

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****7 CFR Parts 300 and 319****[Docket No. 02-026-4]****Importation of Fruits and Vegetables****AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Final rule.

SUMMARY: We are amending the fruits and vegetables regulations to list a number of fruits and vegetables from certain parts of the world as eligible, under specified conditions, for importation into the United States. All of the fruits and vegetables, as a condition of entry, will be inspected and subject to treatment at the port of first arrival as may be required by an inspector. In addition, some of the fruits and vegetables will be required to be treated or meet other special conditions. This action will provide the United States with additional types and sources of fruits and vegetables while continuing to protect against the introduction of quarantine pests through imported fruits and vegetables. We are also recognizing areas in several countries as free from certain fruit flies; amending the packing requirements for certain commodities; expanding locations in the northeastern United States where cold treatment can be conducted; updating and clarifying restrictions on the entry of fruits and vegetables; updating and clarifying permit procedures, including amendment, denial, or withdrawal of permits; requiring full disclosure of fruits and vegetables at the port of first arrival and clarifying the conditions under which they may be released for movement; and making other miscellaneous changes.

DATES: This regulation is effective June 25, 2003. The incorporation by reference of the material described in the rule is approved by the Director of the Federal Register as of June 25, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Burnett, Senior Import Specialist, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737-1236; (301) 734-6799.

SUPPLEMENTARY INFORMATION:**Background**

The regulations in "Subpart—Fruits and Vegetables" (7 CFR 319.56 through 319.56-8, 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 spread of plant pests.

On October 1, 2002, we published a proposed rule in the **Federal Register** (67 FR 61547-61564, Docket No. 02-026-1) to amend the regulations to list a number of fruits and vegetables from certain parts of the world as eligible, under specified conditions, for importation into the United States. We also proposed to make several other amendments to update and clarify the regulations and improve their effectiveness. On November 7, 2002, we published a correction to the proposed rule (67 FR 6799, Docket No. 02-026-2).

We solicited comments concerning our proposal for 60 days ending December 2, 2002. We received 60 comments by that date. They were from growers, packers, shippers, industry and trade representatives, and representatives of State and foreign governments. While 42 commenters wrote to support specific portions of the rule, 18 wrote to express concern or object to some aspect of the proposed rule. These comments are discussed below.

General

Given that certain Animal and Plant Health Inspection Service (APHIS) functions and personnel were moved to the Department of Homeland Security (DHS), one commenter recommended that we delay issuing a final rule based on the proposed rule because a transition period is not an appropriate time to add new responsibilities and procedures. While we are allowing additional fruits and vegetables to be imported into the United States and are making other amendments to update and clarify the regulations and improve their effectiveness, we do not consider these amendments as new responsibilities and procedures. Therefore, we are not delaying this final rule as a result of the transfer of functions to DHS.

In accordance with Executive Order 12988, we included a statement in our proposed rule giving notice that any State and local laws and regulations regarding the importation of fruits and vegetables under this rule would be preempted while the fruits and vegetables are in foreign commerce. Two commenters objected to this language concerning the preemption of State and local laws. One commenter was concerned that APHIS was imposing mandates upon State and local governments by preempting their authority to restrict entry of fruits and vegetables imported under the

regulations, without assuming the full cost of eradication for pests and diseases that may be hitchhiking on these commodities. Both commenters objected to the concept that imported fruits and vegetables are considered in foreign commerce until sold to the ultimate consumer.

One of the requirements under Executive Order 12988 is that a Federal agency specify in clear language the preemptive effect it believes will be given to its regulations. Preemption in foreign commerce is specifically addressed in § 436(a) of the Plant Protection Act (7 U.S.C. 7756(a)), which states that "[n]o State or political subdivision of a State may regulate in foreign commerce any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order—(1) To control a plant pest or noxious weed; (2) to eradicate a plant pest or noxious weed; or (3) prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed." When foreign commerce ceases is a question of fact that must be addressed in each individual case. However, the Department of Agriculture has taken the position that fresh fruits and vegetables imported into the United States for immediate distribution and sale remain in foreign commerce until they are sold to the ultimate consumer. Other questions regarding when foreign commerce ceases must be addressed on a case-by-case basis and will be resolved based on the facts in each particular case.

One commenter recommended that the economic analysis address, in detail, the economic effects of domestic infestation that could occur under the proposed regulations. APHIS conducts economic analyses for import-related rulemaking using the assumption that the importation of a particular commodity will not result in the introduction of pests or diseases; indeed, the prevention of such introductions is a primary goal of those rulemakings. APHIS does, however, routinely attempt to quantify, to the extent possible, the size (in dollar terms) of the domestic industry that stands to be affected by a rulemaking. The introduction of a pest or disease would likely be detrimental to the economic health of that domestic industry, as well as related industries. However, without some indication as to the actual or likely scope of a pest or disease outbreak, any estimate of losses would have to range from somewhere above zero to 100 percent. Further, if we had a sense that an outbreak was likely, we would not promulgate the rule.