

# Rules and Regulations

Federal Register

Vol. 74, No. 210

Monday, November 2, 2009

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

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

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2008–0017]

RIN 0579–AC77

#### Importation of Tomatoes From Souss-Massa-Draa, Morocco

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations to allow the importation of commercial consignments of tomatoes from the Souss-Massa-Draa region of Morocco subject to a systems approach similar to that which is already in place for tomatoes imported into the United States from other areas within Morocco. The tomatoes will have to be produced under conditions that include requirements for pest exclusion at the production site, fruit fly trapping inside the production site, and pest-exclusionary packinghouse procedures. The tomatoes will also be required to be accompanied by a phytosanitary certificate issued by the Moroccan national plant protection organization with an additional declaration stating that the tomatoes have been grown in registered pest-exclusionary structures in the Souss-Massa-Draa region and were pink at the time of packing. This action will allow for the importation of commercial consignments of tomatoes from the Souss-Massa-Draa region of Morocco into the United States while continuing to provide protection against the introduction of quarantine pests.

**DATES:** December 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Charisse Cleare, Project Coordinator, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 156,

Riverdale, MD 20737–1231; (301) 734–0773.

#### SUPPLEMENTARY INFORMATION:

##### Background

Under the regulations in “Subpart-Fruits and Vegetables” (7 CFR 319.56 through 319.56-49, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

On May 16, 2008, we published in the *Federal Register* (73 FR 28377–28382, Docket No. APHIS–2008–0017) a proposal<sup>1</sup> to amend the regulations in § 319.56–28 to allow the importation of commercial shipments of tomatoes from the Souss-Massa-Draa<sup>2</sup> region of Morocco subject to a systems approach similar to that which is already in place in that section for tomatoes imported into the United States from other areas within Morocco. We proposed to require the tomatoes to be produced under conditions that include requirements for pest exclusion at the production site, fruit fly trapping inside and outside the production site, and pest-excluding packinghouse procedures. We further proposed that the tomatoes would be required to be accompanied by a phytosanitary certificate issued by the Moroccan national plant protection organization with an additional declaration stating that the tomatoes have been grown in registered pest-exclusionary structures in the Souss-Massa-Draa region and were pink at the time of packing.

We solicited comments concerning our proposal for 60 days ending July 15, 2008. We received four comments by that date. They were from a State department of agriculture, representatives of growers and importers, and the Moroccan Ministry of Agriculture. They are discussed below.

Two commenters opposed the importation of tomatoes from the Souss-Massa-Draa region of Morocco unless

<sup>1</sup> To view the proposed rule and the comments we received, go to (<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0017>).

<sup>2</sup> In the proposed rule, we referred to the region as Souss-Massa. In this final rule, we use the full name of the region, Souss-Massa-Draa.

the tomatoes are treated for fruit flies with a Probit 9 treatment.

Probit 9 is a treatment standard that requires a pest mortality rate of greater than 99 percent. As described in the proposal, the systems approach uses methods other than treatment to mitigate the risk associated with fruit flies, and, therefore, application of a Probit 9 treatment is not required.

In order to address the risk associated with fruit flies, we proposed various mitigation measures, including ripeness requirements, a requirement that the tomatoes be produced in pest-exclusionary structures, fruit fly trapping, pest-exclusionary procedures at the production site and packinghouse, the removal of shade trees around the pest-exclusionary structures, and fruit fly bait spray applications.

One commenter, the Moroccan Ministry of Agriculture, stated that two of the proposed requirements would not be feasible to implement, specifically the requirement for removal of shade trees within 10 meters of the pest-exclusionary structures and the requirement to apply approved protein bait spray pesticide for Mediterranean fruit fly (Medfly, *Ceratitis capitata*) on shade trees and host plants within 200 meters of the pest-exclusionary structures every 6 to 10 days, starting at least 30 days before harvest. The commenter stated that these requirements would be in conflict with environmental protection requirements in Morocco. In addition, the Moroccan Ministry of Agriculture stated that the pesticide spraying requirements were not feasible because the small size of farms within the Souss-Massa-Draa region means that they are concentrated very close together and the ministry expressed concern that the frequency and concentration of the spraying could negatively affect the natural environment and could lead to fruit flies developing resistance to the protein bait spray pesticides. As an alternative, the Moroccan Ministry of Agriculture stated that it already has an export program in place in Souss-Massa-Draa that focuses on fruit fly protection measures inside the production site such as the use of a greater number of traps per hectare than in areas of Morocco and Western Sahara from which tomatoes are currently approved to be exported under § 319.56–28(c). The program also uses

anti-thrips nets; as the anti-thrips nets are 50 mesh and fruit flies are much larger than thrips, this mesh size is adequate to prevent access to the production site by fruit flies. The commenter stated that the program was adequate to mitigate the risks associated with fruit flies.

We have determined that some of the measures the commenter identified as unfeasible are not necessary to provide phytosanitary security, given the demonstrated efficacy of the existing tomato export program in Morocco and Western Sahara. No fruit flies have ever been intercepted in this program. Therefore, in this final rule, we are not including the proposed requirement in § 319.56–28(g)(6) for the removal of shade trees within 10 meters of the pest-exclusionary structures. In addition, we have changed the proposed buffer zone and spraying requirements to be consistent with the requirements currently in place for the El Jadida and Safi production areas in Morocco and in Western Sahara.

As provided in current paragraph (c) of § 319.56–28, in the El Jadida and Safi production areas in Morocco and in Western Sahara, traps must be placed outside the registered pest-exclusionary structure within a 2-kilometer radius at a density of 4 traps per square kilometer 2 months prior to the start of the shipping season and continuing through the end of the shipping season. The capture of a single Medfly within 200 meters of a registered pest-exclusionary structure necessitates the addition of 6 more traps to be placed within a radius of 200 meters surrounding the initial detection. Capture of 2 Medflies within 200 meters of a registered pest-exclusionary structure within a 1-month time period necessitates bait sprays in the area every 7 to 10 days for 60 days to ensure eradication within the 200-meter buffer zone.

We are adding the requirements for trapping outside the pest-exclusionary structures to proposed paragraph (g)(3) and the requirements for additional trapping when a Medfly is trapped outside the greenhouse to proposed paragraph (g)(5). Because Souss-Massa-Draa is not an area of low prevalence for fruit flies, unlike the currently approved tomato export provinces in Morocco and Western Sahara, some additional mitigations are necessary in order to mitigate the additional pest risk associated with tomatoes from Souss-Massa-Draa. Therefore, we are retaining the proposed requirement for eight fruit fly traps per hectare within the pest-exclusionary structures, with a minimum of four traps per structure, as opposed to the requirement for four

traps per hectare in the currently approved provinces. We are also retaining the proposed prohibition of fruit fly host material within 50 meters of the pest-exclusionary structures, which is not included in the requirements for the currently approved provinces.

In addition, we are retaining the proposed requirements for trapping program monitoring and retention of trapping records for 1 year, and the requirement that sea containers must be kept closed if stored within 20 meters of Medfly host materials prior to loading. We are also amending the regulations in § 319.56–28(c)(4) to make the 1-year retention of trapping records requirement applicable for all approved growing areas within Morocco and Western Sahara in order to harmonize our regulations.

Two commenters expressed concern or had questions regarding Morocco's ability to enforce the proposed systems approach or APHIS' review of the program. One commenter asked what APHIS's confidence level is in the Moroccan Ministry of Agriculture's Division of Plant Protection, Inspection, and Enforcement (DPVCTRF) and asked what quality control measures are in place to monitor compliance with the provisions of the systems approach within Morocco. Specifically, the commenter asked how many site visits have been made or are planned and how much fruit is inspected at the port of arrival.

Another commenter stated that the systems approach is inadequate because it cannot be effectively reviewed or enforced by APHIS. According to the commenter, the systems approach is too reliant on reviews by DPVCTRF staff that may not have proper training. The commenter also expressed concern that there may not be enough DPVCTRF staff to perform required tasks and that decisions within Morocco will not be scrutinized by APHIS in a timely manner.

Based on the track record of our program for the importation of tomatoes from other areas of Morocco and Western Sahara into the United States, we are confident the DPVCTRF can effectively oversee the application of these measures in the Souss-Massa-Draa region. In addition, trapping records must be maintained for each site for 1 year and made available to APHIS for review upon request. To provide additional oversight, we are adding in § 319.56–28(g)(1) a requirement that tomatoes must be grown in approved production sites and provisions for APHIS to maintain oversight by participating in the approval and

monitoring of production sites. In addition, we are adding the provisions that, 2 months before harvest and continuing until the end of the shipping season, DPVCTRF will visit and inspect the production sites and that APHIS may monitor the production sites at any time during this period. Approval and monitoring of production sites are standard requirements for our more recent import programs.

If, through trapping records, site visits, or port-of-arrival inspections, we find that any of the required mitigation measures are not being properly implemented, we will suspend shipments from the offending sites. Two site visits have already been conducted, with a third planned for the future in order to approve the pest-exclusionary structures. We will monitor the program on a regular basis and make additional site visits as needed. A standard port-of-arrival inspection rate of 2 percent will apply.

The proposed rule included a requirement that the tomatoes be pink at the time of packing. As stated in the current regulations, we consider pink tomatoes to be tomatoes where the surface area of the tomato is more than 30 percent but not more than 60 percent pink and/or red. One commenter asked who makes the decision regarding whether the tomatoes are at the correct stage of ripeness.

DPVCTRF is responsible for determining whether the tomatoes are at the correct stage of ripeness. However, port-of-arrival inspection will serve to check compliance with that provision of the regulations.

One commenter asked what safeguards are in place to mitigate high Medfly population fluctuations and ensure that the packinghouse is free of fruit flies. The commenter also asked if there can be fruit fly host plants in close proximity to the packinghouse.

As proposed, the tomatoes will have to be packed within 24 hours of harvest and must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. In addition, they must be packed in insect-proof cartons or containers, or covered by insect-proof mesh or plastic tarpaulin for transit to the airport or ship and export to the United States. We are adding a provision in a new paragraph (g)(8) in § 319.56–28 that during the time the packinghouse is in use for exporting fruit to the United States, the packinghouse may only accept fruit from registered approved production sites. (We are also moving the provisions proposed in paragraph (g)(8) to a new paragraph (g)(9).) This

provision is standard for our import programs, including our import program for Chilean tomatoes, and will provide additional protection against infested host material entering the packinghouse and being transported to the United States. These measures are adequate to protect against the incursion of fruit flies into the packinghouse regardless of Medfly population fluctuations. In addition, as stated in the proposed rule, no fruit fly host material is permitted within 50 meters of the entry door of the packinghouse.

In addition to the changes discussed earlier, we are making several minor changes to the proposed requirements for the importation of tomatoes from Souss-Massa-Draa, Morocco, in § 319.56–28(g). We are replacing the word “greenhouses” with the phrase “pest-exclusionary structures” in the regulatory text we proposed and in the current regulations for the importation of tomatoes from the provinces of El Jadida and Safi in Morocco and the province of Dahkla in Western Sahara in § 319.56–28(c), as “pest-exclusionary structures” is a more inclusive term that allows us the flexibility to approve structures other than greenhouses that we have found to adequately mitigate risk. To be more consistent with the current regulations for the provinces of El Jadida and Safi in Morocco and the province of Dahkla in Western Sahara, and to reflect the current reality within Morocco, we are also making a change in proposed paragraph (g)(8), which we are redesignating (g)(9), of § 319.56–28 to state that the Moroccan Ministry of Agriculture, Fresh Product Export (EACCE) division and not DPVCTRF is responsible for export certification and issuance of phytosanitary certificates.

Since publication of the proposal, several Mediterranean countries, including Morocco, have experienced an outbreak of an additional quarantine pest of tomatoes, the tomato leaf miner (*Tuta absoluta*). We have issued a Federal Order (FO)<sup>3</sup> that imposes additional restrictions on the movement of tomatoes from countries where the pest is known to occur, including Morocco, in order to prevent the spread of the pest. Under the FO, the following criteria must be met before tomatoes from Morocco are eligible to enter the United States:

- The tomatoes must be grown in approved production sites registered with DPVCTRF;
- Tomato production sites must include a pest-exclusionary structure

which must have double self closing doors and have all other openings and vents covered with 1.6 mm (or smaller) of screening;

- Registered production sites must conduct regular inspections for *T. absoluta* throughout the harvest season and find these areas free of evidence (e.g., eggs or larvae) of *T. absoluta*. If, within 30 days of harvest, 2 *T. absoluta* are captured inside the greenhouse or a single *T. absoluta* is found inside individual fruit or in a consignment of the fruit, shipments from the production site will be suspended until APHIS and

- DPVCTRF determine that an appropriate level of risk mitigation has been achieved; and DPVCTRF must maintain records of *T. absoluta* captures for 1 year following the date of the capture for APHIS review. DPVCTRF must maintain an APHIS-approved quality control program to monitor or audit the program. APHIS must be notified when a production site is removed or added to the program.

APHIS will conduct routine site visits to monitor the program and will issue a future rulemaking to revise the regulations in accordance with the requirements in the FO.

Finally, because the botanical name for tomatoes has been changed, we are replacing each occurrence of the old botanical name, *Lycopersicon esculentum*, in §§ 319.56–13 and 319.56–28 with the new botanical name, *Solanum lycopersicum*.

#### Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. We have prepared an economic analysis for this final rule. The analysis, which considers the number and types of entities that are likely to be affected by this action and the potential economic effects on those entities, provides the basis for the Administrator’s determination that the rule will not have a significant economic impact on a substantial number of small entities. The economic analysis may be viewed on the Regulations.gov Web site (see footnote 1 for instructions for accessing Regulations.gov). Copies of the economic analysis are also available from the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### Executive Order 12988

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not

been reviewed by the Office of Management and Budget.

This final rule allows tomatoes to be imported into the United States from the Souss-Massa-Draa region of Morocco. State and local laws and regulations regarding tomatoes imported under this rule will be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0345.

#### 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 rule, please contact Mrs. Celeste Sickles, APHIS’ Information Collection Coordinator, at (301) 851–2908.

#### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, 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, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

#### § 319.56–13 [Amended]

■ 2. In § 319.56–13, the table in paragraph (a) is amended, under the column heading “Botanical name,” by removing the words *Lycopersicon*

<sup>3</sup>The FO can be found on the APHIS Web site at ([http://www.aphis.usda.gov/import\\_export/plants/plant\\_imports/federal\\_order/index.shtml](http://www.aphis.usda.gov/import_export/plants/plant_imports/federal_order/index.shtml)).

*esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ 3. Section 319.56–28 is amended as follows:

■ a. In paragraph (a) introductory text and paragraph (b) introductory text, by removing the words *Lycopersicon esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ b. By revising paragraph (c) introductory text to read as set forth below.

■ c. In paragraph (c)(4), by removing the semicolon after the word "request" and adding a period in its place, and by adding at the end of the paragraph the sentence "The trapping records must be maintained for 1 year for APHIS review;"

■ d. In paragraph (d) introductory text, paragraph (e) introductory text, and paragraph (f) introductory text, by removing the words *Lycopersicon esculentum*" each time they occur and adding the words *Solanum lycopersicum*" in their place.

■ e. By adding a new paragraph (g) to read as set forth below.

■ f. By revising the OMB citation at the end of the section to read as set forth below.

**§ 319.56–28 Tomatoes from certain countries.**

\* \* \* \* \*

(c) *Tomatoes (fruit) (Solanum lycopersicum) from the provinces of El Jadida or Safi in Morocco and the province of Dahkla in Western Sahara.* Pink tomatoes may be imported into the United States from the provinces of El Jadida or Safi in Morocco and the province of Dahkla in Western Sahara only in accordance with this section and other applicable provisions of this subpart.<sup>7</sup>

\* \* \* \* \*

(g) *Tomatoes (fruit) (Solanum lycopersicum) from the Souss-Massa-Draa region of Morocco.* Pink tomatoes may be imported into the United States from the region of Souss-Massa-Draa in Morocco only in accordance with this section and other applicable provisions of this subpart.<sup>8</sup>

(1) The tomatoes must be grown in approved production sites within the region of Souss-Massa-Draa in Morocco in pest-exclusionary structures registered with, and inspected by, the Moroccan Ministry of Agriculture, Division of Plant Protection, Inspection, and Enforcement (DPVCTRF). Production sites will be approved

jointly by DPVCTRF and APHIS. DPVCTRF will visit and inspect the production sites starting 2 months before harvest and continuing until the end of the shipping season. APHIS may monitor the production sites at any time during this period;

(2) The tomatoes may be shipped from the Souss-Massa-Draa region of Morocco only between December 1 and April 30, inclusive;

(3) Beginning 2 months prior to the start of the shipping season and continuing through the end of the shipping season, DPVCTRF must set and maintain Mediterranean fruit fly (Medfly) traps baited with trimedlure, or other approved protein bait, inside the pest-exclusionary structures at a rate of 8 traps per hectare, with a minimum of 4 traps per pest-exclusionary structure. Traps must also be placed outside registered pest-exclusionary structures within a 2-kilometer radius at a rate of 4 traps per square kilometer. All traps must be checked every 7 days;

(4) DPVCTRF must maintain records of trap placement, trap maintenance, and any Medfly captures, and make the records available to APHIS upon request. DPVCTRF must maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records must be maintained for 1 year for APHIS review;

(5) Capture of a single Medfly in a registered pest-exclusionary structure during the 2 months prior to export and continuing through the duration of the harvest, or detection of a Medfly in a consignment that is traced back to a registered pest-exclusionary structure, will immediately result in cancellation of exports from that pest-exclusionary structure until the source of the infestation is determined, the Medfly infestation has been eradicated, and measures are taken to preclude any future infestation. Exports will not be reinstated until APHIS and DPVCTRF mutually determine that risk mitigation has been achieved. Capture of a single Medfly within 200 meters of a registered pest-exclusionary structure will necessitate increasing trap density in order to determine whether there is a reproducing population in the area. Six additional traps must be placed within a radius of 200 meters surrounding the trap where the Medfly was captured. Capture of two Medflies within 200 meters of a registered pest-exclusionary structure and within a 1-month time period will necessitate Malathion bait sprays in the area every 7 to 10 days for 60 days to ensure eradication;

(6) No Medfly host material is permitted within 50 meters of the entry

door of the pest-exclusionary structure or the packinghouse;

(7) The tomatoes must be packed within 24 hours of harvest and must be pink at the time of packing. They must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. They must be packed in insect-proof cartons or containers, or covered by insect-proof mesh or plastic tarpaulin for transit to the airport or ship and export to the United States. These safeguards must be intact upon arrival in the United States. Sea containers must be kept closed if stored within 20 meters of Medfly host materials prior to loading;

(8) During the time the packinghouse is in use for exporting fruit to the United States, the packinghouse may only accept fruit from registered approved production sites; and

(9) The Moroccan Ministry of Agriculture, Fresh Product Export (EACCE) is responsible for export certification inspection and issuance of phytosanitary certificates. Each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by EACCE and bearing the declaration, "These tomatoes were grown in registered pest-exclusionary structures in Souss-Massa-Draa Region, Morocco, and were pink at the time of packing."

(Approved by the Office of Management and Budget under control numbers 0579–0049, 0579–0131, 0579–0316, 0579–0286, and 0579–0345)

**§ 319.56–34 [Amended]**

■ 4. In § 319.56–34, paragraph (j)(2), footnote 8 is redesignated as footnote 9.

Done in Washington, DC, this 26<sup>th</sup> day of October 2009.

**Kevin Shea**

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

[FR Doc. E9–26308 Filed 10–30–09; 8:45 am]

**BILLING CODE: 3410–34–S**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 983**

**[Doc. No. AMS–FV–09–0031; FV09–983–1 FR]**

**Pistachios Grown in California; Changes to Handling Regulations**

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

**ACTION:** Final rule.

<sup>7</sup> See footnote 5 to paragraph (a) of this section.

<sup>8</sup> See footnote 5 to paragraph (a) of this section.