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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS-2017-0049]

Black Stem Rust; Additions of Rust-Resistant Species and Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: We are amending the black stem rust quarantine and regulations by adding 15 varieties to the list of rust-resistant *Berberis* species and varieties and 2 varieties to the list of rust-resistant *Mahonia* species and varieties. This action will allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

DATES: This rule will be effective on November 6, 2017, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before October 5, 2017. If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal Register** withdrawing this rule before the effective date.

ADDRESSES: You may submit comments or written notice of intent to submit adverse comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov#!docketDetail;D=APHIS-2017-0049>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2017-0049, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://>

www.regulations.gov#!docketDetail;D=APHIS-2017-0049 or in our reading room, which 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) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Richard N. Johnson, National Policy Manager, Black Stem Rust, Pest Management, PHP, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1231; (301) 851-2109.

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 (*Puccinia graminis*) that reduces the quality and yield of infected wheat, oat, barley, and rye crops. 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, which are contained in 7 CFR 301.38 through 301.38-8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks. Section 301.38-2 of the regulations includes a listing of regulated articles and indicates those species and varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia* that are known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate. In accordance with the procedures described below under **DATES**, this direct final rule will add the following varieties to the lists of rust-resistant

Berberis and *Mahonia* species in § 301.38-2(a)(1) and (a)(2):

- *B. thunbergii atropurpurea x B. xmedia* H2011-085-006;
- *B. thunbergii* ‘Diabolicum’;
- *B. thunbergii* “8-8-13”;
- *B. thunbergii* H2007-001-031;
- *B. thunbergii* Orange Torch;
- *B. thunbergii* Red Torch;
- *B. thunbergii* Striking Gold;
- *B. thunbergii* UCONNBT039;
- *B. thunbergii* UCONNBT048;
- *B. thunbergii* UCONNBT113;
- *B. thunbergii* UCONNBTCP4N;
- *B. thunbergii* UCONNtrispecific;
- *B. thunbergii x B. sieboldii* H2010-079-012;
- *B. verruculosa x gagnepainii x vulgaris* Trispecific#2;
- *B. xmedia x thunbergii atropurpurea* H2011-165-002;
- *M. eurybracteata* Soft Caress (PPAF); and
- *M. media* Marvel (PPAF).

The 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*. Infected wheat stems, a primary host of black stem rust, are placed on top of the screen. The plants 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 20–80 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 the test procedure 12 times and being determined by USDA to be rust-resistant.

Dates

We are publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, on November 6, 2017, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before October 5, 2017.

Adverse comments are comments that suggest the rule should not be adopted or that suggest the rule should be changed.

If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal Register** withdrawing this rule before the effective date. We will then publish a proposed rule for public comment.

As discussed above, if we receive no written adverse comments or written notice of intent to submit adverse comments within 30 days of publication of this direct final rule, this direct final rule will become effective 60 days following its publication. We will publish a document in the **Federal Register** before the effective date of this direct final rule confirming that it is effective on the date indicated in this document.

Executive Orders 12866 and 13771 and Regulatory Flexibility Act

This 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. Further, because this rule is waived, it does not trigger the requirements of Executive Order 13771.

This direct final rule will amend 7 CFR 301.38–2 by adding 15 varieties to the list of rust resistant *Berberis* species or cultivars, and 2 varieties to the list of rust resistant *Mahonia* species or cultivars. The nursery and floriculture industries that may be affected by this rule are largely composed of small entities. We expect these entities to benefit from the rule, by being able to market interstate barberry species and cultivars that have been determined to be rust-resistant.

The introduction and spread of plant pests can result in damage to crops and losses to the U.S. agricultural sector. For the purpose of this analysis and following the Small Business Administration (SBA) guidelines, we note that a major segment of entities potentially affected by this rule are classified within the following industries: Nursery and Tree Production (NAICS 111421), and Floriculture Production (NAICS 111422). According to the Census of Agriculture, these two categories, along with Greenhouse production, which makes up the rest of NAICS 1114, included 52,777 farms in 2012, and represented 2.5 percent of all farms in the United States. These entities are considered small by SBA standards if their annual sales are \$750,000 or less. Over 87 percent of the farms in these industries had annual sales of less than \$500,000.

Barberry plants are not one of the crops tracked by the Census and therefore data on production and number of producers are not available. Nurseries producing barberry plant species and varieties will not be negatively affected. In fact, they will benefit from being able to market the 17 varieties interstate. In addition, the rule does not require any additional reporting, recordkeeping, or other compliance measures beyond what is already in place.

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 2 CFR chapter IV.)

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 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, 7 CFR part 301 is amended 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).

■ 2. Section 301.38–2 is amended as follows:

- a. In paragraph (a)(1), by adding, in alphabetical order, 15 rust-resistant *Berberis* species; and
- b. In paragraph (a)(2)(ii), by adding, in alphabetical order, two rust resistant *Mahonia* species.

The additions read as follows:

§ 301.38–2 Regulated articles.

- (a) * * *
- (1) * * *
- B. thunbergii atropurpurea* x *B. x media* H2011–085–006
- * * * * *
- B. thunbergii* ‘Diaboliicum’
- * * * * *
- B. thunbergii* “8–8–13”
- * * * * *
- B. thunbergii* H2007–001–031
- * * * * *
- B. thunbergii* Orange Torch
- * * * * *
- B. thunbergii* Red Torch
- * * * * *
- B. thunbergii* Striking Gold
- * * * * *
- B. thunbergii* UCONNBT039
- B. thunbergii* UCONNBT048
- B. thunbergii* UCONNBT113
- B. thunbergii* UCONNBTCP4N
- B. thunbergii* UCONNtrispecific
- * * * * *
- B. thunbergii* x *B. sieboldii* H2010–079–012
- * * * * *
- B. verruculosa* x *gagnepainii* x *vulgaris* Trispecific#2
- * * * * *
- B. x media* x *thunbergii atropurpurea* H2011–165–002
- (2) * * *
- (ii) * * *
- M. eurybracteata* Soft Caress (PPAF)
- * * * * *

M. media Marvel (PPAF)

* * * * *

Done in Washington, DC, this 30th day of August 2017.

Michael C. Gregoire,
Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2017-18712 Filed 9-1-17; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-SC-16-0104; SC16-930-4 FR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin; Modification of Allocation of Assessments

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Tart Cherry Industry Administrative Board (Board) to increase the portion of assessments allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries and decrease the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under the marketing order (order). This rule also corrects the allocation numbers from \$0.006 per pound for research and promotion activities and \$0.0015 per pound for administrative expenses as stated in the proposed rule based on a comment received. The overall assessment rate remains unchanged at \$0.0075 per pound of tart cherries. The Board locally administers the order and is comprised of producers and handlers of tart cherries operating within the area of production, and one public member. Assessments upon tart cherry handlers are used by the Board to fund reasonable and necessary expenses of the program. The fiscal period begins October 1 and ends September 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective September 6, 2017.

FOR FURTHER INFORMATION CONTACT: Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-

3375, Fax: (863) 291-8614, or Email: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin, 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 (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This rule does not meet the definition of a significant regulatory action contained in section 3(f) of Executive Order 12866 and is not subject to review by the Office of Management and Budget (OMB). Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled, "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, tart cherry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable tart cherries beginning on October 1, 2016, and continue until amended, suspended, or terminated.

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 USDA 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. Such handler is afforded the opportunity for

a hearing on the petition. After the hearing, USDA 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 USDA'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 rule increases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.0065 per pound of tart cherries handled and decreases the portion allocated to administrative expenses from \$0.0025 to \$0.001 per pound of tart cherries handled under the order. This rule also corrects the allocation numbers from \$0.006 per pound for research and promotion activities and \$0.0015 per pound for administrative expenses as stated in the proposed rule based on a comment received. The overall assessment rate for the 2016-17 and subsequent fiscal periods remains unchanged at \$0.0075 per pound of tart cherries.

The tart cherry marketing order provides authority for the Tart Cherry Industry Administrative Board (Board), with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Board are producers and handlers of tart cherries, and one public member. They are familiar with the Board's needs and with the costs of goods and services in their local areas and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2010-11 and subsequent fiscal periods, the Board recommended, and USDA approved, an assessment rate of \$0.0075 per pound of tart cherries that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other information available to USDA.

The Board met on September 8, 2016, and unanimously recommended 2016-17 expenditures of \$2,523,550 and an assessment rate of \$0.0075 per pound of tart cherries. In comparison, last year's budgeted expenditures were \$1,725,000. The total assessment rate remains unchanged by this action. However, this rule increases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to