

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****7 CFR Part 354**

[Docket No. 04-042-2]

RIN 0579-AB88

User Fees for Agricultural Quarantine and Inspection Services**AGENCY:** Animal and Plant Health Inspection Service, USDA.**ACTION:** Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the user fee regulations by adjusting the fees charged for certain agricultural quarantine and inspection (AQI) services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international airline passengers arriving at ports in the customs territory of the United States. Prior to the interim rule, user fees had not been adjusted since October 1, 2001. Due to the events of September 11, 2001, and the resulting increased security concerns, a greater volume and variety of cargo entering the United States is being inspected. We determined that the fee adjustments were needed to recover the costs of this increased inspection activity and to account for routine inflationary increases in the cost of doing business. The adjusted AQI user fees cover fiscal years 2005 through 2010.

DATES: Effective on August 24, 2006, we are adopting as a final rule the interim rule that became effective on January 1, 2005.

FOR FURTHER INFORMATION CONTACT: For information concerning program operations, contact Mr. William E. Thomas, Director, Quarantine Policy, Analysis and Support Staff, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737-1236; 301-734-8295. For information concerning rate development, contact Ms. Donna Ford, Branch Chief, Financial Services Branch, FMD, MRPBS, APHIS, 4700 River Road Unit 55, Riverdale, MD 20737-1232, (301) 734-5901.

SUPPLEMENTARY INFORMATION:**Background**

In an interim rule published in the *Federal Register* on December 9, 2004 (69 FR 71660-71683, Docket No. 04-042-1), and effective on January 1, 2005, we amended the user fee regulations in 7 CFR part 354 by adjusting the fees

charged for certain agricultural quarantine and inspection (AQI) services that are provided by the Animal and Plant Health Inspection Service (APHIS) and the Customs and Border Protection (CBP) Bureau of the Department of Homeland Security in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international airline passengers arriving at ports in the customs territory of the United States. Prior to the interim rule, user fees had not been adjusted since October 1, 2001. Due to the events of September 11, 2001, and the resulting increased security concerns, a greater volume and variety of cargo entering the United States is being inspected. We determined that the fee adjustments were needed to recover the costs of this increased inspection activity and to account for routine inflationary increases in the cost of doing business. The adjusted AQI user fees cover fiscal years 2005 through 2010.

We solicited comments on the interim rule for 60 days ending on February 7, 2005. We received 315 comments by that date. The comments were from individuals, an air courier, trade associations representing airlines and air couriers, and State governments. The comments are discussed below by topic.

A number of commenters argued that instead of raising user fees, we should cut costs by increasing efficiency, outsourcing, or employing new technologies.

We are constantly working to improve our efficiency and cut costs. Since border inspection is a core Federal Government responsibility, we do not view outsourcing inspectors' functions as a viable way of accomplishing either goal. We have taken steps to reduce our personnel-related expenditures, however, thereby reducing the costs of inspection. These steps have included using lower-grade employees to perform certain tasks when doing so would not compromise effectiveness, and implementing shift work to reduce our overtime costs. The use of X-ray technology, the Internet, online databases, and specially trained detector dogs has helped make our inspection and clearance processes more efficient. Nevertheless, the costs of providing AQI services do rise from year to year due to inflation, and, as we noted in the supplementary information section of the December 2004 interim rule, increased security concerns have resulted in inspectors having to inspect a greater volume of cargo entering the United States and a greater variety of types of cargo than they did before September 11, 2001. The user fee

increases that were provided for in the interim rule were necessary to enable us to recover the full costs of maintaining the AQI program.

Many commenters argued that by increasing our AQI user fees, we were actually imposing a "stealth tax increase." It was further argued by some of these commenters that since only Congress has the right to raise taxes, our fee increases were thus unconstitutional.

We do not agree with this comment. A tax is money paid by the general public to support general Government operations. A user fee is money paid for a specific Government service by the beneficiary of that service and is designed to recover the costs of providing that service. The AQI user fees covered by the interim rule are intended to recover the costs of providing AQI services for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and airline passengers and are paid by commercial vessel companies, commercial truck drivers, commercial railroad companies, commercial airlines, and international airline passengers. As such, our AQI user fees are user fees and not taxes. We have congressional authority to collect these fees. The Food, Agriculture, Conservation and Trade Act of 1990, as amended, authorizes the Secretary of Agriculture to prescribe and collect fees to cover the cost of providing the AQI services covered by the interim rule.

A commenter suggested that APHIS should have engaged in a public deliberative process prior to the rulemaking, consulting the aviation industry and the general public. The commenter also recommended that we create a user fee advisory committee to deliberate on future user fee changes and AQI expenditures.

We welcome the submission of information at any time that would help us contain costs or enhance our efficiency. We published the December 2004 rule as an interim rather than a proposed rule in response to an emergency funding situation. The aviation industry and the general public did have an opportunity to comment on the interim rule following its publication. The fees in effect previously were not sufficient to allow us to recover our costs fully, and without immediate fee adjustments, the AQI accounts would have gone into deficit status, which could have resulted in an interruption of services. The interim rule ensured the adequate funding and continued operation at necessary levels of CBP and APHIS activities vital to preventing the

introduction of plant and animal pests and diseases into the United States.

Some commenters expressed the view that a 25-percent reserve in each AQI account was excessive. It was suggested that 10 to 15 percent might be a more reasonable figure.

We have determined that a reasonable reserve is one quarter of the annual costs of providing an AQI service. A 25-percent reserve is needed to ensure continuity of AQI services in cases of fluctuations in activity volumes. For example, following the September 11, 2001, terrorist attacks, there was a significant drop in international passenger travel, and several airlines filed for bankruptcy protection. The volume decrease in air travel led to a significant drop in AQI user fee collections for commercial aircraft and international air passengers. In order for us to continue the AQI programs for commercial aircraft and international air passengers through that uncertain time, we relied heavily on our 25-percent reserve. Without a sufficient reserve balance in place, experienced full-time personnel would have been furloughed and services reduced. As volumes returned to normal levels, the AQI program would have needed to recruit, replace, and/or rehire these furloughed employees. This disruptive and costly process would have increased the cost of AQI services and, consequently, would have necessitated higher user fees than those provided for in the interim rule. There would also have been an increased risk of the introduction of harmful plant pests and the possible establishment of those pest populations in the United States, potentially resulting in additional costs related to containing and/or eradicating such pests. The 25-percent reserve also allows for some growth in the AQI program should APHIS find it necessary to increase its inspection workforce and the number of inspections conducted due to an increase in the demand for service. An adequate reserve enables us to enhance inspection technology in order to better protect the United States from agricultural pests and diseases. A 25-percent reserve is also needed should it become necessary to shut down an AQI program completely, in which case we would need to have funding available to cover 3 months of operating expenses while the program is being shut down. A final reason for maintaining a 25-percent reserve, though not applicable to all AQI services, is the lag in AQI user fee collections. Payments are made into AQI user fee accounts for commercial aircraft and international airline passengers on a quarterly basis, with

monies not remitted to APHIS until 1 month after the end of the quarter in which they were collected. Since the fourth-quarter fees are not due, and therefore not received, until after the fiscal year is over, we are not able to use those funds to pay for providing AQI services for commercial airlines and international air passengers in the fiscal year in which they are earned. Therefore, we need to maintain the reserve fund at the 25-percent level in order to continue to cover the costs of administering those AQI services for the remainder of the fiscal year while waiting for the fourth-quarter revenues.

A commenter claimed that it was difficult to evaluate the justifications for the increases in fees presented in the supplementary information section of the December 2004 interim rule because there was an insufficient level of detail regarding direct and distributable costs and their allocation. The commenter requested information on the number of airport inspector positions paid for by the preexisting and the adjusted user fees, citing the lack of such a comparison in the interim rule as an example of the insufficient level of detail presented therein.

The supplementary information section of the interim rule did, in fact, include an extensive discussion of AQI program costs and the methods by which they are calculated. The section also included a presentation, in tabular form, of our projected costs for fiscal years 2005 through 2010. As explained in the interim rule, AQI staffing increased by approximately one-third between September 11, 2001, and the publication of that rule in December 2004. The user fee increases contained in the interim rule covered the positions added during that period, but did not provide funding for the hiring of any additional airport inspectors or other AQI staff.

One commenter argued that the interim rule did not take into account the increased productivity and cost savings that should have resulted from the consolidation of AQI functions formerly carried out by APHIS into CBP. The commenter also stated that the information provided in the interim rule did not demonstrate that actual benefits from consolidation, information sharing, cross training, and increased staff would justify the fee increases.

As noted above, we are constantly working to improve our efficiency and cut costs, while carrying out our mission to protect U.S. agriculture from pest and disease outbreaks. The consolidation of AQI functions into CBP is one example of this ongoing effort; we cited others earlier in this document. As

noted in the supplementary information section of the interim rule, we review our fees annually and adjust them when appropriate. If the APHIS-CBP consolidation results in future cost savings, the user fees will be adjusted to take this into account.

AQI user fees are based on the actual costs of providing the specified AQI services and maintaining a 25-percent reserve in the AQI account for each service category, as explained above. The cost of providing AQI services rises from year to year due to inflation. Prior to the December 2004 interim rule, our last user fee adjustment had come in October 2001. Since our costs had risen substantially in the interim, as a result of inflation and staffing increases, we were not recovering the full costs of administering our AQI services and were being forced to draw from our reserve funds. Had we continued to do so, we would have exhausted the reserve funds. The AQI accounts would then have gone into deficit status, which would have forced APHIS and CBP to lay off significant numbers of employees and cut back on services. The user fee increases contained in the December 2004 interim rule prevented any possible interruption of AQI services.

It was suggested by two commenters that a consolidated fee, reflecting the consolidation of agriculture, customs, and immigration functions into CBP, be adopted as a means of providing more streamlined and transparent accounting.

While we will not be making any changes to the final rule as a result of this comment, we would note that consolidated APHIS-CBP fees already exist for purchasers of yearly truck decals. We will pursue further consolidation of fees if we determine that doing so would yield the benefits that the commenters suggest.

Two commenters argued that the authority to collect the AQI user fees should be transferred from APHIS to CBP. The statute establishing the Department of Homeland Security (The Homeland Security Act of 2002, Pub. L. 107-296), which transferred many responsibilities from APHIS to CBP, did not transfer the authority to establish and collect AQI user fees.

One commenter suggested that we did not discuss the benefits of AQI services to the general public.

The benefits of AQI services were discussed in a number of places in the interim rule. It may be that the benefits are not immediately apparent to the general public because the chief benefit is the harm prevented by having these inspection services in place. The primary mission of our AQI personnel is to prevent animal and plant pests and

diseases from entering the United States. Such disease and pest introductions could lead to reductions in agricultural yield and productivity, costs to governmental and private entities for pest or disease control and eradication, losses in export revenues due to trade embargoes, and environmental degradation, resulting in immense harm to U.S. agriculture. Another benefit of AQI services is that AQI inspectors prevent trade disruptions by inspecting and clearing cargo on a timely basis. Consumers and taxpayers would certainly feel the negative effects if AQI services were disrupted or reduced.

A commenter stated that the interim rule contained no suggestion that AQI user fees could ever be decreased due to lower traffic volume and less workload.

As we noted in the interim rule and earlier in this document, we review our fees annually and, if necessary, undertake rulemaking to amend them. We will adjust a fee up or down, as appropriate, depending on the actual cost of providing services. We have adjusted user fees downward in the past. In a final rule published in the **Federal Register** on January 19, 1996 (61 FR 2660–2665 Docket No. 94–074–2) and effective on March 1, 1996, we decreased our AQI user fee for commercial aircraft by 13.1 percent after our cost analysis revealed that this fee was too high.

One commenter argued that the AQI user fee increases contained in the interim rule placed a disproportionate economic burden on the U.S. airline industry, undermining its attempts at financial recovery.

We do not agree with this comment. The December 2004 interim rule included user fee adjustments for the inspection of commercial vessels, commercial trucks, and commercial railroad cars, as well as commercial aircraft, reflecting the increased costs of administering AQI services for all these types of conveyances. Had we exempted airlines from the fee increases, we would have placed an unfair burden on operators of other conveyances by forcing them to pay the airlines' share of the increased costs.

One commenter argued that clarification is needed regarding operational and revenue sharing agreements between CBP and APHIS so that air couriers can understand which agency is responsible for providing specific AQI services under particular circumstances and which agency is responsible for billing for those services.

APHIS continues to establish the animal and plant health policies and procedures for the AQI programs, under

the authority of the Plant Protection Act, while CBP staff carry out most of these policies and procedures. CBP's agriculture specialists perform the primary inspections. APHIS personnel are still responsible for such functions as pest identification, agricultural product disposal, and fumigations, and are most likely to become involved in the inspection process subsequent to the primary inspection when a treatment is required or a violation of the regulations has occurred. The regulations in § 354.3 contain information on billing and requirements for the remittance of user fees, as well as the tables that list the fees. The December 2004 interim rule included only minor, nonsubstantive changes to the provisions concerning billing and remittances. CBP's regulations pertaining to user fee billing and remittances are located in title 24 of the Code of Federal Regulations. APHIS and CBP do have a revenue-sharing agreement.

Finally, a commenter inquired as to how AQI user fee revenues are distributed between CBP and APHIS.

The distribution is based on the cost to each agency of performing the AQI functions covered by a particular fee. APHIS and CBP have a signed memorandum of understanding that specifies how AQI user fee revenues are to be distributed.

Therefore, for the reasons given in the interim rule and in this document, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, this action has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

List of Subjects in 7 CFR Part 354

Animal diseases, Exports, Government employees, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Travel and transportation expenses.

PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS; AND USER FEES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 354 and that was published at 69 FR 71660–71683 on December 9, 2004.

Done in Washington, DC, this 18th day of August 2006.

Bruce Knight,

Under Secretary for Marketing and Regulatory Programs.

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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 717

RIN 0560–AH64

Removal of Obsolete Regulations; Holding of Referenda

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This action removes regulations that have been rendered obsolete by expiration of their statutory authority and the ending of the programs they governed. There are no impacts on past or current program operations.

EFFECTIVE DATE: August 24, 2006.

FOR FURTHER INFORMATION CONTACT: Phillip Elder, Regulatory Review Group, Farm Service Agency, USDA, STOP 0540, 1400 Independence Avenue, SW., Washington, DC 20250–0540; Telephone: (202) 205–5851; e-mail: Phillip.Elder@usda.gov.

SUPPLEMENTARY INFORMATION:

Discussion of Final Rule

This rule removes regulations at 7 CFR Part 717, Holding of Referenda. That regulation has been rendered obsolete by repeal of its statutory authority and the ending of it applicable programs. Part 717 was authorized by the Agricultural Adjustment Act of 1938 (1938 Act), as amended, and was applicable to all referenda held pursuant to that Act. This Act required the Secretary of Agriculture to establish national marketing quotas for flue-cured, burley and other types of tobacco in years where producers of such tobacco approved of having a national marketing quota (see 7 U.S.C. 1312 *et seq.* (2000)). The quotas for the respective crops were approved or disapproved by such producers in a referendum conducted as provided in part 717. Sections 611 through 613 of the American Jobs Creation Act of 2004 (Pub. L. 108–357; the 2004 Act) repealed the tobacco marketing quota and related price support programs authorized by Title III of the 1938 Act and the Agricultural Act of 1949. Thus, the Farm Service Agency has no authority