

# 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. 97-053-2]

#### Black Stem Rust; Addition of Rust-Resistant Varieties

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

**ACTION:** Proposed rule; withdrawal and reproposal.

**SUMMARY:** We are proposing to amend the black stem rust quarantine and regulations by requiring that persons who request the addition of *Berberis*, *Mahoberberis*, or *Mahonia* spp. plants to the list of rust-resistant varieties in the regulations must provide the Agency with a description of the variety that can be used by State nursery inspectors to clearly identify the variety and distinguish it from others. We are proposing to require that inspectors verify, prior to interstate movement, that varieties match their description. In addition, we are also proposing to add 32 new varieties to the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species. These proposed changes replace a previously published proposed rule, which we are withdrawing as part of this document, that would have added 15 new varieties to the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species without requiring the submission of descriptions of those varieties to the Agency. This proposed rule would help prevent the spread of black stem rust by providing for and requiring the accurate identification of rust-resistant varieties by inspectors and would provide for the interstate movement of newly developed varieties without unnecessary restrictions.

**DATES:** We invite you to comment on this docket. We will consider all comments that we receive by August 13, 2001.

**ADDRESSES:** Please send four copies of your comment (an original and three copies) to: Docket No. 97-053-2, 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. 97-053-2.

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 dockets, are available on the Internet at <http://www.aphis.usda.gov/ppd/rad/webrepor.html>.

**FOR FURTHER INFORMATION CONTACT:** Dr. Vedpal S. Malik, Agriculturist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1231; (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 wind-borne 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.

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.

On April 7, 1998, we published in the **Federal Register** (63 FR 16908-16909, Docket No. 97-053-1) a proposed rule to amend the regulations by adding 15 varieties to the list of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species.

We solicited comments concerning our proposal for 45 days ending on May 22, 1998. We received a total of two comments by that date. They were from a representative of the nursery industry and a State government official.

One commenter supported the proposed rule, but asked that we correct the nomenclature of one proposed rust-resistant barberry variety. The commenter also requested that we consider other changes to the black stem rust quarantine that were outside the scope of the proposed rulemaking.

The other commenter opposed the addition of more rust-resistant barberry varieties to the list in § 301.38-2 without the distribution of proper field identification aids to State inspectors. The commenter recommended that before additional plants are added to the list of rust-resistant barberry varieties in the regulations, the Animal and Plant Health Inspection Service (APHIS) should require persons who develop new varieties to provide APHIS with written descriptions and color photographs of the plants that can be used by inspectors to properly identify and distinguish between barberry varieties. The commenter stated that such a requirement would help to ensure that State inspectors can verify that plants moving into their States are indeed APHIS-approved rust-resistant barberry varieties.

Since this comment raises a new issue, we are reproposing the April 7, 1998, proposed rule and including regulatory text to address this comment. Also, several additional varieties of rust-resistant varieties have been submitted to APHIS for inclusion in the

regulations since the publication of the proposed rule. Therefore, we are proposing to amend the regulations to include these recently developed varieties.

In this document, we are proposing to require that persons who request APHIS to add a variety to the list of rust-resistant barberry varieties in the regulations must provide APHIS with a description of the variety, including a written description and color pictures that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties. This requirement would be contained in § 301.38–2(b) of the regulations. We are proposing this requirement in order to ensure that State plant inspectors can clearly determine whether plants moving into or through their States are rust-resistant varieties listed in § 301.38–2 of the regulations.

In conjunction with this requirement, we are also proposing to require that inspectors who issue certificates for the movement of rust-resistant barberry varieties under the regulations in § 301.38–4(b)(2) must, prior to issuing certificates, verify that the barberry varieties to be shipped match the description of the varieties that were provided to APHIS in accordance with the proposed regulations in § 301.38–2(b).

We are also proposing to add the following varieties to the lists of rust-resistant *Berberis*, *Mahoberberis*, and *Mahonia* species:

#### *Berberis*

*B. aggregata* x *B. wilsoniae* 'Pirate King'  
*B. x carminea* 'Pirate King'  
*B.* 'Amstelveen'  
*B. candidula* x *B. verruculosa*  
 'Amstelveen'  
*B. x frikartii* 'Amstelveen'  
*B. gagnepainii* 'Chenault'  
*B. integerrima* 'Wallichs Purple'  
*B. lologensis* 'Mystery Fire'  
*B. poiretii* 'BJG 073', 'MTA'  
*B. soulieana* 'Claret Cascade'  
*B. thunbergii* 'Antares'  
*B. thunbergii* 'Aurea Nana'  
*B. thunbergii* 'Bailone' (Ruby Carousel®)  
*B. thunbergii* 'Bailtwo' (Burgundy Carousel®)  
*B. thunbergii* 'Bailgreen' (Jade Carousel™)  
*B. thunbergii* 'Concorde'  
*B. thunbergii* 'Criruzam' Crimson Ruby™  
*B. thunbergii* 'Golden Pygmy'  
*B. thunbergii* 'Green Carpet'  
*B. thunbergii* 'Lime Glow'  
*B. thunbergii* 'Midruzam' Midnight Ruby™  
*B. thunbergii* 'Painter's Palette'  
*B. thunbergii* 'Royal Burgundy'

*B. thunbergii* 'Royal Cloak'  
*B. thunbergii* x 'Bailsel' (Golden Carousel®)  
*B. thunbergii* x 'Tara' (Emerald Carousel®)

#### *Mahoberberis*

*M. aquifolium* 'Smaragd'  
*M. x 'Magic'*

#### *Mahonia*

*M. aquifolium* 'Undulata'  
*M. japonica* x *M. lomariifolia* 'Charity'  
*M. x media* 'Charity'  
*M. x media* 'Winter Sun'

The nurseries that developed these rust-resistant species of *Berberis*, *Mahoberberis*, and *Mahonia* have provided identification guides to APHIS and to the receiving States. The proposed addition of these species to the list of rust-resistant 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 Rust 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 to 80 percent relative humidity. If the rust-susceptible plant shows signs of infection after 7 days and the test plant does not, the test results indicate that the test plant is 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 four 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 USDA to be rust-resistant.

#### 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.

This proposed rule would allow the interstate movement of 32 new varieties of *Berberis*, *Mahoberberis*, and *Mahonia* that have been determined to be resistant to black stem rust 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 three or four 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, 123 varieties of barberry plants are listed as rust-resistant. Of those 123 varieties, many are no longer propagated for commercial sale. Many consumers are choosing newer varieties that are horticulturally more attractive. This rule would add 32 new varieties to the current list of 123 varieties. The addition of these 32 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 *Berberis*, *Mahoberberis*, and *Mahonia* 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.

This proposed rule would require that persons requesting the addition of a barberry variety to the list of rust-resistant varieties in the regulations must first provide APHIS with a description of the variety, including a written description and color pictures that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties. This rule would also require that, prior

to interstate movement, an inspector must verify that a rust-resistant variety matches the description of the variety provided to APHIS. However, these proposed requirements are not expected to result in any measurable cost to persons involved in the production or movement of the plants.

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

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). 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. 97-053-2. Please send a copy of your comments to: (1) Docket No. 97-053-2, 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 proposed rule.

In this document, we are proposing to require that persons who request APHIS to add a variety to the list of rust-resistant barberry varieties in the regulations must provide APHIS with a description of the variety, including a written description and color pictures

that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties. This requirement would be contained in § 301.38-2(b) of the regulations. We are proposing this requirement in order to ensure that State plant inspectors can clearly determine whether plants moving into or through their States are rust-resistant varieties listed in § 301.38-2 of the regulations. We are asking OMB to approve the collection of this information for 3 years.

In conjunction with this requirement, we are also proposing to require that inspectors who issue certificates for the movement of rust-resistant barberry varieties under the regulations in § 301.38-4(b)(2) must, prior to issuing certificates, verify that the barberry varieties shipped match the description of the varieties that were provided to APHIS in accordance with the proposed regulations in § 301.38-2(b).

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed 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 proposed 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 4 hours per response.

*Respondents:* Nurseries that propagate new rust-resistant species and varieties of *Berberis* spp., *Mahoberberis* spp., and *Mahonia* spp.

*Estimated annual number of respondents:* 4.

*Estimated annual number of responses per respondent:* 2.

*Estimated annual number of responses:* 8.

*Estimated total annual burden on respondents:* 32 hours.

Copies of this information collection can be obtained from Mrs. Celeste

Sickles, APHIS' Information Collection Coordinator, at (301) 734-7477.

#### 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. 166, 7711, 7712, 7714, 7731, 7735, 7751, 7752, 7753, and 7754; 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 and Sec. 203, Title II, Pub. L. 106-224, 114 Stat. 400.

#### § 301.38-1 [Amended]

2. Section 301.38-1 would be amended as follows:

a. In the definition for *Rust-resistant plants*, by removing the words “§ 301.38-2 (b) and (c)” and adding the words “§ 301.38-2 (a)(2) and (a)(3)” in their place.

b. In the definition for *Rust-susceptible plants*, by removing the words “§ 301.38-2 (b) and (c)” and adding the words “§ 301.38-2(a)(2) and (a)(3)” in their place.

c. In the definition for *Regulated article*, by removing the words “§ 301.38-2 (a) through (d)” and adding the words “§ 301.38-2(a)(1) through (a)(4)” in their place, and by removing the words “§ 301.38-2(e)” and adding the words “§ 301.38-2(a)(5)” in their place.

3. Section 301.38-2 would be revised to read as follows:

#### § 301.38-2 Regulated articles.

(a) The following are regulated articles:<sup>3</sup>

(1) All seedlings and plants of less than 2 years' growth of the genus *Berberis*.

(2) All plants, seeds, fruits, and other plant parts capable of propagation from the following rust-resistant *Berberis* species.

*B. aggregata* x *B. wilsoniae* 'Pirate King'  
*B. 'Amstelveen'*  
*B. aridocalida*  
*B. beaniana*  
*B. buxifolia*  
*B. buxifolia nana*  
*B. calliantha*  
*B. candidula*

<sup>3</sup> Permit and other requirements for the interstate movement of black stem rust organisms are contained in part 330 of this chapter.

- B. candidula* Amstelveen'  
*B. candidula* x *B. verruculosa* 'Amstelveen'  
*B. cavallieri*  
*B. chenaulti*  
*B. chanaulti* 'Apricot Queen'  
*B. circumserata*  
*B. concinna*  
*B. coxii*  
*B. darwini*  
*B. dasystachya*  
*B. dubia*  
*B. feddeana*  
*B. formosana*  
*B. franchetiana*  
*B. gagnepainii*  
*B. gagnepaini* 'Chenault'  
*B. gilgiana*  
*B. gladwynensis*  
*B. gladwynensis* 'William Penn'  
*B. gyalaiica*  
*B. heterophylla*  
*B. horvathi*  
*B. hybrido-gagnepaini*  
*B. insignis*  
*B. integerrima* 'Wallichs Purple'  
*B. julianae*  
*B. julianae* 'Nana'  
*B. julianae* 'Spring Glory'  
*B. koreana*  
*B. koreana* x *B. thunbergii* hybrid *Bailsel*  
*B. koreana* x *B. thunbergii* hybrid *Tara*  
*B. lempergiana*  
*B. lepidifolia*  
*B. linearifolia*  
*B. linearifolia* var. 'Orange King'  
*B. lologensis*  
*B. lologensis* 'Mystery Fire'  
*B. manipurana*  
*B. media* 'Park Jewel'  
*B. media* 'Red Jewel'  
*B. mentorensis*  
*B. pallens*  
*B. poiretii* 'BJG 073', 'MTA'  
*B. potanini*  
*B. Renton*  
*B. replicata*  
*B. sanguinea*  
*B. sargentiana*  
*B. sikkimensis*  
*B. soulieana* 'Claret Cascade'  
*B. stenophylla*  
*B. stenophylla diversifolia*  
*B. stenophylla irwini*  
*B. stenophylla gracilis*  
*B. stenophylla nana compacta*  
*B. taliensis*  
*B. telomaica artisejala*  
*B. thunbergii*  
*B. thunbergii* 'Antares'  
*B. thunbergii aurea*  
*B. thunbergii* 'Aurea Nana'  
*B. thunbergii argenteo marginata*  
*B. thunbergii atropurpurea*  
*B. thunbergii atropurpurea erecta*  
*B. thunbergii atropurpurea erecta Marshalli*  
*B. thunbergii atropurpurea* 'Golden Ring'  
*B. thunbergii atropurpurea* 'Intermedia'  
*B. thunbergii atropurpurea* 'Knight Burgundy'  
*B. thunbergii atropurpurea nana*  
*B. thunbergii atropurpurea* 'Redbird'  
*B. thunbergii atropurpurea* 'Rose Glow'  
*B. thunbergii* 'Bagatelle'  
*B. thunbergii* 'Bailone'  
*B. thunbergii* 'Bailtwo'  
*B. thunbergii* 'Bailone' (Ruby Carousel®)  
*B. thunbergii* 'Bailtwo' (Burgundy Carousel®)  
*B. thunbergii* 'Bailgreen' (Jade Carousel™)  
*B. thunbergii* 'Bonanza Gold'  
*B. thunbergii* 'Concorde'  
*B. thunbergii* 'Crimson Pygmy'  
*B. thunbergii* 'Crizumam' Crimson Ruby  
*B. thunbergii* 'Dwarf Jewell'  
*B. thunbergii* erecta  
*B. thunbergii* 'globe'  
*B. thunbergii* 'golden'  
*B. thunbergii* 'Golden Pygmy'  
*B. thunbergii* 'Green Carpet'  
*B. thunbergii* 'Harlequin'  
*B. thunbergii* 'Helmond Pillar'  
*B. thunbergii* 'Kobold'  
*B. thunbergii* 'Lime Glow'  
*B. thunbergii* 'Lustre Green'  
*B. thunbergii* maximowiczii  
*B. thunbergii* 'Midruzam' Midnight Ruby  
*B. thunbergii* minor  
*B. thunbergii* 'Monry'  
*B. thunbergii* 'Monlers'  
*B. thunbergii* 'Monomb'  
*B. thunbergii* 'Painter's Palette'  
*B. thunbergii* 'Pink Queen'  
*B. thunbergii* pluriflora  
*B. thunbergii* 'Royal Burgundy'  
*B. thunbergii* 'Royal Cloak'  
*B. thunbergii* 'Sparkle'  
*B. thunbergii* 'Thornless'  
*B. thunbergii* 'Upright Jewell'  
*B. thunbergii* variegata  
*B. thunbergii xanthocarpa*  
*B. thunbergii* x 'Bailsel' (Golden Carousel®)  
*B. thunbergii* x 'Tara' (Emerald Carousel®)  
*B. triacanthophora*  
*B. triculosa*  
*B. verruculosa*  
*B. virgatorum*  
*B. workingensis*  
*B. xanthoxylon*  
*B. x carminea* 'Pirate King'  
*B. x frikartii* 'Amstelveen'
- (3) All plants, seedlings, seeds, fruits, and other plant parts capable of propagation from the following rust-resistant *Mahoberberis* and *Mahonia* species, except *Mahonia* cuttings for decorative purposes:  
 (i) Genus *Mahoberberis*:  
*M. aqui-candidula*  
*M. aquifolium* 'Smaragd'  
*M. aqui-sargentiae*  
*M. miethkeana*  
*M. x 'Magic'*  
 (ii) Genus *Mahonia*:  
*M. amplexens*  
*M. aquifolium*  
*M. aquifolium atropurpurea*  
*M. aquifolium compacta*  
*M. aquifolium compacta* 'John Muir'  
*M. aquifolium* 'Donewell'  
*M. aquifolium* 'Kings Ransom'  
*M. aquifolium* 'Orangee Flame'  
*M. aquifolium* 'Undulata'  
*M. aquifolium* 'Winter Sun'  
*M. 'Arthur Menzies'*  
*M. bealei*  
*M. dictyota*  
*M. fortunei*  
*M. 'Golden Abundance'*  
*M. japonica*  
*M. japonica* x *M. lomariifolia* 'Charity'  
*M. lomariifolia*  
*M. nervosa*  
*M. pinnata*  
*M. pinnata* 'Ken Hartman'  
*M. piperiana*  
*M. pumila*  
*M. repens*  
*M. x media* 'Charity'  
*M. x media* 'Winter Sun'
- (4) All plants, seeds, fruits, and other plant parts capable of propagation from rust-susceptible species and varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, and seedlings from rust-susceptible species and varieties of the genera *Mahoberberis* and *Mahonia*, except *Mahonia* cuttings for decorative purposes.  
 (5) Any other product or article not listed in paragraphs (a)(i) through (a)(4) of this section that an inspector determines presents a risk of spread of black stem rust. The inspector must notify the person in possession of the product or article that it is subject to the provisions of this subpart.  
 (b) The person requesting that a rust-resistant variety be added to paragraphs (a)(2) and (a)(3) of this section must provide APHIS with a description of the variety, including a written description and color pictures that can be used by State nursery inspectors to clearly identify the variety and distinguish it from other varieties.
- § 301.38-4 [Amended]**  
 4. Section 301.38-4 would be amended as follows:  
 a. In paragraph (b)(2)(i), by removing the words "§ 301.38-2 (b)" and adding the words "§ 301.38-2 (a)(2)" in their place.  
 b. In paragraph (b)(2)(ii), by removing the words "§ 301.38-2 (c)" and adding the words "§ 301.38-2 (a)(3)" in their place.  
 5. Section 301.38-5(b) would be revised to read as follows:

**§ 301.38-5 Assembly and inspection of regulated articles: issuance and cancellation of certificates.**

\* \* \* \* \*

(b) An inspector may issue a certificate for the interstate movement of a regulated article if he or she:

(1) Determines, upon examination, that the regulated article may be moved interstate in accordance with § 301.38-4;

(2) Determines that the regulated article may be moved interstate in accordance with all other Federal domestic plant quarantines and regulations applicable to the regulated article; and

(3) Verifies that the regulated article, if being moved interstate in accordance with § 301.38-4(b)(2), matches the description provided to APHIS in accordance with § 301.38-2(b).

\* \* \* \* \*

Done in Washington, DC, this 8th day of June 2001.

**Bobby R. Acord,**

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

[FR Doc. 01-14943 Filed 6-13-01; 8:45 am]

BILLING CODE 3410-34-P

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## DEPARTMENT OF ENERGY

### 10 CFR Part 1008

RIN: 1901-AA69

#### Privacy Act; Implementation

**AGENCY:** Department of Energy.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) proposes to amend its Privacy Act regulation by adding three systems of records to the list of systems exempted from certain subsections of the Act. Exemptions for two systems of records are needed to enable the Office of Employee Concerns and the Office of Hearings and Appeals to perform their duties and responsibilities with regard to investigation and/or adjudication of employee and contractor employee concerns or complaints, pursuant to the whistleblower protection provisions in Part 708 of title 10 of the Code of Federal Regulations (CFR) and applicable laws. An exemption for a third system of records is needed to enable the Office of Intelligence to perform its duties and responsibilities.

**DATES:** Written comments should be made on or before July 16, 2001.

**ADDRESSES:** Written comments should be directed to: Abel Lopez, Director, Freedom of Information Act and Privacy Act Division, U.S. Department of

Energy, MA-73, 1000 Independence Avenue, SW, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Abel Lopez (Privacy Act Officer), (202) 586-5955; William Lewis (program contact for Office of Employee Concerns), (202) 586-6530; William Schwartz (program contact for Office of Hearings and Appeals), (202) 287-1522; or Caryl Butler Gross (program contact for Office of Intelligence), (202) 586-5172.

**SUPPLEMENTARY INFORMATION:**

I. Background

II. Analysis

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A. Review Under Executive Order 12866

B. Review Under Executive Order 12988

C. Review Under the Regulatory Flexibility Act

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I. Review Under Executive Order 13084

IV. Public Comment

**I. Background**

Pursuant to the Privacy Act of 1974 (the Act), as amended (5 U.S.C. 552a(j) and (k)), the Secretary of Energy is authorized to promulgate rules, in accordance with the notice and comment requirements in 5 U.S.C. 553, to exempt any system of records within the agency from certain subsections of the Act. Accordingly, DOE is proposing three new systems of records to be added to the list of systems of records exempted from certain subsections of the Act.

One of the proposed exemptions would amend the DOE's Privacy Act regulation to enable the Office of Employee Concerns to carry out its investigative duties and responsibilities. DOE recognizes that free and open expression of DOE Federal and contractor and subcontractor employee concerns is essential to safe and efficient accomplishment of DOE's mission. DOE and contractor employees have the right and responsibility to report concerns relating to the environment, safety, health, or management of Department operations. The Employee Concerns Program is designed to encourage open communication; inform employees of the proper forum for consideration of their concerns; ensure employees can raise issues without fearing reprisal; address employee concerns in a timely and objective manner; and provide employees an avenue for consideration of concerns that fall outside existing

systems. Employee Concerns Program records include concerns or complaints brought to the attention of DOE Employee Concerns Program offices. These records include the receipt of complaints filed under 10 CFR part 708, the DOE Contractor Employee Protection Program. The records in this system will be used by employee concerns program offices to document concerns brought to their attention and to assist in the resolution of concerns about various work-related issues including the environment, safety, health, employer-supervisor relationships, or work processes and practices.

A second proposed exemption would amend the DOE's Privacy Act regulation to enable the Office of Hearings and Appeals to carry out its investigative and adjudicatory duties and responsibilities under 10 CFR part 708 and other whistleblower protection laws. These include investigating allegations of acts of reprisal taken against a DOE employee or DOE contractor employee who claims to have made a protected disclosure, as defined in 10 CFR part 708, and subsequently processing such "whistleblower" claims, including hearings and appeals on such matters. These duties and responsibilities are carried out pursuant to those regulations and section 3164 of the National Defense Authorization Act for FY 2000 (Pub. L. 106-65), *codified in* 42 U.S.C. 7239.

The third proposed exemption would amend the DOE's Privacy Act regulation to enable the Office of Intelligence to carry out its duties and responsibilities involving national security. More specifically, these include controlling access to and use of Sensitive Compartmented Information (SCI) and other classified intelligence information bearing the Director, Central Intelligence (DCI) authorized control markings; approving access to SCI in compliance with DCI directives; and conducting eligibility determinations, adjudications, revocations and appeals from denials and revocations.

**II. Analysis**

DOE proposes to amend § 1008.12 (b) of its Privacy Act regulation to exempt the following three new systems of records from certain subsections of the Privacy Act (5 U.S.C. 552a).

The system of records, "Employee Concerns Program Records" (DOE-3), will be exempt from subsections (c)(3), (d)(2), and (e)(1) of 5 U.S.C. 552a pursuant to subsections (k)(1), (2), and (5), to the extent that information in this system meets the requirements of those subsections of the Act.