

# Proposed Rules

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

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. 04–003–1]

#### Black Stem Rust; Movement Restrictions and Addition of Rust-Resistant Varieties

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the black stem rust quarantine and regulations by changing the movement restrictions in order to allow clonally propagated offspring of rust-resistant *Berberis* cultivars to move into or through a protected area without completing the currently required 2-year growth period. This change would lessen an unnecessarily strict movement requirement. We also propose to add 13 varieties to the list of rust-resistant *Berberis* species. This change would allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

**DATES:** We will consider all comments that we receive on or before December 12, 2005.

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

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and, in the "Search for Open Regulations" box, select "Animal and Plant Health Inspection Service" from the agency drop-down menu, then click on "Submit." In the Docket ID column, select APHIS–2005–0086 to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the "Advanced Search" function in Regulations.gov.

- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies)

to Docket No. 04–003–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 04–003–1.

**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. Vedpal Malik, Agriculturalist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (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 windborne spores.

The black stem rust quarantine and regulations, 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.

#### Clonally Propagated Material

Clonal propagation is a technique whereby the number of plants may be increased without using seeds (i.e., without sexual reproduction). The cloning process is often accomplished via cuttings of roots, stems, or leaves that have the ability to regenerate a complete plant. Cultivars produced clonally are considered genetically identical to the parental source. Clonal propagation is advantageous since exact replicas can be produced in large numbers and those plants produced via clonal propagation are typically disease-free. Conversely, since they are not clones, seeds, fruit, seedlings, and other seed-propagated materials can yield black stem rust sensitive segregants which, if infected, could spread black stem rust to protected areas if proper precautions are not observed.

The regulations in § 301.38–4(b) currently prohibit, among other things, all *Berberis* seedlings and plants of less than 2 years' growth from moving interstate into or through any protected area. This prohibition applies even to rust-resistant *Berberis* varieties because, as noted in the previous paragraph, seed-propagated plants could yield rust-sensitive segregants; the 2-year growth period is necessary to ensure that the plants are "true to type," i.e., they are, in fact, rust-resistant plants.

Because clonally propagated plants are genetically identical to their parental source, it is not necessary to require a 2-year growth period to ensure that the plants are true to type. However, there is no distinction made in the current regulations between clonally propagated offspring and seedlings or seed-propagated material. Therefore, we are proposing to amend the regulations in § 301.38–4 to specify that clonally propagated offspring obtained from black stem rust resistant *Berberis* cultivars of more than 2 years' growth may move into or through protected areas without undergoing the 2-year growth period. All seed-propagated plants and seedlings of the genus *Berberis*, as well as any seeds, fruits, and other plant parts capable of propagation produced by those plants, would continue to be subject to the provisions regarding the 2-year growth period and subject to the current movement restrictions of § 301.38–4(b). We believe that allowing clonally propagated offspring of known rust-

resistant *Berberis* plants to be moved without first undergoing a 2-year growth period would provide producers and distributors relief from restrictions that are not necessary to prevent the spread of black stem rust.

In conjunction with this proposed change, we would also amend § 301.38–1 by adding a definition of *clonally propagated*. We would define the term as “reproduced asexually through cuttings, tissue culture, suckers, or crown division. For the purposes of this subpart, a *Berberis* plant will be considered clonally propagated only if its parent stock is, or was derived from, a seed-propagated black stem rust-resistant plant of more than 2 years’ growth.” This definition would make it clear which *Berberis* plants would not be subject to the 2-year growth requirement.

### Rust-Resistant Species

Section 301.38–2 of the regulations includes a listing of regulated articles and indicates species of the genera *Berberis*, *Mahoberberis*, and *Mahonia* 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. In this document, we are proposing to add 13 additional varieties of *Berberis thunbergii* (the varieties Admiration, Crimson Ruby, Golden Carpet, Golden Devine, Golden Rocket, Golden Ruby, Maria, Pow Wow, Red Carpet, Red Rocket, Rosy Rocket, Talago, and Tiny Gold) to the list of rust-resistant *Berberis* species in § 301.38–2(a).

In accordance with § 301.38–2(b), the nurseries that developed these rust-resistant species of *Berberis* have provided identification guides to the Animal and Plant Health Inspection Service (APHIS) and to the receiving States. The proposed addition of these species is based on recent testing to determine rust resistance conducted by the Agricultural Research Service of the United States Department of Agriculture (USDA) at its Cereal Disease Laboratory in St. Paul, MN.

The testing is performed in the following manner: In a greenhouse, the suspect plant or test subject is placed under a screen with a control plant—a known rust-susceptible species of *Berberis*, *Mahoberberis*, or *Mahonia*. Black stem rust infected stems are placed on top of the screen. The stems are moistened and maintained in 100 percent humidity. This causes the spores to swell and fall on the plants lying under the screen. The plants are then observed for 7 days at 20 to 80 percent relative humidity. If the rust-

susceptible plant shows signs of infection after 7 days and the test plants do not, the test results indicate that the test plants are rust-resistant. This test must be performed 12 times, and all 12 tests must yield the same result before USDA can make a determination as to whether the test plants are rust-resistant. The test may be conducted on 12 individual plants, or it may be performed multiple times on fewer plants (e.g., 6 plants tested twice or 3 plants tested 4 times). The tests must be performed on new growth, just as the leaves are unfolding. Therefore, the tests are usually conducted in the spring or fall, during the growing season. All 12 tests generally cannot be conducted on the same day because of the plants’ different growth stages. Based on over 30 years of experience with this test, we believe that 12 is the reliable test sample size on which USDA can make its determination. We do not know of any plant that was subsequently discovered to be rust-susceptible after undergoing this procedure 12 times and being determined by the USDA to be rust-resistant.

### Miscellaneous

We also propose to make several editorial and organizational changes to the regulations to improve their accuracy or clarity. First, in § 301.38–2, we would remove paragraph (a)(1), which designates all seedlings and plants of less than 2 years’ growth of the genus *Berberis* as regulated articles. All rust-resistant *Berberis* plants, regardless of age, are designated as regulated articles under current paragraph (a)(2) of that section, and all rust-susceptible *Berberis* plants, regardless of age, are designated as regulated articles under current paragraph (a)(4) of that same section. Further, the age of the plants is an issue only with respect to the interstate movement restrictions of § 301.38–4(b), and we believe that paragraph adequately addresses the subject. Therefore, we do not believe it is necessary to specifically designate seedlings and plants of less than 2 years’ growth of the genus *Berberis* as regulated articles.

Second, also in § 301.38–2, where reference is made to “the following rust-resistant... species,” we would refer to “rust-resistant species and varieties,” as not all the articles listed are distinct species.

Third, in the definitions of *rust-resistant plants* and *rust-susceptible plants*, the text refers to “all plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia* species.” We would remove the word “species,” as it is not

necessary when preceded by the word “genera.”

Finally, in several places throughout the subpart, we would update references in the text to specific paragraphs to reflect either the changes proposed in this document or changes that were made in previous rules.

### Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

### Rust-Resistant Cultivars

This proposed rule would add 13 new varieties of *Berberis* to the list of species that have been determined to be resistant to black stem rust and thus eligible to be moved interstate into and through States or parts of States designated as protected areas in accordance with the requirements in the regulations. Based on the information provided to us, we have determined that this proposed rule, if adopted, would affect fewer than five nurseries that might propagate the new species and numerous retail sales nurseries that might purchase and resell the varieties. This proposed rule would 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.

Currently, 126 varieties of *Berberis* are listed as rust-resistant. Of those 126 varieties, many are no longer propagated for commercial sale. Many consumers are choosing newer varieties that are horticulturally more attractive. This rule would add 13 new varieties of *Berberis* to the current list of 126 varieties. The addition of these 13 new varieties would simply create a greater selection of barberry plant varieties from which consumers can choose. This proposed rule could encourage innovation by allowing nurseries that develop new rust-resistant barberry 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 impact on those nurseries that might handle the new varieties.

### Clonally Propagated Cultivars

Additionally, this proposed rule would allow nurseries that produce clonally propagated offspring from rust-resistant *Berberis* cultivars to sell them

without first undergoing the currently required 2-year growth period.

The Regulatory Flexibility Act requires that agencies consider the economic impact of their rules on small entities and to use flexibility to provide regulatory relief when regulations create economic disparities between different-sized entities. According to the Small Business Administration's (SBA's) Office of Advocacy, regulations create economic disparities based on size when they have a significant economic impact on a substantial number of small entities.

Plant nursery farms and greenhouses are classified as small businesses if they receive less than \$750,000 in annual sale receipts. According to the 1997 Census of Agriculture, an average U.S. nursery had annual sales of approximately \$160,000. Therefore, it appears that the majority of U.S. nurseries qualify as small businesses by SBA standards.

Those nurseries that produce rust-resistant *Berberis* varieties would benefit from the proposed change in that they will not have to undergo a 2-year waiting period before they are able to sell the clonally propagated offspring of rust-resistant *Berberis* cultivars in protected areas or move those plants through protected areas. While we are unable to qualify those benefits without knowing the number of entities that may avail themselves of this proposed relaxation of movement restrictions for clonally propagated rust-resistant *Berberis* plants, we do not expect that the savings in production costs will be significant.

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

**Executive Order 12372**

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

**Executive Order 12988**

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

**Paperwork Reduction Act**

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

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

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

Accordingly, we propose to amend 7 CFR part 301 as follows:

**PART 301—DOMESTIC QUARANTINE NOTICES**

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

**Authority:** 7 U.S.C. 7701–7772; 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 would be amended as follows:

a. By adding, in alphabetical order, a definition of *clonally propagated* to read as set forth below.

b. In the definition of *protected area*, by removing the citation “§ 301.38–3(c)” and adding the citation “§ 301.38–3(d)” in its place.

c. In the definition of *rust-resistant plants*, by removing the word “species” and by removing the citation “§ 301.38–2(a)(2) and (a)(3)” and adding the citation “§ 301.38–2(a)(1) and (a)(2)” in its place.

d. In the definition of *rust-susceptible plants*, by removing the word “species” and by removing the citation “§ 301.38–2(a)(2) and (a)(3)” and adding the citation “§ 301.38–2(a)(1) and (a)(2)” in its place.

e. In the definition of *regulated article*, by removing the words “through (a)(4)” and adding the words “through (a)(3)” in their place and by removing the citation “§ 301.38–2(a)(5)” and adding the citation “§ 301.38–2(a)(4)” in its place.

**§ 301.38–1 Definitions.**

\* \* \* \* \*

*Clonally propagated.* Reproduced asexually through cuttings, tissue culture, suckers, or crown division. For the purposes of this subpart, a *Berberis* plant will be considered clonally propagated only if its parent stock is, or was derived from, a seed-propagated black stem rust-resistant plant of more than 2 years' growth.

\* \* \* \* \*

3. Section 301.38–2 would be amended as follows:

a. By removing paragraph (a)(1) and redesignating paragraphs (a)(2) through (a)(5) as paragraphs (a)(1) through (a)(4), respectively.

b. In newly redesignated paragraph (a)(1), by adding the words “and varieties” after the word “species” and by adding, in alphabetical order, 13 new entries to the list of rust-resistant species to read as set forth below.

c. In newly redesignated paragraph (a)(2), by adding the words “and varieties” after the word “species”.

d. By revising newly redesignated paragraph (a)(3) to read as set forth below.

e. In newly redesignated paragraph (a)(4), by removing the words “through (a)(4)” and adding the words “through (a)(3)” in their place.

f. In paragraph (b), in both the first and second sentences, by removing the words “(a)(2) or (a)(3)” and adding the words “(a)(1) or (a)(2)” in their place.

**§ 310.38–2 Regulated articles.**

- (a) \* \* \*
- (1) \* \* \*
- B. thunbergii* ‘Admiration’  
\* \* \* \* \*
- B. thunbergii* ‘Crimson Ruby’  
\* \* \* \* \*
- B. thunbergii* ‘Golden Carpet’  
*B. thunbergii* ‘Golden Devine’  
\* \* \* \* \*
- B. thunbergii* ‘Golden Rocket’  
*B. thunbergii* ‘Golden Ruby’  
\* \* \* \* \*
- B. thunbergii* ‘Maria’  
\* \* \* \* \*
- B. thunbergii* ‘Pow Wow’  
*B. thunbergii* ‘Red Carpet’  
*B. thunbergii* ‘Red Rocket’  
*B. thunbergii* ‘Rosy Rocket’  
\* \* \* \* \*
- B. thunbergii* ‘Talago’  
\* \* \* \* \*
- B. thunbergii* ‘Tiny Gold’  
\* \* \* \* \*

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

**§ 301.38–3 [Amended]**

4. In § 301.38–3, paragraphs (a) and (f) would be amended by removing the words “paragraph (c)” and adding the words “paragraph (d)” in their place.

5. In § 301.38–4, paragraphs (a) and (b) would be revised to read as follows:

**§ 301.38–4 Interstate movement of regulated articles.**

(a) *Non-protected areas.* Interstate movement of regulated articles into or through any State or area that is not designated a protected area under § 301.38–3(d) is allowed without restriction under this subpart.

(b) *Protected areas.* (1) *Prohibited movement.* The following regulated articles are prohibited from moving interstate into or through any protected area:

(i) All rust-susceptible *Berberis*, *Mahoberberis*, and *Mahonia* plants, seeds, fruits, and other plant parts capable of propagation, except *Mahonia* cuttings for decorative purposes.

(ii) All seed-propagated plants of the *Berberis* species and varieties designated as rust-resistant in § 301.38–2(a)(1) of this subpart that are of less than 2 years' growth, and any seeds, fruits, and other plant parts capable of propagation from such plants.

(2) *Restricted movement.* The following regulated articles may be moved interstate into or through a protected area with a certificate issued and attached in accordance with §§ 301.38–5 and 301.38–7 of this subpart:

(i) Seed-propagated plants of at least 2 years' growth, clonally propagated plants of any age, seeds, fruits, and other plant parts capable of propagation of the *Berberis* species and varieties designated as rust-resistant in § 301.38–2(a)(1) of this subpart;

(ii) Plants, seeds, fruits, and other plant parts capable of propagation of the *Mahoberberis* and *Mahonia* species and varieties designated as rust-resistant in § 301.38–2(a)(2) of this subpart.

\* \* \* \* \*

Done in Washington, DC, this 5th day of October 2005.

**Elizabeth E. Gaston,**

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

[FR Doc. 05–20387 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–34–P

**DEPARTMENT OF AGRICULTURE****Animal and Plant Health Inspection Service****7 CFR Part 319**

[Docket No. 05–003–1]

**Importation of Peppers From Certain Central American Countries**

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations governing the importation of fruits and vegetables in order to allow certain types of peppers grown in approved registered production sites in Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to be imported into the United States without treatment. The conditions to which the proposed importation of peppers would be subject, including trapping, pre-harvest inspection, and shipping procedures, are designed to prevent the introduction of quarantine pests into the United States. This action would allow for the importation of peppers from those countries in Central America while continuing to provide protection against the introduction of quarantine pests into the United States.

**DATES:** We will consider all comments that we receive on or before December 12, 2005.

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

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and, in the “Search for Open Regulations” box, select “Animal and Plant Health Inspection Service” from the agency drop-down menu, then click on “Submit.” In the Docket ID column, select APHIS–2005–0095 to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the “Advanced Search” function in Regulations.gov.

- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 05–003–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 05–003–1.

**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:** Ms. Donna L. West, Senior Import Specialist, Commodity Import Analysis

and Operations, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1228; (301) 734–8262.

**SUPPLEMENTARY INFORMATION:****Background**

The regulations in “Subpart—Fruits and Vegetables” (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 plant pests that are new to or not widely distributed within the United States.

We are proposing to amend the regulations to allow the importation of peppers (*Capsicum* spp.) from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua under certain conditions that would be set forth in a new § 319.56–2nn. The quarantine pests of concern for peppers from those countries, as identified in a pest risk assessment prepared for this proposed rule,<sup>1</sup> are the Mexican fruit fly (Mexfly, *Anastrepha ludens*) for certain types of peppers, Mediterranean fruit fly (Medfly, *Ceratitidis capitata*), the weevil *Faustinus ovatipennis*, pea leafminer (*Liriomyza huidobrensis*), tomato fruit borer (*Neoleucinodes elegantalis*), banana moth (*Opogona sacchari*), latana mealybug (*Phenacoccus parvus*), passionvine mealybug (*Planococcus minor*), melon thrips (*Thrips palmi*), the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus.

To mitigate the risks presented by Mexfly and Medfly, we have developed a specific systems approach, which is described below. The remaining pests exhibit symptoms that are macroscopic and detectable upon visual inspection in the production areas or during pre-export or port-of-entry inspections. Specifically:

- The weevil *Faustinus ovatipennis* feeds on leaves, stem, inflorescence, and fruit. Both larvae and adults are external feeders and, as a result, easily observed.
- Pea leafminers spend a majority of their life cycle in larval form, mining host leaves. These mines are easily detectable via visual inspection.
- Tomato fruit borer larvae penetrate the fruit and may cause the fruit to fall

<sup>1</sup> The pest risk assessment, titled “Importation of Fresh Pepper Fruit with Stems (*Capsicum annuum* L., *C. frutescens* L., *C. baccatum* L., *C. pubescens* Ruiz & Pav., and *C. chinense* Jacq.) from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua into the United States,” may be viewed on the Regulations.gov site (see ADDRESSES above for instructions for accessing Regulations.gov) or on the APHIS Web site at <http://www.aphis.usda.gov/ppq/pra/draft/>.