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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. 98–103–5]

#### Importation of Artificially Dwarfed Plants in Growing Media from the People's Republic of China

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations governing the importation of plants and plant products to add artificially dwarfed (penjing) plants of the species *Buxus sinica*, *Ehretia microphylla*, *Podocarpus macrophyllus*, *Sageretia thea*, and *Serissa foetida* from the People's Republic of China to the list of plants that may be imported in an approved growing medium subject to specified growing, inspection, and certification requirements. We are taking this action in response to a request by the Government of China and after determining that the penjing plants established in growing media can be imported without resulting in the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. This rule will relieve restrictions that currently allow these species to be imported only as bare-rooted plants.

**EFFECTIVE DATE:** February 17, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Thomas, Import Specialist, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road, Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

#### SUPPLEMENTARY INFORMATION:

#### Background

On September 20, 2000, we published in the **Federal Register** (65 FR 56803–

56806, Docket No. 98–103–1) a proposal to amend the regulations governing the importation of plants and plant products to allow artificially dwarfed plants (penjing) of the genera *Buxus*, *Ehretia* (*Carmona*), *Podocarpus*, *Sageretia*, and *Serissa* to be imported into the United States from the People's Republic of China in an approved growing medium subject to specified growing, inspection, and certification requirements. We proposed this action after assessing the pest risks associated with the importation of penjing established in growing media from the People's Republic of China under the conditions outlined in the proposed rule and determining that those plants could be imported into the United States without presenting a significant risk of introducing or disseminating dangerous plant pests. We solicited comments regarding the proposed rule for 60 days, ending November 20, 2000. We subsequently extended the comment period until December 20, 2000 (see 65 FR 75187, Docket No. 98–103–2, published on December 1, 2000).

In response to comments received on the proposed rule (discussed in detail later in this document), the Animal and Plant Health Inspection Service (APHIS) narrowed the application of the rule to five species of plants (*Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla*) from China and entered into consultation with the U.S. Fish and Wildlife Service (FWS) to assess the potential effects of the proposed action on endangered or threatened species, as required under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). On April 10, 2003, FWS concluded the section 7 consultation process by concurring with APHIS's determination that the importation of penjing plants from China in growing media will not adversely affect federally listed or proposed endangered or threatened species or their habitats. The section 7 consultation for this rule is described later in this document.

Upon receiving concurrence from FWS, APHIS completed an environmental assessment in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for

implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS's NEPA Implementing Procedures (7 CFR part 372). On September 15, 2003, we published in the **Federal Register** (68 FR 53956–53957, Docket No. 98–103–3) a notice announcing the availability of the environmental assessment, and solicited comments on the environmental assessment for 30 days ending October 15, 2003. On October 28, 2003, we published in the **Federal Register** (68 FR 61391–61392, Docket No. 98–103–4) another notice that extended the comment period on the environmental assessment for an additional 15 days ending November 12, 2003.

#### *Risk Assessments and Risk Management Analysis*

The risk assessments that supported our proposed rule (referred to elsewhere in this document as the 1996 risk assessments) identified pests that are known to be associated with the five species of penjing plants in China and assessed the risk posed by those pests 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. Because the original risk assessments were prepared in September 1996, APHIS believed it was appropriate to update them in order to bring them up to date with current APHIS guidelines<sup>1</sup> for pathway-initiated risk assessments. The 1996 risk assessments were based on guidelines applicable at the time those assessments were drafted, and the updates were necessary to provide the most transparent communication of risk possible at this time. The updated risk assessment documents are referred to elsewhere in this document as the 2003 supplementary risk assessments.

Further, as noted by commenters, the 1996 risk assessments did not contain a thorough description of how the mitigation measures required under the regulations in § 319.37–8(e) reduce the risk posed by the specific quarantine pests of penjing that were identified in the risk assessments. To address these

<sup>1</sup> Version 5.02, available on the Internet at: <http://www.aphis.usda.gov/ppq/pracommodity/cpraguide.pdf>.

concerns, we have prepared a risk management analysis, "Pest Risk Management for Chinese Penjing Plants (September 15, 2003)," that includes a substantial discussion of how the risk mitigation measures required under this final rule mitigate the risks posed by the classes of quarantine pests that were identified as likely to follow the commodity import pathway. The 2003 risk management analysis, as well as the 2003 supplemental risk assessments are available on the Internet at <http://www.aphis.usda.gov/ppq/pim/>.

#### *Determination by the Secretary*

In this document, APHIS is adopting its proposal to allow the importation of penjing plants from China established in an approved growing medium as a final rule, with the changes discussed in this document. Specifically, we are allowing the importation of *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* penjing plants in growing media from China only.

Under § 412(a) of the Plant Protection Act, the Secretary of Agriculture may prohibit or restrict the importation and entry of any plant or plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

The Secretary has determined that it is not necessary to prohibit the importation of five species of penjing plants from China that are established in an approved growing medium in order to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. This determination is based on the findings of the risk documents referred to earlier in this document and the Secretary's judgment that the application of the measures required under this rule will prevent the introduction or dissemination of plant pests into the United States.

#### *Regulatory Requirements*

Under this final rule, penjing plants of the species *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* imported in growing media are subject to the requirements of paragraph (a) of § 319.37–8 of the regulations, which 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 10 listed taxa may be imported into the United States established in an approved growing medium. In addition to other requirements, § 319.37–8(e):

- Specifies the types of growing media that may be used;
- Requires plants to be grown in accordance with written agreements between 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 addition to being subject to the general requirements of § 319.37–8(e), under this final rule, penjing plants imported from China in growing media must also meet the following requirements:

- The propagative materials used to produce the penjing plants may enter an

approved greenhouse only as seeds, tissue cultures, unrooted cuttings, or rooted cuttings without growing media. Rooted cuttings may not be established or grown in soil at any time. Rooted cuttings may be established in a greenhouse or outside the greenhouse on raised benches (46 cm in height) in pots containing only APHIS approved growing media.

- When any cuttings are introduced into the greenhouse, they must be free of growing media, inspected, and found free of plant pests and then treated with a pesticide dip approved by the Animal and Plant Quarantine Service of the People's Republic of China that will control mites, scale insects, whiteflies, thrips, and fungi. The plants must be propagated from mother plants that have been visually inspected by an APHIS inspector or an inspector of the Animal and Plant Quarantine Service of the People's Republic of China and found free of certain pests.

- The penjing plants must be grown in a greenhouse that meets the requirements of § 319.37–8(e) for at least 6 months immediately prior to export.

- While in the greenhouse, plants must be treated with appropriate pesticides at least once every 10 days or as needed for 3 months before shipping to maintain a pest-free condition.

These additional requirements were determined to be necessary according to risk analysis to mitigate the unique risks posed by the five species of penjing plants that are eligible for importation from China in growing media under this final rule.

#### *Other Recent Revisions to Regulations Pertaining to Imported Artificially Dwarfed Plants*

On August 19, 2002, APHIS published in the **Federal Register** a final rule (67 FR 53727–53731, Docket No. 00–042–2) that amended the regulations pertaining to all imported artificially dwarfed plants. Under the requirements established by that final rule (contained in § 319.37–5(q)), imported artificially dwarfed plants must be grown in accordance with the following requirements and be accompanied by a phytosanitary certificate containing declarations that those requirements have been met:

- The artificially dwarfed plants must be grown for at least 2 years in a greenhouse or screenhouse in a nursery registered with the government of the country where the plants were grown;

- The greenhouse or screenhouse in which the artificially dwarfed plants are grown must have screening with openings of not more than 1.6 mm on all vents and openings, and all

entryways must be equipped with automatic closing doors;

- The artificially dwarfed plants must be grown in pots containing only sterile growing media during the 2-year period when they are grown in a greenhouse or screenhouse in a registered nursery;

- The artificially dwarfed plants must be grown on benches at least 50 cm above the ground during the 2-year period when they are grown in a greenhouse or screenhouse in a registered nursery; and

- The plants and the greenhouse or screenhouse and nursery where they are grown must be inspected for any evidence of pests and found free of pests of quarantine significance to the United States at least once every 12 months by the plant protection service of the country where the plants are grown.

We wish to clarify that, for the purposes of the regulations, plants less than 2 years of age are not considered to be artificially dwarfed, even if they have been trained in the same manner as other artificially dwarfed plants. Although the regulations in § 319.37–5(q) require artificially dwarfed plants to be grown in a greenhouse for 2 years, plants that are less than 2 years of age may be imported subject to applicable regulations in “Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products” (§§ 319.37 through 319.37–14).

The regulations in § 319.37–5(q) were proposed and adopted after publication of our proposed rule regarding the importation of penjing from China in growing media, and were intended to address the risk that imported artificially dwarfed plants could be infested by longhorned beetles. These requirements do not apply to penjing plants imported from China in growing media under the regulations in § 319.37–8(e) unless the imported penjing plants are 2 years of age or older. Penjing plants less than 2 years of age that are grown in accordance with the requirements of § 319.37–8(e) are not likely to become infested with longhorned beetles due to pest-exclusionary greenhouse conditions. Furthermore, such plants are not likely to be of suitable size to provide harborage for wood-boring beetles.

We believe that plants that are 2 years of age or greater may reach dimensions that could provide harborage for longhorned beetles, and therefore, penjing plants imported from China in growing media that are 2 years of age or older must satisfy the requirements of this final rule and the requirements of § 319.37–5(q). For example, the regulations in § 319.37–5(q) require that plants be grown for 2 years in a

greenhouse or screenhouse with screen openings no greater than 1.6 mm in size, while § 319.37–8(e) requires that plants be grown for 6 months in a greenhouse with screen openings no greater than 0.6 mm in size. Again, both requirements must be satisfied. One way to satisfy both requirements would be to grow the plants in accordance with § 319.37–5(q) for 18 months, and then move them to a greenhouse that meets the requirements of § 319.37–8(e) for 6 additional months. Alternately, the plants could be grown in a greenhouse that meets the requirements of § 319.37–8(e) for a total of 24 months, thus eliminating the need for multiple facilities and the movement of plants.

The current regulations in § 319.37–5(q) do not make it clear that plants less than 2 years of age are not subject to the regulations in that section. We are therefore clarifying that fact in this final rule. This change will not affect the way the current regulations are enforced, and is necessary to clarify what imported plants are subject to the requirements of § 319.37–5(q), especially in light of the revisions made to the regulations by this final rule.

#### *Discussion of Public Comments on the Proposed Rule*

We received eight comments on the proposed rule. Two comments, which arrived during the first 60 days of the comment period, simply asked for an extension of the comment period, which we granted. The other six comments were from representatives of plant industry organizations, an invasive species interest group, and representatives of State agricultural agencies.

We also received seven comments in response to our September 2003 notice of the availability of the environmental assessment. Some of those comments pertain to the risk documents or to the proposed rule for this action. All of these comments are addressed below, along with comments submitted during the comment period for the proposed rule.

#### *Compliance and APHIS's Ability to Enforce*

One commenter stated that due to budget cuts and downsizing in Federal agencies, it is unclear whether APHIS can continue to conduct adequate inspections, especially in the face of an increase in the amount of plant material entering the United States.

While some Federal agencies have been subject to budget cuts and downsizing, APHIS's appropriated funding for Agricultural Quarantine Inspection (AQI) Programs has doubled

since 1998, from approximately \$27.2 million to \$55 million in 2002. Funds collected via AQI user fees have increased from \$140.5 million in 1998 to \$260 million in 2002. The inspections required under this rule will not be affected by the transfer of APHIS personnel to the Department of Homeland Security (DHS). All plants imported under this rule are required to be imported into Federal plant inspection stations,<sup>2</sup> which continue to be staffed by specially trained APHIS, not DHS, inspectors. APHIS has reviewed its resources and believes it has adequate resources available to ensure compliance with the conditions of the final rule.

Another commenter suggested that some inspectors may not be able to recognize every pest of risk, and claimed that APHIS's own pest interception data show that inspectors are often unable to identify the genus and species of intercepted pests.

When an unknown pest is found, inspectors may allow treatment of the commodity; they may allow the shipper to re-export the commodity to the country of origin, or, in some cases, to another country, or they may destroy the commodity, if necessary. Such decisions are based on the information that is available on the pests and are made in consultation with APHIS-Plant Protection and Quarantine's National Identification Service,<sup>3</sup> which is made up of national experts on pest identification.

One commenter stated that the conditions imposed by § 319.37–8 cannot be verified by APHIS because the cost of attempting to verify compliance is a significant expense and would require an unprecedented level of cooperation from other governments and their agencies.

Under the regulations in § 319.37–8, there must be an agreement between APHIS and a foreign entity for enforcement of the regulations in that section. In this case, the agreement will technically be between APHIS and the national plant protection organization of China. This agreement is referred to elsewhere in this document as the bilateral workplan. Each grower who wishes to export to the United States under the regulations must enter into an agreement with the national plant protection organization of the People's Republic of China whereby he or she must agree to comply with the

<sup>2</sup> A list of Federal plant inspection stations is contained in 7 CFR 319.37–14(b).

<sup>3</sup> See <http://www.aphis.usda.gov/ppq/nis/> for more information on National Identification Services.

provisions of the regulations in § 319.37–8 and to allow APHIS inspectors, and representatives of the People's Republic of China's national plant protection organization, access to the growing facility as necessary to monitor compliance with the provisions of that section. China's national plant protection organization is responsible for ongoing oversight of the program. APHIS inspectors will monitor for compliance with the regulations by making periodic visits to production sites, as is the case with current and past plants in growing media programs such as the following:

- In the Netherlands, two to four greenhouses (companies) have participated in the plants in growing media program each year since 1990. Both ferns and *Anthurium* have been grown and exported to the United States. Currently, three greenhouses are in the program. APHIS plant health specialists inspect the greenhouses 4 to 12 times a year for compliance with program requirements, including the absence of plant pests. No greenhouses have been found to be noncompliant, and no plant pests have been found on any of these visits.

- In Israel, one greenhouse growing ferns and African violets participated in the plants in growing media program between 1990 and 1994. This facility was inspected by APHIS plant health specialists three to five times a year. Again, no greenhouses were found to be noncompliant and no plant pests were found.

Based on our experience with these programs, we are confident that the safeguards work, and that we can verify compliance effectively.

One commenter questioned what will happen if parties are caught out of compliance, including in the event of pest- or disease-infested shipments.

If APHIS determines that certain species of penjing imported from China in growing media contain quarantine or actionable pests, APHIS will investigate the source of the detection and apply appropriate measures to mitigate the pest risk, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that either of these actions is warranted.

#### Risk Assessment

As noted earlier in this document, several commenters expressed that the rule should apply only to imports of *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* penjing plants, since those were the only species considered in the 1996 risk assessments.

The commenters expressed concern that if the rule was applied at the genus level for each species without considering the unique risks posed by other species within the genus, imports would pose greater pest risks than APHIS estimated in its risk assessments.

We agree with commenters' concerns, and this final rule allows only the importation of *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* penjing plants, as those species were the only ones considered in the 1996 risk assessments.

Several commenters stated that APHIS should reexamine its 1996 pest risk assessments, analysis procedures, and policies to ensure that they are consistent with current levels of scientific knowledge and standards. Commenters suggested that the 1996 risk assessments should form "a link between scientific data and decision makers," but also that decisionmakers must have accurate and adequate scientific data upon which to base their decisions—which, the commenters argued, is not the case in this rulemaking. The commenters further claimed that the risk assessors' conclusions were not supported by enough scientific information and that the risk assessments should describe the processes and information sources used to estimate the risk posed by the importation of each plant species.

As noted elsewhere in this document, we have updated the 1996 risk assessment to bring them up to current standards. These updates included (1) inserting the data from the 1996 risk assessment into the risk assessment document format currently used by APHIS, (2) searching for additional research and data published since the 1996 risk assessment was prepared that could have a bearing on the findings of the risk assessment, and (3) preparing a risk management analysis to address how to reduce the risk posed by quarantine pests of the five species of penjing that can be expected to follow the import pathway. The 2003 supplemental risk assessments and risk management analysis also cite scientific evidence upon which conclusions were based.

We believe that by making the link between the identified quarantine pests and the mitigation measures more apparent, we have addressed the commenters' concerns about the need for a link between scientific data and decisionmakers. The 2003 risk assessment and risk management analysis are based on the best data available to us at the time the documents were drafted, and they

provide a clear and rational basis as to why the five identified species of penjing imported from People's Republic of China in growing media will not lead to the introduction of plant pests or noxious weeds into the United States.

Further, the pest list contained in the 1996 and 2003 risk assessments are based on (1) a search of all available scientific literature and (2) APHIS's pest interception records for imported plants of the five penjing species. As such, we examined data on prior bare-root penjing imports and visited some of the production sites that would export as a result of the final rule. Furthermore, any exports of the five species of penjing by People's Republic of China would be contingent on an inspection of the production sites by APHIS and the execution of the bilateral workplan described earlier in this document. We believe our 2003 risk analysis provides an adequate analysis of the risks posed by quarantine pests, and documents how the measures in § 319.37–8(e) remove those pests from the import pathway.

Several commenters stated that basing a risk assessment on a literature search has some inherent weaknesses. One of the commenters stated that literature searches do not catch all pests due to the fact that pests have different common names, and because only the title words of literature are searched. Several commenters also stated that insufficient scientific literature and biological information regarding penjing pests exists to justify reliance upon a literature search, as the five species of penjing are not a major agricultural commodity and research has not been conducted to the necessary depth for every pest on every penjing species. Several commenters noted that penjing is an uncommon crop, and that as such, has not had the extensive research that more widely produced crops typically endure. Another commenter claimed that the risk potential for all the pest species identified may be high, yet due to a lack of information, the potential effects of penjing importation cannot be adequately addressed at this time. Another commenter stated that the 1996 risk assessment may not consider all potential pests, and relatedly, other commenters stated that the risk mitigations are not designed to protect against all potential unidentified pests.

The purpose of conducting an analysis of the risk posed by imported agricultural commodities is to evaluate available scientific evidence and to provide an evaluation of the risk associated with the importation of those commodities. As such, APHIS can only

make the determination to allow the importation of the commodity based on the current state of scientific knowledge. In developing the list of pests that are analyzed in the 1996 and 2003 risk assessments, we began with a list of pests provided to us by People's Republic of China. We then consulted applicable scientific literature (including field surveys done to date) and reviewed APHIS's records to determine what pests were intercepted on imported plants of the five penjing species. Literature searches are unique to each risk analysis, and typically begin with broad searches of both abstracts of publications and the entire text of publications, depending on the database being searched. These initial searches typically use scientific species, genus, and family names, as well as known common names of plants. As analysts learn more about the pests involved and their nomenclature, additional pest-specific searches are conducted. We believe these sources provide an adequate means to identify and assess pests of concern, even on plants considered to be uncommon crops.

While we do not believe there is a shortage of appropriate scientific information in this specific case, if APHIS were to regulate the trade of agricultural commodities based on the risk posed by unknown factors, such an action could be viewed as highly arbitrary, which could potentially affect the export markets for our own domestically produced commodities. Under the Plant Protection Act, APHIS protects American agriculture while facilitating the trade of agricultural commodities. There is always some uncertainty associated with the risk posed by imported agricultural products, and if zero risk were the standard applied, there would be no international trade in agricultural products. While we can never be certain that our methods, regulations, and policies will exclude pests 100 percent of the time, our goal is to do just that, to the extent practicable. We are confident that the measures required under this rule will mitigate the pest risk posed by importing penjing plants of the species *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* in approved growing media. Our judgment is supported by the fact that bare-rooted penjing plants and the growing media in which they will be imported have separately been imported from throughout the world for many years with no known associated pest introductions. Given that the plants in growing media will be subject to a

number of additional requirements (the effects of which are considered and evaluated in the 2003 risk management analysis) that do not apply to bare-rooted plants, we believe that the risk posed by known and unknown pests is appropriately reduced, to the extent practicable, by the measures required by this final rule.

Several commenters stated that we had not included certain pests of concern in the 1996 pest risk assessments. The commenters also claimed that the risk assessments should be reevaluated in light of past detections of wood-boring citrus longhorned beetles that were believed to be associated with imported artificially dwarfed plants.

As described earlier in this document, in August 2002, APHIS amended the regulations pertaining to the importation of artificially dwarfed plants from all countries. Those amendments to the regulations were intended to address the risk that imported artificially dwarfed plants could contain longhorned beetles. Further, we are confident that our 1996 risk assessments and our 2003 risk assessment and management documents consider all pests known to be associated with the five species of penjing. Based on the findings of our risk documents, we believe that the measures contained in § 319.37-8(e) will effectively remove known quarantine pests from the import pathway. As stated previously, the measures contained in § 319.37-5(q) will effectively address the risk posed by longhorned beetles.

#### *Risk Management*

Several commenters claimed that inspection is not a reliable mitigation against many pests, including pathogens.

Inspection is only one of several risk mitigation measures required by this final rule to be applied to penjing plants imported from China in growing media, and is not intended to be the sole source of protection against the introduction of pests, including pathogens. The combined effects of several other measures required are described in detail in the 2003 risk management analysis. We believe the application of the measures required by the plants in growing media regulations in § 319.37-8(e), as revised, is sufficient to reduce the risk posed by penjing plants imported from China in growing media to the extent practicable.

One commenter suggested that APHIS should require plant defoliation prior to export of plants from China, since defoliation would eliminate many foliar

pathogens and make visual inspections of the plant at the port of entry easier to conduct.

We are confident that the proposed preshipment inspection and pesticide sprays will remove foliar pests of concern from the import pathway. Furthermore, it is standard practice for inspectors at plant inspection stations to visually inspect the entire imported plant, including foliage.

Several commenters noted that the proposed rule's provisions allow field-grown plants to be moved into a greenhouse, and claimed that the risk posed by such an action is unacceptable due to the potential for field-grown plants to become infested with soil-based pests such as nematodes prior to entry into the greenhouse.

We agree that the risks noted by commenters should be further mitigated. In response, we are prohibiting the entry of field-grown plants into approved greenhouses. Under this final rule, the propagative materials used to produce artificially dwarfed (penjing) plants may enter an approved greenhouse only as seeds, tissue cultures, unrooted cuttings, or rooted cuttings with no attached growing media. Furthermore, cuttings may not be established or grown in soil at any time, but may be established in a greenhouse in approved media or outside the greenhouse on raised benches (46 cm in height) in pots containing only APHIS approved growing media. We believe this revision to our proposal reduces the risk that plants entering an approved greenhouse could be infested with nematodes or other soil-based pests to the extent practicable.

One commenter stated that the risk mitigations contained in the proposed rule rely too heavily on the use of chemicals and further suggested that serious alien pests are resistant to many highly toxic and persistent chemical insecticides. That commenter also noted that many effective pesticides are no longer available in the United States. Another commenter suggested that APHIS needs to require the use of specific chemicals and provide efficacy data for each one.

There is no specific scientific evidence that any of the quarantine pests affecting the five species of penjing are resistant to pesticides. We are confident that the measures required under the regulations in § 319.37-8(e) will reduce the risk posed by penjing plants imported from China, regardless of whether or not the pests are resistant to pesticides. Our judgment is supported by the fact that these plants have been imported bare-rooted for

many years, with no known associated pest introductions. Given that the plants in growing media will be subject to a number of additional requirements that do not apply to bare-rooted plants, we believe that the risks are appropriately mitigated.

APHIS generally does not require, by regulation, that specific pesticides be used to control pests as part of foreign import programs, given that pesticide labels are subject to change and given that certain pesticides may not be available in all countries. Rather, APHIS will not enter into a bilateral workplan with an exporting country unless the exporting country provides us with data on the efficacy of pesticides that are to be applied as part of a regulatory system.

One commenter claimed that the success of the proposed rule depends upon the cooperation and enforcement of the government of exporting country, which in many cases simply are inadequate or underfunded. The commenter claimed that compliance with the conditions spelled out in § 319.37–8(e) could only be assured if an inspector were on-site every hour of every day in every “certified” greenhouse—and perhaps not even then—and stated that signing an agreement does not guarantee that it will be followed. The commenter stated that APHIS should take extra precautions to enter only into agreements that have a high likelihood of compliance and claimed that there is no such assurance in this case.

The regulations in § 319.37–8 require that for penjing producers in the People’s Republic of China to export *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* to the United States, there must be an agreement in place that stipulates provisions for how the regulations will be enforced. Furthermore, each grower who wishes to export to the United States under the regulations must enter into an agreement with the national plant protection organization of the People’s Republic of China whereby he or she must agree to comply with the provisions of the regulations in § 319.37–8 and to allow APHIS inspectors, and representatives of the People’s Republic of China’s national plant protection service, access to the growing facility as necessary to monitor compliance with the provisions of that section.

We disagree with the commenter that these agreements do not provide for verification that the conditions specified in the regulations will be followed. As noted elsewhere in this document,

APHIS monitors production sites to ensure compliance with the regulations. If the regulations are not followed, inspections of the production sites and inspections of the imported plants at the ports of entry in the United States will reveal as much, and APHIS may hold imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted. For this reason, the national plant protection organization of the People’s Republic of China and growers have an economic incentive to follow the regulations.

Several commenters stated that screens of 0.6 mm mesh are inadequate to keep out certain important pests.

The screen mesh size required under the regulations in § 319.37–8(e) is sufficient to exclude most life stages of all quarantine pests of the five penjing species. Mesh screening is one part of the systems approach, and those screens are used in conjunction with pesticide dips; these measures act as redundant phytosanitary measures to remove all pests of concern from the pathway. Regular inspections of growing premises are intended to ensure that plants are grown in a pest-free environment, and our past experience with this type of program provides evidence that this approach is successful.

#### *Growing Media*

Some commenters stated that increased risk of pest introduction comes not from penjing plants but from the medium in which they are shipped, which, they maintain, the 1996 risk assessment did not consider. The commenters stated that the likelihood of importing pests and diseases is greatly increased where plants are already established in sphagnum, or any other growing medium, as bare-root plants allow a more thorough inspection of plant roots and easier detection of any pests or diseases which may be present. One commenter stated that the medium also provides harborage for dormant pest stages and may delay pest and disease symptoms. Another commenter stated that insects and other pests that feed on roots are found in substrates during part of their life cycle may not be noticed by the APHIS inspector during inspection. The commenters also stated that there may be an unacceptable risk of pest introduction associated with even bare-root penjing.

The 1996 risk assessment and 2003 risk documents consider the fact that growing media has an effect on pests’ ability to find suitable shelter and an

effect on the ability of inspectors to detect certain pests that may be obscured by growing media. Specifically, the risk assessment took these factors into consideration in its estimates of the likelihood of introduction. The risk posed by growing media in and of itself was not considered in the risk assessment, because the specific types of growing media are already approved and listed in § 319.37–8(e)(1) of the regulations, and have been successfully imported into the United States for years. Such media do not present a risk of pest introduction into the United States.

Based on many years of inspections of bare-rooted artificially dwarfed plants, we do not believe that it is necessary to impose any additional restrictions on their entry, beyond those we established in 2002 (described earlier in this document). We believe the recently amended regulations provide protection against the introduction of pests known to infest such plants.

One commenter stated, without providing specific evidence, that growing media increases the possibility that the imported commodity will be a host for bacteria and viruses.

We are aware that many plants, including those not established in growing media, carry bacterial and viral pathogens. Available literature, however, indicates that none of these pathogens are specifically identified as a pest of the five species of penjing. As stated elsewhere in this document, we can only make determinations as to whether a new agricultural commodity can be safely imported based on available scientific evidence, and we are not aware of any evidence that supports the commenter’s suggestion. Given that the commenter did not identify particular viruses and bacteria, we have no basis to revise our risk documents.

One commenter stated that plants should be required to be established in sterile growing media rather than unused media, as was proposed.

Based on years of importations and inspections of various types of approved growing media we are confident that the approved growing media listed in § 319.37–8(e)(1), by virtue of their natural composition, are inhospitable to most pest species, and need not be sterilized to remain pest-free. Further, APHIS intends to require under the conditions of the bilateral workplan for this program that media will have to be safeguarded against pest infestation prior to entry into the greenhouse.

#### *Other General Comments*

Several commenters expressed confusion regarding our use of the terms

penjing and artificially dwarfed plants, and requested we clarify them.

A plant is considered by APHIS to be artificially dwarfed if the plant and its root system are trained and/or trimmed by a grower to restrict the plant's growth and to create or maintain an aesthetically pleasing miniature plant. Penjing is an art form which utilizes artificially dwarfed plants.

Nearly any species of plant can be artificially dwarfed, but certain species are preferred by growers due to their natural characteristics and ability to respond to training. Such plants are artificially dwarfed to create miniature landscapes in pots. In fact, a literal translation of the Chinese word penjing is "landscape in a pot." The Chinese term penjing, like the Japanese term bonsai, simply refers to any plant that has received this kind of training, regardless of species of the plant. To clarify, this final rule applies to plants of *Buxus sinica*, *Sageretia thea*, *Serissa foetida*, *Podocarpus macrophyllus*, and *Ehretia microphylla* that have been artificially dwarfed by growers, and that are imported in growing media from China.

One commenter stated that the regulatory flexibility analysis included in the proposed rule was superficial and not sensitive to the losses the commenter suggested that U.S. plant retailers and importers would face as a result of the importation of penjing established in growing media from China. The commenter also suggested that the economic analysis did not adequately account for the extra costs and losses that U.S. growers may suffer should a penjing-related pest become established in the country.

The commenter did not provide specific figures or other data for us to evaluate. APHIS is bound under international trade agreements to remove technical barriers to trade in the event that such barriers are found by scientific analysis to be unnecessary. In this case, we have conducted risk analyses that found that all quarantine pests associated with the five species of penjing from China are effectively removed from the import pathway by the measures required under § 319.37–8(e). As such, we have determined that it is not necessary to prohibit those penjing species from the People's Republic of China in approved growing media. We believe our final regulatory flexibility analysis complies with the requirements of the Regulatory Flexibility Act, as amended. Further, our analysis makes use of all the relevant data that we could locate.

One commenter suggested that the proposed rule was published

prematurely because APHIS's Section 7 consultations with the U.S. Fish and Wildlife Service were incomplete.

We have now concluded those consultations, and we have received concurrence from the U.S. Fish and Wildlife Service. Information regarding those findings is available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Another commenter expressed confusion as to why the title for the environmental assessment for this action referred to a final rule, when no final rule had been published at the time the environmental assessment was made available for public review.

The environmental assessment for this action pertained simply to this rulemaking action, and evaluated the potential environmental effects of the proposed imports given the application of the provisions of this final rule, which are different from the provisions originally proposed.

Another commenter stated that the body and conclusion of the environmental assessment made contradictory statements regarding eradication and control programs.

We note the potential for confusion in these statements, and have revised the environmental assessment to eliminate the potential for confusion. The conclusion now clearly corresponds to statements made within the body of the document regarding control and eradication programs.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the one change, as discussed in this document.

#### **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.

In this rule we are amending the regulations governing the importation of plants and plant products to add artificially dwarfed (penjing) plants of the species *Buxus sinica*, *Ehretia microphylla*, *Podocarpus macrophyllus*, *Sageretia thea*, and *Serissa foetida* from the People's Republic of China to the list of plants that may be imported in an approved growing medium subject to specified growing, inspection, and certification requirements. This rule will relieve restrictions that currently allow these species to be imported only as bare-rooted plants.

This analysis provides a qualitative assessment of the potential costs and

benefits to U.S. interests and domestic small entities that are associated with the regulatory change. Given that pest risks will be adequately mitigated by the application of measures required by this rule, both costs and benefits associated with the rule derive primarily from increased availability of artificially dwarfed plants. Costs of the regulations will be borne largely by U.S. penjing growers and producers who could experience increased competition and marginally lowered prices. Benefits will be enjoyed by U.S. consumers, who will have access to an increased variety of penjing for consumption at lowered prices, and also by U.S. penjing importers (many of whom are also growers).

Historically, the five penjing species have been enterable from China as bare-rooted plants. Penjing potted in growing media may have some advantages over bare-rooted plants, including the potential for enhanced survival time in transit and decreased transit costs. Bare-rooted plants have short survival time outside of potting media and must be shipped by air freight. Potted plants, on the other hand, are more likely to tolerate the long and much less expensive ocean freight transit process.

#### **Comparison of Regulatory Alternatives**

APHIS considered three alternatives to the implementation of a rule to allow the importation of penjing plants in growing media from China: (1) No action (no change to the current regulations), (2) a rule change to allow the importation of 5 species of penjing plants in approved growing media subject only to the general requirements contained in § 319.37–8(e) without additional restrictions that are specific to penjing, and (3) a rule change to allow the importation of 5 species of penjing plants in approved growing media subject to the general requirements contained in § 319.37–8(e) and subject to additional restrictions that are specific to penjing (preferred alternative).

Under the first alternative (no change to the current regulations) APHIS would continue to allow the importation of bare-rooted penjing plants from China, according to the current regulations in §§ 319.37 through 319.37–14 and would not allow penjing plants to be imported in approved media. This alternative was not chosen because we have conducted risk analyses that found that all quarantine pests associated with the five species of penjing from China are effectively removed from the import pathway by the measures required under § 319.37–8(e). As such, we have determined that it is not necessary to

prohibit those penjing species from the People's Republic of China in approved growing media.

The second alternative would allow importation of *B. sinica*, *E. microphylla*, *P. macrophyullus*, *S. thea*, and *S. foetida* in approved growing media from China under the universal requirements that apply to all plants imported in growing media under § 319.37-8(e), without additional penjing-specific restrictions. This alternative was not chosen because it did not adequately mitigate the risk posed by specific pests that may be associated with the plants in media in China.

Under the third alternative, APHIS would allow the importation of penjing plants in APHIS-approved growing media provided that certain phytosanitary requirements are met. This is the preferred regulatory option because it effectively mitigates the risk posed by all identified pests and is responsive to China's request.

The changes to the regulations in § 319.37-8(e) include specific risk management measures that, when applied, will provide adequate protection against the introduction into the United States of certain pests that may be present in shipments of penjing plants from China that are established in

growing media. The components of this regulatory system, either used singly or in combination with one another, work toward ensuring that plant pests or diseases will not be imported with penjing plants from China. The components of the regulatory system are described in detail earlier in this document and in the 2003 risk management analysis.

**Description of Domestic Industry**

Neither the U.S. Department of Agriculture nor the U.S. Census Bureau report domestic production data or trade data for artificially dwarfed plants. Available data on imports, which are based on number of shipments rather than number of plants, shows that in 2001, 207 shipments of artificially dwarfed plants entered the United States. Almost half (97) of the shipments were from China, 23 were from Japan, 13 were from Vietnam, and the remaining 37 were from Korea, Hong Kong, Canada, and other sources.

A National Arboretum survey of North American nurseries and businesses involved in supplying artificially dwarfed plants and related products<sup>4</sup> identified 367 bonsai and penjing firms, 95 percent of which were in the United States (not including retail nurseries, garden centers, florists, or

kiosks found in large U.S. shopping malls, which buy small numbers of plants for resale). The number of firms has been increasing steadily since the early 1950s. One hundred eight firms (30 percent) were identified in the Southeast, 102 (28 percent) were identified in the Southwest, including California in particular, 84 (23 percent) were identified in the Northeast, 37 (10 percent) were in the Midwest, and 26 (7 percent) in the Northwest; however, a few of the firms identified in the Northeast and Northwest are located in Canada. Ninety-seven (26 percent) full-service firms were identified, which import, obtain from other sources, and produce plants and supply all of the tools needed to cultivate and display plants, as well as 82 plant and/or seed suppliers, 81 tool suppliers, 46 pot and container suppliers, 32 educational material suppliers, 28 suppliers of educational services, and one rock supplier.

Of the 367 bonsai-related firms reported in the survey, the 225 most affected by this rule would probably be the full service bonsai nurseries (97 firms in 1997), specialty stores selling plants (82 firms in 1997), and stores selling containers and pots (46 firms in 1997).

TABLE 1.—U.S. NATIONAL ARBORETUM SURVEY OF NORTH AMERICAN BONSAI RELATED BUSINESSES IN 1997

Type of company	Number of companies	Percentage of companies
<i>General stores</i>		
Full-service bonsai nurseries .....	97	26
<i>Specialty stores:</i>		
Plants including seed .....	82	22
Tools, supplies, stands .....	81	22
Containers and pots .....	46	13
Magazines, books, and newsletters .....	32	9
Consultants and teachers .....	28	8
Rocks .....	1	0
<b>Total</b> .....	<b>367</b>	<b>100</b>

This table was reproduced using data reported by Elias. Elias indicated that bonsai nurseries are smaller in scale than nurseries supplying traditional landscape trees, shrubs, and bedding plants and that, therefore, gross retail sales are significantly smaller. Per-unit sales, however, are among the highest in the industry: Mature bonsai specimens can range from several hundred dollars to \$5,000.

**Retail Prices**

Retail prices for penjing, reported by one of the larger full-service firms on the west coast, range between \$5 and \$10 for 80 percent of the trees in inventory, \$20 and \$35 for 10 percent of the trees in inventory, and \$36 and up for the remainder.<sup>5</sup> Three year old penjing plants, 7 inches tall, typically sell for \$20.00.

In general, retail penjing prices increase with age, quality, and the amount of labor devoted to production and maintenance. Retail prices also appear to vary by species. A simple ordinary least squares regression of retail prices on age, height, and species indicates that retail prices increase almost \$11 and \$9 for each year a Japanese bonsai and Chinese penjing, respectively, have been alive. In addition, retail prices increased over

\$14 and a little less than \$2 for each tree inch. The marginal impact of age on retail price was statistically significant for bonsai and penjing; however, the marginal impacts were not statistically different. The price data and regression statistics indicate that Japanese bonsai are much more expensive than Chinese penjing, as well as older and larger.

Given the age/price relationships reported here, we would expect young penjing (greater than 6 months and less

<sup>4</sup> Elias, T.S. "Bonsai Bonanza." *American Nurseryman*. pp. 60-66. April 1, 1999.

<sup>5</sup> Muth, J. Personal communication. Bonsai Northwest. Seattle WA, 2003.

than 24 months) plants imported from China under this rule to be at the lower end of the price spectrum, and to sell for less than the \$20.00 price reported for 7 inch 3-year-old penjing plants.

**Transportation Costs**

The majority of penjing are imported via air freight or ocean vessel with soil removed from the roots. Because penjing and bonsai eventually die if left bare-rooted too long (especially plants

25 years old or older), only young trees can survive ocean shipment bare-rooted.

Transportation costs vary widely and depend on the size of the tree, whether soil is attached to the roots, and the method of shipment (See table below). It may cost roughly \$0.50 to ocean ship a small bare-rooted tree, \$3.00 to ship the same bare-rooted tree airfreight, and \$115 to ship a larger bare-rooted tree airfreight.

Transportation costs increase dramatically for potted plants in media,

because costs are based on the dimensions of the tree and its weight, both of which increase with the addition of growing media and a pot. For example, it may cost anywhere between \$400 and \$1,200 to airfreight a large tree with growing media attached to its roots<sup>6</sup> and between \$67 and \$200 for ocean shipment, using the relationship between ocean and airfreight costs for small bare-rooted trees.

TABLE 2.—RETAIL PRICE FOR SMALL AND LARGE ARTIFICIALLY DWARFED TREES

Penjing retail price	\$0.50	\$3.00	\$3.00	\$21.00
	Water (bare-root)	Air (bare-root)	Water (potted)	Air (potted)
\$28.11	2%	11%	12%	74%
\$35.85	1%	8%	10%	58%
\$43.58	1%	7%	8%	48%
\$51.32	1%	6%	7%	41%
\$59.06	1%	5%	6%	35%
\$66.79	1%	4%	5%	31%
\$74.53	1%	4%	5%	28%
\$82.27	1%	4%	4%	25%
\$90.00	1%	3%	4%	23%
\$97.74	1%	3%	4%	31%

Data taken from relationships estimated by Michael Livingston, USDA (unpublished). Retail price for penjing was estimated using an age of two years and a height appropriate to a two-year old tree.

The data in the table present air and sea shipping costs for bare-rooted and potted penjing as a percentage of retail plant prices (for plants of a height and price appropriate to 2 year old trees). Because of data limitations, shipping costs for plants less than 2 years old are not analyzed here. Shipping costs are a declining percentage of retail price for all four transit modes examined here. Air freight for penjing potted in media is by far the most expensive shipping option. Sea shipment of bare-rooted plants is the least expensive; but is usually not feasible because bare-rooted plants tend to die in transit during the long sea voyage.

The cost of air shipping bare-rooted plants and the cost of sea shipping potted plants in media are roughly equivalent. This relationship suggests that the decision about whether to air freight bare-rooted penjing plants or sea freight potted penjing to the United States will probably be made on a case-by-case basis, and will depend on factors such as size, age, and species.

**Conclusions**

Upon implementation of this rule, five species (*Buxus sinica*, *Ehretia microphylla*, *Podocarpus macrophyllus*, *Sageretia thea*, and

*Serissa foetida*) of potted penjing plants (of any age, but which have been grown in a greenhouse for at least 6 months) will be enterable into the United States. All other species of penjing plants may continue to enter the United States as bare-rooted plants as they have done in the past. Under the new rule we might see increased imports of less expensive potted penjing of the five designated species.

It is impossible to predict the amount by which volume of penjing imports from China will increase under this rule. Compliance with the more stringent mitigations required to ship potted penjing in media to the United States will impose additional costs on Chinese penjing producers. The extent to which the compliance costs associated with potted penjing will offset potential cost savings associated with shipping potted penjing is unclear. Possible sources of cost savings for potted penjing include improved survival in-transit for some ages/sizes plants; possible cost advantages associated with selling plants and pots together as a unit; or unit cost savings that might be associated with high volume importations of potted penjing by U.S. chain stores using proprietary shipping lines.

Many full-service bonsai nurseries import penjing from China and also grow their own artificially dwarfed plants; the net effects of potentially increased imports of lower-priced penjing from China on these firms is unclear. For large nurseries we contacted, roughly 45 percent of the current inventory is imported, mostly from China, and 55 percent is produced domestically or obtained from other sources. Potted penjing between 6 and 24 months shipped under this rule could compete with less expensive, younger, domestically produced dwarfed plants. But at the same time, these same firms would benefit by being able to import lower priced potted plants from China. Based on the National Arboretum survey, roughly 97 full service bonsai nurseries could be affected in this way. The net effect of the rule is expected to be positive, as consumers and some firms in the bonsai/penjing industry are expected to benefit from increased availability and potentially lower prices.

**Regulatory Impacts on Small Entities**

The U.S. Small Business Administration defines a small full-service bonsai and penjing nursery as one with annual sales receipts no

<sup>6</sup>Elias, T.S. Personal communication. U.S. National Arboretum, Agricultural Research Service,

U.S. Department of Agriculture. Washington DC, 2003.

greater than \$6 million (NAICS 444220 Nursery and Garden Centers) or one with fewer than 100 employees (NAICS 422930 Flower, Nursery Stock, and Florists' Supplies Wholesalers). There were 97 full service bonsai nurseries in 1997. All of the full-service firms in the United States are small entities (Elias 2003). Net impacts of the regulation on these firms are unclear, as many of these firms are both importers and growers of penjing; however, impacts are not expected to be significant.

Small plant and/or seed suppliers are those with annual sales receipts no greater than \$0.75 million (NAICS 111421, Nursery and Tree Production). There were 82 stores specializing in bonsai plants in 1997. It is thought that all of these were small firms. To the extent that these firms benefit from increased availability and variety of penjing at lower prices, the net effect of the regulation on these firms could be positive.

Small pot, container, tool, and rock suppliers in the industry are those with annual sales receipts no greater than \$6 million (NAICS 444220, Nursery and Garden Centers; NAICS 451120, Hobby, Toy, and Game Stores). There were 128 firms specializing in bonsai/penjing tools in 1997. All are believed to be small firms. To the extent that the supply of penjing increases following implementation of this rule, the 82 bonsai tool and supply firms should be positively affected. Most custom bonsai container and pot manufacturers produce pots for more expensive plants, so they should not be significantly affected by this rule.

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 final 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.

#### National Environmental Policy Act

An environmental assessment and finding of no significant impact (FONSI) have been prepared for this final rule. The assessment provides a basis for the conclusion that the importation of penjing plants from China in approved growing media under the conditions specified in this rule will not present a

risk of introducing or disseminating plant pests and will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and FONSI were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS's NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment and FONSI may be viewed on the Internet at <http://www.aphis.usda.gov/ppd/es/ppqdocs.html>. You may request paper copies of the environmental assessment and FONSI from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Please refer to the title of the environmental assessment when requesting copies. The environmental assessment and FONSI are also available for review in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

#### Paperwork Reduction Act

This final 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, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

#### PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450 and 7701–7772; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 319.37–5, paragraph (q), the introductory text is revised to read as follows:

#### § 319.37–5 Special foreign inspection and certification requirements.

\* \* \* \* \*

(q) Any artificially dwarfed plant imported into the United States, except for plants that are less than 2 years old, must have been grown and handled in accordance with the requirements of this paragraph and must be accompanied by a phytosanitary certificate of inspection that was issued by the government of the country where the plants were grown.

\* \* \* \* \*

■ 3. In § 319.37–8, paragraph (e) is amended as follows:

■ a. By revising the introductory text to read as set forth below.

■ b. In paragraph (e)(2)(ix), by removing the word “and” at the end of the paragraph.

■ c. In paragraph (e)(2)(x)(B), by removing the period at the end of the paragraph and adding the word “; and” in its place.

■ d. By adding new paragraph (e)(2)(xi).

#### § 319.37–8 Growing media.

\* \* \* \* \*

(e) A restricted article of any of the following groups of plants may be imported established in an approved growing medium listed in this paragraph if the restricted article meets the conditions of this paragraph and is accompanied by a phytosanitary certificate issued by the plant protection service of the country in which the restricted article was grown that declares that the restricted article meets the conditions of this paragraph:

*Alstroemeria*

*Ananas*<sup>11</sup>

*Anthurium*

Artificially dwarfed (penjing) plants from the People's Republic of China of the following plant species: *Buxus sinica*, *Ehretia microphylla*, *Podocarpus macrophyllus*, *Sageretia thea*, and *Serissa foetida*.

*Begonia*

*Gloxinia* (= *Sinningia*)

*Nidularium*<sup>11a</sup>

*Peperomia*

Polypodiophyta (= *Filicales*) (ferns)

Rhododendron from Europe

*Saintpaulia*.

\* \* \* \* \*

(2) \* \* \*

(xi) Plants of the species *Buxus sinica*, *Ehretia microphylla*, *Podocarpus macrophyllus*, *Sageretia thea*, and

<sup>11</sup> These articles are bromeliads, and if imported into Hawaii, bromeliads are subject to postentry quarantine in accordance with § 319.7–7.

<sup>11a</sup> See footnote 11.

*Serissa foetida* from the People's Republic of China must also meet the following conditions:

(A) *Propagative cuttings.* The propagative materials used to produce the artificially dwarfed (penjing) plants may enter an approved greenhouse only as seeds, tissue cultures, unrooted cuttings, or rooted cuttings with no growing media. Rooted cuttings may not be established or grown in soil at any time. Rooted cuttings may be established in a greenhouse or outside the greenhouse on raised benches (46 cm in height) in pots containing only APHIS approved growing media.

(B) *Inspection and treatment.* When any cuttings are introduced into the greenhouse, they must be free of growing media, inspected, and found free of plant pests and then treated with a pesticide dip approved by the Animal and Plant Quarantine Service of the People's Republic of China that will control mites, scale insects, whiteflies, thrips, and fungi. The artificially dwarfed (penjing) plants must be propagated from mother plants that have been visually inspected by an APHIS inspector or an inspector of the Animal and Plant Quarantine Service of the People's Republic of China and found free of the following pests:

(1) For *Buxus sinica*: *Guignardia miribelii*, *Macrophoma ehretiae*, *Meliola buxicola*, and *Puccinia buxi*.

(2) For *Ehretia microphylla*: *Macrophoma ehretiae*, *Phakopsora ehretiae*, *Pseudocercospora ehretiae*, *Pseudocercospora ehretiae-thyrsoiflora*, *Uncinula ehretiae*, *Uredo ehretiae*, and *Uredo garanbiensis*.

(3) For *Podocarpus macrophyllus*: *Pestalotia diospyri*, *Phellinus noxius*, and *Sphaerella podocarpi*.

(4) For *Sageretia thea*: *Aecidium sageretiae*.

(5) For *Serissa foetida*: *Melampsora serissicola*.

(C) *Growing.* The artificially dwarfed (penjing) plants must be grown in an approved greenhouse for at least 6 months immediately prior to export.

(D) *Additional treatments.* While in the greenhouse, plants must be treated with appropriate pesticides at least once every 10 days or as needed for three months before shipping to maintain a pest-free condition.

\* \* \* \* \*

Done in Washington, DC, this 13th day of January 2004.

**Bobby R. Acord,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 04-1066 Filed 1-15-04; 8:45 am]

BILLING CODE 3410-34-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 959

[Docket No. FV03-959-4 FR]

#### Onions Grown in South Texas; Decreased Assessment Rate

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule decreases the assessment rate established for the South Texas Onion Committee (Committee) for the 2003-04 and subsequent fiscal periods from \$0.085 to \$0.03 per 50-pound equivalent of onions handled. The Committee locally administers the marketing order which regulates the handling of onions grown in South Texas. Authorization to assess onion handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began on August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** January 20, 2004.

**FOR FURTHER INFORMATION CONTACT:**

Belinda G. Garza, Regional Manager, McAllen Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry, McAllen, Texas 78501; telephone: (956) 682-2833, Fax: (956) 682-5942; 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, fax: (202) 720-8938.

Small businesses may request information on complying with this regulation 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](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 143 and Order No. 959, both as amended (7 CFR part 959), regulating the handling of onions grown in South Texas, 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 now in effect, South Texas onion handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable onions beginning August 1, 2003, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2003-04 and subsequent fiscal periods from \$0.085 to \$0.03 per 50-pound equivalent of onions handled.

The South Texas onion marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of South Texas onions. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002-03 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal