

B. triculosa
B. verruculosa
B. virgatorum
B. workingensis
B. xanthoxylon
B. x carminea 'Pirate King'
B. x frikartii 'Amstelveen'

(3) All plants, seedlings, seeds, fruits, and other plant parts capable of propagation from the following rust-resistant *Mahoberberis* and *Mahonia* species, except *Mahonia* cuttings for decorative purposes:

(i) Genus *Mahoberberis*:
M. aquifolium candidula
M. aquifolium 'Smaragd'
M. aquifolium sargentiae
M. miethkeana
M. x Magic
(ii) Genus *Mahonia*:
M. amplexans
M. aquifolium
M. aquifolium atropurpurea
M. aquifolium compacta
M. aquifolium compacta 'John Muir'
M. aquifolium 'Donewell'
M. aquifolium 'Kings Ransom'
M. aquifolium 'Orangee Flame'
M. aquifolium 'Undulata'
M. aquifolium 'Winter Sun'
M. 'Arthur Menzies'
M. bealei
M. dictyota
M. fortunei
M. 'Golden Abundance'
M. japonica
M. japonica x M. lomariifolia 'Charity'
M. lomariifolia
M. nervosa
M. pinnata
M. pinnata 'Ken Hartman'
M. piperiana
M. pumila
M. repens
M. x media 'Charity'
M. x media 'Winter Sun'

(4) All plants, seeds, fruits, and other plant parts capable of propagation from rust-susceptible species and varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, and seedlings from rust-susceptible species and varieties of the genera *Mahoberberis* and *Mahonia*, except *Mahonia* cuttings for decorative purposes.

(5) Any other product or article not listed in paragraphs (a)(1) through (a)(4) of this section that an inspector determines presents a risk of spread of

black stem rust. The inspector must notify the person in possession of the product or article that it is subject to the provisions of this subpart.

(b) A person may request that an additional rust-resistant variety be added to paragraph (a)(2) or (a)(3) of this section. The person requesting that a rust-resistant variety be added to paragraph (a)(2) or (a)(3) of this section must provide APHIS with a description of the variety, including a written description and color pictures that can be used by an inspector to clearly identify the variety and distinguish it from other varieties.

(Approved by the Office of Management and Budget under control number 0579-0186)

[67 FR 8179, Feb. 22, 2002]

§ 301.38-3 Protected areas.

(a) The Administrator may designate as a protected area in paragraph (c) of this section any State that has eradicated rust-susceptible plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia* under the cooperative Federal-State eradication program. In addition, the State must employ personnel with responsibility for the issuance and withdrawal of certificates in accordance with § 301.38-5, and maintain and enforce an inspection program under which every plant nursery within the State is inspected at least once each year to ensure that they are free of rust-susceptible plants. During the requisite nursery inspections, all nursery stock shall be examined to determine that it consists only of rust-resistant varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, and that the plants are true to type. Plants that do not meet this criteria must be destroyed.

(b) The Administrator may designate as a protected area any county within a State, rather than the entire State, if areas within the State have eradicated rust-susceptible plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia* under the cooperative Federal-State program, and;

(1) The State employs personnel with responsibility for the issuance and withdrawal of certificates in accordance with § 301.38-5;

(2) The State is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed by this subpart on the interstate movement of regulated articles, as determined by the Administrator; and

(3) The State maintains and enforces an inspection program under which every plant nursery within the county is inspected at least once each year to ensure that plant nurseries within that area are free of rust-susceptible plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia*. During the requisite nursery inspections, all nursery stock shall be examined to determine that it consists only of rust-resistant varieties of the genera *Berberis*, *Mahoberberis*, and *Mahonia*, and that the plants are true to type. Plants that do not meet this criteria must be destroyed.

(c) All seed used to propagate plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia* in protected areas, and all seed used to propagate plants of the genera *Berberis*, *Mahoberberis*, and *Mahonia* that are certified as rust-resistant for interstate movement into protected areas, must be produced at properties where a State inspector has verified that no wild or domesticated rust-susceptible plants are growing at or within one-half mile of the property.⁴

⁴Persons performing the inspections must be able to recognize rust-susceptible varieties of *Berberis*, *Mahoberberis*, and *Mahonia*. Inspectors must work side by side, 10 to 20 feet apart, and walk outward away from the property a distance of one-half mile measured from the edge of the property, and observe all plants growing in the half-mile band. The distance between the inspectors may vary within this range, depending upon the visibility of the plant growth. In areas with low brush and flat terrain, the inspectors may be the maximum distance of 20 feet apart if they can observe all plants growing within 10 feet of them. In areas of high plant growth or hilly terrain, the inspectors must be closer together due to limited or obstructed visibility. Inspectors must observe all plants growing between themselves and the mid-point of the distance between themselves and the next inspector. This process must be repeated so that the entire band, measured from the border of the property to the circumference of an imaginary circle having the property as its mid-point, is visually inspected in this manner.

(d) The following are designated as protected areas:

(1) The States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming.

(2) The following counties in the State of Washington: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman, Yakima.

(e) Each State that is a protected area or that encompasses a protected area must submit annually to the Administrator a written statement, signed by an inspector, assuring APHIS that all nursery inspections have been performed in accordance with this section. The statement must be submitted by January 1st of each year, and must include a list of the nurseries inspected and found free of rust-susceptible plants.

(f) The Administrator may remove a protected area from the list of designated protected areas in paragraph (c) of this section if he or she determines that it no longer meets the criteria of paragraph (a) or (b)(1) through (3) of this section. A hearing will be held to resolve any conflict as to any material fact. Rules of practice for the hearing shall be adopted by the Administrator.

[54 FR 32791, Aug. 10, 1989, as amended at 55 FR 29558, July 20, 1990; 57 FR 3118, Jan. 28, 1992]

§ 301.38-4 Interstate movement of regulated articles.

(a) *Non-protected areas.* (1) Interstate movement of regulated articles into or through any State or area that is not designated a protected area under § 301.38-3(c) is allowed without restriction under this subpart.

(b) *Protected areas*—(1) *Prohibited movement.* The following regulated articles are prohibited from moving interstate into or through any protected area:

(i) All *Berberis* seedlings and plants of less than 2 years' growth, and rust-susceptible *Berberis* plants, seeds, fruits,