

Rules and Regulations

Federal Register

Vol. 64, No. 145

Thursday, July 29, 1999

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 360

[Docket No. 98-091-1]

Noxious Weeds; Permits and Interstate Movement

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the noxious weed regulations to clearly state that a permit is required for the movement of noxious weeds interstate, as well as into or through the United States. The regulations currently provide for the issuance of permits for movements into or through the United States, but do not explicitly address interstate movements. This action is necessary to help prevent the artificial interstate spread of noxious weeds into noninfested areas of the United States.

DATES: This interim rule is effective July 29, 1999. We invite you to comment on this docket. We will consider all comments that we receive by September 27, 1999.

ADDRESSES: Please send your comment and three copies to: Docket No. 98-091-1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. 98-091-1.

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.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS rules, are available on the Internet at <http://www.aphis.usda.gov/ppd/rad/webrepor.html>.

FOR FURTHER INFORMATION CONTACT: Dr. Randy Westbrook, Invasive Plant Liaison, Interagency Field Office for Invasive Species, 233 Border Belt Drive, PO Box 279, Whiteville, NC 28472; (910) 648-6762.

SUPPLEMENTARY INFORMATION:

Background

The regulations at 7 CFR part 360 (referred to below as the regulations) list Federal noxious weeds and require persons wishing to move a Federal noxious weed into or through the United States to obtain a permit. The regulations were established in 1976 under the authority of the Federal Noxious Weed Act (FNWA) of 1974 (7 U.S.C. 2801 *et seq.*).

Until 1994, the FNWA prohibited the movement of any noxious weed listed in the regulations into or through the United States, or interstate, unless the movement was authorized by a permit and was made in accordance with any conditions in the permit and the regulations. In 1994, Congress amended the FNWA (Pub. L. 103-465, section 431(f)). As amended, the FNWA provides that no person may import or enter any noxious weed listed in the regulations into or through the United States, or move any noxious weed interstate, unless the movement is in accordance with regulations promulgated under the FNWA.

As noted above, the regulations specifically require a permit for the movement of any Federal noxious weed into or through the United States, but do not specifically address interstate movements. In the past, the Animal and Plant Health Inspection Service has not required a permit for interstate movements originating within the United States unless a quarantine, in conjunction with a control and eradication program, was first established in the area of the United States where the noxious weed existed.

Upon review of this policy, especially in circumstances where adequate funds

are not available for control and eradication programs, or where such programs do not appear necessary or appropriate (for example, where a Federal noxious weed previously imported under permit is being grown in a controlled area for a specific approved use), we no longer believe that this policy provides adequate protection against the spread of Federal noxious weeds within the United States.

Therefore, we are amending the regulations to specifically require a permit for the interstate movement of Federal noxious weeds. We believe that this action is necessary to prevent the spread of Federal noxious weeds within the United States.

Immediate Action

The Administrator of the Animal and Plant Health Inspection Service has determined that there is good cause for publishing this interim rule without prior opportunity for public comment. Immediate action is necessary to prevent the artificial interstate movement of noxious weeds to noninfested areas of the United States.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make this action effective upon publication in the **Federal Register**. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register**. 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 as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 603, we have performed an Initial Regulatory Flexibility Analysis, set forth below, regarding the impact of this interim rule on small entities. We do not currently have all the data necessary for a comprehensive analysis of the economic effects of this rule on small entities.

Therefore, we are inviting comments concerning potential economic impacts. In particular, we are interested in determining the number and kinds of small entities that may incur benefits or costs from implementation of this interim rule. The discussion below also serves as the cost-benefit analysis required by Executive Order 12866.

In accordance with 7 U.S.C. 2803 and 2809, the Secretary of Agriculture is authorized to promulgate regulations to prevent the dissemination of any noxious weed into the United States, or interstate. Further, under 7 U.S.C. 2803, no person shall import or enter any noxious weed listed in the regulations into or through the United States, or interstate, unless the movement is in accordance with regulations.

This interim rule amends the regulations by specifically requiring a permit for the interstate movement of Federal noxious weeds. In the past, the Animal and Plant Health Inspection Service has not required a permit for interstate movements originating within the United States unless a quarantine, in conjunction with a control and eradication program, was first established in the area of the United States where the noxious weed existed.

Upon review of this policy, especially in circumstances where adequate funds are not available for control and eradication programs, or where such programs do not appear necessary or appropriate (for example, where a Federal noxious weed previously imported under permit is being grown in a controlled area for a specific approved use), we no longer believe that this policy provides adequate protection against the spread of Federal noxious weeds within the United States.

As part of our analysis of the economic effects of this action, we compared the expected benefits of restricting the interstate movement of Federal noxious weeds with the expected costs to the private sector associated with the new restrictions.

Effects of Noxious Weeds

Noxious weeds affect both crops and native plant species in the same way—by out-competing for light, water, and soil nutrients. Noxious weeds cause estimated crop losses of \$2 to \$3 billion annually. These losses are attributed to: (1) Decreased quality of agricultural products due to high levels of competition from noxious weeds; and (2) decreased quantity of agricultural products due to noxious weed infestations.

Further, noxious weeds can negatively affect livestock and dairy producers by making forage unpalatable

to livestock, thus decreasing livestock productivity and potentially increasing producers' feed costs. Increased costs to producers are eventually borne by consumers.

Noxious weeds also grow in aquatic habitats and may clog waterways and block irrigation and drainage canals, thus negatively affecting fish and wildlife resources and recreational use of these areas.

Infestations of noxious weeds can have a potentially disastrous impact on biodiversity and natural ecosystems, as evidenced by the case of the Mediterranean clone of *Caulerpa taxifolia*, a listed aquatic Federal noxious weed. The clone was introduced into the Mediterranean in 1984 and has since spread along the French and Italian coasts, covering 10,000 acres of the coastal sea floor, and crowding out many native seaweeds, sea grasses, and invertebrates such as coral, sea fans, and sponges.

In order to combat the negative effects of noxious weeds on crop lands, grazing lands, and waterways, herbicidal and other weed control strategies can be implemented at further costs to producers and government agencies. Such costs would then likely be passed down to consumers, who would pay more for products due to increased producer costs.

This rule could potentially benefit any entities referred to above by curbing the spread of Federal noxious weeds and thereby eliminating potential new costs resulting from infestations.

Entities Potentially Affected by the Interim Rule

Any person involved in moving Federal noxious weeds interstate will be affected by this rule because they will now have to obtain a permit prior to the interstate movement. Those likely to be affected are nursery stock catalog firms and individual backyard producers who distribute Federal noxious weeds.

We have found that at least 61 nursery stock catalog companies list some Federal noxious weeds, either in the form of seeds or plants, in their inventory of available products. Available data suggests, however, that sales of Federal noxious weeds (and seeds) make up a small fraction of the total receipts for these businesses. We invite any persons engaged in the sale of Federal noxious weeds, including seeds, to provide us with additional economic data regarding revenue generated by those sales. (The list of Federal noxious weeds is contained in 7 CFR 360.200, and can be found on the APHIS web site at <http://www.aphis.usda.gov/ppq/bats/>

fnwsbycat-e.html. Copies of the list may also be obtained by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.)

Also, there are entities in some States that import noxious weed seeds under permit and grow them under conditions specified in permits granted by APHIS. We are aware that, in isolated cases, entities that import Federal noxious weeds and seeds under permit may also wish to move them interstate. Under this rule, those entities will be required to obtain another permit from APHIS for any movement of noxious weeds that is not authorized in the original permit. Further, APHIS has the authority to deny such a permit if it determines that the movement of such Federal noxious weeds may cause dissemination of the weed into noninfested areas of the United States. This means that, based on the risk of dissemination, APHIS may grant a permit for the movement of a Federal noxious weed into one State, but not into another, or may grant a permit for the movement of one species of Federal noxious weed, but not another.

Also among the entities potentially affected by this rule are individual backyard producers. Some listed Federal noxious weeds are known to be valued among certain groups as vegetable crops and are grown in small garden plots for personal use and sale at informal markets. Since these producers are not registered with APHIS, the total number of such entities is not available. However, since most of these entities probably do not depend upon the production of noxious weeds for their livelihood, this rule should have a very limited economic effect on them. We invite the public to submit any available data on such entities that are affected by this rule.

We are also aware that there are producers of *Ipomoea aquatica* (Chinese water spinach—a listed Federal noxious weed and a food valued by some groups) in some counties in Florida, California, and Hawaii who raise the weed as a cash crop for interstate sale to metropolitan and other markets. The exact number of such farms and their size is not available, but most holdings are said to be as small as an acre or less. Under this rule, persons wishing to move *I. aquatica* interstate will be required to obtain a permit from APHIS. We realize that this may result in a new burden on sellers and purchasers of *I. aquatica*, and we intend to address the situation in an upcoming rulemaking. In the near future, we plan to publish an advance notice of proposed rulemaking (ANPR) in the **Federal Register**, in which we will request the public to

comment on potential changes to our weed classification system. The weed classification system to be considered in the ANPR could eliminate the need for sellers of *I. aquatica* to obtain permits prior to shipping the weed interstate.

Alternatives Considered

The only significant alternative to this interim rule that we considered was to make no changes in the regulations, i.e., to not restrict the interstate movement of noxious weeds. We have rejected this alternative because of the potential economic and ecological consequences that we believe could result if listed Federal noxious weeds are disseminated into noninfested areas of the United States.

This interim rule contains new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which are described below under the heading "Paperwork Reduction Act."

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

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0579-0054 to the information collection and recordkeeping requirements.

Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 98-091-1. Please send a copy of your comments to: (1) Docket No. 98-091-1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03,

4700 River Road Unit 118, Riverdale, MD 20737-1238, and (2) Clearance Officer, OCIO, USDA, room 404-W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this interim rule.

This interim rule amends the noxious weed regulations to clearly state that a permit is required for the movement of noxious weeds interstate, as well as into or through the United States. Prior to the effective date of this rule, the regulations provided for the issuance of permits for movements into or through the United States, but did not explicitly address interstate movements. This action is necessary to help prevent the artificial interstate spread of noxious weeds into noninfested areas of the United States.

Under this interim rule, persons wishing to move listed Federal noxious weeds interstate must first apply for a permit. We are asking OMB to approve this information collection in connection with our efforts to ensure that listed Federal noxious weeds are not disseminated into noninfested areas of the United States.

We are soliciting comments from the public (as well as affected agencies) concerning this information collection activity. We will use these comments to help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average .166 hours per response.

Respondents: Researchers, owner/operators of nursery stock firms, and backyard producers who engage in the interstate distribution of plants (for consumption, ornamental use, or other purposes) that are listed Federal noxious weeds.

Estimated annual number of respondents: 50.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 50.

Estimated total annual burden on respondents: 8 hours.

Copies of this information collection can be obtained from: Clearance Officer, OCIO, USDA, room 404-W, 14th Street and Independence Avenue, SW., Washington, DC 20250.

List of Subjects in 7 CFR Part 360

Imports, Plants (Agriculture), Quarantine, Transportation, Weeds. Accordingly, 7 CFR part 360 would be amended as follows:

PART 360—NOXIOUS WEED REGULATIONS

1. The authority citation for part 360 would continue to read as follows:

Authority: 7 U.S.C. 2803 and 2809; 7 CFR 2.22, 2.80, and 371.2(c).

2. Section 360.300 is amended as follows:

a. By revising the section heading to read as set forth below.

b. By redesignating paragraphs (a), (b), (c), and (d) as paragraphs (b), (c), (d), and (e), respectively.

c. By adding a new paragraph (a) to read as set forth below.

d. By revising the newly redesignated paragraphs (b) and (e) to read as set forth below.

§ 360.300 General prohibitions and restrictions on the movement of noxious weeds; permits.

(a) No person may move a Federal noxious weed into or through the United States, or interstate, unless:

(1) He or she obtains a permit for such movement in accordance with paragraphs (b) through (e) of this section; and

(2) The movement is consistent with the specific conditions contained in the permit.

(b) The Deputy Administrator will issue a written permit for the movement of a noxious weed into or through the United States, or interstate, if application is made for such movement and if the Deputy Administrator determines that such movement, under conditions specified in the permit, would not involve a danger of dissemination of the noxious weed in the United States, or interstate; otherwise such a permit will not be issued.

* * * * *

(e) The Deputy Administrator may revoke any outstanding permit issued

under this section, and may deny future permit applications, if the Deputy Administrator determines that the issuee has failed to comply with any provision of the Act or this section, including conditions of any permit issued. Upon request, any permit holder will be afforded an opportunity for a hearing with respect to the merits or validity of any such revocation involving his or her permit.

(Approved by the Office of Management and Budget under control number 0579-0054)

Done in Washington, DC, this 23rd day of July 1999.

Alfonso Torres,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99-19420 Filed 7-28-99; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. FV98-920-4 FR]

Kiwifruit Grown in California; Changes in Minimum Size, Pack, Container, and Inspection Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the minimum size, pack, container, and inspection requirements prescribed under the California kiwifruit marketing order. The marketing order regulates the handling of kiwifruit grown in California and is administered locally by the Kiwifruit Administrative Committee (Committee). This rule specifies minimum size requirements for all kiwifruit as a maximum of 55 pieces of fruit in an 8-pound sample regardless of pack style; requires that individual consumer packages placed directly on a pallet be stamped with the applicable inspection lot number; and makes minor changes to clarify pack and container marking requirements for several containers. In addition, this rule continues, for the 1999-2000 season, the suspension of minimum net weight requirements for kiwifruit tray packs scheduled to expire at the end of the 1998-1999 season. Also, continued for the 1999-2000 season is the suspension of the requirement that fruit must be reinspected if it has not been shipped by specified dates. These changes clarify the minimum size, pack, and container requirements, and are expected to reduce handler packing costs, increase producer returns, and enable handlers

to compete more effectively in the marketplace.

EFFECTIVE DATE: This final rule becomes effective August 1, 1999. The suspension of §§ 920.302(a)(4)(iii), and 920.155 expires on August 1, 2000.

FOR FURTHER INFORMATION CONTACT: Rose M. Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, F&V, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698. Small businesses may request information on complying with this regulation or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698, or E-mail Jay.Guerber@usda.gov. You may view the marketing agreement and order small business compliance guide at the following web site: <http://www.ams.usda.gov/fv/moab.html>.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the

order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the minimum size, pack, container, and inspection requirements prescribed under the California kiwifruit marketing order. The marketing order regulates the handling of kiwifruit grown in California and is administered locally by the Committee.

This rule specifies the minimum size requirements for all kiwifruit as a maximum of 55 pieces of fruit in an 8-pound sample regardless of pack style; requires that individual consumer packages placed directly on a pallet be stamped with the applicable inspection lot number; and makes minor changes to clarify pack and container marking requirements for several containers.

In addition, this rule continues, for the 1999-2000 season, the suspension of the minimum net weight requirements in § 920.302 (a)(4)(iii) for kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays scheduled to expire at the end of the 1998-1999 season. This suspension action was implemented by an interim final rule published last September (63 FR 46861; September 3, 1998). No comments were received pursuant to the request for comments in the interim final rule. A final rule published last August suspended the requirement in § 920.155 that fruit must be reinspected if it has not been shipped by specified dates for the 1998-1999 season (63 FR 41390; August 4, 1998). This rule also continues the suspension of this requirement for the 1999-2000 season. These changes were unanimously recommended by the Committee. Clarification of the minimum size, pack, and container requirements are expected to reduce handler packing costs, increase producer returns, and enable handlers to compete more effectively in the marketplace.

The interim final rule published last September also increased the size variation tolerance, from 10 percent, by count, in any one container, to 25 percent, by count, for Size 42 kiwifruit, and the maximum number of fruit per 8-pound sample for Sizes 42, 39, 36, 33, and 30 of kiwifruit packed in bags,