IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERCITRUS, IBERTRADE COMMERCIAL CORP. and LGS SPECIALITY SALES, LTD.	:	**CIVIL ACTION**
v.	:	
UNITED STATES DEPARTMENT OF AGRICULTURE	:	**NO. 02-1061**

M E M O R A N D U M

WALDMAN, J. **August 13, 2002**

I. Introduction

Plaintiffs are involved in the business of exporting clementines from Spain to the United States for distribution throughout the country. They contend that defendant's order of December 5, 2001, reaffirmed on December 26, 2001, suspending importation of Spanish clementines after the reported detection of live Medfly larvae in clementines shipped from Spain was arbitrary, capricious and contrary to law, particularly the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 et seq.

Plaintiffs seek an order vacating the decision to suspend importation under the Administrative Procedures Act ("APA"). They seek declaratory relief and a preliminary injunction against enforcement of the suspension order to permit the importation and distribution of Spanish clementines within 33 states. They also assert a claim for breach of contract for defendant's withdrawal of inspectors from Spain following the suspension which plaintiffs allege was in derogation of the Spain

Citrus Preclearance Program Work Plan to which defendant and plaintiff Ibertrade were signatories.

The administrative record has been produced. The parties have filed cross-motions for summary judgment.

II. Applicable Legal Standards

In addressing a request for a preliminary injunction, a court assesses whether there is a reasonable probability the movant will succeed on the merits; whether denial of relief will result in irreparable harm to the movant; whether granting relief will result in greater harm to the non-movant; and, whether granting relief would be in the public interest. See ACLU v. Reno, 217 F.3d 162, 172 (3d Cir. 2000). The movant bears the burden of demonstrating each of these elements. See Adams v. Freedom Forge Corp., 204 F.3d 475, 486 (3d Cir. 2000). All four factors should favor a preliminary injunction before such exceptional relief is granted. See Nutrasweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 153 (3d Cir. 1999).

As a practical matter, a determination regarding likelihood of success in the context of an APA claim will often effectively resolve the merits of the underlying claim as well. This is because an APA claim is resolved on a review of the administrative record, see 5 U.S.C. § 706, and the court must generally review that record to resolve conscientiously the request for injunctive relief. Thus, when the request for

injunctive relief can be resolved, the case will generally be ready for disposition on the merits.[1]

There are generally no genuine issues of material fact in an APA case. See Clairton Sportsmen's Club v. Pennsylvania Turnpike Comm'n, 882 F. Supp. 455, 463 (W.D. Pa. 1995). As a practical matter, "when a plaintiff who has no right to a trial de novo brings an action to review an administrative record which is before the reviewing court, the case is ripe for summary disposition, for whether the order is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law." Bank of Commerce of Laredo v. City Nat'l Bank of Laredo, 484 F.2d 284, 289 (5th Cir. 1973).

Under the APA, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency decision "is entitled to a presumption of regularity." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). "{T]he court must consider whether the decision was

[1] There is no showing or claim of imminent harm at this juncture. Any loss resulting from the suspension order in the most current season has been incurred. Plaintiffs acknowledge that their primary concern is the potential loss which may occur next season if current regulatory proceedings aimed at providing new long-term safeguards are not concluded by the fall.

based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 416. A choice of action made by an agency upon consideration of the relevant factors and rationally related to the facts found is not arbitrary or capricious. See Baltimore Gas and Elec. Co. v. National Res. Def. Council, Inc., 462 U.S. 87, 105 (1983).

While the "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." Id. A court may not substitute its own judgment for that of the agency. See Fertilizer Inst. v. Browner, 163 F.3d 774, 777 (3d Cir. 1998).

The court's review is limited to the whole administrative record before the relevant agency at the time of its decision. See 5 U.S.C. § 706; Overton Park, 401 U.S. at 420; Higgins v. Kelly, 574 F.2d 789, 792-94 (3d Cir. 1978); Twiggs v. U.S. Small Bus. Admin., 541 F.2d 150, 152-53 (3d Cir. 1976). However, "[a] document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record." Clairton Sportsmen's Club, 882 F. Supp. at 465. Pertinent information upon which administrative decisionmakers may have relied may be considered although not included in the record as filed. See Higgins, 574 F.2d at 792-93.

In making an administrative decision, an agency may rely on its own experts and counter expert opinions or suppositions about the mental processes of the decisionmakers are not cognizable absent "a strong showing of bad faith or other improper behavior by the agency. See Overton Park, 401 U.S. at 420; Society Hill Towers Owners' Ass'n v. Rendell, 20 F. Supp. 2d 855, 863 (E.D. Pa. 1998). A party may not undermine an agency decision even with an affidavit of unquestioned integrity from an expert expressing disagreement with the views of other qualified experts relied on by the agency, and a court may not weigh the contrary views of such experts to assess which may be more persuasive. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); Price R. Neighborhood Ass'n v. U.S. Dept. of Transp., 1125 F.3d 1505, 1511 (9th Cir. 1997). An agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion and studies in its best reasoned judgment based on the evidence before it. See Hughes River Watershed v. Johnson, 165 F.3d 283, 289-90 (4th Cir. 1999); Oregon Environmental Council v. Kunzman, 817 F.2d 484, 496 (9th Cir. 1987). As a practical matter, were it otherwise, virtually every agency action involving expertise or technical analyses could be obstructed by a party who engaged an expert willing to disagree with the views or conclusions of the experts utilized by the agency.

III. Factual Background

Defendant received reports that live Mediterranean Fruit Fly ("Medfly") larvae were found in clementines purchased on November 20, 2001 in Avon, North Carolina and on November 27, 2001 in Bowie, Maryland. An investigation by the Systematic Entomology Laboratory at the Smithsonian Institute determined that the larvae infested clementines were the "Nadal" brand, a Spanish brand of clementines that had entered the United States on November 10, 2001 at a Philadelphia port.[2]

In response, the Animal Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), temporarily suspended the entry of Spanish clementines into the United States on November 30, 2001. APHIS inspectors began examining and cutting Spanish clementines throughout the United States. By December 3, 2001, APHIS concluded that the live Medfly findings were attributable to a flaw in the cold treatment process employed aboard the vessels used to transport clementines from Spain to the United States.

On December 4, 2001 additional live Medfly larvae were found in clementines in Shreveport, Louisiana which were

[2] Approximately five percent of Spanish clementine exports are shipped to the United States, primarily through the Holt Terminal in Camden and the Tioga Terminal in Philadelphia.

determined to have originated from Spain.[3] On December 5, 2001, APHIS informed the Spanish government that the suspension order was reimposed and was applicable to shipments of clementines that had not yet left Spain, shipments in transit from Spain and shipments that had arrived at U.S. ports but had not been unloaded.[4] The Spanish government was also notified that clementines currently in the southern tier states, where warmer temperatures increase the survival rate of Medfly larvae, were subject to internal recall and destruction or reshipment to northern locations. The USDA did permit clementines in southern states to be shipped to northern tier states and one shipload to be transported to Canada with appropriate safeguards. Three unloaded vessels were redirected to foreign ports.

A team of APHIS officials traveled to Spain on December 9, 2001 to identify possible causes for the Medfly larvae finds in the United States. While the inspectors were in Spain, the

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[3] Prior to these findings, APHIS informed Spanish authorities that clementine imports could resume as it then appeared that there was an isolated problem with the cold treatment aboard only one vessel. When the Louisiana Medfly larvae were traced back to Spanish clementines aboard a different vessel, however, APHIS concluded the problem was more widespread.

[4] It appears from communications to USDA from the Spanish embassy and Barthco, a customs broker, in the administrative record that there were three ships at U.S. ports at the time the suspension order was issued and four which arrived the following day.

Spanish government made several proposals which were rejected by APHIS inspectors.[5]

Following the initial suspension order on November 30, 2001, Medfly larvae findings in the United States were reported on almost a daily basis. Larvae examined were variously reported to be gray, brown and black in color. Some were curling, although none were jumping. Live Medfly larvae were found throughout the United States on December 3, 4, 6, 7 and 11, 2001. At least eighty dead Medlfy larvae were found between December 3 and 5, 2001 in Michigan, Connecticut, Oklahoma, Louisiana and Missouri. Over 200 dead larvae were found between December 5 and 13, 2001 at U.S. ports of entry in New Jersey and Philadelphia.

As a result of the multiple confirmed live Medlfy larvae findings, the Secretary of Agriculture declined a request to reconsider the suspension order by letter of December 26, 2001. APHIS concluded that the entire cold treatment process aboard the vessels needed to be reviewed before imports of Spanish clementines could safely resume.

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[5] The Spanish government proposed extending the cold treatment on vessels in transit to the United States and offloading the fruit to allow storage for two weeks in sealed warehouses for reshipment elsewhere, if necessary. APHIS officials were not confident at the time that extended cold treatment would eliminate the larvae. APHIS ultimately approved extended cold treatment upon subsequent assessment after its investigation in Spain. Spain also suggested a joint inspection by APHIS personnel and Spanish officials of vessels currently at port in Philadelphia. This was undertaken by APHIS alone.

IV. Discussion

A. Requirements of Law

Plaintiffs contend that defendant ignored pertinent legal requirements in imposing the suspension.

1. "Sound science" and "transparent and accessible" requirements of 7 U.S.C. § 7712(b)

The suspension order was issued pursuant to 7 U.S.C. § 7712(a). This provision of the PAA grants the Secretary authority to "prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States."

Plaintiffs assert that any action taken by the Secretary pursuant to § 7712(a) is subject to 7 U.S.C. § 7712(b) which reads:

> The Secretary shall ensure that processes used in developing regulations under this section governing consideration of import requests are based on sound science and are transparent and accessible.

Plaintiffs contend that the suspension order was not based on sound science and that the processes leading to the suspension were not transparent and accessible.

Section 7712(b) on its face imposes standards for "the processes used in developing regulations" and not requirements

for the issuance of orders pursuant to § 7712(a). This is logical as there are often critical differences in the two functions. The process of promulgating regulations, like the drafting of legislation, generally lends itself to and benefits from full discourse including an open presentation of views by an array of interested citizens and groups. The need to issue an order, particularly one directed to public safety or health, may often be urgent and time-sensitive.

Indeed, the Secretary's decision in this case to suspend the importation of Spanish clementines was based on unprecedented finds of live Medfly larvae. The Medfly is not native to the United States and its effects on American agricultural could potentially be devastating. Live Medfly larvae can develop into mature Medflies, reproduce and infest up to 250 American fruit and vegetable crops. An official faced with such a situation would reasonably be expected to have the flexibility needed to take prompt action.

Plaintiffs quote at length numerous provisions of The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreements") of the Uruguay Round Agreement ("URA").[6] The court does not have jurisdiction to review compliance with the URA and the GATT. There is no private cause

[6] The provisions of the Uruguay Round Agreements apply to the General Agreement on Tariffs and Trade ("GATT"). See 19 U.S.C. § 3511(d)(1).

of action under the URA which precludes a "challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement." See 19 U.S.C. §§ 3512(c)(1)(A) & (B).

The URA also provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States, shall have effect," 19 U.S.C. § 3512(a)(1), and "[n}othing in this act shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health." 19 U.S.C. § 3512(a)(2)(A)(i).

The Secretary nevertheless is required to base decisions involving imports and exports on sound science. See 7 U.S.C. §§ 7701(4) & 7751(e). Section 7751(e) of the PPA reads:

> "PHYTOSANITARY ISSUES - The secretary shall ensure that phytosanitary issues involving imports and exports are addressed based on sound science and consistent with applicable international agreements."

There is, however, no showing that she failed to do so in this case. The Secretary relied on reports from experts in the field and her decision comports with scientific information about the Medfly as recited by Dr. Susan McCombs, a Ph.D. in entomology.

2. "Least drastic action" requirement of § 7714(d)

Plaintiffs contend that the Secretary was required to take the least drastic action available and did not. The PPA permits the Secretary to destroy any plant or plant pest that "is moving into or through the United States or interstate, or has moved into or through the United States or interstate" when the "Secretary considers it necessary in order to prevent the dissemination of a plant pest." 7 U.S.C. § 7714(a).

Section 7714(d) provides:

> No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.

The issuance of a suspension order would thus be subject to the constraints of § 7714 insofar as it applied to those Spanish clementines found with Medfly larvae within the United States. Significantly, Congress has provided that the application of these constraints in any particular instance is substantially committed to the judgment of the Secretary with language such as when the "Secretary considers it necessary" and "in the opinion of the Secretary." There has been no showing that the Secretary, in her "opinion," did not take the least

drastic action feasible regarding Spanish clementines in the country. The Secretary allowed Spanish clementines already in southern states to be reshipped to northern tier states and others to go to Canada with appropriate safeguards. Vessels with unloaded clementines were redirected to foreign ports.

APHIS did not unreasonably reject proposals of the Spanish government to extend cold treatment aboard vessels en route to the United States and to offload fruit from vessels in port to allow storage for two weeks in sealed warehouses prior to reshipment out of the country. At that time, APHIS had no reason to believe that extending the cold treatment period would be effective.[7] While the maturation cycle of the Medfly varies with temperature, it is quite short and there is no showing that "sealed" means hermetically sealed.[8]

Permitting additional imports of Spanish clementines even to northern tier states still presented a risk of Medfly infestation. It was evident that the cold treatment process had not been effective and it was reasonable for the Secretary to believe there were likely additional live Medfly larvae in clementines aboard unloaded vessels. In these circumstances, the

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[7] The agricultural counselor at the Spanish embassy acknowledged this in a communication to USDA of December 9, 2001.

[8] Once offloaded into warehouses, of course, the fruit would have moved into the United States and the Secretary would have been confronted with substantially more produce subject to the requirements of § 7714.

Secretary was not required to gamble with the vitality of domestic agriculture.

Plaintiffs also suggest that the USDA should have considered "the relative cost-effectiveness of alternative approaches to limiting risks." The Secretary reasonably need not expend time and resources to conduct an analysis of the costs of mitigating the risks associated with each possible option when confronted with an immediate risk of infestation. She may promptly take prudent prophylactic action and then proceed diligently to collect and analyze further data. The Secretary did dispatch APHIS officials to Spain to assist in ascertaining the precise cause of the infestation problem and is working on a permanent solution.

B. Application of the Arbitrary and Capricious Standard

Plaintiffs contend that the administrative record does not support defendant's assertion that the agency considered the relevant factors and made a decision rationally connected to the facts found.

Plaintiffs argue that none of the live Medfly larvae found were reared out and placed in growing medium to determine if they were capable of maturing into mating adult Medfly. They cite the conclusion of their expert, Timothy J. Gibb, that none of the reports of larval finds "stated, with specificity, characteristics or behaviors of the larvae or pupae that are

sufficient to determine whether the insects were viable." He noted that none of the larvae were identified as "jumpers" or "wigglers" and some were described as moving very slowly which suggests they were close to death.[9] He also noted that healthy live larvae are "creamy-white in color" and the larvae found were variously brown or black which suggests imminent or actual mortality.[10]

The conclusion and many assumptions of plaintiffs' expert are refuted by Dr. McCombs who has studied fruit flies for seventeen years. She explains that jumping is a characteristic of mature third instar larvae and even certain mature larvae will cease movement in a wet environment. The movement described by one of the individuals who inspected the larvae, Paul A. Courneya, was consistent with larvae held in a moist environment, in that instance a sealed plastic bag with two clementines. Scott Sanner examined larvae that were "curling" which Dr. McCombs explains is typical of larvae attempting to jump. She also noted that larvae exposed to low temperatures can still survive and complete their development when moved to higher temperatures. Dr. McCombs explains that the color of larvae depends upon the material ingested in the feeding process and

[9] The more mature Medfly larvae are able to build up tension through muscle contractions and lift themselves seven centimeters in the air and transverse a mean distance of twelve centimeters.

[10] It appears from reports in the administrative record that in fact some of the larvae were light brown and some were gray.

that the ingestion of fungi in decaying fruit can produce a gray or brown larva.

Live larvae were found when cold treatment should have killed virtually all of them.[11] Defendant was not arbitrary or capricious in taking prompt prophylactic action.

Plaintiffs argue that defendant should not have acted without determining that the Medfly finds constituted a significant breach of quarantine security. Quarantine security is defined in the USDA "Pre-Clearance Program Guidelines" memorandum as "a level of control which assures a 95% confidence level that a pest population will not become established based on the inspection/treatment certification procedure(s) used when considering the biology and ecology of the pest species." Plaintiffs' reliance on the 95% quarantine security level is

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[11] Although dead Medfly larvae pose no risk, the unusually high number of dead larvae found does reasonably indicate an exceptional infestation problem in the Spanish groves. Although subsequent tracking data proving that Medfly infestation in Spanish groves for the 2001-02 season was severe was not available to APHIS when the suspension order was issued, there is evidence in the administrative record that APHIS was aware of a high infestation rate based in part on the investigation of APHIS officials in Spain. APHIS ultimately concluded that unusually high temperatures caused or contributed to the problem. The Secretary need not defer action until receiving evidence of mature larvae approaching the reproductive stage. She may act to prevent the introduction or dissemination of a plant pest at "any living stage" that can "directly or indirectly injure, cause damage to, or cause disease in any plant or plant product." See 7 U.S.C. §§ 7702(14) & 7712(a).

misplaced. This definition of "quarantine security" applies to the effectiveness of procedures "aimed at detecting or eliminating exotic pests through actions taken at origin."

When the suspension order was issued, Spanish clementines received no preventative treatment at the point of origin. The cold treatment process takes place aboard vessels after completion of the pre-clearance program. The relevant quarantine security level required of Probit 9 cold treatment is 99.9967%, virtually complete mortality of the larvae.

Plaintiffs also suggest that defendant acted arbitrarily and capriciously in according less favorable treatment to their product than that of others similarly situated. Plaintiffs contend that their imported produce was treated less favorably than like products of national origin in violation of Article III:4 of the GATT. Plaintiffs contend that the USDA did not restrict shipments of clementines from California after reported finds of live larvae and permitted Hawaii, Florida and California to ship locally grown clementines from areas near Medfly infested orchards to non-citrus producing states. Plaintiffs also contend they were discriminated against because the USDA permitted importation of clementines from Morocco, Israel and Italy during this time period.

There is absolutely no evidence of any live larvae finds in clementines from Morocco, Israel or Italy during this

period. Only the Spanish clementines were found to provide a pathway for live Medfly larvae.

There is no evidence that infested clementines found in California originated there. Nancy Berrera, an agricultural biologist employed by the Santa Clara County Department of Agriculture, went to the store in San Jose where allegedly infested California clementines were found and discovered that store employees had placed California and Spanish clementines together in the cooler. Her examination of the fruit revealed that the live larvae were found in Spanish clementines and "no live or dead larvae were found in California Clementines." All of the other seven live larvae identified by the USDA in California were found in Spanish brand clementines.[12]

Plaintiffs also claim a discrepancy in the USDA's treatment of Mexican Hass avocados. Plaintiffs assert that Hass avocados do not go through cold treatment and yet the USDA allowed their importation to the northern tier states after concluding that there was no significant threat of infestation of the Mexican fruit fly ("Mexfly"), a cousin of the Medfly.

As Dr. McCombs explained, however, "extrapolation of information for Mexican fruit fly to the Mediterranean fruit fly is inappropriate. These are not closely related species. The

[12] On November 29, 2001, the California Department of Food and Agriculture issued a Pest Exclusion Advisory barring Spanish clementines.

bioclimatic tolerances cannot be expected to be the same for a tropical species and one that has demonstrated cold tolerance under field conditions." The Medfly is a hardier species and can survive a much wider range of temperature. The Hass avocado also is not a preferred host for the Mexfly.

Most importantly, plaintiffs overlook the differences between the regulatory constraints on Mexican avocados and Spanish clementines. There are elaborate protections to guard against fruit fly infestation in Mexico that are not replicated in the Spanish clementine groves. All Mexican avocado orchards must be registered with the Mexican government and the export program. When a second Mexfly is captured, a Malathion bait spray of the orchards is mandatory. Fallen fruit in Mexican orchards must be collected and removed to minimize the presence of host fruit.

There is no evidence of disparate treatment by the USDA of similarly situated produce, and no basis on which the court could conscientiously conclude that the Secretary exceeded her legal authority or acted in an arbitrary or capricious manner.

That the Secretary's action was prudent and reasonable in the circumstances would not, of course, justify the exclusion of Spanish clementines in perpetuity.

Defendant is attempting to solve the problem permanently with a new proposed regulation which is now in the

comment period. Public hearings are scheduled for the third week of August 2002. Plaintiffs suggest that the proposed new rule would impose additional cold treatment requirements with a cost which could result in a competitive disadvantage and that domestic producers have a motive to exaggerate the problem or otherwise prolong the rulemaking process. Plaintiffs express concern that the administrative process may consume part of the next season for clementines.

An extension of cold treatment was a measure first proposed by Spanish authorities themselves. It is true that domestic producers share with other producers an interest in maximizing their markets. It is also domestic producers, however, who face the greatest risk from the introduction of the Medfly into the United States and it is entirely reasonable to afford them an adequate opportunity to comment on a rule designed to mitigate that risk. Such an opportunity, of course, will also be afforded to plaintiffs.

A court may compel agency action which is unlawfully withheld or unreasonably delayed. See 5 U.S.C. § 706(1); American Littoral Soc'y v. United States EPA Region, 199 F. Supp. 2d 217, 227 (D.N.J. 2002). An administrative agency, however, is entitled to considerable deference in setting the timetable for completion of its proceedings. See Natural Resource Defense Council v. Fox, 93 F. Supp. 2d 531, 544 (S.D.N.Y. 2000). Court

intervention generally is warranted only when an agency is withholding or delaying action in a manner which is arbitrary, capricious or contrary to law. See Raymond Proffitt Foundation v. United States Army Corps of Eng'rs, 128 F. Supp. 2d 762, 767-68 (E.D. Pa. 2000). Plaintiffs have not expressly requested such intervention and in any event have not shown that defendant is proceeding on an unreasonable timetable in view of its statutory authority, what is at stake, the type of regulation involved, its other priorities and the nature and extent of plaintiffs' interests which may be adversely affected.

C. Breach of Contract

Plaintiffs assert that the USDA breached the Spain Citrus Preclearance Program Work Plan for Exports to the United States to which the USDA, the Spanish Ministry of Agriculture and plaintiff Ibertrade are signatories. Plaintiffs contend that the Work Plan was breached when the USDA removed its personnel from Spain the week of December 9, 2001 and ceased to perform functions related to the export of clementines from Spain to the United States. Plaintiffs assert that the "USDA unilaterally shut down the entire program without first ascertaining whether there was any data to support any less drastic action appropriate to address the perceived problem" and suspended clementine shipments without first determining that "the rate of rejection

of inspection lots reach[ed] a level (20%) determined by APHIS to be unacceptable."

Defendant initially argues that the Work Plan is not a contract but merely an operational plan to effectuate the importation of Spanish clementines under permits issued by the United States government and is unsupported by any distinct consideration. Defendant cites to Quiman, S.A. de C.V. v. United States, 39 Fed. Cl. 171 (Ct. Fed. Cl. 1997), aff'd, 178 F.3d 1313 (Fed. Cir. 1999). The Federal Circuit, however, expressly rejected the conclusion of the Court of Federal Claims that the cooperative import agreement at issue in Quiman was not an enforceable contract. The Federal Circuit found that the sums paid by the foreign exporter to defray the expense of the APHIS inspectors and the benefit of encouraging importation of a product "at a time of heightened demand" provided adequate consideration. There is no suggestion of a heightened need or demand for clementines in the instant case, however, Ibertrade paid for the cost of APHIS inspectors at Spanish groves.

Assuming that the Work Plan was a contract supported by adequate consideration, there was no breach by the USDA.

The Work Plan addresses the parties' respective functions relating to the facilitation of exports to the United States. The Secretary's decision to suspend the importation of Spanish clementines was not contrary to law, arbitrary or

capricious. When and while importation is legally suspended, there are no functions to be performed under the Work Plan by APHIS inspectors in Spain.[13]

There is nothing in the Work Plan which imposes a least drastic feasible action requirement on the Secretary in preventing the introduction of plant pests or which otherwise restricts her authority to issue suspension orders pursuant to § 7712. Section VIII.C of the Work Plan provides that "[i]f the rate of rejection of inspectional lots reaches a level (20%) to be determined by APHIS to be unacceptable for reason of pest risk or operational practicality, the preclearance program will be subject to review and possible cancellation." The Work Plan encompasses procedures during pre-clearance to detect quarantine pests while the fruit is still in Spain. This would not include the cold treatment, the major method of treatment of clementines, which takes place on vessels after they have left Spain. The 20% rejection rate refers to fruit that receives "pre-clearance treatment."

[13] Plaintiffs acknowledge that they cannot prevail on their breach of contract theory if they are not entitled to relief under the APA. As stated by plaintiffs at oral argument, "breach of contract is not a stand alone claim."

V. Conclusion

It appears from the whole administrative record that the Secretary considered the relevant factors and her suspension decisions were rationally related to the facts found and consistent with the PPA. Her action was based on reports from professionals in the field and was consistent with sound entomological data. She made accommodations for clementines already in the country and was not required to admit further produce in the circumstances. Her action was not in breach of the Work Plan.

Agencies charged with responsibility to provide protection against infestation, contamination or pollution would appropriately be subject to criticism if they failed to act in the face of a credible threat. An agency is not required to complete its investigation of the possible causes of and potential long-term remedies for such a problem before taking prophylactic action.

In view of the unusually high findings of live Medfly larvae and the apparent failure of the cold treatment, the Secretary's action was rational, prudent and in accord with applicable law. She is seeking to implement a regulation which would allow for the safe resumption of clementine imports from Spain. There is no basis on the current record to conclude that she is not proceeding conscientiously and within a reasonable time frame.

Accordingly, defendant's motion will be granted and plaintiffs' cross-motion will be denied. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERCITRUS, IBERTRADE	**:**	**CIVIL ACTION**
COMMERCIAL CORP. and	**:**	
LGS SPECIALITY SALES, LTD.	**:**	
	:	
v.	**:**	
	:	
UNITED STATES DEPARTMENT	**:**	
OF AGRICULTURE	**:**	**NO. 02-1061**

O R D E R

AND NOW, this day of August, 2002, as plaintiffs did not demonstrate a reasonable probability of success on the merits or immediate harm pending resolution on the merits, and have indeed not prevailed on the merits, **IT IS HEREBY ORDERED** that plaintiffs' Motion for a Preliminary Injunction is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERCITRUS, IBERTRADE COMMERCIAL CORP. and LGS SPECIALITY SALES, LTD.	:	**CIVIL ACTION**
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UNITED STATES DEPARTMENT OF AGRICULTURE	:	**NO. 02-1061**

O R D E R

AND NOW, this day of August, 2002, upon consideration of defendant's Motion for Summary Judgment (Doc. #9) and plaintiffs' Cross-Motion for Summary Judgment (Doc. #13), and following review of the administrative record herein and an opportunity for the parties to be heard, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that plaintiffs' Motion is **DENIED**, defendant's Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.