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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF  
12 AMERICA,

13 Plaintiff,

14 v.

15 IM EX TRADING COMPANY,  
16 DAVID L. MAHONEY and  
17 JAMES D. MAHONEY

18 Defendants.

No. CR-03-2213-EFS  
No. CR-03-2214-EFS  
No. CR-03-2215-EFS

DEFENDANTS' MOTION TO  
DISMISS COUNTS 11-15 and 16-  
18 OF THE INDICTMENT

19 **I. INTRODUCTION**

20 The indictment contains three sets of counts. Each is identical in form,  
21 charging conspiracy to commit wire fraud, one or more substantive wire fraud  
22 counts and a forfeiture count predicated upon the conspiracy charge. In this  
23 motion defendants seek dismissal of the second and third sets of charges  
24 – counts 11-15 and 16-18. Our motion is based on the requirement that a  
25 mail or wire fraud charge must allege (and at trial the government must prove)  
26 that the defendants' scheme was to deprive the named victims of money or  
27 property. Under the trilogy of Supreme Court cases defining this requirement  
28 – *McNally*, *Carpenter and Cleveland* – we believe these two sets of counts

1 fail to state an offense and must be dismissed. Our motion is also based on  
2 the indictment's failure to allege materiality, an essential element of a wire  
3 fraud offense.

## 4 **II. THE INDICTMENT**

5 The two conspiracy counts (Counts 11 and 16) specify a single object:

6 It was part of the conspiracy to circumvent the Mexican Stone  
7 Fruit Inspection Program by the use of false, forged and  
8 counterfeit phytosanitary certificates to cross truckloads of stone  
fruit from the United States to Mexico.

9 (Indictment, at page 10, lines 24-26 and at page 17, lines 10-12.) No other  
10 "part of the conspiracy" is set out in the indictment; it states only that single  
11 object. The substantive counts (Counts 12-14 and 17) are stated a bit  
12 differently:

13 . . . the defendants . . . devised a scheme and artifice to defraud  
14 the United States and the Republic of Mexico of and concerning  
15 the proper enforcement of their agreement regarding the proper  
handling and certification of stone fruit to be exported to Mexico.

### 16 **A. THE SCHEME AND ARTIFICE**

17 The defendant's [sic] scheme included the preparation of false,  
18 counterfeit and forged phytosanitary certificates which indicated  
19 the stone fruit met the requirements of the Republic of Mexico for  
20 importation and were used in crossing the stone fruit from the  
United States into the Republic of Mexico.

21 (Indictment, at page 11, lines 15-26 and at page 15, line 24 -page, 16, line  
22 8.). The two sets of counts allege that in total eight truckloads of peaches  
23 entered Mexico in the manner alleged.

## 24 **III. THE MAIL AND WIRE FRAUD STATUTES IN GENERAL**

25 In presenting our arguments to the Court, we rely on decisions  
26 interpreting the mail fraud statute (18 U.S.C. § 1341) as well as the wire fraud  
27 statute (18 U.S.C. § 1343). We do so because the Supreme Court  
28 observed, "The mail and wire fraud statutes share the same language in

1 relevant part, and accordingly we apply the same analysis to both sets of  
2 offenses here.” *Carpenter v. United States*, 484 U.S. 19, at n.6 (1987).

3 Section 1343 read, at the time of the alleged offenses:<sup>1</sup>

4 Whoever, having devised or intending to devise any scheme or  
5 artifice to defraud, or for obtaining money or property by means  
6 of false or fraudulent pretenses, representations, or promises,  
7 transmits or causes to be transmitted by means of wire, radio, or  
8 television communication in interstate or foreign commerce, any  
9 writings, signs, signals, pictures, or sounds for the purpose of  
10 executing such scheme or artifice, shall be fined under this title  
11 or imprisoned not more than five years, or both. If the violation  
12 affects a financial institution, such person shall be fined not more  
13 than \$1,000,000 or imprisoned not more than 30 years, or both.

14 In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court  
15 held that the mail fraud statute is “limited in scope to the protection of  
16 property rights.” After reviewing the history of the law, it found that “the  
17 original impetus behind the mail fraud statute was to protect people from  
18 schemes to deprive them of their money or property.” *Id.*, at 356. In  
19 subsequent cases the Supreme Court and lower courts have developed the  
20 line of demarcation between defrauding a person or entity of money or  
21 property on the one hand, and defrauding a government entity of its  
22 regulatory power. As developed below, we believe that the government has  
23 charged a violation that falls on the wrong side of the line.

#### 24 **IV. McNALLY, CARPENTER AND CLEVELAND**

25 In *McNally v. United States*, 483 U.S. 350, 360 (1987), the issue

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26 <sup>1</sup> The penalty provisions of the mail and wire fraud statutes were  
27 changed in 2002, but those changes are inapplicable to the present  
28 matter.

1 before the court was whether the mail fraud statute reached defendants'  
2 "participation in a self-dealing patronage scheme [which] defrauded the  
3 citizens and government of Kentucky of certain 'intangible rights,' such as the  
4 right to have the Commonwealth's affairs conducted honestly." *Id.*, at 352.

5  
6 A state government officer had placed insurance contracts with an insurance  
7 company. The insurance company shared its commissions with another  
8 company in which the state officer had an ownership interest. *Id.* In other  
9 words, the state officer did business with a company that "kicked back"  
10 money to him.

11 After reviewing the history and Congressional action on the mail fraud  
12 statute, the Court concluded that the statute did not reach the activities  
13 charged. ". . . we read § 1341 as limited in scope to the protection of  
14 property rights." *Id.*, at 360.

15 We note that as the action comes to us, there was no charge and  
16 the jury was not required to find that the Commonwealth itself was  
17 defrauded of any money or property. It was not charged that in  
18 the absence of the alleged scheme the Commonwealth would  
19 have paid a lower premium or secured better insurance. Hunt  
20 and Gray received part of the commissions but those  
21 commissions were not the Commonwealth's money. Nor was the  
22 jury charged that to convict it must find that the Commonwealth  
23 was deprived of control over how its money was spent.

24 *Id.* Although the state may have been cheated and its citizens wronged, the  
25 Supreme Court concluded that the mail fraud statute did not reach the  
26 conduct alleged for lack of the state's loss of "money or property." *Id.*, at  
27 360-361.

28 The second case in the trilogy was *Carpenter v. United States*, 484  
U.S. 19 (1987). There the defendants were charged with conspiracy, mail  
fraud and securities fraud. *Id.*, at 20 - 21. One defendant was a *Wall Street*

1 *Journal* columnist. He leaked information, considered confidential by his  
2 employer, to a stock broker codefendant. That information allowed the latter  
3 to profit in the stock market and the profits were divided among the  
4 participants. *Id.*, at 23. The profits were substantial – about \$690,000. *Id.*

5  
6 The District Court found, and the Court of Appeals agreed, that  
7 Winans had knowingly breached a duty of confidentiality by  
8 misappropriating prepublication information regarding the timing  
9 and contents of the "Heard" column, information that had been  
10 gained in the course of his employment under the understanding  
11 that it would not be revealed in advance of publication and that if  
it were, he would report it to his employer. It was this  
appropriation of confidential information that underlay both the  
securities laws and mail and wire fraud counts.

12 *Id.*, at 23-24. "In affirming the mail and wire fraud convictions, the Court of  
13 Appeals ruled that Winans had fraudulently misappropriated 'property' within  
14 the meaning of the mail and wire fraud statutes . . ." *Id.*, at 24. Concluding  
15 that the *Journal's* information was confidential, the Court observed,  
16 "Confidential business information has long been recognized as property."  
17 *Id.*, at 26. It held that the mail fraud statute reaches intangible property as  
18 well as tangible but it did not retreat from *McNally's* requirement that the  
19 scheme must target the victim's "money or property."

20 Here, the object of the scheme was to take the *Journal's*  
21 confidential business information -- the publication schedule and  
22 contents of the "Heard" column -- and its intangible nature does  
23 not make it any less "property" protected by the mail and wire  
fraud statutes. *McNally* did not limit the scope of § 1341 to  
tangible as distinguished from intangible property rights.

24 *Id.*, at 25.

25 The most recent decision in the series is *Cleveland v. United States*,  
26 531 U.S. 12 (2000). The *Cleveland* case is closest on its facts to the  
27 present case. The State of Louisiana permitted businesses to enter  
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1 commerce in video poker machines. It regulated entry by requiring  
2 prospective entrants to prove their integrity and obtain a state permit. *Id.*, at  
3 15. By fraudulent submissions to the state, the defendant acquired  
4 permission to enter video poker commerce and he was indicted for mail  
5 fraud, among other things. *Id.*, at 15-16. The question posed to the Court  
6 was “. . . whether, for purposes of the federal mail fraud statute, a  
7 government regulator parts with "property" when it issues a license.” *Id.*, at  
8 20. The court concluded it did not.

9 Louisiana’s scheme for determining who may enter video poker  
10 commerce was termed by the Court as a “typical regulatory scheme,” *id.*, at  
11 21, and that its “core concern is regulatory.” *Id.*, at 20.

12 In short, the statute establishes a typical regulatory program. It  
13 licenses, subject to certain conditions, engagement in pursuits  
14 that private actors may not undertake without official authorization.  
15 In this regard, it resembles other licensing schemes long  
16 characterized by this Court as exercises of state police powers.

17 *Id.*, at 21. The Court recognized that the state had a “substantial economic  
18 stake” in regulating business, *id.*, at 22, and by statute had “assert[ed its]  
19 ‘legitimate interest in providing strict regulation . . . ’” of the commerce. *Id.*,  
20 at 21. But that did not mean that fraudulently obtaining state authorization to  
21 engage in regulated commerce was mail fraud. The Supreme Court found  
22 it “telling” that “the Government nowhere allege[d] that Cleveland defrauded  
23 the State of any money to which the State was entitled by law.” *Id.*, at 22.

24 Addressing this concern, the Government argues that Cleveland  
25 frustrated the State's right to control the issuance, renewal, and  
26 revocation of video poker licenses under La. Rev. Stat. Ann. § §  
27 27:306, 27:308 (West Supp. 2000). . . . But far from composing  
28 an interest that “has long been recognized as property,”  
*Carpenter*, 484 U.S. at 26, these intangible rights of allocation,  
exclusion, and control amount to no more and no less than  
Louisiana's sovereign power to regulate. Notably, the  
Government overlooks the fact that these rights include the

1 distinctively sovereign authority to impose criminal penalties for  
2 violations of the licensing scheme, La. Rev. Stat. Ann. § 27:309  
3 (West Supp. 2000), including making false statements in a  
4 license application, § 27:309(A). Even when tied to an expected  
5 stream of revenue, the State's right of control does not create a  
6 property interest any more than a law licensing liquor sales in a  
7 State that levies a sales tax on liquor. Such regulations are  
8 paradigmatic exercises of the States' traditional police powers.

9 *Id.*, at 23.

10 Defrauding the state, the Court concluded, of its power to regulate entry  
11 into commerce, was not a violation of the mail fraud statute but rather  
12 suggested a substantial expansion of the mail fraud law.

13 We resist the Government's reading of § 1341 as well because  
14 it invites us to approve a sweeping expansion of federal criminal  
15 jurisdiction in the absence of a clear statement by Congress.  
16 Equating issuance of licenses or permits with deprivation of  
17 property would subject to federal mail fraud prosecution a wide  
18 range of conduct traditionally regulated by state and local  
19 authorities.

20 *Id.*, at 24. The Court noted that the state, as part of its regulatory function,  
21 had tools by which it could penalize those who falsely obtained a permit and  
22 thereby cheated the state of its regulatory authority. *Id.*

## 23 **V. "MONEY OR PROPERTY" IN THE COURTS OF APPEALS**

24 Subsequent to *Cleveland*, the Court of Appeals for the Ninth Circuit  
25 applied the decision to reverse a mail fraud conviction for obtaining a hunting  
26 license through the use of "false or fraudulent pretenses, representations or  
27 promises . . ." *United States v. LeVeque*, 283 F.3d 1098 (9<sup>th</sup> Cir. 2002).  
28 That was consistent with pre-*Cleveland* decisions in this Circuit such as  
*United States v. Kato*, 878 F.2d 267 (9th Cir. 1989) and *United States v.*  
*Lew*, 875 F.2d 219 (9th Cir. 1989) .

In *Kato* the court held the mail fraud statute did not apply to a flight

1 training school owner's scheme to defraud the FAA into issuing pilot licenses  
2 to unqualified candidates because the licenses were not property. In *Lew* the  
3 court held that false representations by a lawyer in applications for alien  
4 employment certifications did not constitute mail fraud because the  
5 certifications were not property. In each of these cases a government  
6 regulatory program was subverted through fraud. In each a defendant or  
7 defendants submitted false documentation to a government agency in order  
8 to obtain government permission for some activity. In each the convictions  
9 were overturned because the government involved was not defrauded of  
10 "money or property."

## 11 **VI. THE EXPORT FRAUD CASES**

12 A review of case law shows there have been two groups of export fraud  
13 cases prosecuted. One involves violation of U.S. export laws and the other  
14 involves violation of foreign laws imposing duties or taxes on goods entering  
15 from the United States. The former group includes cases such as *United*  
16 *States v. Bruchhausen*, 977 F.2d 464 (9<sup>th</sup> Cir. 1992). There the defendants  
17 schemed to export prohibited goods to the former Soviet bloc. The wire  
18 fraud indictment alleged that the defendants schemed to deprive the goods'  
19 manufacturers of "their property and their right to make business decisions  
20 based on truthful information and representations," and to deprive the United  
21 States government agencies of their "right to conduct their affairs free from  
22 stealth, chicanery, fraud, false statements and deceit." *Id.*, at 467. The Court  
23 of Appeals reversed the convictions for lack of a "property" interest of either  
24 group of alleged victims.

25 Similarly, in *United States v. Evans*, 844 F.2d 36 (2<sup>nd</sup> Cir. 1988), the  
26 government brought mail and wire fraud charges predicated on false  
27 statements made by defendants in international arms sales. The court of  
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1 appeals upheld dismissal of the charges because it concluded the  
2 government's interest in the export of weapons was "ancillary to a regulation,  
3 not to property." *Id.*, at 42.

4 The second group of cases charged mail and wire fraud in situations  
5 where a foreign nation was deprived of duty or tax revenue because people  
6 smuggled goods into another country from the United States. Usually those  
7 cases involved smuggling of alcohol or cigarettes. We invite the Court's  
8 attention to *United States v. Pierce*, 224 F.3d 158 (2<sup>nd</sup> Cir. 2000). The  
9 defendants in that case were prosecuted for money laundering. The  
10 predicate offense was a wire fraud scheme to deprive Canada of liquor taxes  
11 on alcohol smuggled into Canada from the U.S. The Court of Appeals  
12 reversed the defendants' conviction for failure of the government to prove  
13 that Canada was entitled to taxes or duties and observed that absent proof  
14 of that property interest, the defendants did not violate the wire fraud statute.

15 A scheme to deceive, however dishonest the methods  
16 employed, is not a scheme to defraud in the absence of a  
17 property right for the scheme to interfere with. *See Carpenter v.*  
18 *United States*, 484 U.S. 19, 27-28, 98 L. Ed. 2d 275, 108 S. Ct.  
19 316 (1987) . . .

20 224 F.3d at 165. Another Canadian revenue case is pending before the U.S.  
21 Supreme Court this Term. *United States v. Pasquantino*, No. 03-725.

22 In *Pasquantino* the defendants allegedly smuggled whisky into Canada  
23 without paying national and provincial taxes due. The indictment alleged a  
24 scheme in the United States to defraud the Canadian and Ontario  
25 governments of those monies due. The issue presented is whether the  
26 common law "revenue rule" prohibits or limits a U.S. prosecution for  
27 scheming to deprive Canadian governments of taxes due and owing to them.  
28 The indictment before this Court contains no allegation that the Mexican  
government was deprived of any money in any form, e.g., duties or excise

1 taxes. For that reason it is significant to note the extent to which the Solicitor  
2 General relied on the Canadians' loss of tax money to bring the case within  
3 the *McNally-Carpenter-Cleveland* trilogy.

4 The indictment in this case, however, did not charge that  
5 petitioners schemed to defraud a foreign government of its  
6 regulatory interest in imposing taxes. Rather, the indictment  
7 charged that petitioners schemed to deprive Canada and Ontario  
8 of money due under their tax laws. Pet. App. 58a. . . . Nothing in  
9 *Cleveland* suggests that such a scheme fails to satisfy the  
10 money or property requirement. To the contrary, the Court in  
11 *Cleveland* emphasized that "[t]ellingly, as to the character of  
12 Louisiana's stake in its video poker licenses, the Government  
13 nowhere alleges that *Cleveland* defrauded the State of any  
14 money to which the State was entitled by law. Indeed, there is no  
15 dispute that TSG paid the State of Louisiana its proper share of  
16 revenue, which totaled more than \$1.2 million, between 1993 and  
17 1995." 531 U.S. at 22. As that passage indicates, a scheme to  
18 defraud a government of tax revenue satisfies the wire fraud  
19 statute's money or property requirement because it involves  
20 defrauding the government of "money to which the [government]  
21 was entitled by law." *Ibid*.

22 *Cleveland* states that the object of the fraud must be property "in  
23 the victim's hands," and not merely property in the defendant's  
24 hands. 531 U.S. at 26. In light of the common law understanding  
25 of fraud, this Court's decision in *Manning*, and the passage in  
26 *Cleveland* cited above, that formulation necessarily  
27 encompasses schemes to deprive a government of money that  
28 is legally due under its tax laws. "[T]axes owed to the  
government-even if not yet collected-are property in the hands of  
the government." *Fountain*, 357 F.3d at 257.

Solicitor General's Brief, <http://www.usdoj.gov/osg/briefs/2004/3mer/2mer/2003-0725.mer.aa.pdf>, at 31.

In contrast, in the present case, the indictment alleges a regulatory interest of the U.S. and Mexican governments and in no way alleges that the scheme was designed or intended to cause either to part with money or property in their hands. Absent such allegations, the wire fraud indictment cannot pass muster.

1 **VII. THE INDICTMENT SHOULD BE DISMISSED**

2 Rather than allege a scheme to defraud the named victims of money  
3 or property, the present indictment alleges an effort to circumvent a  
4 regulatory program. The conspiracy counts allege a “. . . conspiracy to  
5 circumvent the Mexican Stone Fruit Inspection Program . . .” The substantive  
6 counts allege a

7 . . . scheme and artifice to defraud the United States and the  
8 Republic of Mexico of and concerning the proper enforcement  
9 of their agreement regarding the proper handling and certification  
10 of stone fruit to be exported to Mexico.

11 The indictment alleges that false paperwork was used “. . . which indicated  
12 the stone fruit met the requirements of the Republic of Mexico for importation  
13 . . .”

14 We believe it is clear from the face of the indictment that at issue here  
15 is a Mexican regulatory program relating to “the proper handling and  
16 certification” of fruit entering that country and not any matter relating to money  
17 or property. It may assist the Court to consider the “Mexican Stone Fruit  
18 Inspection Program” to which the indictment refers.<sup>2</sup> It is titled, “Pilot  
19 Program for the Exportation of Peaches and Nectarines from the United  
20 States to Mexico Under a Systems Approach.”

21 The purpose of the program, which was agreed to by the Mexican and  
22 American governments, was stated clearly:

23 \_\_\_\_\_  
24 <sup>2</sup> We have attached a copy of what we believe to be the document  
25 to which the indictment refers. In early December we requested the  
26 government provide us with copies of the relevant documents. None has  
27 been received at this time.  
28

1 The purpose of this document is to facilitate the exportation of  
2 peaches and nectarines from the [sic] California to Mexico to  
ensure there is procedural uniformity among participants. . . .

3 The procedures being followed are to ensure that peaches and  
4 nectarines are free of Oriental fruit moth . . . apple maggot . . . ,  
5 plum curculio . . . and fruit flies . . .

6 [Latin names omitted.] As written, it is clear that the agreement and the work  
7 plan contained in Appendix 1 reflect the Mexican government’s rights, to  
8 paraphrase *Cleveland*, “ . . . of allocation, exclusion, and control” and are  
9 clearly within its “sovereign power to regulate.” 531 U.S. at 23.

10 The Mexican government has the ability to decide whether goods may  
11 enter that country, and if so on what terms and conditions,<sup>3</sup> just as the State  
12 of Louisiana was able to determine who could enter the video poker business  
13 in its jurisdiction and on what terms. The Mexican government had no greater  
14 property interest than the State of Louisiana in deciding what it would permit  
15 and what it would not permit. And as in *Cleveland*, both sovereigns had the  
16 power to punish those who circumvented their regulatory scheme.<sup>4</sup>

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18 <sup>3</sup> Reasonable people may disagree on whether the Mexican  
19 government was engaged in legitimate protection of its country and  
20 agricultural industry from agricultural pests, or whether the Mexican  
21 government’s demands were a trade barrier imposed in contravention of  
22 its free trade agreements.  
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25 <sup>4</sup> For example, the indictment alleges that some unnamed  
26 conspirator manufactured “false, counterfeit and forged phytosanitary  
27 certificates” which are U.S. government documents. Such conduct is  
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punishable under 7 U.S.C. § 7734. Presumably Mexico has laws  
punishing those who smuggle goods into it in violation of its regulatory  
rules.

1 **VIII. THE INDICTMENT ALSO FAILS FOR FAILURE TO ALLEGE**  
2 **MATERIALITY, AN ESSENTIAL ELEMENT OF THE OFFENSE**

3 A. A Count of an Indictment Must be Dismissed if it Fails to Allege  
4 an Essential Element

5 A basic and settled proposition is that each count of an indictment must  
6 allege every element of an offense. The failure to do so requires, on timely  
7 pretrial motion, that the indictment be dismissed. A very clear statement of  
8 that proposition may be found in *United States v. Du Bo*, 186 F.3d 1177 (9<sup>th</sup>  
9 Cir. 1999).

10 We hold that, if properly challenged prior to trial, an indictment's  
11 complete failure to recite an essential element of the charged  
12 offense is not a minor or technical flaw subject to harmless error  
13 analysis, but a fatal flaw requiring dismissal of the indictment.

14 186 F.3d at 1179.

15 Du Bo's conviction requires reversal because his indictment fails  
16 to ensure that he was prosecuted only "on the basis of the facts  
17 presented to the grand jury . . . ." *United States v. Rosi*, 27 F.3d  
18 409, 414 (9th Cir. 1994). At common law, "the most valuable  
19 function of the grand jury was . . . to stand between the  
20 prosecutor and the accused, and to determine whether the  
21 charge was founded upon credible testimony . . . ." *Hale v.*  
22 *Henkel*, 201 U.S. 43, 59, 50 L. Ed. 652, 26 S. Ct. 370 (1906).  
23 Incorporated into the Fifth Amendment by the Founders, there is  
24 "every reason to believe that our constitutional grand jury was  
25 intended to operate substantially like its English progenitor."  
26 *Costello v. United States*, 350 U.S. 359, 362, 100 L. Ed. 397,  
27 76 S. Ct. 406 (1956). The Fifth Amendment thus requires that a  
28 defendant be convicted only on charges considered and found  
by a grand jury. See *United States v. Hooker*, 841 F.2d 1225,  
1230 (4th Cir. 1988).

Failing to enforce this requirement would allow a court to "guess  
as to what was in the minds of the grand jury at the time they  
returned the indictment . . . ." *United States v. Keith*, 605 F.2d  
462, 464 (9th Cir. 1979) [<sup>\*\*4</sup>] (citing *Russell v. United States*,  
369 U.S. 749, 770, 8 L. Ed. 2d 240, 82 S. Ct. 1038 (1962)).  
Such guessing would "deprive the defendant of a basic  
protection that the grand jury was designed to secure," by  
allowing a defendant to be convicted "on the basis of facts not

1 found by, and perhaps

2 not even presented to, the grand jury that indicted him." *Id.* (citing  
3 *Russell*, 369 U.S. at 770). . . .

4 186 F.3d at 1179-1180.

5 B. Materiality is an Essential Element of the Crime of Wire Fraud

6 Although the word "materiality" is not included in the text of the wire  
7 fraud statute, the United States Supreme Court definitively ruled that it is an  
8 essential element of that offense. *Neder v. United States*, 527 U.S. 1 (1999).

9 . . . we hold that materiality of falsehood is an element of the  
10 federal mail fraud, wire fraud, and bank fraud statutes.

11 527 U.S. at 24. Subsequent to *Neder* and citing it, the Court of Appeals for  
12 the Ninth Circuit observed, "A misrepresentation must be material to form the  
13 basis of a conviction for mail or securities fraud." *United States v. Tarallo*,  
14 380 F.3d 1174, 1182 (9<sup>th</sup> Cir. 2004). (The issue in *Tarallo* was adequacy of  
15 the proof of materiality rather than the sufficiency of the indictment.)

16 C. The Indictment Does Not Allege that the Misrepresentations  
17 Charged were Material

18 Nowhere in the indictment have we found reference to the element of  
19 materiality. The word does not appear in it as far as we can see. Rather, the  
20 indictment tracks the language of the wire fraud statute,<sup>5</sup> and in doing so

21 \_\_\_\_\_  
22 <sup>5</sup> "An indictment is sufficient if it states each of the essential  
23 elements of the offense. *Hamling v. United States*, 418 U.S. 87, 117, 41

24 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). 'It is generally sufficient that an

25 indictment set forth the offense in the words of the statute itself, as long as

26 'those words  
27  
28

1 omits the materiality element.

2 As the *Du Bo* court noted, without specific reference to an essential  
3 element in the indictment, we are left to guess about whether the grand jury  
4 knew that materiality was an element or, if it did so, whether it found probable  
5 cause to believe that materiality had been demonstrated. The remedy is  
6 clear. These counts of the indictment should be dismissed as insufficient for  
7 their failure to allege an essential element of the crimes charged.

## 8 **IX. CONCLUSION**

9 Although the reach of the federal mail and wire fraud statutes is broad,  
10 it is not without limit. The *McNally-Carpenter-Cleveland* trilogy imposed a  
11 clear and definite limit on those statutes. They can be used only where the  
12 object of the conspiracy is fraud that aims at victims' money or property.

13 Fraud that aims at circumventing a regulatory program does not violate the  
14 wire fraud statute.

15 In the case before the Court, the indictment alleges a "scheme and  
16 artifice to defraud the United States and the Republic of Mexico of and  
17 concerning the proper enforcement of their agreement regarding the proper  
18 handling and certification of stone fruit to be exported to Mexico." It is clearly

19 \_\_\_\_\_  
20 of themselves fully, directly, and expressly, without any uncertainty or  
21 ambiguity, set forth all the elements necessary to constitute the offence  
22 intended to be punished." *Hamling*, 418 U.S. at 117 (quoting *United*  
23 *States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1882))." *United*  
24 *States v. Lockhart*, 382 F.3d 447, 449 (4<sup>th</sup> Cir. 2004).



1 an allegation of a scheme to defeat Mexico's regulatory rules for American  
2 produce entering Mexico. As in *Cleveland* it is "telling" that the indictment  
3 does not allege that the defendants "defrauded [Mexico or the United States]  
4 of any money to which [either government] was entitled by law." 531 U.S. at  
5 21. The second and third groups of counts fail to charge offenses under the  
6 wire fraud statute and should be dismissed for that reason.

7 Second, the indictment omits an essential element of the charged  
8 offenses. When challenged in a timely manner before trial, the only remedy  
9 for the insufficiency is dismissal.

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12 Dated: \_\_\_\_\_

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14 Respectfully submitted:

15  
16 \_\_\_\_\_  
17 Irwin H. Schwartz, WSBA #4769  
18 Counsel for James D. Mahoney and  
19 Co-counsel for Im Ex Trading Co.

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22 \_\_\_\_\_  
23 J. Adam Moore, WSBA # 4458  
24 Counsel for David L. Mahoney and  
25 Co-counsel for Im Ex Trading Co.

**PROGRAMA PILOTO PARA LA  
EXPORTACION DE DURAZNOS Y  
NECTARINAS DE LOS ESTADOS UNIDOS  
A MEXICO**

**I. PREFACIO**

A. El propósito de este documento es facilitar la exportación de duraznos y nectarinas de California a México para asegurar que exista uniformidad de procedimientos entre todos los participantes. Para fines cuarentenarios se considera a los duraznos y las nectarinas como un solo producto.

B. Los procedimientos que se deben seguir tienen el propósito de asegurar que los duraznos y las nectarinas estén libres de la palomilla oriental de la fruta (*Cydia molesta*), la mosca de la manzana (*Rhagoletis pomonella*), el picudo de la ciruela (*Conotrachelus nenuphar*) y moscas de la fruta (tefrítidos).

C. Las zonas de producción y exportación participantes son únicamente los condados que actualmente no están sujetos a cuarentena por moscas de la fruta de importancia cuarentenaria en México.

D. Todos los participantes tienen la responsabilidad de poner en práctica los procedimientos acordados en este plan de trabajo.

**II. PANORAMA DEL RIESGO CUARENTENARIO**

A. *Cydia (Grapholita) molesta*  
De amplia distribución en los Estados Unidos, infesta fruta de hueso (hospedero preferido). No está presente en México.

B. *Rhagoletis pomonella*  
De amplia distribución en los Estados Unidos, infesta el fruto del manzano (hospedero preferido) y la fruta de hueso. Distribución restringida en México.

**PILOT PROGRAM FOR THE  
EXPORTATION OF  
PEACHES AND NECTARINES FROM THE  
UNITED STATES TO MEXICO  
UNDER A SYSTEMS APPROACH**

**I. PREFACE**

A. The purpose of this document is to facilitate the exportation of peaches and nectarines from the California to Mexico to ensure there is procedural uniformity among participants. Peaches and nectarines are considered a single commodity for quarantine purposes.

B. The procedures being followed are to ensure that peaches and nectarines are free of Oriental fruit moth (*Cydia molesta*), apple maggot (*Rhagoletis pomonella*), plum curculio (*Conotrachelus nenuphar*) and fruit flies (Tephritidae).

C. The participants growing/exporting areas are only those counties not currently regulated for fruit flies of quarantine importance to Mexico.

D. All participants are responsible for carrying into effect the procedures agreed to in this work plan.

**II. OVERVIEW OF QUARANTINE RISK**

A. *Cydia (Grapholita) molesta*  
Widely distributed in the United States, infesting stone fruit (preferred host). Not present in Mexico.

B. *Rhagoletis pomonella*  
Widely distributed in the United States, infesting apples fruit (preferred host) and stone fruit. Restricted distribution in Mexico.

*C. Conotrachelus nenuphar*

Ocurre en los Estados Unidos y no se encuentra al oeste de las Montañas Rocallosas, con la excepción del estado de Utah. Infesta manzanas y fruta de hueso. No está presente en México.

D. Tefrítidos. (Géneros *Anastrepha*, *Ceratitis*, *Bactrocera*, *Rhagoletis*). California es una entidad en donde continuamente se detectan especies exóticas de moscas de la fruta. Es necesario especificar procedimientos para asegurar que estas especies no infesten la fruta de exportación a México.

### III. PARTICIPANTES

A. El Servicio de Inspección de Sanidad Animal y Vegetal del Departamento de Agricultura de los Estados Unidos (USDA/APHIS).

B. Departamentos de Agricultura de los Estados.

C. Dirección General de Sanidad Vegetal de la Secretaría de Agricultura, Ganadería y Desarrollo Rural de México (SAGAR/DGSV).

D. Dirección General de Inspección Fitozoosanitaria de la Secretaría de Agricultura, Ganadería y Desarrollo Rural de México (SAGAR/DGIFZ).

E. Asociaciones industriales.

F. Empacadores/Exportadores (participantes)

G. Productores

H. Entidades asociadas (importadores, transportistas y comerciantes).

### IV. RESPONSABILIDADES

A. USDA/APHIS TENDRA LAS SIGUIENTES RESPONSABILIDADES:

1. Designar un representante nacional oficial para la administración general del programa y un

*C. Conotrachelus nenuphar*

Occurs in the United States. Is not present west of the Rocky Mountains with the exception of Utah. Infests apples and stone fruit. Not present in Mexico.

D. Tephritidae. (Genus *Anastrepha*, *Ceratitis*, *Bactrocera*, *Rhagoletis*) California is an entity with continuous detection of exotic species of fruit flies. It is necessary to specify procedures to ensure that these species do not infest exporting fruit to Mexico.

### III. PARTICIPANTS

A. Plant Protection and Quarantine, Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA/APHIS/PPQ).

B. State Departments of Agriculture.

C. Dirección General de Sanidad Vegetal of the Comisión Nacional de Sanidad Agropecuaria of the Secretaría de Agricultura, Ganadería y Desarrollo Rural of Mexico (SAGAR/CONASAG/DGSV).

D. Dirección General de Inspección Fitozoosanitaria of the Comisión Nacional de Sanidad Agropecuaria of the Secretaría de Agricultura, Ganadería y Desarrollo Rural of Mexico (SAGAR/CONASAG/DGIFZ).

E. Industry Associations.

F. Packers/Shippers (Participants)

G. Growers

H. Associated Entities (importers, commercial handlers and transporters).

### IV. RESPONSIBILITIES

A. USDA/APHIS IS RESPONSIBLE FOR:

1. Designating an official national representative for the general management of the

representante local oficial para la operación y coordinación del programa. Conjuntamente con los funcionarios designados de SAGAR/DGSV, coordinará el desarrollo de las actividades del programa.

2. Encargarse de la administración y dirección del programa para la ejecución de este plan de trabajo, proporcionar el personal suficiente para llevarlo a cabo, y cooperar con SAGAR/DGSV para el desarrollo del programa.

3. Enviar a SAGAR/DGSV una lista de productores/empacadores que participan en el programa basado en el enfoque de sistemas dentro de los primeros 30 días después de que se inicie la exportación.

4. Informar a SAGAR/DGSV de todas las medidas correctivas cuando se detecten plagas de interés cuarentenario en los procedimientos de certificación.

5. Llevar a cabo una investigación completa en casos de problemas y cuando SAGAR/DGSV solicite una aclaración para mejorar las actividades del programa.

6. Proporcionar apoyo en el punto de ingreso a México, proporcionando la identificación de las plagas, a solicitud de SAGAR/DGSV.

7. Apoyar a los participantes de la industria proporcionando aclaración sobre plagas o problemas de documentación detectados en el punto de ingreso a México.

8. Notificar a todos los participantes afectados de los problemas que afecten el programa de exportación, y coordinar la resolución de estos problemas con los estados y la industria.

9. Verificar que se cumplan las responsabilidades de todos los participantes.

10. Hacer seguimiento de cargamentos rechazados en la frontera, e informar a SAGAR/DGSV del destino final de estos, así como de las conclusiones de las investigaciones efectuadas.

program and an official local representative for the coordination-operation of program. Jointly with the designated officials from SAGAR/CONASAG/DGSV will coordinate the development of program activities.

2. Providing management and program direction for the implementation of this work plan and sufficient personnel to accomplish this and cooperating with SAGAR/CONASAG/DGSV for the development of program.

3. Sending SAGAR/CONASAG/DGSV a list of growers/packers participating in the systems approach program within 30 days of the initiation of exports.

4. Informing SAGAR/CONASAG/DGSV of all corrective measures when pests of quarantine concern to Mexico are detected during the certification procedures.

5. Carrying out a complete investigation in problem cases and where SAGAR/CONASAG/DGSV requests clarification for the improvement of program activities.

6. Providing support at the Mexico point of entry with identification of pests when requested by SAGAR/CONASAG/DGSV.

7. Providing support to industry participants for clarification for pests or documentation problems detected at the Mexico point of entry.

8. Notifying all affected participants of problems impacting the exportation program and coordinating the resolution of these with the States and industry.

9. Verifying that the responsibilities of all participants are being met.

10. Following up on rejected shipments at the border and reporting to SAGAR/CONASAG/DGSV the final destination of the shipment as well as the finding of

B. EL DEPARTAMENTO DE AGRICULTURA DEL ESTADO ES RESPONSABLE DE:

1. Designar un representante local oficial para la coordinación del programa de exportación y para actuar como enlace con SAGAR/DGSV para la ejecución del programa.
2. Enviar a USDA/APHIS una lista proporcionada por la asociación industrial de productores y empaques que participan en la opción de enfoque de sistemas para el programa de exportación, por lo menos 45 días antes de que se inicien las exportaciones.
3. Supervisar y encargarse de la dirección administrativa para implementar los procedimientos específicos de este plan de trabajo, así como el personal suficiente para lograrlo.
4. Implementar los procedimientos específicos del plan de trabajo para llevar a cabo las certificaciones requeridas de programas de campo, tratamiento y envíos, así como la expedición de certificados correspondientes a cada una de las anteriores certificaciones, en colaboración con USDA/APHIS y representantes de la industria.
5. Asegurar que los participantes realicen las operaciones de campo y empaque necesarias, según las indicaciones del Apéndice I.
6. Proporcionar retroalimentación a los participantes para asegurar que se tomen las medidas correctivas adecuadas en cualquier situación que no cumpla con los requisitos de este plan de trabajo.
7. Rechazar cualquier cargamento que no cumpla con este plan de trabajo.
8. Verificar que toda la fruta proveniente de un solo lote se identifique por medio de un número de lote único, para poder rastrear el origen de la

investigations performed.

B. STATE DEPARTMENT OF AGRICULTURE IS RESPONSIBLE FOR:

1. Designating an official local representative for the coordination of the export program and to act as the liaison with SAGAR/DGSV for the implementation of the program.
2. Sending to USDA/APHIS a list provided by the industry association of growers/packers participating in the systems approach option for this export program at least 45 days prior to the initiation of exports.
3. Supervising and providing management direction to implement the specific procedures in this work plan and sufficient personnel to accomplish this.
4. Implementing the specific procedures of the work plan to accomplish the required field program, treatment, and shipment certifications and issuing certificates for each of the certifications above mentioned in cooperation with USDA/APHISPPQ and industry representatives.
5. Ensuring participants are conducting necessary field and packing operations as outlined in Appendix I.
6. Providing feedback to participants to ensure that appropriate corrective action is taken in situations not meeting requirements of the work plan.
7. Rejecting any shipment not in compliance with this work plan.
8. Verifying all fruit coming from a single lot is identified with a unique lot number in order to trace the origin of the fruit.

fruta.

9. Tomar medidas correctivas inmediatas en casos en que se identifique algún problema, y notificar a USDA/APHIS y a SAGAR/DGSV cuando sean necesarias tales medidas.

10. Coordinar las actividades correctivas con USDA/APHIS e informar a todos los participantes afectados de las medidas tomadas. En caso necesario, los cargamentos de la huerta o del participante afectado, no serán certificados hasta que el problema quede resuelto a satisfacción de SAGAR/DGSV.

11. Expedir Certificados Fitosanitarios Federales después de verificar que se hayan cumplido todos los requisitos.

12. A solicitud de un inspector de SAGAR/DGSV, presentar para su revisión copias de todos los documentos de certificación pertinentes.

13. Verificar que se cumplan las responsabilidades de todos los participantes.

#### C. SAGAR/DGSV TENDRA LAS SIGUIENTES RESPONSABILIDADES:

1. Designar un representante nacional oficial para la administración general del programa y un representante local oficial para la coordinación del programa. Estos representantes ayudarán a coordinar las actividades del programa conjuntamente con los funcionarios designados de USDA/APHIS.

2. Mantener un programa de visitas al lugar de origen para supervisar en forma aleatoria las actividades del plan de trabajo.

3. Coordinar las actividades con representantes de la industria y de USDA/APHIS.

4. Informar a los importadores de los procedimientos para efectuar la importación.

5. Confirmar una lista maestra de lotes, plantas

9. Taking immediate corrective action in cases where problems are identified and notifying the USDA/APHIS and SAGAR/DGSV when such actions are necessary.

10. Coordinating corrective activities with USDA/APHIS and informing all affected participants of actions taken. If necessary, shipments from the affected orchard area or participant will not be certified until the problem is resolved to the satisfaction of SAGAR/DGSV.

11. Issuing Federal Phytosanitary Certificates after verifying that all requirements have been met.

12 Presenting for review, upon request of SAGAR/DGSV inspector, copies of all pertinent certification documents.

13. Verifying that the responsibilities of all participants are being met.

#### C. SAGAR/DGSV IS RESPONSIBLE FOR:

1. Designating an official national representative for the general management of the program and official local representative for the coordination of the program. This representation will help coordinate program activities in conjunction with the designated officials from USDA/APHIS.

2. Maintaining a program of visits at origin for randomly supervising the activities of the work plan.

3. Coordinating activities with USDA/APHIS and industry representatives.

4. Informing the importers of the procedures to carry out the importation.

5. Confirming a master list of approved lots,

empacadoras y compañías asociadas aprobadas.

6. Proporcionar a SAGAR/DGIFZ la lista maestra de participantes aprobados y de todos los procedimientos necesarios de ingreso, retención y rechazo, así como los procedimientos para efectuar inspecciones de documentación, identificación de cajas y estado fitosanitario del cargamento.

7. SAGAR/DGSV informará inmediatamente a los inspectores locales de USDA/APHIS de cualquier problema que se detecte para poder tomar medidas correctivas a la brevedad.

8. Conjuntamente con funcionarios de la industria, el estado y USDA/APHIS, hacer una investigación completa de cualquier problema detectado que se relacione con actividades del programa, y solicitar que USDA/APHIS investigue esos problemas y aporte una aclaración para mejorar el programa.

9. Efectuar una evaluación al final de la temporada, así como un análisis del programa actual, con la cooperación de USDA/APHIS, el estado y la industria.

#### C. SAGAR/DGIFZ TENDRA LAS SIGUIENTES RESPONSABILIDADES:

1. Proporcionar a los inspectores en los puntos de ingreso la lista maestra de participantes aprobados por SAGAR/DGSV, así como toda la información y documentación necesarias para llevar a cabo este programa.

2. Verificar en el punto de ingreso la documentación, el empaque, el medio de transporte y las condiciones fitosanitarias de cada cargamento, de acuerdo con el plan de trabajo.

3. Liberar para importación a México los cargamentos que cumplan con todos los requisitos del plan de trabajo, y llevar a cabo procedimientos específicos para cargamentos problema. (Ver las Secciones VIII y IX).

4. Negar el ingreso a México de cualquier embarque que no cumpla con los requisitos del plan de trabajo. SAGAR/DGIFZ cooperará con

packing facilities and associated companies.

6. Providing to SAGAR/DGIFZ the master list of approved participants and all of the necessary entry, holding and rejection procedures and the procedures for carrying out inspections of documentation, box identification and the phytosanitary condition of the shipment.

7. SAGAR/DGSV will immediately inform USDA/APHIS local inspectors of any detected problems so that prompt corrective actions can be taken.

8. Conducting a complete investigation, jointly with USDA/APHIS, State and industry officials, on detected problems related to activities of the program, and requesting USDA/APHIS conduct an investigation of those problems and to provide clarification to improve the program.

9. Performing an end-of-season evaluation and analysis of the current program with the cooperation of the USDA/APHIS, the state and the industry.

#### D. SAGAR/DGIFZ IS RESPONSIBLE FOR:

1. Providing to the inspectors at the points of entry the master list of the SAGAR/DGSV approved participants, and all the information and documentation needed to carry out this program.

2. Verifying, at the point of entry, the documentation, packing, conveyance and phytosanitary condition of each shipment in accordance with the work plan.

3. Releasing for import to Mexico shipments that meet all the work plan requirements, and carrying out specific procedures for problem shipments. (See Section VIII and IX).

4. Rejecting for entrance into Mexico any shipment that does not fulfill the requirements of the work plan. SAGAR/DGIFZ will cooperate

USDA/APHIS para proporcionar la oportunidad de confirmar cualquier intercepción de plagas.

5. Notificar a SAGAR/DGSV de cualquier intercepción de plagas vivas cuarentenarias o no cuarentenarias con una infestación de más del 5%, así como de cualquier rechazo por deficiencias detectadas en cuanto a documentación, empaque o medio de transporte.

6. Informar a SAGAR/DGSV de cualquier desviación detectada en actividades del programa que requieran medidas correctivas.

**E. LAS ASOCIACIONES INDUSTRIALES TENDRAN LAS SIGUIENTES RESPONSABILIDADES:**

a. Cooperar con USDA/APHIS Y SAGAR/DGSV en el desarrollo de las actividades del programa.

b. Proporcionar al Departamento de Agricultura del Estado 60 días antes de que se inicien las actividades del programa una lista de los participantes que pretenden exportar duraznos y nectarinas a México. Esta lista deberá incluir una relación de las plantas empacadoras y sus números de lotes de productor aprobado.

Si se hacen las notificaciones después de esta fecha podrá ocasionar demoras en la iniciación del programa.

c. Proporcionar a los participantes de la industria la información y documentación necesarias relativas a los requisitos del plan de trabajo.

d. Desarrollar procedimientos operativos (lista de verificación) para satisfacer los requisitos del plan de trabajo y distribuirlos a los participantes de la industria.

e. Asegurar que la fruta sea inspeccionada por técnicos de la empacadora, según se indica en la Sección VI y con el modelo de acuerdo de cumplimiento (Apéndice I).

f. Suscribir un acuerdo financiero con SAGAR/DGSV 15 días antes de que se inicie el programa, indicando los procedimientos

with USDA/APHIS to provide the opportunity to confirm pest interceptions.

5. Notifying SAGAR/DGSV of any interception of live quarantine pest or non-quarantine pest with infestation over 5%, or any rejection due to deficiencies detected in documentation, packing and conveyance.

6. Informing SAGAR/DGSV of any deviation detected in the program activities which require a corrective action.

**E. INDUSTRY ASSOCIATIONS ARE RESPONSIBLE FOR:**

a. Cooperating with USDA/APHIS and SAGAR/DGSV in the development of program activities.

b. Providing the State Department of Agriculture 60 days prior to the initiation of program activities, with a list of participants intending to export peaches and nectarines to Mexico. This includes a list of packing facilities and their approved grower lot numbers.

Notifications after this date may cause delays in the program initiation.

c. Providing to all industry participants the necessary information and documentation related to the work plan requirements.

d. Developing operational procedures (checklist) to satisfy the work plan requirements and distributing these to the industry participants.

e. Ensuring that fruit is being inspected by packing house technicians as noted in Section VI and the sample compliance agreement (Appendix I).

f. Finalizing a financial agreement with SAGAR/DGSV 15 days before the beginning of the program, indicating the specific procedures



específicos para proporcionar todos los fondos necesarios para llevar a cabo las actividades descritas en el plan de trabajo.

g. Verificar que se cumplan las responsabilidades de todos los participantes.

**F. LOS EMPACADORES/EXPORTADORES (PARTICIPANTES) TENDRAN LAS SIGUIENTES RESPONSABILIDADES:**

a. Inscribirse en el programa con la asociación industrial 75 días antes de que se inicie el programa.

b. Implementar los procedimientos específicos según lo indicado en el plan de trabajo.

c. Verificar que estén claramente visibles todas las marcas y la identificación requeridas en las cajas de cartón.

d. Verificar que cada caja de cartón destinada para exportación a México tenga impresos el nombre y la dirección del participante o de su(s) compañía(s) asociada(s), y que lleve un número de lote único con el fin de poder rastrear la fruta a su origen.

e. Identificar en forma clara un área dentro del cuarto frío donde se almacene la fruta destinada a México y evitar que se mezcle con fruta que no reuna los requisitos establecidos por México. (Ver la Sección VII.D)

f. Proteger la fruta contra infestaciones y reinfestaciones (debido a insectos oportunistas y mezclas de fruta) después de la certificación y hasta que sea cargada en el interior de un medio de transporte limpio y sellado.

**G. LOS PRODUCTORES TENDRAN LAS SIGUIENTES RESPONSABILIDADES:**

a. Registrar los lotes elegibles con sus respectivas organizaciones de empacadores.

b. Asegurar que los lotes registrados tienen sistemas de control para reducir la incidencia de *Cydia molesta*, como se indica en el ejemplo del acuerdo de cumplimiento del Apéndice I.

for providing all the necessary funds to fulfill the activities describes in the work plan.

g. Verifying that the responsibilities of all participants are being met.

**F. PACKERS/SHIPPERS (PARTICIPANTS) ARE RESPONSIBLE FOR:**

a. Registering for the program with the industry association 75 days prior to program initiation.

b. Implementing the specific procedures as outlined in the work plan.

c. Verifying that all required markings and identification on the cartons are clear.

d. Verifying that each carton, destined for export to Mexico, is pre-printed with the name and address of the participant or its associated company(s), and contains a unique lot number in order to trace the fruit back to origin.

e. Clearly identifying an area within a cold room where fruit bound for Mexico will be stored, and preventing commingling with fruit that doesn't meet Mexico's entry requirements. (See. Section VII.D)

f. Protecting fruit from being infested and reinfested (due to hitch-hikers and to commingling) after certification and until loaded onto a clean conveyance and sealed.

**G. GROWERS ARE RESPONSIBLE FOR:**

a. Registering eligible lots with their respective packing organizations.

b. Ensuring that registered lots have pest control systems in place to minimize the occurrence of *Cydia molesta* as detailed in the example compliance agreement provided in

Appendix I.

H. LAS ENTIDADES ASOCIADAS SON RESPONSABLES DE:

1. LOS IMPORTADORES SON RESPONSABLES DE:

- a. Obtener los requisitos de importación de SAGAR/DGSV.
- b. Averiguar y estar enterados de las condiciones especiales requeridas para el manejo y transporte de fruta importada a México.
- c. Hacerse responsable de rechazos cuando no se cumplan estos requisitos.
- d. Comunicar a los tratantes comerciales los requisitos para la importación de duraznos y nectarinas a México.

2. COMERCIANTES (VENDEDORES, INTERMEDIARIOS Y DESPACHADORES) TENDRAN LAS SIGUIENTES RESPONSABILIDADES:

- a. Notificar a los transportistas de los requisitos sobre los procedimientos de envío.
- b. Solicitar el apoyo del Representante de la Industria para aclarar los requisitos para los envíos y para las aclaraciones sobre problemas por rechazo de cargamentos.
- c. Averiguar y estar enterado de los requisitos para la importación de frutas a México.
- d. Verificar que se cumplan las condiciones establecidas en este plan de trabajo para los cargamentos.
- e. Informar al Representante de la industria, cuando los requisitos no se cumplan.
- f. Hacerse responsable de los rechazos cuando no se cumplan dichos requisitos.

H. ASSOCIATED ENTITIES ARE RESPONSIBLE FOR:

1. IMPORTERS ARE RESPONSIBLE FOR:

- a. Having the SAGAR/DGSV import requirements.
- b. Inquiring into and being aware of special conditions required for the handling and transportation of fruit imported into Mexico.
- c. Taking responsibility for rejections when these requirements are not met.
- d. Communicating to commercial handlers the requirements for importing peaches and nectarinas to Mexico.

2. COMMERCIAL HANDLERS (SELLERS, BROKERS AND FORWARDING AGENTS) ARE RESPONSIBLE FOR:

- a. Notifying the transporters of the shipping procedure requirements.
- b. Requesting support from the Industry Representative for clarification of shipment requirements and for clarification of shipment rejection problems.
- c. Inquiring into and being aware of the requirements for importation of fruit into Mexico.
- d. Verifying that the conditions established in this work plan for shipments are met.
- e. Informing the Industry Representative when the requirements of this work plan are not met.
- f. Taking responsibility for rejections when these requirements are not met.

- g. Verificar que los medios de transporte estén limpios antes de cargar la fruta en el vehículo.
- h. Realizar los procedimientos de embarque específicos determinados en este plan de trabajo para los envíos que estén listos para ser cargados en un medio de transporte.

i. Verificar que los cargamentos certificados de fruta con destino a México pero almacenados temporalmente en la frontera estén protegidos de infestación y reinfestación, tal como se describe en el plan de trabajo (Ver la Sección VII.B.)

### 3. LOS TRANSPORTISTAS TENDRAN LAS SIGUIENTES RESPONSABILIDADES:

a. Averiguar y estar enterados de los requisitos para el envío de embarques, así como solicitar aclaraciones al Representante de la Industria en el lugar de origen.

b. Verificar que los transporte estén limpios y sin hojas, basura vegetal y tierra antes de cargar la fruta en el vehículo.

c. Verificar que el embarque que va a ser cargado en un transporte corresponda a la documentación expedida.

d. Verificar que el inspector autorizado por USDA/APHIS, asigne un sello numerado al transporte y asegurar que el sello numerado asignado no sea substituido. Los empacadores deberán informar a los transportistas que los sellos no podrán quitarse hasta que no lo autorice un funcionario de SAGAR/DGSV o SAGAR/DGIFZ, en el punto de ingreso en México.

e. Evitar la ruptura no autorizada de sellos. Estos deberán quitarse únicamente por personal de SAGAR/DGIFZ en el punto de ingreso.

### V. PROCEDIMIENTOS DE REGISTRO

1. El participante deberá registrar con la asociación de la industria, su nombre o razón social exactos, así como el de sus compañías asociadas y lotes de producción que se planean mantener durante la vigencia del programa de exportación. El apropiado nombre registrado, estará impreso en todas las cajas de fruta.

g. Verifying that conveyances are clean prior to loading of the fruit.

h. Carrying out the specific shipping procedures established in this work plan for shipments ready to be loaded onto conveyances.

i. Verifying that certified shipments of fruit destined for Mexico but stored temporarily at the border, are protected from infestation and reinfestation as describes in the work plan (see section VII.B.).

### 3. TRANSPORTERS ARE RESPONSIBLE FOR:

a. Inquiring into and being aware of shipping requirements, and requesting clarification from the Industry Representative at the place of origin.

b. Verifying that conveyances are clean and free of leaves, plant debris and soil prior to loading of fruit.

c. Verifying that the shipment to be loaded into the conveyance corresponds to the documentation issued.

d. Verifying that the USDA/APHIS authorized inspector assigns a numbered seal to the conveyance and ensuring that the assigned numbered seal is not replaced. Packers must notify transporters that seals should not be broken until authorized by a SAGAR/DGSV or SAGAR/DGIFZ officer in Mexico at the point of entry.

e. Preventing unauthorized breakage of the seals. These are to be broken only by SAGAR/DGIFZ personnel at the point of entry.

### V. REGISTRATION PROCEDURES

1. A participant must register with the industry association its precise name and with the name(s) of its associated companies and grower lots which it plans to maintain throughout the exportation program. The appropriate registered name will be preprinted on all the boxes of fruit.

2. Los lineamientos de registro se apejarán a las siguientes directrices generales del programa:

a. Los participantes deberán registrarse con la asociación industrial, con 75 días de anticipación del inicio el programa.

b. La asociación industrial debe registrarse con el Estado, 60 días antes de que se inicie el programa.

c. El Estado deberá registrarse con USDA/APHIS, 45 días antes de que se inicie el programa.

d. USDA/APHIS deberá registrarse con SAGAR/DGSV, 30 días antes de que se inicie el programa.

e. SAGAR/DGSV debe registrarse con SAGAR/DGIFZ, 15 días antes de que se inicie el programa.

3. No se permitirá el ingreso de un nuevo participante al programa de exportación, después de 30 días a partir del inicio oficial del programa.

4. El participante interesado deberá someter una solicitud dentro de los primeros 30 días, a partir del inicio del programa, declarando que cumple con todos los requisitos del plan de trabajo y deberá esperar hasta 30 días para ser evaluado antes de su aprobación.

5. Los nuevos participantes podrán proponer cargamentos para su exportación a México, por puntos de ingreso designados, sólo después de haber sido aprobados por SAGAR/DGSV.

## **VI. PROGRAMA DE MANEJO INTEGRADO**

### **ETAPA I - PRODUCCION**

1. Todos los huertos participantes en este programa deberán contar con una hoja de manejo certificada/validada por el USDA/APHIS en la que se especifique que el huerto ha sido sometido a monitoreos precosecha y que no se ha detectado la presencia de *Cydia molesta* en frutos.

2. Registration time lines will follow the follow general guidelines for the program:

a. Participants should register with the industry association 75 days prior to program initiation.

b. The industry association should register with the State 60 days prior to program initiation.

c. The State should register with USDA/APHIS 45 days prior to program initiation.

d. USDA/APHIS should register with SAGAR/DGSV 30 days prior to program initiation.

e. SAGAR/DGSV should register with SAGAR/DGIFZ 15 days prior to program initiation.

3. The entry of a new participant into the export program after 30 days from the formal initiation of the program, is not allowed.

4. An interested participant must submit an application within 30 days from the initiation of the program stating that they comply with all the requirements in the work plan, and must wait up to 30 days to be evaluated for approval.

5. New participants can submit shipments for export to Mexico at designated entry points, only after being approved SAGAR/DGSV.

## **VI. SYSTEMS APPROACH**

### **STAGE I – PRODUCTION**

1. All participant orchards in this program will have records certified and validated by USDA/APHIS/PPQ in which should be specified that the orchard has been subjected to pre-harvest monitoring and live *Cydia molesta* in fruits or buds has not been detected.

2. Solo fruta cosechada después de las aspersiones o fruta que no ha estado expuesta a la infección de larvas según datos del trapeo de adultos serán elegibles para la exportación a México. Estas condiciones serán determinadas en forma conjunta entre el personal del USDA y el profesional fitosanitario designado por DGSV al programa piloto.

## **ETAPA II. INSPECCION EN CAMPO**

1. Antes del envío de la fruta a la empacadora se deberá hacer un muestreo en los huertos, se tomarán 60 árboles por block, de cada árbol se seleccionarán 10 frutos los cuales deberán ser cortados en rebanadas delgadas para buscar la presencia de larvas de *Cydia molesta* en su interior.

2. La detección de plagas cuarentenadas en este muestreo descartará al huerto y al empaque, hasta que el profesional fitosanitario mexicano y el coordinador asignado por parte del USDA establezcan las medidas correctivas que minimicen el riesgo.

## **ETAPA III - INSPECCIONES DE LAS EMPACADORAS**

1. Las empacadoras registradas deben tener por lo menos dos técnicos capacitados de APHIS o del Condado, responsables de cortar la fruta durante el proceso de empaque y de registrar cualquier problema fitosanitario.

2. El personal de USDA/APHIS tomará 300 duraznos y/o nectarinas de cada cargamento que llegue a la empacadora y cortará cada uno de ellos por la mitad para buscar en el interior del fruto larvas de interés cuarentenario y de *Cydia molesta*.

3. De la línea de fruta desechada, el técnico cortará y buscará *Cydia molesta* en por lo menos 300 frutas de cada lote registrado, destinado a México, según este método. La fruta cortada deberá ser representativa del lote cosechado en su totalidad (v.g.: no nada más de una o dos cajas del campo).

2. Only fruit harvested after sprays or fruit that have not been exposed to larval infection based on adults trapping will be eligible for exportation to México, these conditions will be determined between USDA personnel and the phytosanitary professional design by DGSV to the pilot program.

## **STAGE II. FIELD INSPECTION**

1. Before shipping fruit to the packing house orchard sampling must be taken on each block at rates specified in Appendix I. Each fruit will be thin cut, looking for *Cydia molesta* larvae in them.

2. The detection of live *Cydia molesta* in the fruit or shoots during the above sampling removes the orchard lot from the systems approach for the remainder of the season.

## **STAGE III - PACKING HOUSE INSPECTIONS**

1. Registered packing facilities must have at least two county/APHIS trained technical employees responsible for fruit cutting during the packing process and for recording phytosanitary problems.

3. From the cull line, the technical employees shall cut and examine for *Cydia molesta* at least 300 fruit from each registered lot intended for shipment to Mexico under the supervision of regulatory officials. The fruit that is cut should be representative of the entire harvested lot (e.g. not from one or two field bins).

4. Los técnicos llenarán la forma indicada en el Apéndice II para cada lote, y someterán esta bitácora a los funcionarios del Condado o de APHIS, antes de la certificación fitosanitaria.

5. Cualquier larva que encuentre el técnico correspondiente, durante el proceso de corte de fruta, deberá ser identificada.

6. Las medidas correctivas aplicarán a todos los huertos y empaques incluidos en el programa piloto, una segunda detección causará la cancelación definitiva del programa.

#### **ETAPA IV - INSPECCIONES OFICIALES REGLAMENTARIAS**

1. La inspección de duraznos y nectarinas para exportación a México se hará en huertos, en las compañías empacadoras o instalaciones de almacenamiento en frío registradas por la CGTFL y en las oficinas de USDA/APHIS.

2. Dos por ciento (2%) del cargamento será inspeccionado y 5% de la fruta en las cajas será cortada, para revisar si hay plaga alimentándose en su interior.

3. Los lotes en los que se detecte la presencia de larvas vivas de *Cydia molesta* serán rechazados y todos los lotes subsecuentes para exportación a México, deberán ser fumigados de acuerdo con el plan de trabajo de fumigación.

#### **VII. OTROS PROCEDIMIENTOS DE OPERACION**

##### **A. PROCEDIMIENTOS DE EMPAQUE**

1. Requisitos para el empaque de frutas  
a. Cajas nuevas y limpias que lleven impreso el nombre y la dirección del empacador.

4. The technical employees shall complete the form noted in Appendix II for each lot and present this log to county/APHIS officials prior to phytosanitary certification.

5. Any larvae found during the technical employee's cutting process will be held for identification.

6. The detection of live *Cydia molesta* (OFM) during the packing house inspection will result in the immediate removal of the lot from the Mexico program for the remainder of the season. The second detection of OFM will result in the removal of that orchard from the systems approach. A third detection of OFM from the same grower will result in the removal of that grower from the systems approach for the remainder of the season.

#### **STAGE IV – REGULATORY OFFICIAL INSPECTIONS**

1. The inspection of the peaches and nectarines to be exported to Mexico will take place in orchards, at the packing companies or cold storage facilities registered by CGTFL and USDA/APHIS.

2. Two percent (2%) of the shipment will be inspected and 5% of the fruit in those boxes will be cut to examine for the presence of the internal feeders.

3. The detection of a live *Cydia molesta* (OFM) during regulatory inspection will result in the removal of the orchard (contiguous planting of multiple lots) from the systems program for the remainder of the season.

The second detection of live OFM during regulatory inspection, at the same packing house, will result in the removal of that packing house from the systems approach.

#### **VII. OTHER OPERATING PROCEDURES**

##### **A. PACKING PROCEDURES**

1. Fruit Packing Requirements  
a. New clean boxes with the preprinted name and address of the packer.

b. Todas las cajas de los participantes deben estar marcadas con el número de lote correspondiente.

c. Deberá mantenerse la identidad de las cajas a todo lo largo del proceso de exportación.

d. La fruta empacada no debe tener ningún residuo vegetal o tierra, ni ninguna hoja completa en la caja.

#### B. PROCEDIMIENTOS PARA LA CERTIFICACION DE CARGAMENTOS.

1. Sólo la fruta que cumpla con los requisitos generales, así como de empaque y almacenamiento del plan de trabajo, podrá ser presentada y aceptada para certificación.

2. Duraznos y nectarinas pueden ser transportadas en el mismo transporte y amparados por el mismo Certificado Fitosanitario.

3. La inspección para certificación del cargamento deberá llevarse a cabo según lo indicado en la Sección VI.C.

4. Toda la fruta de cada caja muestreada deberá ser inspeccionada para ver si hay hojas, daño o signos externos de alimentación de plagas.

5. Si se encuentra cualquier plaga cuarentenaria viva o más de 5% de plagas no cuarentenarias, el cargamento será rechazado y no podrá presentarse nuevamente para su certificación. Sólo se permitirá el reacondicionamiento por presencia de residuo vegetal, tierra o la presencia de alguna hoja completa en las cajas.

6. En caso de que se detecte una plaga viva y no se posible su identificación rápidamente, se detendrá la certificación del cargamento hasta que se pueda determinar la identidad de la plaga.

#### C. PROCEDIMIENTOS PARA LA TRANSPORTACION DESPUES DEL TRATAMIENTO

1. La fruta certificada será transportada directamente de las instalaciones de tratamiento al almacenamiento refrigerado en forma expedita,

b. All boxes from participants must be stamped with the corresponding lot number.

c. Identity of the boxes must be maintained throughout the exportation process.

d. Packed fruit must have no plant debris, soil or more than an average of 2 whole leaves per box.

#### B. SHIPMENT CERTIFICATION PROCEDURES

1. Only fruit which meets the packing, storage and general requirements of the work plan will be presentes and accepted for certification.

2. Peaches and nectarines can be shipped in the same conveyance and can be covered by the same Phytosanitary Certificate.

3. The inspection for shipment certification must be carried out as noted in Section VI.C.

4. All of the fruit of each sampled box must be inspected for leaves, damage or signs of extemal pest feeding.

5. If any live quarantine pest or more than 5% non-quarantine pests are found, the shipment will be rejected and will not be resubmitted for certification. Reconditioning is allowed only for the presence of plant debris, soil and if there are no whole leaves in the box.

6. In case that a live pest is detected, and identifications not readily available, shipment certification will be held until a determination can be made for the identity of the pest.

#### C. POST-CERTIFICATION TRANSPORTING PROCEDURES

1. Certified fruit shall be transported from the packing facility directly to the cold storage in an expeditious manner, minimizing the exposure of

con un mínimo de exposición de la fruta certificada a la intemperie.

2. Los pallets de fruta certificada no podrán ser expuestos a la intemperie por mas de dos horas durante las horas pico de vuelo de las plagas. Los pallets de fruta certificada expuestos innecesariamente a la intemperie, pueden perder su certificación a juicio de los inspectores de SAGAR/DGSV o USDA/APHIS

#### D. REQUISITOS PARA EL ALMACENAMIENTO EN FRIO.

1. Un área aislada será designada para almacenar solamente fruta certificada para exportación a México en el lugar de origen y en la frontera.

2. La fruta certificada no debe tener contacto físico con fruta no certificada.

3. La fruta certificada debe ser protegida contra infestación o reinfestación mientras esté almacenada en el lugar de origen y en la frontera.

#### E. PROCEDIMIENTOS PARA EL ENVIO

1. Se permite mezclar los cargamentos de duraznos y nectarinas que se exporten a México, con otras frutas frescas certificadas, de acuerdo con otros planes de trabajo de SAGAR/DGSV y USDA/APHIS.

2. El inspector de USDA/APHIS anotará en el Certificado Fitosanitario el número del sello asignado por el exportador al vehículo en cuestión. El exportador colocará este sello numerado al vehículo al terminar de cargarlo. El número del sello deberá anotarse en el cuadro 14 del certificado fitosanitario. (Para fines de esta sección, "exportador" es la persona responsable del proceso de carga y envío del vehículo).

3. Los vehículos serán sellados en el punto de origen y permanecerán sellados hasta que SAGAR/DGIFZ quiten el sello en la frontera.

### VIII. CRITERIOS DE ADMISION

#### A. CRITERIOS GENERALES

certified fruit to the outdoors.

2. Pallets of certified fruit shall not be exposed to the outdoors for more than two hours during peak flight of pests. Pallets of certified fruit exposed unnecessarily to outdoors, might lose their certification at the judgment of SAGAR/CONASAG/DGSV or USDA/APHIS PPQ authorized inspectors.

#### D. COLD STORAGE REQUIREMENTS

1. An isolated area will be designated to store only certified fruit for exportation to Mexico at point of origin and at the border.

2. Certified fruit must not be in physical contact with uncertified fruit.

3. Certified fruit must be protected against infestation or re-infestation during storage at origin and at the border.

#### E. SHIPPING PROCEDURES

1. Mixing of peaches and nectarines with other certified fruit under joint SAGAR/CONASAG/DGSV and USDA/APHIS PPQ commodity work plans is permitted.

2. USDA-APHIS-PPQ inspector will enter on the Phytosanitary Certificate the number of the assigned seal by the exporter to that conveyance. Exporter will put this numbered seal to conveyance at the end of the load. Seal number will be written in block 14 of the phytosanitary certificate. (For this section, "exporter" is the person responsible for the loading and shipping process)

3. Conveyances shall be sealed at the point of origin and remain sealed until SAGAR/DGIFZ breaks the seal at the border.

### VIII. ADMISSION CRITERIA

#### A. GENERAL CRITERIA



1. Sólo los cargamentos que cumplen con todos los requisitos de este plan de trabajo serán presentados a SAGAR/DGIFZ en el punto de ingreso.

2. Se permitirá el ingreso de los cargamentos a México solo a través de 8 puntos de entrada: Matamoros. Reynosa y Nuevo Laredo, Tamps.; Tijuana y Mexicali, B. C.; Ciudad Juárez, Chih.; Manzanillo, Col. y Nogales, Son.

#### B. CERTIFICADOS FITOSANITARIOS

1. El documento requerido por SAGAR/DGIFZ en el punto de entrada, es el Certificado Fitosanitario Federal.

2. El certificado fitosanitario deberá incluir la siguiente información:

a. LUGAR DE ORIGEN: Estado y Condado de origen de la fruta.

b. MEDIO DE TRANSPORTE: incluir el número del sello.

c. INFORMACION ADICIONAL: nombre de la empacadora aprobada.

d. MARCAS DISTINTIVAS: lote(s) del productor que contiene el cargamento.

e. Cuadro de DECLARACION ADICIONAL: "LOS DURAZNOS Y/O LAS NECTARINAS DE ESTE CARGAMENTO FUERON INSPECCIONADOS SEGUN LOS PROCEDIMIENTOS DEL PLAN DE TRABAJO SOBRE EL ENFOQUE DE SISTEMAS ACORDADO POR SAGAR/DGSV Y USDA/APHIS Y SE ENCONTRARON LIBRES DE PLAGAS CUARENTENARIAS".

3. SAGAR/DGIFZ rechazará cualquier cargamento que no cumpla con lo anterior.

#### C. INSPECCION DE CARGAMENTOS

1. Only shipments meeting all of the requirements of this work plan will be presented to SAGAR/DGIFZ at the point of entry.

2. Shipments will be allowed to enter Mexico only at 8 points of entry: Matamoros, Reynosa y Nuevo Laredo, Tam.; Tijuana y Mexicali, B.C.; Ciudad Juarez, Chih; Manzanillo, Col. and Nogales, Son.

#### B. PHYTOSANITARY CERTIFICATES

1. The document required by SAGAR/DGIFZ at the point of entry is a U.S. Federal Phytosanitary Certificate.

2. Phytosanitary certificate will include the following information:

a. PLACE OF ORIGIN: Packer name, state and county of origin of fruit.

b. DECLARED MEANS OF CONVEYANCE: include seal number.

Note: Additional Information was removed from the text. This item is used in the phytosanitary certificate for fumigated peach and nectarine to include the TF (treatment facility) number. It does not apply to systems peach and nectarine.

d. DISTINGUISHING MARKS: grower lot(s) contained in shipment.

e. ADDITIONAL DECLARATION box: "PEACHES AND/OR NECTARINES IN THIS SHIPMENT WERE INSPECTED UNDER THE PROCEDURES OF THE SYSTEMS APPROACH WORK PLAN AGREED BETWEEN SAGAR/DGSV AND USDA/APHIS AND WERE FOUND FREE OF QUARANTINE PESTS"

3. SAGAR/DGIFZ will reject shipments which do not comply with the above.

#### C. SHIPMENT INSPECTION

1. SAGAR/DGIFZ verificará que se cumpla con los requisitos sobre empacado.

2. SAGAR/DGIFZ inspeccionará hasta 2% de las cajas del cargamento y cortará 1 % de las frutas en esas cajas para determinar si hay plagas cuarentenarias vivas, plagas no cuarentenarias vivas y alguna hoja completa por caja empacada, así como presencia de residuo vegetal y tierra tanto en cajas como en vehículos.

#### D. ADMISION

1. Sólo podrán entrar a México los cargamentos que cumplan los requisitos de documentación, empacado y transporte y siempre que el envío no contenga:

- a. Plagas cuarentenarias vivas.
- b. Plagas no cuarentenarias vivas que excedan un 5% de infestación (5 frutas infestadas entre 100).
- c. Residuo vegetal con alguna hoja completa.

2. En los casos en que se detecten plagas muertas los cargamentos si serán admitidos en México.

3. En el punto de ingreso, DSAGAP/DGIFZ notificará oportunamente a SAGAR/DGSV de cualquier plaga (viva o muerta) detectada en los envíos, así como de las medidas que se hayan tomado (admisión, retención o rechazo).

### IX. PROCEDIMIENTOS DE RETENCION Y RECHAZO

#### A. RETENCION DE CARGAMENTOS

1. En los casos donde se detecten plagas vivas, el cargamento será retenido hasta que se determine su importancia cuarentenaria. Cuando esté disponible, el entomólogo de APHIS en la frontera tendrá la oportunidad de indentificar los especímenes antes de que se envíen a la Ciudad de México. Lo anterior se hará para acelerar el proceso de identificación

El exportador podrá elegir regresar el embarque a los Estados Unidos. Sin embargo, USDA/APHIS deberá ser informado del destino final de dicho embarque debiendo tener la documentación que

1. SAGAR/DGIFZ will verify that the packing requirements are met.

2. SAGAR/DGIFZ will inspect up to 2% of the boxes in the shipment and cut 1 % of fruit in those boxes and inspect for the live quarantine pest, for live non-quarantine pest and for any whole leaves in packed boxes, and for plant debris and soil both in boxes and in conveyances.

#### D. ADMISSION

1. Shipments will enter Mexico only when the documentation, packing and conveyance requirements have been met, and if the shipment does not contain:

- a. Live quarantine pests.
- b. Live non-quarantine pests in excess of 5% infestation (5 infested fruit in 100).
- c. Plant debris or more than an average of 2 whole leaves per box.

2. In cases where dead pests are detected, the shipment will be admitted to Mexico.

3. SAGAR/DGIFZ at the point of entry will notify SAGAR/DGSV in a timely manner of any, pest (dead or alive) detected in shipments, as well as what action was taken (admission, holding or rejection).

### IX. HOLDING AND REJECTION PROCEDURES

#### A. HOLDING OF SHIPMENTS

1. In cases where live pests are detected, the shipment will be held until its quarantine status is determined. When available, APHIS entomologist at the border will have the opportunity to identify the specimens prior to their movement to Mexico City. This will be done in an effort expedite the identification process.

The exporter may elect to return shipment to the United States. However, USDA/APHIS must be informed of the final destination of the shipment and must have documentation to support this

respalde dicha acción.

## B. RECHAZOS EN LA FRONTERA

1. La intercepción de una plaga cuarentenaria viva requerirá la fumigación de todos los lotes futuros de durazno y nectarinas hacia México, de acuerdo con el plan de trabajo.

2. Los envíos rechazados en el punto de ingreso debido a las causas anteriores no podrán ser reacondicionados ni reenviados para su importación a México.

3. En caso de deficiencias en la documentación, USDA/APHIS evaluará en la frontera las enmiendas en los datos, informándolo al Coordinador del programa de exportación de SAGAR/DGSV y USDA/APHIS a su vez, expedirá en el punto de origen la documentación necesaria, después de consultar a SAGAR/DGSV.

4. USDA/APHIS deberá efectuar una investigación de los cargamentos rechazados con el fin de determinar las responsabilidades de los participantes e identificar cualquier punto débil del programa. USDA/APHIS informará a SAGAR/DGSV de sus hallazgos y de las medidas correctivas aplicadas.

## X. PROCEDIMIENTOS DE SUSPENSION, REINICIACION Y REINSTALACION

### A. SUSPENSION DE UN PARTICIPANTE Y DEL PROGRAMA

SAGAR/DGSV informará inmediatamente a USDA/APHIS de cualquier problema identificado referente al programa, con el fin de que USDA/APHIS pueda informar inmediatamente a la compañía involucrada. Después de una consulta conjunta entre SAGAR/DGSV y USDA/APHIS, la DGSV podrá determinar las suspensiones necesarias, en acuerdo con APHIS.

### B. REINICIACION DEL PROGRAMA

## B. BORDER REJECTION

1. The first detection of live *Cydia molesta* (OFM) at the Mexico border will result in the removal of the grower for a minimum of 30 days (pending investigation and reentry authorization by Mexican regulatory officials).

The second detection of live *Cydia molesta* at the Mexico border will result in the removal of the grower from the systems approach.

2. Shipments rejected at entry point due to items above cannot be reconditioned or resubmitted for importation into Mexico.

3. In case of documentation deficiencies, USDA/APHIS/PPQ at the border will evaluate the amendments of data informing the SAGAR/CONASAG/DGSV Coordinator of export program and USDA/APHIS at origin will issue the necessary documentation after consultation with SAGAR/CONASAG/DGSV.

4. A follow-up investigation of rejected shipments by USDA/APHIS/PPQ should be carried out in order to determine participant responsibilities and identify weak points in the program. USDA/APHIS will inform SAGAR/CONASAG/DGSV of its findings and applied corrective measures.

## X. SUSPENSION, RE-INITIATION AND REINSTALLATION PROCEDURES

### A. PROGRAM AND PARTICIPANT SUSPENSION.

SAGAR/CONASAG/DGSV will inform USDA/APHIS/PPQ immediately of identified problems concerning the program in order that USDA/APHIS can immediately inform the involved company, After joint consultation among SAGAR-CONASAG-DGSV and USDA APHIS, PPQ in mutual agreement may make necessary suspensions.

### B. PROGRAM RE-INITIATION

Sólo se podrán reiniciar las actividades de un participante o de todo el programa cuando se tenga la seguridad de que todos los acuerdos se cumplan a satisfacción de SAGAR/DGSV.

#### C. REINSTALACION DE UN PARTICIPANTE

Sólo se podrá efectuar la reinstalación de un Estado, Condado o empacadora siempre que se satisfagan todas las condiciones siguientes:

1. Que USDA/APHIS realice una investigación completa oportunamente, y se envíen las conclusiones y recomendaciones a SAGAR/DGSV.
2. Que SAGAR/DGSV considere satisfactorias las conclusiones y recomendaciones de la investigación.
3. Que se haya determinado la responsabilidad del participante y se hayan tomado medidas correctivas a satisfacción de SAGAR/DGSV.
4. Que SAGAR/DGSV determine que ya no existe un riesgo cuarentenario.
5. Que SAGAR/DGSV haga todos los esfuerzos por responder a la solicitud de USDA/APHIS de reinstalación, en un plazo mínimo razonable.

#### XI. ACCIONES COOPERATIVAS

1. Todas las dependencias de gobierno involucradas, cooperarán entre si, proporcionando el apoyo necesario para resolver problemas de manera expedita.
2. El personal de las oficinas centrales de USDA/APHIS y SAGAR/DGSV visitarán las áreas del programa para evaluar las actividades del mismo y aportar directrices para establecer las acciones correctas, cuando sea necesario.

#### XII. ACUERDO GENERAL

The re-initiation of activities for one participant will occur only when there is the assurance that all agreements are fulfilled to the satisfaction of SAGAR/DGSV.

#### C. PARTICIPANT REINSTALLATION

The reinstallation of a state, county or packing facility will take place only when all the following have been satisfied:

1. USDA/APHIS/PPQ performs a complete investigation in a timely manner and findings and recommendations are sent to SAGAR/CONASAG/DGSV.
2. SAGAR/DGSV is satisfied with the findings and recommendations of the investigation.
3. The participant responsibility was determined and a corrective action was taken to the satisfaction of SAGAR/CONASAG/DGSV.
4. SAGAR/DGSV determines that a quarantine risk no longer exists.
5. SAGAR/CONASAG/DGSV will make every effort to provide a response to a USDA/APHIS/PPQ request for reinstatement in a minimum reasonable time.

#### XI. COOPERATIVE ACTIONS

1. All involved agencies will jointly cooperate with each other providing the necessary support for solving problems expeditiously.
2. Personnel from the USDA/APHIS/PPQ and SAGAR/CONASAG/DGSV headquarters will visit program areas to evaluate program activities and provide program direction in establishing correct actions whenever they are needed.

#### XII. GENERAL AGREEMENT

Este plan de trabajo fue elaborado conjuntamente por USDA/APHIS y SAGAR/DGSV para ser utilizado como guía para la certificación y exportación de duraznos y nectarinas de California a México conforme a un enfoque de sistemas. No se permite ninguna desviación del plan de trabajo a menos que esté justificada por condiciones específicas en cuanto a condiciones de importación establecidas por SAGAR/DGSV. Todas las modificaciones tienen que hacerse por escrito y podrán recopilarse en un Addendum.

### **XIII. VIGENCIA**

A. Este plan entrará en vigor a partir de la fecha en que se suscriba y se mantendrá en vigor por tiempo indefinido.

B. SAGAR/DGSV, USDA/APHIS o la Industria tendrán el derecho, conjuntamente o por separado, de cancelar o suspender el programa, previa justificación y con aviso por escrito a los otros participantes con 30 días de anticipación.

**Secretaria De Agricultura, Ganaderia y  
Desarrollo Rural.  
Dirección General de Sanida Vegetal  
El Director General**

**Dr. Luis Alberto Aguirre Uribe**

Fecha:

This work plan was jointly developed by USDA/APHIS/PPQ and SAGAR/DGSV to be used as a guide for the certification and exportation of peaches and nectarines from California to Mexico under a systems approach. No deviations from the work plan are allowed unless they are protected by specific conditions regarding importation conditions established by SAGAR/CONASAG/DGSV. All modifications must be done in writing and can be compiled into an addendum.

### **XIII. IN FORCE**

A. This work plan will take effect from its signatura date and will remain in force indefinitely.

B.SAGAR/CONASAG/DGSV,USDA/APHIS or industry have their own right together or separately, to cancel or suspend the program, prior justification and notifying the other participants by writing with 30 days in advance.

**United States Department of Agriculture  
Animal and Plant Health Inspection Service  
Deputy Administrator**

**Dr. Alfred Elder**

Date: