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GREEN LEAF FARMS, INC.  
BRAVANTE PRODUCE  
RICHARD BAGDASARIAN INC.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

U.S. CITRUS SCIENCE COUNCIL;  
SANTA PAULA CREEK RANCH; CPR  
FARMS; GREEN LEAF FARMS, INC.;  
BRAVANTE PRODUCE; and RICHARD  
BAGDASARIAN INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE;  
Sonny Perdue, Secretary of Agriculture; and  
Kevin Shea, Administrator, Animal and  
Plant Health Inspection Service,

Defendants.

Civil Action No. \_\_\_\_\_

**COMPLAINT**

Plaintiffs U.S. Citrus Science Council—a coalition of lemon growers and shippers in California and Arizona—and Santa Paula Creek Ranch; CPR Farms; Green Leaf Farms, Inc.; Bravante Produce; and Richard Bagdasarian Inc.—California lemon growers—hereby allege:

**INTRODUCTION**

1. To protect citrus grown in the United States from blight and disease, the United States government has banned the importation of lemons from Argentina since 1947.<sup>1</sup> Sound science and good public policy underlie that longstanding position. Many highly destructive plant pests and diseases plague Argentine citrus—pests and diseases that would wreak havoc on American citrus if introduced into the United States. Moreover, the Argentine agency charged with plant protection—the Servicio Nacional de Sanidad y Calidad Agroalimentaria (SENASA)—has a long and problematic history of failing to report pest and disease outbreaks promptly and of failing to ensure compliance with basic phytosanitary (that is, plant protection) measures. Recognizing that history, the U.S. Department of Agriculture (USDA) has until recently considered SENASA unable to safeguard reliably U.S. growers and U.S. crops from Argentine threats.

2. In the face of those threats and that history, however, in December 2016, the Animal and Plant Health Inspection Service (APHIS) of the USDA promulgated a new Rule that lifts the longstanding ban on imports—a Rule that, if it goes into effect, will allow lemons from pest-infested areas of Argentina to flood into the United States.<sup>2</sup> In a rush to reverse decades-old policy in the service of unrelated foreign policy objectives, APHIS made significant analytical errors and violated the agency’s basic obligations established by the United States Congress under the Plant Protection Act (PPA) and the Administrative Procedure Act (APA).

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<sup>1</sup> As discussed below, the one brief exception to this ban was swiftly overturned by this Court. *Harlan Land Co. v. U.S. Dep’t of Agric.*, 186 F. Supp. 2d 1076, 1085-99 (E.D. Cal. 2001).

<sup>2</sup> 81 Fed. Reg. 94,217 (Dec. 23, 2016) (Exhibit 1) (Rule).

1           3.     The reasons for APHIS’s decision were and remain political and extraneous to the  
2     statutory design intended by Congress—which focuses on science. The scientific explanations  
3     proffered by APHIS were inadequate and APHIS has withheld critical information from the  
4     public, thus preventing stakeholders from reviewing and commenting on information critical to  
5     its decision. In light of APHIS’s thin and flawed explanations, a less than transparent process,  
6     the timing of key agency decisions, and official statements, it is clear that foreign policy  
7     objectives—not careful science and risk analysis—drove the agency’s decision, contrary to  
8     Congress’s intent and the design of the PPA and the APA.

9           4.     The PPA authorizes APHIS to restrict imports of fruit to ensure that dangerous  
10    pests are not introduced into the United States. When imposing or, as here, lifting, such  
11    restrictions, the PPA mandates that APHIS base its decisions on “sound science” and that it use  
12    procedures that are “transparent and accessible.”<sup>3</sup> As with all agencies, moreover, the APA  
13    imposes foundational requirements that APHIS (1) provide the public and stakeholders with  
14    notice and an opportunity to comment on key information and analysis underlying its agency  
15    decisions and (2) engage in reasoned decisionmaking.<sup>4</sup> APHIS violated those basic duties here  
16    in numerous respects.

17          5.     *First*, at the heart of its decision to lift the import ban, APHIS relied on  
18    conclusions allegedly reached on a trip that it claimed an APHIS team made to Argentina  
19    during the 2015 harvest season (the 2015 Harvest Season Site Visit), yet APHIS has never  
20    disclosed a trip report or any other information from that site visit and thus has denied the  
21    public a fair opportunity to comment on the trip. APHIS has itself described the conclusions  
22    reached on this site visit as critical to the agency’s decision. Indeed, the 2015 Harvest Season  
23    Site Visit constituted APHIS’s only relevant opportunity to observe the actual harvesting  
24    conditions in Argentina and the actual quality of SENASA’s monitoring of pest-management  
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26    <sup>3</sup> 7 U.S.C. § 7712(b).

27    <sup>4</sup> 5 U.S.C. §§ 553(b), 706(2)(A), (D).

1 practices. APHIS described the 2015 Harvest Season Site Visit as the foundation of its  
2 judgment that producers, packinghouses, and SENASA itself are up to the task of implementing  
3 mitigation measures to keep pests out of the United States. And APHIS allegedly relied upon  
4 information it gathered during the 2015 Harvest Season Site Visit to update its otherwise  
5 outdated Pest Risk Assessment—a key technical document underpinning APHIS’s analysis.

6 6. Throughout the rulemaking, despite the obvious and express centrality of the 2015  
7 Harvest Season Site Visit, APHIS has refused to permit public review of or comment on *any*  
8 information about that visit. Initially, in its notice of proposed rulemaking, APHIS did not  
9 acknowledge that it was relying on the 2015 Harvest Season Site Visit or even that the trip had  
10 occurred. Although the agency published and allowed comment on a trip report for a visit it  
11 made outside the harvest season in 2016, APHIS never published a trip report about the 2015  
12 Harvest Season Site Visit. Indeed, APHIS even refused—and to this day, still refuses—to  
13 respond to a FOIA request submitted by Plaintiff U.S. Citrus Science Council on June 21, 2016,  
14 seeking information about the trip. Belatedly, upon publication of the final Rule, the agency  
15 formally acknowledged the trip’s existence, and repeatedly cited it as rebutting key criticisms of  
16 the Rule by commenters—including, for example, observations of SENASA’s lack of ability  
17 and lack of intent to comply with the “systems approach” for managing pest risks that APHIS  
18 adopted under the Rule. Yet despite heavy and express reliance on the 2015 Harvest Season  
19 Site Visit in the final Rule, APHIS neither published a trip report nor provided any meaningful  
20 details about the trip.

21 7. APHIS was obligated to disclose such critical information on which the agency  
22 relied in a timely manner, so as to afford the public a meaningful opportunity to review and  
23 comment on it *before the final rule was issued*. The APA requires such disclosure to permit  
24 meaningful public comment, and the PPA explicitly directs USDA to ensure that the regulatory  
25 processes for considering import requests are “transparent and accessible.” Yet in this case,  
26 information relating to the 2015 Harvest Season Site Visit was shrouded in secrecy throughout  
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1 the rulemaking, and even today remains undisclosed. This is not the “transparent and  
2 accessible” process that Congress requires under both the PPA and the APA.

3 8. *Second*, APHIS improperly evaluated the ability and willingness of SENASA to  
4 comply with the systems approach specified in the Rule despite SENASA’s history of  
5 phytosanitary failures. Part of APHIS’s error was in evaluating SENASA based on an  
6 incomplete and undisclosed operational workplan—drafted at least in the first instance by  
7 SENASA—that APHIS has indicated is subject to major change and only once finalized will fill  
8 critical gaps and ambiguities in the Rule. As APHIS recognized, the systems approach will fail  
9 to provide vitally needed protection to American lemon crops if SENASA cannot or will not  
10 discharge its duties effectively. But APHIS determined that SENASA can and will comply with  
11 the systems approach without finalizing the operational workplan that defines key parameters—  
12 and resolves fundamental ambiguities—regarding the scope of SENASA’s duties. APHIS’s  
13 determination thus represents a stark departure from reasoned decisionmaking, as the extent of  
14 SENASA’s effectiveness depends crucially on what the systems approach demands of  
15 SENASA, which APHIS left unresolved during the rulemaking. Moreover, APHIS made a  
16 separate error in failing to disclose the draft operational workplan that APHIS *did* have before  
17 it. Under the APA’s and PPA’s notice requirements, that draft—which underpinned,  
18 legitimately or not, the agency’s premise that SENASA could be relied upon to implement the  
19 systems approach—should have been disclosed to the public before the comment period closed.

20 9. *Third*, on the cusp of the Rule taking effect, APHIS suddenly announced a major  
21 change in its scope: Rather than lifting the ban on imports nationwide, APHIS would limit  
22 imports to ports in the northeastern United States for the first two years after the Rule takes  
23 effect. This major amendment to the Rule was promulgated without notice-and-comment  
24 rulemaking. APHIS offered no explanation for the new policy, but its about-face strongly  
25 suggests that the agency itself shares commenters’ concerns that the Rule’s mitigation measures  
26 will be ineffective. Reasoned decisionmaking required the agency to explain the impetus  
27 behind these new limits and why it would not be more prudent to repeal the Rule in its entirety.  
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1           10.     *Fourth*, the agency unreasonably brushed aside recent scientific and empirical  
2 developments that raise substantial questions about its conclusions. For example, APHIS  
3 summarily dismissed the risk that Argentine lemons could introduce Citrus Black Spot (a fungal  
4 disease that causes early fruit drop, reduces crop yield, and creates pocks and blemishes that  
5 render fruit unmarketable) into citrus-growing regions of the United States based entirely on an  
6 opinion the agency offered in 2010, an opinion that had become highly questionable due to  
7 intervening events. By simply reasserting this six-year-old analysis, APHIS failed meaningfully  
8 to address those critical intervening events, including the outbreak and development of Citrus  
9 Black Spot in Florida that began in 2010 and a new scientific analysis of Citrus Black Spot  
10 published in a peer-reviewed journal in 2014 by the expert European Food Safety Authority—  
11 an analysis that undercut critical assumptions and conclusions on which APHIS relied in 2010.  
12 Reasoned decisionmaking required that, at a minimum, APHIS confront that new scientific  
13 analysis and reevaluate its prior judgments about Citrus Black Spot. Instead, APHIS simply  
14 alluded to its prior opinion, with no meaningful discussion of this or other important intervening  
15 developments.

16           11.     *Fifth*, when confronted in public comments with the fact that the unusually large  
17 amount of residential citrus in Southern California would provide ample host material for pests  
18 arriving from Argentina, and thereby facilitate potentially catastrophic spread in the United  
19 States, APHIS insisted that this unique feature of California’s landscape did not matter, offering  
20 in support only cryptic explanations inconsistent with prior agency guidance. But the ubiquity  
21 of such citrus—such as orange trees in backyards—should have informed APHIS’s risk  
22 analysis, as the prevalence of such citrus has recently contributed to the spread of a number of  
23 pests and diseases in California. APHIS acted arbitrarily in dismissing this concern without  
24 meaningful explanation and in contradiction to the agency’s own guidelines and practices—a  
25 blinkered approach that fell far short of the agency’s PPA obligation to base its import decisions  
26 on “sound science” and its APA duty to engage in reasoned decisionmaking.  
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1           12.     Indeed, APHIS's analysis is substantially undercut by the agency's recent  
2     revelation that, for the first two years that the Rule takes effect, importation will only be  
3     allowed in northeastern ports. This implicit admission that California presents unique risk  
4     factors for which the Rule's mitigation measures will not be effective compounds the  
5     arbitrariness of the Rule—not only because it belies APHIS's earlier reasoning, but because,  
6     among other things, APHIS has failed to explain how matters will be materially different once  
7     the two-year period has elapsed and it has failed to explain how, during the two-year period, the  
8     agency will prevent lemons imported to northeastern ports from arriving in California through  
9     domestic distribution channels.

10           13.     APHIS also erred in other important respects. For example, it adopted the Rule to  
11     further foreign policy objectives unrelated to the statutory, scientific factors with which the PPA  
12     requires all importation requests be evaluated. It violated the National Environmental Policy  
13     Act by failing to prepare an Environmental Impact Statement or Environmental Assessment  
14     despite the massive environmental harm threatened by the importation of Argentine lemons.  
15     And it conducted a flawed economic analysis of the effects of the Rule that, contrary to the  
16     Regulatory Flexibility Act and principles of reasoned decisionmaking, ignored and left  
17     unexplained crucial economic data.

18           14.     For these and other reasons elaborated on below, this Court should vacate  
19     APHIS's Rule and declare it to be arbitrary and capricious, contrary to law, and adopted without  
20     complying with required procedures.

#### 21                                   **JURISDICTION AND VENUE**

22           15.     This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201-2202,  
23     as well as the APA, 5 U.S.C. §§ 701-706, and the Regulatory Flexibility Act, 5 U.S.C. § 611.

24           16.     Venue is proper in the United States District Court for the Eastern District of  
25     California sitting in Fresno, California pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1) and Local  
26     Rule 120(d). Plaintiffs CPR Farms; Green Leaf Farms, Inc.; and Bravante Produce reside in  
27     Fresno County, California; a substantial part of the events giving rise to this claim occurred in  
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Fresno and Kern Counties, California; and each Defendant is an officer or agency of the United States sued in his or its official capacity.

### **PARTIES**

17. Plaintiff U.S. Citrus Science Council is a non-profit coalition of approximately 750 lemon growers and shippers in California and Arizona, with its principal place of business in Santa Paula, California. Its members represent the vast majority of growers and shippers of fresh lemons in the United States, and many members grow or ship other citrus products as well. Since its founding in 1998, the Council has worked to protect United States citrus from environmental and other harms by ensuring that governmental decisions on phytosanitary matters affecting domestic citrus are based on the most current and accurate scientific information available. The Council played a key role, for example, in successful litigation in this Court to set aside an earlier rule by APHIS that attempted to allow the importation of Argentine citrus into the United States. The Council and its members, both as citrus farmers and as residents of areas with extensive residential citrus, such as Southern and Central California, have a substantial and direct interest in protecting the environment from the pests and diseases that could be introduced by lemons imported from Argentina.

18. Plaintiff Santa Paula Creek Ranch is a family farm with lemon-producing orchards in California. The farm was founded in 1983 and its principal place of business is in Santa Paula, California.

19. Plaintiff CPR Farms is a company with lemon-producing orchards in Kern County, California. The company was founded in 2001 and its principal place of business is in Fresno, California.

20. Plaintiff Green Leaf Farms, Inc. is a company with orchards in Fresno County, California that produce lemons and other fruits. The company was founded in 1977 and its principal place of business is in Kingsburg, California.

21. Plaintiff Bravante Produce is a company that produces, packs, and ships lemons and other fruits. The company's more than 2,000 acres of citrus orchards are located across three



1 Californian counties, including Fresno County. The company was founded in 1992 and its  
2 principal place of business is in Reedley, California.

3 22. Plaintiff Richard Bagdasarian Inc. is a privately held California corporation that  
4 produces, ships, and markets lemons and other fruits. It has lemon-producing orchards in  
5 California. Richard Bagdasarian Inc. was founded in 1952 and its principal place of business is  
6 in Mecca, California.

7 23. Defendant U.S. Department of Agriculture is the agency charged with, among  
8 other things, protecting the nation's agriculture from dangerous foreign animal and plant pests  
9 and diseases.

10 24. Defendant Sonny Perdue is the Secretary of Agriculture, confirmed by the Senate  
11 on April 24, 2017. He is sued in his official capacity.

12 25. Defendant Kevin Shea is the Administrator of the U.S. Department of  
13 Agriculture's Animal and Plant Health Inspection Service, the agency that administers the  
14 Department's statutory functions related to animal and plant protection and that promulgated the  
15 Rule. Defendant Shea is sued in his official capacity.

## 16 **FACTUAL ALLEGATIONS**

### 17 **Statutory and Regulatory Mechanisms Designed to Counter** 18 **the Introduction of Dangerous Agricultural Pests**

19 26. Congress has long recognized the need to protect the Nation from threats posed  
20 by invasive species, including agricultural pests. Congress passed the Plant Protection Act  
21 (PPA), 7 U.S.C. § 7701 *et seq.*, in 2000 to protect the agriculture, environment, and economy of  
22 the United States from "plant pests or noxious weeds."<sup>5</sup> As the Ninth Circuit has explained,  
23 "[t]he PPA's purpose is to prevent the spread of parasitic, diseased, and invasive plants and  
24 organisms, and it does so through the regulation of 'plant pests' and 'noxious weeds.'"<sup>6</sup>

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25 <sup>5</sup> 7 U.S.C. § 7701(1) ("[T]he detection, control, eradication, suppression, prevention, or retardation of the  
26 spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and  
economy of the United States.").

27 <sup>6</sup> *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 834 (9th Cir. 2013).

27. “The PPA was designed to streamline various prior plant regulation statutes, including the Plant Quarantine Act, the Federal Pest Act, and the Federal Noxious Weed Act.”<sup>7</sup> Passage of one of those earlier statutes, the Plant Quarantine Act, followed several serious and costly incidents in which foreign pests entered the United States and ravaged various fruit- and vegetable-growing regions. Citing the example of white-pine blister rust disease (which entered the United States in seedlings from an infested district in Germany), Congress concluded that “[a] law under which such districts and such products can be absolutely quarantined against is imperatively needed.”<sup>8</sup> As the House Agriculture Committee explained: “The past cannot be altogether remedied, but the future can be safeguarded, and this act will go a long way toward accomplishing this end.”<sup>9</sup> The Plant Quarantine Act thus sought “to exclude plants or plant products which may convey fruit diseases or insect pests new to or not theretofore widely prevalent or distributed within and throughout the United States.”<sup>10</sup>

28. Part of Congress’s aim in consolidating the predecessor statutes to the PPA was to enhance protections against plant pests and diseases.<sup>11</sup> Representative Charles T. Canady introduced the PPA, and explained:

[The PPA] is designed to address a very real problem facing American agriculture. The United States loses thousands of acres and billions of dollars in farm production each year due to invasive species. Exacerbating this serious problem are the outdated and fragmented quarantine statutes that govern interdiction of prohibited plants and plant pests. Our agricultural sector needs a modern, effective statutory authority that will protect our crops from these destructive invasive species. .... [The PPA] is an important step forward in protecting American agriculture.<sup>12</sup>

<sup>7</sup> *Int’l Ctr. for Tech. Assessment v. Johanns*, 473 F. Supp. 2d 9, 25 (D.D.C. 2007); *see also Vilsack*, 718 F.3d at 834 (“The PPA was enacted in 2000 and combined APHIS’s prior regulation of plant pests and noxious weeds into a single statute.”).

<sup>8</sup> H.R. Rep. No. 398, at 5 (1912).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *See* 146 Cong. Rec. 9,055, 9,211 (2000) (PPA “enhances the authority of the Secretary [of Agriculture] to regulate ... the movement of any plant” as “necessary to prevent the introduction or dissemination of a plant pest or noxious weed”).

<sup>12</sup> 146 Cong. Rec. 9,239, 9,244 (2000) (statement of Rep. Canady).

29. The PPA specifically emphasizes the importance of regulating imports that carry the risk of pestilence, reflecting Congress’s finding that “unregulated movement of ... plants ... and articles capable of harboring plant pests or noxious weeds could present an unacceptable risk of introducing or spreading plant pests or noxious weeds.”<sup>13</sup>

30. To protect against the risk of pestilence presented by imports, the PPA authorizes the Secretary to “prohibit or restrict the importation ... of any plant ... [or] article” as “necessary to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.”<sup>14</sup>

31. “[I]n developing regulations ... governing consideration of import requests,” Congress mandated that the Secretary use “processes” that are “based on sound science” and that are “transparent and accessible.”<sup>15</sup>

32. The Secretary has delegated the authority to issue importation regulations to APHIS.<sup>16</sup>

**Under the PPA and Similar Statutes, Argentine Lemons Have Been Banned for Import Since 1947 Because of Serious Pest Risks**

33. Since 1947, regulations issued under the PPA and its predecessor statutes have banned the importation of lemons and other types of citrus from Argentina to prevent citrus pestilence found in Argentina from being introduced into the United States.<sup>17</sup>

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<sup>13</sup> 7 U.S.C. § 7701(7).

<sup>14</sup> *Id.* § 7712(a).

<sup>15</sup> *Id.* § 7712(b).

<sup>16</sup> 7 C.F.R. §§ 2.22(a)(2)(xxxi), 2.80(a)(36); *see also* 65 Fed. Reg. 49,471 (Aug. 14, 2000) (final rule delegating authority).

<sup>17</sup> *See* 7 C.F.R. § 319.28(b), (c) (1947) (banning various forms of citrus, including lemons, from Argentina due to the presence of sweet orange scab disease and Cancrosis B); 12 Fed. Reg. 6,346, 6,346-6,347 (Sept. 24, 1947) (revising regulations to include ban based on “[i]nformation available to the Secretary of Agriculture, and presented on December 5, 1946, at a public hearing,” which showed that sweet orange scab disease and Cancrosis B—“plant diseases[] new to and not heretofore widely prevalent or distributed within and throughout the United States”—“infect[ed] certain species of citrus,” including lemons, “in several South American countries,” including Argentina); *see also* 7 C.F.R. § 319.28(a)(1)-(3) (2017) (lemons and other citrus from Argentina still banned to prevent spread of the aforementioned diseases, and citrus from certain regions of Argentina also banned to prevent spread of citrus canker).

34. The ban on the importation of citrus from Argentina has remained in place continuously with one brief exception: In 2000, APHIS amended its regulations to allow importation of Argentine citrus.<sup>18</sup> This Court swiftly struck down that amendment, however, because APHIS had failed adequately to analyze and explain the risks involved.<sup>19</sup>

35. Thus restored in 2001, these long-standing restrictions on the import of lemons from Argentina reflect two important factors.

36. *First*, Argentina is home to a significant number of dangerous citrus pests. Indeed, in this rulemaking, APHIS identified “nine pests of quarantine significance present in Argentina that could follow the pathway for lemons from northwest Argentina to the continental United States.”<sup>20</sup> A “quarantine pest” is a pest with “potential economic significance to the area endangered” and is “not yet present there, or present there but not widely distributed and being officially controlled.”<sup>21</sup> APHIS identified the following quarantine pests:

- a. The Chilean false red mite (*Brevipalpus chilensis*). This mite is a possible transmitter of Citrus leprosis virus.<sup>22</sup> This “serious citrus tree disease” produces lesions and can cause “extreme crop loss and tree debilitation.”<sup>23</sup> Potential impacts include “plant mortality, increased costs of production, and loss of foreign markets.”<sup>24</sup> APHIS rated this pest a high risk.<sup>25</sup>

<sup>18</sup> 65 Fed. Reg. 37,608 (Jun. 15, 2000).

<sup>19</sup> *Harlan*, 186 F. Supp. 2d at 1085-99. The court cited other defects as well. *See id.* at 1096-99 (rule failed to comply with the Regulatory Flexibility Act and the National Environmental Policy Act).

<sup>20</sup> 81 Fed. Reg. 28,758, 28,759 (May 10, 2016).

<sup>21</sup> *Id.*; *see also* 7 C.F.R. § 319.56–2.

<sup>22</sup> *Pest Risk Assessment* (Exhibit 2) at 2.

<sup>23</sup> *Id.* at 42, 48.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Risk Management Document* (Exhibit 3) at 2.

- 1           b.     Three related flat mites (*Brevipalpus* spp.). These mites are confirmed  
2                   transmitters of Citrus leprosis virus.<sup>26</sup> They attack a multitude of plant families.<sup>27</sup>  
3                   APHIS rated these pests a medium risk.<sup>28</sup>
- 4           c.     Medfly (also known as Mediterranean fruit fly) (*Ceratitis capitata*). Medfly is  
5                   “one of the world’s most destructive fruit pests.”<sup>29</sup> It causes “substantial yield  
6                   reductions” and “lowers crop values by requiring costly controls.”<sup>30</sup> Introduction  
7                   would “lead to severe constraints for fruit export, resulting in losses of foreign  
8                   and domestic markets.”<sup>31</sup> APHIS rated this pest a high risk.<sup>32</sup>
- 9           d.     The honeydew moth (*Cryptoblabes gnidiella*). This moth is “an internal feeder  
10                  that punctures fruit and causes premature ripening, blotches, and early fruit  
11                  drop”—as well as “increases the incidence of fungal and bacteria diseases that  
12                  cause fruit rot”—all of which can “cause substantial losses to citrus crops.”<sup>33</sup>  
13                  APHIS rated this pest a high risk.<sup>34</sup>
- 14          e.     The citrus borer (*Gymnandrosoma aurantianum*). This insect is “an internal  
15                  feeder that punctures fruit[,] .... caus[ing] substantial losses to citrus crops due to  
16                  fruit drop and rot, rendering fruit unsuitable for the fresh or processed markets.”<sup>35</sup>  
17                  APHIS rated this pest a high risk.<sup>36</sup>

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<sup>26</sup> Ex. 2 at 2, 3 n.2.

<sup>27</sup> *Id.* at 50.

<sup>28</sup> Ex. 3 at 2.

<sup>29</sup> Ex. 2 at 53.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 53-54 (citation omitted).

<sup>32</sup> Ex. 3 at 2.

<sup>33</sup> Ex. 2 at 54.

<sup>34</sup> Ex. 3 at 2.

<sup>35</sup> Ex. 2 at 54.

<sup>36</sup> Ex. 3 at 2.

f. The fungus (*Elsinoë australis*) that is the causal agent of sweet orange scab disease. Sweet orange scab disease “causes unsightly, scab-like lesions to develop on fruit rinds and, less often, on leaves and twigs.”<sup>37</sup> “Infected fruit are more likely to drop prematurely, and the scabby lesions reduce the fruit’s fresh market value. In addition, the disease may stunt young citrus seedlings.”<sup>38</sup> APHIS rated this pest a medium risk.<sup>39</sup>

g. The bacterium (*Xanthomonas citri* subsp. *citri*) that is the causal agent of citrus canker disease. Citrus canker disease “causes lesions on the leaves, stems, and fruit of plants[,] .... affect[ing] the health of infected citrus trees and the marketability of infected fruit.”<sup>40</sup> It is “mostly a leaf-spotting and fruit rind-blemishing disease, but when conditions are highly favorable for infection, infections cause defoliation, shoot dieback, and fruit drop.”<sup>41</sup> APHIS rated this pest a medium risk.<sup>42</sup>

37. Finally, Citrus Black Spot (*Guignardia citricarpa*) is “an economically significant citrus disease” that is “marked by dark, speckled spots or blotches on the rinds of fruit” and that “causes early fruit drop, reduces crop yield, and renders the highly-blemished fruit unmarketable.”<sup>43</sup> Citrus Black Spot “is a particularly insidious disease. Once the disease takes

<sup>37</sup> APHIS, *Sweet Orange Scab* (last modified Jan. 3, 2017), [https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct\\_sweet\\_orange](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct_sweet_orange).

<sup>38</sup> *Id.*

<sup>39</sup> Ex. 3 at 2.

<sup>40</sup> APHIS, *Citrus Canker* (last modified Aug. 10, 2016), [https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct\\_citrus\\_canker](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct_citrus_canker).

<sup>41</sup> *Id.*

<sup>42</sup> Ex. 3 at 2.

<sup>43</sup> APHIS, *Citrus Black Spot* (last modified Dec. 6, 2016), [https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct\\_black\\_spot](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/citrus-health-response-program/ct_black_spot).

hold in a geographic area, there is no known way to eradicate it.”<sup>44</sup> For example, Citrus Black Spot was introduced into Florida in 2010 and, since the outbreak, the disease has only spread within the State—with efforts to contain the spread of the disease largely unsuccessful.<sup>45</sup> APHIS once considered the causal agent of Citrus Black Spot a quarantine pest likely spread by the importation of infected citrus fruit, but the agency changed its position six years ago.<sup>46</sup> More recent science casts substantial doubt on APHIS’s reversal in position.

38. *Second*, concerns about SENASA’s dismal record with respect to controlling and reporting pests and diseases have also compelled APHIS’s bar on the imports of lemons from Argentina. APHIS’s 2000 rule allowing importation of Argentine citrus was judicially invalidated on this basis (among others): SENASA, this Court concluded, had recently “fail[ed] to report [a] foot-and-mouth outbreak,” which this Court found raised serious questions “about whether SENASA [could] be entrusted to enforce the mitigation measures used by the systems approach” prescribed in that rule.<sup>47</sup>

39. More recent evidence continues to raise questions about SENASA’s effectiveness. For example, as the U.S. Citrus Council has explained, “[i]n 2005, there were incidents regarding (1) the possibility of blueberries being a host for Medfly and (2) trapping for Medfly, specifically in the Mendoza province. With respect to blueberries, SENASA denied that blueberries were a host for Medfly in Argentina, but blueberry fruit with many Medfly larvae were identified by APHIS personnel – both on the farm and in the packinghouse. With respect to trapping, Argentina requested that Mendoza be declared a FruitFlyFree area and trapping results at the time were promising. However, trapping results within approximately a year came in at high levels. At a later date, the levels were lowered.”<sup>48</sup>

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<sup>44</sup> Comments of U.S. Citrus Science Council at 29.

<sup>45</sup> *Id.* at 9, 29-30.

<sup>46</sup> Ex. 3 at 3.

<sup>47</sup> *Harlan*, 186 F. Supp. 2d at 1096.

<sup>48</sup> Comments of U.S. Citrus Science Council at 18.

40. Concerns with SENASA do not stop there. As the U.S. Citrus Council also explained, the Argentine agency’s scientific judgment regarding certain mites recently conflicted with APHIS’s—with SENASA eventually forced to concede that it had been wrong: “In July 2009, there was an incident with respect to mites. Mites that were believed to be Chilean False Red Mites were discovered on a shipment of grape budwood from Argentina. Argentina challenged the identification. A USDA expert worked with SENASA personnel and positively identified that the mite was a new, not yet fully described type of *Brevipalpus* species. Ultimately, SENASA declared that there were indeed Chilean False Red Mites in Argentina, at a meeting of Mercosur in 2010.”<sup>49</sup>

41. Moreover, SENASA’s dealings with the EU raise substantial doubts about its ability to carry out its regulatory functions effectively. SENASA’s “lemon protocols for the EU market, which are the basis for the [systems approach] being proposed by APHIS, have faced repeated problems in recent years.”<sup>50</sup> For example, “[t]he EU has repeatedly intercepted Argentine lemon imports for compliance reasons,”<sup>51</sup> including due to identification of lemons with the symptoms of Citrus Black Spot. Twenty-eight such shipments of symptomatic lemons were intercepted by the EU from 2012 to 2015.<sup>52</sup> And the EU has identified no fewer than 45 Argentine citrus shipments to the EU from 2012 to 2015 as having the symptoms of Citrus Black Spot.<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> Comments of Sunkist at 4.

<sup>51</sup> *Id.*

<sup>52</sup> Comments of U.S. Citrus Science Council at 10-11.

<sup>53</sup> *Id.* In 2016, after comments were filed, the EU intercepted 14 shipments from Argentina with symptoms of Citrus Black Spot—four of these shipments were lemon shipments. See European Union Notification System for Plant Health Inspections, *Interceptions of harmful organisms in commodities imported into the EU Member States and Switzerland*, at 1-2 (Apr. 1, 2017) (cataloguing shipments with *Phyllosticta citricarpa*, the causal agent of Citrus Black Spot), [https://ec.europa.eu/food/sites/food/files/plant/docs/ph\\_bioseco\\_europhyt-interceptions-2016\\_summary.pdf](https://ec.europa.eu/food/sites/food/files/plant/docs/ph_bioseco_europhyt-interceptions-2016_summary.pdf).



**APHIS Issues the Proposed Rule in the Wake of  
High Level Political Trade Talks With Argentina**

42. Since reinstatement of the import ban in 2001, SENASA has sought on several occasions to convince APHIS to allow the import of Argentine lemons. Following a request by SENASA in 2007, APHIS made a technical visit to citrus production areas in Northwest Argentina to conduct a first-hand review of production systems and phytosanitary measures proposed by SENASA.<sup>54</sup> APHIS prepared a site trip report describing this 2007 visit.<sup>55</sup> And based in part on that trip report, APHIS prepared and published in the Federal Register a draft Pest Risk Assessment, on which APHIS sought comment from the public.<sup>56</sup> A Pest Risk Assessment is a technical document that provides “a qualitative assessment of the plant pest risk associated with the importation of commercially produced and commercially packed fresh lemon fruit ... from Northwest Argentina.”<sup>57</sup> APHIS did not, however, propose lifting the ban.

43. APHIS updated the 2007 draft Pest Risk Assessment in an ad hoc fashion in the ensuing seven years.<sup>58</sup> But it did not conduct, or at least disclose the existence of, any new site visit to Argentina to update its in-person observations from 2007. In June 2014, APHIS again released a version of the draft Pest Risk Assessment and solicited comments on that draft. Once again, however, APHIS did not propose lifting the import ban.

44. APHIS changed its position, however, following trade talks between then-President Barack Obama and then-newly elected Argentine President, Mauricio Macri in March 2016.<sup>59</sup> As Argentine Minister of Agroindustry Ricardo Buryaile explained in his comments, the new government in Argentina viewed the opening of the U.S. market for Argentine lemons as a

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<sup>54</sup> Ex. 2 at 9.

<sup>55</sup> *Id.* at 9, 83.

<sup>56</sup> 72 Fed. Reg. 45,216 (Aug. 13, 2007).

<sup>57</sup> Ex. 2 at 2.

<sup>58</sup> *Id.* at 88-93 (listing changes made in 2008 and between 2008 and 2015).

<sup>59</sup> See 81 Fed. Reg. at 28,759; Jonathan Gilbert, *President Obama’s Argentina Visit Is All About Trade*, Fortune, Mar. 23, 2016, <http://fortune.com/2016/03/23/obama-argentina-macri-trade>.

1 way to “reinforce the position of President Macri[]” and improve U.S.-Argentine relations.<sup>60</sup>

2 The Obama Administration wished to accommodate President Macri, whom it viewed as a  
3 potential ally after years of difficult U.S.-Argentine relations.<sup>61</sup>

4 45. On May 10, 2016, six weeks after President Obama’s visit to Argentina, APHIS  
5 issued a notice of proposed rulemaking (NPRM), proposing new regulations to permit the  
6 importation of lemons from Northwest Argentina.<sup>62</sup> APHIS acknowledged in the NPRM that  
7 there are “nine pests of quarantine significance present in Argentina that could follow the  
8 pathway for lemons from northwest Argentina to the continental United States.”<sup>63</sup> But APHIS  
9 claimed that those risks could be mitigated through the adoption of a “systems approach.”<sup>64</sup>  
10 APHIS did not, however, state that the systems approach it was proposing would be sufficient to  
11 prevent the introduction of plant pests on lemons imported from Argentina.

12 46. A “systems approach” is “a defined set of phytosanitary procedures, at least two  
13 of which have an independent effect in mitigating pest risk associated with [that importation].”<sup>65</sup>  
14 The “systems approach” proposed by APHIS requires lemon producers, packinghouses, and  
15 regulators in Argentina to adopt and consistently implement a complex array of measures that  
16 have not previously been applied in Argentina to such a large volume of fruit. Measures  
17 proposed by APHIS include pest management in the field, Medfly trapping, sampling of fruit for  
18 pests in the field, assessing the color of harvested fruit to segregate green lemons from yellow  
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23 <sup>60</sup> Comments of Argentine Minister of Agroindustry Ricardo Buryaile at 1.

24 <sup>61</sup> See Jonathan Gilbert, *President Obama’s Argentina Visit Is All About Trade*, Fortune, Mar. 23, 2016,  
<http://fortune.com/2016/03/23/obama-argentina-macri-trade>.

25 <sup>62</sup> See 81 Fed. Reg. at 28,758.

26 <sup>63</sup> *Id.* at 28,759.

27 <sup>64</sup> 81 Fed. Reg. at 28,762.

28 <sup>65</sup> 7 U.S.C. § 7702(18).

lemons, official sampling and inspection of the fruit after packing, registration of production areas and packinghouses, and adoption of an identification and traceability system.<sup>66</sup>

47. Although it viewed consistent and accurate compliance with each of these measures as critical to mitigating the risk associated with the quarantine pests that it had identified, APHIS did not propose to become directly involved in monitoring compliance with the measures in Argentina. Instead, APHIS proposed to entrust that responsibility entirely to SENASA, making SENASA's intent and capacity to regulate crucial to the proposed rule. The wide-ranging duties assigned to the Argentine agency under the systems approach include:

- Determining which places of production and packinghouses can be involved in importing lemons, registering these places of production and packinghouses, and keeping associated records.<sup>67</sup>
- Monitoring Medfly trapping.<sup>68</sup>
- Visiting and inspecting registered places of production regularly throughout the exporting seasons for signs of infestations.<sup>69</sup>
- Visually inspecting a biometric sample of each consignment for quarantine pests, washing the lemons in this sample, inspecting the filtrate for the Chilean false red mite, and then cutting open and inspecting for evidence of quarantine pests.<sup>70</sup>
- Evaluating lemons for color and grade to ensure compliance with harvesting restrictions intended to ward off the presence of fruit flies.<sup>71</sup>
- Awarding each consignment of lemons imported with a phytosanitary certificate with an additional declaration stating that the requirements of this section have been met and that the consignments have been inspected and found free of each quarantine pest.<sup>72</sup>

<sup>66</sup> APHIS, *Market Access Trip Report: Site Visit to Assess Fresh Lemon Fruit and Risk Management Practices in Northwest Argentina, September 12-16, 2016*, at 3 (Sept. 27, 2016) (2016 Trip Report), [https://www.aphis.usda.gov/import\\_export/plants/plant\\_imports/process/downloads/trip-report/argentina-lemons.pdf](https://www.aphis.usda.gov/import_export/plants/plant_imports/process/downloads/trip-report/argentina-lemons.pdf).

<sup>67</sup> See 7 C.F.R. § 319.56–76(a)(2), (3), (4).

<sup>68</sup> *Id.* § 319.56–76(b)(3).

<sup>69</sup> *Id.* § 319.56–76(b)(5).

<sup>70</sup> *Id.* § 319.56–76(b)(4).

<sup>71</sup> Ex. 1 at 94,224; 7 C.F.R. § 319.56–76(a)(7).

<sup>72</sup> 7 C.F.R. § 319.56–76(a)(9).

- Preparing an operational work plan that details the activities that SENASA and places of production and packinghouses registered with SENASA will carry out to meet the requirements of this section, which includes requirements beyond those already bulleted, such as maintaining identification of each lot of lemons to be imported and “safeguarding” these lots.<sup>73</sup>

48. APHIS based its proposal on two agency-prepared technical documents. The first is a version of the draft Pest Risk Assessment that APHIS initially prepared in 2007, let languish for some time, and then updated sporadically. The second is a Risk Management Document, which explains the “risk management measures” that APHIS believes “will provide an appropriate level of phytosanitary protection against the pests of quarantine concern” identified in the Pest Risk Assessment.<sup>74</sup>

49. Notwithstanding the extensive and complex measures APHIS expected SENASA to implement, neither the Pest Risk Assessment nor the Risk Management Document nor the NPRM itself indicated whether APHIS had visited Argentina since 2007, and thus there was no indication that APHIS had any contemporary basis to conclude that Argentine lemon producers, packinghouses, and SENASA had the means to implement APHIS’s proposed “systems approach.” To the contrary, the Pest Risk Assessment purported to rely exclusively on APHIS’s observations from 2007 as proof that SENASA was capable of performing its significant responsibilities (despite its dismal record of failure).<sup>75</sup>

#### **Comments on the Proposed Rule Raise Substantial Questions About the Reasonableness of Key Assumptions Underlying the Rule**

50. In response to the NPRM, stakeholders extensively criticized APHIS’s proposed repudiation of the longstanding ban on lemon imports from Argentina.

<sup>73</sup> *Id.* § 319.56–76(a)(1); *id.* § 319.56–76(a)(6), (8).

<sup>74</sup> Ex. 3 at 9.

<sup>75</sup> *See* Ex. 2 at 9 (“SENASA has been successfully overseeing the production of lemons to the EU for numerous years with no notable compliance issues. USDA-APHIS observed and verified the inclusion of these practices and SENASA’s current EU export program oversight during a technical visit to citrus production areas in NWA in 2007. The USDA team reviewed production systems, research related to citrus pests ..., and review[ed] phytosanitary measures proposed by SENASA.” (citation omitted)).

1           51.     *Environmental and economic risks.* Many commenters highlighted the  
 2 environmental and economic upheaval threatened by the importation of lemons from Argentina.  
 3 For example, the Council noted:

4           If Citrus Black Spot, the Medfly, various species of the four mites, Citrus Leprosis or  
 5 other pests were to enter the U.S. via Argentine fruit and become established in the U.S.,  
 6 it is possible that considerable and widespread steps would have to be taken to contain  
 7 the pest or disease. These steps would include substantial spraying and other risk  
 8 mitigation measures that would impact the human environment. In addition, these pests  
 9 and diseases would have a devastating effect on the residential landscape throughout  
 10 Southern California ... , which would also impact the human environment.<sup>76</sup>

11           The Council also submitted two expert economic analyses that “found that the economic losses  
 12 [of the rule for domestic industry] would range from \$180-260 million in the first year alone.”<sup>77</sup>  
 13 Other stakeholders further elaborated on critical economic considerations that APHIS had  
 14 ignored in assessing the impacts of the Rule.<sup>78</sup>

15           52.     *Stale and incomplete data.* The Council and others also criticized the NPRM for  
 16 relying on stale data and for failing to disclose more up-to-date data that commenters suspected  
 17 APHIS planned to rely upon. The Council, for example, explained that APHIS could not  
 18 possibly rely on a site visit conducted *nine years earlier* in 2007—as the Pest Risk Assessment  
 19 purported to do.<sup>79</sup> As the Council explained, Argentina “has been under significant financial  
 20 turmoil” since 2007, and for that reason, as well as the ordinary evolution of orchard and  
 21 packinghouse practices over time, Argentina’s orchards and packinghouses had undoubtedly

22 <sup>76</sup> Comments of U.S. Citrus Science Council at 39; *see also, e.g.*, Comments of the National Plant Board  
 23 at 1 (“oppos[ing] ... importation of [Argentine] lemons” because of “grave concerns about the level of  
 24 enforcement and phytosanitary effectiveness of [the proposed] ... systems approach to eliminate the  
 25 introduction ... quarantine pests,” which would place “crops and the U.S. food supply at risk”).

26 <sup>77</sup> Comments of U.S. Citrus Science Council at 2; *see id.*, Attachment 2 at ii; *see also, e.g.*, Comments of  
 27 the Florida Department of Agriculture and Consumer Services - Division of Plant Industry at 1  
 28 (recommending “that shipments of lemon from Argentina not be allowed into Florida” because  
 introduction of “any of the[] pests” at issue “could be catastrophic” to “Florida’s \$120 billion dollar  
 agricultural industry”)

<sup>78</sup> *See, e.g.*, Comments of Sunkist at 6-8 (explaining that APHIS’s invocation of historical export figures  
 did not account for recent changes in the marketplace).

<sup>79</sup> Comments of U.S. Citrus Science Council at 5-6, 12-13.

1 changed significantly.<sup>80</sup> APHIS’s obligation to base its decision on sound science required it to  
 2 assess the current state of pests and diseases that exist in or near growing areas and to assess the  
 3 current capabilities of Argentine producers and packinghouses, and of SENASA itself.

4 53. The Council also explained that only a trip conducted *during Argentina’s harvest*  
 5 *season*—between April and June—would allow APHIS to fulfill its obligation to review and  
 6 assess harvesting and packing operations; a trip taken at any other time would not permit APHIS  
 7 to actually observe whether producers, packinghouses, and SENASA officials were faithfully  
 8 implementing APHIS’s “systems approach.”<sup>81</sup> Accordingly, although APHIS had planned one  
 9 trip for September or October 2016, the Council explained that APHIS would need to take a  
 10 second trip during the 2017 harvest season before finalizing the proposed rule.<sup>82</sup>

11 54. Finally, although the Council noted that APHIS officials had previously alluded  
 12 to a trip that had been taken in June 2015—that is, during the 2015 harvest season—the Council  
 13 observed that APHIS had not purported to rely on this trip in the NPRM or its accompanying  
 14 technical documents. It further made clear that neither notes nor a “trip report” had been made  
 15 available to the public about this (apparently) secret 2015 trip. The Council also submitted a  
 16 FOIA request seeking notes or a trip report for “any visits to the Argentine growing areas that  
 17 have taken place since the 2007 visit on which the [Pest Risk Assessment] and the Proposed Rule  
 18 are based”—but APHIS did not respond, and still has not responded, to that FOIA request.<sup>83</sup>  
 19 “Without providing stakeholders documentation of the [2015 Harvest Season Site Visit],” the  
 20 Council explained, “APHIS cannot rely on it or claim it has fulfilled the responsibility of the  
 21 agency for a current site visit to a growing area that is home to so many serious pests and  
 22 diseases that affect citrus.”<sup>84</sup>

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 24 <sup>80</sup> *Id.* at 5.

25 <sup>81</sup> *Id.* at 6.

26 <sup>82</sup> *Id.*

27 <sup>83</sup> *Id.* at 40.

28 <sup>84</sup> *Id.* at 5-6; *see also* Comments of Sunkist at 3 (“APHIS has conveyed off the record that it also  
 conducted ‘a site visit to Argentina in June 2015 to observe production areas, production and packing

55. *Failure to account for SENASA's past failures, including through reliance on an undisclosed, incomplete operational workplan drafted at least in the first instance by SENASA.* The Council and others also criticized the NPRM for failing to meaningfully address SENASA's troubled history of concealing and inadequately protecting against phytosanitary risks emanating from Argentine pests.<sup>85</sup> Importantly, SENASA's ability to comply with the systems approach—a fundamental premise of the NPRM—depends on the details of the finalized operational workplan detailing SENASA's specific duties, which did not and does not yet exist. Instead, APHIS relied on a draft operational workplan that was at least initially prepared by SENASA and that was not disclosed to the public.<sup>86</sup> The Council insisted that the Rule could not be finalized without disclosing the details of the plan and providing an opportunity for the public to comment on those details.<sup>87</sup>

56. *Failure to account for recent science regarding Citrus Black Spot.* The Council and others also criticized the NPRM for failing to grapple with recent developments concerning Citrus Black Spot. The Council acknowledged that “APHIS does not discuss Citrus Black Spot ... in the [Pest Risk Assessment]” based on the agency's earlier determination, in 2010, that “fresh or dried citrus fruit is not a likely pathway for the [disease's] introduction.”<sup>88</sup> But the Council explained that intervening scientific developments had rendered this earlier determination outdated, for at least three reasons.

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practices, and traceback abilities,' yet its [Pest Risk Assessment] makes no reference to that site visit. .... [T]his proposed rule should be withdrawn at least until APHIS conducts comprehensive additional site visits to verify the outdated information on which it[] ... relies, and thereafter allow[] public comment on those findings. Until the outdated data and omissions in the record are corrected, the public is being deprived of a reasonable opportunity to assess and comment on the rule's impact.”).

<sup>85</sup> Comments of U.S. Citrus Science Council at 18-19; Comments of U.S. Citrus Science Council on 2016 Trip Report at 4; Comments of Sunkist at 2.

<sup>86</sup> On May 16, 2017, well after the opportunity for public comment on the proposed rule had passed, APHIS circulated to certain industry stakeholders an unsigned, undated draft of an operational workplan. Far from obviating concerns about SENASA, that workplan confirms the degree to which the operation of the systems approach will depend principally upon SENASA and private entities.

<sup>87</sup> Comments of U.S. Citrus Science Council at 16, 20, 23; *see also* Comments of U.S. Citrus Science Council on 2016 Trip Report at 4.

<sup>88</sup> *Id.* at 9.



57. First, in 2014, the European Union’s expert agency on food matters, the European Food Safety Authority (EFSA), had published a comprehensive, peer-reviewed scientific opinion concluding that the risk of entry of the causal agent of Citrus Black Spot is “moderately likely for citrus fruit without leaves.”<sup>89</sup>

58. EFSA’s scientific conclusions—published in peer-reviewed papers in 2014 and 2016—cast substantial doubt on APHIS’s 2010 opinion that fruit is not a likely pathway for Citrus Black Spot. The causal agent of Citrus Black Spot has two lifecycle stages: a sexual stage involving ascospores that may be found on plants and leaves, and an asexual stage involving pycnidiospores that are found on fruit.<sup>90</sup> APHIS’s view in 2010 had been that only ascospores play a significant role in spreading the disease, and so importation of fruit (without plant or leaf material attached) created only a low risk of introducing Citrus Black Spot. In its 2014 and 2016 papers, however, EFSA pointed to research identifying a mechanism by which pycnidiospores could lead to the spread of Citrus Black Spot as well.<sup>91</sup> EFSA explained that if infected fruit, fruit peel, or other citrus by-products were discarded close to citrus trees (by, for example, packing houses, processing plants, fresh fruit markets, or households), then pycnidiospores could be splashed by rain or other sources of moisture from the fruit onto the lower parts of the citrus trees, thereby infecting leaves, twigs, and fruit. And once domestic citrus trees are infected, ascospores will be created that are capable of spreading the disease more broadly.

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<sup>89</sup> EFSA Panel on Plant Health, *Scientific Opinion on the risk of Phyllosticta citricarpa (Guignardia citricarpa) for the EU territory with identification and evaluation of risk reduction options*, EFSA Journal 2014;12(2):3557 (2014 EFSA Report), <http://onlinelibrary.wiley.com/doi/10.2903/j.efsa.2014.3557/epdf>; see also EFSA Panel on Plant Health, *Evaluation of new scientific information on Phyllosticta citricarpa in relation to the EFSA PLH Panel (2014) Scientific Opinion on the plant health risk to the EU*, EFSA Journal 2016;14(6):4513 (2016 EFSA Report), <http://onlinelibrary.wiley.com/doi/10.2903/j.efsa.2016.4513/epdf>; Comments of U.S. Citrus Science Council at 11.

<sup>90</sup> Ex. 1 at 94,223.

<sup>91</sup> E.g., 2014 EFSA Report at 40-43.



59. *Second*, the EU had detected Citrus Black Spot symptoms in 45 Argentine citrus shipments—28 of which were lemon shipments—to the European Union from 2012 to 2015, indicating both that Citrus Black Spot is a serious problem with Argentine shipments and that SENASA had not dealt effectively with the problem.<sup>92</sup> These new facts flatly contradicted APHIS’s statement in the Pest Risk Assessment that “SENASA has been successfully overseeing the production of lemons to the EU for numerous years with no notable compliance issues.”<sup>93</sup>

60. *Third*, there had been an outbreak of Citrus Black Spot in Florida in 2010—and since then “there have been no reductions in ... quarantine areas,” only “five expansions.”<sup>94</sup> That outbreak provides an important new data source for APHIS to study ways in which Citrus Black Spot spreads, yet APHIS had not reevaluated its analysis in light of that experience.

61. *Residential citrus in Southern California*. The Council and others further criticized APHIS for ignoring the “reality of the residential landscape in Southern California, where millions of citrus trees and thus potential hosts to a pest or disease are located.”<sup>95</sup> Residential citrus is similarly prevalent in Central California. The Council explained that the prevalence of residential citrus multiplied the possibility and resultant damage of an outbreak from importation of Argentine lemons.<sup>96</sup>

62. *Compliance with the National Environmental Policy Act (NEPA)*. Finally, the Council charged APHIS with “fail[ing] to fulfill the requirements under Section 102 of the National Environmental Policy Act” because the agency had failed to prepare an Environmental Impact Statement or Environmental Assessment, although both had been required because the

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<sup>92</sup> Comments of U.S. Citrus Science Council at 10-11.

<sup>93</sup> Ex. 2 at 9; *see also* Ex. 3 at 7 (“SENASA already has an adequate monitoring program in effect that is used for citrus export to the European Union.”); Comments of U.S. Citrus Science Council at 18-19 (noting SENASA’s “history of intentional concealment and delayed reporting of outbreaks”); Sunkist Comments at 2 (noting “Argentina’s poor phytosanitary record in the citrus sector,” including SENASA’s “historical tendency ... to conceal pest and disease outbreaks”).

<sup>94</sup> Comments of U.S. Citrus Science Council at 8, 29-30.

<sup>95</sup> *Id.* at 1; *see also id.* at 6-8.

<sup>96</sup> *See id.* at 6-8.

1 Rule was a “major federal action significantly ‘affecting the quality of the human  
2 environment.’”<sup>97</sup>

### 3 **APHIS Conducts a September 2016 “Non-Harvest Season Site Visit”**

4 63. From September 12-16, 2016—after the comment period had closed for the  
5 NPRM—a delegation of experts from APHIS conducted a site visit in Argentina.<sup>98</sup> A month  
6 after the site visit, APHIS released a site trip report describing the Non-Harvest Season Site Visit  
7 in detail and invited the public to submit comments on the trip report.

8 64. This September 2016 site visit—which occurred *after* Argentina’s lemon harvest  
9 season (and *before* Argentina’s “spring flush,” when lemon trees bloom and pests become  
10 attracted to the fruit)<sup>99</sup>—well-illustrated the importance of investigating Argentine growing areas  
11 first-hand. The delegation included, among others, a senior risk manager for entomology, a  
12 senior risk manager for plant pathology, a plant pathologist, and a fruit-fly expert, along with two  
13 informal observers from the California Department of Food and Agriculture.<sup>100</sup> In just five days,  
14 the delegation was able to visit five lemon production sites and four lemon packinghouses.<sup>101</sup>  
15 And the delegation was able to investigate in-person the progress that had been made toward  
16 implementing APHIS’s proposed mitigation measures.

17 65. But because the trip was conducted in September, outside the harvest season (and  
18 the blooming season), the site visit was incomplete in critical respects. Most importantly, the  
19 delegation was unable to verify whether the protocols that APHIS had designed were in fact  
20 being carried out effectively. For example, the delegation was unable to view pest-management  
21 practices in Argentine orchards. The delegation was unable to observe actual pesticide use.<sup>102</sup>

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23 <sup>97</sup> *Id.* at 39 (quoting 42 U.S.C. § 4332); *see also* 40 C.F.R. §§ 1508.18, 1508.27.

24 <sup>98</sup> *2016 Trip Report* at 1.

25 <sup>99</sup> *See* Comments of U.S. Citrus Science Council on 2016 Trip Report at 1-3, 7.

26 <sup>100</sup> *2016 Trip Report* at 2.

27 <sup>101</sup> *Id.* at 1.

28 <sup>102</sup> *Id.* at 7.

1 The delegation also could not observe how SENASA judged lemon color—a critical  
2 determination since the proposed protocol permitted shipment of green lemons without further  
3 Medfly treatment but required further treatment for yellow lemons. And as the delegation itself  
4 acknowledged, the Medfly trapping that it observed shed little light on Medfly conditions or the  
5 effectiveness of Argentina’s trapping program during the wet harvest season because Medfly  
6 populations are naturally reduced during the dry season (when the delegation was visiting).<sup>103</sup>

7 66. The Non-Harvest Season Site Visit also revealed that, even as of then, the  
8 mandated “systems approach” was incomplete: Three of the four packinghouses that the  
9 delegation visited were still in the process of building required infrastructure.<sup>104</sup> In light of these  
10 shortcomings, APHIS’s trip report observed that “APHIS may require an additional site visit or  
11 certification by SENASA or registered facilities to verify they meet the safeguarding  
12 requirements prior to export.”<sup>105</sup>

13 67. The contrast between the agency’s immediate disclosure of the 2016 Non-Harvest  
14 Season Site Visit and complete concealment of any record of the 2015 Harvest Season Site Visit  
15 could not have been starker. In 2016, APHIS needed only a month to release and solicit  
16 comment on an 11-page trip report containing a detailed account of where the delegation went,  
17 what they saw (or did not see), whom they spoke with, and which questions were answered or—  
18 critically—were left unanswered. The detail in the report permitted stakeholders to identify  
19 shortcomings both in Argentina’s preparation and in the sufficiency of APHIS’s investigation.  
20 APHIS’s refusal to release anything documenting the 2015 Harvest Season Site Visit deprived  
21 stakeholders of the opportunity to similarly comment on that earlier trip.

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25 <sup>103</sup> *Id.* at 9

26 <sup>104</sup> *Id.* at 6, 9-10, 14.

27 <sup>105</sup> *Id.* at 1; *see also id.* at 10 (“APHIS will require verification of all safeguarding measures that were not  
28 in place at the time of the visit, either by local APHIS personnel or by SENASA.”).

**APHIS Issues the Final Rule**

68. In the last few weeks of the Obama administration, and despite the extensive commentary criticizing its proposal, APHIS issued the Rule on December 23, 2016. The explanations offered by APHIS were unsupported and arbitrary and capricious in many respects.

69. For example, for the first time and in multiple instances, the Rule explicitly and materially relied on the 2015 Harvest Season Site Visit to respond to commenters' criticisms of the Rule.<sup>106</sup> Nevertheless, APHIS continued to withhold any 2015 trip report (or other documentation) from the public about this harvest season visit, despite having already publicly made available the 2016 trip report, which was not conducted during harvest season. APHIS offered no explanation for failing to disclose the materials that formed the basis for its key judgments, much less did it explain the obvious inconsistency in disclosing the 2016 materials while withholding the 2015 materials.

70. Moreover, contrary to public comments, APHIS issued the Rule both absent a final operational workplan defining key details of SENASA's duties and without providing the public with the draft plan that the agency did have in its possession (one drafted at least originally by SENASA, the very entity whose credibility was and is in question).<sup>107</sup>

71. In addition, APHIS issued the Rule without reasonably explaining its rejection of commenters' concerns about recent developments related to Citrus Black Spot. Thus, APHIS relied on its 2010 determination without explaining how that determination had greater force than the EFSA's more recent expert opinion to the contrary.<sup>108</sup>

72. Furthermore, APHIS issued the Rule without meaningfully addressing concerns about the ubiquitous presence of residential citrus trees in Southern (and other parts of)

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<sup>106</sup> Ex. 1 at 94,218, 94,219, 94,221.

<sup>107</sup> *Id.* at 94,222, 94,224; *see also* 7 C.F.R. § 319.56–76(a).

<sup>108</sup> *See, e.g.*, Ex. 1 at 94,217, 94,221, 94,223.

1 California, summarily stating that accounting for the presence of residential citrus would not  
2 change its risk analysis or mitigation measures.<sup>109</sup>

3 73. APHIS also issued the Rule without conducting an Environmental Impact  
4 Statement or an Environmental Assessment, reasoning that such documentation would only be  
5 required “if ... the mitigations specified in the rule are ineffective in precluding the introduction  
6 of quarantine pests.”<sup>110</sup>

7 74. In addition, APHIS issued the Rule without correcting or meaningfully addressing  
8 criticisms of fundamental errors in its Initial Regulatory Flexibility Analysis, such as lack of  
9 support for APHIS’s prediction of the number of lemons that Argentina will import into the U.S.

10 75. Finally, APHIS refused in issuing the final Rule to disclose the draft workplan,  
11 the final workplan, or the details of the workplan, explaining that “[o]perational workplans”—  
12 although including critical day-to-day operational requirements for the systems approach—“are  
13 available to the public upon request only after a rule has been finalized.”<sup>111</sup> As noted above,  
14 APHIS disclosed an undated, unsigned version of the workplan on May 16, 2017—well after the  
15 opportunity for public comment on the proposed rule had passed.

16 **APHIS Significantly Alters the Rule Without Notice and Comment Rulemaking**

17 76. Following the inauguration of President Trump, “for the purpose of reviewing  
18 questions of fact, law, and policy,” White House Chief of Staff Reince Priebus issued a  
19 memorandum to all executive departments and agencies directing them to, among other things,  
20 temporarily postpone for 60 days the effective date of regulations that had been published in the  
21 Federal Register but had not yet taken effect. Consistent with that direction, APHIS issued a 60-

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26 <sup>109</sup> *Id.* at 94,220.

27 <sup>110</sup> *Id.* at 94,217.

28 <sup>111</sup> *Id.* at 94,222.

1 day stay of implementation of the Rule on January 25, 2017.<sup>112</sup> On March 24, 2017, APHIS  
 2 issued an additional stay of 60 days, extending the effective date of the Rule to May 26, 2017.<sup>113</sup>

3 77. Approximately a month before the Rule was to take effect, on April 27, 2017,  
 4 Argentine President Macri had his first official visit with newly elected President Trump—his  
 5 first audience with a United States President since his meetings with President Obama in March  
 6 2016. During a joint press conference in the Oval Office, the first policy question posed to  
 7 President Trump was whether he would “let the lemons—the Argentine lemons in, in your  
 8 country?” President Trump made no reference to any of the risks (environmental or economic)  
 9 posed by Argentine lemons; nor did he express confidence in the Rule’s mitigation measures; nor  
 10 did he make any observation about the ability of Argentine governmental agencies to protect  
 11 U.S. agriculture from pests. Instead President Trump suggested that he viewed allowing  
 12 importation of Argentine lemons as a bargaining chip to achieve unrelated foreign policy  
 13 objectives: “I’ll tell him [President Macri] about North Korea, and he’ll tell me about lemons. I  
 14 think that we’re going to be very favorably disposed. We’re going to be talking.”<sup>114</sup>

15 78. Four days after President Trump’s meeting with President Macri, on May 1, 2017,  
 16 APHIS announced that it would allow the Rule to take effect on May 26, 2017. But APHIS  
 17 announced a new substantive change to the Rule—namely, that “[f]or 2017 and 2018, Argentine  
 18 lemons w[ill] be imported only into the *northeastern* United States.”<sup>115</sup> The agency did not  
 19 explain why it would initially limit Argentine lemon imports to only the northeastern United  
 20 States. And APHIS suggested that it would impose that limit not through a new round of notice-

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21 <sup>112</sup> 82 Fed. Reg. 8,353, 8,353 (Jan. 25, 2017).

22 <sup>113</sup> 82 Fed. Reg. 14,987, 14,987 (Mar. 24, 2017).

23 <sup>114</sup> The White House Office of the Press Secretary, *Remarks by President Trump in Meeting with*  
 24 *President Macri of Argentina* (Apr. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/27/remarks-president-trump-meeting-president-macri-argentina>.

25 <sup>115</sup> APHIS, *APHIS Will Not Extend Stay on Import Regulations for Lemons from Northwest Argentina*  
 26 (May 1, 2017) (*APHIS Stakeholder Announcement*) (emphasis added), [https://www.aphis.usda.gov/wcm/connect/APHIS\\_Content\\_Library/SA\\_Newsroom/SA\\_Stakeholder\\_Announcements/SA\\_By\\_Date/SA-2017/SA-05/argentina-lemons?presentationtemplate=APHIS\\_Design\\_Library%2FPT\\_Print\\_Friendly\\_Stakeholder\\_Announcement](https://www.aphis.usda.gov/wcm/connect/APHIS_Content_Library/SA_Newsroom/SA_Stakeholder_Announcements/SA_By_Date/SA-2017/SA-05/argentina-lemons?presentationtemplate=APHIS_Design_Library%2FPT_Print_Friendly_Stakeholder_Announcement).  
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1 and-comment rulemaking and an amendment of the Rule, but through “finaliz[ation] [of] the  
2 operational work plan described in the final regulation.”<sup>116</sup>

3 **COUNT I**

4 **FAILURE TO DISCLOSE FOR PUBLIC COMMENT**  
5 **DATA, NOTES, OR A TRIP REPORT FOR**  
6 **THE 2015 HARVEST SEASON SITE VISIT**  
**(7 U.S.C. § 7712(b); 5 U.S.C. §§ 553(b), 706(2)(A), (D))**

7 79. Plaintiffs incorporate by reference paragraphs 1-78 as if set forth fully herein.

8 80. APHIS’s failure to disclose data, notes, a trip report, or any information  
9 whatsoever about the 2015 Harvest Season Site Visit violated duties imposed by both the PPA  
10 and the APA to permit meaningful comment on critical information that the agency relied on in  
11 deciding whether to permit importation of fruit from a pest-infested area of the world.

12 81. APHIS’s complicated systems approach regulates harvesting, production, and  
13 packinghouse procedures as a purported way of minimizing pest risk. The agency could  
14 therefore make a scientifically sound judgment about the adequacy of its proposed harvesting,  
15 production, and packinghouse procedures—particularly with regard to whether SENASA can  
16 and will effectively oversee, enforce, and comply with those procedures—*only* if it had recently  
17 visited Argentina during the harvest season and observed conditions on the ground.

18 82. APHIS did not dispute that a recent visit during the harvest season was necessary  
19 for it to carry out its statutorily mandated responsibilities. Nor did it claim that it could base its  
20 decision on the (plainly outdated) site visit that it had conducted in 2007. Instead, for the first  
21 time in the preamble to its final Rule, APHIS stated that it was relying on a site visit that it  
22 claimed to have made in June 2015.

23 83. That 2015 Harvest Season Site Visit formed a critical part of APHIS’s analysis.  
24 For example, that site visit is the only ground that APHIS invoked in the Rule for making any  
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27 <sup>116</sup> *Id.*

1 observations of harvesting conditions. And, along with the September 2016 site visit, it is the  
2 basis for APHIS's observations of production and packinghouse conditions.<sup>117</sup>

3 84. Moreover, on the basis of the 2015 Harvest Season Site Visit, APHIS rejected  
4 requests from commenters for additional harvest-concurrent data. For example, the agency  
5 stated: "The 2015 site visit occurred in June, during harvest season in Argentina. For this  
6 reason, APHIS considered a second site visit during the September/October timeframe to be  
7 sufficient."<sup>118</sup>

8 85. The 2015 Harvest Season Site Visit also was a primary basis for APHIS's  
9 conclusion that SENASA can comply with APHIS's systems approach, particularly as it applies  
10 in the harvest season—a conclusion on which the rationality of the Rule wholly depended. The  
11 agency claimed that "[t]he 2015 site visit team included several APHIS risk managers who have  
12 extensive experience in evaluating foreign production systems to determine the ability of those  
13 systems to meet requisite mitigation measures."<sup>119</sup> But the "risk managers" who purportedly  
14 traveled to Argentina in 2015 were not identified, so interested stakeholders could not verify that  
15 they possessed the expertise needed to conduct a proper investigation. Furthermore, interested  
16 stakeholders were prevented from seeing a report or other information on what the site visit team  
17 found or what conclusions the team drew from those findings, even though SENASA's ability  
18 and commitment to ensuring that the complicated systems approach is fully and effectively  
19 implemented was a critical factor in APHIS's decision to issue the final Rule.

20 86. In addition, the agency stated that "[t]he 2015 site visit was a technical review of  
21 Argentina's program" and that "the 2015 site visit specifically evaluated SENASA's oversight of  
22 the Argentine production system for lemons to determine whether the provisions of the systems  
23 approach could be implemented and maintained."<sup>120</sup> Given the serious concerns presented about  
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25 <sup>117</sup> Ex. 1 at 94,217, 94,218.

26 <sup>118</sup> *Id.* at 94,218.

27 <sup>119</sup> *Id.* at 94,219.

28 <sup>120</sup> *Id.* at 94,219, 94,221.



1 SENASA's capability and willingness to implement a systems approach, as well as the fact that  
2 the Rule relies heavily on the unchecked discretion of SENASA to carry out that approach,  
3 APHIS's supposed judgments about SENASA in 2015 were critical. The 2015 Harvest Season  
4 Site Visit information supposedly underlying those judgments should have been made available  
5 in a timely fashion to interested stakeholders for evaluation and comment.

6 87. Finally, APHIS acknowledged in the preamble to the Rule that "information  
7 gathered during [the 2015 Harvest Season Site Visit] was used to update the [Pest Risk  
8 Assessment]"—a significant document in APHIS's analysis—although the Pest Risk Assessment  
9 itself makes no reference to the 2015 Harvest Season Site Visit.<sup>121</sup> Information used to update  
10 the Pest Risk Assessment is clearly important in evaluating APHIS's conclusions regarding the  
11 risk of introducing plant pests through shipments of Argentine lemons. Yet that information was  
12 withheld from interested stakeholders.

13 88. Despite this crucial reliance on the 2015 Harvest Season Site Visit—and in the  
14 face of numerous requests by interested parties for the data or other information from that visit—  
15 APHIS never published a corresponding trip report or any other information. Nor did it provide  
16 such a report (or any other documentation) in response to the Council's FOIA request—despite  
17 acknowledging that the agency had materials that appeared responsive to that request.

18 89. Because APHIS failed to provide a trip report or other documentation relating to  
19 the 2015 Harvest Season Site Visit prior to promulgating the Rule, Plaintiffs and other parties  
20 were denied access to critical information and were precluded from commenting on a central  
21 aspect of the rulemaking.

22 90. APHIS's failure to disclose data, information, or a trip report for the 2015 Harvest  
23 Season Site Visit violated the agency's obligation under the PPA to use "processes" that are  
24 "transparent and accessible" in issuing regulations regarding import restrictions.<sup>122</sup>

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26 <sup>121</sup> *Id.* at 94,218.

27 <sup>122</sup> 7 U.S.C. § 7712(b).

91. APHIS’s failure to disclose data, information, or a trip report for the 2015 Harvest Season Site Visit also violated a duty “[i]ntegral to [the APA’s] notice requirement”: the “duty [of an agency] to ‘identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.’”<sup>123</sup> As the Ninth Circuit has explained, “[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”<sup>124</sup>

92. APHIS’s failure to disclose any information relating to the 2015 Harvest Season Site Visit also was inexplicably inconsistent with the agency’s decision to disclose publicly the 2016 trip report and to make it available for public comment. That inconsistent decisionmaking independently violates the APA.<sup>125</sup>

93. APHIS’s refusal to conduct a site visit during the 2017 harvest season before lifting the import ban was arbitrary and capricious in light of APHIS’s own observations during the September 2016 visit that three out of four packinghouses that APHIS visited were still under construction and required infrastructure, and that further “verification of all safeguarding measures” would therefore be needed. APHIS could not possibly have verified operation of its “systems approach” during the 2015 Harvest Season Site Visit because APHIS had not yet articulated what measures would be required at that time and because necessary construction at the packinghouses had not been completed. APHIS’s reliance on the 2015 Harvest Season Site Visit in lieu of a visit during the 2017 harvest season was therefore unreasonable.

94. At a minimum, APHIS violated duties of reasoned decisionmaking in failing to explain why it rejected reasonable alternatives to an immediate lifting of the import ban—such as

<sup>123</sup> *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

<sup>124</sup> *Id.*; see also 5 U.S.C. § 553(b)-(c) (notice-and-comment requirements); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1402-04 (9th Cir. 1995) (agency’s failure to disclose for comment a report “central” to agency action that “contained key [relied-upon] data” made its decision “‘without observance of procedure required by law’” (quoting 5 U.S.C. § 706(2)(D))).

<sup>125</sup> See *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (under the APA, “[a] long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently”).

conducting another site visit (during harvest season) before issuing a Rule, as APHIS's own site trip team in 2016 had suggested as a possibility.<sup>126</sup>

95. For the foregoing reasons, the Rule must be vacated under the APA because APHIS's action in promulgating the Rule was "arbitrary [and] capricious" and "not in accordance with law," and because APHIS failed to observe a "procedure required by law" as more specifically articulated in the PPA.<sup>127</sup>

## COUNT II

### **FAILURE TO CONSIDER PROPERLY SENASA'S FAILED HISTORY, ALONG WITH UNJUSTIFIED RELIANCE ON AN UNDISCLOSED, INCOMPLETE OPERATIONAL WORKPLAN OVER WHICH SENASA HAS PRIMARY RESPONSIBILITY (7 U.S.C. § 7712(b); 5 U.S.C. §§ 553(b), 706(2)(A), (D))**

96. Plaintiffs incorporate by reference paragraphs 1-95 as if set forth fully herein.

97. The APA charges every agency with the duty to consider important aspects of the problem and to "cogently explain why it has exercised its discretion in a given manner."<sup>128</sup> This duty of reasoned decisionmaking is especially strict under the PPA, which requires that "processes used in developing regulations ... governing consideration of import requests [be] *based on sound science* and [be] *transparent and accessible*."<sup>129</sup>

98. APHIS violated this duty of reasoned decisionmaking in assessing whether SENASA is capable of complying and truly intends to comply with the systems approach. As explained, the Rule fundamentally relies on SENASA's supposed capability and commitment.

<sup>126</sup> See, e.g., *American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("reasoned decisionmaking requires" agencies to consider "reasonable alternatives").

<sup>127</sup> 5 U.S.C. § 706(2)(A), (D).

<sup>128</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983); see also, e.g., *id.* at 43-44 ("Normally, an agency rule would be arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem."); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) ("Deference is not owed when the agency has completely failed to address some factor[,] [the] consideration of which was essential to [making an] informed decision." (internal quotation marks omitted)).

<sup>129</sup> 7 U.S.C. § 7712(b) (emphases added).

APHIS unreasonably rejected public comments that SENASA would not be effective in this regard,<sup>130</sup> despite SENASA's past failures to report outbreaks, to align its scientific judgment regarding pests with APHIS, and to prevent citrus—including lemons—with symptoms of Citrus Black Spot from being exported to the EU. These failures are the best evidence of SENASA's expected performance, particularly given that APHIS has not released any details about the 2015 Harvest Season Site Visit that—according to APHIS—show that SENASA has moved beyond its dismal track record.

99. Moreover, whether SENASA can and will comply with the systems approach depends crucially on what the systems approach demands of SENASA. APHIS thus could properly evaluate SENASA's effectiveness only by *first* defining the system approach's scope. APHIS failed to do so, however, by leaving important aspects of the systems approach contingent on finalization of an operational workplan, a document “contain[ing] details that are necessary for day-to-day operations needed to carry out provisions of the rule and [the Risk Management Document]” for which SENASA is largely responsible.<sup>131</sup> Indeed, the undated, unsigned workplan disclosed by USDA on May 16, 2017 confirms that SENASA (in connection with private entities) will have primary responsibility for implementing the systems approach.

100. For example, the lack of a finalized operational workplan precluded proper evaluation of SENASA's capabilities and intent with regard to the following workplan-dependent requirements: “export protocols,” also known as “the conditions for export,” which SENASA “must ensure that growers are following”;<sup>132</sup> how exactly “lemons are evaluated for color and graded as part of packinghouse procedures,” which is a determination “made by

<sup>130</sup> Ex. 1 at 94,218; *see also, e.g., id.* at 94,221-94,222, 94,227.

<sup>131</sup> *Id.* at 94,222; *see also* 7 C.F.R. § 319.56–76(a)(1) (“[SENASA] must provide an operational workplan to APHIS that details the activities that [SENASA] and places of production and packinghouses registered with [SENASA] will, subject to APHIS’ approval of the workplan, carry out to meet the requirements of this section. The operational workplan must include and describe the specific requirements as set forth in this section. APHIS will be directly involved with [SENASA] in monitoring and auditing implementation of the systems approach.” (emphasis added)).

<sup>132</sup> Ex. 1 at 94,222.

1 graders employed by SENASA”;<sup>133</sup> “trapping requirements,” for which SENASA must ensure  
 2 compliance;<sup>134</sup> and, more generally, SENASA’s “standard operating procedures.”<sup>135</sup>

3 101. As further explained above, an agency has a fundamental duty under the APA to  
 4 ““identify and make available ... data that it has employed in reaching the decisions to propose  
 5 particular rules”” so that the public can comment.<sup>136</sup> The PPA similarly requires that APHIS, in  
 6 issuing regulations regarding import restrictions, use “processes” that are “transparent and  
 7 accessible.”<sup>137</sup>

8 102. APHIS violated these duties to disclose essential data and information when it  
 9 failed to provide stakeholders with any form of the operational workplan on which they could  
 10 comment during the rulemaking. Because the operational workplan is essential to evaluating  
 11 SENASA’s ability and willingness to comply with the systems approach—as well as to  
 12 evaluating whether the systems approach will be effective as a general matter—the APA and  
 13 PPA require that the public have notice of, and be able to comment on, the plan’s specific  
 14 requirements. Nevertheless, APHIS disregarded comments requesting that the workplan, in  
 15 whole or in part or in draft or in final form, be made accessible for public comment.<sup>138</sup>

16 103. A concrete example of how APHIS apparently intends to use the operational  
 17 workplan as a backdoor around notice-and-comment requirements and proper evaluation of the  
 18 systems approach is the agency’s sudden, unexplained change with regard to Medfly trapping  
 19 requirements. The Risk Management Document mandates that Medfly trapping must occur “at

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20 <sup>133</sup> *Id.* at 94,224.

21 <sup>134</sup> *Id.* at 94,226; *see also* 7 C.F.R. § 319.56-76(b)(3).

22 <sup>135</sup> Ex. 1 at 94,224.

23 <sup>136</sup> *Kern*, 450 F.3d at 1076 (“An agency commits serious procedural error when it fails to reveal portions  
 24 of the technical basis for a proposed rule in time to allow for meaningful commentary.”); *see also* 5  
 25 U.S.C. § 553(b)-(c) (notice-and-comment requirements); *Idaho Farm Bureau*, 58 F.3d at 1402-04  
 26 (agency’s failure to disclose for comment a report “central” to agency action that “contained key [relied-  
 upon] data” made its decision ““without observance of procedure required by law”” (quoting 5 U.S.C.  
 § 706(2)(D)).

27 <sup>137</sup> 7 U.S.C. § 7712(b).

28 <sup>138</sup> Ex. 1 at 94,222, 94,224.

1 least 1 year before harvest and continu[e] throughout the year.”<sup>139</sup> Yet APHIS, in its 2016 trip  
 2 report, indicated that the operational workplan will move the goal posts: “Under the proposed  
 3 mitigations in the draft workplan, production sites must have fruit fly trapping programs in place  
 4 for 180 days (6 months) prior to export.”<sup>140</sup> The Rule itself does not remark upon this change in  
 5 position, even though the Council asked for an explanation of the inconsistency.<sup>141</sup> APHIS  
 6 presumably believes it can alter such an important mitigation measure without stakeholder input  
 7 and without explanation because the Rule stipulates that “[p]laces of production must trap for  
 8 [Medfly] in accordance with the operational workplan.”<sup>142</sup> But the APA and PPA demand more.

9 104. Moreover, APHIS recently announced that, through the operational workplan, the  
 10 agency will amend the Rule to limit importation to northeastern ports in the United States for the  
 11 first two years of the Rule.<sup>143</sup> This change further illustrates just how important the specific  
 12 provisions of the workplan are in evaluating the Rule, the risks the Rule creates for pest  
 13 introduction, and SENASA’s ability to mitigate those risks effectively. The operational  
 14 workplan can and will be used by APHIS to effect massive changes in the Rule; notice and  
 15 comment on the workplan is thus necessary to ensure that fundamental aspects of the Rule can be  
 16 meaningfully reviewed by interested stakeholders, such that their input can be heard by APHIS  
 17 *before* the agency takes major actions affecting the public.

18 105. Furthermore, apart from the agency’s use of the workplan to make substantial  
 19 changes to the Rule, APHIS’s failures of reasoned decisionmaking and disclosure with regard to  
 20 SENASA’s effectiveness and the finalized operational workplan are problematic given the gaps  
 21 and ambiguities in the Rule. For example, 7 C.F.R. § 319.56–76(c)(4)(ii) provides that, if a  
 22 single mite is found on a lemon during packinghouse inspection, the place of production that

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23 <sup>139</sup> Ex. 3 at 5.

24 <sup>140</sup> *2016 Trip Report* at 8.

25 <sup>141</sup> Comments of U.S. Citrus Science Council on 2016 Trip Report at 4.

26 <sup>142</sup> 7 C.F.R. § 319.56–76(b)(3).

27 <sup>143</sup> *See APHIS Stakeholder Announcement*. Despite this announcement, the undated, unsigned workplan  
 28 shared by USDA on May 16, 2017 does not contain an express northeastern import limitation.

1 produced the affected consignment of lemons “*may be* suspended from the export program,  
 2 pending an investigation.” (emphasis added). This provision leaves fundamental details  
 3 unexplained, such as who decides whether to suspend the offending place of production and on  
 4 what basis the decider evaluates the issue. The same vagueness appears in 7 C.F.R. § 319.56–  
 5 76(c)(4)(iii), which provides that, if a single immature Medfly is found, the place of production  
 6 “*may be* suspended from the export program, pending an investigation.” (emphasis added). By  
 7 leaving open major questions about these provisions and others—and by not providing notice of  
 8 and comment on the ultimate answers prior to promulgation of the Rule—APHIS compounded  
 9 its failures to notify the public and to consider SENASA’s capability and intent to comply with  
 10 the systems approach during the rulemaking proceeding.

11 106. The Rule must therefore be vacated under the APA because APHIS’s action in  
 12 promulgating the Rule was “arbitrary [and] capricious” and “not in accordance with law,” and  
 13 because APHIS failed to observe a “procedure required by law” as more specifically articulated  
 14 in the PPA.<sup>144</sup>

### 15 COUNT III

#### 16 **FAILURE TO USE NOTICE AND COMMENT PROCEDURES TO AMEND, AND** 17 **FAILURE TO PROVIDE REASONED DECISIONMAKING IN AMENDING, THE** 18 **RULE TO RESTRICT IMPORTATION TO NORTHEASTERN PORTS** (7 U.S.C. § 7712(b); 5 U.S.C. §§ 553, 706(2)(A), (D))

19 107. Plaintiffs incorporate by reference paragraphs 1-106 as if set forth fully herein.

20 108. APHIS violated its duty to use notice-and-comment procedures to amend its  
 21 regulations when it announced, on the cusp of the Rule taking effect, that, “[f]or 2017 and 2018,  
 22 Argentine lemons w[ill] be imported only into the *northeastern* United States.”<sup>145</sup> The decision  
 23 to limit the ports through which lemons may be imported was a legislative or substantive rule—  
 24 an agency action that “adopts ‘a new position inconsistent with’ an existing regulation or  
 25 effect[ing] ‘a substantive change in the regulation [for which] notice and comment are

26 <sup>144</sup> 5 U.S.C. § 706(2)(A), (D).

27 <sup>145</sup> *APHIS Stakeholder Announcement* (emphasis added).



required.”<sup>146</sup> Before modifying its regulations in this way, the APA required the agency to notify the public, solicit comments, and reasonably explain the basis for its decision.<sup>147</sup> Indeed, in this case, the substance of APHIS’s decision itself is unclear. Does APHIS intend that the lemons that are imported into the *northeastern* United States will be precluded from distribution elsewhere in the country, notably to citrus-growing areas?

109. APHIS’s change of heart suggests that, contrary to the agency’s declarations in the Rule, APHIS now has concerns about allowing Argentine lemons into California—for example, due to the region’s climate and prevalence of residential citrus—notwithstanding the Rule’s mitigation measures. Such concerns cast doubt on the Rule itself: Does the agency now disbelieve its own assurances that Argentine lemons pose no threat to Californian and other domestic lemon growers? Do agency experts disagree with the agency’s public statements? If not, why suddenly limit Argentine lemon imports to northeastern ports? Had the agency used the proper notice-and-comment procedures to amend the Rule, the public would not be forced to guess at answers to these critical questions. Moreover, APHIS’s silence on these issues itself suggests that the agency acted arbitrarily.<sup>148</sup>

110. APHIS’s surprise announcement of its intent to delay implementation of the full Rule deprived the public of access to the agency’s data and reasons for thinking that only the northeastern United States is ready to receive imports of Argentine lemons, and also deprived the

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<sup>146</sup> *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995)); *see also W.C. v. Bowen*, 807 F.2d 1502, 1504-05 (9th Cir. 1987) (determining agency action was a substantive rule because “[i]t changed existing policy” that “affect[ed] existing rights” and thus was invalid because agency had acted without notice and comment).

<sup>147</sup> 5 U.S.C. § 553.

<sup>148</sup> *See Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981) (“[A]n agency must provide a reasoned explanation for any failure to adhere to its own precedents. ... ‘[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.’” (citation omitted)); *see also State Farm*, 463 U.S. at 42 (“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”); *id.* at 43 (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”).



public of an opportunity to explain to the agency why it is arbitrary and unreasonable for the agency to take only half-measures when the agency's own lingering concerns require that Argentine lemons be banned from importation anywhere in the United States. The agency's last-minute reversal was procedurally improper and arbitrary and capricious; that action requires that the Rule be vacated in its entirety.

**COUNT IV**  
**FAILURE TO PROVIDE REASONED DECISIONMAKING**  
**IN MULTIPLE RESPECTS**  
**(5 U.S.C. § 706(2)(A))**

111. Plaintiffs incorporate by reference paragraphs 1-110 as if set forth fully herein.

112. As explained above, the APA requires that each agency consider important aspects of the problem and “cogently explain why it has exercised its discretion in a given manner.”<sup>149</sup> This duty of reasoned decisionmaking is especially strict under the PPA given the statute's mandate that “processes used in developing regulations ... governing consideration of import requests [be] *based on sound science* and [be] *transparent and accessible*.”<sup>150</sup> APHIS's promulgation of the Rule violated the APA's duty of reasoned decisionmaking and the PPA's requirements in multiple respects, including but not limited to those detailed in Parts A-C.

**A**  
**FAILURE OF REASONED DECISIONMAKING**  
**WITH REGARD TO CITRUS BLACK SPOT**  
**(5 U.S.C. § 706(2)(A))**

113. Commenters identified for APHIS at least three recent developments regarding Citrus Black Spot raising new concerns that the disease could be transmitted via commercial fruit

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<sup>149</sup> *State Farm*, 463 U.S. at 48; *see also, e.g., id.* at 43-44 (“Normally, an agency rule would be arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem.”); *Nat'l Wildlife Fed'n*, 422 F.3d at 798 (“Deference is not owed when the agency has completely failed to address some factor[,] [the] consideration of which was essential to [making an] informed decision.” (internal quotation marks omitted)).

<sup>150</sup> 7 U.S.C. § 7712(b) (emphases added).

in ways not previously understood by APHIS. APHIS's responses to these important developments are cursory and do not reflect reasoned decisionmaking.

114. First, in 2014, the EFSA published a peer-reviewed scientific opinion concluding that the risk of entry of the causal agent of Citrus Black Spot is "moderately likely for citrus fruit without leaves."<sup>151</sup> The EFSA is a European agency that was set up in 2002 "following a series of food crises in the late 1990s to be a source of scientific advice and communication on risks associated with the food chain."<sup>152</sup> It relies on a scientific committee, made up of leading scientists, as well as outside experts, to conduct its scientific work.<sup>153</sup>

115. APHIS's Pest Risk Assessment does not even *mention* the 2014 EFSA report. And although the preamble to the final Rule does reject the EFSA report's finding, it does not provide a reasoned basis for doing so. Instead, it simply restates APHIS's 2010 analysis that "pycnidiospores, the asexual phase, do not play a significant role in the disease cycle" and so, fruit cannot be a significant pathway for the transmission of Citrus Black Spot.<sup>154</sup> At no point in any rulemaking document did APHIS grapple with the specific mechanism that EFSA had identified by which pycnidiospores *could* play a significant role in spreading Citrus Black Spot—splash dispersal of pycnidiospores from discarded fruit or fruit peels onto nearby citrus plants. Recapitulating an older determination without analyzing how that determination fares in light of an expert foreign agency's more recent, comprehensive, and peer-reviewed finding to the contrary does not fulfill APHIS's obligation to base its decision on "sound science."<sup>155</sup>

<sup>151</sup> 2014 EFSA Report at 1. The EFSA has since confirmed its findings after taking into account new publications. *E.g.*, 2016 EFSA Report at 1, 4-5.

<sup>152</sup> EFSA, *About EFSA* (last visited Mar. 15, 2017), <https://www.efsa.europa.eu/en/aboutefsa>.

<sup>153</sup> *Id.*

<sup>154</sup> Ex. 1 at 94,223; *see also, e.g., id.* at 94,221 (APHIS contending no developments related to CBS matter because it "disagree[s] with the EU regarding the transmissibility of CBS via commercially produced fruit").

<sup>155</sup> *See* 7 U.S.C. §§ 7711(b), 7712(b) ("[P]rocesses used in developing regulations ... governing consideration of import requests [must be] based on *sound science*." (emphasis added)).

116. *Second*, from 2012 to 2015, there have been 45 interceptions of Argentine citrus shipments to the European Union with symptoms of Citrus Black Spot, 28 of which were lemon shipments. These detections of Citrus Black Spot are flatly inconsistent with APHIS's statement in the Pest Risk Assessment that "SENASA has been successfully overseeing the production of lemons to the EU for numerous years with no notable compliance issues."<sup>156</sup> They are also inconsistent with APHIS's claim in the Risk Management Document that "SENASA already has an adequate monitoring program in effect that is used for citrus export into the European Union."<sup>157</sup>

117. *Third*, in 2010, there was an outbreak of Citrus Black Spot in Florida. In the Rule, APHIS summarily dismisses this outbreak, noting that "[t]he spread of [Citrus Black Spot] within Florida could have occurred through a pathway other than fruit," such that it "is not in itself indicative of errors in the [agency's] 2010 [determination]" that fruit is not a significant pathway for the transmission of Citrus Black Spot.<sup>158</sup> This back-of-the-hand treatment of the issue does not reflect reasoned decisionmaking. As an initial matter, APHIS concedes that Citrus Black Spot can be transmitted via fruit.<sup>159</sup> Moreover, the agency's premise is flawed because the Florida outbreak does not stand alone: It stands with the EFSA's recent findings and with the multiple interceptions in the EU since 2012 of Argentine citrus shipments having symptoms of Citrus Black Spot. APHIS's failure to meaningfully engage with the Florida outbreak represents a failure to explain its decisionmaking in a reasoned manner.

118. APHIS's failures to reevaluate its past assessment of Citrus Black Spot was all the more significant because the agency conceded that after-the-fact measures were unlikely to

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<sup>156</sup> Ex. 2 at 9 (citing sources from 2007 and earlier).

<sup>157</sup> Ex. 3 at 7.

<sup>158</sup> Ex. 1 at 94,223.

<sup>159</sup> *E.g., id.* at 94,222 ("The [Pest Risk Assessment] acknowledges that [Citrus Black Spot] could follow the pathway, and is a quarantine pest.").

1 contain Citrus Black Spot; the agency’s analysis rested only on the supposed “[in]ability” of  
 2 Citrus Black Spot “to become established via fruit” in the first place.<sup>160</sup>

3 119. Because APHIS failed to meaningfully address recent and significant  
 4 developments regarding Citrus Black Spot, APHIS’s promulgation of the Rule was arbitrary,  
 5 capricious, an abuse of discretion, and otherwise not in accordance with the law.

## 6 B

### 7 FAILURE OF REASONED DECISIONMAKING 8 WITH REGARD TO RESIDENTIAL 9 CITRUS TREES IN CALIFORNIA 10 (5 U.S.C. § 706(2)(A))

11 120. During the rulemaking, commenters emphasized a key concern that APHIS  
 12 ignored in its original risk assessment: that Southern California contains an unusually large  
 13 amount of residential citrus that could provide ample host material for pests carried on imported  
 14 Argentine lemons, and thus that lifting the ban would have devastating consequences for  
 15 California citrus.<sup>161</sup> There are more than 2.3 million citrus trees in residential settings across the  
 16 counties of Los Angeles, Orange, and San Diego (and Central California is also home to a large  
 17 number of residential citrus trees).<sup>162</sup> Commenters warned that pests could move easily from  
 18 imported Argentine lemons to these residential citrus trees and thereby gain a foothold in the  
 19 center of agriculture in the United States. Indeed, California has recently been beset by many  
 20 pest and disease outbreaks, such as an outbreak of Huanglongbing disease (also known known as  
 21 citrus greening disease), in part due to the prevalence of residential citrus in the area.<sup>163</sup>

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22 <sup>160</sup> *Id.* at 94,223.

23 <sup>161</sup> *See* Comments of U.S. Citrus Science Council at 7.

24 <sup>162</sup> *Id.*

25 <sup>163</sup> *Id.* at 7-8; *see also* California Department of Food and Agriculture, *Asian Citrus Psyllid and*  
 26 *Huanglongbing (HLB)*, at 2, 12, 15 (Feb. 2, 2016) (“California’s iconic citrus is at risk,” including the  
 27 residential citrus located in “[o]ver 70% of Californians['] ... backyards,” because of Asian Citrus Psyllid  
 28 and Huanglongbing disease, the latter of which “was initially found at a residential property”),  
<http://www.montecitoassociation.org/sites/default/files/community/issues/Psyllid%20Presentation%20CDFA.pdf>.

121. APHIS categorically dismissed this concern in the Rule—based on a deeply flawed analysis, as described below. But then, just this month, on the heels of the Rule’s effective date, APHIS has apparently retreated from its prior flawed analysis of California residential citrus in a surprise post-Rule announcement that, “[f]or 2017 and 2018, Argentine lemons w[ill] be imported only into the *northeastern* United States.”<sup>164</sup> The agency’s belated recognition of the seriousness of the problem does not, however, solve it. For one thing, there is no guarantee that residential citrus—a longstanding feature of the Californian landscape—will be any less prevalent in 2019, when the Rule is slated to go into effect nationwide. Nor has APHIS offered any other reason to believe that the agency’s concerns prompting this last-minute limitation will be abated by 2019. And temporarily delaying direct importation of Argentine lemons into California will do nothing to prevent such lemons from being imported into the northeastern United States and then shipped to California—something that will happen almost immediately, given how lemons are distributed within the domestic market.

122. APHIS’s last-minute attempt to backtrack its position is not only ineffective—it also confirms that the agency’s original analysis of the risks posed by residential citrus in California was unreasonable. In the Rule, APHIS articulated only two reasons that the agency did not need to consider the prevalence of residential citrus. But both contradict agency guidance regarding how APHIS diagnoses pest risks and prescribes mitigation measures.

123. *First*, APHIS stated that “[i]ncorporating information regarding likelihood of establishment would not have affected the pest risk ratings or the risk mitigation structure” and thus, APHIS claimed, taking account of residential citrus would not change its approach in any regard.<sup>165</sup> This rationale contradicts the Department of Agriculture’s guidelines, as well as statements in the Rule itself.<sup>166</sup> Under agency guidelines, two categories of factors contribute to

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<sup>164</sup> *APHIS Stakeholder Announcement* (emphasis added).

<sup>165</sup> Ex. 1 at 94,220.

<sup>166</sup> See USDA, *Guidelines for Plant Pest Risk Assessment of Imported Fruit & Vegetable Commodities* (2012) (*Guidelines*), [https://www.aphis.usda.gov/import\\_export/plants/plant\\_imports/process/downloads/PRAGuidelines-ImportedFruitVegCommodities.pdf](https://www.aphis.usda.gov/import_export/plants/plant_imports/process/downloads/PRAGuidelines-ImportedFruitVegCommodities.pdf).

1 risk assessment: those that measure the likelihood of introduction and those that measure the  
 2 consequences of introduction.<sup>167</sup> Both categories contain factors that would be affected by the  
 3 amount of residential citrus near ports of entry and other sites in the chain of distribution and  
 4 consumption—including wholesale distribution points, retail markets, restaurants, and travel  
 5 routes in between all these destinations—that could inadvertently disperse infected material.<sup>168</sup>  
 6 For example, the former category tracks the “[l]ikelihood of coming into contact with host  
 7 material.”<sup>169</sup> And the latter category tracks “[d]amage potential” and “[s]pread potential.”<sup>170</sup>  
 8 Each would obviously be affected by the number and location of citrus trees near areas that come  
 9 into contact with Argentine lemons, and thus the ubiquity of residential citrus in Southern  
 10 California (and Central California) is clearly relevant to evaluating and mitigating pest risk.

11 124. *Second*, APHIS stated that “both medium and high-risk pests are subject to pest-  
 12 specific mitigations beyond standard port-of-entry inspection,” such that, even if medium-risk  
 13 pests were elevated to high-risk pests based on the presence of residential citrus, the safeguards  
 14 imposed in response would not change.<sup>171</sup> This rationale also contradicts agency guidelines as  
 15 well as the Pest Risk Assessment, which contemplate that a difference in rating with regard to a  
 16 risk could make a difference in how lemons are treated. For example, the Pest Risk Assessment  
 17 states that while “[s]pecific phytosanitary measures *may* be necessary” for medium risks, such  
 18 measures are “*strongly recommended*” for high risks.<sup>172</sup> And the Pest Risk Assessment states  
 19 more generally that “[t]he appropriate risk management strategy for a particular pest depends on  
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22 <sup>167</sup> See *Guidelines* at 2-3, 20; see also Ex. 1 at 94,221 (“[T]he likelihood and consequences of quarantine  
 23 pests that could follow the pathway on lemons from northwest Argentina to the United States, in the  
 24 absence of any mitigations ... is a necessary aspect of our evaluation of the risk rating for the pests.”).

25 <sup>168</sup> See, e.g., 2014 EFSA Report at 220-22 (describing how Citrus Black Spot can spread from imported  
 26 citrus that goes to packinghouses, retail, and processing plants located near local citrus).

27 <sup>169</sup> *Guidelines* at 2-21.

28 <sup>170</sup> *Id.*

<sup>171</sup> Ex. 1 at 94,220.

<sup>172</sup> E.g., Ex. 2 at 64 (emphasis added).

the risk posed by that pest.”<sup>173</sup> Indeed, the Rule contemplates actions regarding *Brevipalpus chilensis* mites (rated high risk) that do not apply with regard to other *Brevipalpus* mites (rated medium risk).<sup>174</sup> APHIS’s assertion that the risk categorization is of no consequence thus contradicts the agency’s own reasoning elsewhere, with no explanation.

125. Because APHIS’s reasons for ignoring Californian residential citrus are inconsistent with, contradict, or depart from other agency guidance and guidelines, and because APHIS does not acknowledge or offer any reasoned basis for these inconsistencies—problems that are only highlighted by the agency’s recent backpedaling on permissible ports of importation—promulgation of the Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.<sup>175</sup>

## C

### FAILURE OF REASONED DECISIONMAKING IN PURSUING UNRELATED FOREIGN POLICY OBJECTIVES (5 U.S.C. § 706(2)(A), (C))

126. An agency decision must be set aside as arbitrary and capricious if the agency “relie[s] on factors which Congress has not intended it to consider.”<sup>176</sup>

127. The PPA makes unmistakably clear which “factors” Congress intended APHIS to consider: The agency must “reduce, to the extent practicable ... the risk of dissemination of plant pests and noxious weeds” and it must “base[.]” “decisions affecting imports ... on sound

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<sup>173</sup> *Id.*

<sup>174</sup> *E.g.*, 7 C.F.R. § 319.56–76(b)(1) (“Prior to each harvest season, registered places of production of lemons destined for export to the continental United States must be determined by APHIS and the NPPO of Argentina to be free from *B. chilensis* .... If a single live *B. chilensis* mite is discovered as a result of such sampling, the place of production will not be considered free from *B. chilensis* and will not be able to export lemons to the United States. Each place of production will have only one opportunity per harvest season to be considered free of *B. chilensis*, and certification of *B. chilensis* freedom will only last one harvest season.”).

<sup>175</sup> *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>176</sup> *State Farm*, 463 U.S. at 43; *see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007); *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).



science.”<sup>177</sup> Nothing in the Act authorizes APHIS, at the behest of the President, to convert import decisions into bargaining chips to achieve unrelated foreign policy objectives.

128. Yet that appears to be exactly what happened here. In the waning days of the Obama Administration, APHIS suddenly proposed to lift the decades-old import ban on Argentine lemons a mere month and a half after President Obama held trade talks with then-newly elected Argentine President Macri. During the rulemaking, Argentine officials expressly advocated for lifting the ban in order to “reinforce the position of President Macri[]” and improve U.S.-Argentine relations.<sup>178</sup> After taking office and while sitting next to President Macri in the Oval Office, President Trump linked the decision to permit importation of Argentine lemons to extraneous foreign policy negotiations. And only four days later, APHIS announced that it would permit the Rule to take effect. The timing of the agency’s decisions and President Trump’s own statements indicate that APHIS based its decision not on science—and certainly not on science alone (as Congress intended)—but on extra-statutory political factors.

129. Because the agency acted based on factors that Congress did not intend it to consider, the Rule must be vacated as arbitrary and capricious and contrary to law.

## COUNT V

### FAILURE TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (5 U.S.C. § 706(2)(A), (D); 42 U.S.C. § 4332)

130. Plaintiffs incorporate by reference paragraphs 1-129 as if set forth fully herein.

131. Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the implementing regulations issued by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500.1 *et seq.*, require Federal agencies to prepare (and solicit comments on) an Environmental Impact Statement for all major Federal actions significantly affecting the human environment or prepare an Environmental Assessment if the proposed action is neither

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<sup>177</sup> 7 U.S.C. § 7701(3), (4).

<sup>178</sup> Comments of Argentine Minister of Agroindustry Ricardo Buryaile at 1.



1 categorically excluded from the requirement to produce an Environmental Impact Statement nor  
2 would clearly require the production of an Environmental Impact Statement.<sup>179</sup>

3 132. As explained above and as demonstrated in the administrative record, introducing  
4 various plant pests and diseases on lemons from Argentina into the United States would have  
5 serious consequences for the human environment. APHIS, however, did not prepare an  
6 Environmental Impact Statement or an Environmental Assessment for the Rule.

7 133. APHIS's failure to prepare an Environmental Impact Statement or Environmental  
8 Assessment violated NEPA and the implementing regulations, and the agency thereby acted  
9 without observance of procedure required by law or otherwise not in accordance with the law.

## 10 COUNT VI

### 11 FAILURE TO CONDUCT 12 A PROPER ECONOMIC ANALYSIS (5 U.S.C. § 706(2)(A), (D); 5 U.S.C. § 604)

13 134. Plaintiffs incorporate by reference paragraphs 1-133 as if set forth fully herein.

14 135. The Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, requires agencies to  
15 prepare a final regulatory flexibility analysis that states "the significant issues raised by the  
16 public comments in response to the initial regulatory flexibility analysis" and "the assessment of  
17 the agency of such issues."<sup>180</sup> This analysis must "demonstrate a 'reasonable, good-faith effort'  
18 to fulfill [the Regulatory Flexibility Act's] requirements."<sup>181</sup> "[R]easonable regulation,"  
19 moreover, "ordinarily requires paying attention to the advantages *and* the disadvantages of  
20 agency decisions."<sup>182</sup>

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23 <sup>179</sup> See 40 C.F.R. § 1500.4; *see also* *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

24 <sup>180</sup> 5 U.S.C. § 604(a)(2).

25 <sup>181</sup> *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d  
26 1078, 1101 (9th Cir. 2005), *as amended* (Aug. 17, 2005) (quoting *U.S. Cellular Corp. v. FCC*, 254 F.3d  
27 78, 88-89 (D.C. Cir. 2001)); *see also* *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 114 (1st  
28 Cir. 1997) ("Congress, in enacting section 604, intended to compel administrative agencies to explain the  
bases for their actions.").

<sup>182</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

136. APHIS failed to provide a reasoned explanation of its assessment of a number of significant economic issues raised in public comments. For example, APHIS received evidence that it dramatically underestimated the volume of lemons Argentina can and will export into the United States under the Rule.<sup>183</sup> This evidence included the statement of José Carbonell of the Argentine Citrus Federation that Argentina’s lemon industry’s “aim is to start off with prudent volumes, perhaps between 20,000 and 30,000 tonnes so as not to generate any adverse reaction from our Californian counterparts.”<sup>184</sup> It also includes an analysis from an expert economist that “Argentina has the potential to export around 100,000 metric tons more of fresh lemons than it has in recent years ... , [such that] [i]t is reasonable to expect a minimum of 25,000 metric tons of exports from Argentina for the U.S. market in the first season and easily as much as 50,000 tons and more in subsequent years.”<sup>185</sup>

137. APHIS’s final regulatory flexibility analysis concludes, in contrast, that “Argentina’s fresh lemon exports to the United States are expected to range from 15,000 MT to 20,000 MT, with 18,000 MT the most likely quantity.”<sup>186</sup> Although the analysis summarily lists some of the contrary evidence and arguments raised in public comments, it does not address these points specifically.<sup>187</sup> Instead, the agency states in conclusory fashion that its estimated range is “based on Argentina’s historical level of lemon exports,” citing the Pest Risk Assessment and the Risk Management Document for this historical assessment.<sup>188</sup> But the Risk Management Document does not discuss quantity of imports at all. And the Pest Risk

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<sup>183</sup> Comments of U.S. Citrus Science Council at 35; Comments of Sunkist at 6-8.

<sup>184</sup> U.S. Citrus Science Council at 35 (quoting Maura Maxwell, *Argentina Celebrates US Lemon Deal*, America Fruit, May 9, 2016, <http://www.fruitnet.com/americafruit/article/168661/argentina-celebrates-us-lemon-deal>).

<sup>185</sup> *Id.*, Attachment 1 at 2-3; *see also id.*, Attachment 2 at ii (if Argentina exports just 1.9% of its total fresh lemon production to the U.S. market “this will result in a substantial adverse effect on the U.S. lemon sector and the U.S. economy of \$183 million (total loss) or more in short term sector revenues”).

<sup>186</sup> APHIS, *Final Regulatory Flexibility Analysis* at 9, <https://www.regulations.gov/document?D=APHIS-2014-0092-0423>.

<sup>187</sup> *Id.* at 30-31.

<sup>188</sup> *Id.* at 25 & n.16, 31.

Assessment offers only a conclusory estimate that “approximately 600-800 standard 40-foot shipping containers are expected annually, based on a conversion factor of 20 metric tons per 40-foot shipping container[.]”—a range of 12,000 to 16,000 metric tons, not the range of 15,000 to 20,000 metric tons referenced in APHIS’s Final Regulatory Flexibility Analysis—without explaining the basis for that expectation.<sup>189</sup> Meanwhile, although APHIS’s Final Regulatory Flexibility Analysis itself lists a partial history of Argentina’s production of lemons,<sup>190</sup> it does not explain or assess, among other issues,<sup>191</sup> how these historical levels translate into APHIS’s predicted range of lemons exported to the United States. In other words, not only does APHIS never explain why it credits its “historical assessment” over contrary evidence, but the agency does not even provide its historical assessment in the first place.

138. APHIS’s failure to provide a reasoned explanation regarding economic issues, including, among other things, the volume of lemons that the agency expects Argentina to export to the United States, was arbitrary and capricious and violated the Regulatory Flexibility Act. APHIS therefore promulgated the Rule without observance of procedure required by law or otherwise not in accordance with the law.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

a. Declare that the Rule violates the APA as being arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and as having been adopted without observance of procedure required by law, *id.* § 706(2)(D), and that the Rule violates the PPA’s requirement to use “processes” that are “transparent

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<sup>189</sup> Ex. 2 at 56; *see also id.* at 57.

<sup>190</sup> *Final Regulatory Flexibility Analysis* at 4-5.

<sup>191</sup> *See, e.g.,* Comments of Sunkist at 7 (“USDA’s analysis ... emphasizes that 87% of Argentina’s lemon exports go to Europe and Russia. Its reliance on that figure ignores both the economic slowdowns in Europe and Russia and Russia’s restrictive import policies, which collectively have caused lemon demand in those markets to drop by large margins. Argentina is also facing increased competition in those markets from Turkey and South Africa, and is therefore looking for new lemon export markets for its enormous production volume. Moreover, the fresh lemon industry in Argentina is growing.”).

1 and accessible,” because APHIS failed to disclose for comment notes, information, or a  
2 trip report for the 2015 Harvest Season Visit;

3 b. Declare that the Rule violates the APA as being arbitrary, capricious, an abuse  
4 of discretion, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and as  
5 having been adopted without observance of procedure required by law, *id.* § 706(2)(D),  
6 and that the Rule violates the PPA’s requirement to use “processes” that are “transparent  
7 and accessible,” because APHIS failed to rely upon a finalized operational workplan and  
8 failed to disclose for comment the draft operational workplan that it did rely upon;

9 c. Declare that the Rule violates the APA as being arbitrary, capricious, an abuse  
10 of discretion, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and as  
11 having been adopted without observance of procedure required by law, *id.* § 706(2)(D),  
12 and that the Rule violates the PPA’s requirement to use “processes” that are “transparent  
13 and accessible,” because APHIS failed to use notice-and-comment procedures in making,  
14 and failed to explain the basis for, its decision to delay importation of Argentine lemons to  
15 areas outside of the northeastern United States for the first two years of the Rule’s  
16 implementation;

17 d. Declare that the Rule violates the APA as being arbitrary, capricious, an abuse  
18 of discretion, and otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and that the  
19 Rule violates the PPA’s requirement for APHIS to base its decisions on “sound science,”  
20 because APHIS failed to engage in reasoned decisionmaking with regard to, among other  
21 issues, recent developments concerning Citrus Black Spot and the large number of  
22 residential citrus trees in Southern California;

23 e. Declare that the Rule violates the APA as having been promulgated without  
24 observance of procedure required by law and otherwise as not in accordance with law,  
25 5 U.S.C. § 706(2)(A), (D), because APHIS failed to prepare an environmental impact  
26 statement or environmental assessment, contrary to § 102 of NEPA, 42 U.S.C. § 4332, and  
27 the implementing CEQ regulations;  
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1           f. Declare that the Rule violates the APA as having been promulgated without  
2 observance of procedure required by law and otherwise as not in accordance with law,  
3 5 U.S.C. § 706(2)(A), (D), because APHIS failed to comply reasonably with the  
4 requirements imposed by the Regulatory Flexibility Act, 5 U.S.C. § 604;

5           g. Issue an order holding unlawful and setting aside the Rule and enjoining the  
6 Defendants from implementing the Rule or otherwise allowing the importation of lemons  
7 from Northwest Argentina;

8           h. Award Plaintiffs their costs, disbursements, and reasonable attorney's fees  
9 associated with this litigation pursuant to 28 U.S.C. § 2412 and other applicable authority;  
10 and,

11           i. Grant such other relief as this Court may deem just and proper.  
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1 Dated: May 17, 2017

Respectfully submitted,

2  
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