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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS-2012-0108]

Black Stem Rust; Additions of Rust-Resistant Species and Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: We are amending the black stem rust quarantine and regulations by adding two varieties to the list of rust-resistant Berberis species and varieties and one variety to the list of rust-resistant Mahonia species and varieties. This action will allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

DATES: This rule will be effective on [Insert date 60 days after date of publication in the Federal Register], unless we receive written adverse comments or written notice of intent to submit adverse comments on or before [Insert date 30 days after date of publication in the Federal Register]. If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the Federal Register withdrawing this rule before the effective date.

ADDRESSES: You may submit comments or written notice of intent to submit adverse comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0108-0001>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2012-0108, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0108> or 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) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Prakash K. Hebbar, National Program Manager, Black Stem/Barberry Rust Program, PPQ, APHIS, 4700 River Road Unit 26, Riverdale, MD 20737-1231; (301) 851-2228.

#### SUPPLEMENTARY INFORMATION:

##### Background

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus (*Puccinia graminis*) that reduces the quality and yield of infected wheat, oat, barley, and rye crops. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis*, *Mahoberberis*, and *Mahonia*. The fungus is spread from host to host by windborne spores.

The black stem rust quarantine and regulations, which are contained in 7 CFR 301.38 through 301.38-8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera

Berberis, Mahoberberis, and Mahonia, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks. Section 301.38-2 of the regulations includes a listing of regulated articles and indicates those species and varieties of the genera Berberis, Mahoberberis, and Mahonia that are known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate. In accordance with the procedures described below under “Dates,” this direct final rule will add B. thunbergii varieties ‘Della’ and ‘O’ Byrne’ to the list of rust-resistant Berberis species in § 301.38-2(a)(1). Similarly, this rule will add the Mahonia x media variety ‘Lionel Fortescue’ to the list of rust-resistant Mahonia species in § 301.38-2(a)(2)(ii).

The addition of these species is based on recent testing to determine rust resistance conducted by the Agricultural Research Service of the United States Department of Agriculture (USDA) at its Cereal Disease Laboratory in St. Paul, MN. The testing is performed in the following manner: In a greenhouse, the suspect plant or test subject is placed under a screen with a control plant—a known rust-susceptible species of Berberis, Mahoberberis, or Mahonia. Infected wheat stems, a primary host of black stem rust, are placed on top of the screen. The plants are moistened and maintained in 100 percent humidity. This causes the spores to swell and fall on the plants lying under the screen. The plants are then observed for 7 days at 20-80 percent relative humidity. If the rust-susceptible plant shows signs of infection after 7 days and the test plants do not, the test results indicate that the test plants are rust-resistant. This test must be performed 12 times, and all 12 tests must yield the same result before USDA can make a determination as to whether the test plants are rust-resistant. The test may be conducted on 12

individual plants, or it may be performed multiple times on fewer plants (e.g., six plants tested twice or three plants tested four times). The tests must be performed on new growth, just as the leaves are unfolding. Therefore, the tests are usually conducted in the spring or fall, during the growing season. All 12 tests generally cannot be conducted on the same day because of the plants' different growth stages. Based on over 30 years of experience with this test, we believe that 12 is the reliable test sample size on which USDA can make its determination. We do not know of any plant that was subsequently discovered to be rust-susceptible after undergoing the test procedure 12 times and being determined by USDA to be rust-resistant.

#### Dates

We are publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, on [insert date 60 days after date of publication in the Federal Register], unless we receive written adverse comments or written notice of intent to submit adverse comments on or before [insert date 30 days after date of publication in the Federal Register].

Adverse comments are comments that suggest the rule should not be adopted or that suggest the rule should be changed.

If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the Federal Register withdrawing this rule before the effective date. We will then publish a proposed rule for public comment.

As discussed above, if we receive no written adverse comments or written notice of intent to submit adverse comments within 30 days of publication of this direct final rule, this direct final rule will become effective 60 days following its publication. We will publish a document

in the Federal Register before the effective date of this direct final rule confirming that it is effective on the date indicated in this document.

#### Executive Order 12866 and Regulatory Flexibility Act

This rule is subject to Executive Order 12866. However, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

This analysis provides the basis, as required by the Regulatory Flexibility Act, for certification by the APHIS Administrator that the rule will not have a significant economic impact on a substantial number of small entities.

This direct final rule will amend 7 CFR 301.38-2 by adding two varieties to the list of rust-resistant Berberis species and varieties and by adding one variety to the list of rust-resistant Mahonia species and varieties. The nursery and floriculture industries that may be affected by this rule are largely composed of small entities. We expect these entities to benefit from the rule, by being able to market interstate barberry species and varieties that have been determined to be rust-resistant.

The introduction and spread of plant pests can result in damage to crops and losses to the U.S. agricultural sector. For the purpose of this analysis and following the Small Business Administration (SBA) guidelines, we note that a major segment of entities potentially affected by this rule are classified within the following industries: Nursery and Tree Production (NAICS 111421), and Floriculture Production (NAICS 111422). According to the Census of Agriculture, these two categories included 52,845 farms in 2007, and represented 3 percent of all farms in the United States. These entities are considered small by SBA standards if their annual sales are \$750,000 or less. Over 93 percent of the farms in these industries had annual sales of less than \$500,000. Barberry plants are not one of the crops tracked by the Census and therefore data on

production and number of producers are not available. Nurseries producing barberry plant species and varieties will not be negatively affected. In fact, they will benefit from being able to market the three varieties interstate. In addition, the rule does not require any additional reporting, recordkeeping, or other compliance measures beyond what is already in place.

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 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. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

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

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

Accordingly, 7 CFR part 301 is amended 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. Section 301.38-2 is amended as follows:

a. In paragraph (a)(1), by adding, in alphabetical order, two rust-resistant Berberis species; and

b. In paragraph (a)(2)(ii), by adding, in alphabetical order, one rust-resistant Mahonia species.

The additions read as follows:

§ 301-38-2 Regulated articles.

(a) \* \* \*

(1) \* \* \*

\* \* \* \* \*

B. thunbergii ‘Della’

\* \* \* \* \*

B. thunbergii ‘O’Byrne’

\* \* \* \* \*

(2) \* \* \*

(ii) \* \* \*

\* \* \* \* \*

M. x media 'Lionel Fortescue'

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Done in Washington, DC, May 8, 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

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