



**California Association of Nurseries and Garden Centers**

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Mr. James Writer  
Agriculturist  
Invasive Species & Pest Management  
Plant Protection & Quarantine  
APHIS  
4700 River Road, Unit 137  
Riverdale, MD 20737-1231

Re: **Docket No. APHIS-2005-0103**

Dear Mr. Writer:

On behalf of its members, the California Association of Nurseries and Garden Centers (CANGC) offers these comments to the proposed rule entitled “Special Needs Requests Under the Plant Protection Act”.

The rulemaking documents correctly note that the *Phytophthora ramorum* controversy illustrated the need for criteria to evaluate special needs requests. At that time, several states disregarded federal rules and their preemptive effect and erected blockades to plants shipped from California. Simultaneously with their rejection of the Secretary’s authority, many of these same states requested “special needs” exemptions to the rules. While the Plant Protection Act does provide for such exemptions, the consideration of such requests must be guided by the Act itself.

APHIS is charged with protecting American agriculture and when it regulates a plant pest it must do so to guard against that risk with rules based on sound science. A state may disagree with those regulatory decisions but disagreement alone is insufficient to create a special need. APHIS has not defined the unique circumstances that would merit this extraordinary departure from a single national standard. Therefore, as drafted, this rule jeopardizes interstate commerce and could call into question APHIS’ role as the protector of American agriculture.

**I. Legal Background**

USDA’s right to preempt state regulation of plant pests has long been recognized. In *Oregon-Washington Railroad & Navigation Co. v. State of Washington*, 270 U.S. 87 (1926), the state of Washington issued a quarantine against the importation of alfalfa because of the danger of introduction of the alfalfa weevil. The federal statute at that time did not expressly preempt state action, but the Supreme Court struck down the state law as conflicting with USDA’s authority.

In consolidating various authorities into the Plant Protection Act of 2000, Congress made a number of findings, including:

- It is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds;
- Decisions affecting imports, exports, and interstate movement of products regulated under this title shall be based on sound science;
- The smooth movement of enterable plants, plant products, biological control organisms, or other articles into, out of, or within the United States is vital to the United State's economy and should be facilitated to the extent possible;
- The unregulated movement of plant pests, noxious weeds, plants, certain biological control organisms, plant products, and articles capable of harboring plant pests or noxious weeds could present an unacceptable risk of introducing or spreading plant pests or noxious weeds;
- All plant pests, noxious weeds, plants, plant products, articles capable of harboring plant pests or noxious weeds regulated under this title are in or affect interstate commerce or foreign commerce.

7 U.S.C. § 7701. Thus, USDA was given the responsibility of facilitating interstate commerce in such a way as to reduce the spread of plant pests. The Act itself speaks of the Secretary taking action when necessary to prevent the introduction or dissemination of a plant pest within the United States. When the Secretary regulates a pest, states are expressly preempted:

Except as provided in paragraph (2), no State or political subdivision of a state may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

7 U.S.C. § 7756(b)(1). The preemption provision of the Plant Protection Act contains an exception clause that allows states to regulate plant pests under certain conditions:

Special need – A State ... may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State. . . demonstrates to the Secretary and the Secretary

finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

7 U.S.C. § 7756(b)(2)(B).

Significantly, during the lengthy legislative process that culminated in the passage of the Plant Protection Act, Congress considered allowing states to regulate plant pests to a greater extent than USDA. Senator Akaka of Hawaii introduced a competing bill that would have weakened the preemption provision by allowing states to adopt more aggressive approaches than those undertaken by USDA. S. 83, 106<sup>th</sup> Congress, § 14 (1999). That version, however, failed, and Congress chose to retain preemption.

## **II. Proposed Rule**

As required by the statute, the proposed rule requires a risk assessment or other scientific data to support any request. Beyond that, the proposal lists several mandatory items though it provides no clue as to the weight given to any particular item. In brief, the request must have scientifically sound evidence the pest is not in the state or provide information on the distribution of the pest. If the pest is not in the state, the proposal must include a risk assessment that the pest could enter and become established in the state. The proposal must include “specific information” that the pest would cause environmental or economic harm or “any other special basis for the request”. The proposed rule also includes requirements that the state or local government tailor its regulation to address only the special need.

## **III. Comments**

### **A. Proposed Rule Fails to Clarify When a Special Needs Petition is Granted.**

CANGC supports the idea of specific criteria, but they must be narrow and consistent with the Plant Protection Act.

The proposed criteria are so broad that no potential request is clearly excluded or included. Without more, the uncertainty surrounding this process will remain. For example, while APHIS permits economic harm to industries within a state to serve as a basis for additional regulation, the rule does not explain why APHIS would otherwise permit such economic harm to occur.

Other criteria only add to the confusion. The draft appears to say that no risk assessment is required if the pest is already in the state and phrases such as “particularly vulnerable” do little to explain when a request may be granted or denied. Further, the proposed rule offers no clue as to the level of rigor needed on each of the five criteria listed in the draft document. Some of the specific criteria, such as the pest populations and pest pathways, depend on scientific data while others, such as the economic size of the industry, relate to economic figures. For each, USDA should specify the type of data required to support the assertion that the state has a special need.

The proposed rule calls for economic data on affected industries but does not explain the relevance to a state's request. If, for example, APHIS regulates a pest that threatens the almond industry, that regulation must protect almond growers even though they are all within a single state. APHIS' duty is the same whether a commodity is grown in all 50 states or is grown only in a single state. As drafted, the rule is inviting politically connected commodities to receive greater protection while smaller or less geographically concentrated commodities will lack the sway to erect barriers to commerce.

**B. The Rules Must Define the Scientific Rigor Required to Accompany a Request.**

With regard to the scientific data, the draft rules shine little light on the rigor necessary to meet the statutory requirement of a thorough pest risk analysis or other sound scientific data. Congress' use of the modifiers of "thorough" and "sound" must be respected as these are clear evidence of intent to raise the bar of the science that must accompany a request.

The rule should designate the standards that would satisfy this request. Otherwise, what is "sound" and what is "thorough" will be left to the eye of the beholder, as was demonstrated in the *P. ramorum* controversy. Some relevant international standards are the Food and Agriculture Organization's International Standards for Phytosanitary Measures: #01, Principles of Plant Quarantine As Related to International Trade #3, Guidelines for the Export, Shipment, Import and Release of Biological Control Agents and other Beneficial Organisms, the Use of Integrated Systems Approach for Pest Risk Management #14, and Guidelines for the Determination and Recognition of Equivalence of Phytosanitary Measures #24.

The recommendation of these international documents is not made carelessly. Whatever standard a state or local government imposes must be consistent with our international obligations. It must be based on sound science and commensurate with the risk.

**C. Special Needs Must Relate to Unusual Local Conditions.**

It is not enough for a state to claim unique characteristics. To be consistent with the underlying law, a special needs request must explain why the unique characteristics qualify for regulation over and above the APHIS rules.

It is illegitimate to claim a special need based on a disagreement with APHIS' judgment as to risk; such a complaint (and accompanying scientific data) must be directed to federal regulators so that they fulfill their statutory duty. If a state believes a federal regulation is not protecting agriculture in that state, the only recourse must be to prove to the Secretary the inadequacies of that regulation. Otherwise, preemption is meaningless, as is the Secretary's duty to protect agriculture and facilitate interstate commerce.

In the special needs request, a state must demonstrate something truly so unusual within the state that APHIS is incapable of regulating for that risk. The Organic Food Production Act also preempts state programs but gives the Secretary of Agriculture the power to grant states additional restrictive requirements. 7 U.S.C. § 6507(b). In its implementing regulations, USDA

will only permit additional requirements to address “environmental conditions or specific production or handling practices particular to the state” and will only permit those additional requirements in the part of the state where needed. 7 C.F.R. § 205.621. To date, the Secretary has not granted any request and the entire country operates under a consistent standard. Similarly, it must be an usual quirk within a state that necessitates additional regulation.

The U.S. Constitution and the Plant Protection Act guard against local economic interests infringing on interstate commerce. Indeed, during *P. ramorum*, some state officials publicly encouraged consumers to buy in-state products instead of the plants they illegally barred from their state. Yet, APHIS claims protectionism as an economic benefit flowing from the rule: “Restricted supplies from sources outside the special need area could create increased market opportunities for suppliers within the area.” We strongly encourage APHIS not to codify this sort of economic protectionism.

Underlying this proposed rule is a very troubling philosophy. It appears that APHIS is saying that states may need to protect important industries in their state because APHIS will fail to protect adequately those industries. If scientific data proves APHIS regulation is inadequate, then APHIS should re-examine its own rules rather than give permission to states to disregard those rules.

#### **IV. Specific Changes to the Proposed Rule.**

As drafted, the rules fail to clarify the circumstances under which a state may qualify for special needs exemption. This will only heighten attempts to usurp APHIS’ duty under the U.S. Constitution and under the Plant Protection Act and it will inexorably lead to political attempts to muscle economic protection into what are supposed to be science-based rules.

CANGC requests APHIS to consider the following alterations to the proposed rules:

- A. *Exclude states violating rules.*** APHIS should bar states from requesting “special needs” rules if they are disregarding federal regulation. It makes a mockery of the Plant Protection Act to allow stakeholders to abide by only the provisions they like.
- B. *Clarify the local and unusual nature of the special need.*** As discussed, a disagreement as to APHIS’ rule does not support an exemption and is not even relevant to the consideration. The special need must fall outside what APHIS is charged with protecting and the request must focus on that need. A request focused on the correctness of APHIS’ judgment as to risk should be taken as evidence that the federal rule controls and the state has no special need -- merely a disagreement with the policy judgment.

- C. **Clarify fully that the rules must be local and no broader than needed.** The special need that drives the request must be identified and the additional regulations must be narrowly tailored to address only those concerns.
- D. **Define the scientific requirements.** Mirroring the statute, the draft rules require a risk assessment or other scientific evidence. It will be important to define the rigor needed for such documents.
- E. **Clarify that states must pay for additional requirements.** States must bear the costs of exceeding the federal regulations. After all, the basis of the request is the need to address specific concerns that are inappropriate for federal regulation. In such instances, states should pay those costs.

The *P. ramorum* blockades sparked the need to clarify a special needs request. Ignoring the Act's requirements on preemption and seizing its language on special needs, states sought federal approval to enforce rules they were already enforcing through disobedience of federal law. In truth, those states' complaints came down to a disagreement regarding the efficacy of the USDA rules. That will always happen, and the special needs process cannot become the process to appeal those decisions. Congress has concluded that interstate shipment is too important to suffer from multiple rules once the Secretary steps in and regulates.

Plant regulation, regardless of the level of government, is difficult. Often regulation is necessary despite a lack of consensus on the scientific data. In the end, regulators must make those decisions and when the Secretary makes the call, states must follow. The special needs process should not become a debating society to argue whether or not the Secretary made the right decision.

Thank you for your consideration of these comments.

Very truly yours,



Robert Falconer  
Executive Vice President

Cc: Dr. Ronald DeHaven  
Dr. Richard Dunkle