

## Mexican Avocados: History...The Full Story

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On February 27, 1914, B.T. Galloway, then Acting U.S. Secretary of Agriculture, signed Notice of Quarantine Number 12, which states: "I... do hereby declare that it is necessary, in order to prevent the introduction into the United States of [the avocado seed weevil, *Heilipus lauri* Boh.], to forbid the importation ... from [Mexico and Central America], of the seeds of the avocado." The authority for this action rested with section 7 of the Plant Quarantine Act, approved by Congress on August 20, 1912.

The 1914 quarantine regulation became unnecessary with the promulgation of the Nursery Stock, Plants and Seeds Quarantine (7 CFR Part 319) effective June 1, 1919, but it was over fifty years before the 1914 regulation was dropped in favor of 7 CFR Part 319. On February 8, 1973, the original avocado seed quarantine was terminated and 7 CFR Part 319 was amended concurrently, adding the avocado seed to the list of items prohibited from Mexico and all countries in Central and South America because of the avocado weevil (*Heilipus lauri* Boh.), avocado seed moth (*Stenomoma catenifer*), and weevils of the genus *Conotrachelus* on the justification that better protection was afforded by this regulation (Quarantine 37).

In the 1970s, continuing requests for import permits by firms and individuals in the U.S., coupled with inquiries from plant health officials at Mexico's Dirección General de Sanidad Vegetal (DGSV or Sanidad Vegetal), kept the entry status of avocados in the forefront during this period. Cooperative surveys were conducted in the State of Michoacan in 1973; in the States of Nayarit and Sinaloa in 1976; in Sinaloa again in 1976 and twice in 1977; and in Sinaloa, Southern Sonora and the Territory of Baja California Sur in 1978. The detection of seed weevils during some of these surveys resulted in no change in the regulatory policy of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), pending careful review of the validity of the surveys and the adequacy of procedures designed to prevent the introduction and dissemination of destructive pests.

During the review period, avocado industry representatives challenged the survey results because the March 1976 survey in Sinaloa was conducted when little or no fruit was available on the trees. USDA reviewed the survey and recommended that another survey be conducted in late August and early September to coincide with the fruiting of the criollo type avocado (native to Mexico). Three subsequent surveys were conducted, but they were not in conformance with APHIS procedures and there was no evidence that criollo avocados were being inspected. During the second survey in October 1976, black light traps were used at night for insect detection with no U.S. surveyors present.

The fact that a significant number of avocado seeds were not cut, that U.S. surveyors were not present during nighttime trapping, and no indication that criollo type avocados were examined caused USDA to state that no valid conclusions could be drawn from the surveys. On June 30, 1976, APHIS wrote to Sanidad Vegetal: *"Based upon data from the 1976 field survey, we must continue, as in the past, to rule against the issuance of permits for the importation of avocado fruit from Mexico. This reverses the recommendation of our position paper of April 8, 1974, which proposed a protocol for export from specified sites in the Uruapan area of Michoacan. "*

## **THE SPIRIT OF NAFTA (1990)**

Trade liberalization and the harmonization of sanitary and phytosanitary (SPS) measures have, over time, altered the backdrop against which governments examine animal and plant health issues as they relate to the movement of agricultural commodities across national boundaries. For most of the 20th century, the protection of plant health was maintained through a policy of pest exclusion. The policy was clear; commodities known to harbor quarantine pests in a producing country were denied access by an importing country concerned about the health of its domestic agricultural industries. In the last decade, however, the rules began to change.

Debate over the North American Free Trade Agreement (NAFTA) in the late 1980s and early 1990s placed trade between the U.S., Canada, and Mexico at the top of the national agenda, and its passage in 1994 reaffirmed broad-based political support for reciprocal trade through the reduction of tariffs, export subsidies and domestic supports, removal of unjustified trade restrictions, and the strengthening of effective dispute settlement mechanisms. In one fell swoop, NAFTA, and the creation of the World Trade Organization (WTO) one year later, provided the momentum, opening, and pathway for renewed requests by Mexico for access to the U.S. avocado market.

Although NAFTA's primary goal was the phased removal of most tariffs by 2004, it also provided for the harmonization of sanitary and phytosanitary (SPS) measures between trading partners. NAFTA explicitly recognizes that each country has a legitimate need for regulations to protect human, animal, and plant life and health. Where the risk from pest infestation or disease is high, NAFTA contemplates that a government will choose a cautious level of protection firmly based on scientific principles and risk assessment.

NAFTA confirms the right of each country to establish the level of SPS protection that it considers appropriate provided that SPS measures are applied only to the extent necessary to achieve the chosen level of protection and in a way that does not discriminate or disguise restrictions on trade. The NAFTA members have also agreed to accept each others' SPS measures as equivalent provided that the exporting country makes available scientific evidence—consistent with risk assessment methodologies agreed on by NAFTA governments—that objectively demonstrates that its measures achieve the importing country's appropriate level of protection.

The SPS provisions of NAFTA also address regional differences in pest or disease distribution within a member country. These provisions make it possible to apply SPS

measures in different ways, depending upon the relevant goods and the region from which those goods originate. For example, a region of a country could have a plant pest that is present in low numbers or entirely absent from another region of the same country. Similarly, an animal or plant pest or disease may not pose the same risk when imported to different regions of a country. Accordingly, NAFTA allows for the flow of goods from an area of low pest or disease prevalence or a pest free area provided that the exporting country can provide objective evidence supporting its claims with respect to pest population levels.

The harmonization of phytosanitary measures between WTO countries has had specific implications for the California avocado industry. With the recognition and agreement that "areas of low pest prevalence" may exist in WTO member countries, Mexico saw an opportunity for avocado exports that did not previously exist. For the 80 years preceding NAFTA, Mexico was unable to ship fresh avocados to the U.S. because of the existence of the seed weevil and other insects pests that were "new to and not theretofore widely prevalent or distributed within or throughout the United States."

At least nine pests of quarantine significance are known to occur in Michoacan, Mexico, where the avocado industry is principally located, but elimination of all of these pests has not been possible. By designating "areas of low pest prevalence," Mexico is relieved of the burden of demonstrating that all pests of concern have been eradicated, thereby clearing the way for avocado exports to the U.S.

With the implementation of NAFTA, the U.S. government came under increased pressure to facilitate the importation of agricultural commodities from Mexico and Canada. The challenge before the U.S. Department of Agriculture (USDA)—to find and adopt more flexible and creative solutions to plant pest problems, while protecting U.S. agriculture – led to a reexamination of U.S. phytosanitary policy and a philosophical shift away from pest exclusion strategies to risk mitigation "systems" or technology solutions.

Maintaining an exclusion policy has become an untenable position for the U.S. government. The consequences of maintaining the exclusion goal in the face of a NAFTA changed arena are legal challenges founded on claims that the U.S. is not complying with NAFTA provisions which allow for the importation of agricultural commodities from areas of low pest prevalence. In addition, it could be asserted that the U.S. has failed to comply with its obligation to impose plant health requirements only to the extent necessary to meet its chosen and appropriate level of protection. The U.S. government is also concerned that trading partners might mirror plant health policies that set an extremely high standard of protection, resulting in trade disruptions and uncertainties due to the unwarranted restriction of imports.

USDA's Animal and Plant Health Inspection Service (APHIS) is the primary government branch charged with implementing the phytosanitary provisions of NAFTA and other trade agreements. The position is full of conflicts, for the agency's new mandate to expand agricultural export and import trade is not easily reconciled with its historical role of preventing the introduction and establishment of exotic pests and diseases.

A 1995 analysis by the University of California Center for Exotic Pest Research raised the question of conflict of interest within APHIS, concluding that "the only logical outcome is a weakened effort in relation to the performance of both of these missions." APHIS officials have publicly acknowledged the dilemma, but have consistently held to the position that both functions are necessary if the U.S. agricultural sector is to remain vibrant. According to APHIS representatives, the agency is striving to adopt a more balanced regulatory approach to traditional protection activities. To do so, APHIS must rely on international standards and programs that manage rather than eliminate risk. The agency's ability to walk the new strategic tightrope is just now being tested, and the outcome remains to be seen.

## **MOMENTUM BUILDS**

As NAFTA was being debated in the corridors of Congress and elsewhere across the country, U.S. and Mexican plant health officials were engaged in another debate, one which centered on Mexico's assertion that the Hass avocado was not susceptible to attack by the Mexican fruit fly. USDA's long-standing position was that the fruit was a host, particularly in the absence of other, preferred host plants. Mexico strongly disagreed. The issue was obviously one of critical importance to the California avocado industry.

Fruit flies present APHIS with an enormous problem. The insect's wide host range places it at the top of the list of the world's most destructive plant pests. The introduction of Mexican fruit flies into the U.S. potentially endangers a variety of agricultural crops such as oranges, grapefruit, peaches, plums and apples that have a farmgate value well in excess of \$3 billion. Suitable fruit fly host material can be found in a large number of states from coast to coast. Additionally, fruit flies are implicated worldwide, in phytosanitary disputes between countries where they have become established and those where they have not. Avocado-specific pests, by comparison, are relatively easy to manage—keep them out of Florida, Texas, California, and Hawaii, the only states in the U.S. where avocados are grown, and infestation is not an issue.

By 1990, APHIS was on record stating that "it has not been possible" for Mexico to ship fresh avocados to the U.S. because of four species of fruit flies, as well as a number of other avocado-specific insects. Mexican plant health officials were now faced with the difficult task of demonstrating that:

- Mexican fruit flies were not present in the avocado growing regions of Michoacan or
- Hass avocados are resistant or not susceptible to attack by the Mexican fruit fly.

Fruit fly population levels could only be determined by trapping programs conducted over an extended period of time. Similarly, scientific research on the host status of Hass avocados would take months to complete.

Fruit fly research and trapping ran contrary to deep-seated beliefs on the part of the Mexicans that imported Hass avocados did not pose a risk of introducing fruit flies into the U.S. The beliefs resulted in the introduction of biases into the design and conduct of the research and trapping efforts.

In May 1992, APHIS rejected a draft work plan prepared by the Mexicans for the importation of Hass avocados into the U.S. The work plan was based on research that APHIS found to be inadequate. At the same time, USDA tentatively accepted survey data collected on avocado-specific pests. Following a technical meeting to determine the data requirements necessary to support a change in the host status of Hass avocados, USDA provided the Mexicans with suggestions on a revised research protocol.

During the next two years, Mexico conducted further research and pest surveys. The new data were submitted to USDA in June 1994, along with a revised work plan and a renewed request for access to the U.S. market. The work plan specifically requested that Mexico be allowed to ship to 19 northeastern states from October through February.

APHIS responded to Sanidad Vegetal in August 1994, soon after the California Avocado Commission (Commission) presented the Department with a review of the Mexican research, conducted by independent scientists. APHIS did not comment on the research at that time, but instead requested additional pest survey data from the Mexicans. Sensing that a decision to issue a Proposed Rule was imminent, the Commission pressed USDA for the insertion of a little-used step—an Advance Notice of Proposed Rulemaking or ANPR—based upon weaknesses in the Mexican research.

A critical exchange of correspondence between APHIS and DGSV took place in autumn 1994. APHIS continued to press Mexico for adjustments to the proposed work plan and DGSV fired back, accusing USDA of "totally ignoring" the research and "discriminatory treatment." Eventually, Mexican plant health officials complied with modifications of the work plan that, in their view, "reduc[ed] the risk that we know in advance does not exist." A final set of pest records sent to APHIS in October 1994 cleared the way for rulemaking, a major milestone in the 80 year history of the issue.

On November 15, 1994, USDA issued an Advance Notice of Proposed Rulemaking (ANPR) concerning the importation of fresh Hass avocado fruit grown in Michoacan, Mexico. In the ANPR, the Department advised that it would hold two public meetings, one in Homestead, Florida and another in San Diego, California. The Commission mounted a frontal assault, coordinating grower participation at the two hearings and a grass roots campaign designed to ensure that grower concerns filled the administrative record. The Commission also developed its own extensive comments detailing the numerous gaps and deficiencies in the science presented to date by Mexico and USDA. These were submitted into the record after the Commission successfully secured an extension of the comment period until January 1995.

The battle shifted into the legislative arena during the first six months of 1995. Commission representatives testified before the House Agriculture Committee and at 22nd Congressional District Agricultural Summit, calling for sound science to prevail in the decision-making process. The Commission also arranged for the House Agriculture Committee Chairman to meet with avocado growers in Fillmore, California, as part of a coordinated campaign to keep steady pressure on USDA by concerned Members of Congress.

By mid-summer, 1995, Commission representatives had met twice with the U.S. Secretary of Agriculture and his Deputy, urging the Department to subject the scientific data generated by Mexico and USDA to peer review. A supporting strategy—the insertion of language in the Agriculture Appropriations Bill that would make peer review mandatory—was pursued to keep the scientific issues in the spotlight and the pressure on USDA. In late June 1995, the Deputy Secretary of Agriculture contacted the Commission and California's Congressional delegation to advise all parties that a Proposed Rule was about to be issued in the *Federal Register*.

The Proposed Rule, released on July 3, 1995, described a proposed set of conditions under which fresh Hass avocado fruit grown in approved orchards in approved municipalities in Michoacan, Mexico would be allowed to enter the U.S. Specifically, the Proposed Rule set forth a series of steps designed to mitigate pest risk, including November through February shipping and limited distribution of Mexican avocados to 19 northeastern states and the District of Columbia. USDA solicited comments concerning the July 3, 1995 proposed rule for 105 days, ending on October 16, 1995.

USDA conducted five public hearings in connection with its latest proposal, including one for scientists only. The science hearing was USDA's response to industry and legislative insistence that the matter be put to peer review. Shortly before the comment period closed, the Commission secured language in the Agriculture Appropriations Bill Conference Report underscoring Congress' intense interest in the outcome of the rulemaking. USDA received 2,080 written comments and 211 oral comments on the proposed rule by the time the comment period closed.

In early 1996, Commission sources in Washington, D.C. confirmed the existence of a draft Final Rule that had been prepared by USDA for placement in the *Federal Register* in the first quarter of the year. The Commission forcefully responded by staging a grower protest in San Diego and immediately requesting a meeting with the Secretary of Agriculture. Shortly thereafter, the Commission obtained compelling information about pest population levels in Mexico and activities of a foreign agent that had not previously come to light. Commission representatives met with the Deputy Secretary to advise USDA that the Commission would be petitioning USDA to have the administrative record reopened to allow for the entry and review of the new pest data. Following the meeting, the Commission submitted a second, written request to meet with the Secretary of Agriculture. In late February, the request was denied, and the Commission advised USDA that a Petition to Reopen the Administrative Record would be filed in a matter of weeks. USDA did not reopen the record, but it did take nearly one year to

review and analyze the information contained in the Commission's series of Petitions. Although the eventual outcome of the administrative process—a Final Rule allowing Mexico to have access to the U.S. avocado market—was largely predetermined, the Commission's efforts challenging the scientific underpinnings of USDA's risk assessment caused the Department to approach the latter stages of this phase of rulemaking with extreme caution.

On February 5, 1997, the U.S. Department of Agriculture (USDA) issued a Final Rule authorizing the importation of Mexican avocados into the U.S. subject to certain conditions. This was the first time USDA used the so-called "systems approach" to manage risks posed by multiple quarantine pests known to occur in the area where fruit was originating. The Final Rule allowed for shipment of Mexican avocados to 19 northeastern states during four months of the year—November through February.

Operational issues surfaced soon after the program got underway. During the first two shipping seasons an estimated 3,782 cartons of Mexican avocados were illegally transshipped to destinations outside of the designated shipping area. In direct response to formal complaints raised by CAC, USDA tightened the existing regulations with substantive measures pertaining to the distribution, labeling, and repacking of Mexican avocados shipped to the U.S., effective January 5, 2000. USDA also made various procedural adjustments to the operation of the program in response to annual program reviews conducted between the Department's operations staff and representatives of the California avocado industry.

At the conclusion of the second shipping season in February 1999, the Government of Mexico formally requested that USDA expand the program to increase the number of states into which avocados may be imported and to allow the shipping season to begin one month earlier (October) and end one month later (March). USDA's response came over one year later, on May 11, 2000, in the form of a *Federal Register* Notice seeking comments on Mexico's request to expand the avocado import program.

USDA also announced in May 2000 that pest surveys for the 2000-01 Mexican avocado import program would commence in July, rather than late August and early September as done in previous years. The Commission had been on record since 1994 urging USDA to conduct surveys for avocado pests, including the seed moth, when adult stages of the insects are known to be present. Commission representatives were invited to travel to Mexico to observe the planned fieldwork, but less than 24 hours before the scheduled departure of the Commission team, Mexican government officials cancelled the trip.

While preparing written comments in response to USDA's Notice, Commission staff learned that USDA had failed to use the documented technique for surveying for the avocado seed moth. In the face of this breach of responsibility by USDA, and with the knowledge that California avocado growers were at risk, the Commission forcefully called for program suspension in a July 18, 2000 letter to the Administrator of the Animal and Plant Health Inspection Service. The Commission charged that USDA's

failure to account for pest biology in survey design and implementation, and its role in undoing the July 2000 visit to Mexico seriously called into question the agency's ability to manage the risk of pest infestation posed by the importation of Mexican avocados. A copy of the letter was sent to all 6,000 California avocado growers.

USDA responded to the Commission's letter in early September, maintaining that adequate controls were in place to detect the presence of quarantine pests in Mexican avocado groves. According to USDA, fruit cutting had not revealed the presence of any avocado pest and the seed moth was not reported to occur in Michoacan, Mexico. The Department's letter included an offer to send a representative to California to meet with the Commission to "further explain the avocado program's structure and rationale behind the survey methods employed." In a separate communication, USDA advised the Commission that it arranged for a late September review of the avocado program in Mexico, and invited CAC participation.

On August 8, 2000, CAC submitted comments along with three volumes of attached exhibits in response to USDA's May 11, 2000 Notice regarding program expansion. CAC also sent Herb Murphy, an ex USDA official who served as Michoacan-based Program Manager for the Mexican avocado import program during its first two years of operation, to gather first-hand information about the special program review performed by USDA in September 2000.

By September 2000, USDA had more immediate concerns than the initiation of rulemaking to expand the Mexican avocado import program. USDA was focused on the criticisms raised by CAC and conducting the program review. In addition, USDA had extensive comments to review and analyze. Forward motion on rulemaking virtually slowed to a halt in the months preceding the 2000 Presidential election in the U.S.

On November 29, 2000, USDA officials traveled to California to meet with the CAC Board of Directors. CAC Directors had an opportunity to hear first hand from top-level USDA officials responsible for formulating phytosanitary policy, and to formally present their program concerns. Department officials advised the Board that they had made a commitment to meet with their Mexican counterparts in January 2001, and that the Department was considering expansion of the program to include 12 additional states and approximately two additional months, as determined by evaluation of trapping data and host availability.

A bilateral meeting between the U.S. and Mexico took place as scheduled on January 25, 2001, and plant health officials in both countries agreed to set a target date of October 2001 for accomplishing the expansion. USDA also agreed to initiate a regulatory work plan to immediately begin the rulemaking process.

The year 2001 marked the fifth season of Mexican Avocado imports into the U.S. It was a year with explosive geo-political drama as a backdrop. The U.S. government's decision in 2001 to expand the shipping zone and season for Mexican avocado imports represented the manifestation of America's bilateral love affair with Mexico.. the



irresponsible evisceration of science-based plant protection principles. The Commission was not surprised. We had been fighting our government on this issue for nearly 15 years. Expansion had been "imminent" since 1999, held at bay by the Commission's efforts. But we were, nonetheless, stung by the reality of USDA's action and its sweeping implications to our industry. Stung that USDA actually pulled the plug to short-circuit its pest protection process and standards to deliver the Mexican Trade Deal as part of a vast compact with its enabled partner south of the border. Stung that our legitimate and compelling scientific arguments slowly lost their power and eventually went into the review process without impact.

In its expansion move, USDA added 12 states for shipments bringing the total from the original 19 to 31. The Department also widened the shipment "window." Originally shipping was authorized for four months— November through February; under a expanded program, shipments would be permitted from October 15 through April 15<sup>th</sup>.

Leading up to the expansion, Mexico became increasingly confident that its objectives would be realized. The certainty was the result of five years of shipments of Mexican avocados to the U.S. without the detection of insect pests. Mexico leveraged the fact that millions of avocados were sampled without a pest find by threatening to formally submit the issue to a NAFTA dispute panel alleging that USDA had acted unreasonably by not granting access to all 50 states. Mexico's position was made even more powerful through the deployment of formidable technical and legal expertise, as the Mexican avocado industry became engaged across all fronts—political, technical, and procedural—with a new commitment of talent and resources.

All of this came as trade relations between Mexico and the U.S. were improving with the election of President George W. Bush in the U.S. and President Vicente Fox in Mexico. Their individual, and indeed collective, power emboldened bureaucrats and trade officials responsible for making policy, thereby accelerating the pace of rulemaking. Clearly, the Fox-Bush nexus and alignment of the geo-political constellation in this Hemisphere produced the Inflection Point for Mexico's expansion into 31 states in 2001.

Given the history of the issue and these new political dynamics, change in the Mexican avocado import program was inevitable.

Even though expansion of the Mexican avocado import program appeared to be a foregone conclusion, the Commission had yet to exhaust all available response options on behalf of the industry. In fact, conditions surrounding the expansion in late 2001 and early 2002 created for the first time an opening to wage a legal fight. That's exactly what happened on December 18, 2001 when the Commission filed suit against USDA, challenging the Department's claim that Mexican avocados can be imported into the U.S. without risk of pest infestation. The Commission's 42-page complaint was filed in U.S. District Court in the Eastern District of California (Fresno). This same court decided the Argentine citrus case (*Harlan Land Co. v. USDA*, 186 F. Supp. 2d 1076 (E.D. Cal. 2001)) remanding a Final Rule back to USDA. Named as defendants in the avocado action were U.S. Secretary of Agriculture Ann M. Veneman and Bobby Acord,

Administrator of USDA's Animal and Plant Health Inspection Service.

The Commission's suit seeks to overturn the November 1, 2001 Final Rule which expanded the Mexican avocado import program to 31 states for 6 months, as well as the original rule of February 5, 1997 which first granted Mexico access to the U.S. The Commission requested a court declaration that the rules are invalid and their enforcement should be enjoined. The thrust of the Commission's arguments was that Mexican avocado imports place U.S. agriculture at grave risk to pest infestation and that the risk assessment performed by USDA in support of its rulemaking is full of errors and forms an unreliable basis for proper decision-making. The Commission's legal team anticipated that USDA would vigorously defend its rules and that the battle would be hard fought.

Despite this aggressive tactic, some industry members were disappointed that legal action wasn't taken earlier, in 1997, when the original rule was published. The Commission was disappointed as well, but the decision not to pursue legal action in 1997 was based on the facts available at the time. One overriding concern was the rule that requires courts to defer to government agencies on questions that are particularly within the purview of the agency. Such broad deference meant that we had to do more than just prove that the agency was wrong, we had to prove— unless we could show that the agency acted contrary to law—that USDA's decision was arbitrary and capricious. That is an extremely difficult test to meet.

After 1997, the situation has changed in ways that are significantly more favorable to the pursuit of litigation. *First, the Harlan Land* case demonstrated that the deference shown to an administrative agency by a federal court had certain limits. Second, USDA's expansion of the Mexican avocado import program in 2001 was not based on a new or revised pest risk analysis—the Department simply did not bother to do one. Finally, additional evidence of USDA's mishandling of the program had been accumulating ever since the program began. Together, these factors combined to make the Commission's legal case much stronger than it would have been back in 1997.

During 2002 the parties to the lawsuit moved for summary judgment and the matter was submitted for decision at oral argument in mid-November. The Commission's summary judgment motion focused on the failure of the USDA to define "significant risk," as well as its failure to be transparent in the conduct of its pest risk assessment for Mexican avocados. Considerable reliance was placed on the 2001 decision of U.S. District Court Judge Robert Coyle of the Eastern District of California in *Harlan Land Co. v. USDA*. CAC also challenged the rule on the basis that the government had failed to adequately justify its decision not to prepare an Environmental Impact Statement (EIS) with respect to the issuance of the two rules. The government argued that it is not required to quantify "significant risk" and that any concerns about the validity of its original pest risk assessment were eliminated by four successful years of importation without any insects found in the fruit. They also argued that USDA fully complied with federal law in making its decision not to prepare an EIS.

The Commission pointed out, however, that the Court must base its evaluation of the agency's decision on the information the agency had available at the time, not on what was developed later. If the original 1997 Rule was invalid based on data then available, later-developed data cannot make it valid. The Commission also argued that most of the fruit inspections the government was relying on were done in the field with the naked eye rather than in a lab or with a lens or microscope. Finally, Commission attorneys reminded the Judge at oral argument that the government was choosing to ignore the 700 fruit flies and 2,100 stem weevils detected in or near Mexico's export orchards since the import program began. The Judge asked the other side to respond to that point at oral argument, but it failed to do so.

On January 17, 2003, the Commission filed a Notice of Supplemental Authority, drawing the Court's attention to the Ninth Circuit's January 16, 2003 decision in *Public Citizen v. Dept. of Transportation*. This decision, the Commission noted, supports the argument that APHIS violated the National Environmental Policy Act by failing to prepare an EIS in connection with the 1997 Mexican Avocado Rule and the 2001 Expansion Rule. In *Public Citizen*, the Ninth Circuit held that the Department of Transportation (DOT) violated the law by failing to provide adequate justification for not preparing an EIS in connection with DOT's decision to lift the ban on use of Mexican commercial vehicles on U.S. highways. Throughout the remainder of 2003 the parties requests for summary judgment were still pending before the court.

Another development occurring in 2003 was the issuance of a draft Pest Risk Assessment (PRA) for Mexican avocados. In early 2002, soon after the Commission filed suit, USDA announced that it would be revising the PRA. Given the Department's loss in *Harlan Land* and the criticisms raised by CAC, the move seemed largely preemptive. USDA also appeared to be expecting a positive outcome from fruit fly research that had been underway in Mexico since 2001. In fact, the scientific research was a renewed effort by the Mexican industry to establish that Hass avocados are not a host to infestation by *Anastrepha* spp. fruit flies. Mexico had conducted research in 1994 with a similar objective, but problems with the project design rendered the results inconclusive.

By contrast, the 2001-02 research project was considerably more rigorous than its predecessor. With help from USDA, Dr. Martin Aluja, the principal researcher, designed a comprehensive project which included a foraging behavior test, forced infestation test, trapping and fruit sampling, environmental monitoring, and special ad-hoc tests intended to supplement preliminary findings. All of the project's principal components were subject to multiple repetitions.

Of greatest interest to the California and Mexican avocado industries was the forced infestation test. This test consisted of placing sleeve cages over tree limbs containing 10-20 pieces of Hass avocado fruit, then exposing fruit to 10 flies of oviposition age for each piece of fruit in the cage for four consecutive days. Following the exposure period, avocados were harvested and taken to a laboratory for observation. By the end of the test, a total of 1,512 cages had been deployed over the same number of trees, and

10,800 pieces of fruit had been exposed to at least 108,000 flies. This test was expected to shed new light on the susceptibility of Hass avocados to fruit fly attack at varying altitudes and seasonal conditions.

The Mexican research team completed the field portion of the study by August 2002. Once the results of the study were packaged, it would only be a matter of time before USDA would propose further expansion of the Mexican avocado import program. Late in 2002, knowing the path USDA was on, the Commission succeeded in getting the following language in Committee Report accompanying the FY 2003 Agriculture Appropriations Bill: "The [House Committee on Appropriations] directs APHIS to include independent, third-party scientists in the development of any Pest Risk Assessment for Mexican avocados, prior to the publication of any such Pest Risk Assessment in the *Federal Register*."

In June 2003, USDA released a draft Pest Risk Assessment on Mexican avocados in which it concluded that—based on the Mexican research—"commercially harvested and processed Hass avocados are not hosts for *Anastrepha* fruit flies." Although the draft PRA had deceptively labeled the Mexican research study as being "in press" when, in fact, it was not, the research had proven to be effective at persuading USDA to drop distribution restrictions in the Mexican avocado import program that had been in place due to fruit fly concerns. In the PRA, USDA essentially concluded that it was now safe to ship Mexican avocados year round to all 50 states. The PRA also indicated that an unpublished version of the research report was provided to APHIS by the Mexican researchers in November 2002.

In the interim period ending with the issuance of the draft PRA, APHIS apparently reached its conclusions about the risks associated with *Anastrepha* fruit flies, despite the fact that the manuscript was rife with inconsistencies and unanswered questions. APHIS subsequently provided a copy of the manuscript, marked "very rough draft" to the Commission on June 19, 2003 following repeated requests for the information over a period of 8 months. The California Department of Food and Agriculture went on record at the time objecting to the circulation of multiple versions of the draft research manuscript, some with handwritten comments by APHIS scientists and some without. Little doubt remained that USDA was now on a predetermined course, one which would lead it to abandon its earlier position on the host status of Hass avocados and accept the results of the new research, thereby allowing for expansion of the import program.

Comments submitted by the Commission during the public comment period on the draft PRA were critical of USDA for mischaracterizing the research as being "in press" and ignoring the directive of the House Committee on Appropriations. Rather than including independent, third-party scientists in the development of the draft PRA prior to its publication in the *Federal Register*, USDA stated that "external review is sought by publication of this analysis and requesting stakeholder input." The Commission also called for an evaluation of the draft PRA to be performed by the Agricultural Research Service (ARS), since four independent entomologists reported to the Commission that certain scientists at ARS disagreed with their APHIS counterparts about the conclusions

that had been drawn from the Mexican research. The Commission took issue with many of the details of the draft PRA as well, enlisting the services of two of the country's top risk assessors. For the remainder of 2003, rumors circulated that a Proposed Rule was under development at USDA.

In a surprise move that came without notice of any kind, USDA released a revised version of its PRA in February 2004. Sources in Washington, D.C. reported that high-level USDA officials directed APHIS to "decouple" the PRA from the Proposed Rule and issue the revised PRA immediately, presumably because of problems the Department has been encountering with Mexico on issues involving other commodities. The February 2004 PRA also contained a letter from the Agricultural Research Service (ARS) to APHIS raising concerns about the susceptibility of Hass avocados to fruit fly infestation as fruit maturation progresses. This was in direct response to criticism raised by the Commission that APHIS had failed to consult with ARS. The ARS letter caused APHIS to modify its position regarding the host status of Hass avocados. Reluctantly, to be sure, APHIS no longer considered them to be "non-hosts" but "very poor hosts" instead. On the heels of the February PRA came a draft Environmental Assessment, another step preparatory to rulemaking. Shortly thereafter, the Mexican research finally gained legitimacy in the form of publication in the *Journal of Economic Entomology*. No longer could it be said that USDA failed to subject the underlying science—at least with respect to fruit flies—to peer review.

On May 24, 2004, USDA issued a Proposed Rule calling for public comment on a proposal to fully expand the Mexican avocado import program to allow for shipments to all 50 states for all 12 months of the year. The Proposed Rule had a 60-day comment period and the preamble contained the following language:

"We [USDA] are considering a limited distribution plan that would delay the entry of Hass avocados from Mexico into commercial avocado-producing areas in the United States for up to 1 full year. This would mean that the importation and distribution of Mexican Hass avocados would continue to be prohibited into and within California, Florida, and Hawaii during the limited distribution period. This delay would provide an opportunity for the efficacy of the proposed regulations to be demonstrated under actual production and distribution conditions for up to one full year before Mexican Hass avocado imports would be allowed to enter commercial avocado-producing areas of the United States. We invite the public to submit information demonstrating whether or not this measure is warranted" (69 Fed. Reg. 29468, May 24, 2004).

Commission representatives had worked hard to convince APHIS to provide this opening. The fact that some policymakers within APHIS seemed to have reservations about the wisdom of unbridled expansion of the Mexican avocado import program helped the industry's cause. It had become increasingly evident, however, that expansion beyond 31 states was "inevitable" and that USDA was not about to reject the Mexican fruit fly research despite the remaining gaps and deficiencies in this latest study. Accordingly, the Commission focused its efforts on having California, Florida, and Hawaii excluded from the next round of expansion.

Once again, the Commission mounted a multi-faceted campaign to bring the industry message to Washington. The message frame follows: Mexican avocados had never before been allowed into the U.S. between April 15 and October 15, months when pest populations are high and vulnerable crops are in full production. Before taking this unprecedented step—one potentially exposing U.S. growers to great risk—USDA should test the Mexican avocado import program under actual conditions. USDA's recent experience with Ya pears from China proved that systems approaches can and do fail. In short, the past performance of the Mexican avocado import program should not be relied upon as a predictor of the program's future success.

To mobilize grassroots support, the Commission launched a special web site for growers, [stopusda.com](http://stopusda.com), shortly after the comment period opened. Stopusda.com was designed to help growers frame their arguments and facilitate grower comments into the record. Complementing this effort was a major push in Washington, D.C. to win the support of Members of Congress. Grower delegation visits to key legislators and state officials ultimately resulted in a strong show of support from influential politicians and the California Department of Food and Agriculture. Behind the scenes, the Commission dissected and analyzed every facet of the Proposed Rule and its supporting documentation with the assistance of scientific and technical experts. By the close of the comment period, nearly 6,000 email comments had been received by USDA, including a 70-page submission by the Commission. The deliberative process is now underway within USDA.