

# Proposed Rules

Federal Register

Vol. 69, No. 206

Tuesday, October 26, 2004

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 360

[Docket No. 04-037-1]

#### Noxious Weeds; Notice of Availability of Petitions To Regulate *Caulerpa*

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

**ACTION:** Petitions and request for comments.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has received two petitions requesting that additional aquatic plants of the genus *Caulerpa* be added to the list of noxious weeds. We are soliciting public comments on the petitions and the implications of adopting them.

**DATES:** We will consider all comments that we receive on or before December 27, 2004.

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

- **Postal Mail/Commercial Delivery:** Please send four copies of your comment (an original and three copies) to Docket No. 04-037-1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. 04-037-1.

- **E-mail:** Address your comment to [regulations@aphis.usda.gov](mailto:regulations@aphis.usda.gov). Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 04-037-1" on the subject line.

- **Agency Web Site:** Go to <http://www.aphis.usda.gov/ppd/rad/cominst.html> for a form you can use to submit an e-mail comment through the APHIS Web site.

**Petitions:** The petitions discussed in this document are available on the APHIS Web site at <http://www.aphis.usda.gov/ppq/weeds/> or from the individual listed as the contact for further information.

[www.aphis.usda.gov/ppq/weeds/](http://www.aphis.usda.gov/ppq/weeds/) or from the individual listed as the contact for further information.

**Reading Room:** You may also review all documents associated with this notice 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) 690-2817 before coming.

**Other Information:** You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at <http://www.aphis.usda.gov/ppd/rad/webrepor.html>.

**FOR FURTHER INFORMATION CONTACT:** Dr. Alan V. Tasker, Noxious Weeds Program Coordinator, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1237; (301) 734-5225.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA) authorizes the Secretary of Agriculture to prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance 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 or the dissemination of a plant pest or noxious weed within the United States. The PPA defines "noxious weed" as "\* \* \* any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment." The PPA also provides that the Secretary may publish, by regulation, a list of noxious weeds that are prohibited or restricted from entering the United States or that are subject to the restrictions on interstate movement within the United States, and that any

person may petition the Secretary to add a plant species to, or remove a plant species from, the regulations issued by the Secretary.

The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA), regulates the importation and interstate movement of noxious weeds under 7 CFR part 360, "Noxious Weed Regulations" (referred to below as the regulations), which were established in 1976 under the authority of the Federal Noxious Weed Act (FNWA).

Section 360.200 of the regulations lists noxious weeds. In this section, noxious weeds are divided into three categories: Aquatic weeds, parasitic weeds, and terrestrial weeds. Listed noxious weeds are only eligible to be moved into or through the United States, or interstate, under a permit granted by APHIS. Persons who move noxious weeds under permit must follow all the conditions contained in the permit with regard to storage, shipment, cultivation, and propagation.

There are typically five steps in adding a weed to the list of noxious weeds in § 360.200<sup>1</sup>:

(1) Identify a weed that may meet the definition of a "quarantine pest" (a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled);

(2) Prepare a risk assessment that establishes the identity of the weed (scientific name, common name, description, etc.); verifies quarantine pest status; assesses habitat suitability in the United States, including the likelihood of introduction, dispersal and survival; provides information on potential environmental and economic impacts; characterizes pest risk (low, medium, high, etc.); and cites references;

(3) Publish a proposed rule in the **Federal Register**;

(4) Analyze and respond to public comments; and

(5) Publish a final rule in the **Federal Register** if appropriate.

On March 16, 1999, APHIS published a final rule in the **Federal Register** (64 FR 12881-12884, Docket No. 98-063-2) adding *Caulerpa taxifolia*

<sup>1</sup> See APHIS' Guide to the Listing Process for Federal Noxious Weeds at <http://www.aphis.usda.gov/ppq/weeds/listingguide.pdf>.

(Mediterranean clone) to the list of aquatic weeds in § 360.200(a). This listing was prompted by a petition for action addressed to the Secretary of the Interior dated October 19, 1998, asking him to work with the USDA to list the Mediterranean strain as a noxious weed, and followed a report prepared for the Aquatic Nuisance Species Task Force by the Fish and Wildlife Service. Based on the report, APHIS determined that the Mediterranean clone met the definition of a quarantine pest and provided a high level of risk.

*C. taxifolia* (Mediterranean clone) has invaded the Mediterranean coasts of France and Italy and now covers thousands of acres of the coastal zone. This invasive, aquarium-bred strain appears to have been introduced into the Mediterranean Sea from the Monaco Aquarium in 1984. It covered approximately 1 square yard in 1984, spread to over 2 acres by 1989, and now covers over 10,000 acres, extending from the shore to depths of over 250 feet. *C. taxifolia* (Mediterranean clone) grows on both rocky and sandy bottoms, from protected bays to exposed capes, and attains great densities, forming monocultural stands whose impact has been compared to unrolling a carpet across the bottom of the sea. In the regions where it is established, *C. taxifolia* (Mediterranean clone) has caused ecological devastation by overgrowing and eliminating native seaweeds, sea grasses, and invertebrates (such as corals, sea fans, and sponges) and has caused economic damage by harming tourism and recreational diving and creating a costly impediment to commercial fishing. No effective eradication strategies have been identified for *C. taxifolia* (Mediterranean clone), partly because it has the ability to regenerate from small fragments.

On April 29, 2003, the International Center for Technology Assessment sent APHIS a petition requesting that APHIS add the entire *Caulerpa* genus to the list of noxious weeds. A second petition, submitted by the same organization on April 30, 2003, requested, in the event the first petition was denied, that APHIS add all varieties of the species *C. taxifolia* to the list of noxious weeds.

In their first petition, the petitioners cite several sources that provide information to support the listing of four additional species of *Caulerpa* to the noxious weed list: *C. scalpelliformis*, *C. racemosa*, *C. verticillata*, and *C. brachypus*. According to the petitioners, it is too difficult to tell the difference between species of *Caulerpa* due to their morphological variability, especially when tiny fragments of the

species could be imported into the United States in the crevices of what are sold as “live rocks,” and because of this, all species of *Caulerpa* must be designated as noxious weeds.

The second petition states that at least two new strains of *C. taxifolia* have been discovered in Australia. These strains, which lack scientific or recognized common names, are described by the petitioners as genetically distinct from the Mediterranean strain. The petitioners maintain that it would be impossible to list all genetically distinct strains of the algae as separate noxious weeds and, therefore, they request the amendment of the regulations by removing the parenthetical (Mediterranean clone) so that the noxious weed listing includes all varieties of *C. taxifolia*.

The scope of the regulations continues to expand as new invasive plants and new pathways for the introduction of invasive plants are brought to our attention. With few exceptions, APHIS has regulated only vascular plants that present a risk of introducing plant pests or posing weed threats to agriculture or forest resources, and that move via pathways that are traditional targets for agricultural inspection.<sup>2</sup> APHIS first regulated a species of nonvascular plant in 1983 by listing invasive aquatic ferns as noxious weeds. The 1998 listing of *C. taxifolia* (Mediterranean clone) marked the first time APHIS regulated a form of marine algae. The expanding scope of the noxious weed list poses new challenges for APHIS as unique pathways for marine algae, such as “live rocks,” live fish, and other mediums of transport, are nontraditional targets for agricultural inspection.

Listing all species of *Caulerpa* as noxious weeds, or even all strains of *C. taxifolia*, as requested by the petitioner, would also extend our regulations to native species, as there are one or more strains of *C. taxifolia* native to Florida and Hawaii. As noted above, APHIS lists in the regulations only those weeds that meet the international definition of a quarantine pest; *i.e.*, “a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.” This practice is consistent with the International Plant Protection Convention (IPPC), to which the United States is a signatory. Under the IPPC, a country may prohibit or restrict

importation of quarantine pests or, in the case of contaminants in plants for planting, regulated nonquarantine pests. This practice is also consistent with sections 414 and 415 of the PPA, which authorize the Secretary to take general remedial measures or to declare an extraordinary emergency if necessary to prevent the introduction or spread of plant pests or noxious weeds that are new to or not known to be prevalent or distributed widely within and throughout the United States.

There are other legal authorities such as the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4701, *et seq.*) that apply to marine algae. This Act established the Aquatic Nuisance Species Task Force, co-chaired by the Departments of the Interior and Commerce and consisting of several Federal agencies, including the Department of Agriculture and non-Federal entities. A Task Force Working Group, on which APHIS participates, is currently developing a national management plan for the genus *Caulerpa* that will include a range of approaches to *Caulerpa* prevention and management.

Before receiving the petitions, we recognized that the present listing for *C. taxifolia* (Mediterranean clone) could be confusing, and we planned to amend it in a future rulemaking. We recognized it might be confusing because the noxious weed list includes common names in parentheses following the scientific names for other noxious weeds. In the case of *C. taxifolia*, (Mediterranean clone), we used parentheses to designate the regulated strain, not to provide a common name. While the term “clone” was in use at the time of the listing, “strain” is used most commonly in recent scientific literature. The term “killer algae” is in use as a common name. Therefore, we have considered changing the listing to *Caulerpa taxifolia*, Mediterranean strain (killer algae). We also planned to change the wording of the footnote in § 360.200 to clarify that a scientific name includes all subordinate taxa except in the case of *C. taxifolia*, where we only regulate the Mediterranean strain. The footnote would read “Except for *C. taxifolia*, scientific names include all subordinate taxa. For example, taxa listed at the genus level include all species, subspecies, varieties and forms within the genus; taxa listed at the species level include all subspecies, varieties and forms within the species. In the case of *C. taxifolia*, the listing includes only the Mediterranean strain.” We will be making these changes in a future separate rulemaking.

<sup>2</sup> Vascular plants have vessels in their tissues that carry fluids, such as water or sap. Nonvascular plants do not and are commonly referred to as “lower plants” because they do not achieve the structural complexity and size of vascular plants.

### Request for Comments

We are publishing this notice to inform the public that APHIS will accept written comments from the public regarding these petitions for 60 days. This is the first time APHIS has published a notice of availability of petitions to list noxious weeds and sought comments. We are publishing these petitions and seeking comments because the petitions raise unusually complex and controversial issues.

### Issues for Discussion

We are particularly interested in comments pertaining to the following issues. We request responses to the bulleted questions at the end of each section:

In accordance with international agreements, APHIS supports all noxious weed listings with risk assessments based on data and other published information. Depending on the source of the information, the number of *Caulerpa* species ranges from 70 to about 1,000. However, there has been little scientific research on *Caulerpa*, and many species have not been fully characterized. The petitioners requested that all species of *Caulerpa* be listed as noxious weeds and submitted information concerning four species, in addition to *C. taxifolia*, that have caused harmful invasions: *C. scalpelliformis*, *C. racemosa*, *C. verticillata*, and *C. bracypus*.

- What data is there to help us evaluate the risks associated with non-native species of *Caulerpa* other than *C. taxifolia*?

- How many and what species of *Caulerpa* and other nonvascular plants are currently being imported?

- In addition to aquatic plant shipments, ballast water, fishing gear, "live rocks," and live fish, what other pathways exist that could potentially facilitate the spread of *C. taxifolia* (Mediterranean clone) and other demonstrably invasive, non-native *Caulerpa* species?

We recognize that regulating the importation and interstate movement of marine algae is difficult. Most noxious weeds are introduced with common agricultural commodities and not in the marine aquarium trade. The pathways by which the algae may travel into the United States are not traditional targets for agricultural inspection. Among these potential pathways are "live rocks," fishing gear, and live fish, where specimens may be merely fragments that are not clearly visible. In these cases, identifying the presence of *C. taxifolia* (Mediterranean clone) has been particularly difficult.

Currently, APHIS's policy is to prohibit the entry of any plant

intercepted at the port of entry if there is reason to believe that it is *C. taxifolia* (Mediterranean clone). The importer or exporter is given an opportunity to establish the identity of specimens that resemble *C. taxifolia* (Mediterranean clone). We consider any foreign origin *Caulerpa* to be suspect.

Expanding our noxious weed program to cover additional species of *Caulerpa* would require additional funding, personnel, training, and possibly additional facilities and equipment as there is a lack of Agency expertise in the area of marine algae and no new funds automatically become available when a new weed is listed. It seems that, at this time, other Federal agencies are not able to provide financial or other resources in support. Without increased appropriations, the program expansion could divert attention and resources from APHIS's current weed programs.

- Given the difficulty of identifying *C. taxifolia* (Mediterranean clone), and the existence of native species of *Caulerpa* in United States waters, how could APHIS effectively regulate additional species and strains of marine algae?

- If we list additional species and strains of non-native marine algae, how should our current weed program resources be shifted in order to regulate these other strains or species as well as currently listed noxious weeds?

- If we list additional non-native species or strains of non-native marine algae, where should most of our existing resources and efforts be placed in order to be most effective? For example: Increased port of entry inspection, surveying, eradication, public education, etc.

**Authority:** 7 U.S.C. 7711–7714, 7718, 7731, 7751, and 7754; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 21st day of October 2004.

**Elizabeth E. Gaston,**

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

[FR Doc. 04–23921 Filed 10–25–04; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2004–19446; Directorate Identifier 2004–NM–130–AD]

RIN 2120–AA64

#### Airworthiness Directives; Boeing Model 767–200 and –300 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 767 series airplanes. The existing AD currently requires repetitive detailed and eddy current inspections of the aft pressure bulkhead for damage and cracking, and repair if necessary. This proposed AD would add one-time detailed and high frequency eddy current inspections of any "oil-can" located on the aft pressure bulkhead, and related corrective actions if necessary. An "oil-can" is an area on a pressure dome web that moves when pushed from the forward side. This proposed AD is prompted by reports of cracking at "oil-can" boundaries on the aft pressure bulkhead. We are proposing this AD to detect and correct fatigue cracking of the aft pressure bulkhead, which could result in rapid depressurization of the airplane and possible damage or interference with the airplane control systems that penetrate the bulkhead, and consequent loss of controllability of the airplane.

**DATES:** We must receive comments on this proposed AD by December 10, 2004.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.

- *Fax:* (202) 493–2251.

- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington,