moth cannot be contained.

Since publication of the proposed rule, South American cactus moth has been found to be present in Mississippi, and, as noted previously, we stated in our September 2008 notice that we planned to add Mississippi to the list of States quarantined for South American cactus moth. We will add any additional States or portions of States to the South American cactus moth quarantine as necessary in accordance with the regulations.

One commenter asked for clarification of when a limited permit may be required for the movement of regulated articles.

As stated in § 301.55–5(b), a limited permit may be issued for regulated articles when an inspector finds that, because of a possible pest risk, the articles may be safely moved interstate only subject to further restrictions, such as movement to limited areas or movement for limited purposes. Specifically, the regulations provide that a limited permit may be issued by an inspector for the interstate movement of a regulated article if the inspector determines that the article (1) Is to be moved interstate to a specified destination for specified handling, processing or utilization, and that the movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed by the specified handling, processing, or utilization; (2) will be moved in compliance with any additional

<sup>1</sup> To view the proposed rule, the EA, and the comments we received, go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0153>.

conditions imposed by APHIS under section 414 of the Plant Protection Act (7 U.S.C. 7714) to prevent the spread of the South American cactus moth; and (3) is eligible for interstate movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

One commenter disagreed with the explanation in the preamble of the proposed rule that stated the South American cactus moth was likely introduced into Florida via infested nursery plants.

While we pointed to infested nursery stock as the most likely route of introduction, it is possible that the moth could have spread naturally to Florida.

One commenter stated that the requirements for the interstate movement of South American cactus moth host plant material from quarantined areas is too restrictive, specifically the requirement that host and non-host plants be separated while in the nursery and the required frequency of treatments.

The separation between host and non-host plants is necessary because South American cactus moth larvae pupate in soil or debris near the plants on which they feed. If host and non-host plants are placed close together, the larvae may easily move to a nearby non-host plant to pupate and could then be shipped. The treatment regimen was developed because South American cactus moth eggs develop and hatch within 25 to 30 days. Because of the risk of eggs being laid after a single treatment or in between multiple treatments, and because inspection may not detect all eggs, spraying is required every 21 days as well as 3 days prior to shipment.

One commenter suggested that APHIS should ban all imports of prickly pear cacti from entering the United States because of the risk of domestic growers importing prickly pear pads that may be infested with South American cactus moth into areas outside of the quarantined areas.

We are developing regulations to address the risks of introducing South American cactus moth on host material imported from foreign countries where the pest is present. We will also make any necessary amendments to our Hawaiian and territorial quarantine regulations in 7 CFR part 318 to address the risks presented by South American cactus moth.

One commenter expressed concern that the proposed rule could negatively impact the movement of cactus pads and fruits for consumption from outside the quarantined area to commercial food warehouses and distribution centers located within the quarantined area and

suggested changes to the regulations to make provisions for such movement.

We agree with the commenter that such movement presents low risk of spreading South American cactus moth. Therefore, we have amended the regulations in § 301.55–4 in this final rule to provide for the movement, without a certificate or limited permit, of cactus pads or fruits for consumption from outside of the quarantined area to a commercial food warehouse or distribution center in the quarantined area as long as the articles are moved in accordance with the protocols described in a compliance agreement and remain covered with canvas, plastic, or closely woven cloth adequate to prevent access by South American cactus moths while within the quarantined area.

One commenter expressed concern that the use of insecticides to treat cactus pads for South American cactus moth is harmful to other insect species.

While we understand the commenter's concern, as stated in the EA, the required insecticide treatments will take place within nurseries, likely within enclosed greenhouses or shadehouses. This provision will significantly reduce the risk of exposure to other insect species.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

In addition, we are advising the public of our decision and finding of no significant impact regarding our decision to quarantine the States of Alabama, Florida, Georgia, South Carolina, and Mississippi because of South American cactus moth and restrict the interstate movement of regulated articles from the quarantined areas. This decision is based upon the EA, entitled "Quarantine for the South American Cactus Moth *Cactoblastis cactorum*, in Florida, South Carolina, Georgia, Alabama, and Mississippi; Environmental Assessment" (August 2008), which we made available for comment in our September 2008 notice. We did not receive any comments regarding the EA. For instructions on viewing the EA and the finding of no significant impact, please see below under the heading "National Environmental Policy Act."

#### Executive Order 12866 and Regulatory Flexibility Act

This final 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 rule, we are establishing regulations to restrict the interstate movement of South American cactus moth host material from quarantined areas to non-quarantined areas. Prior to this rule, there were no restrictions on the interstate movement of South American cactus moth host material from areas on the mainland that were found to be infested with the pest.<sup>2</sup> In addition, the rule designates the States of Alabama, Florida, Georgia, Mississippi, and South Carolina, in their entirety, as quarantined areas for South American cactus moth.

All current growers in the five-State quarantined area are believed to produce host materials primarily for use in dish gardens of mixed species. For these growers, the rule will not be particularly problematic. This is because other species of cactus could easily be substituted for host species cactus in dish gardens shipped to non-quarantined areas. However, the rule could pose a problem for would-be growers of prickly pear cactus for the small but growing food market.<sup>3</sup> This is because, if found to be infested with South American cactus moth, they will be unable to ship fresh cactus leaves and fruit to non-quarantined areas, including some areas with large Hispanic populations. Although these growers will be able to ship canned, preserved, or frozen cactus food from a quarantined area, consumers prefer the fresh varieties.<sup>4</sup> The number of would-be growers of cactus for use as food in the five-State quarantined area is unknown, but it is likely to be very small, based on the small number of ornamental cactus growers in that area.

To the extent that it prevents the spread of *C. cactorum*, the rule will benefit U.S. entities, primarily those in the ornamental nursery and landscape industries in the Southwest. Most commercial nurseries that produce prickly pear cacti as ornamental plants are located in Arizona, followed by California. In Arizona, there are an estimated 40 to 50 such producers in the Phoenix area alone; in California, there are an estimated 30 growers of ornamental cacti. U.S. production of

<sup>2</sup> Currently, cactus plants or parts thereof moving from Hawaii, Puerto Rico, or the U.S. Virgin Islands into the continental United States are prohibited or restricted under 7 CFR part 318 in order to prevent the dissemination of South American cactus moth.

<sup>3</sup> The Florida Department of Plant Industry has promoted the use of prickly pear cactus as a niche crop to fill the Hispanic market demand.

<sup>4</sup> Florida Department of Agriculture and Consumer Services, "Nopalitos: Florida's New Niche Production Commodity," Final Report for Agreement #12–25–G–0382.

prickly pear cactus for edible use is limited largely to California; many, if not most, cactus growers are small in size.<sup>5</sup>

Based on available information, we conclude that the rule will not have a significant economic impact on a substantial number of small entities. Although it is possible that some growers could be significantly affected, the number so affected is likely to be very small. Although hard data are not available, informed APHIS staff estimate that there are no more than about seven producers of the host material in the five-State quarantined area, most of whom are believed to be Florida nurseries that produce prickly pear cactus, usually for use in dish gardens of mixed species. The bulk of U.S. prickly pear cactus production, both for use as an ornamental plant and for use as an edible food, is concentrated in the southwestern United States, not the five southeastern States designated as quarantined areas.<sup>6</sup>

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.)

#### National Environmental Policy Act

An EA and finding of no significant impact have been prepared for this final rule. The EA provides a basis for the conclusion that the establishment of regulations for South American cactus moth will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The EA and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR

parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The EA and finding of no significant impact may be viewed on the Regulations.gov Web site.<sup>7</sup> Copies of the EA and finding of no significant impact are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

#### 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 0579–0337. E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

#### 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. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

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

<sup>7</sup> See footnote 1 at the beginning of this document.

■ 2. Part 301 is amended by adding a new Subpart—South American Cactus Moth, §§ 301.55 through 301.55–9, to read as follows:

#### Subpart—South American Cactus Moth

Sec.

301.55 Restrictions on interstate movement of regulated articles.

301.55–1 Definitions.

301.55–2 Regulated articles.

301.55–3 Quarantined areas.

301.55–4 Conditions governing the interstate movement of regulated articles from quarantined areas.

301.55–5 Issuance and cancellation of certificates and limited permits.

301.55–6 Compliance agreements and cancellation.

301.55–7 Assembly and inspection of regulated articles.

301.55–8 Attachment and disposition of certificates and limited permits.

301.55–9 Costs and charges.

#### Subpart—South American Cactus Moth

##### § 301.55 Restrictions on interstate movement of regulated articles.

No person may move interstate from any quarantined area any regulated article except in accordance with this subpart.<sup>1</sup>

##### § 301.55–1 Definitions.

**Administrator.** The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

**Animal and Plant Health Inspection Service (APHIS).** The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

**Cactus plants.** Any of various fleshy-stemmed plants of the botanical family Cactaceae.

**Certificate.** A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article is free of South American cactus moth and may be moved interstate to any destination.

**Compliance agreement.** A written agreement between APHIS and a person engaged in growing, handling, or moving regulated articles, wherein the person agrees to comply with this subpart.

**Departmental permit.** A document issued by the Administrator in which he or she affirms that interstate movement of the regulated article identified on the

<sup>1</sup> Any properly identified inspector is authorized, upon probable cause, to stop and inspect persons and means of conveyance moving in interstate commerce and to hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

<sup>5</sup> Source: Lynn Garrett (APHIS) and Irish, M. 2001. The Ornamental Prickly Pear Industry in the Southwestern United States. Florida Entomologist 84(4).

<sup>6</sup> See footnote 5.

document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.55–4(c).

**Infestation.** The presence of the South American cactus moth or the existence of circumstances that makes it reasonable to believe that the South American cactus moth may be present.

**Inspector.** Any employee of APHIS or other person authorized by the Administrator to perform the duties required under this subpart.

**Interstate.** From any State into or through any other State.

**Limited permit.** A document in which an inspector or person operating under a compliance agreement affirms that the regulated article identified on the document is eligible for interstate movement in accordance with § 301.55–5(b) only to a specified destination and only in accordance with specified conditions.

**Moved (move, movement).** Shipped, offered for shipment, received for transportation, transported, carried, or allowed to be moved, shipped, transported, or carried.

**Person.** Any association, company, corporation, firm, individual, joint stock company, partnership, society, or other entity.

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

**Quarantined area.** Any State, or any portion of a State, listed in § 301.55–3(c) or otherwise designated as a quarantined area in accordance with § 301.55–3(b).

**Regulated article.** Any article listed in § 301.55–2(a) or (b), or otherwise designated as a regulated article in accordance with § 301.55–2(c).

**South American cactus moth.** The live insect known as the South American cactus moth, *Cactoblastis cactorum*, in any life stage (egg, larva, pupa, adult).

**State.** The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any State, territory, or possession of the United States.

#### § 301.55–2 Regulated articles.

The following are regulated articles:

(a) The South American cactus moth, in any living stage of its development.<sup>2</sup>

(b) Cactus plants or parts thereof (excluding seeds and canned, preserved, or frozen pads or fruits) of the following

genera: *Consolea*, *Cylindropuntia*, *Nopalea*, and *Opuntia*.

(c) Any other product, article, or means of conveyance not listed in paragraphs (a) or (b) of this section that an inspector determines presents a risk of spreading the South American cactus moth, after the inspector provides written notification to the person in possession of the product, article, or means of conveyance that it is subject to the restrictions of this subpart.

#### § 301.55–3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator will list as a quarantined area in paragraph (c) of this section each State, or each portion of a State, in which the South American cactus moth has been found by an inspector, in which the Administrator has reason to believe that the South American cactus moth is present, or that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from localities where South American cactus moth has been found. Less than an entire State will be designated as a quarantined area only if the Administrator determines that:

(1) The State has adopted and is enforcing restrictions on the interstate movement of the regulated articles that are equivalent to those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire State as a quarantined area will be adequate to prevent the interstate spread of the South American cactus moth.

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a State as a quarantined area in accordance with the criteria specified in paragraph (a) of this section. The Administrator will give a copy of this regulation along with written notice of the temporary designation to the owner or person in possession of the nonquarantined area, or, in the case of publicly owned land, to the person responsible for the management of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area will be subject to this subpart. As soon as practicable, the area will be added to the list in paragraph (c) of this section or the designation will be terminated by the Administrator or an inspector. The owner or person in possession of, or, in the case of publicly owned land, the person responsible for the management of, an area for which designation is terminated will be given

written notice of the termination as soon as practicable.

(c) The following areas are designated as quarantined areas: The States of Alabama, Florida, Georgia, Mississippi, and South Carolina.

#### § 301.55–4 Conditions governing the interstate movement of regulated articles from quarantined areas.

Any regulated article may be moved interstate from a quarantined area<sup>3</sup> only if moved under the following conditions:

(a) With a certificate or limited permit issued and attached in accordance with §§ 301.555 and 301.55–8;

(b) Without a certificate or limited permit if:

(1) The regulated article originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering (such as canvas, plastic, or closely woven cloth) adequate to prevent access by South American cactus moths while moving through the quarantined area; and

(2) The point of origin of the regulated article is indicated on the waybill, and the enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area; and

(3) The regulated article is moved through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs.

(c) Without a certificate or limited permit if the regulated articles are cactus pads and fruits for consumption from outside the quarantined area that are being moved in accordance with the protocols described in a compliance agreement (see § 301.55–6(a)) to a commercial food warehouse or distribution center within the quarantined area and the regulated articles remain enclosed by a covering (such as canvas, plastic, or closely woven cloth) adequate to prevent access by South American cactus moths while within the quarantined area; and

(d) Without a certificate or limited permit if the regulated article is moved:

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) Pursuant to a departmental permit issued by the Administrator for the regulated article;

(3) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent

<sup>2</sup> Permit and other requirements for the interstate movement of South American cactus moths are contained in part 330 of this chapter.

<sup>3</sup> Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

the spread of the South American cactus moth; and

(4) With a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

**§ 301.55-5 Issuance and cancellation of certificates and limited permits.**

(a) An inspector<sup>4</sup> may issue a certificate for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article to be moved and all other regulated articles on the premises have been grown and maintained indoors in a shadehouse or greenhouse and no other cactus moth host material exists on the premises outside of a shadehouse or greenhouse;

(2) The regulated article to be moved and all other regulated articles on the premises are maintained on benches that are kept separate from benches containing non-host material;

(3) The regulated article to be moved and all other regulated articles on the premises have been placed on a 21-day insecticide spray cycle and have been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid if maintained in the nursery for longer than 21 days;

(4) The regulated article to be moved has been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid 3 to 5 days prior to shipment and inspected and found free of cactus moth egg sticks and larval damage; and

(5) If the regulated article was moved into the premises from another premises in a quarantined area listed in § 301.55-3, it was immediately placed inside the shadehouse or greenhouse and sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid within 24 hours.

(b) An inspector will issue a limited permit for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article is to be moved interstate to a specified destination for specified handling, processing, or utilization (the destination and other conditions to be listed in the limited permit), and this interstate movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed

by the specified handling, processing, or utilization;

(2) It is to be moved in compliance with any additional conditions that the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714) in order to prevent the spread of the South American cactus moth; and

(3) It is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(c) Certificates and limited permits for the interstate movement of regulated articles may be issued by an inspector or person operating under a compliance agreement. A person operating under a compliance agreement may issue a certificate or limited permit for interstate movement of a regulated article after an inspector has determined that the regulated article is eligible for a certificate or limited permit in accordance with paragraphs (a) or (b) of this section.

(d) Any certificate or limited permit that has been issued may be canceled, either orally or in writing, by an inspector whenever the inspector determines that the holder of the limited permit has not complied with this subpart or any conditions imposed under this subpart. If the cancellation is oral, the cancellation will become effective immediately, and the cancellation and the reasons for the cancellation will be confirmed in writing as soon as circumstances permit. Any person whose certificate or limited permit has been canceled may appeal the decision in writing to the Administrator within 10 days after receiving the written cancellation notice. The appeal must state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. A hearing may be held to resolve a conflict as to any material fact. Rules of practice for the hearing will be adopted by the Administrator. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision.

(Approved by the Office of Management and Budget under control number 0579-0337)

**§ 301.55-6 Compliance agreements and cancellation.**

(a) Any person engaged in growing, handling, or moving regulated articles may enter into a compliance agreement when an inspector determines that the person is aware of this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions

contained in the compliance agreement.<sup>5</sup>

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart or the terms of the compliance agreement. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, to the Administrator, within 10 days after receiving written notification of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

(Approved by the Office of Management and Budget under control number 0579-0337)

**§ 301.55-7 Assembly and inspection of regulated articles.**

(a) Any person (other than a person authorized to issue limited permits under § 301.555(c)) who desires a certificate or limited permit to move a regulated article interstate must request an inspector<sup>6</sup> to examine the articles as far in advance of the desired interstate movement as possible, but no less than 48 hours before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

**§ 301.55-8 Attachment and disposition of certificates and limited permits.**

(a) A certificate or limited permit required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill,

<sup>5</sup> Compliance agreement forms are available without charge from local Plant Protection and Quarantine offices, which are listed in telephone directories.

<sup>6</sup> See footnote 4.

<sup>4</sup> Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine, which are listed in telephone directories.

the regulated article must be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article.

(b) The certificate or limited permit for the interstate movement of a regulated article must be furnished by the carrier or the carrier's representative to the consignee listed on the certificate or limited permit upon arrival at the location provided on the certificate or limited permit.

(Approved by the Office of Management and Budget under control number 0579-0337)

#### **§ 301.55-9 Costs and charges.**

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. APHIS will not be responsible for all costs or charges incident to inspections or compliance with the provisions of the quarantine and regulations in this subpart, other than for the services of the inspector.

Done in Washington, DC, this 2nd day of June 2009.

**Kevin Shea,**

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

[FR Doc. E9-13317 Filed 6-5-09; 8:45 am]

BILLING CODE 3410-34-P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 36**

#### **Calculation of Noise Levels Published in Advisory Circular 36-3**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Statement of policy.

**SUMMARY:** This action clarifies the Federal Aviation Administration's (FAA) policy on the calculation of derived noise levels submitted for publication in Advisory Circular (AC) 36-3, Estimated Airplane Noise Levels in A-Weighted Decibels. This action is intended to provide guidance on calculating the derived levels used in that publication.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Skalecky, Office of Environment and Energy (AEE-100), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3699; facsimile (202) 267-5594; e-mail [James.Skalecky@faa.gov](mailto:James.Skalecky@faa.gov).

## **Background**

Paragraph 3 of AC 36-3 states that "14 CFR part 36 requires the reporting of turbojet and large transport category aircraft certificated noise levels in units of Effective Perceived Noise Level in decibels (EPNdB). Many airport and other community noise analyses utilize a noise rating scale that is based upon A-weighted decibels. For this reason, A-weighted noise levels for aircraft under 14 CFR part 36 conditions have been estimated to provide a reference source for aircraft noise levels that is consistent with the many noise rating scales having A-weighted noise level as the basic measure." The noise levels published in AC 36-3 for turbojet and large transport category airplanes are usually submitted to the FAA by the airplane type certificate (or supplemental type certificate) holder. The entity submitting the noise levels for publication is responsible for deriving the A-weighted level from the EPNdB levels submitted for certification.

Recently, we received an inquiry requesting a clarification of those reference procedures, data analysis procedures, and data corrections that are to be used in deriving A-weighted noise levels for publication in AC 36-3. The question and our policy stated in this document apply only to noise levels for turbojet and large transport category airplanes.

## **Policy Statement**

In order to ensure that all airplane noise levels submitted for publication in AC 36-3 are derived in a consistent manner, it is the FAA's policy that the noise levels be derived using the same reference procedures, data analysis procedures, and data corrections/adjustments that were used in deriving the 14 CFR part 36 certificated noise levels. The only exceptions are for deviations necessitated by (1) differences between the effective perceived noise level and A-weighted sound level metrics, or (2) inclusion of approach noise levels corresponding to use of less than the maximum flap setting, as permitted under AC 36-3, paragraph 4.a. In the case of number 2, the deviation is limited to the use of an approach configuration other than the noise-critical configuration that is required for the noise certification approach reference procedure by part 36, Appendix B, paragraph B36.7(c)(5). Such deviations must be identified to the FAA when the data are submitted for inclusion in the AC. No other deviations will be accepted.

When an airplane model that is already listed in AC 36-3 is recertificated from 14 CFR part 36 Stage 3 to Stage 4, the noise levels corresponding to the Stage 3 configuration are not automatically replaced. The Stage 3 noise levels will remain in AC 36-3, unless noise levels corresponding to the Stage 4 configuration are submitted for publication. If Stage 4 noise levels are submitted, the FAA will remove the Stage 3 noise levels from AC 36-3 for that model and replace them with the Stage 4 noise levels when the AC is updated.

Noise levels submitted for Stage 4 configurations must conform to this policy for deriving noise levels submitted for publication in AC 36-3.

Issued in Washington, DC, on June 2, 2009.

**Lourdes Q. Maurice,**

*Acting Director of Environment and Energy.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 71**

[Docket No. FAA-2009-1236; Airspace Docket No. 08-AGL-16]

#### **Amendment of Class E Airspace; Waverly, OH**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace at Waverly, OH. Additional controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Pike County Airport, Waverly, OH. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Pike County Airport.

**DATES:** *Effective Date:* 0901 UTC, August 27, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193-0530; telephone (817) 321-7716.

**SUPPLEMENTARY INFORMATION:**