

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Parts 360 and 361

[Docket No. APHIS-2008-0097]

#### Noxious Weeds; Old World Climbing Fern and Maidenhair Creeper

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

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the noxious weed regulations by adding Old World climbing fern (*Lygodium microphyllum* (Cavanilles) R. Brown) and maidenhair creeper (*Lygodium flexuosum* (Linnaeus) Swartz) to the list of terrestrial noxious weeds. This action is necessary to prevent the artificial spread of these noxious weeds into the United States.

**DATES:** This interim rule is effective October 19, 2009. We will consider all comments that we receive on or before December 18, 2009.

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

- **Federal eRulemaking Portal:** Go to (<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0097>) to submit or view comments and to view supporting and related materials available electronically.

- **Postal Mail/Commercial Delivery:** Please send two copies of your comment to Docket No. APHIS-2008-0097, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2008-0097.

**Reading Room:** You may read any comments that we receive on this docket in our reading room. The reading

room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

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

**FOR FURTHER INFORMATION CONTACT:** Dr. Alan V. Tasker, Noxious Weeds Program Coordinator, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1236, (301) 734-5225; or Ms. Dorothy Wayson, Regulatory Coordination Specialist, Regulatory Coordination and Compliance, Permits, Registrations, Imports, and Manuals, PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737-1236, (301) 734-0772.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed into the United States or dissemination of a plant pest or noxious weed within the United States.

The PPA 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, and the natural resources of the United States, the public health, or the environment.” The PPA also provides that the Secretary may publish, by regulation, a list of noxious weeds that are prohibited or restricted from entering the United States or that are subject to restrictions on interstate movement within the United States. Under this authority, the Animal and Plant Health Inspection Service (APHIS) administers the noxious weeds regulations in 7 CFR part 360, which prohibit or restrict the

importation and interstate movement of those plants that are designated as noxious weeds in § 360.200.

Under the authority of the Federal Seed Act of 1939, as amended (7 U.S.C. 1551 *et seq.*), the U.S. Department of Agriculture regulates the importation and interstate movement of certain agricultural and vegetable seeds and screenings. Title III of that Act, “Foreign Commerce,” requires shipments of imported agricultural and vegetable seeds to be labeled correctly and to be tested for the presence of the seeds of certain noxious weeds as a condition of entry into the United States. APHIS’ regulations implementing the provisions of title III of the Federal Seed Act are found in 7 CFR part 361. A list of noxious weed seeds is contained in § 361.6. Paragraph (a)(1) of § 361.6 lists species of noxious weed seeds with no tolerances applicable to their introduction into the United States.

In this document, we are amending the regulations by adding Old World climbing fern (*Lygodium microphyllum* (Cavanilles) R. Brown) and maidenhair creeper (*Lygodium flexuosum* (Linnaeus) Swartz) to the list of terrestrial noxious weeds in § 360.200(c) and the list of noxious weed seeds with no tolerances applicable to their introduction in § 361.6(a)(1). We are taking this action based on information, discussed below, that indicates that *L. microphyllum* and *L. flexuosum* are harmful noxious weeds that pose a serious threat to U.S. agriculture and the natural resources of the United States.

This information is also available in the weed risk assessment (WRA) document titled “*Lygodium microphyllum* (Old World climbing fern), *Lygodium japonicum* (Japanese climbing fern), and *Lygodium flexuosum*,” which may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

APHIS received an inquiry regarding market access for leaves of *L. microphyllum* from China to be used in basket weaving. Shortly afterward, the State of Florida requested that APHIS assess all 25 *Lygodium* species to determine whether they could be added to the list of Federal noxious weeds. A preliminary review of the genus indicated that only five species of the

*Lygodium* genus are considered weeds: *L. circinnatum*, *L. flexuosum*, *L. japonicum*, *L. microphyllum*, and *L. polymorphum*. Because importation of *L. microphyllum* and *L. japonicum*, which are already present in the United States, may lead to the establishment of additional populations in the United States, PPQ's Plant Epidemiology and Risk Analysis Laboratory (PERAL) prepared a WRA to determine whether these species qualify as Federal noxious weeds.

We also assessed *L. flexuosum*, which is not known to be present in the United States, because it is similar to *L. microphyllum* and *L. japonicum* and may have similar impacts if introduced. Due to the limited information available on *L. polymorphum* and *L. circinnatum*, PERAL was not able to gather sufficient evidence to assess the invasiveness of these species; however, they may be assessed separately if more information becomes available. We invite the public to submit any additional information on these species that could help us assess their invasiveness.

*L. microphyllum* is a vine-like fern with fronds that can grow up to 30 feet long, which can overtake and blanket environments and provide access for wildfires to reach into tree canopies. The species is native in parts of Africa, Asia, and Australia. Fertile *Lygodium* leaves contain reproductive structures filled with spores that can become windborne and spread the fern into uninfested areas. *L. microphyllum* possesses a number of traits that contribute to its destructive establishment, naturalization, and spread. These traits include its tolerance to a wide variety of light conditions, massive spore production, tolerance to fire, and rapid growth and photosynthetic rates.

In the United States, *L. microphyllum* is currently established in southern Florida, where it has rapidly invaded a variety of habitats including pine forests, wetlands, hammocks, ditches, and disturbed areas. The fern's prolific growth shades underlying vegetation and damages the habitats of federally listed threatened and endangered species in Florida in the Everglades National Park, national wildlife refuges, and other Federal and State conservation areas.

*L. microphyllum* has not reached the limit of its potential geographic distribution in the United States. Florida, the only state with *L. microphyllum* populations, regulates it as a State noxious weed. Florida currently has a *Lygodium* management plan, which was released in 2006, and an active control program in place. The

States of Alabama, North Carolina, South Carolina, and Vermont, incorporate the Federal noxious weed list by reference into their State noxious weed lists and thus will regulate both *L. microphyllum* and *L. flexuosum* as State noxious weeds.

*L. flexuosum* is a vine-like fern that spreads by rhizomes and by climbing over other lowland vegetation. The species is native to temperate and tropical Southeast Asia and Australia. In its native range, it reduces rice yields, obstructs harvesting operations in rubber tree and oil palm plantations, and may compete with tea plants for resources. *L. flexuosum* is not known to be present in the United States, other than for scientific study in containment at a biological control research facility.

*L. japonicum* is a vine-like fern with fronds that can grow up to 30 feet long, capable of reaching into forest canopies. The species is native to tropical and temperate Asia. In the United States, it has been established since 1937 and is relatively widespread in some States, but regionalized or isolated in others. Besides being spread through horticulture, *L. japonicum* is readily wind-dispersed and can spread in contaminated pine straw and on field equipment.

There are 11 States (Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, and Texas) with known populations of *L. japonicum*. Out of those States, only Florida and Alabama list *L. japonicum* as a State noxious weed. Florida is planning on releasing a detailed management plan for *L. japonicum* similar to the plan released for *L. microphyllum* in 2006. Outside Florida, *L. japonicum* may be controlled locally by various Federal, State, or local agencies; however, the extent of local control is unknown.

Based on APHIS' evaluation of the preliminary information generated during the weed risk assessment as well as our review of Florida's request, APHIS concluded that *L. microphyllum* and *L. flexuosum* are noxious weeds that posed a serious threat to U.S. agriculture and the environment.

Accordingly, APHIS issued a Federal Import Quarantine Order on May 30, 2008, that immediately restricted the importation from all countries of any part of *L. microphyllum* or *L. flexuosum* capable of propagation, including nursery stock, spores, and leaves (fronds), unless authorized by a PPQ permit for specified research in containment. This interim rule is intended to codify provisions of the existing Federal Order that prevent the

introduction into or spread of *L. microphyllum* and *L. flexuosum* within the United States. Accordingly, we are adding *L. microphyllum* and *L. flexuosum* to the list of terrestrial weeds in § 360.200(c), thus allowing them to be imported or moved interstate only with a permit in which conditions are specified to prevent their artificial spread. Additionally, we are adding *L. microphyllum* and *L. flexuosum* to the list of noxious weed seeds in § 361.6(a)(1) with no tolerances applicable to their introduction into the United States.

The WRA recommended that we consider listing *L. japonicum* to the list of terrestrial weeds in § 360.200(c). We prepared a Federal noxious weed decision document to help evaluate whether to list *L. japonicum* as a noxious weed. This document may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov). Based on the information provided in that document, we are not regulating *L. japonicum* at this time, because *L. japonicum* is not regulated by 9 of the 11 States where it occurs, and the extent of control programs throughout these States is unclear.

### Federal Preemption

On May 20, 2009, the President issued a memorandum to the heads of executive departments and agencies on the subject of preemption. The memorandum states that it is the general policy of the Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. The memorandum further states:

To ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis:

- Heads of departments and agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.

- Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the

principles outlined in Executive Order 13132.

Since 1996, Executive Order 12988, "Civil Justice Reform," has required agencies to include in each regulation a statement regarding its preemptive effects. APHIS has included a statement of preemptive effects in regulatory preambles under the heading, "Executive Order 12988."

In compliance with the May 2009 memorandum from the White House, we are adding preemption provisions to parts 360 and 361 that would apply to this rule, as well as to the existing regulations in parts 360 and 361.

Part 360 contains restrictions on the movement into or through the United States of plants and plant products that fall within the definition of "noxious weed" as defined in section 403 of the Plant Protection Act (7 U.S.C. 7702 (10)).

Under section 436 of the Plant Protection Act (7 U.S.C. 7756), no State or political subdivision of a State may regulate in foreign commerce any noxious weed in order to control it, eradicate it, or prevent its dissemination. A State or political subdivision of a State also may not regulate the movement in interstate commerce of noxious weeds if the Secretary has issued a regulation or order to prevent the dissemination of the noxious weed within the United States. The only exceptions to this are:

- If the prohibitions or restrictions issued by the State or political subdivision of a State are consistent with and do not exceed the regulations or orders issued by the Secretary; or
- If the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

Therefore, in accordance with section 436 of the Plant Protection Act, the regulations in part 360 preempt all State and local laws and regulations that are inconsistent with or exceed the regulations in part 360 unless a special need request has been granted in accordance with our regulations governing the consideration of such a request (see 7 CFR 301.1 through 301.1-3).

Accordingly, in this interim rule, we are adding a new § 360.400 to codify the preemptive effects of the regulations in part 360.

As noted previously, the regulations in part 361 were issued under the authority of the Federal Seed Act of 1939, as amended. The Federal Seed Act does not include in its text explicit provisions regarding preemption such

as these found in the Plant Protection Act. However, APHIS' regulations in part 361 and the provisions of the Federal Seed Act on which they are based deal entirely with foreign commerce, and the regulation of foreign commerce is a power granted to the Federal Government under the U.S. Constitution. Therefore, those regulations preempt State and local laws regarding seed and screenings imported into the United States while the seed and screenings are in foreign commerce.

Accordingly, we are amending the regulations in part 361 to codify their preemptive effects. The new provisions regarding preemption will be added to § 361.2, which we have renamed "Preemption of State and local laws; general restrictions on the importation of seed and screenings."

#### Emergency Action

This rulemaking is necessary on an emergency basis to prevent the introduction of *L. microphyllum* and *L. flexuosum* into uninfested areas of the United States and prevent the artificial spread of *L. microphyllum* within the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

#### Executive Order 12866 and Regulatory Flexibility Act

This interim rule is subject to Executive Order 12866. However, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

We are amending the regulations by adding *L. microphyllum* and *L. flexuosum* to the list of terrestrial noxious weeds in § 360.200(c) and the list of noxious weed seeds with no tolerances applicable to their introduction in § 361.6(a)(1). In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. This action, which is necessary to prevent the artificial spread of these noxious weeds into the United

States, is expected to have only minor, if any, economic effects on U.S. entities.

In the last 5 years, there have been only two recorded shipments of *Lygodium* species imported into the United States, one in 2006 and a second in 2008. The species that were imported are not known and may or may not have been *L. microphyllum* or *L. flexuosum*. The 2006 shipment consisted of 122 stems imported from Colombia as cut flowers. Two years later, a second shipment arrived into the United States from the United Kingdom in the form of *Lygodium* spores, ready for propagation. The value of these two *Lygodium* shipments is also not known, but clearly it was negligible when compared to the approximately \$1.5 billion in floriculture products imported annually. Moreover, whatever small benefit U.S. importers would derive from selling *Lygodium* spores or cut flowers is insignificant when compared to the costs of controlling the invasive ferns if inadvertently released into the environment. Florida is already bearing such costs in combating *L. microphyllum*.

Additionally, the May 2008 Federal Importation Quarantine Order restricts the importation from all countries of any part of *L. microphyllum* or *L. flexuosum* capable of propagation, including nursery stock, spores, and leaves (fronds), unless authorized by a PPQ permit for specified research in containment. We have received no feedback from the nursery industry on the Federal Order that would lead us to believe that the restriction of *Lygodium* imports would have any impact on a substantial number of small entities.

We do not have any additional information on the importation of *Lygodium* spp. and its impacts on small entities. The intrastate movement of *L. microphyllum* is currently restricted by Florida; we do not have any information on interstate trade in *L. microphyllum*. We invite the public to submit additional information on the possible impacts listing *L. microphyllum* and *L. flexuosum* as Federal noxious weeds could have on small entities.

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 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

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

#### List of Subjects

##### 7 CFR Part 360

Imports, Plants (Agriculture), Quarantine, Reporting and recordkeeping requirements, Transportation, Weeds.

##### 7 CFR Part 361

Agricultural commodities, Imports, Labeling, Quarantine, Reporting and recordkeeping requirements, Seeds, Vegetables, Weeds.

■ Accordingly, we are amending 7 CFR parts 360 and 361 as follows:

#### PART 360—NOXIOUS WEED REGULATIONS

■ 1. The authority citation for part 360 continues to read as follows:

**Authority:** 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

##### § 360.200 [Amended]

■ 2. In § 360.200, the list in paragraph (c) is amended by adding, in alphabetical order, entries for “*Lygodium flexuosum* (Linnaeus) Swartz (maidenhair creeper)” and “*Lygodium microphyllum* (Cavanilles) R. Brown (Old World climbing fern)”.

■ 3. A new § 360.400 is added to read as follows:

##### § 360.400 Preemption of State and local laws.

(a) Under section 436 of the Plant Protection Act (7 U.S.C. 7756), a State or political subdivision of a State may not regulate in foreign commerce any noxious weed in order to control it, eradicate it, or prevent its dissemination. A State or political subdivision of a State also may not impose prohibitions or restrictions upon the movement in interstate commerce of noxious weeds if the Secretary has issued a regulation or order to prevent

the dissemination of the noxious weed within the United States. The only exceptions to this are:

(1) If the prohibitions or restrictions issued by the State or political subdivision of a State are consistent with and do not exceed the regulations or orders issued by the Secretary; or

(2) If the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

(b) Therefore, in accordance with section 436 of the Plant Protection Act, the regulations in this part preempt all State and local laws and regulations that are inconsistent with or exceed the regulations in this part unless a special need request has been granted in accordance with the regulations in §§ 301.1 through 301.13 of this chapter.

#### PART 361—IMPORTATION OF SEED AND SCREENINGS UNDER THE FEDERAL SEED ACT

■ 4. The authority citation for part 361 continues to read as follows:

**Authority:** 7 U.S.C. 1581-1610; 7 CFR 2.22, 2.80, and 371.3.

■ 5. In § 361.2, the section heading is revised and paragraphs (a) through (d) are redesignated as paragraphs (b) through (e), respectively, and a new paragraph (a) is added to read as follows:

##### § 361.2 Preemption of State and local laws; general restrictions on the importation of seed and screenings.

(a) The regulations in this part preempt State and local laws regarding seed and screenings imported into the United States while the seed and screenings are in foreign commerce. Seed and screenings imported for immediate distribution and sale to the consuming public remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be considered on a case-by-case basis.

\* \* \* \* \*

##### § 361.6 [Amended]

■ 6. In § 361.6, paragraph (a)(1) is amended by adding, in alphabetical order, entries for “*Lygodium flexuosum* (Linnaeus) Swartz (maidenhair creeper)” and “*Lygodium microphyllum* (Cavanilles) R. Brown (Old World climbing fern)”.

Done in Washington, DC, this 6th day of October, 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9-25119 Filed 10-16-09; 8:45 am]

BILLING CODE: 3410-34-S

#### DEPARTMENT OF AGRICULTURE

##### Agricultural Marketing Service

##### 7 CFR Part 922

[Doc. No. AMS-FV-09-0038; FV09-922-1 FIR]

#### Apricots Grown in Designated Counties in Washington; Decreased Assessment Rate

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

**ACTION:** Affirmation of interim final rule as final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule which decreased the assessment rate established for the Washington Apricot Marketing Committee (Committee) for the 2009–2010 and subsequent fiscal periods from \$2.00 to \$1.00 per ton of apricots handled. The Committee locally administers the marketing order, which regulates the handling of apricots grown in designated counties in Washington. The decreased assessment rate is necessary to align the Committee's expected revenue with its proposed 2009–2010 budget.

**DATES:** Effective Date: October 20, 2009.

##### FOR FURTHER INFORMATION CONTACT:

Robert Curry or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, suite 385, Portland, OR 97204; telephone: (503) 326-2724, fax: (503) 326-7440; or e-mail:

Robert.Curry@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>; or by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237;