

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. APHIS-2006-0153]

RIN 0579-AC25

#### South American Cactus Moth; Quarantine and Regulations

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the domestic quarantine regulations to establish regulations to restrict the interstate movement of South American cactus moth host material, including nursery stock and plant parts for consumption, from infested areas of the United States. This action would help prevent the artificial spread of South American cactus moth into noninfested areas of the United States.

**DATES:** We will consider all comments that we receive on or before April 11, 2008.

**ADDRESSES:** You may submit comments by either of the following methods:

*Federal eRulemaking Portal:* Go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0153> to submit or view comments and to view supporting and related materials available electronically.

*Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS-2006-0153, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2006-0153.

*Reading Room:* 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.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at <http://www.aphis.usda.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joel Floyd, Planning and Preparedness Team Leader, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737-1236; (301) 734-4396.

#### SUPPLEMENTARY INFORMATION:

##### Background

The South American cactus moth (*Cactoblastis cactorum*) is a grayish-brown moth with a wingspan of 22 to 35 millimeters (approximately 0.86 to 1.4 inches) that is indigenous to Argentina, southern Brazil, Paraguay, and Uruguay. It is a serious quarantine pest of *Opuntia* spp., and an occasional pest of *Nopalea* spp., *Cylindropuntia* spp., and *Consolea* spp., four closely related genera of the family *Cactaceae*. After an incubation period following mating, the female South American cactus moth deposits an egg stick resembling a cactus spine on the host plant. The egg stick, which consists of 70 to 90 eggs, hatches in 25 to 30 days and the larvae bore into the cactus pad to feed, eventually hollowing it out and killing the plant. Within a short period of time, the South American cactus moth can destroy whole stands of cactus.

In the 1920s, the South American cactus moth was introduced into Australia and other areas as a biological control agent of invasive prickly pear cactus (*Opuntia* spp.). Its success led to its introduction into the Caribbean and Hawaii in the 1950s. In 1989, it was detected in southern Florida, where it was most likely introduced through imported infested nursery plants. More recently, South American cactus moth has been discovered in other parts of Florida, as well as in Georgia, South Carolina, and Alabama, and it continues to spread north and west. It is projected that, at the same rate of spread as seen in Florida, without any control measures, the moth may reach Texas by

2008 by natural spread along the Gulf Coast.

The Southwestern United States and Mexico are home to 114 native species of *Opuntia*, which are highly valued for their ecological and agricultural uses. The rooting characteristics of *Opuntia* spp. reduce wind and rain erosion, encouraging the growth of other plants in degraded areas. In addition, many species of birds, mammals, reptiles, and insects eat, nest in, or otherwise rely on *Opuntia* spp. for survival. *Opuntia* spp. are also important sources of food, medicine, cosmetics, and dye. In Mexico, *Opuntia* spp. are an important agricultural commodity, and it is estimated that 2 percent of the value and production of Mexico's agriculture comes from them. In the Southwestern United States, *Opuntia* spp. are only a minor agricultural crop, but are popular plants in the landscaping and ornamental nursery industries. *Opuntia* spp. can also be an important source of emergency forage for cattle grazing during drought periods. If the South American cactus moth were to spread to these areas, there would be significant ecological and economic damage.

Currently, cactus plants or parts thereof moving from Hawaii, Puerto Rico, or the U.S. Virgin Islands into the continental United States are prohibited or restricted under 7 CFR part 318 in order to prevent the dissemination of South American cactus moth. With limited exceptions, all plants, including cacti, imported into the United States for propagation from foreign countries are required to be accompanied by a phytosanitary certificate and to be inspected at an Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), plant inspection station in accordance with 7 CFR part 319. Any propagative plant material found to be infested with the South American cactus moth currently must be returned to its place of origin, treated, or destroyed. Since the South American cactus moth larvae are internal feeders, they are difficult to detect during normal inspection. Therefore, the current regulations that require only inspection may not provide an adequate safeguard to prevent the introduction and spread of South American cactus moth. APHIS is in the process of amending these territorial and foreign cactus moth regulations to better

address the risks associated with the movement of host material from areas where South American cactus moth is known to occur.

In order to provide a barrier to the natural westward spread of South American cactus moth, APHIS, in cooperation with the Agricultural Research Service, USDA, and funding provided by the Government of Mexico, is testing a sterile insect release program along the U.S. Gulf Coast. However, without a domestic quarantine program to address the artificial spread of the pest by restricting the movement of host material from infested States, this barrier alone will not be effective in stopping the westward movement of the South American cactus moth. Therefore, we are proposing to amend the domestic quarantine notices in 7 CFR part 301 by adding a new subpart, "South American Cactus Moth" (§§ 301.55 through 301.55–9, referred to below as the regulations). The regulations would provide for the designation of quarantined areas and would restrict the interstate movement of regulated articles from quarantined areas into or through nonquarantined areas. These proposed provisions are described in detail below.

#### Restrictions on Interstate Movement of Regulated Articles (§ 301.55)

Proposed § 301.55 would prohibit the interstate movement of regulated articles from any quarantined area except in accordance with the regulations. This section would also contain a footnote explaining that any properly identified inspector is authorized, upon probable cause, to stop and inspect persons and means of conveyance moving in interstate commerce and to hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

#### Definitions (§ 301.55–1)

Proposed § 301.55–1 would contain definitions of the following terms: *Administrator, Animal and Plant Health Inspection Service (APHIS), cactus plants, certificate, compliance agreement, departmental permit, infestation, inspector, interstate, limited permit, moved (move, movement), person, Plant Protection and Quarantine (PPQ), quarantined area, regulated article, South American cactus moth, and State*. These proposed terms and their definitions are set out in the regulatory text at the end of this document.

#### Regulated Articles (§ 301.55–2)

Certain articles present a risk of spreading the South American cactus moth if they are moved from quarantined areas without restrictions. We would call these articles regulated articles, and would impose restrictions on their movement because the South American cactus moth can survive in these materials if present and could possibly be transported to noninfested areas. Paragraphs (a) through (c) of proposed § 301.55–2 would list the following as regulated articles:

- The South American cactus moth, in any living stage of its development;
- Cactus plants or parts thereof (excluding seeds and canned, preserved, or frozen pads or fruits) of the following genera: *Consolea*, *Cylindropuntia*, *Nopalea*, and *Opuntia*; and
- Any other product, article, or means of conveyance when an inspector determines that it presents a risk of spreading the South American cactus moth and the person in possession of the product, article, or means of conveyance has been notified in writing that it is subject to the restrictions in the regulations.

The last item listed above, which would provide for the designation of "any other product, article, or means of conveyance" as a regulated article, would be intended to address the risks presented by, for example, a truck that may have inadvertently picked up plant material or adult South American cactus moths while driving through fields, thus enabling an inspector to designate that truck as a regulated article in order to ensure that any necessary risk-mitigating measures are carried out.

#### Quarantined Areas (§ 301.55–3)

Paragraph (a) of proposed § 301.55–3 would provide the criteria for the inclusion of States, or portions of States, in the list of quarantined areas. Under these criteria, any State or portion of a State in which the South American cactus moth is found by an inspector, in which the Administrator has reason to believe that the South American cactus moth is present, or that the Administrator considers necessary to regulate due to the area's inseparability for quarantine enforcement purposes from localities in which the South American cactus moth has been found, would be listed as a quarantined area. These proposed criteria would also provide that we would designate less than an entire State as a quarantined area only if we determine that the State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those

imposed on the interstate movement of regulated articles and that the designation of less than the entire State as a quarantined area would prevent the interstate spread of the South American cactus moth. In practice, the latter determination—that the designation of less than an entire State would prevent the interstate spread of the South American cactus moth—would be based, at least in part, on our finding that infestations are confined to the quarantined areas as a result of natural breaks between infested areas and noninfested areas, known as zones, and would eliminate the need for designating an entire State as a quarantined area. APHIS would likely adopt existing buffer zones that have been established under the States' current eradication programs.

Paragraph (b) of proposed § 301.55–3 would provide that we may temporarily designate any nonquarantined area in a State as a quarantined area when we determine that the nonquarantined area meets the criteria for designation as a quarantined area described in § 301.55–3(a). In such cases, we would give the owner, person in possession of the nonquarantined area, or, in the case of publicly owned land, the person responsible for the management of the nonquarantined area, a copy of the regulations along with written notice of the area's temporary designation as a quarantined area, after which time the interstate movement of any regulated article from the area would be subject to the regulations. This proposed provision would be necessary to prevent the spread of the South American cactus moth during the time between the detection of the pest and the time a document designating the area as a quarantined area could be made effective and published in the **Federal Register**. In the event that an area's designation as a temporary quarantined area is terminated, we would provide written notice of that termination to the owner or person in possession of the area as soon as would be practicable.

Paragraph (c) would list the areas quarantined because of the presence of the South American cactus moth. Surveys conducted by State agriculture departments in the States of Alabama, Florida, Georgia, and South Carolina during recent years have confirmed the presence of South American cactus moth in both wild and cultivated cactus plants. If these States were to delimit their infestations and implement intrastate quarantines, we would be able to narrow the scope of the quarantine. However, none of these States currently have intrastate quarantines in place. Therefore, we are proposing to designate

the States of Alabama, Florida, Georgia, and South Carolina, in their entirety, as quarantined areas.

#### Conditions Governing the Interstate Movement of Regulated Articles From Quarantined Areas (§ 301.55-4)

This section would provide criteria for moving regulated articles interstate from quarantined areas. Paragraph (a) would provide that any regulated articles from a quarantined area may be moved interstate if moved with a certificate or limited permit issued and attached in accordance with proposed §§ 301.55-5 and 301.55-8. Seeds and canned, preserved, or frozen pads or fruits of regulated cactus genera would not be considered to be regulated articles because the life stages of the South American cactus moth either do not inhabit the specified plant part (i.e., seeds) or would be destroyed by the specified handling, processing, or utilization. As noted previously, we are planning to issue a separate rulemaking to address the risks from cactus moth host material moving into the continental United States from Hawaii and U.S. territories and from foreign countries where South American cactus moth is known to occur.

Paragraph (b) would provide that any regulated articles from a quarantined area may be moved interstate without a certificate or limited permit if the regulated article:

- Originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering (such as canvas, plastic, or other closely woven cloth) adequate to prevent access by South American cactus moths while moving through the quarantined area;
- Is kept in an enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area and the point of origin of the regulated article is indicated on the waybill; and
- Moved through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs.

Paragraph (c) would provide that a certificate or limited permit would also not be required if the regulated article is moved by the USDA for experimental or scientific purposes in accordance with conditions specified on a departmental permit and with a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

#### Issuance and Cancellation of Certificates and Limited Permits (§ 301.55-5)

Certificates would be issued for regulated articles when an inspector or other person authorized to issue certificates finds that the articles have met the conditions of the regulations and may be safely moved interstate without further restrictions.

Specifically, proposed § 301.55-5(a) would provide that a certificate may be issued for the interstate movement of a regulated article by an inspector, or a person operating under a compliance agreement in accordance with proposed § 301.55-6, if the inspector or other authorized person determines that:

- The regulated article to be moved and all other regulated articles on the premises have been grown and maintained indoors in a shadehouse or greenhouse and no other cactus moth host material exists on the premises outside of a shadehouse or greenhouse;
- The regulated article to be moved and all other regulated articles on the premises are maintained on benches that are kept separate from benches containing non-host material;
- The regulated article to be moved and all other regulated articles on the premises have been placed on a 21-day insecticide spray cycle and have been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, deltamethrin, spinosad, or imidacloprid if maintained in the nursery for longer than 21 days;
- The regulated article to be moved has been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidacloprid 3 to 5 days prior to shipment and inspected and found free of cactus moth egg sticks and larval damage; and
- If the regulated article was moved into the premises from another premises in a quarantined area listed in § 301.55-3, it was immediately placed inside the shadehouse or greenhouse and sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidacloprid within 24 hours.

Limited permits would be issued for regulated articles when an inspector finds that, because of a possible pest risk, the articles may be safely moved interstate only subject to further restrictions, such as movement to limited areas or movement for limited purposes. Proposed § 301.55-5 would explain the conditions under which a limited permit would be issued.

Specifically, proposed § 301.55-5(b) would provide that a limited permit may be issued by an inspector for the interstate movement of a regulated article if the inspector determines that

the article (1) is to be moved interstate to a specified destination for specified handling, processing or utilization, and that the movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed by the specified handling, processing, or utilization; (2) will be moved in compliance with any additional conditions imposed by the Administrator under section 414 of the Plant Protection Act (7 U.S.C. 7714) to prevent the spread of the South American cactus moth; and (3) is eligible for interstate movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

We would include a footnote that would provide an address for securing the addresses and telephone numbers of the local Plant Protection and Quarantine (PPQ) offices from which the services of an inspector may be requested.

Paragraph (c) of proposed § 301.55-5 would provide that any person who has entered into and is operating under a compliance agreement may issue a certificate or limited permit for the interstate movement of a regulated article after an inspector has determined that the article is otherwise eligible for a certificate under § 301.55-5(a) or a limited permit under § 301.55-5(b).

Also, § 301.55-5(d) would contain provisions for the cancellation of a certificate or limited permit by an inspector if the inspector determines that the holder of the certificate or limited permit has not complied with conditions of the regulations. This paragraph would also contain provisions for notifying the holder of the reasons for the cancellation and for holding a hearing if there is any conflict concerning any material fact in the event that the person wishes to appeal the cancellation.

#### Compliance Agreements and Cancellation (§ 301.55-6)

Proposed § 301.55-6 would provide for the use of and cancellation of compliance agreements. Compliance agreements would be provided for the convenience of persons who are involved in the growing, handling, or moving of regulated articles from quarantined areas. A person would be able to enter into a compliance agreement when an inspector has determined that the person requesting the compliance agreement has been made aware of the requirements of the regulations and the person has agreed to comply with the requirements of the regulations and the provisions of the

compliance agreement. This section would contain a footnote that explains where compliance agreement forms may be obtained.

Proposed § 301.55–6 would also provide that an inspector may, either orally or in writing, cancel the compliance agreement upon finding that a person who has entered into the agreement has failed to comply with any of the provisions of the regulations or the terms of the compliance agreement. If the cancellation is oral, the cancellation and the reasons for the cancellation would be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled would be able to appeal the decision, in writing, to the Administrator, within 10 days after receiving written notification of the cancellation and would have to state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator would grant or deny the appeal, in writing, stating the reasons for the decision.

#### **Assembly and Inspection of Regulated Articles (§ 301.55–7)**

Proposed § 301.55–7 would provide that any person (other than an inspector or a person operating under a compliance agreement) who desires to move interstate regulated articles which must be accompanied by a certificate or limited permit would have to request that an inspector inspect the articles for movement at least 48 hours before the desired movement. The regulated articles would have to be assembled in a place and manner directed by the inspector.

#### **Attachment and Disposition of Certificates and Limited Permits (§ 301.55–8)**

Proposed § 301.55–8 would require the certificate or limited permit issued for movement of the regulated article to be attached, during the interstate movement, to the regulated article, or to a container carrying the regulated article, or to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill, the regulated article would have to be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article. Further, the section would require that the carrier or the carrier's representative furnish the certificate or limited permit to the consignee listed on the certificate or limited permit upon arrival at the

location provided on the certificate or limited permit.

#### **Costs and Charges (§ 301.55–9)**

Proposed § 301.55–9 would explain the APHIS policy that the services of an inspector that are needed to comply with the regulations would be provided without cost between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays, to persons requiring those services, but that APHIS would not be responsible for any other costs or charges incident to inspections or compliance with the provisions of the quarantine and regulations other than for the services of the inspector.

#### **Executive Order 12866 and Regulatory Flexibility Act**

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

South American cactus moth is a pest that attacks primarily prickly pear cacti that can live in arid and coastal areas. In the continental United States, South American cactus moth has been found in Florida, Georgia, South Carolina, and Alabama. It has also been found in Hawaii, Puerto Rico, and the U.S. Virgin Islands, as well as more than 30 foreign countries. Hosts for the pest are the live plants and plant parts (except seeds) of *Consolea*, *Cylindropuntia*, *Nopalea*, and *Opuntia*, four genera of the botanical family Cactaceae. *Opuntia* spp. are commonly known as prickly pear cactus.

*Opuntia*, in particular, has both commercial and ecological value. Most of its commercial value lies in its use as an ornamental plant material for landscaping projects in the more arid areas of the United States Southwest. *Opuntia* also has a small but growing commercial value as a food crop, as there is demand in the United States for edible cactus leaves and fruit, especially in the Hispanic community. Other uses of *Opuntia* include emergency forage for cattle during periods of drought and wildlife feed for game animals. In the United States southwest desert, *Opuntia* plants play a key role in sustaining ecosystems, providing habitat for wildlife and protection against soil erosion. A healthy desert ecosystem also has economic benefits, since it promotes increased tourism, recreation, and hunting.<sup>1</sup>

<sup>1</sup> Preliminary assessment of the potential impacts and risks of the invasive cactus moth, *Cactoblastis cactorum* Berg. in the United States and Mexico;

In this rule we are proposing to establish regulations to restrict the interstate movement of South American cactus moth host material from quarantined areas on the U.S. mainland to non-quarantined areas. Under this rule, such movement would be prohibited, except under certain conditions. Currently, there is no restriction on the interstate movement of South American cactus moth host material from areas on the mainland that have been found to be infested with the pest. In addition, the rule would designate the States of Alabama, Florida, Georgia, and South Carolina, in their entirety, as quarantined areas for South American cactus moth.

All current growers in the four-State quarantined area are believed to produce host materials primarily for use in dish-gardens of mixed species. For these growers, the proposed rule should not be particularly problematic. This is because other species of cactus could easily be substituted for host species cactus in dish-gardens shipped to non-quarantined areas. However, the rule could pose a problem for would-be growers of prickly pear cactus for the small but growing food market.<sup>2</sup> This is because, if found to be infested with South American cactus moth, they might be unable to ship fresh cactus leaves and fruit to non-quarantined areas, including some areas with large Hispanic populations. Although these growers would be able to ship canned, preserved, or frozen cactus food from a quarantined area, consumers prefer the fresh varieties.<sup>3</sup> The number of would-be growers of cactus for use as food in the four-State quarantined area is unknown, but it is likely to be very small, based on the small number of ornamental cactus growers in that area.

To the extent that it prevents the spread of *C. cactorum* on the mainland, the rule would benefit U.S. entities,

Final Report to the International Atomic Energy Agency, April 25, 2005.

<sup>2</sup> The Florida Department of Plant Industry recently promoted the use of prickly pear cactus as a niche crop to fill the Hispanic market demand.

<sup>3</sup> In a 2004 report on cactus leaf pads (nopalitos), the Florida Department of Agriculture and Consumer Services stated that consumers prefer fresh nopalitos. However, the report also stated that shipping them is difficult, a factor that would seem to lessen the negative impact of the rule's restriction on the movement of fresh cactus from the quarantined areas. The report stated that "cactus pads are thorny and the consumer has the unpleasant task of cleaning them. If the nopalitos are shipped cleaned of thorns they tend to oxidize and have a short shelf life. Some companies dethorn and dice the Nopales, seal them in plastic bags and ship them in refrigerated trucks to U.S. markets, but the quality is low, the price is high, and they spoil within 2–3 days." See Nopalitos: Florida's New Niche Production Commodity, Final Report for Agreement #12–25–G–0382.

primarily those in the ornamental nursery and landscape industries in the Southwest. Most commercial nurseries that produce prickly pear cacti as ornamental plants are located in Arizona, followed by California. In Arizona, there are an estimated 40 to 50 such producers in the Phoenix area alone; in California, there are an estimated 30 growers of ornamental cacti. U.S. production of prickly pear cactus for edible use is limited largely to California; many, if not most, cactus growers are small in size.<sup>4</sup>

Based on available information, we conclude that adoption of the rule would not have a significant economic impact on a substantial number of small entities, if for no other reason than few entities, large or small, are likely to be affected. Although hard data are not available, informed APHIS staff estimate that there are no more than about five producers of the host material in the four-State quarantined area, all of whom are believed to be Florida nurseries that produce prickly pear cactus, usually for use in dish-gardens of mixed species. The bulk of U.S. prickly pear cactus production, both for use as an ornamental plant and for use as an edible food, is concentrated in the Southwest, not the four Southeastern States designated as quarantined areas.<sup>5</sup>

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

<sup>4</sup> Source: Lynn Garrett (APHIS) and Irish, M. 2001. The Ornamental Prickly Pear Industry in the Southwestern United States. Florida Entomologist 84(4).

<sup>5</sup> See footnote 4.

#### Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS-2006-0153. Please send a copy of your comments to: (1) Docket No. APHIS-2006-0153, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238, and (2) Clearance Officer, OCIO, USDA, room 404-W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to establish regulations to quarantine the States of Alabama, Florida, Georgia, and South Carolina because of South American cactus moth and restrict the interstate movement of regulated articles from the quarantined areas. In order to move regulated articles interstate from the quarantined area, regulated parties would have to obtain certificates or limited permits, and they would be able to enter into compliance agreements with APHIS. We are soliciting comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

*Estimate of burden:* Public reporting burden for this collection of information

is estimated to average 0.6 hours per response.

*Respondents:* State plant regulatory officials.

*Estimated annual number of respondents:* 3.

*Estimated annual number of responses per respondent:* 10.

*Estimated annual number of responses:* 30.

*Estimated total annual burden on respondents:* 18 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734-7477.

#### E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734-7477.

#### List of Subjects in 7 CFR Part 301

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

Accordingly, we propose to amend 7 CFR part 301 as follows:

#### PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

**Authority:** 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75-15 issued under Sec. 204, Title II, Public Law 106-113, 113 Stat. 1501A-293; sections 301.75-15 and 301.75-16 issued under Sec. 203, Title II, Public Law 106-224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Part 301 is amended by adding a new Subpart—South American Cactus Moth, §§ 301.55 through 301.55-9, to read as follows:

#### Subpart—South American Cactus Moth

Sec.  
301.55 Restrictions on interstate movement of regulated articles.  
301.55-1 Definitions.  
301.55-2 Regulated articles.  
301.55-3 Quarantined areas.

- 301.55-4 Conditions governing the interstate movement of regulated articles from quarantined areas.
- 301.55-5 Issuance and cancellation of certificates and limited permits.
- 301.55-6 Compliance agreements and cancellation.
- 301.55-7 Assembly and inspection of regulated articles.
- 301.55-8 Attachment and disposition of certificates and limited permits.
- 301.55-9 Costs and charges.

### Subpart—South American Cactus Moth

#### § 301.55 Restrictions on interstate movement of regulated articles.

No person may move interstate from any quarantined area any regulated article except in accordance with this subpart.<sup>1</sup>

#### § 301.55-1 Definitions.

*Administrator.* The Administrator, Animal and Plant Health Inspection Service, or any person authorized to act for the Administrator.

*Animal and Plant Health Inspection Service (APHIS).* The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

*Cactus plants.* Any of various fleshy-stemmed plants of the botanical family Cactaceae.

*Certificate.* A document in which an inspector or person operating under a compliance agreement affirms that a specified regulated article is free of South American cactus moth and may be moved interstate to any destination.

*Compliance agreement.* A written agreement between APHIS and a person engaged in growing, handling, or moving regulated articles, wherein the person agrees to comply with this subpart.

*Departmental permit.* A document issued by the Administrator in which he or she affirms that interstate movement of the regulated article identified on the document is for scientific or experimental purposes and that the regulated article is eligible for interstate movement in accordance with § 301.55-4(c).

*Infestation.* The presence of the South American cactus moth or the existence of circumstances that makes it reasonable to believe that the South American cactus moth may be present.

*Inspector.* Any employee of APHIS or other person authorized by the

Administrator to perform the duties required under this subpart.

*Interstate.* From any State into or through any other State.

*Limited permit.* A document in which an inspector or person operating under a compliance agreement affirms that the regulated article identified on the document is eligible for interstate movement in accordance with § 301.55-5(b) only to a specified destination and only in accordance with specified conditions.

*Moved (move, movement).* Shipped, offered for shipment, received for transportation, transported, carried, or allowed to be moved, shipped, transported, or carried.

*Person.* Any association, company, corporation, firm, individual, joint stock company, partnership, society, or other entity.

*Plant Protection and Quarantine (PPQ).* The Plant Protection and Quarantine program of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

*Quarantined area.* Any State, or any portion of a State, listed in § 301.55-3(c) or otherwise designated as a quarantined area in accordance with § 301.55-3(b).

*Regulated article.* Any article listed in § 301.55-2(a) or (b), or otherwise designated as a regulated article in accordance with § 301.55-2(c).

*South American cactus moth.* The live insect known as the South American cactus moth, *Cactoblastis cactorum*, in any life stage (egg, larva, pupa, adult).

*State.* The District of Columbia, Puerto Rico, the Northern Mariana Islands, or any State, territory, or possession of the United States.

#### § 301.55-2 Regulated articles.

The following are regulated articles:

- (a) The South American cactus moth, in any living stage of its development.<sup>2</sup>
- (b) Cactus plants or parts thereof (excluding seeds and canned, preserved, or frozen pads or fruits) of the following genera: *Consolea*, *Cylindropuntia*, *Nopalea*, and *Opuntia*.

(c) Any other product, article, or means of conveyance not listed in paragraphs (a) or (b) of this section that an inspector determines presents a risk of spreading the South American cactus moth, after the inspector provides written notification to the person in possession of the product, article, or means of conveyance that it is subject to the restrictions of this subpart.

#### § 301.55-3 Quarantined areas.

(a) Except as otherwise provided in paragraph (b) of this section, the Administrator will list as a quarantined area in paragraph (c) of this section each State, or each portion of a State, in which the South American cactus moth has been found by an inspector, in which the Administrator has reason to believe that the South American cactus moth is present, or that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from localities where South American cactus moth has been found. Less than an entire State will be designated as a quarantined area only if the Administrator determines that:

(1) The State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed by this subpart on the interstate movement of regulated articles; and

(2) The designation of less than the entire State as a quarantined area will be adequate to prevent the interstate spread of the South American cactus moth.

(b) The Administrator or an inspector may temporarily designate any nonquarantined area in a State as a quarantined area in accordance with the criteria specified in paragraph (a) of this section. The Administrator will give a copy of this regulation along with written notice of the temporary designation to the owner or person in possession of the nonquarantined area, or, in the case of publicly owned land, to the person responsible for the management of the nonquarantined area. Thereafter, the interstate movement of any regulated article from an area temporarily designated as a quarantined area will be subject to this subpart. As soon as practicable, the area will be added to the list in paragraph (c) of this section or the designation will be terminated by the Administrator or an inspector. The owner or person in possession of, or, in the case of publicly owned land, the person responsible for the management of, an area for which designation is terminated will be given written notice of the termination as soon as practicable.

(c) The following areas are designated as quarantined areas:

Alabama

The entire State.

Florida

The entire State.

Georgia

The entire State.

<sup>1</sup> Any properly identified inspector is authorized, upon probable cause, to stop and inspect persons and means of conveyance moving in interstate commerce and to hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of regulated articles as provided in sections 1414, 421, and 434 of the Plant Protection Act (7 U.S.C. 7714, 7731, and 7754).

<sup>2</sup> Permit and other requirements for the interstate movement of South American cactus moths are contained in part 330 of this chapter.

South Carolina

The entire State.

**§ 301.55-4 Conditions governing the interstate movement of regulated articles from quarantined areas.**

Any regulated article may be moved interstate from a quarantined area<sup>3</sup> only if moved under the following conditions:

(a) With a certificate or limited permit issued and attached in accordance with §§ 301.55-5 and 301.55-8;

(b) Without a certificate or limited permit if:

(1) The regulated article originated outside the quarantined area and is either moved in an enclosed vehicle or is completely enclosed by a covering (such as canvas, plastic, or other closely woven cloth) adequate to prevent access by South American cactus moths while moving through the quarantined area; and

(2) The point of origin of the regulated article is indicated on the waybill, and the enclosed vehicle or the enclosure that contains the regulated article is not opened, unpacked, or unloaded in the quarantined area; and

(3) The regulated article is moved through the quarantined area without stopping except for refueling or for traffic conditions, such as traffic lights or stop signs.

(c) Without a certificate or limited permit if the regulated article is moved:

(1) By the United States Department of Agriculture for experimental or scientific purposes;

(2) Pursuant to a departmental permit issued by the Administrator for the regulated article;

(3) Under conditions specified on the departmental permit and found by the Administrator to be adequate to prevent the spread of the South American cactus moth; and

(4) With a tag or label bearing the number of the departmental permit issued for the regulated article attached to the outside of the container of the regulated article or attached to the regulated article itself if not in a container.

**§ 301.55-5 Issuance and cancellation of certificates and limited permits.**

(a) An inspector<sup>4</sup> may issue a certificate for the interstate movement of

a regulated article if the inspector determines that:

(1) The regulated article to be moved and all other regulated articles on the premises have been grown and maintained indoors in a shadehouse or greenhouse and no other cactus moth host material exists on the premises outside of a shadehouse or greenhouse;

(2) The regulated article to be moved and all other regulated articles on the premises are maintained on benches that are kept separate from benches containing non-host material;

(3) The regulated article to be moved and all other regulated articles on the premises have been placed on a 21-day insecticide spray cycle and have been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid if maintained in the nursery for longer than 21 days;

(4) The regulated article to be moved has been sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid 3 to 5 days prior to shipment and inspected and found free of cactus moth egg sticks and larval damage; and

(5) If the regulated article was moved into the premises from another premises in a quarantined area listed in § 301.55-3, it was immediately placed inside the shadehouse or greenhouse and sprayed with *Bacillus thuringiensis* subsp. *kurstaki*, carbaryl, spinosad, or imidaploprid within 24 hours.

(b) An inspector will issue a limited permit for the interstate movement of a regulated article if the inspector determines that:

(1) The regulated article is to be moved interstate to a specified destination for specified handling, processing, or utilization (the destination and other conditions to be listed in the limited permit), and this interstate movement will not result in the spread of the South American cactus moth because life stages of the South American cactus moth will be destroyed by the specified handling, processing, or utilization;

(2) It is to be moved in compliance with any additional conditions that the Administrator may impose under section 414 of the Plant Protection Act (7 U.S.C. 7714) in order to prevent the spread of the South American cactus moth; and

(3) It is eligible for unrestricted movement under all other Federal domestic plant quarantines and regulations applicable to the regulated article.

(c) Certificates and limited permits for the interstate movement of regulated articles may be issued by an inspector or person operating under a compliance

agreement. A person operating under a compliance agreement may issue a certificate or limited permit for interstate movement of a regulated article after an inspector has determined that the regulated article is eligible for a certificate or limited permit in accordance with paragraphs (a) or (b) of this section.

(d) Any certificate or limited permit that has been issued may be canceled, either orally or in writing, by an inspector whenever the inspector determines that the holder of the limited permit has not complied with this subpart or any conditions imposed under this subpart. If the cancellation is oral, the cancellation will become effective immediately, and the cancellation and the reasons for the cancellation will be confirmed in writing as soon as circumstances permit. Any person whose certificate or limited permit has been canceled may appeal the decision in writing to the Administrator within 10 days after receiving the written cancellation notice. The appeal must state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. A hearing may be held to resolve a conflict as to any material fact. Rules of practice for the hearing will be adopted by the Administrator. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision.

**§ 301.55-6 Compliance agreements and cancellation.**

(a) Any person engaged in growing, handling, or moving regulated articles may enter into a compliance agreement when an inspector determines that the person is aware of this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions contained in the compliance agreement.<sup>5</sup>

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart or the terms of the compliance agreement. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, to the Administrator, within 10 days after receiving written notification

<sup>3</sup> Requirements under all other applicable Federal domestic plant quarantines and regulations must also be met.

<sup>4</sup> Services of an inspector may be requested by contacting local offices of Plant Protection and Quarantine, which are listed in telephone directories.

<sup>5</sup> Compliance agreement forms are available without charge from local Plant Protection and Quarantine offices, which are listed in telephone directories.

of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

#### **§ 301.55-7 Assembly and inspection of regulated articles.**

(a) Any person (other than a person authorized to issue limited permits under § 301.55\*5(c)) who desires a certificate or limited permit to move a regulated article interstate must request an inspector<sup>6</sup> to examine the articles as far in advance of the desired interstate movement as possible, but no less than 48 hours before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

#### **§ 301.55-8 Attachment and disposition of certificates and limited permits.**

(a) A certificate or limited permit required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill, the regulated article must be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article.

(b) The certificate or limited permit for the interstate movement of a regulated article must be furnished by the carrier or the carrier's representative to the consignee listed on the certificate or limited permit upon arrival at the location provided on the certificate or limited permit.

#### **§ 301.55-9 Costs and charges.**

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. APHIS will not be responsible for all costs or charges incident to inspections or compliance with the provisions of the quarantine and

regulations in this subpart, other than for the services of the inspector.

Done in Washington, DC, this 5th day of February 2008.

**Kevin Shea,**

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

[FR Doc. E8-2477 Filed 2-8-08; 8:45 am]

**BILLING CODE 3410-34-P**

## **DEPARTMENT OF AGRICULTURE**

### **Grain Inspection, Packers and Stockyards Administration**

#### **9 CFR Part 201**

**RIN 0580-AA99**

#### **Weighing, Feed, and Swine Contractors**

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We propose to amend four existing scales and weighing regulations issued under the Packers and Stockyards Act (P&S Act) to ensure that payments by live poultry dealers and swine contractors to poultry and swine production contract growers are based on accurate weighing of both inputs and outputs. We propose to amend a regulation on scale tickets to reduce redundant wording and clarify weighing procedures. We propose to amend a regulation on reweighing to add swine contractors to the list of firms that must comply, and to add feed to the list of items for which reweighing may be requested. We propose to amend two regulations on weighing livestock and poultry to add weighing processes for feed, to add a specific time limit for weighing poultry, and to add swine contractors to the list of firms that must comply with care and promptness requirements.

**DATES:** We will consider comments we receive by April 11, 2008.

**ADDRESSES:** We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- E-Mail: Send comments via electronic mail to [comments.gipsa@usda.gov](mailto:comments.gipsa@usda.gov).
- Mail: Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643-S, Washington, DC 20250-3604.
- Fax: Send comments by facsimile transmission to: (202) 690-2755.
- Hand Delivery or Courier: Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue,

SW., Room 1643-S, Washington, DC 20250-3604.

• Federal e-Rulemaking Portal: Go to <http://www.regulation.gov>. Follow the on-line instruction for submitting comments.

**Instructions:** All comments should refer to the date and page number of this issue of the **Federal Register**.

**Background Documents:** Regulatory analyses and other documents relating to this action will be available for public inspection in the above office during regular business hours.

**Read Comments:** All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call GIPSA Management Support Services staff at (202) 720-7486 to arrange a public inspection of comments.

**FOR FURTHER INFORMATION CONTACT:** S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-7363, [s.brett.offutt@usda.gov](mailto:s.brett.offutt@usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Grain Inspection, Packers and Stockyards Administration (GIPSA) is responsible for enforcement of the P&S Act. Under authority delegated to us by the Secretary of Agriculture, we are authorized (7 U.S.C. 228) to make those regulations necessary to carry out the provisions of the P&S Act. We propose to amend the following regulations:

- Section 201.49—Requirements regarding scale tickets evidencing weighing of livestock, live poultry and feed,
- Section 201.76—Reweighing,
- Section 201.82—Care and promptness in weighing and handling livestock and live poultry, and
- Section 201.108-1—Instructions for weighing live poultry.

Violations of these sections of the regulations are deemed to be unfair or deceptive practices and constitute violations of § 202 (7 U.S.C. 192) or § 312 (7 U.S.C. 213) of the P&S Act. Packers and swine contractors may be assessed civil penalties of up to \$11,000 (7 U.S.C. 193) for each violation of § 202. Market agencies and dealers may be assessed civil penalties of as much as \$11,000 (7 U.S.C. 213) for each violation of § 312. Given the consequences for violating these regulations, it is important that these regulations be clear. Therefore, we propose to amend § 201.49 and § 201.108-1 to remove redundant language.

We also propose to revise § 201.82 and § 201.108-1 to prohibit practices

<sup>6</sup> See footnote 4.