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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2011–0012]

RIN 0579–AD48

#### Importation of Tomatoes From the Economic Community of West African States Into the Continental United States

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the fruits and vegetables regulations to allow the importation of tomatoes from the member States of the Economic Community of West African States (ECOWAS) into the continental United States. As a condition of entry, tomatoes from the ECOWAS will be subject to a systems approach that includes requirements for pest exclusion at the production site, fruit fly trapping and monitoring, and procedures for packing the tomatoes. The tomatoes will also be required to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country with an additional declaration that the tomatoes have been produced in accordance with these requirements. This action will allow for the importation of tomatoes from the ECOWAS into the continental United States while continuing to provide protection against the introduction of quarantine pests.

**DATES:** *Effective Date:* July 12, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. Tony Román, Import Specialist, Plant Protection and Quarantine, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1236; (301) 851–2242.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in “Subpart–Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–56, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States. Section 319.56–28 of the regulations contains administrative instructions allowing the importation of tomatoes from various countries where the Mediterranean fruit fly (Medfly, *Ceratitidis capitata*) is present.

On August 2, 2011, we published in the **Federal Register** (76 FR 46209–46212, Docket No. APHIS–2011–0012) a proposal<sup>1</sup> to amend the regulations by allowing tomatoes from the member States of the Economic Community of West African States (ECOWAS) to be imported into the continental United States under a systems approach that would include requirements for pest exclusion at the production site, fruit fly trapping and monitoring, and procedures for packing the tomatoes. We also proposed to require the tomatoes to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country with an additional declaration that the tomatoes had been produced in accordance with the proposed requirements.

We solicited comments concerning our proposal for 60 days ending October 3, 2011. We received four comments by that date. They were from members of the public and a State department of agriculture.

Two commenters opposed the importation of tomatoes from the ECOWAS without raising any issues related to the pest risk analysis or proposed rule. The remaining comments are discussed below by topic.

One commenter opposed the proposed rule, stating that the pest risk analysis (PRA) identified 10 quarantine pest species that could potentially accompany shipments of tomatoes from the ECOWAS into the continental United States and that the potential introduction of these pests, specifically the fruit flies, into the commenter’s

State would pose a risk to the State’s agriculture.

The PRA, which includes a qualitative, pathway-initiated pest risk assessment and a risk management document, not only identifies quarantine pests that could potentially accompany shipments of fresh tomatoes from the ECOWAS, but also identifies mitigation measures that will be required for this commodity to be imported into any State in the continental United States. The mitigation measures for tomatoes from the ECOWAS have been previously evaluated and proven effective for other commodities, and we will continuously monitor the effectiveness of those mitigations with port-of-entry inspections. We do not consider it necessary to prohibit the importation of a commodity based on identification of quarantine pests that could potentially accompany consignments when proven mitigations are available for this risk and will be required as a condition of importation.

The commenter also requested additional information regarding the production site monitoring and post-harvest procedures. Specifically, the commenter asked about the frequency of Animal and Plant Health Inspection Service (APHIS) visits to production and packing facilities, the guidelines for and oversight of the packinghouse, and the corrective measures and penalties resulting from the detection of live pests.

While being used for packing tomatoes for export to the United States, the packinghouses will only be allowed to accept fruit from registered production sites. In addition, no shade trees may be grown within 10 meters of the entry door of the packinghouses, and no other fruit fly host plants may be grown within 50 meters of the entry door of the packinghouses.

After initial approval of production site by both APHIS and the national plant protection organization (NPPO) of the exporting country, APHIS may monitor the production sites if necessary; however, regular inspection of production sites by APHIS is no longer required. The NPPO of the exporting country will be responsible for monitoring the production sites monthly beginning 2 months before harvest and continuing through the end of the shipping season. The inspection

<sup>1</sup>To view the proposed rule, the pest risk analysis, and the comments we received, go to <http://www.regulations.gov/#/doCKETDetail;D=APHIS-2011-0012>.

of shipments at the port of entry by APHIS is sufficient to verify that the required packinghouse procedures have been followed because failure to follow these procedures will be evident by the presence of fruit flies or other quarantine pests at the point of entry.

The detection of a single fruit fly of concern inside a pest exclusionary structure (PES) starting 2 months prior to export and continuing through the duration of the harvest, or detection of a fruit fly of concern in a consignment at port of entry inspection which is traced back to a PES will result in immediate cancellation of exports from that production site until APHIS and NPPO of the exporting country have mutually determined that the risk has been properly mitigated.

With regard to other quarantine pests, the systems approach for the importation of tomatoes from ECOWAS includes the submission of a bilateral workplan to APHIS by the NPPO of each exporting country. Those workplans will include the specific corrective measures that must be taken to prevent a recurrence of the quarantine mealy bugs and moths identified in the PRA.

One commenter opposed the proposed rule and stated that the potentially negative impact on the U.S. economy, specifically small tomato producers, resulting from this action would be too great. The commenter said that APHIS should promote greater production of tomatoes by U.S. farmers and promote the purchase of tomatoes produced in the United States as the healthy choice.

The Plant Protection Act (7 U.S.C. 7701 *et seq.*), the authorizing statute for APHIS' plant-health-related activities, authorizes the Secretary of Agriculture to prohibit or restrict the importation of any plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed into the United States. The factors cited by the commenter are not within our decisionmaking authority under the Act.

In addition, the economic analysis made available with the proposed rule noted that even when assuming imports into the United States of 20 percent of the average annual exports from ECOWAS to the rest of the world, and no displacement of tomato imports from other countries, the welfare loss for U.S. small-entity producers would be equivalent to about 0.05 percent of their average annual revenue, or about \$4.00.

The commenter also mentioned the cost of controlling and monitoring the inspection and production of the commodity in another country and

asked whether the cost of importing the commodity outweighs the benefits.

APHIS involvement in the inspection and monitoring of the importation of tomatoes in ECOWAS member countries is limited. Prior to the importation of the tomatoes, APHIS and the NPPO of the exporting country approve the production sites. The only other time APHIS action may be required in the exporting country is in the event of the capture of a fruit fly of concern inside a PES.

In addition, the agricultural quarantine and inspection (AQI) program provides for inspections of imported agricultural goods, products, and other articles to prevent the introduction of harmful agricultural pests and diseases. Services to directly provide these inspections or that support these inspections are known as AQI services. APHIS charges a user fee to recover the costs of providing AQI services. Therefore, much of the costs associated with the importation of tomatoes from the ECOWAS will be funded by the importers.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

#### **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.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The analysis examines impacts for U.S. small entities of this final rule, which will allow fresh tomato imports from member countries of the ECOWAS. The United States has no history of importing tomatoes from these countries. We model three levels of tomato exports to the United States from ECOWAS member States: (i) 5 percent of ECOWAS average annual world exports, 2003–2008 (484 metric tons (MT)); (ii) 10 percent of ECOWAS average annual world exports, 2003–2008 (967 MT); and (iii) 20 percent of ECOWAS average annual world exports, 2003–2008 (1,934 MT). Even when assuming the largest import quantity and no displacement of tomato imports

from other countries, the welfare loss for U.S. small-entity producers would be equivalent to about 0.05 percent of their average annual revenue, that is, about \$4.00. While U.S. tomato producers are predominantly small, this rule will not have a significant economic impact on a substantial number of small entities.

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

#### **Executive Order 12988**

This rule would allow tomatoes to be imported into the United States from the ECOWAS. If this rule is adopted, State and local laws and regulations regarding tomatoes imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public and would 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. If this rule is adopted, 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 0579–0381.

#### **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 amend 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.

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

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

■ b. By revising the Office of Management and Budget citation at the end of the section to read as set forth below.

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

\* \* \* \* \*

(h) *Tomatoes (fruit) (Solanum lycopersicum) from member States of the Economic Community of West African States.* Fresh tomatoes may be imported into the continental United States from member States of the Economic Community of West African States (ECOWAS) only in accordance with this section and other applicable provisions of this subpart. The ECOWAS consists of Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo Republic. These conditions are designed to prevent the introduction of the following quarantine pests: *Bactrocer cucurbitae*, *B. invadens*, *Ceratit capitata*, *C. rosa*, *Chrysodeixis chalcites*, *Helicoverpa armigera*, *H. assulta*, *Leucinodes orbonalis*, *Maconellicoccus hirsutus*, and *Nipaecoccus viridis*.

(1) *Production site requirements.* (i) Production sites in which the tomatoes are produced must be registered with the national plant protection organization (NPPO) of the exporting country. Initial approval of production sites must be completed jointly by the NPPO of the exporting country and APHIS.

(ii) The NPPO of the exporting country must visit and inspect the production sites monthly, beginning 2 months before the harvest and continuing through the end of the shipping season. APHIS may monitor the production sites if necessary.

(iii) Production sites must be pest-exclusionary structures (PES). The PES must have self-closing double doors. All openings, including vents, to the outside of the PES must be covered by screening with mesh openings of not more than 1.6 mm.

(iv) No shade trees may be grown within 10 meters of the entry door of the

PES, and no other fruit fly host plants may be grown within 50 meters of the entry door of the PES.

(2) *Mitigation measures for fruit flies.* (i) Beginning 2 months prior to the start of the shipping season and continuing through the end of the harvest, the NPPO of the exporting country must set and maintain fruit fly traps with an APHIS-approved protein bait inside each PES at a rate of eight traps per hectare, with a minimum of four traps in each PES, and check the traps every 7 days. The NPPO of the exporting country must maintain records of trap placement, trap maintenance, and captures of any fruit flies of concern. The NPPO must maintain trapping records for 1 year, and make the records available to APHIS upon request.

(ii) Capture of a single fruit fly of concern inside a PES will immediately result in cancellation of exports to the United States from that PES. The detection of a fruit fly of concern in a consignment at the port of entry that is traced back to a PES will also result in immediate cancellation of exports to the United States from that PES. In both cases, exports from the PES in question may not resume until APHIS and the NPPO of the exporting country have mutually determined that the risk has been properly mitigated.

(3) *Harvesting requirements.* The stem and calyx must be removed from the tomato.

(4) *Packinghouse requirements.* (i) While in use for exporting tomatoes to the United States, the packinghouses may only accept fruit from registered production sites.

(ii) No shade trees may be grown within 10 meters of the entry door of the packinghouses, and no other fruit fly host plants may be grown within 50 meters of the entry door of the packinghouses.

(5) *Post-harvest procedures.* (i) The tomatoes must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing.

(ii) Tomatoes must be packed within 24 hours of harvest in insect-proof cartons or containers, or covered with insect-proof mesh or a plastic tarpaulin for transport to the United States. These safeguards must remain intact until arrival in the United States or the consignment will be denied entry into the United States.

(iii) If transported by sea, the containers in which the tomatoes are packed must be kept closed if stored within 20 meters of a fruit fly host prior to being loaded on the vessel.

(6) *Commercial consignments.* The tomatoes may be imported in commercial consignments only.

(7) *Phytosanitary certificate.* Each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by the NPPO of the exporting country, providing an additional declaration “These tomatoes were grown in registered production sites in [name of country] and the consignment has been inspected and found free of quarantine pests.”

(Approved by the Office of Management and Budget under control numbers 0579–0049, 0579–0131, 0579–0316, 0579–0286, 0579–0345, and 0579–0381.)

Done in Washington, DC, this 6th day of June 2012.

**Kevin Shea,**

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

[FR Doc. 2012–14294 Filed 6–11–12; 8:45 am]

**BILLING CODE 3410–34–P**

**DEPARTMENT OF AGRICULTURE****Animal and Plant Health Inspection Service****9 CFR Parts 93, 94, and 95**

[Docket No. APHIS–2006–0074]

RIN 0579–AC36

**Highly Pathogenic Avian Influenza**

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

**ACTION:** Interim rule; reopening of comment period.

**SUMMARY:** We are reopening the comment period for our interim rule that amended the regulations concerning the importation of animals and animal products to prohibit or restrict the importation of bird and poultry products from regions where any subtype of highly pathogenic avian influenza (HPAI) is considered to exist. The interim rule also imposed restrictions concerning importation of live poultry and birds that have been vaccinated for certain types of HPAI, or that have been moved through regions where any subtype of HPAI is considered to exist. This action will give the public an additional opportunity to comment on the interim rule and on a change to its provisions that we are considering.

**DATES:** We will consider all comments that we receive on or before July 12, 2012.

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