

Regulatory Analysis & Development
USDA PPD, APHIS Station 3A-03.8
4700 River Road, Unit 118
Riverdale MD, 20737-1238

June 5, 2006

**Re: Federal Register Docket No. APHIS 2005-0103
Special Needs Request under the Plant Protection Act.**

Dear Sir or Madam:

On behalf of The Nature Conservancy, I offer comments regarding the Animal and Plant Health Inspection Service's (APHIS) proposed rule¹ to guide the Agency's consideration of a special needs exemption request (hereinafter Special Needs Request) under the Plant Protection Act.²

Generally, we support the Agency's issuance of a rule to define criteria under which the Agency will grant a Special Needs Request. We hope this will allow expedited, transparent review and granting of states' and local entities' Special Needs Requests. Additionally we encourage APHIS to use this rulemaking opportunity to articulate the Agency's intent to coordinate with and assist states in enforcing the states' more stringent phytosanitary standards where they exist. However, as explained in the following comments we urge APHIS to make the following changes to its proposed rule:

- Facilitate expedient review and action on a Special Needs Request by providing notice of APHIS consideration of a Special Needs Request as an interim rule, not a proposed action, and by providing mandatory deadlines for Agency response to the Request;
- delete proposed language requiring that subdivisions of States (such as a county) act only through the State, and instead implement the Plant Protection Act's broader exemption that allows political subdivisions to make requests to APHIS directly;
- articulate the agency's process in circumstances where insufficient evidence may be present, and to provide additional guidance regarding the quantity and quality of data required by the Agency to support a Special Needs Request;
- employ the agency's existing authority to regulate pathways of pest and pathogen conveyance;

¹ See Proposed Rule, *Special Needs Request under the Plant Protection Act*, 71 Fed. Reg. 16711 (April 4, 2006) (*hereinafter* Proposed Rule).

² See § Plant Protection Act, 7 U.S.C. § 7701 (U.S.C. 2006) (*hereinafter* PPA).

- clarify the burden of proof required to support a Special Needs Request; and
- reject proposals to require inclusion of additional criteria that require the state or political subdivision making a Special Needs Request to additionally attempt to assess the effects of its action on neighboring states.

Species introduced into natural ecosystems can differ significantly from agricultural pests. These differences warrant adoption of a more flexible approach by APHIS that anticipates more frequent granting of states' Special Needs Requests. Scientists do not know all organisms that will cause significant damage. Introductions of new species can be devastating, up to and including virtual elimination of plant species from the native ecosystem.³ Such disappearance of a plant species can then set in motion a cascade of cumulative and long-lasting impacts. Control options are often of limited efficacy and can themselves have severe ecological impacts. In virtually all cases, response is very costly.

We hope you will look favorably on our suggestions and include them in your final rule to allow the Special Needs Request exemption to be available to protect states and local entities from new invasive plants or associated pests, as Congress intended.

A. Introduction

The Nature Conservancy is an international, nonprofit organization dedicated to the conservation of biological diversity. Our mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. Our on-the-ground conservation work is carried out in all 50 states and in 27 foreign countries and is supported by approximately one million individual members. We have helped conserve nearly 15 million acres of land in the United States and Canada and more than 102 million acres with local partner organizations globally.

While the Conservancy owns and manages the largest private system of nature sanctuaries in the world, our mission cannot be achieved by protecting specific sites alone. We are working to abate the top threats facing these and other protected areas, including invasive species. Drawing upon our years of experience with invasive species management, The Nature Conservancy created the Global Invasive Species Initiative in 2001 to focus a core team of specialists within the Conservancy to help prevent new invasions and reduce the spread of invaders at the national and international scale, as well as to build our capacity to assess, prevent, rapidly detect and control invasive species that threaten biodiversity targets. The Conservancy has recently created its Global Forest Partnership which recognizes preventing the introduction and spread of additional plant pests that threaten native trees and forests as one of its principal goals. We are continuing

³ See D.M. Rizzo, *Exotic species and fungi: interactions with fungal, plant and animal communities*, p. 857-877 THE FUNGAL COMMUNITY, (CRC Press, 2005).

to expand and enhance our organizational capacity to address invasive species threats to ensure that we meet our mission to conserve biological diversity.

B. Generally, we support the Agency’s issuance of a rule to define criteria under which the Agency will grant a Special Needs Request to ensure that valid Requests are recognized and permitted by APHIS in the future.

The special needs exemption from the broader Plant Protection Act’s preemption provision⁴ was a critical component of the Act’s authorization in 2000. In enacting a new federal program that largely reflected U.S. obligations under international trade agreements, Congress included the exemption as a safeguard to allow a state or local entity to take action expediently in absence of federal action to minimize the spread of a plant associated pest or pathogen.⁵ The provision reflects critically needed safeguards to ensure that in the pursuit of free trade the United States does not unnecessarily put its own economy or environment at risk.⁶ Unfortunately, according to the Government Accountability Office (GAO), the federal government’s performance in reducing the risk of invasions carried through trade has actually declined over the last decade. In reports issued in 1997⁷ and earlier this month,⁸ GAO found that the resources and tools available to USDA and states to exclude invasive species had failed to keep pace with rapid increases in trade and tourism. Alarming, GAO noted in this month’s report that reduced inspections since the creation of the Department of Homeland Security have rendered American agriculture even more vulnerable to foreign pests,⁹ an assessment with which the Department itself agrees.¹⁰ Given the increasing risk and the declining

⁴ PPA § 436(b)(2)(B). “Special need. – A State or political subdivision of 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 or political subdivision of a 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.”

⁵ APHIS testified in favor of the bill creating the Plant Protection Act. In responding to Congressional inquiry regarding what safeguards were available to force expedient action to control invasives, APHIS noted that while the bill reaffirmed the “principle of Federal preemption,... [a]t the same time the bill explicitly recognizes for the first time that there may be special considerations or situations at the local level that should be taken into account. The bill establishes the right to petition the Department for more stringent requirements if special needs or conditions can be demonstrated based on sound science.” *See testimony of Craig Reed, Acting Administrator, USDA APHIS, before the House Committee on Agriculture*, available at <http://commdocs.house.gov/committees/ag/hagplant.000/hagplant_0.HTM>.

⁶ *See Testimony of Mike Stuart, President of Florida Fresh Fruit and Vegetable Association, before the House Committee on Agriculture*, available at <http://commdocs.house.gov/committees/ag/hagplant.000/hagplant_0.HTM>.

⁷ *See Improvements Needed to Minimize Threat of Foreign Pests and Diseases*, GAO-97-102 May 1997. (“Despite changes in resources and activities, APHIS’ inspection program at most of the ports we visited has not kept pace with the increasing pressure from its growing workload and mission.”)

⁸ *See Homeland Security: Management and Coordination Problems Increase the Vulnerability of U.S. Agriculture to Foreign Pests and Disease*, GAO-06-644, May 19, 2006.

⁹ *See id.* (“Customs and Border Protection officials, for instance, don’t yet have a complete listing of e-mail addresses for agriculture inspectors, complicating efforts to send out crucial warnings.”)

¹⁰ *See id.* *See also* Michael Doyle, *Report Finds Less Port Pest Scrutiny*, SACRAMENTO BEE, at D1, May 23, 2006. (“One inspector expressed dismay that specialists at the port to which he had recently transferred were unaware of new regulations for conducting inspections to safeguard against avian influenza ...”)

rate of inspections, APHIS should at a minimum fully support state efforts to assist federal authorities in the prevention and spread of new invasive species.

Unfortunately, use of the special needs exemption has been inconsistent and hampered because of the lack of procedural guidelines from APHIS instructing its use. In reviewing implementation since the Plant Protection Act's enactment, The Nature Conservancy notes that APHIS has rejected many Special Needs Requests despite strong scientific showings by the state seeking the exemption. In many of these instances, the denial and subsequent inability by states to impose additional restrictions appears to have exacerbated the spread of invasive species needlessly.

For example, in 2004 APHIS denied the Special Needs Request exemptions submitted by several states, including Delaware, Florida, Kentucky, Louisiana, Mississippi and West Virginia, all of whom sought to impose further restrictions on host and associated plants of *Phytophthora ramorum* (the pathogen which causes sudden oak death). The pathogen rapidly spread from infected plants in the nursery trade in California to shipments in over 20 states. While APHIS originally focused its restrictions on isolated host plants, the pathogen has now been found in over 100 susceptible host plants and has been detected in nurseries or retail garden stores in 21 U.S. states, in British Columbia and throughout Europe.¹¹

As another example, APHIS denied the state of Hawaii's Special Needs Request to exempt the state from the importation of ivy gourd fruits, justifying the denial because of an Agency finding that the species was not a "pest risk" to the United States. While the species may not pose a pest risk to many agricultural crops of the continental U.S., ivy gourd remains one of Hawaii's most serious noxious weeds, invading island lowlands, decimating trees, and overgrowing telephone and power lines.

Responding to Hawaii's concerns that APHIS has not adequately protected the state from the risk of new invasions, on January 19, 2006 the Hawaii Invasive Species Council¹² endorsed the Hawaii Invasive Species Prevention Act,¹³ introduced by Congressman Ed Case. The Hawaii Invasive Species Council includes the heads of the State of Hawaii Departments of Land & Natural Resources, Agriculture, Transportation, Business, Economic Development & Tourism, and Health, and the President of the University of Hawaii. The Hawaii Invasive Species Prevention Act, H.R. 3468, would require the Secretary of Agriculture to (i) establish a post-arrival quarantine protocol in Hawaii, (ii) provide Hawaii with an expedited process to secure special needs exemptions from the preemption provisions of the Plant Protection Act, and (iii) allow the state to impose emergency quarantine restrictions on imminent pest threats. The ongoing costs of

¹¹See *Sudden Oak Death Introduced To U.S., Study Finds*, Press Release, U.C. Berkely, available at <http://www.berkeley.edu/news/media/releases/2006/04/20_oakdeath.shtml>.

¹²The Council's website is available at <http://www.hawaii.gov/dlnr/dofaw/HISC/>.

¹³ Hawaii Invasive Species Prevention Act, (H.R. 3486, 109th Congress).

prevention are overwhelmingly less than the ongoing costs of damage and control associated with an established invasive species.¹⁴

A more expansive application of the special needs authority would allow APHIS to respond appropriately to states or political subdivisions which harbor especially vulnerable natural resources without impeding interstate and foreign trade to an appreciable extent. For example, isolated ecosystems, such as those of the Hawaiian islands, are well documented by scientists as being especially vulnerable to introduced species, including introduced plant pests and invasive plants. To protect these unique resources, Hawaii should be able to apply more stringent phytosanitary standards. At the same time, since Hawaii constitutes a small share of the U.S. economy, allowing the state to apply its more stringent phytosanitary controls will not impose an undue economic burden on commerce.

A current issue in Hawaii relates to imports of plants or cut greens in the Myrtaceae that might transport `ohi`a rust (*Puccinia psidii*). APHIS could work with Hawaii to prohibit movement of such materials to the islands, thereby protecting the very widespread and ecologically irreplaceable `ohi`a tree and other native plants in this family. A precedent for such a cooperative program to protect a limited vulnerable area was APHIS's decision to limit imports of Hass avocados from Mexico to destinations outside avocado-growing regions for several years.¹⁵ This step precluded any possible risk from pests that might be associated with the avocados from threatening U.S. avocado producers.

Reviewing the sporadic implementation of the special needs exemption provision, we support APHIS's issuance of criteria in the hope this will allow expedited, transparent review and support of Special Needs Requests. However, as explained in the following comments we urge the Agency to make changes in its proposal to reflect the intent of the Plant Protection Act to protect the authority of states and local entities to take needed steps beyond those contemplated by the federal government to protect against invasions from plants and associated pests and pathogens.

B. We request that APHIS make several changes to its proposed rule to facilitate prompt objective response to states' Special Needs requests.

1. We urge APHIS to publish notice of the Agency's consideration of a Special Needs Request as an interim rule to facilitate expedient review and action on a request.

APHIS proposes to consider a Special Needs Request following publication in the Federal register of the request, and soliciting comment upon the proposal. The federal notice and comment process typically takes a minimum of 180 days, an unacceptably

¹⁴ See *Invasive Species: The Economics of Prevention, Control and Environmental Impact*, Trey Huffman, The Nature Conservancy of Hawai'i (2002).

¹⁵ The most recent APHIS rulemaking, in November 2004, does allow imports of avocados to California, Florida, and Hawaii beginning in January 2007. See Federal Register Vol. 69, No. 229 (November 30, 2004).

long time while the requesting state or political subdivision remains powerless to act. When one factors in the additional time prior to the filing of the request during which the state or political subdivision prepares the scientific data to support the Special Needs Request, it is clear that publication by rule will not allow sufficiently rapid response time by APHIS to the state or political subdivision's request.

We therefore urge that a special need request be noticed in the Federal Register as an interim rule, published within 10 working days of APHIS's original receipt of the Request. APHIS would thus have the additional benefit of weighing comments received on the rule in the Agency's consideration to grant or deny the request, publishing the final decision in the federal register. As the state of Florida has noted in its comments, if APHIS's current proposal is implemented, "the pest or disease of concern [will] likely have been introduced or spread into the state....negating the need for the Special Need Request."¹⁶ We suggest that APHIS establish a short expedited time frame within which it would decide to grant or deny such a request.

2. We request that APHIS delete proposed language requiring that political subdivisions of a state act only through the state, and instead implement the Plant Protection Act's broader exemption that allows political subdivisions to make requests to APHIS directly.

We are concerned that proposed language in §301.1-2(a) requires the acquiescence of a state where a political subdivision such as a county or city requests a special need exemption. The Plant Protection Act allows either a state or a political subdivision of a state to petition APHIS directly. The only restriction the statute speaks to is the demonstration by *either* the petitioning state *or* political subdivision that there is a special need for additional prohibitions or restrictions.¹⁷

The proposed rule would add a new requirement that the political subdivision obtain the state's permission and active support for APHIS to even consider the request.¹⁸ This has the potential to stop otherwise valid actions by local officials solely because the state chooses not to support the political subdivision's request. In our view this proposal may prove incapacitating to a local entity, leading to unnecessary and costly spread of a plant associated pest or pathogen.

¹⁶ See *Comment*, Richard Gaskalla, Division Director, on behalf of Charles H. Bronson, Commissioner of Agriculture, State of Florida, Federal Register Docket No. APHIS-2005-0103.

¹⁷ See *infra* at FN 3. (§ 436(b)(2)(B). "Special need. – A State or political subdivision of 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 or political subdivision of a 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.")

¹⁸ §301.1-2 states "A special need request, as described in §301.1, may be generated by a State or a political subdivision of a State. If the request is generated by a political subdivision of a State, the request must be submitted to APHIS through the State. All Special Needs Requests must be signed by the executive official or a plant protection official of the State..."

APHIS justifies its proposal only by noting that “our contacts are at the State level.”¹⁹ The relative importance of the bureaucratic convenience contemplated by APHIS is minimal when compared to the significant environmental and economic need for the Agency’s timely consideration of a Special Needs Request. We urge APHIS to change its proposed requirement to reflect the intent of the Plant Protection Act to allow proactive measures to be taken where appropriate at the local level. Solicitation of the relevant state’s views would be provided through opportunity to comment on the interim rule (see *infra*, page 5, Comment (B)(1)). Any additional burden borne by APHIS or a state could be mitigated by requiring a political subdivision to give notice to the relevant state prior to filing its Special Needs Request with the APHIS, and by requiring the political subdivision to include contact information in its Special Needs Request for the appropriate state agency official.

3. We urge APHIS to articulate the Agency’s intended process in circumstances where insufficient evidence may be present, and provide additional guidance regarding the quantity and quality of data required by the Agency to support a Special Needs Request.

a. Process to accommodate the development of data upon which an objective decision can be made.

Generally speaking, APHIS’s proposed criteria for evaluating a Special Needs Request appears intended to mirror criteria used under the World Trade Organization’s Agreement on the Application of Sanitary and Phytosanitary Measures.²⁰ We urge APHIS to incorporate additional language from the Agreement, currently missing from the proposed Rule, articulating processes the Agency shall follow where insufficient evidence may be present, yet where interim or provisional measures may be necessary until more information becomes available.²¹ We suggest the following language:

§301.1-4 Process where insufficient information present.

In cases where relevant scientific evidence is insufficient, a State or political subdivision of a State may adopt provisional prohibitions or restrictions on the basis of available pertinent information. In such circumstances, the state or political subdivision of a state shall seek the additional information necessary for an objective assessment of risk to facilitate APHIS’s review of the restriction accordingly within a reasonable period of time to be determined by APHIS on a case by case basis.

¹⁹ See Proposed rule, *infra* at FN 1, 71 Fed Reg. 16712 (April 4, 2006) (Submission of Requests).

²⁰ See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex IA (*hereinafter* WTO SPS Agreement).

²¹ See WTO SPS Agreement, Article 5 (7) “Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

The incorporation of this language would facilitate the development of information where critically needed, is expressly permitted by the World Trade Organization's relevant agreement, and is consistent with the Plant Protection Act.

b. Examples to guide Agency decision-making.

We additionally suggest APHIS include specific suggestions of examples of the quantity and quality of scientific data that shall be used by the Agency in its review of the §302.1-2 criteria to ensure the consistency of both Special Need Requests and Agency decision-making. As currently drafted, the proposed rule leaves several terms without further definition,²² allowing the terms to potentially be subjectively and inconsistently interpreted. Clarification of the type and quantity of data APHIS deems sufficient, including specific examples for each criteria, would assist states and local entities in meeting the criteria.

4. We request that APHIS revise its proposal to clarify the burden of proof for a state or political subdivision of a state requesting a special needs exemption.

States or political subdivisions of states conducting pest risk assessment for potential pests face many daunting challenges. Among these are severe information gaps regarding the existence of species, their current ranges, and their likely behavior when introduced to new ecosystems. The National Research Council²³ has recognized “[t]here are currently no known broad scientific principles or reliable procedures for identifying the invasive potential of plants, plant pests, or biological control agents in new geographic ranges.” As a result of these uncertainties, predictions about the behavior of newly introduced organisms have often proved faulty.

In recognition of these uncertainties, we suggest the following amendment to the criteria regarding the burden of proof a state or political subdivision must meet in order to obtain a Special Needs exemption:

Sec. 301.1-2 Criteria for special need requests.

(3) ~~Specific~~ Available information showing that, if introduced into or allowed to spread within the State or political subdivision, the biological control organism, noxious weed, or plant pest would harm or injure the environment and/or cause economic harm to industries in the State or political subdivision. The request should contain ~~detailed~~ available information about what harm or injury would result from the introduction

²²For example, the terms “scientifically sound detection survey,” “risk analysis or other scientific data,” and “any other special basis for the request for additional restrictions or prohibitions” currently lack further definition or description.

²³ National Research Council, *Predicting Invasions of Non-indigenous Plants and Plant Pests* 9 (2002), available at < <http://www.nap.edu/books/0309082641/html/>>.

or dissemination of the biological control organism, noxious weed, or plant pest in the State or political subdivision;

(suggested deletions indicated by stricken text, suggested additions indicated by underlined text).

5. We request that APHIS clarify and employ the available authority to the Agency to regulate pathways of pest and pathogen conveyance.

Section 412 of the Plant Protection Act allows the Secretary to “prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organisms, noxious weed, *article* or *means of conveyance*, ... to prevent the introduction ... or the dissemination of a plant pest or noxious weed within the United States”(emphasis added).²⁴ APHIS has generally issued rules targeting restrictions to a particular species or article (e.g., wood packing), yet the Act’s conferral of authority allows the Agency to more broadly impose restrictions on pathways. We urge the Agency to articulate where the use of a pathway approach by a state may be supported by the Agency. We suggest APHIS include recognition that through a Special Needs Request a state may conduct a pathway risk assessment and – where criteria of the Special Needs Request are otherwise met - adopt a management approach to the pathway that applies to all potential invasive plants or plant pests using the pathway, not just a single particular species. This more efficient approach would have been greatly beneficial in the response to *Phytophthora ramorum*.

6. Finally, we urge APHIS to reject comment(s) suggesting additional criteria that if adopted would require the state or political subdivision making a Special Needs Request to additionally attempt to assess the implications of its action on neighboring states.

In particular, we are troubled by the suggestion that APHIS require the state or political subdivision provide information “demonstrating that this special need request would not impose greater risk of injury to one or more neighboring states or political subdivisions.”²⁵ A state or political subdivision is inherently unable to provide information or data on behalf of another state or political subdivision. Rather, it is APHIS’s responsibility to consider a Special Needs Request under the general framework authorized by the Plant Protection Act, which expressly recognizes the right of states to act to protect their local interests, balanced with the interest in free commerce.²⁶ Therefore, we urge APHIS to reject this additional proposed criterion.

²⁴ See § 412 PPA, 7 U.S.C. §7712 (2006).

²⁵ See Comments by Harry Lamberton, Waste Management Upstream, Federal Register Docket No. APHIS-2005-0103. (“Specific information demonstrating that this special need request would not impose greater risk of injury to one or more neighboring states or political subdivisions. In providing such demonstration, the state or political subdivision shall evidence its consultation with any jurisdiction(s) adversely impacted by the requested exemption.” *Id.*, page 3).

²⁶ See PPA §402 (3) “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

In conclusion, we appreciate this opportunity to provide comment to the Agency in its work to facilitate more transparent, informed use and consideration of Special Need Requests under the Plant Protection Act. If you have any questions about our comments, please do not hesitate to contact me at (703) 841-4582 or Catherine Hazlewood, Senior Policy Advisor, Global Invasive Species Initiative at (703) 841-4229.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jimmie Powell". The signature is fluid and cursive, with a large initial "J" and "P".

Jimmie Powell
Director, Government Relations

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” (emphasis added).