



STATE OF IDAHO



August 28, 2017

C. L. "BUTCH" OTTER
GOVERNOR
CELIA R. GOULD
DIRECTOR

Re: Japanese Yew Rulemaking Analysis, Docket No. 02-0622-1701

Introduction

The Idaho State Department of Agriculture (ISDA) received two petitions to initiate negotiated rulemaking proposing to develop and implement rules governing the sale, distribution, and possession of certain yew species in Idaho. One petition cited Idaho Code § 22-2403 and IDAPA 02.06.22, Idaho Noxious Weed Rules as the controlling authorities to proceed with the rulemaking request. The second petition did not identify any statutory authority to proceed, only stating that the request sought to make it illegal to sell or have any Japanese Yew plant or tree in the state of Idaho. Consistent with the requirements of the Idaho Administrative Procedures Act, the ISDA sought and received permission to proceed with negotiated rulemaking through the Office of the Governor and published a subsequent Notice of Intent to Promulgate Rules in the Administrative Bulletin.

Rulemaking Authority

The ISDA has authority to promulgate certain rules regulating noxious weeds in Idaho under Idaho Code § 22-2403. Specifically, the Director is required to "[m]ake and publish such rules as in the director's judgment are necessary to carry out the provisions of this chapter . . ." Idaho Code § 22-2403(c). Additionally, the Idaho Noxious Weeds Act defines a "noxious weed" as "any plant having the potential to cause injury to public health, crops, livestock, land or other property; and which is designated as noxious by the director." Idaho Code § 22-2402(15). Accordingly, certain toxic Yew species could, under the authority granted to the ISDA in the Idaho Noxious Weed Act, be listed and regulated according to the provisions of the Idaho Noxious Weed Rules if the Director designates Yew species as noxious and subsequently determines that such designation and rules are necessary to carry out the provisions of the Idaho Noxious Weed Act.

Informal Rulemaking

The ISDA hosted four in-person informal rulemaking meetings during May, June and July. The first two meetings held on May 16, 2017, and June 6, 2017, were well attended with 29 and 26 people attending respectively. Individuals and organizations attended that supported the petition and encouraged the ISDA to proceed with adding Yew species to the noxious weed list and develop specific rules regulating the species. Individuals and organizations also attended that did not support the petition and encouraged the ISDA not to add Yew species to the noxious weed list. Two additional meetings were held with a smaller working group on June 20, 2017, and July 14, 2017. This smaller working group was comprised of volunteers representing stakeholders with differing perspectives or goals related to the rulemaking. The desired outcome was for the group to identify and develop a consensus based recommendation for how best to proceed. No recommendation was provided due to a lack of consensus. Information was collected from attendees and presenters at all meetings and is included in the rulemaking record. Additionally, the ISDA solicited and accepted written comments related to the rulemaking through July 15, 2017. The ISDA received 144 written comments from individuals or organizations. The rulemaking record is available on the ISDA website and can be viewed at the following link:

http://www.agri.idaho.gov/AGRI/Categories/LawsRules/sub_rules/2017_rules/020622_Noxious_Weeds.php

Analysis

The Idaho Noxious Weeds Act declaration of policy states that “[i]t is the purpose of this chapter to define noxious weeds; legal requirements, duties, and responsibilities of persons; and to provide the statutory and financial means for the control of noxious weeds, wherever such noxious weeds occur in the state.” Idaho Code § 22-2401. A weed or plant may only be listed as a noxious weed after the Director designates the plant as “noxious.” See Idaho Code § 22-2402(15). Additionally, rules are authorized only after the Director determines they are necessary to carry out the provisions of the Idaho Noxious Weed Act.

The ISDA has carefully considered the positions of the interested stakeholders, reviewed the rulemaking record and reviewed the controlling laws and rules associated with the current rulemaking petitions. It has determined not to proceed further under the negotiated rulemaking and will not propose any changes to the current Noxious Weed Rules.

The governing law and rules, specifically the Idaho Noxious Weeds Act and the associated Noxious Weed Rules, regulate a lengthy list of weeds that are damaging or threatening to the environment due to their invasive characteristics or difficulty to control. Various response plans are outlined in the rule based on potential damage and or the ability to contain a population within certain parameters. The Yew species associated with the current rulemaking do not share any of the characteristics in common with all other noxious weeds on the list. To the contrary, they are not known to be invasive or cause environmental harm or damage as a result of their growth habits or ability to spread in the Idaho environment. It is not in dispute by any of the rulemaking stakeholders or this agency that they are toxic to mammals and can and have caused the death of wildlife, pets and livestock. This alone cannot justify adding the species to the noxious weed list. The ISDA is not stating a position that Yew or other toxic species should not be regulated in some manner, it has only determined through this rulemaking process that the noxious weed list is not the appropriate or best place to do so. The noxious weed list should be limited to those weed species that do present a threat to the environment due to their invasive characteristics and present a threat to overtake or out-compete desirable plant species in the environment.

Representatives of several Idaho counties through county commissioners, weed superintendents and the Idaho Association of Weed Control Superintendents expressed concern and opposition to listing Yew species due to the financial burden it would create on county noxious weed programs. A fundamental requirement specifically mentioned in the Noxious Weeds Act is for the state to provide the “financial means for the control of noxious weeds” Idaho Code § 22-2401. Negotiated rulemaking was unable to identify an agreeable or consensus driven regulatory response and as a result no financial means could be subsequently identified to off-set the additional cost burden to the counties who would be the front lines in implementing any new rules.

Finally, several very positive outcomes have resulted in this negotiated rulemaking process. First, wildlife advocates have come together with nursery industry representatives and have identified ways to increase awareness of the toxic effects Yew have on wildlife and other mammals. Industry leaders have stepped up voluntarily and removed Yew species for sale and/or offered discounts or other financial incentives to replace Yew in citizen’s yards and gardens. Many of these activities are happening due to the tireless efforts of Idahoans who care passionately about wildlife. This effort is on-going and the ISDA encourages stakeholders and interested citizens to continue to work together to educate the public and raise awareness of this issue. The ISDA is willing to distribute through nursery license renewals the Yew educational materials developed by the nursery industry to help in this effort.



Brian J. Oakey
Deputy Director