UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA, EX REL. BILL LOCKYER, ATTORNEY GENERAL, STATE OF CONNECTICUT, and STATE OF ILLINOIS,

Plaintiffs,

v.

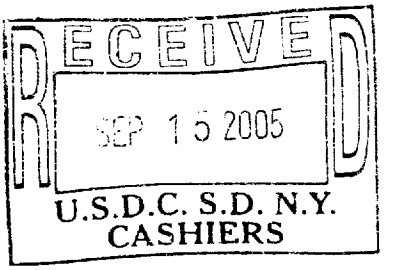
UNITED STATES DEPARTMENT OF AGRICULTURE, MIKE JOHANNS, in his official capacity as Secretary of Agriculture, and W. RON DEHAVEN, in his official capacity as Administrator of the Animal and Plant Health Inspection Service of the United States Department of Agriculture,

Defendants.

05 CV 8008
Civil Action No.

ECF Case

COMPLAINT



NATURE OF THE ACTION

1. Plaintiffs, the State of New York, the People of the State of California ex rel. Bill Lockyer, Attorney General, the State of Connecticut, and the State of Illinois (collectively "the Plaintiff States"), challenge the promulgation of a final rule (the "Rule"), entitled "Importation of Wood Packaging Material," 69 Fed. Reg. 55719 (Sept. 16, 2004) (codified at 7 C.F.R. pt. 319), by the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA"). The Rule imposes what APHIS acknowledges are not the most effective requirements to prevent the introduction into the United States of invasive pests, such as the Asian longhorned beetle, the emerald ash borer, and the pine shoot beetle, often found in imported wooden pallets and other packaging material made from raw wood. The Rule thus threatens the Plaintiff States' parks, woods, and forests, as well as the public health.

2. The promulgation by APHIS of the Rule lacked the careful analysis of more effective and less environmentally harmful alternatives required by law. The Plaintiff States thus seek an order declaring that the promulgation of the Rule violated applicable law, and remanding the Rule to APHIS with instructions to conduct the analysis of alternatives required by law.

3. In recent years, the use of cheap, low-quality, unmanufactured or raw wood for pallets and packaging materials has greatly increased in connection with the expanding volume of trade in manufactured goods. Raw solid wood packaging material – including pallets and other packaging – has emerged as a major entry-point for highly destructive invasive insects. The most significant invasive pest outbreaks in the United States so far involve insects from China – the Asian longhorned beetle, which has infested urban trees in New York City, Long Island, Northern New Jersey, and Chicago, and the emerald ash borer, which is currently destroying millions of ash trees in the Midwest – and from Europe – the pine shoot beetle, which is killing young pine trees throughout the Midwest and Northeast.

4. APHIS has responded to the raw wood packaging problem by using techniques developed for traditional agricultural trade. In the typical case, the agricultural commodity that poses the pest risk is itself the desired article of commerce, and for this reason APHIS strives to identify a quarantine procedure or treatment method that will be effective in killing any pest present rather than bar the commodity from entry into the United States. Raw wood packaging, however, is significantly different from the typical agricultural commodity. In this case, the desired articles of commerce are *non*-agricultural goods that are shipped on raw wood pallets or inside raw wood packaging. The agricultural product is only the packaging material, an incident to the desired trade goods.

5. In September 2004, APHIS promulgated the Rule, which requires that all raw wood packaging material imported into the United States be either heat treated or fumigated with methyl bromide before importation. The Rule is scheduled to take effect September 16, 2005.

6. The use of methyl bromide for non-quarantine purposes (*i.e.*, field and structural fumigation) is being phased out under the Montreal Protocol (the "Protocol"), an international treaty on substances that deplete the ozone layer. The ozone layer protects all life on Earth from harmful ultraviolet radiation, which can cause skin cancer, cataracts, and immunological disease in humans. Methyl bromide is the most powerful ozone-depleting chemical still in widespread use, although it is being phased out, except for its use for the quarantine treatment of agricultural trade.

7. As APHIS itself admits, the treatment methods it has chosen in the Rule are not completely effective, first because the treatment methods fail to kill all invasive pests when properly applied, and second because there is a demonstrated incidence of shippers fraudulently certifying treatment when no treatment was actually applied. These defects in the Rule will allow destructive invasive species to continue finding their way into the United States on raw wood packaging.

8. APHIS further admits that there is a more effective method of preventing the importation of insect pests – to phase out the use of raw wood packaging material altogether over a multi-year period in favor of substitute packaging materials such as processed wood, fiberboard, plywood, plastics, and other materials. This method would not only reduce the risk of pest infestation compared to the Rule, it would also prevent harm to the ozone layer resulting

from implementation of the Rule, as substitute packaging materials do not require methyl bromide treatment. APHIS did not undertake any consideration or analysis of this option.

9. APHIS's actions in issuing the Final Environmental Impact Statement ("FEIS") and promulgating the Rule are arbitrary, capricious, and otherwise unlawful in three respects. First, even though the agency had identified in a 1999 Federal Register notice the elimination of raw wood packaging as the *most effective and least environmentally harmful* practical alternative, APHIS failed in either the FEIS or its rulemaking even to consider the option of replacing raw wood packaging with substitute packaging materials through a phased transition over a number of years.

10. Second, in preparing the FEIS and promulgating the Rule, APHIS relied on a grossly flawed estimate of the amount of methyl bromide usage that would be triggered by the Rule. APHIS's defective methodology likely resulted in a drastic *underestimation* of the worldwide increase in methyl bromide use – and corresponding environmental damage – that will result from implementation of the Rule.

11. Third, even though APHIS had identified a practicable remedy (phasing out raw or unmanufactured wood) that would be both more effective in blocking importation of pests and more environmentally benign, the agency failed to explain how a higher-risk approach satisfied the requirements of the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 *et seq.*, the statute that provides standards for how APHIS must protect the United States from invasive species.

12. Moreover, in evaluating the effectiveness of its chosen treatment methods, APHIS never considered the demonstrated problem of fraudulent certification – where raw wood packaging is marked as treated without actually having been treated. APHIS assumed throughout

its rulemaking that foreign packagers and shippers will properly implement the agency's treatment methods, despite evidence that some such entities fraudulently certify untreated raw wood packaging as having been treated, and that fraudulent certifications cannot be detected at U.S. ports.

13. As a result, the promulgation of the Rule fails to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the PPA, and should be held to be arbitrary, capricious, or otherwise unlawful; in excess of statutory authority; and without observance of procedure required by law; in accordance with section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), & (D). Accordingly, the Rule should be remanded to APHIS for further proceedings as set forth below.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and has the authority to grant the declaratory and other relief sought pursuant to 28 U.S.C. § 2201, 5 U.S.C. §§ 705 and 706, and its general equity powers.

15. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(2) as a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and a substantial part of the property that is the subject of the action is situated in this judicial district. Alternatively, venue is also proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(3) as Plaintiff State of New York resides in this judicial district.

PARTIES

16. Plaintiff State of New York, a sovereign state, brings this action on its own behalf and as *parens patriae* on behalf of its over 19 million citizens and residents.

17. Plaintiff People of the State of California, ex rel. Bill Lockyer, Attorney General, brings this action on behalf of the state and as *parens patriae* on behalf of its citizens and residents. The Attorney General is authorized to maintain this action under the California Constitution, case law, and Cal. Gov. Code § 12607.

18. Plaintiff State of Connecticut, a sovereign state, brings this action on its own behalf and as *parens patriae* on behalf of its citizens and residents.

19. Plaintiff State of Illinois, a sovereign state, brings this action on its own behalf and as *parens patriae* on behalf of its citizens and residents.

20. Defendant United States Department of Agriculture is the federal agency charged, *inter alia*, with protecting the nation's agriculture and natural resources from the harmful effects of plant pests.

21. Defendant Mike Johanns is the Secretary of Agriculture and is sued in his official capacity. The Secretary of Agriculture's responsibilities for plant protection and quarantine have been delegated to APHIS and the Deputy Administrator of Plant Protection and Quarantine. 7 C.F.R. § 371.3.

22. Defendant W. Ron DeHaven is the Administrator of APHIS, the agency that promulgated the Rule and that administers the USDA's responsibilities for plant protection and quarantine. He is sued in his official capacity.

STANDING

23. The Rule promulgated by APHIS will injure the property and the citizens of the Plaintiff States in several significant ways:

(a) The Rule will harm the Plaintiff States' property – in particular, their

parks and forests. APHIS admits that the Rule will not be fully effective in stopping deep wood-boring pests such as the Asian longhorned beetle from spreading to the United States. The parks and forests of the Plaintiff States will consequently continue to be at great risk of devastating infestation by the Asian longhorned beetle and other deep wood-boring pests. Once an infestation has begun, the most effective method of eradication is the complete destruction of infested trees; over 7,000 trees have already been destroyed in New York alone as part of its on-going quarantine efforts. In addition, efforts to fight on-going Asian longhorned beetle infestations in New York City, on Long Island, and in Chicago have already cost millions of dollars. APHIS estimates that the total value of tree resources at risk in New York City is $2.3 billion. If the Asian longhorned beetle were to spread from ports of entry to the vast forests in any of the Plaintiff States, many important industries would suffer economic damage, including the timber, the maple syrup, commercial fruit, tree nursery and greenhouse, and tourist industries. The public parks and forests of the Plaintiff States would also suffer significant ecological, economic, and aesthetic damage. Such damage will harm the Plaintiff States' proprietary interests in those public parks and forests, as well as the recreational and aesthetic interests of their citizens in those same parks and forests. In addition, efforts to prevent or control invasive pest infestations require significant funds and thus harm the Plaintiff States in their proprietary capacity.

(b) The Rule will also harm the health of the Plaintiff States' citizens and therefore the Plaintiff States' proprietary interests, as the Plaintiff States are responsible for a significant portion of medical expenses incurred by their residents. Methyl bromide

is one of the most powerful ozone depleting chemicals. The increased use of methyl bromide allowed by the Rule will result in ozone depletion, thereby exposing the Plaintiff States' citizens to increased levels of harmful ultraviolet radiation. The Plaintiff States' citizens will consequently be at higher risk of developing skin cancers, cataracts, and immunological diseases because of the Rule.

(c) The Rule will also harm the crop yields of the Plaintiff States' farmers. Harmful ultraviolet radiation not only injures people, but also plant life, including domestic field crops. The increased used of methyl bromide allowed by the Rule will result in ozone depletion, thereby exposing the field crops of the Plaintiff States' farmers to increased levels of harmful ultraviolet radiation. Greater exposure will result in reduced crop yields. The Plaintiff States' farmers will consequently suffer economic damages from less productive crop harvests. Agriculture contributes billions to the Plaintiff States' economies annually.

24. The Plaintiff States' injuries are fairly traceable to Defendants' actions in promulgating the Rule.

25. The Plaintiff States' injuries can be redressed by an order remanding, but not vacating, the Rule to APHIS with instructions to issue, upon a prompt schedule to be set by the Court:

(a) a supplemental environmental impact statement that (i) analyzes a phase out of raw wood packaging material implemented over a reasonable range of time periods; (ii) evaluates the impact of counterfeit or fraudulent marking on the Rule's effectiveness; (iii) fairly estimates the likely future increase in methyl bromide use to be

expected under the Rule using realistic assumptions on the prevalence of methyl bromide fumigation after cargo is packaged and placed in shipping containers; and (iv) evaluates whether the Rule's higher-risk approach of treating raw wood packaging materials is acceptable under the PPA given the availability of the alternative of a transition to risk-free substitute packaging materials; and

(b) an appropriate revised proposed rule and final rule based upon the supplemental environmental impact statement.

26. The Plaintiff States are persons adversely affected or aggrieved by agency action within the meaning of NEPA and the PPA. *See* 5 U.S.C. § 702. Their injuries are within the zones of interests sought to be protected by the relevant provisions of NEPA and the PPA.

STATUTORY AND REGULATORY BACKGROUND

National Environmental Policy Act

27. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The Council on Environmental Quality ("CEQ"), an agency within the Executive Office of the President, has promulgated regulations implementing NEPA. *See* 40 C.F.R. §§ 1500-1508. All federal agencies must comply with NEPA and the CEQ's implementing regulations. *See* 40 C.F.R. § 1507.1.

28. Section 102(2)(C) of NEPA requires federal agencies to prepare, consider, and approve an adequate environmental impact statement ("EIS") for any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

29. An EIS must include a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. This discussion may not consider a proposed action in isolation,

but rather must consider cumulative impacts, including the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future significant actions." 40 C.F.R. § 1508.7.

30. An adequate EIS must consider both direct and indirect environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place. *Id.* at § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *Id.* at § 1508.8(b). Both include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social, or health [effects]." *Id.*

31. Section 102(2)(E) of NEPA requires all federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

32. Thus, an EIS must "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. This requirement represents "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The agency must therefore "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *Id.* at § 1502.14(a).

33. The agency must explain any relevant gaps in the data it has used to support its conclusions regarding environmental impacts. 40 C.F.R. § 1502.22.

34. If the costs of obtaining missing data are exorbitant or the means to obtain it are unknown, the agency must (i) identify the missing information, (ii) assess its relevance in evaluating reasonably foreseeable significant adverse environmental impacts, (iii) summarize existing credible scientific evidence on the subject, and (iv) demonstrate that the agency's evaluation of such impacts is "based upon theoretical approaches or research methods generally accepted in the scientific community." *Id.* at § 1502.22(c).

Plant Protection Act

35. Section 412(a) of the PPA authorizes the Secretary of Agriculture to prohibit or restrict the importation or entry of any plant product "if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest . . . within the United States." 7 U.S.C. § 7712(a). The Secretary may issue regulations – ranging from a ban on entry to treatment requirements – to implement section 412(a). 7 U.S.C. § 7712(c).

36. In exercising authority under the PPA, the Secretary's decisions affecting imports and on related phytosanitary, or plant pest control, issues must be based on sound science. 7 U.S.C. §§ 7701(4), 7712(b), 7751(e). For the Secretary's decision to be based on sound science, it must be supported by persuasive, verifiable, and sufficient scientific evidence. The supporting scientific evidence, moreover, must be clearly identified in the administrative record for APHIS's decision.

The Rule

37. APHIS promulgated the Rule pursuant to the PPA, 7 U.S.C. § 7701 *et seq.*

38. APHIS set out to address an increasing threat from harmful invasive alien species

found in raw solid wood packaging material accompanying shipments of non-agricultural goods in international trade. Outbreaks of the Asian longhorned beetle, pine shoot beetle, and emerald ash borer traced to importations of raw wood packaging materials evidenced this threat. These outbreaks caused significant damage to U.S. agriculture and to natural, cultivated, and urban forests across the nation. 69 Fed. Reg. at 55719.

39. In response to pest outbreaks traced to packaging from China, in 1998 APHIS established an "interim rule" requiring all raw wood packaging material originating from that country to be certified as either heat treated or fumigated with methyl bromide. 63 Fed. Reg. 50,099 (Sept. 18, 1998) ("China Interim Rule"). Because of the urgency of the situation, APHIS imposed the China Interim Rule through abbreviated rulemaking procedures. In promulgating the Interim Rule, APHIS stated that it "is concerned that any increase in methyl bromide use as a result of this interim rule does not cause long-lasting damage to the ozone layer." *Id.* at 50109. APHIS also emphasized that "this is an interim measure that will remain in effect for only as long as it takes to develop a more effective solution to the problem...." *Id.* APHIS said that it:

> considers this interim rule to be the first step towards better exclusion of pest risks from SWPM [solid wood packaging material]. APHIS will initiate an interagency review in order to develop an advance notice of proposed rulemaking that will identify various options for amending existing regulations for importing SWPM from all foreign countries to further improve exclusion procedures and protect forest resources, while at the same time minimizing the further use of methyl bromide in order to protect the stratospheric ozone layer.

Id. at 50101.

40. The promised Advance Notice of Proposed Rulemaking ("ANPR") was published in January 1999. 64 Fed. Reg. 3049 (Jan. 20, 1999). In the notice, APHIS once again acknowledged concern over harm to the ozone layer from increased use of methyl bromide for

this purpose, saying:

> Any potential increase in the use of methyl bromide is of concern because of the associated risk of increased ozone depletion, which results in increased ultraviolet radiation at the Earth's surface .... In the absence of any agreed upon international controls on the use of methyl bromide for quarantine purposes, use of methyl bromide for these purposes may not only continue, but could increase. This makes it all the more critical that we find a long-term solution to the problem of how best to manage the pest risk associated with imported SWPM. We are intent on minimizing the use of methyl bromide in order to protect the stratospheric ozone layer, and we are seeking options that will accomplish this objective.

Id. at 3051.

41. In the ANPR, APHIS identified an alternative that would reduce the risk of pest introduction in raw wood packaging to virtually zero and at the same time eliminate damage to the ozone layer. That is: to eliminate all raw wood packaging material in favor of alternative packaging materials, including processed wood and wood products (such as plywood and particle board), plastic, and other materials. Processed wood and manufactured wood products do not pose a significant problem of harboring pests. The ANPR stated that switching to substitute packaging materials "would provide the greatest protection against pest risk and could eventually result in decreased use of methyl bromide." *Id.* at 3051.

42. After a several-year delay, APHIS prepared an environmental impact statement ("EIS") to consider the potential environmental impacts of five alternative regulatory measures in accordance with NEPA and Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions." APHIS provided a notice of availability of the draft EIS, 67 Fed. Reg. 69216 (Nov. 15, 2002), and received public comments through December 30, 2002. APHIS published a proposed rule in the Federal Register on May 20, 2003. 68 Fed. Reg. 27480-27491. APHIS then issued the final EIS ("FEIS") in August 2003.

43. In neither the draft nor final EIS, nor the proposed rule, did APHIS follow through on its express commitment to consider the option of a phased transition to substitute packaging materials that would be more effective in preventing the entry of invasive pests and less harmful to the ozone layer.

44. Instead, the proposed rule would only extend heat treatment or methyl bromide fumigation requirements to raw wood packaging material emanating from all countries. APHIS proposed to adopt guidelines for treating raw wood packaging material approved by the International Plant Protection Convention (the "IPPC Guidelines"). The treatment methods in the IPPC Guidelines are similar to, but less stringent than, the treatment methods required by the China Interim Rule. The China Interim Rule mandates higher concentrations of methyl bromide over a longer time period or, if heat treatment is used, higher temperatures over a longer time period.

45. The IPPC Guidelines were prepared under the International Plant Protection Convention ("IPPC"), which is administered by the United Nations Food and Agriculture Organization. One hundred seventeen nations, including the United States, are parties to the IPPC. Guidelines adopted pursuant to the IPPC serve only as a baseline for phytosanitary treatment, or pest control, requirements that are adopted by individual nations under their domestic laws – for example, the PPA in the United States. Signatory nations may adopt treatment measures more stringent than the IPPC Guidelines under their domestic laws where there is "scientific justification" to do so. WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS"), Art. II, ¶¶ 3-4, Art. III, ¶ 3, *available at* http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm. APHIS thus is not bound to

implement the IPPC Guidelines as written, but may impose phytosanitary measures that are more effective – for instance, a phase-out of raw wood packaging material – where such measures are scientifically justified to attain a higher degree of pest protection. SPS Art. V, ¶ 6.

46. The public filed detailed comments on the draft and final EIS and on the proposed rule. Many of these comments raised specific criticisms of APHIS's assumptions regarding the effectiveness of its proposed rule in stopping invasive pests and the amount of methyl bromide usage that would be triggered by the rule. The comments requested that APHIS honor its commitment to consider a transition to substitute packaging materials that would more effectively prevent pest entry while avoiding damage to the ozone layer. APHIS made no changes to the text of the proposed rule in response to these comments.

47. APHIS published the final rule on September 16, 2004. 69 Fed. Reg. 55719-55733 (Sept. 16. 2004). The Rule requires either heat treatment or fumigation with methyl bromide of all raw wood packaging material imported into the United States from any country. Treated raw wood packaging material must be visibly marked with a graphic symbol to certify that it has been treated in accordance with the IPPC Guidelines. The Rule provides for the immediate re-export of regulated wood packaging material that is imported into the United States without the required mark. The Rule is scheduled to take effect September 16, 2005. 69 Fed. Reg. at 55719.

Failure to Consider or Evaluate the "No Risk" Alternative: Phase Out of Raw Wood Packaging Material

48. It is undisputed that processed wood, manufactured wood products (such as plywood and particle board), and plastic do not pose a significant problem of harboring pests.

APHIS stated in the 1999 ANPR that switching to substitute packaging materials would be the most effective alternative for reducing pest risk and would be the least environmentally harmful. APHIS also observed in the ANPR that although an abrupt switchover to substitute packaging materials could have an undesirable effect on international trade, *"[t]his effect could be mitigated by a phase-in period* to allow shippers to adjust to the prohibition." 64 Fed. Reg. at 3051 (emphasis added).

49. In the ANPR, APHIS sought public comment on a number of questions, including the following: "If importation of SWPM [solid wood packaging material] into the United States were to be prohibited . . . would the shipping industry need a phase-in period to allow time to adapt? If yes, how long?" *Id.*

50. Although the draft and final EIS admit that alternative packaging material would eliminate the pest-introduction risk and the danger to the ozone layer, APHIS abandoned the inquiry begun in its ANPR and did not consider or assess the feasibility, cost, or merits of a phased transition away from raw wood packaging material in the draft or final EIS. Instead, APHIS only examined the effects of an abrupt and immediate switchover to substitute packaging materials – an alternative that it had already determined was not feasible. Thus, APHIS considered a "straw man" proposal in lieu of a reasonable and feasible no-risk alternative.

51. The FEIS stated that "[s]ubstitute packing materials *would require a phase-in period* to allow the industry of the regulated countries to adapt to the usage of these materials in the shipping process." FEIS at 81 (emphasis added). Public comments filed on the draft EIS and filed again in supplementary comments on the FEIS reminded APHIS of its commitment to assess phase-in periods for a transition to substitute packaging materials. *See* FEIS at A-63.

Nonetheless, the FEIS did not include any assessment of the feasibility or cost of any alternative to an abrupt ban on raw wood packaging.

52. APHIS gave two main reasons for rejecting the alternative of abruptly switching to substitute packaging materials: (1) that the cost of substitute packaging materials was, in the agency's opinion, currently higher than that of raw wood packaging; and (2) that the agency believed there would be logistical problems in the use of alternatives. Had APHIS followed through on its commitment to evaluate a phased transition to substitutes, the agency would have had to consider how these issues would be affected by the length of time allowed for a transition.

53. APHIS calculated only the *current* cost per unit of a variety of substitute packaging materials. Regulatory Impact Assessment ("RIA") at 18-21. Using those costs, APHIS concluded that the "alternatives are generally more costly than wooden pallets and crates." *Id.* at 23; FEIS at 81. In addition, APHIS relied exclusively on current prices and made no effort to estimate how costs would change if the transition to other packaging materials were undertaken over a reasonable period of time and markets could adjust. APHIS did not examine the magnitude of the possible increases to the cost of the goods transported (including all other packaging, transportation, distribution, insurance, and other costs) that might be attributable to these alternatives. APHIS neglected to take into account that the cost of a pallet is entirely insignificant in comparison to the costs of goods shipped; according to APHIS's RIA, for each $100 of goods imported, the value of the pallets associated with those goods is merely 4.4 cents. RIA at 16. The agency's conclusory statement of possible cost increases without examination of their magnitude, context, and persistence does not constitute reasoned analysis.

54. Further, while APHIS claimed that an abrupt switch to substitute packaging would

be too expensive, the agency did not define the term "expensive" in relation to the benefits of such a switch – better pest protection and less damage to the nation's parks and forests and to the ozone layer. To the contrary, APHIS asserted that it was "unable to realistically estimate the benefits that could result using substitute materials." 69 Fed. Reg. at 55721. Again, such an abdication of analysis is improper.

55. With respect to the logistical problems, APHIS claimed that "[t]here is currently insufficient capacity in the *short run* to accommodate a switch from wood to alternative packing materials." RIA at 23 (emphasis added). Similarly, it claimed that "[i]ndustry's inability to *quickly* tool up to manufacture and switch to substitute packing materials for such a shipping volume may impede or limit the implementation of a switchover." FEIS at 81 (emphasis added). APHIS made no attempt to estimate industry's capacity to achieve a transition from raw wood packaging materials to substitute materials over a reasonable period of time.

56. APHIS claimed that "recovery and reuse of alternative packing materials requires a more complex infrastructure than is required by reuse of [raw wood packaging materials]." 69 Fed. Reg. at 55721. APHIS did not explain why this is so, or evaluate whether such infrastructure would be too complex or costly to be implemented in various countries. It also did not consider whether the analysis would change if the costs were spread over time and technology improved.

Failure to Articulate Any Rational Basis for Choosing a High-Risk Rule

57. APHIS conceded that methyl bromide treatment "may not eliminate all pest risks present." FEIS at 65. It noted that under the IPPC Guidelines many deep wood-borers, fungi, rots, and wilts would "continue to be problematic for abatement of pest risk." *Id.* at 88. APHIS

further conceded that "[t]he efficacy data of methyl bromide for many pests and pathogens do not exist," *id.* at 24, and that "the ability of methyl bromide to penetrate into wood has been a limitation to efficacy," *id.* at 51. APHIS also admitted that "[h]eat treatments may be impractical for large volumes of wood or thick pieces of wood without elaborate sensoring." *Id.* at 52.

58. Despite conceding these significant pest risks, APHIS failed to explain why a rule allowing additional risk of pest introduction was consistent with the PPA, as compared to the available and practicable "no risk" approach of transitioning to substitute packaging materials. Although APHIS was aware that a more effective prevention measure was available, the agency claimed that its treatment methods nevertheless provided an "acceptable level" of protection against pests and that methyl bromide treatment would provide the "necessary level" of protection. 69 Fed. Reg. at 55721, 55724. Such conclusory assertions do not constitute reasoned analysis. Nowhere did APHIS articulate what "acceptable" or "necessary" levels of pest protection are, either qualitatively or quantitatively, in comparison with alternatives that offer complete protection.

59. Moreover, APHIS failed to account for the likelihood of fraudulent markings and the resulting impact, which would significantly decrease the efficacy of the final rule. The Rule requires shippers to place an IPPC-approved graphic mark on packages to indicate that they have been treated. This mark can easily be placed on packaging material without any sort of treatment, because the wood does not change in appearance after being fumigated or heat treated. There is no effective way to test at the port of entry if treatment has in fact occurred, or whether instead the mark was fraudulently applied without any treatment. By contrast, one can often distinguish processed wood from raw wood on sight.

60. APHIS failed to account for the likelihood of fraudulent marking in spite of evidence indicating that fraudulent marking has taken place under the China Interim Rule. *See* FEIS at A-62. Instances of fraudulent marking can be expected to increase as businesses operating in nations with poor enforcement infrastructures are tempted to evade the Rule and its associated costs. The technical director of the National Wood Pallet and Container Association recently commented in the *Los Angeles Times* that shippers in most small developing countries will have difficulty complying with the new Rule because they do not have the facilities for fumigation or heat treatment. Steven Bodzin, "Pest Rule Will Have a Few Bugs, Critics Say," *L.A. Times* (Aug. 14, 2005). Although the Rule provides for immediate re-export of raw wood packaging materials imported without the required mark, 7 CFR § 319.40-3, APHIS has no technical mechanism for detecting fraudulent marking. APHIS admitted, in the same *Los Angeles Times* article, that "Customs and Border Protection officers will look to validate that the wood packaging material has a mark, not that the mark is valid."

61. Despite the fact that the China Interim Rule already requires heat treatment or methyl bromide fumigation for raw wood packaging shipped from China, invasive pests continue to arrive on packaging shipped from that country. As just one example of the ineffectiveness of the China Interim Rule, live Asian longhorned beetles were recently found at a Sacramento, California warehouse containing imports from China that were certified as having been treated in compliance with the China Interim Rule. This incident indicates either (a) that the treatment was ineffective or (b) that Chinese exporters have engaged in fraudulent certification. Either possibility undermines Defendants' claim that the proposed Rule would be effective. Indeed, a senior import specialist at USDA acknowledged that pests are likely to enter the United States

despite the new Rule because shippers sometimes include untreated extra pieces of lumber or fresh tree limbs to shore up a load. "You'd be amazed at what you find in there," he stated. Bodzin, "Pest Rule Will Have a Few Bugs, Critics Say," *L.A. Times* (Aug. 14, 2005).

62. Given the potential for fraud which APHIS essentially ignored, APHIS had no rational basis for determining that the Rule poses an "acceptable" risk compared to an available and practicable "no-risk" alternative.

Underestimation of Methyl Bromide Usage

63. In the FEIS and in promulgating the Rule, APHIS relied on a flawed estimate of methyl bromide usage under the Rule and the examined alternatives. It is likely that APHIS's flawed methodology resulted in a significant underestimation of worldwide methyl bromide usage – and the corresponding environmental damage – that will result from the implementation of the Rule.

64. In particular, APHIS developed two wildly divergent estimates of how much methyl bromide could be used worldwide as a result of this rule. The low-end estimate of world usage is *twenty times lower* than the high-end estimate, and is also lower than APHIS's estimate of the amount of methyl bromide usage attributable to the China Interim Rule alone. Yet APHIS completely ignored its own high-end estimate in the FEIS and dismissed it without reasonable justification in the final Rule.

65. The lower estimate, developed in the FEIS for this Rule, projected that the Rule would lead to a worldwide increase of between 384 to 4,630 metric tons of methyl bromide per year. FEIS at 67. (A metric ton equals approximately 2,205 pounds.) This estimate of world use is even lower than the amount APHIS estimated could be used in China alone under the Interim

Rule – 1,040 to 12,565 metric tons. *See* China Interim Rule, 63 Fed. Reg. at 50109. Nonetheless, APHIS's low-end estimate for the Rule at issue would amount to increasing total world use of methyl bromide by up to 7 percent.

66. APHIS, however, had developed another estimate of worldwide use in another, nearly contemporaneous environmental impact statement – one prepared in conjunction with a rule regarding the importation of raw or unmanufactured wood articles from Mexico (the "Mexico FEIS"). The Mexico FEIS, prepared in 2002, also estimated methyl bromide consumption attributable to requiring treatment of all imported raw wood packaging material (from all countries, not just Mexico). The Mexico FEIS predicted that total world methyl bromide use could realistically increase as much as 8,536 to 102,893 metric tons per year. Mexico FEIS at 65. This estimate is more than 20 times higher than the estimate found in the FEIS for the Rule.

67. There are two independent factors that cause these two worldwide estimates to diverge so greatly. First, the range within each estimate reflects different assumptions about the prevalence of heat treatment versus methyl bromide fumigation. At the lower end of each range APHIS assumed that heat treatment will predominate over methyl bromide fumigation; the upper end of each range reflects the opposite assumption.

68. Available public data strongly suggests that, in the one country that is already subject to an APHIS treatment requirement, China, methyl bromide predominates over heat treatment. *See* FEIS at A-62.

69. Even more significant is APHIS's assumption of how methyl bromide fumigation will take place. The lower estimate, from the FEIS for the Rule at issue, is based on the

assumption that all methyl bromide fumigation will take place *before cargo loading, i.e.*, while the wood material is still unassembled and isolated from cargo. In contrast, the higher estimate, from the Mexico FEIS, is based on the assumption that fumigation will occur *after* cargo is loaded into packaging material and shipping containers. Given the difference in the volume of unloaded and loaded packaging material, much more methyl bromide is required if fumigation occurs after cargo is already loaded.

70. Available data show that most raw wood packaging material emanating from China is fumigated with methyl bromide *after* cargo loading. *See* FEIS at A-62.

71. APHIS chose to ignore contrary data, and groundlessly asserted that "*most* shippers fumigate [raw wood packaging material] prior to cargo loading to lower costs, avoid agricultural commodity tolerance issues, and to prevent damage to sensitive commodities." *Id.* at 56 (emphasis added). APHIS gave no data – no numbers, no anecdotal information – to substantiate this claim. APHIS also claimed that heat treatment and substitute packaging materials are sometimes used, suggesting lower methyl bromide usage, but did not state with any specificity how often this occurs. *Id.*

72. In spite of these facts, APHIS assumed in its FEIS for this Rule that *all* raw wood packaging materials would be fumigated prior to cargo loading. *See id.* In projecting the impact of the proposed alternative – which eventually became the Rule – APHIS used this flawed and unsubstantiated assumption to estimate that methyl bromide usage would increase by 384 to 4,630 metric tons per year. *Id.* at 67. Despite conceding that at least *some* fumigation occurs after cargo loading, APHIS did not calculate *any* estimates of methyl bromide use that would result if some spraying were done after cargo loading.

73. The Plaintiff States will suffer irreparable injury if the Rule is allowed to take effect.

74. The Plaintiff States have no adequate remedy at law.

FIRST CAUSE OF ACTION
(Failure to Comply with NEPA)

75. In preparing the FEIS, APHIS relied on a flawed and biased estimate of the likely actual increase in future worldwide methyl bromide usage under the Rule and the examined alternatives.

76. APHIS failed in the FEIS to consider or evaluate a reasonable and feasible alternative of phasing out the use of raw wood packaging over a multi-year period in favor of substitute packaging materials – an alternative that (unlike the rule adopted) would essentially reduce the risk of pest introduction through the medium of shipping material to zero and would help preserve the ozone layer.

77. Because APHIS failed to prepare an adequate FEIS, the promulgation of the Rule violated section 102 of NEPA, 42 U.S.C. § 4332, and the implementing CEQ regulations, 40 C.F.R. § 1500.1 *et seq.*

78. The Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and is without observance of procedure required by law, as provided in section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (D).

SECOND CAUSE OF ACTION
(Failure to Comply with the PPA)

79. The PPA requires that decisions affecting imports and on related phytosanitary, or plant pest control, issues be based on sound science. 7 U.S.C. §§ 7701(4), 7712(b), 7751(e).

80. Because APHIS relied on a flawed estimate of methyl bromide usage and failed to assess the effectiveness of its requirements in light of the conceded problem of fraudulent marking, the agency failed to promulgate a Rule based on sound science.

81. Because APHIS failed to explain why a higher level of pest risk was "acceptable" under the PPA, despite the existence of a practicable "no-risk" alternative that would eliminate the pest risk and avoid harm to the ozone layer, the agency's promulgation of the Rule was arbitrary and capricious, lacking a reasonable basis, and in violation of the PPA.

82. The Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; is in excess of statutory authority under the PPA; and is without observance of procedure required by law, as provided in section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), & (D).

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this Court enter judgment against Defendants as follows:

1. On the First Cause of Action, declare that the promulgation of the Rule violated section 102 of NEPA, 42 U.S.C. § 4332, and the implementing CEQ regulations, 40 C.F.R. § 1500.1 *et seq.*, and therefore was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and was without observance of procedure required by law, as provided in 5 U.S.C. § 706(2)(A) & (D).

2. On the Second Cause of Action, declare that the promulgation of the Rule was not based on sound science, as required by the PPA, 7 U.S.C. §§ 7701(4), 7712(b), 7751(e), and therefore was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; was in excess of statutory authority; and was without observance of procedure required by law, as provided in 5 U.S.C. § 706(2)(A), (C), & (D).

3. Issue an order remanding, but not vacating, the Rule to APHIS with instructions to issue, upon a prompt schedule to be set by the Court:

(a) a supplemental environmental impact statement (SEIS) that (i) analyzes a phase out of raw wood packaging material implemented over a reasonable range of time periods; (ii) evaluates the impact of counterfeit or fraudulent marking on the Rule's effectiveness; (iii) fairly estimates the likely future increase in methyl bromide use to be expected under the Rule using realistic assumptions on the prevalence of methyl bromide fumigation after cargo is packaged and placed in shipping containers; and (iv) evaluates whether the Rule's higher-risk approach of treating raw wood packaging materials is acceptable under the PPA given the availability of the alternative of a transition to risk-free substitute packaging materials: and

(b) an appropriate revised proposed rule and final rule based upon the SEIS.

4. Retain jurisdiction in this Court to ensure compliance with the judgment.

5. Grant Plaintiffs such other and further relief as the Court deems appropriate.

Dated: September 15, 2005

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