

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 97

[SD-95-001]

RIN 0581-AB39

Plant Variety Protection Regulations; Amendments To Conform to Change in the Law and To Increase Certification Fees

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule revises the Plant Variety Protection Regulations to conform to changes made in the Plant Variety Protection Act (PVPA). The amendments to the PVPA become effective April 4, 1995. Fees are increased to recover the cost of administering the Act and to maintain the program as a fully user funded program.

DATES: Effective April 4, 1995; comments received by May 4, 1995 will be considered prior to issuance of a final rule.

ADDRESSES: Comments should be sent to Kenneth H. Evans, Commissioner, Plant Variety Protection Office, Science Division, Agricultural Marketing Service, U. S. Department of Agriculture, Room 500, National Agricultural Building, Beltsville, Maryland 20705-2351. Telephone (301) 504-5485. Comments will be available for public inspection at this location during regular business hours, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Kenneth H. Evans, Commissioner, Plant Variety Protection Office, Telephone:(301)504-5518, FAX (301)504-5291

SUPPLEMENTARY INFORMATION:**I. Executive Order 12866; Executive Order 12778**

This interim final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866, and, therefore, has not been reviewed by the Office of Management and Budget.

This rule has also been reviewed under Executive Order 12778, Civil Justice Reform. This action 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. There are no

administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

II. Regulatory Flexibility Act

The Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612). The fees provided for in this document merely reflect a minimal increase in the costs currently borne by those entities which utilize Plant Variety Protection services.

III. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) the information collection requirements included in 7 CFR Part 97 have been approved previously by the Office of Management and Budget and have been assigned OMB control number 0581-0055.

IV. Background Information

The Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*) (PVPA) authorizes the Secretary to issue Certificates of Plant Variety Protection which afford variety ownership rights similar to patent rights. As a member of the International Union for the Protection of New Varieties of Plants (UPOV) the United States participated in negotiations which resulted in the March 19, 1991 UPOV Convention. The PVPA was amended on October 6, 1994 to conform to the new UPOV Convention and the amendments will be effective on April 4, 1995. This interim final rule revises the regulations to conform to the amendments of the PVPA. The regulations must be revised so that they are in place when the amended Act becomes effective. It is also necessary that the program be maintained as a fully user-fee funded program. Therefore, pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impractical, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**.

Section 97.1 (a general statement of the scope of the regulations) is revised in three respects. First, the phrase "novel varieties" is replaced by "new, distinct, uniform, and stable varieties" because the term "novel variety" is no longer used in the PVPA. Second, a reference to tuber reproduced plants is added to reflect the extension of the

PVPA to tuber reproduced as well as sexually reproduced plant varieties. Third, the description of the rights afforded by a certificate is revised by adding conditioning and stocking as actions which require the authorization of the owner, as provided in the PVPA.

In § 97.2 (a list of definitions), the term "hybrid" is removed. The definition is no longer necessary because the PVPA now extends to hybrid varieties.

Section 97.5(a)(2) is revised to specify that the member states of UPOV include those countries which are members of an intergovernmental organization which is a UPOV member. This clarification is made because nationals of such countries would in any event be fully eligible for protection under section 97.5(a)(3).

Section 97.6(d), which deals with the requirement that the application must be accompanied by a seed sample, is revised by adding that, for a tuber propagated variety, the application be accompanied by "verification that a viable cell culture will be deposited in a public depository before the issuance of the certificate and will be maintained for the duration of the certificate." This reflects the extension of the PVPA to tuber propagated varieties where the reference to seeds would be inapplicable. Additionally, seed samples provide information on seed characteristics and demonstrate the uniformity of the deposit. No such information is gained from a cell culture.

Section 97.7 is removed. This section relates to the statements of the applicant in signing a completed application. It is unnecessary because the applicant in signing the application states what is stated on the completed application. Further, the provision mentions items which are no longer applicable because of the amendment of the PVPA.

Section 97.11(b), which relates to the length of time an incomplete or defective application will be held, is revised to provide for holding for three months rather than six months, to reflect a change in the statute.

The heading of § 97.15 is revised by removing the word "novel" so that it would read "Assigned varieties and certificates." As mentioned above, the amended PVPA no longer uses the term "novel variety."

Section 97.19 is revised by replacing the word "novel" with "distinctive" for the same reason. Similar changes would be made in §§ 97.100(b), 97.104(b), 97.105, 97.106, 97.130, 97.140, 97.141, 97.201(e), and 97.800.

Section 97.20, relating to abandonment for failure to respond to

requests for information, is revised by changing the time period from 6 months to 30 days to reflect the amendment of the PVPA. This only changes the automatic period of time provided; extensions may still be granted. In connection with this change, the reference in § 97.20(c) to a "shortened" period of 30 days is removed.

The amendments to the PVPA provide that certificates which have been granted and applications which are pending as of the effective date of the amendments will continue to be governed by the Act as it was prior to the amendments. There is an exception for applications which are withdrawn and refilled under the new amendments to the law. Section 97.23 (relating to the withdrawal of applications) is revised by adding a provision which simplifies the withdrawal of a pending application for the purpose of refiling under the amended PVPA. All that is required is written notice and payment of the application fee. Completion of a new application form would not be necessary.

Sections 97.140 and 97.141 (which relate to notice on the label that protection has been applied for or granted, respectively) are also revised to clarify that the notice may, where applicable, specify "PVPA-1994" so as to give notice that the variety is subject to the new infringement provisions.

Section 97.142 (which relates to notice accompanying seed released for testing or increase only) is revised so that it would also apply to tuber reproducing plants.

A footnote is added to the provisions relating to priority contests (beginning at § 97.205) stating that they apply only to varieties protected under the PVPA as it was prior to the 1994 amendments. The amendments removed the date of determination of a variety a deciding factor in eligibility for protection. The provisions are not removed, however, because there could be a possibility that there may be a priority contest involving applications under the PVPA prior to the 1994 amendments.

Similarly, §§ 97.303 and 97.500 (relating to appeals from the decisions of the Secretary) are revised to remove references to specific sections of the PVPA. These references are unnecessary and may be confusing because there is a possibility of an appeal from the decision of the Secretary which would be governed by the PVPA as it was prior to the 1994 amendments.

The fees set forth in § 97.175 are increased. The application fee is increased from \$275 to \$300, the search fee from \$2,050 to \$2,150, and the issuance fee from \$275 to \$300. The fees

for reviving an abandoned application, correcting or reissuance of a certificate are increased from \$275 to \$300. The charge for granting an extension for responding to a request is set at \$50. The hourly charge for any other service not specified is increased from \$40 to \$60. The fee for appeal to the Secretary (refundable if appeal overturns the Commissioner's decision) is increased from \$2,600 to \$2,750.

These fee increases are necessary to maintain the program as a fully user funded program.

The Plant Variety Protection Advisory Board has been consulted on a fee increase on September 23, 1992. The fees were not increased at that time. The Board was also consulted and advised that the regulations should be revised to conform to any amendments made in the PVPA to conform to the new UPOV Convention. This interim final rule makes the minimum changes in the regulations to implement the PVPA and increase fees to maintain the program as a fee funded program.

List of Subjects in 7 CFR Part 97

Plants, Seeds.

For reasons set forth in the preamble, 7 CFR part 97 is amended as follows.

PART 97—PLANT VARIETY AND PROTECTION

1. The authority citation for part 97 is revised to read as follows:

Authority: Secs. 6, 22, 23, 26, 31, 43, 56, 57, 91(c), Plant Variety Protection Act, as amended; 7 U.S.C. 2321, 2326, 2352, 2353, 2356, 2371, 2402b, 2403, 2426, 2427, 2501(c); Sec. 14, Plant Variety Protection Act amendments of 1994; 7 U.S.C. 2401 note; 29 FR 16210, as amended, 37 FR 6327, 6505.

§ 97.1 [Amended]

2. Section 97.1 is amended by removing the word "novel" and adding in its place "new, distinct, uniform, and stable"; adding "or tuber propagated" after the word "reproduced" and adding "conditioning it, stocking it," after the words "exporting it,".

§ 97.2 [Amended]

3. Section 97.2 is amended by removing the definition of "hybrid".

§ 97.5 [Amended]

4. Section 97.5(a)(2) is amended by adding the words "(including states which are members of an intergovernmental organization which is a UPOV member)" after the word "Plants".

§ 97.6 [Amended]

5. Section 97.6(d) is amended by adding the words "or with the

application for a tuber propagated variety, verification that a viable cell culture will be deposited in a public depository before the issuance of the certificate and will be maintained for the duration of the certificate" after the word "variety".

§ 97.7 [Removed and Reserved]

6. Section 97.7 is removed and reserved.

§ 97.11 [Amended]

7. Section 97.11 (b) is amended by removing the number "6" and adding a "3" in its place.

§ 97.15 [Amended]

8. Section 97.15 heading is revised to read as follows: Assigned varieties and certificates.

§ 97.19 [Amended]

9. Section 97.19 is amended by removing the word "novel" from the undesignated paragraph at the end of the section and adding the word "distinctive" in its place.

§ 97.20 [Amended]

10. Section 97.20(a) is amended by removing the words "6 months" and adding the words "30 days" in their place; and paragraph (c) is amended by removing the word "shortened".

§ 97.23 [Amended]

11. Section 97.23 is amended by adding a new paragraph (d) as follows:

§ 97.23 Voluntary withdrawal and abandonment of an application.

* * * * *

(d) Transitional provision. An applicant whose application is pending on April 4, 1995, may notify the Plant Variety Protection Office in writing that he or she wishes to withdraw the application and refile it under the Plant Variety Protection Act as amended in 1994. Payment of the current application fee is required but no other formalities are necessary.

§ 97.100 [Amended]

12. Section 97.100(b) is amended by removing the word "novel" and adding the words "new, distinct, uniform, and stable" in its place.

§ 97.104 [Amended]

13. Section 97.104(b) is amended by removing the word "novel".

§ 97.105 [Amended]

14. Section 97.105(a) is amended by removing the word "novel" and adding the words "new, distinct, uniform, and stable" in its place and paragraph (b) is amended by removing the words "for want of novelty".

§ 97.106 [Amended]

15. Section 97.106(b) is amended by removing the word “novelty” and adding “the variety being new, distinct, uniform, and stable” in its place; and (c) is amended by removing the word “novelty” and adding “the variety is new, distinct, uniform, and stable” in its place; and removing the word “novel” and adding “new, distinct, uniform, and stable” in its place.

§ 97.130 [Amended]

16. Section 97.130(c) through (d) are amended by removing the word “novel” at each occurrence.

§§ 97.140, 97.141 [Amended]

17. Sections 97.140 and 97.141 are amended by removing the word “novel” and adding a new sentence to the end of each section reading “Where applicable, “PVPA 1994” may be added to the notice.”.

§ 97.142 [Amended]

18. Section 97.142 is amended by removing the words “other sexually” and “produced from seed” and adding the word “material” before the word “substantially”.

§ 97.175 [Revised]

19. Section 97.175 is revised to read as follows:

§ 97.175 Fees and charges.

The following fees and charges apply to the services and actions specified below:

| | |
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| (a) Filing the application and notifying the public of filing | \$300 |
| (b) Search or examination | 2,150 |
| (c) Allowance and issuance of certificate and notifying public of issuance | 300 |
| (d) Revive an abandoned application | 300 |
| (e) Reproduction of records, drawings, certificates, exhibits, or printed material (copy per page of material) | 1 |
| (f) Authentication (each page) | 1 |
| (g) Correcting or reissuance of a certificate | 300 |
| (h) Recording assignments (per certificate/application) | 25 |
| (i) Copies of 8 x 10 photographs in color | 25 |
| (j) Additional fee for reconsideration | 300 |
| (k) Additional fee for late payment | 25 |
| (l) Additional fee for late replenishment of seed | 25 |
| (m) Appeal to Secretary (refundable if appeal overturns the Commissioner's decision) | 2,750 |
| (n) Granting of extension for responding to a request | 50 |
| (o) Field inspections by a representative of the Plant Variety Protection Office made at the request of the applicant shall be reimbursable in full (including travel, per diem or subsistence, and salary) in accordance with Standardized Government Travel Regulations. | |
| (p) Any other service not covered above will be charged for at rates prescribed by the Commissioner, but in no event shall they exceed \$60 per employee-hour. | |

§ 97.201 [Amended]

20. Section 97.201(e) is amended by removing the word “novel” in the second sentence.

21. A footnote number 2 is added to the undesignated center heading “PRIORITY CONTEST” preceding section 97.205, as follows: “² All provisions relating to priority contests apply only to varieties protected under

the Act as it was in force prior to April 4, 1995.”

§ 97.303 [Amended]

22. Section 97.303(b) is amended by removing “sections 71, 72, or 73 of”.

§ 97.500 [Amended]

23. Section 97.500 is amended by removing “sections 71, 72, and 73 of”.

§ 97.800 [Amended]

24. Section 97.800 is amended by removing the word “novel” and adding “distinct, uniform, and stable” in its place.

Dated: March 29, 1995.

Lon S. Hatamiya,
Administrator.

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