



Office of the General Counsel

B-276989

May 21, 1997

The Honorable Richard G. Lugar
Chairman
The Honorable Tom Harkin
Ranking Minority Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Bob Smith
Chairman
The Honorable Charles W. Stenholm
Ranking Minority Member
Committee on Agriculture
House of Representatives

Subject: Department of Agriculture, Animal and Plant Health Inspection Service:
Karnal Bunt Disease; Domestic Plant-related Quarantine; Final Rule and
Karnal Bunt; Compensation for 1995-1996 Crop Season; Final Rule

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on major rules promulgated by the Department of Agriculture, Animal and Plant Health Inspection Service (APHIS), entitled "Karnal Bunt Disease; Domestic Plant-related Quarantine; Final Rule" and "Karnal Bunt; Compensation for 1995-1996 Crop Season; Final Rule" (RIN: 0579-AA83). We received the compensation rule on May 1, 1997. It was published in the Federal Register as a final rule on May 6, 1997. 62 Fed. Reg. 24746. The quarantine rule was previously published on October 4, 1996, and we received it on October 7, 1996. 61 Fed. Reg. 52190.

When the quarantine rule was issued on an emergency basis, our Office was advised by APHIS that a joint cost-benefit analysis and Regulatory Flexibility Analysis would be prepared in conjunction with the compensation rule. The staffs of the committees of jurisdiction agreed that we would issue our report on the quarantine rule jointly with the compensation rule when the latter rule was published.

The final rules establish criteria for levels of risk for areas with regard to Karnal bunt, a fungal disease of wheat, and for the movement of regulated articles based

on those risk areas and provide compensation for certain growers and handlers, owners of grain storage facilities and flour millers to mitigate losses because of Karnal bunt in the 1995-1996 crop season.

Neither final rule complies with the 60-day delay in the effective date of a major rule required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The quarantine rule states that it is effective 30 days after publication in the Federal Register and the compensation rule states that it is effective upon publication in the Federal Register.

The preambles to both final rules state that the Administrator of APHIS has determined that there is good cause for not delaying the effective dates for 60 days because it is in the public interest to avoid a delay in implementation. The Administrator states that the quarantine rule had to be quickly implemented for growers to be able to make planning decisions for the 1996-1997 crop season and that the compensation rule had to be effective upon publication so that growers and other parties could be compensated for losses in the 1995-1996 crop season.

The Administrator contends that 5 U.S.C. § 808(2) provides that rules which the agency believes would have been exempt from the notice and comment requirements of the Administrative Procedure Act, although the exemption was not actually invoked, are exempt from the 60-day delay period imposed by SBREFA and may take effect at such time as the agency determines.

Section 808(2) states that where an agency for "good cause" finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the delay provisions of section 801 do not apply. Here, APHIS did not make such a finding, but published the draft rules in accordance with APA requirements, receiving and considering comments on both of the rules. It now cites the good cause exception to avoid the congressionally-mandated delay for SBREFA review. As discussed in our report on a major rule concerning Medicare issued by the Health Care Financing Administration (B-275549, B-275552, December 9, 1996), the good cause exception to the 60-day delay provision found at 5 U.S.C. § 808(2) is not available when notice and comment procedures have been used. Moreover, we note that the compensation rule has been under consideration at least since an interim rule and request for comments was published on July 5, 1996. See 62 Fed. Reg. 52190.

Enclosed is our assessment of APHIS' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that APHIS, with the exception of the delay in the effective date, complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of Agriculture, Animal and Plant Health Inspection Service is Robert Robinson, Director for Food and Agriculture Issues. Mr. Robinson can be reached at (202) 512-5138.

Robert P. Murphy
General Counsel

Enclosure

cc: Terry L. Medley
Administrator
Animal and Plant Health Inspection Service
Department of Agriculture

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION SERVICE
ENTITLED
"KARNAL BUNT DISEASE;
DOMESTIC PLANT-RELATED QUARANTINE; FINAL RULE" AND
"KARNAL BUNT;
COMPENSATION FOR 1995-1996 CROP SEASON; FINAL RULE"
(RIN: 0579-AA83)

(i) Cost-benefit analysis

A cost-benefit analysis is included in the Regulatory Impact Analysis at 62 Fed. Reg. 24763 which covers both the quarantine and compensation final rules.

The analysis finds that the benefits of the rules are the avoided losses in the wheat export markets which maintain restrictions against wheat imports from countries where Karnal bunt is known to occur. It is estimated that the impact of Karnal bunt on exports, because of substitution effects, would likely result in a 10-percent reduction of wheat exports and a drop in wheat sector of over \$500 million.

The costs of the rules is estimated to be a \$44 million loss in market value for the 1995-1996 crop season, and as of April 4, 1997, \$39 million in compensation funding had been made available through budget apportionment.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

On April 3, 1997, APHIS published an Initial Regulatory Flexibility Analysis (62 Fed. Reg. 15809) for the quarantine final rule. Regarding the compensation final rule, APHIS advised our Office that since the rule was issued on an emergency basis, no Initial Regulatory Flexibility Analysis was done, but since the rule may have a significant impact on a substantial number of small entities, a Final Regulatory Flexibility Analysis would be included with the final rule.

A joint Final Regulatory Flexibility Analysis was published on May 6, 1997, for both rules. 62 Fed. Reg. 24753. The analysis describes the reason for the final rules and the legal basis for them. The analysis also includes descriptions and estimates of the number of small entities affected by the rules; a discussion of the record-keeping, reporting, and other compliance requirements; and the steps taken to minimize the burdens on small entities and alternatives which were considered.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rules do not impose any federal mandates under title II of the Unfunded Mandates Reform Act of 1995 on state, local, or tribal governments or the private sector of \$100 million or more in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The quarantine final rule was issued as a notice of proposed rulemaking on August 2, 1996 (61 Fed. Reg. 40354) under the notice and comment procedures of 5 U.S.C. § 553. In addition to requesting comments, public forums were held in four cities to enable the public to participate more fully. APHIS received 178 comments in response and the preamble discusses the comments received and the actions taken as a result of the comments.

The compensation final rule was published as an interim rule with a request for comments on July 5, 1996 (61 Fed. Reg. 35102) and resulted in 15 comments being received. The preamble to the final rule discusses the comments and any actions taken.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The quarantine final rule does not contain any information collections which are subject to review under the Paperwork Reduction Act.

The compensation final rule's information collections were included in the prior interim rule and were approved by the Office of Management and Budget (OMB) which issued OMB Nos. 0579-0121, 0563-0003, 0563-0004, and 0563-0033.

The final rule contains an information collection which was not included in the prior OMB submission which requires a claimant to make a request in order to be granted an extension of the deadline for filing compensation claims. The final rule contains the reason and the need for the collection and the estimate of the burden hours. The collection has been submitted to OMB for approval and when OMB notifies APHIS of its action on the submission, APHIS will publish a notice in the Federal Register. Until OMB approval is obtained, compliance with the collection requirement is unnecessary.

Statutory authorization for the rule

The compensation and quarantine final rules both cite as authority 7 U.S.C. §§ 150bb, 150dd, 150ee, 150ff, 161, 162, and 164-167.

Executive Order No. 12866

Both final rules are considered to be "economically significant regulatory actions" under Executive Order No. 12866 and were reviewed by the Office of Management and Budget. The Office of Information and Regulatory Affairs of OMB approved the final rules as complying with the requirements of the order based on the information supplied by APHIS, which included a planned regulatory action document describing the reason for the rules and an assessment of the costs and budgetary impact of the interim rule.

National Environmental Protection Act, 42 U.S.C. §§ 4321 et seq.

APHIS performed an environmental assessment in accordance with NEPA. The assessment found that the anti-fungicide and other sanitization treatments required by the rules do not present a risk of introducing or disseminating plant pests and will not have a significant impact on the quality of the human environment. Based on these findings, APHIS determined that an environmental impact statement need not be prepared.

Executive Order No. 12988

The final rules were reviewed under Executive Order No. 12988 (Civil Justice Reform) and found to meet the standards set forth in the order. The final rules preempt all state and local laws and regulations that are inconsistent with the final rules, do not have a retroactive effect, and do not require administrative proceedings before parties may file suit in court challenging the rules.