

# Proposed Rules

Federal Register

Vol. 63, No. 169

Tuesday, September 1, 1998

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 319

[Docket No. 98-035-1]

#### Importation of Orchids in Growing Media

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend our regulations governing the importation of plants and plant products to add orchids of the genus *Phalaenopsis* to the list of plants that may be imported in an approved growing medium subject to specified growing, inspection, and certification requirements. We have assessed the pest risks associated with the importation of *Phalaenopsis* spp. orchids established in growing media and have determined that the degree of pest risk is no greater than the pest risk associated with the importation of bare-rooted *Phalaenopsis* spp. orchids, which may already be imported under the regulations. This proposed rule would allow *Phalaenopsis* spp. orchids established in growing media to be imported into the United States under certain conditions.

**DATES:** Consideration will be given only to comments received on or before November 2, 1998.

**ADDRESSES:** Please send an original and three copies of your comments to Docket No. 98-035-1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comments refer to Docket No. 98-035-1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to

inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Peter M. Grosser, Senior Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1236; (301) 734-6799; fax (301) 734-5786; e-mail:

Peter.M.Grosser@usda.gov.

**SUPPLEMENTARY INFORMATION:**

#### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation into the United States of certain plants and plant products to prevent the introduction of plant pests. The regulations contained in "Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products," §§ 319.37 through 319.37-14 (referred to below as the regulations) restrict, among other things, the importation of living plants, plant parts, and seeds for propagation.

Paragraph § 319.37-8(a) of the regulations requires, with certain exceptions, that plants offered for importation into the United States be free of sand, soil, earth, and other growing media. This requirement is intended to help prevent the introduction of plant pests that might be present in the growing media; the exceptions to the requirement take into account factors that mitigate that plant pest risk. Those exceptions, which are found in paragraphs (b) through (e) of § 319.37-8, consider either the origin of the plants and growing media (paragraph (b)), the nature of the growing media (paragraphs (c) and (d)), or the use of a combination of growing conditions, approved media, inspections, and other requirements (paragraph (e)).

That combination approach found in § 319.37-8(e) provides conditions under which plants from nine listed genera may be imported into the United States established in an approved growing medium. In addition to specifying the types of plants that may be imported, § 319.37-8(e) also:

- Specifies the types of growing media that may be used;
- Requires plants to be grown in accordance with written agreements between the Animal and Plant Health Inspection Service (APHIS) and the

plant protection service of the country where the plants are grown and between the foreign plant protection service and the grower;

- Requires the plants to be rooted and grown in a greenhouse that meets certain requirements for pest exclusion and that is used only for plants being grown in compliance with § 319.37-8(e);
- Restricts the source of the seeds or parent plants used to produce the plants, and requires grow-out or treatment of parent plants imported into the exporting country from another country;
- Specifies the sources of water that may be used on the plants, the height of the benches on which the plants must be grown, and the conditions under which the plants must be stored and packaged; and
- Requires that the plants be inspected in the greenhouse and found free of evidence of plant pests no more than 30 days prior to the exportation of the plants.

A phytosanitary certificate issued by the plant protection service of the country in which the plants were grown that declares that the above conditions have been met must accompany the plants at the time of importation. These conditions have been used successfully to mitigate the risk of pest introduction associated with the importation into the United States of approved plants established in growing media.

In 1997, the Government of Taiwan requested that APHIS consider amending the regulations to allow orchids of the genus *Phalaenopsis*—commonly known as moth orchids—to be imported into the United States under the provisions of § 319.37-8(e). Taiwan is the largest exporter of *Phalaenopsis* spp. orchids to the United States, exporting most of them as bare-rooted plants under the provisions of § 319.37-8(a). Several other countries, notably Thailand and The Netherlands, also export orchids, including *Phalaenopsis* spp. orchids, to the United States. In its request, the Taiwanese Government specifically requested that we allow *Phalaenopsis* spp. orchids to be imported into the United States established in sphagnum moss, which is one of the approved growing media listed in § 319.37-8(e)(1).

The regulations in § 319.37-8(g) provide that a request such as that made

by Taiwan to allow the importation of additional taxa of plants established in growing media will be evaluated by APHIS using specific pest risk evaluation standards. That analysis is conducted to determine the plant pest risks associated with each requested plant article and to determine whether or not APHIS will propose to allow the requested plant article established in growing media to be imported into the United States. The pest risk evaluation, the standards for which are set forth in § 319.37–8 (g)(1) through (g)(4), involves collecting commodity information, cataloging quarantine pests, conducting individual pest risk assessments, and determining an overall estimation of risk based on a compilation of the component estimates.

After receiving Taiwan's request to allow the importation of *Phalaenopsis* spp. orchids established in growing media, APHIS conducted the required pest risk analysis in accordance with the standards described above. (The analysis is described in a qualitative, pathway-initiated pest risk assessment titled "Importation of Moth Orchid (*Phalaenopsis* spp.) Seedlings from Taiwan in Growing Media into the United States," copies of which are available through the person listed under **FOR FURTHER INFORMATION CONTACT**.) The pest risk assessment identified several arthropod pests (*Planococcus minor*, *Spodoptera litura*, and *Spodoptera* sp.), mollusks (*Acusta (Bradybaena) tourranensis* and *Bradybaena* sp.), and fungi (*Colletotrichum phalaenopsidis*, *Cylindrosporium phalaenopsidis*, *Phomopsis orchidophila*, and *Sphaerulina phalaenopsidis*) as the plant pests most likely to travel with the plant and having the greatest potential for economic damage. However, the pest risk assessment acknowledged that the risk presented by these plant pests is consistent with any propagative epiphytic orchid materials and pest associations. Further, it is important to note that those plant pest risks were identified in the absence of the mitigative effects of the requirements of § 319.37–8(e), which are designed to establish and maintain a pest-free production environment and ensure the use of pest-free seeds or parent plants. Given that, the pest risk assessment concluded that it is likely that the risk of *Phalaenopsis* spp. orchids, or any other epiphytic orchid, grown in sphagnum moss (an approved growing medium) under modern conditions (i.e., the conditions required by § 319.37–8(e)) is no greater than that posed by

allowed entry as bare-rooted plants or on other approved epiphytic growing media (tree fern slabs, coconut husks, or coconut fiber).

Based on the conclusions of the pest risk assessment, we have determined that the importation of *Phalaenopsis* spp. orchids from any country—not just Taiwan—under the conditions required by § 319.37–8(e) would pose no greater plant pest risk than is posed by the importation of epiphytic orchid material currently allowed entry from any country as bare-rooted plants under § 319.37–8(a) or established on other approved epiphytic growing media (tree fern slabs, coconut husks, or coconut fiber) under § 319.37–8(d). On the basis of that determination, we are proposing to amend the regulations in § 319.37–8(e) by adding the genus *Phalaenopsis* to the list of genera that may be imported established in approved growing media. This proposed change would allow *Phalaenopsis* spp. orchids to be imported into the United States established in approved growing media from any country provided the orchids were produced, handled, and imported in accordance with the requirements of § 319.37–8(e) and are accompanied at the time of importation by a phytosanitary certificate issued by the plant protection service of the country in which the plants were grown that declares that those requirements have been met.

#### Miscellaneous

As part of this proposed rule, we are also proposing to renumber an incorrect footnote reference in § 319.37–8.

#### Executive Order 12866 and Regulatory Flexibility Act

This proposed 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.

In accordance with 5 U.S.C. 603, we have performed an Initial Regulatory Flexibility Analysis, which is set out below, regarding the impact of this proposed rule on small entities. Based on the information we have, there is no basis to conclude that adoption of this proposed rule would result in any significant economic impact on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number

and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

Under the Federal Plant Pest Act (7 U.S.C. 150aa–150jj) and the Plant Quarantine Act (7 U.S.C. 151–165 and 167), the Secretary of Agriculture is authorized to regulate the importation of plants and plant products to prevent the introduction of injurious plant pests.

This proposed rule would amend the regulations to add orchids of the genus *Phalaenopsis* to the list of plants that may be imported in an approved growing medium subject to specified growing, inspection, and certification criteria. This proposal follows the completion of our analysis of the pest risks associated with the importation of *Phalaenopsis* spp. orchids established in growing media and our determination that the degree of pest risk is no greater than the pest risk associated with the importation of bare-rooted *Phalaenopsis* spp. orchids. This proposed rule would allow *Phalaenopsis* spp. orchids established in approved growing media to be imported into the United States under certain conditions.

Economic data on potted orchid plants in general is scarce, and specific data on potted *Phalaenopsis* spp. orchids in particular is virtually nonexistent. Nevertheless, certain conclusions and inferences regarding the potential economic impact of the proposed rule are possible.

#### Domestic Production

The National Agricultural Statistics Service (NASS) of the U.S. Department of Agriculture (USDA) publishes data on the value and production of potted orchid plants in the United States. However, that data is of limited usefulness for this analysis because it: (1) Shows only aggregate data for all types of orchid plants, and does not offer specific data for *Phalaenopsis* spp. orchids as a separate orchid type; (2) is available only for the year 1996; (3) includes only the larger producers, i.e., those with annual gross sales of \$100,000 or more; and (4) includes only producers in 36 States.

The NASS data shows that there were 169 growers of potted orchid plants in the United States in 1996. These 169 growers sold a combined 8.2 million potted orchids that year, with an equivalent wholesale value of \$42.7 million, for an average of \$252,781 per grower. Of the 8.2 million potted orchids sold, 5.1 million (62 percent) were less than 5 inches in diameter. The average wholesale price of pots less than 5 inches in diameter was \$3.90; the average wholesale price for pots 5 inches or more in diameter was \$7.30.

The 8.2 million pots were produced in a 6.3 million sq. ft. area, an average of 36,982 sq. ft. for each of the 169 growers. Three States—California, Florida, and Hawaii—accounted for 55 percent of the growers and 92 percent of the pots sold in 1996. Florida alone accounted for about 25 percent of the growers and about 50 percent of the pots sold (USDA, NASS, "Floriculture Crops, 1996 Summary"). The American Orchid Society (AOS) does not collect statistical data on the production of potted *Phalaenopsis* spp. orchids in the United States, but it estimates that about half of all potted orchid plants produced in the United States fall within that genus.

### Imports and Exports

The USDA's Foreign Agriculture Service (FAS) collects and publishes data on U.S. imports and exports of orchid plants. The FAS data is also of limited usefulness for the purposes of this analysis because it, too, shows only aggregate data for all types of orchid plants without separating out figures for separate orchid types such as *Phalaenopsis*.

As noted in the background section of this proposed rule, most of the *Phalaenopsis* spp. orchids currently imported into the United States arrive as bare-rooted plants. We expect that complying with the growing, inspection, and treatment requirements of § 319.37-8(e) would increase costs for orchid producers in exporting countries. In addition, the cost of shipping orchids in growing media would be higher than the cost of shipping bare-rooted plants. Therefore, it is reasonable to expect that *Phalaenopsis* spp. orchids would be exported to the United States established in growing media only if the higher production and shipping costs were offset by the savings that would accompany the elimination of the costs associated with shipping the plants bare-rooted and then preparing them for sale after their arrival (i.e., de-potting the plants in the country of origin for importation purposes, then re-potting the plants in the United States for sale purposes).

The FAS data shows that the United States is a net importer of orchid plants. In 1996, the United States imported 223 metric tons of orchid plants worth \$4.3 million; Taiwan, Thailand, and The Netherlands together accounted for 93 percent of those imports. In 1997, 289 metric tons of orchid plants worth \$6.6 million were imported into the United States, with almost 90 percent of those imports originating in either Taiwan (171 metric tons), Thailand (49 metric tons), or The Netherlands (33 metric tons). In comparison, the United States

exported 52 metric tons of orchid plants in 1996 and 112 metric tons of orchid plants in 1997. The value of the 1997 U.S. exports was \$235,330.

### Effects on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic impact of rule changes on small businesses, organizations, and governmental jurisdictions. Those entities potentially affected by this proposed rule are growers, retailers, and importers of *Phalaenopsis* spp. orchids.

Domestic orchid growers sell their plants primarily at wholesale to general merchandise retailers (e.g., hardware or home improvement stores) and to specialty retailers such as specialty florists and landscapers. Domestic producers would be adversely affected if they lose plant sales to cheaper foreign imports. Currently, *Phalaenopsis* spp. orchids grown in Taiwan are sold in the United States at or below the price of domestically produced *Phalaenopsis* spp. orchids, according to the AOS. This proposed rule would likely enhance the competitive positions of the countries currently exporting orchids to the United States if, as discussed above, it serves to reduce the costs that are incurred in preparing imported, bare-rooted *Phalaenopsis* spp. orchids for sale in the United States.

Domestic growers are already competing with imports of bare-rooted *Phalaenopsis* spp. orchids, so the magnitude of any adverse economic impact would depend on the extent to which they rely on potted *Phalaenopsis* spp. orchids as a source of their overall revenue, the extent to which their sales of potted *Phalaenopsis* spp. orchids are displaced by imports, and the amount of any increase in the overall level of orchid plant imports. Most orchid producers grow only orchids, and many of those—especially the larger producers—grow only one type of orchid. The number of producers who grow potted *Phalaenopsis* spp. orchids exclusively, i.e., those who could be affected most by the rule change, is unknown. However, many producers appear to be in that category, since the AOS estimates that about half of all potted orchid plants produced by U.S. growers are of the genus *Phalaenopsis*.

The amount of lost sales would depend, in turn, on the price differential between domestic and foreign plants and on the volume of plant imports, both of which are unknown at this time. If the price differential in favor of imports was not significant, it is conceivable that some retailers would continue to purchase their plants from domestic growers, especially if those

growers provided superior service or other non-price advantages. The volume of imports is significant because it could be too small to satisfy the demand of all retailers, leaving some with no other option but to purchase plants from domestic growers.

The availability of cheaper foreign imports would likely benefit plant retailers and importers. Retailers would benefit because they could pass the savings from lower wholesale prices on to their customers, creating an environment that would lead to increased sales volume and revenue. Importers would benefit from the income that the increased business activity would produce.

The number of commercial growers of potted *Phalaenopsis* spp. orchids in the United States is unknown, but there are at least 300 to 400 producers who grow one or more of the various types of potted orchid plants, since that is the number of growers who advertise their products through the AOS. The number of retailers who sell potted *Phalaenopsis* spp. orchids is also unknown, as is the number of importers. Nevertheless, it is reasonable to assume that most of the entities potentially affected by this proposed rule are small, at least by U.S. Small Business Administration's (SBA) standards. This assumption is based on composite data for providers of the same and similar services in the United States. In 1992, the per-farm average gross receipts for all 38,569 U.S. farms in Standard Industrial Classification (SIC) 0181 ("Ornamental Floriculture and Nursery Products," which includes potted orchid producers) was \$174,431, well below the SBA's small entity threshold of \$0.5 million for those farms. Similarly, the 1993 per-firm average gross receipts for all 9,867 U.S. firms in SIC 5261 ("Retail Nurseries, Lawn and Garden Supply Stores," which includes plant retailers) was \$688,898, well below the SBA's small entity threshold of \$5 million. In 1993, there were 3,877 U.S. firms in SIC 5193 ("Flowers, Nursery Stock, and Florists' Supplies," which includes plant importers), and 98 percent of those firms had fewer than 100 employees, the SBA's small entity threshold.

### Alternatives Considered

Two alternatives to this proposed rule were considered: (1) To make no changes in the regulations and (2) to limit the scope of the proposed rule to *Phalaenopsis* spp. orchids from Taiwan. We rejected the first alternative—making no change in the regulations—after determining that the degree of pest risk associated with the importation of *Phalaenopsis* spp. orchids in growing

media under the conditions set forth in § 319.37-8(e) is no greater than the pest risk associated with the importation of bare-rooted *Phalaenopsis* spp. orchids. Because there is no greater risk involved, we have no plant pest-based rationale for rejecting the Taiwanese request that we consider allowing the importation of *Phalaenopsis* spp. orchids in growing media. Similarly, we rejected the second alternative of limiting the scope of the proposal to *Phalaenopsis* spp. orchids from Taiwan because our pest risk assessment indicated that *Phalaenopsis* spp. orchids produced in accordance with the growing, inspection, and certification requirements of the regulations could be safely imported from any country, regardless of specific pest associations.

#### **Executive Order 12988**

This proposed rule would allow the importation of *Phalaenopsis* orchids established in growing media under certain conditions. If this proposed rule is adopted, State and local laws and regulations regarding *Phalaenopsis* orchids imported under this rule would

be preempted while the plants are in foreign commerce. Some nursery stock articles are imported for immediate distribution and sale to the consuming public, and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect would be given to this rule, and this rule would not require administrative proceedings before parties may file suit in court challenging this rule.

#### **Paperwork Reduction Act**

This proposed rule contains no new 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 319**

Bees, Coffee, Cotton, Fruits, Honey, Imports, Incorporation by reference, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

**Accordingly, we are proposing to amend 7 CFR part 319 as follows:**

#### **PART 319—FOREIGN QUARANTINE NOTICES**

1. The authority citation for part 319 would continue to read as follows:

**Authority:** 7 U.S.C. 150dd, 150ee, 150ff, 151-167, 450, 2803, and 2809; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.2(c).

#### **§ 319.37-8 [Amended]**

2. In § 319.37-8, paragraph (e), the introductory text of the paragraph would be amended by removing the footnote reference 11 immediately after the word "*Nidularium*," and adding the footnote reference 10 in its place, and by adding the word "*Phalaenopsis*," immediately after the word "*Peperomia*,".

Done in Washington, DC, this 25th day of August 1998.

**Alfred S. Elder,**

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

[FR Doc. 98-23406 Filed 8-31-98; 8:45 am]

BILLING CODE 3410-34-P