

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2009

5 (Argued: April 6, 2010 Decided: July 8, 2010)

6 Docket No. 09-2021-cv
7 -----x

8 Natural Resources Defense Council, Inc.,
9

10 Plaintiff-Appellant,
11

12 People of the State of California, Ex Rel, Attorney
13 General Bill Lockyer, State of Connecticut, State of
14 Illinois,
15

16 Consolidated-Plaintiffs-Appellants,
17

18 State of New York,
19

20 Consolidated-Plaintiff,
21

22 -- v. --
23

24 United States Department of Agriculture, Secretary
25 Thomas J. Vilsack, of Agriculture, Administrator Cindy
26 Smith, of the Animal and Plant Health Inspection Service
27 of the United States Department of Agriculture,
28

29 Defendants-Appellees.
30
31 -----x

32
33 B e f o r e : JACOBS, Chief Judge, WINTER and WALKER, Circuit
34 Judges.

35 Appeal from a judgment of the United States District Court
36 for the Southern District of New York (Lawrence M. McKenna,
37 Judge) holding that Defendants-Appellees complied with the
38 National Environmental Policy Act and the Plant Protection Act
39 when they adopted new regulations for the importation of

1 unmanufactured wood packaging material into the United States.
2 Because we conclude that Defendants-Appellees considered all
3 reasonable alternatives to the proposed rule, and did not act
4 arbitrarily or capriciously in adopting a rule providing for
5 either heat treatment or fumigation with methyl bromide of the
6 wood material prior to importation, we AFFIRM the judgment of the
7 district court.

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38 United States Attorney for the
39 Southern District of New York, New
40 York, NY, for Defendants-Appellees.
41

1 JOHN M. WALKER, JR., Circuit Judge:

2 This case concerns our national response to the significant
3 environmental threat presented by plant pests and pathogens
4 introduced into the United States through the importation of
5 solid wood packaging material ("SWPM")-including pallets, crates,
6 boxes, cases, and skids-used to support, protect, and carry
7 commodities entering the country. Exotic wood-boring insects
8 that accompany SWPM, such as the pine shoot beetle, the Asian
9 longhorned beetle, and the emerald ash borer, undisputedly pose a
10 threat to U.S. agriculture and ecotourism, and to natural,
11 cultivated, and urban forests. While the environmental impact of
12 these destructive insects is real, the United States cannot
13 address this global threat alone, and the U.S. Department of
14 Agriculture, through the Animal and Plant Health Inspection
15 Service ("APHIS"), is required to balance environmental
16 considerations, international guidelines, and global trade
17 concerns in adopting a final rule for the importation of SWPM.

18 Plaintiffs-Appellants Natural Resources Defense Council,
19 Inc. ("NRDC") and the States of California, Connecticut, and
20 Illinois (collectively, "Plaintiffs") appeal from a judgment and
21 order of the United States District Court for the Southern
22 District of New York (Lawrence M. McKenna, Judge) holding that
23 Defendants-Appellees ("Defendants") complied with the National
24 Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and

1 the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 et seq., when
2 they adopted a final rule concerning the treatment of imported
3 SWPM.¹ The final rule required that all SWPM be either heat
4 treated to a minimum wood core temperature of 56°C for a minimum
5 of 30 minutes or fumigated with methyl bromide prior to being
6 used in connection with the importation of goods into the United
7 States. Because we conclude that Defendants considered all
8 reasonable alternatives, and the environmental impact of each,
9 and did not act arbitrarily or capriciously, in adopting the
10 final rule, we affirm.

11 12 **BACKGROUND**

13 The facts of this case are largely undisputed and are set
14 forth only as they may be relevant to Plaintiffs' challenge to
15 this instance of APHIS's rulemaking. Plaintiffs claim that APHIS
16 violated the NEPA and the PPA by failing to fully consider the
17 reasonable alternative of a phased-in substitute materials
18 requirement before adopting a final rule requiring that all SWPM
19 be either heat treated or fumigated with methyl bromide prior to
20 being used in the transport of goods into the United States.

21 With the growth of international trade and the corresponding

1 ¹ The State of New York was also a Plaintiff in the underlying
2 action. See Complaint, State of N.Y. v. U.S. Dep't of Agric.,
3 No. 05-cv-8008(LMM) (S.D.N.Y. June 4, 2007). However, it did not
4 seek appellate review of the district court's March 9, 2009
5 judgment.

1 increase in the amount of pest-ridden SWPM being imported into
2 the United States, on January 20, 1999, APHIS issued an advance
3 notice of proposed rulemaking ("ANPR") that solicited public
4 comment on how to strengthen existing restrictions on the
5 importation of SWPM to control the introduction of exotic plant
6 pests into the United States. See Importation of Unmanufactured
7 Wood Articles; Solid Wood Packing Material, 64 Fed. Reg. 3049
8 (notice published Jan. 20, 2009). APHIS stated that its goal was
9 "to maximize protection of U.S. agriculture and forests against
10 exotic plant pests associated with SWPM without unduly affecting
11 international trade or the environment." Id. at 3051.

12 The ANPR set forth several possible options for protecting
13 against SWPM wood-boring insects: for example, the continued use
14 of methyl bromide; the imposition of certain treatment
15 requirements or SWPM bans on a country-by-country basis; a
16 blanket requirement that all SWPM imported into the United States
17 be heat treated, fumigated, or treated with preservatives; and a
18 complete prohibition on the importation of any form of SWPM from
19 any country. As to a complete prohibition on the importation of
20 SWPM, the ANPR stated that the "advantages of this option are
21 that it would provide the greatest protection against pest risk
22 and could eventually result in decreased use of methyl bromide
23 [an ozone-depleting chemical]. A disadvantage . . . is that it
24 could have an undesirable effect on international trade. This

1 effect could be mitigated by a phase-in period to allow shippers
2 to adjust to the prohibition” Id. In its ANPR, APHIS
3 specifically solicited public comment regarding the cost-
4 effectiveness and feasibility of, and the length of any necessary
5 phase-in period for, a prohibition on SWPM and a substitute-
6 materials-only requirement.

7 On May 20, 2003, APHIS proposed amending the existing
8 regulations for the importation of SWPM to adopt the recommended
9 guidelines approved in March 2002 by the Interim Commission on
10 Phytosanitary Measures of the International Plant Protection
11 Convention² (the “IPPC Guidelines”). See Importation of Solid
12 Wood Packing Material, 68 Fed. Reg. 27,480 (proposed May 20,
13 2003). The IPPC Guidelines called for SWPM to be either heat
14 treated or fumigated with methyl bromide, and to be stamped with
15 an internationally recognized mark indicating treatment. APHIS
16 sought to adopt the IPPC Guidelines because of an increase in
17 plant pests found in non-treated SWPM being imported into the
18 United States from locations other than China and Hong Kong, both
19 of which were already subject to an interim treatment rule on the
20 basis of their identified plant pest risk, see Solid Wood Packing
21 Material from China, 63 Fed. Reg. 50,100 (Sept. 18, 1998)

1 ² The International Plant Protection Convention (“IPPC”) is an
2 international agreement on plant health to which 173 governments,
3 including the United States, are contracting parties. See
4 <http://www.ippc.int> (last visited July 7, 2010).

1 (codified at 7 C.F.R. Pts. 319 & 354); Solid Wood Packing
2 Material from China, 63 Fed. Reg. 69,539 (amended Dec. 17, 1998)
3 (codified at 7 C.F.R. Pt. 319) ("China Interim Rule"). APHIS
4 asserted that by adopting the IPPC Guidelines, the United States
5 would be reducing pest risk while furthering its obligations
6 under Article 3 of the World Trade Organization's Agreement on
7 the Application of Sanitary and Phytosanitary Measures ("SPS
8 Agreement"), which urges Member States to base their
9 phytosanitary measures on international standards, guidelines, or
10 recommendations, where they exist, thereby harmonizing plant
11 protection standards on as wide a global basis as possible, see
12 SPS Agreement, available at
13 http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm; see
14 also 19 U.S.C. § 3511(d)(3). Finally, APHIS stated that adopting
15 the IPPC Guidelines would standardize trade requirements, because
16 China, Canada, the European Union, and many other U.S. trading
17 partners were also planning to implement the IPPC Guidelines as
18 their phytosanitary measure for the importation of SWPM.

19 In announcing the proposed rule, APHIS outlined the
20 environmental hazards presented by wood-boring insects, discussed
21 the efficacy of the heat and methyl bromide fumigation treatments
22 in the IPPC Guidelines, and indicated APHIS's intention to adopt
23 the IPPC Guidelines as its final rule. APHIS acknowledged that
24 the proposed rule would not completely eradicate all plant pest

1 risk, and a corresponding draft environmental impact statement
2 ("Draft EIS") listed reasonable alternatives to the proposed
3 rule, including, inter alia, taking no additional protective
4 action; extending the China Interim Rule to all countries;
5 instituting a comprehensive risk reduction program that would
6 employ various phytosanitary measures based upon a particular
7 country's risk of introducing pests to the United States; and
8 prohibiting all importation of SWPM and requiring the use of
9 substitute packing materials only. See APHIS, U.S. Dep't of
10 Agric., Importation of Solid Wood Packing Material, Draft
11 Environmental Impact Statement 7, 9-12 (2002).

12 The Draft EIS also noted four non-environmental factors that
13 APHIS would consider before adopting an alternative: "(1)
14 foremost, the efficacy of the alternative in mitigating risk; (2)
15 the relative costs of the alternatives/methods; (3) the differing
16 capabilities of exporting nations to comply with quarantine
17 requirements; and (4) the need for harmonization of regulatory
18 efforts among trading partner nations." Id. at 2. In discussing
19 the environmental effects of each of the identified alternatives,
20 the Draft EIS noted that the IPPC Guidelines "would result in
21 substantial reduction in risk of introduction of pests and
22 pathogens from SWPM" but "would result in the [second] greatest
23 level of anticipated adverse environmental consequences from
24 component methods because (1) it would require treatments of SWPM

1 from all countries, (2) it would result in substantial use of
2 methyl bromide, and (3) it would continue to increase the demand
3 for forest products." Id. at 10-11.

4 With respect to a prohibition on SWPM and the use of
5 substitute packing materials, the Draft EIS stated that this
6 alternative "would achieve the greatest possible reduction in
7 risk from the introduction of pests and pathogens associated with
8 SWPM," "would achieve the greatest reduction of adverse
9 environmental consequences from the use of control methods
10 (chemical and/or physical)," and "would result in diminished use
11 of wood resources, but could result in increased use of other
12 resources (e.g., ores for metal production and petroleum for
13 plastics) and energy for manufacturing processes." Id. at 12.
14 The Draft EIS further stated, however, that use of substitute
15 packing materials might be limited due to a lack of current
16 industry capability, increased expense associated with the
17 materials, and the need for a phase-in period to allow the
18 industry and developing nations to adapt to a complete
19 prohibition on SWPM. The Draft EIS emphasized that while
20 prohibiting SWPM was likely the most effective means of
21 eliminating pest risk associated with the importation of goods,
22 such a restriction might violate the SPS Agreement's stipulation
23 that any phytosanitary measures implemented by contracting
24 nations shall be no more trade-restrictive than necessary to

1 achieve the requisite level of plant protection.

2 Subsequent to the announcement of the proposed rule,
3 additional public comment, and three public hearings, APHIS
4 released a final environmental impact statement ("Final EIS") in
5 August 2003, see APHIS, U.S. Dep't of Agric., Importation of
6 Solid Wood Packing Material, Final Environmental Impact Statement
7 (2003), and a final regulatory impact analysis ("Final RIA") in
8 September 2004, see APHIS, U.S. Dep't of Agric., Regulatory
9 Impact Analysis of the Final Rule to Adopt the International
10 Standard on Wood Packing Material in International Trade (2004).
11 In the Final EIS, APHIS again emphasized the effectiveness of the
12 IPPC Guidelines in thwarting the introduction of plant pests into
13 the United States and the IPPC Guidelines' role in harmonizing
14 international phytosanitary regulations. APHIS also recognized
15 that the greatest level of plant protection would result from a
16 complete prohibition on SWPM, but explained that adopting such a
17 measure presented feasibility issues, economic hurdles, and the
18 potential that the United States would be held in violation of
19 its obligations under international trade agreements. The Final
20 EIS also noted that while the ANPR had specifically sought
21 comments regarding the amount of time the industry would need to
22 adapt to a substitute-materials-only requirement, no substantive
23 information was provided to APHIS that could contribute to
24 establishing a specific phase-out period for SWPM. As to this

1 issue of phase-out timing, APHIS stated as follows:

2 No program decision has been made as to what constitutes
3 an acceptable time period for implementation for a
4 regulatory rule of this magnitude. . . . It is difficult
5 for APHIS to specify a time period when the present
6 ability of substitute packing manufacturers to supply the
7 market indicates a need for extended growth of the
8 industry. The compliance time is particularly difficult
9 to project when the new regulations are specifically
10 directed to address packing materials from foreign
11 countries whose industries may be less able to adjust
12 readily to proposed changes. Also, any decisions made by
13 APHIS to improve phytosanitary measures against pests in
14 packing materials require international negotiations with
15 other countries to ensure their ability and concurrence
16 with the measures being considered.

17
18 Final EIS at A-5.

19 As for the capability of substitute materials to meet market
20 demands, APHIS stated that "current projections indicate that the
21 increase in use of substitute packing materials could constitute
22 no more than 10 to 15 percent of the total market in the next
23 several years." Id. at 89. In the Final RIA, APHIS estimated
24 that substitute packing materials constituted no more than five
25 percent of the packing market and presented certain logistical
26 and economic limitations that made their widespread acceptance
27 unlikely. See Final RIA at 18, 20-21.

28 On September 16, 2004, APHIS issued a final rule adopting
29 the IPPC Guidelines and mandating either heat treatment or
30 fumigation with methyl bromide for all SWPM used in connection
31 with the importation of goods into the United States, effective
32 September 16, 2005. See Importation of Solid Wood Packaging

1 Material, 69 Fed. Reg. 55,719 (Sept. 16, 2004) (codified at 7
2 C.F.R. pt. 319). APHIS chose the IPPC Guidelines because "they
3 represent the current international standard determined . . . to
4 be necessary and effective for controlling pests in SWPM," and
5 because adopting them "would simplify and standardize trade
6 requirements." Id. at 55,719. In summarizing its response to
7 public comment on the rule, APHIS noted that some commenters
8 urged APHIS to phase out SWPM in favor of substitute packing
9 materials on the basis that this alternative was the least
10 harmful to the environment. APHIS stated that it would continue
11 to work with IPPC members to develop alternative treatments to
12 using ozone-depleting methyl bromide, but that the chosen
13 treatments were currently the most technically and economically
14 feasible methods of responding to the plant pest problem.

15 On September 15, 2005, the NRDC and the Plaintiff-States
16 sued APHIS in separate actions, each asserting violations of
17 section 102 of the NEPA, 42 U.S.C. § 4332, and section 412 of the
18 PPA, 7 U.S.C. § 7712, and seeking judicial relief in accordance
19 with section 10(e) of the Administrative Procedure Act ("APA"), 5
20 U.S.C. § 706(2) (A), (C), & (D). After the district court
21 consolidated the cases, the parties filed cross-motions for
22 summary judgment, and on June 4, 2007, the district court granted
23 in part and denied in part both Plaintiffs' and Defendants'

1 motions.³ The district court characterized Plaintiffs' challenge
2 as "the failure of APHIS to properly consider and weigh an
3 unadopted alternative to heat treatment or fumigation with methyl
4 bromide: a phased transition away from raw wood pallets and
5 crates, replacing them with packing materials made of substitute
6 materials, such as processed wood, fiberboard, plywood, and
7 plastics, that are impervious to the insect pests." Natural Res.
8 Def. Council, Inc. v. U.S. Dep't of Agric., Nos. 05 Civ. 8005 &
9 05 Civ. 8008, 2007 WL 1610420, at *1 (S.D.N.Y. June 4, 2007)
10 (internal quotation marks omitted). The district court noted
11 that Plaintiffs did not seek to have the final rule overturned;
12 rather, they sought to have the district court "order APHIS to
13 reconsider its environmental impact analysis in light of its
14 obvious defects and then to revise the rule as appropriate based
15 on any supplemental findings." Id. (internal quotation marks
16 omitted). The district court rejected Plaintiffs' challenge
17 under the NEPA, concluding that APHIS adequately considered the
18 environmental impact of the proposed rule and four alternatives,
19 including a phased-in substitute-materials-only alternative. Id.
20 at *6. The district court also rejected Plaintiffs' challenge
21 that Defendants violated the PPA by failing to adopt the

1 ³ The district court granted Plaintiffs' motion only with
2 respect to their challenge that the final EIS underestimated the
3 amount of ozone-depleting methyl bromide that would be released
4 into the atmosphere under the rule. That issue, now resolved, is
5 not a part of this appeal.

1 alternative that would most effectively reduce the introduction
2 of plant pests into the United States. Id. at *4-5.

3 This appeal followed.
4

5 DISCUSSION

6 We review the district court's ruling on cross-motions for
7 summary judgment de novo, in each case construing the evidence in
8 the light most favorable to the non-moving party. See Fund for
9 Animals v. Kempthorne, 538 F.3d 124, 131 (2d Cir. 2008). Our
10 review under the APA is limited, however, and we may disturb
11 agency action if, inter alia, it was "arbitrary, capricious, an
12 abuse of discretion, or otherwise not in accordance with the
13 law," in excess of the agency's statutory jurisdiction or
14 authority, or "without observance of procedure required by law."
15 5 U.S.C. § 706(2) (A), (C), & (D). In reviewing an agency's
16 rationale for adopting a particular rule, "we must be satisfied
17 that the agency examined the relevant data and established a
18 'rational connection between the facts found and the choice
19 made.'" Fund for Animals, 538 F.3d at 132 (quoting Motor Vehicle
20 Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43
21 (1983)). "The agency's action should only be set aside if it
22 relied on factors which Congress has not intended it to consider,
23 entirely failed to consider an important aspect of the problem,
24 offered an explanation for its decision that runs counter to the

1 evidence before the agency, or is so implausible that it could
2 not be ascribed to a difference in view or the products of
3 expertise.'" Id. (quoting Cellular Phone Taskforce v. FCC, 205
4 F.3d 82, 90 (2d Cir. 2000) (internal quotation marks and
5 alteration omitted)).

6 **I. National Environmental Policy Act**

7 **A. Overview**

8 The NEPA "establishes a 'national policy [to] encourage
9 productive and enjoyable harmony between man and his
10 environment,' and was intended to reduce or eliminate
11 environmental damage and to promote 'the understanding of the
12 ecological systems and natural resources important to' the United
13 States." Dep't of Transp. v. Public Citizen, 541 U.S. 752, 756
14 (2004) (quoting 42 U.S.C. § 4321). As such, the "NEPA requires a
15 federal agency to prepare an EIS before taking any major action
16 significantly affecting the quality of the human environment."
17 Coal. on W. Valley Nuclear Wastes v. Chu, 592 F.3d 306, 310 (2d
18 Cir. 2009) (internal quotation marks omitted); see 42 U.S.C.
19 § 4332(2)(C). "The purpose of an EIS is to provide full and fair
20 discussion of significant environmental impacts and to inform
21 decisionmakers and the public of the reasonable alternatives
22 which would avoid or minimize adverse impacts or enhance the
23 quality of the human environment." Natural Res. Def. Council,
24 Inc. v. FAA, 564 F.3d 549, 556 (2d Cir. 2009) (internal quotation

1 marks and alteration omitted); see also 42 U.S.C. § 4332(2)(C).
2 Thus, the NEPA does not mandate particular results; it “imposes
3 only procedural requirements on federal agencies with a
4 particular focus on requiring agencies to undertake analyses of
5 the environmental impact of their proposals and actions.” Public
6 Citizen, 541 U.S. at 756-57 (citing Robertson v. Methow Valley
7 Citizens Council, 490 U.S. 332, 349-50 (1989)).

8 Our only role in reviewing agency action for compliance with
9 the NEPA “is to insure that the agency has taken a hard look at
10 environmental consequences.” Coal. on W. Valley Nuclear Wastes,
11 592 F.3d at 310 (internal quotation marks omitted). We cannot
12 “interject [ourselves] within the area of discretion of the
13 executive as to the choice of the action to be taken,” and we
14 cannot “rule an EIS inadequate if the agency has made an adequate
15 compilation of relevant information, has analyzed it reasonably,
16 has not ignored pertinent data, and has made disclosures to the
17 public.” Id. (internal quotation marks omitted).

18 “Significantly, ‘if the adverse environmental effects of the
19 proposed action are adequately identified and evaluated, the
20 agency is not constrained by NEPA from deciding that other values
21 outweigh the environmental costs.’” Natural Res. Def. Council,
22 Inc. v. FAA, 564 F.3d at 556 (quoting Robertson, 490 U.S. at
23 350).

24 **B. Discussion**

1 Plaintiffs assert that APHIS adopted the final rule in
2 violation of the NEPA because APHIS failed to adequately consider
3 the reasonable alternative of a phased-in substitute-materials-
4 only requirement. Plaintiffs' challenge is two-fold: (1) that
5 APHIS considered only an immediate, and not a phased-in,
6 prohibition on SWPM; and (2) that APHIS unreasonably failed to
7 assess the long-term feasibility of a substitute-materials-only
8 requirement, and more specifically, "how the cost of substitute
9 materials could come down, or how quickly the market share of
10 substitute materials could expand, in response to a regulation
11 requiring a transition to such materials over a reasonable time
12 period." Appellants' Br. at 18-19. Both challenges fail for the
13 reasons set forth below.

14 The administrative record with respect to the importation of
15 SWPM reflects several statements that make clear that any
16 substitute-materials-only requirement would perforce be phased in
17 rather than implemented immediately. See Natural Res. Def.
18 Council, Inc. v. U.S. Dep't of Agric., 2007 WL 1610420, at *6
19 (noting phase-in language in the ANPR, Draft EIS, and Final EIS).
20 Furthermore, while the Final EIS discusses substitute packing
21 materials as a component of a broader comprehensive risk
22 reduction program as well as a stand-alone alternative to SWPM,
23 it is clear that, under either scenario, APHIS recognized that a
24 phase-in period would be required:

1 The capability of industry to tool up to manufacture and
2 switch to substitute packing materials for such a
3 shipping volume may limit the feasibility or
4 implementation of a switch over. Substitute packing
5 materials are more expensive than SWPM. Although some
6 substitute packing materials show great promise . . . ,
7 other materials have limitations on their use.
8 Substitute packing materials would require a phase-in
9 period to allow the industry of the regulated countries
10 to adapt these materials to the shipping processes.
11 Compliance with international agreements is expected to
12 increase the costs associated with the use of SWPM and
13 this change may make substitute packing materials more
14 competitive in the packing market and indirectly promote
15 use of these other materials.

16
17 Final EIS at 41. Plaintiffs' assertions notwithstanding, it
18 cannot fairly be said that APHIS considered only an immediate ban
19 on SWPM and not a phased-in substitute-materials-only
20 requirement.

21 Plaintiffs' second challenge concerns the depth of APHIS's
22 consideration of the substitute-materials-only alternative. As
23 to this argument, we conclude that APHIS adequately evaluated the
24 substitute-materials-only alternative and reasonably explained
25 its decision not to adopt it as the final rule at the present
26 time. "Under [the] NEPA, an agency's discussion of 'alternatives
27 to the proposed action,' 42 U.S.C. § 4332(2)(C)(iii), forms 'the
28 heart of the environmental impact statement,' 40 C.F.R.
29 § 1502.14." Natural Res. Def. Council, Inc. v. FAA, 564 F.3d at
30 557. However, an agency satisfies its duty under the NEPA where
31 it "[r]igorously explore[s] and objectively evaluate[s] all
32 reasonable alternatives, and for alternatives which were

1 eliminated from detailed study, briefly discuss[es] the reasons
2 for their having been eliminated." 40 C.F.R. § 1502.14(a); see
3 also Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190,
4 195 (D.C. Cir. 1991) ("If . . . the consideration of alternatives
5 is to inform both the public and the agency decisionmaker, the
6 discussion must be moored to some notion of feasibility."
7 (internal quotation marks and footnote omitted)).

8 Under the facts of this case, APHIS reasonably concluded
9 that while a phased-in substitute-materials-only requirement
10 would provide maximum plant protection with minimal adverse
11 environmental consequences, it is not currently a workable
12 alternative to an urgent problem in need of an immediate
13 response. APHIS reached this conclusion because adopting such a
14 rule would require international negotiations to expand the level
15 of plant protection beyond that afforded by the IPPC Guidelines.
16 In the absence of an international consensus, adoption of such a
17 rule by the United States could disrupt international trade and
18 result in a potential violation of U.S. obligations under the SPS
19 Agreement. Moreover, the negotiations would be time-consuming,
20 and their outcome would depend upon a variety of factors,
21 including developing nations' technical capacities and
22 anticipated economic growth.

23 While Plaintiffs would have liked for APHIS to have more
24 fully examined the likely effects of adopting Plaintiffs' desired

1 alternative on the global market for substitute materials, the
2 Final EIS complied with the NEPA. It provided sufficient
3 information for the agency and public to take into account the
4 environmental impact of each of the alternatives presented and
5 for APHIS to make a reasoned decision as to how best to proceed
6 with plant protection in light of the competing considerations of
7 pest control and environmental concerns, on the one hand, and, on
8 the other, the harmonization and facilitation of global trade.

9 That numerous forecasts and predictions related to the
10 adoption of a substitute-materials-only requirement were not
11 included in the Final EIS was explained by APHIS at the outset:
12 "The necessity for extensive negotiations with other countries
13 precludes the ability to establish meaningful timetables for any
14 anticipated changes in regulations of packing materials
15 worldwide." Final EIS at 6. The Final EIS also noted that
16 "[t]he wide differences in perspective among respondents on the
17 draft EIS as to the ability of the packing industry to switch to
18 packing materials other than SWPM provide no clear consensus on
19 the relative ability to implement such an alternative." Id. at
20 A-4. Importantly, APHIS stated that "[a]ny decision to designate
21 a specific time for completion of actions [will be] made by the
22 decisionmaker after review of an economic assessment, the
23 logistics of implementation of a specific course of action, the
24 potential international negotiations involved, and any trade

1 implications for the United States and other countries.” Id. at
2 A-5.

3 While Plaintiffs fault APHIS for not forecasting how the
4 international market for substitute packing materials might
5 expand over time if a phased-in substitute-materials-only
6 requirement were promulgated by the United States, such forecasts
7 were not necessary for APHIS’s completion of a comprehensive EIS
8 or its compliance with the NEPA. See Natural Res. Def. Council,
9 Inc. v. Callaway, 524 F.2d 79, 90 (2d Cir. 1975) (“[The agency]
10 is not required to study and report on the effect of . . . a
11 relationship as yet not understood. Nor does it need to consider
12 other projects so far removed in time or distance from its own
13 that the interrelationship, if any, between them is unknown or
14 speculative.”). The Final EIS in this case adequately sets forth
15 the environmental risks and benefits of numerous reasonable
16 alternatives to APHIS’s proposed action of adopting the IPPC
17 Guidelines and explains the agency’s decision not to pursue
18 further a substitute-materials-only alternative because of
19 current global trade considerations; it was not required to
20 speculate on the potential changes to the global cost and
21 availability of substitute materials in the event that APHIS were
22 to adopt a phased-in substitute-materials-only requirement. See
23 Fund for Animals, 538 F.3d at 137 (“Where there is uncertainty
24 regarding the potential effects of an agency action, speculation

1 in an EIS is not precluded, but the agency is not obliged to
2 engage in endless hypothesizing as to remote possibilities.”
3 (internal quotation marks and alterations omitted)).

4 Accordingly, we conclude that the Final EIS complied with the
5 NEPA.

6 **II. Plant Protection Act**

7 **A. Overview**

8 The PPA was enacted to detect, eradicate, suppress, and
9 prevent the spread of plant pests and noxious weeds. See 7
10 U.S.C. § 7701(1). Under the PPA, “it is the responsibility of
11 the Secretary [of Agriculture] to facilitate exports, imports,
12 and interstate commerce in agricultural products and other
13 commodities that pose a risk of harboring plant pests . . . in
14 ways that will reduce, to the extent practicable, as determined
15 by the Secretary, the risk of dissemination of plant pests
16” Id. § 7701(3); see also id. § 7702(16). The PPA vests
17 the Secretary with authority to issue regulations “to prevent the
18 introduction of plant pests into the United States,” id.
19 § 7711(a), and to “prohibit or restrict the importation . . . of
20 any . . . plant product, . . . article, or means of conveyance,
21 if the Secretary determines that the prohibition or restriction
22 is necessary to prevent the introduction [of a plant pest] into
23 the United States,” id. § 7712(a); see also id. § 7754. “The
24 Secretary shall ensure that phytosanitary issues involving

1 imports and exports are addressed based on sound science and
2 consistent with applicable international agreements.” Id.
3 § 7751(e). The Secretary has delegated his authority under the
4 PPA to APHIS. See Monsanto Co. v. Geertson Seed Farms, No. 09-
5 475, slip op. at 2 (U.S. June 21, 2010) (citing applicable
6 regulations).

7 **B. Discussion**

8 We agree with the district court that the Defendants did not
9 violate the PPA by failing to elevate environmental concerns over
10 other legitimate factors when formulating the final SWPM rule.
11 See Natural Res. Def. Council, Inc. v. U.S. Dep’t of Agric., 2007
12 WL 1610420, at *4-5. The Secretary’s decision to require either
13 heat treatment or fumigation with methyl bromide was not an abuse
14 of discretion given his dual responsibility to protect plants by
15 reducing plant pest risk and to facilitate commerce by avoiding
16 unduly burdensome trade restrictions. Because the record is
17 clear that the Secretary considered the relevant environmental
18 and commercial concerns when deciding on a final SWPM rule, the
19 Secretary cannot be said to have abused his discretion in
20 ultimately concluding that adopting the measures specified in the
21 IPPC Guidelines best accomplished these dual objectives.
22 Finally, Plaintiffs’ argument that the Secretary’s decision was
23 arbitrary and capricious because he failed to adequately consider
24 a phased-in substitute-materials-only requirement, and the

1 magnitude of the impact on trade from such a requirement, echoes
2 the argument advanced in Plaintiffs' NEPA challenge and it fails
3 for the same reasons.

4

5

CONCLUSION

6

Accordingly, we AFFIRM the district court's March 9, 2009

7

judgment and June 4, 2007 memorandum and order.