



GUIDE TO THE APHIS LISTING PROCESS FOR FEDERAL NOXIOUS WEEDS

The Five Steps

1. Identify a weed that may meet the Plant Protection Act (PPA) authority for applying remedial measures, thus is appropriate for listing as a Federal Noxious Weed.
2. Prepare a risk assessment
3. Publish a proposed rule in the Federal Register
4. Analyze and respond to public comments
5. Publish a final rule in the Federal Register

Discussion of Each Step

1. Identify a Federal noxious weed that may meet the PPA authority for applying remedial measures, thus is appropriate for listing as a Federal Noxious Weed.

APHIS identifies weeds as possible candidates for designation as Federal noxious weeds in several ways, including:

- Discovery of an established infestation or an outbreak of a new weed in the United States.
- Identification of a new weed risk through literature search or other research. (For example, we look for information about weed problems in other countries and target for risk assessment those that do not yet occur in the US.)
- Petition or proposal from outside APHIS.

The PPA definition of a noxious weed is broad: “any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.”

APHIS lists in the noxious weed regulations only those taxa that qualify as quarantine pests under the definition of that term in the International Plant Protection Convention (IPPC) Glossary of Phytosanitary Terms, i.e., “a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.” This practice is consistent with the IPPC, to which the United States is a signatory. This practice is also consistent with sections 414 and 415 of the PPA, which authorize the Secretary to take general remedial measures, or to declare an extraordinary emergency if necessary, to prevent the introduction or spread of plant pests or noxious weeds that are new to or not known to be prevalent or distributed widely within and throughout the United States.

All Federal noxious weeds are determined, at the time of their listing, to pose economic and/or environmental risks to the United States. Economic importance includes environmental impacts. The IPPC definition of “official control”, which was adopted at the Third Interim Commission on Phytosanitary Measures in 2001, is: "The active enforcement of mandatory phytosanitary regulations and the application of mandatory phytosanitary procedures with the objective of eradication or containment of quarantine pests or for the management of regulated non-quarantine pests." Therefore, a candidate for the Federal Noxious Weed List should be either not yet present in the United States or of limited distribution, and should be capable of causing economic and/or environmental harm. If the weed has been introduced, eradication or control efforts which constitute “official control” should be underway where the weed occurs, or establishment of such a program should be practical and supported financially and/or politically by local and State authorities.

2. Risk Assessment

APHIS prepares or reviews risk assessments for species identified as potential candidates for the Federal noxious weed list. Anyone may petition the Secretary of Agriculture to add a weed to the regulations. Because resources for weed risk assessment within APHIS are limited, we encourage stakeholders to submit draft risk assessments for review. A petition to add a weed to the list of Federal noxious weeds should, to the extent possible, provide the following information identified in the template, preferably in electronic format, needed to develop the pest risk assessment.

- The taxon's scientific name and author;
- Common synonyms;
- Botanical classification;
- Common names;
- Summary of life history;
- Native and world distribution;
- Distribution in the United States, if any;
- Description of control efforts, if established in the United States;
- Whether the taxon is regulated at the State or local level;
- The taxon's habitat suitability in the United States (predicted ecological range);

- Dispersal potential (biological characteristics associated with invasiveness);
- Potential economic impacts (e.g., potential to reduce crop yields, lower commodity values, or cause loss of markets for U.S. goods);
- Potential environmental impacts (e.g., impacts on ecosystem processes, natural community composition or structure, human health, recreation patterns, property values, or use of chemicals to control the taxon);
- Potential pathways for the taxon's movement into and within the United States;
- The likelihood of survival and spread of the taxon within each pathway.

APHIS will review (and if necessary complete) the risk assessment, determine the pest risk potential, and send the finished document for peer review. If the outcome of the risk assessment is high risk or medium-high risk, an organism is eligible for listing if it also meets the PPA authority under section 414 of PPA for APHIS to apply remedial measures; i.e., the organism is “new to or not known to be widely prevalent or distributed within and throughout the United States.”

3. Publish a Proposed Rule in the Federal Register

Because Federal noxious weeds are listed in Title 7 of the Code of Federal Regulations (CFR), parts 360 and 361, adding a weed to the list requires a change to these regulations under mechanisms laid out in the Administrative Procedure Act (APA). The APA governs the way in which administrative agencies of the United States federal government may propose and establish or modify regulations. A weed program staff member prepares a work request, called a regulatory work plan, for a proposed rule to be published in the Federal Register for public comment. The regulatory work plan is submitted to a staff in APHIS that provides regulatory drafting services – the Regulatory Analysis and Development (RAD) staff. The RAD staff forwards the regulatory work plan for clearance through policy officials in USDA and assigns a writer to draft the proposed rule. The Office of Management and Budget (OMB) also classifies the action under Executive Order 12866, Regulatory Planning and Review. OMB may waive review of an action or will designate the action “not significant” or “significant.” Any action designated “significant” must be reviewed by the OMB before it can be published in the Federal Register. In addition to drafting the proposed rule, APHIS must complete various analyses required by laws and Presidential executive orders to support the proposed rule. These include an analysis of the potential economic effects of the rule on small entities. The proposed rule and its accompanying analyses must undergo legal and policy reviews.

The Office of General Counsel (OGC) reviews for legal sufficiency. If the proposed rule has been designated “significant” by OMB, the proposed rule must be cleared by a number of USDA offices outside APHIS and then by OMB. If OMB has waived review or designated the proposed rule “not significant,” there is minimal USDA review beyond APHIS, and the proposed rule is not reviewed by OMB.

Once all reviews are completed, the proposed rule is signed and sent to the Federal Register. The public is invited to comment, usually for 60 days. During this time, the World Trade Organization is notified about the proposed action.

In an emergency, APHIS may publish a “interim rule” rather than a proposed rule. Alternatively, a federal order may be issued (effective immediately) followed by an interim rule. In either of these cases, the federal order or interim rule is effective prior to our receiving and considering public comments – in the case of the interim rule, usually upon publication of the interim rule in the Federal Register. There is still a 60-day comment period, but the rule or federal order is effective and can be enforced during this time. Generally, interim rules and/or federal orders are reserved for situations where a serious pest risk must be addressed immediately. (After the comment period closes, an agency may make changes to an interim rule or federal order in a follow-up final rule. If the agency decides to adopt the interim rule without changes, the follow-up document is called an affirmation of interim rule.)

4. Analyze and Respond to Public Comments

After the comment period ends, we review all comments received. We identify each issue raised and decide how to respond. We do not respond directly to each commenter. Rather, we include our response to issues raised by the commenters in the introduction (or Supplementary Information section) of the final rule. We must explain why we agree or disagree with the comment and what, if any, changes we are making in the final rule as a result. Note: We can also decide to withdraw a proposed rule at this stage. If so, we will publish a Notice of Withdrawal in the Federal Register.

5. Publish the Final Rule

Review and clearance procedures for a final rule are similar to those for a proposed rule. This includes submitting a document to OMB, based on which OMB may waive review of the final rule or will designate it “not significant” or “significant.” Next, the final rule is drafted. The analyses prepared for the proposed rule are updated and adjusted if necessary. Final rules must also be reviewed by OGC for legal sufficiency and by APHIS and USDA policy officials and, if “significant,” by OMB. Once all reviews are completed, the final rule is signed and sent to the Federal Register. The published rule includes an effective date. This date is usually 30 days after publication unless there is good cause for making it effective sooner.