DOCKET NO. APHIS-2008-0119

BEFORE

THE UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

ANIMAL AND PLANT HEALTH INSPECTION SERVICE

COMMENTS OF THE AMERICAN HERBAL PRODUCTS ASSOCIATION ON THE IMPLEMENTATION OF REVISED LACEY ACT PROVISIONS – PHASE VI

July 1, 2020

Introductory remarks

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA is comprised of domestic and foreign companies doing business as growers, collectors, processors, manufacturers, and marketers of herbs and herbal products. AHPA's members offer their products for sale primarily in or as foods, including dietary supplements, and also in or as drugs, cosmetics, and other consumer products. AHPA serves its members by promoting the responsible commerce of products that contain herbs.

The Animal and Plant Health Inspection Service (APHIS or the agency) issued a Federal Register notice on March 31, 2020 (the March 31 Notice) to inform the public of its implementation of another phase (Phase VI) of the federal government's enforcement schedule for the requirement for submission of declarations at the time of importation into the United States of certain plants and plant products, as established by the 2008 amendments to the Lacey Act.

Under Phase VI as stated in the March 31 Notice, import declarations will be required, effective as of October 1, 2020, for several new products. Of particular relevance to AHPA's members are products in the following Harmonized Tariff Schedule of the United States (HTSUS), classified in Chapter 33 (Essential oils[1]) within subheading 3301.29.51 (Essential oils other than those of citrus fruit; Other; Other) to include:

- 3301.29.51.09 - essential oils of cedarwood
- 3301.29.51.21 - essential oils of linaloe or bois de rose
- 3301.29.51.39 - essential oils of sandalwood
- 3301.29.51.50 - essential oils of "other"

AHPA members' herbal products may consist of or include essential oils as ingredients. AHPA and its members therefore have an interest in the Phase VI

[1] Defined in HTSUS as: "Essential oils (terpeneless or not), including concretes and absolutes; resinoids; extracted oleoresins; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils." Use of the term "essential oils" throughout these comments means this definition in its entirety.

enforcement schedule insofar as it includes these specified essential oils. These comments are therefore submitted on behalf of AHPA and its members in response to the March 31 Notice. Note however that AHPA is not offering comments to all elements of the May 31 Notice; absence of comments on any element or section of the May 31 Notice should not be taken to mean that AHPA agrees with such element or section, unless such agreement is specifically stated.

"Other" essential oils should be excluded from Phase VI

Inclusion of HTSUS 3301.29.51.50 in Phase VI is overly broad and inconsistent with the definitions of "plant" and "plants" as provided in the amended Lacey Act. AHPA therefore request that HTSUS 3301.29.51.50 be removed from Phase VI; detailed rationale for this request follows.

The Lacey Act's definitions of "plant" and "plants" are codified at 16 U.S.C. § 3371(f) as follows in relevant part, and with emphasis added in paragraph (2) in which certain exclusions are defined:

> "(1) IN GENERAL. —
>
> The terms 'plant' and 'plants' mean any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands.
>
> "(2) EXCLUSIONS.—The terms 'plant' and 'plants' exclude—
>
> > (A) **common cultivars**, except trees, **and common food crops** (including roots, seeds, parts, or products thereof)…

The exclusionary terms "common cultivars" and "common food crops" are defined in federal regulation at 7 C.F.R. § 357.2, which regulation also redefines "plant" and "plants." Definitions from this regulation relevant to these comments are:

> *Artificial selection.* The process of selecting plants for particular traits, through such means as breeding, cloning, or genetic modification.
>
> *Commercial scale.* Production, in individual products or markets, that is typical of commercial activity, regardless of the production methods or amount of production of a particular facility or the purpose of an individual shipment.

Common cultivar. A plant (except a tree) that:

(1) Has been developed through artificial selection for specific morphological or physiological characteristics; and

(2) Is a species or hybrid, or a selection thereof, that is produced on a commercial scale; and

(3) Is not listed:

(i) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);

(ii) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); or

(iii) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Common food crop. A plant that:

(1) Is raised, grown, or cultivated for human or animal consumption; and

(2) Is a species or hybrid, or a selection thereof, that is produced on a commercial scale; and

(3) Is not listed:

(i) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);

(ii) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); or

(iii) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

…

Plant. Any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands. The term plant excludes:

(1) Common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof);

(2) A scientific specimen of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that is to be used only for laboratory or field research; and

(3) Any plant that is to remain planted or to be planted or re planted.

(4) A plant is not eligible for these exclusions if it is listed:

(i) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);

(ii) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); or

(iii) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

HTSUS 3301.29.51.50 is broadly defined to include “other” essential oils not specified explicitly elsewhere in HTSUS Chapter 33, and presumably each and every other such “other” essential oil. But many “other” essential oils, and possible the majority of these in commerce, including many used as rather common food and flavoring ingredients, certainly meet the definitions for a “common cultivar” or “common food crop” as codified in 7 C.F.R. § 357.2. Any such common cultivar or common food crop is explicitly excluded from the federal definition of a “plant” as applicable to the Lacey Act and that law’s importation declaration requirements, unless subject to one of the ineligibility provisions specified in the definitions for these terms; that is, unless listed in a CITES Appendix, or as an endangered or threated species under the ESA, or pursuant to the described State laws.

Any such eligible common cultivar or common food crop therefore cannot be subject to the importation declaration requirement for plants established by the amended Lacey Act, since these do not meet the statute’s definition of a “plant.”

Examples of essential oils that are not listed elsewhere in HTSUS Chapter 33 and that are common cultivars or common food crops not subject to CITES, ESA or a State listing include but are not limited to: basil leaf essential oil; cardamom seed essential oil; celery seed essential oil; cinnamon leaf or bark essential oil; clary sage essential oil; coriander seed essential oil; dill herb or seed essential oil; fennel seed essential oil; ginger rhizome essential oil; hops catkin essential oil; mustard seed essential oil; oregano leaf or flowering tops essential oil; parsley seed essential oil; sage leaf essential oil; thyme flowering plant essential oil; turmeric rhizome essential oil; etc.[2] But each of these would be assumed to be included in HTSUS 3301.29.51.50 as “other” essential oils, even though none of these meet the definition of a “plant” under the Lacey Act, due to the “common cultivar” or “common food crop” exemptions.

The fact that APHIS has not proposed to include in Phase VI any of the articles listed elsewhere in HTSUS Chapter 33 that also clearly meet the definitions for a “common cultivar” or “common food crop” seems to suggest that APHIS recognizes that these articles are not “plants” for purposes of the amended Lacey

[2] Many of these same common cultivars and common food crops, and numerous other such common cultivars and food crop species, also provide concretes, absolutes, resinoids, and other products that meet the broad definition for “essential oils” as established in HTSUS Chapter 33.

Act's importation declaration requirement. Such common articles include, for example, clove essential oil (HTSUS 3301.29.51.13); garlic essential oil (3301.29.51.15); onion essential oil (3301.29.51.28); citronella (3301.29.51.11) and lemongrass (3301.29.51.19) essential oils; peppermint essential oil (3301.24.00.00); rosemary leaf essential oil (3301.29.51.37); etc.

AHPA therefore restates its request that HTSUS 3301.29.51.50 be removed from Phase VI for the reasons given here.

Consideration for a delay in the Phase VI enforcement schedule

The May 31 Notice identifies October 1, 2020 as the date on which Phase VI of APHIS enforcement schedule would begin, thus requiring importation disclosures for the newly listed products as of that date.

AHPA is concerned that this very short time – just 3 months after the extended close of the comment period – will not be sufficient for importers of any essential oils that are subject to Phase VI importation disclosure to come into compliance with this new obligation. This is of particular concern for companies that import essential oils but do not import any of the other commodities or products that have been included in earlier phases of the enforcement schedule. Such firms may be unaware of this new requirement and will need training that provides a clear understanding of how to be in compliance with this regulation.

AHPA therefore requests an extension of time for compliance of not less than 6 months, and preferably a full year. AHPA is committed to developing training guidance in this matter, but will need sufficient time to implement such education and capacity building for the trade.

Concluding statement

AHPA is requesting by these comments that APHIS amend Phase VI of its import declarations enforcement schedule by removing HTSUS 3301.29.51.50, covering "other" essential oils, from the list of products covered under this phase. AHPA is also requesting an extension of time for compliance of 6 to 12 months to provide sufficient time for essential oil importers to gain an understanding of this rule.

AHPA appreciates the opportunity to present comments on this process and welcomes any questions that may arise from these comments.

Respectfully submitted,

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