

USDA



## Special Need Exception Requests: Why is the Bar Set So High?

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# Special Need Exception Requests

- Plant Protection Act Context
- APHIS Special Need Exception Implementing Regulations
- History of Special Need Exception Requests
- Recommendations for the Future
- Questions

# Plant Protection Act Context

## Preemption Provisions - 7 U.S.C 7756

- States cannot regulate interstate commerce if USDA has a regulation or order in place for a plant pest, biological control organism (BCO), or Federal Noxious Weed (FNW).
- States may regulate consistently with USDA, provided they don't exceed USDA regs & orders—except that:
- States can exceed Federal regs & orders (generally 7 CFR 301 & 360) “if the State or political subdivision of a State demonstrates to USDA and USDA finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.” (emphasis added)

# APHIS Special Need Exception Regulations

- APHIS issued regulations at 7 CFR 301.1 to implement PPA provisions for special needs in October 2008.
- APHIS regulations, among other things:
  - List criteria which must be met to support a special need exception, and
  - Describe the request submission process and procedures that USDA follows in granting, denying, withdrawing special need exceptions.

## Information Needed from Requesting State(s)

1. Provide survey & distribution info;
2. Provide risk assessment demonstrating pest/BCO/FNW could enter and become established;
3. Provide specific information showing the pest/BCO/FNW would be harmful;
4. Demonstrate that area to be protected has characteristics that make it particularly vulnerable, such as unique plants, diversity of flora, historical concerns or other special basis; and
5. Demonstrate why the additional prohibitions or restrictions are necessary and adequate, and that there is no appropriate less drastic action available.

# Historical Special Need Requests

- Four written requests received.
  - Two from a regional group of states for LBAM & P. ramorum
  - Two from a single state for LBAM & P. ramorum
- Two regional requests resulted in changes to APHIS program for P. ramorum, and significant discussion on program direction on LBAM.
- Only one request denied in writing; others withdrawn after discussions between APHIS & requestors.

# Making Requests More Viable

- Distinguish between issues of broad concern and special needs.
- Criteria 4 & 5 are critical:
  - Is the area in question uniquely at risk? What would justify special treatment vs. the rest of the country?
    - “characteristics that make it particularly vulnerable, such as unique plants, diversity of flora, historical concerns or other special basis”
    - Establish clear points of contrast with other areas that are subject to the Federal quarantine.
  - Establish clear linkage between the additional desired measures and the unique situation in the State.
  - Are the measures proposed the least drastic measures required to mitigate the risk?

# Why is the Bar Set So High?

- Special need exceptions are subject to legal challenge like any other Federal action.
- Federal responsibility is to provide clear rules for commerce, and we want to avoid a patchwork of multiple quarantine restrictions unless those differences are justified by unique local/regional risks.



# Moving Forward

We welcome additional requests and we will work with you to help you make your request viable.

- Broad issues of concern warrant discussion on the underlying quarantine.
- Unique local & regional issues may justify special need exceptions.



# Questions?

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