

Rules and Regulations

Federal Register

Vol. 67, No. 83

Tuesday, April 30, 2002

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 01–118–1]

Karnal Bunt; Restrictions on the Use of Grain Originating in a Regulated Area

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Karnal bunt regulations to prohibit grain grown in a regulated area from being used as seed outside the regulated areas. This action is necessary to address the absence in the regulations of an explicit prohibition on the use of grain grown in a regulated area as seed in fields located outside the regulated area. We are also removing the requirement that wheat seed, durum wheat seed, and triticale seed that originates within a regulated area be treated with a fungicide before it may be planted within a regulated area. This interim rule will help to prevent the artificial spread of Karnal bunt to fields outside the regulated area by prohibiting the use of potentially spore-positive grain as seed in those fields and will remove a treatment requirement that we have determined is not necessary.

DATES: This interim rule was effective April 25, 2002. We will consider all comments we receive that are postmarked, delivered, or e-mailed by July 1, 2002.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 01–118–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River

Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 01–118–1. If you use e-mail, address your comment to regulations@aphis.usda.gov. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and “Docket No. 01–118–1” on the subject line.

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: Mr. Robert Spaide, Director, Surveillance and Emergency Programs Planning and Coordination, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–7819.

SUPPLEMENTARY INFORMATION:

Background

Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum* X *Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the smut fungus *Tilletia indica* (Mitra) Mundkur and is spread by spores, primarily through the movement of infected seed. In the absence of measures taken by the U.S. Department of Agriculture (USDA) to prevent its spread, the establishment of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets.

Use of Grain as Seed

The domestic quarantine and regulations regarding Karnal bunt are set forth in “Subpart—Karnal Bunt” (7 CFR 301.89–1 through 301.89–16, referred to below as the regulations). Among other things, the regulations define areas

regulated for Karnal bunt and restrict the movement of regulated articles, including wheat seed and grain, from the regulated areas. Those movement restrictions are designed to prevent the artificial spread of Karnal bunt. Certain regulated articles are eligible for movement out of a regulated area under a certificate, which is a document in which an inspector or a person operating under a compliance agreement affirms that a specified regulated article meets the requirements of the regulations and may be moved to any destination. Other articles may be moved only under a limited permit, which is a document in which an inspector affirms that a specified regulated article not eligible for a certificate is eligible for movement only to a specified destination and in accordance with conditions specified on the permit. However, the regulations have not included an explicit prohibition on the use of grain grown in a regulated area as seed in fields located outside the regulated area.

A recent case made apparent the need for such an explicit prohibition. In that case, grain produced in a Texas county that subsequently became a regulated area was moved to a storage facility outside that county before it was designated as a regulated area. Once the county was designated as a regulated area and it was determined that grain produced in that county was being stored outside the regulated area, the grain was tested for Karnal bunt and found free of bunted kernels. Because this grain originated in a regulated area and had not been found negative for Karnal bunt through testing at the field level, the grain (and the grain with which it had been commingled) was ineligible for movement under a certificate and could only move under limited permit. During routine audits of the issued limited permits from the storage facility, we discovered that some of the commingled grain had been sold for seed. Subsequent sampling at the facility of the lots sold as seed confirmed that the seed was spore positive, so the grain was not eligible for use as seed within the regulated area. Upon further investigation, we found that some of the commingled grain had been used as seed in fields outside the regulated area. It is, therefore, possible that the use of spore-positive grain as seed will result in the artificial spread

of Karnal bunt to the fields outside the regulated area in which it was planted. Although the regulations in § 301.89–6(c) regarding limited permits state that regulated articles may be moved under a limited permit only if the movement will not result in the artificial spread of Karnal bunt, it appears that the absence of an explicit prohibition on the use of grain produced in a regulated area as seed outside the regulated area may have played a role in the case described above. This interim rule is necessary to prevent a recurrence of this situation.

Specifically, we are amending § 301.89–4, “Planting,” to add a paragraph prohibiting wheat, durum wheat, and triticale that originates within a regulated area from being planted outside a regulated area.

We are also amending § 301.89–6, “Issuance of a certificate or limited permit,” to prohibit wheat, durum wheat, and triticale that is moved out of a regulated area under a certificate from being used for planting outside the regulated area. These changes will help to prevent the artificial spread of Karnal bunt to fields outside the regulated area by explicitly prohibiting the use of potentially spore-positive grain as seed in those fields.

Seed Treatment

The regulations also require that seed that originates within a regulated area must be treated with an approved fungicide before it may be planted within a regulated area. We are eliminating this requirement because we have been unable to conclusively establish that fungicide treatments applied to seed are effective in preventing Karnal bunt infection. The biology of the Karnal bunt pathogen is such that the disease does not occur until the flowering stage of the host plant, and then only if conditions are right; there is currently no supportive literature that shows the seed treatments reduce infection at flowering. We are, therefore, amending § 301.89–4 to remove the requirement for fungicide treatment for wheat seed, durum wheat seed, and triticale seed that originates within a regulated area before it may be planted within a regulated area. Further, the removal of this treatment requirement means that the seed treatment methods listed in § 301.89–13(d) are no longer necessary, so we are amending § 301.89–13, “Treatments,” by removing paragraph (d).

Miscellaneous

We are also making one minor editorial change to § 301.89–6(d). That paragraph has referred to the issuance of certificates under § 301.89–6(a) and

limited permits under § 301.89–6(b). However, paragraphs (a) and (b) of § 301.89–6 currently pertain to the issuance of certificates, and the requirements for the issuance of limited permits are in paragraph (c) of that section. We have, therefore, amended § 301.89–6(d) so that it refers to the correct paragraphs.

Immediate Action

Immediate action is necessary to prevent the artificial spread of Karnal bunt to fields outside the regulated area and to remove a treatment requirement that we have determined is unnecessary. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

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

We are amending the Karnal bunt regulations to prohibit grain grown in a regulated area from being used as seed outside the regulated areas. This action is necessary to address the absence in the regulations of an explicit prohibition on the use of grain grown in a regulated area as seed in fields located outside the regulated area. We are also removing the requirement that wheat seed, durum wheat seed, and triticale seed that originates within a regulated area be treated with a fungicide before it may be planted within a regulated area.

Currently, major foreign importers will not accept U.S. wheat unless it can be certified as coming from an area where Karnal bunt is not known to exist. To the extent that it helps prevent the artificial spread of Karnal bunt in the United States, this interim rule has the potential for averting the loss of export sales of U.S. wheat. The potential economic benefits are substantial; perhaps as much as 20 to 25 percent of U.S. wheat exports are contingent on the

Karnal bunt certification. During the first 10 months of 2001, the U.S. exported 20.7 million metric tons of wheat, valued at \$2.7 billion.

As a practical matter, this interim rule's prohibition on the use of grain grown in a regulated area from being used as seed outside the regulated area is likely to have little or no negative economic impact. This is because most growers outside regulated areas, aware of the risks involved, are unlikely to knowingly use grain grown in a regulated area as seed. Furthermore, this specific prohibition would have no impact on the ability of growers in non-regulated areas to continue using grain (as opposed to the more costly certified seed) for planting. Growers in non-regulated areas will still be able to use grain as seed, as long as it is grown outside the regulated areas.

This aspect of the interim rule also will not prevent growers and handlers in regulated areas from selling their spore-positive (but bunted kernel negative) wheat outside regulated areas; they will still be able to do so, as long as it is used for grain or another approved purpose.

The removal of the fungicide requirement will save growers approximately \$225,000 per year for seed produced within the regulated area. Most of the savings (approximately \$175,000) will accrue to growers in the four regulated northern Texas counties of Archer, Baylor, Throckmorton, and Young. The balance of the savings will accrue to growers in San Saba County, TX, and in the regulated areas of California. The cost of fungicide treatment varies, but generally runs from \$0.50 to \$1 per bushel. The savings might potentially affect approximately 470 growers, at an average of \$479 per grower.

The Regulatory Flexibility Act requires that agencies consider the economic impact of their rules on small businesses, organizations, and governmental jurisdictions. Growers and handlers of wheat (especially those in or near the regulated areas of Texas) are the entities most likely to be affected by this interim rule.

It is estimated that there are a total of 450 to 500 wheat growers and handlers in the regulated areas of Texas, most of whom are growers with total annual sales of less than \$750,000, the Small Business Administration's threshold for classifying wheat producers as small entities. Accordingly, any economic impact of the rule change will fall largely on small entities.

As explained previously, this rule's prohibition on the use of grain grown in a regulated area as seed in fields outside

the regulated area is likely to have little or no economic impact. The removal of the fungicide treatment requirement will save growers the cost of treatment, which varies from \$0.50 to \$1 per bushel, thus resulting in a slight reduction in per-acre planting costs.

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 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 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 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are amending 7 CFR part 301 to read as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues 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; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Section 301.89–4 is revised to read as follows:

§ 301.89–4 Planting.

(a) Wheat, durum wheat, and triticale may be planted in all fields within a regulated area. All wheat seed, durum wheat seed, and triticale seed that originates within a regulated area must be tested and found free from spores and bunted wheat kernels before it may be planted within a regulated area.

(b) No wheat, durum wheat, or triticale that originates within a regulated area may be used for planting outside a regulated area.

3. In § 301.89–6, paragraph (b) is amended by adding a new sentence after the last sentence, and paragraph (d) is amended by revising the last sentence to read as follows:

§ 301.89–6 Issuance of a certificate or limited permit.

* * * * *

(b) * * * No wheat, durum wheat, or triticale moved out of a regulated area under a certificate may be used for planting outside the regulated area.

* * * * *

(d) * * * These certificates and limited permits may then be completed and used, as needed, for the movement of regulated articles that have met the applicable requirements of paragraphs (a) and (b) of this section for the issuance of certificates or of paragraph (c) of this section for the issuance of limited permits.

§ 301.89–13 [Amended]

4. In § 301.89–13, paragraph (d) is removed and reserved.

Done in Washington, DC, this 25th day of April 2002.

W. Ron DeHaven,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 02–10566 Filed 4–29–02; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV02–930–1 FR]

Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2001–2002 Crop Year for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes final free and restricted percentages for the 2001–2002 crop year. The percentages are 59 percent free and 41 percent restricted and will establish the proportion of cherries from the 2001 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions and were recommended by the Cherry Industry Administrative Board (Board), the body which locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York,

Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Effective July 1, 2001, through June 30, 2002. This rule applies to tart cherries acquired during the 2001–2002 crop year until the restricted cherries from that crop year are diverted or used for exempt purposes under the marketing order.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, MD 20737, telephone: (301) 734–5234, or Fax: (301) 734–5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing agreement and Order No. 930 (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 rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This rule will establish final free and restricted percentages for tart cherries for the 2001–2002 crop year, beginning July 1, 2001, through June 30, 2002. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.