

July 24, 2014

Mr. Kevin Shea, Administrator
Animal and Plant Health Inspection Service
Docket Nos. APHIS-2013-0021 and APHIS-2009-0047
Regulatory Analysis and Development, PPD
Station 3A-3.8
4700 River Road, Unit 118
Riverdale, MD 20737-1238

Re: Docket No. APHIS-2013-0021-User Fees for Agricultural Quarantine Inspection Services & Docket No. APHIS-2009-0047-Fee Increases for Overtime Services

Administrator Shea,

The undersigned organizations provide these comments in response to the Animal and Plant Health Inspection Service (APHIS) proposed rulemakings, entitled “User Fees for Agricultural Quarantine and Inspection Services” and “Fee Increases for Overtime Services.” We represent companies in the agriculture, manufacturing, pest management, trucking, shipping, air transportation and passenger and cargo vessel industries. We also represent other stakeholders, including ports, which would be significantly impacted by the proposed rule.

I. Executive Summary and Background

The businesses and industries we represent recognize the challenges APHIS faces as risks confronting our nation at the border have evolved. First established in 1990, Agricultural Quarantine Inspection (AQI) user fees enable APHIS to conduct a variety of inspections at ports of entry aimed at seizing prohibited materials and intercepting foreign agricultural pests. We appreciate that APHIS has not increased AQI user fees since 2004 and that it may be appropriate to adjust some fees at this time.

We further applaud the agency for seeking to more accurately align fees with the costs associated with each fee service. It is neither appropriate nor consistent with the authorizing statute—Section 2509(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (21 U.S.C. 136a)—to have one beneficiary of AQI services subsidize another. However, the fee increases proposed in the pending rulemakings are so exorbitant that they are impossible to justify to our respective constituencies.

We greatly appreciate the extension of the comment period as requested, and we value the attention that APHIS has given to this matter. Nevertheless, we encourage APHIS to withdraw the current proposals and establish a working group to review the proposed fee increases and the detailed underlying cost data that the agency has not yet provided to the regulated community to enable it to evaluate and meaningfully comment on the proposed actions. We also request that the underlying data be peer reviewed and verified by both the USDA chief economist and a qualified third party. Since this is such a significant overhaul of the current process, it must be done correctly and must be done in cooperation with industry.

The new baseline model that APHIS intends to employ will dictate the level of future fee adjustments, so it is imperative that both direct and indirect costs be attributed correctly. We also request that APHIS establish a multiyear implementation schedule that ensures that affected parties are not unduly burdened by the fee increases. It is unprecedented and frankly unfair to expect a regulated entity to pay upwards to 200 percent more in user fees over a short period of time.

II. APHIS has not provided sufficient information to justify its proposed costing methodology or to allow meaningful public comment

After nearly 25 years, APHIS is proposing to change the way it calculates user fees to an activity-based costing (ABC) methodology. However, the agency has not yet conducted a sufficiently rigorous and transparent process to determine whether ABC is the most appropriate costing methodology and has not provided detailed cost information to give stakeholders a meaningful opportunity to comment. This lack of rigor and transparency must be remedied before the agency can adopt a legally valid final rule to adjust AQI user fees.

The significant and sweeping proposed change in the APHIS costing methodology is based on two documents: “Fee Setting Process Documentation and Recommendation” (dated October 25, 2011) and “AQI Fee Schedule Assessments and Alternatives, Revised” (dated May 21, 2012). We are concerned that APHIS uses the documents as the foundation of its proposals, yet the documents were not peer reviewed or, to our knowledge, reviewed and approved by the USDA chief economist. APHIS also failed to seek public comment for the documents and the models that form the basis of a sea change for how the agency will implement the AQI user fee program.

It is not clear from these documents or from the proposed rule that APHIS ever considered alternatives to an ABC methodology, even though federal accounting guidance expressly “does not require the use of a particular type of costing

system or costing methodology.”¹ Even if APHIS determines the ABC methodology is appropriate through further analysis and proper consideration of other alternatives, it has not provided sufficient information to enable stakeholders to replicate or analyze the cost analysis that is summarized in the two documents relied upon by the agency, or to determine whether the proposed user fees were calculated fairly and accurately.

Additional information is particularly essential because there is reason to question whether costs have been properly calculated or appropriately allocated to specific activities for which user fees are paid. For example, the FY 2011 cost figures cited in the March 2013 General Accountability Office (GAO) Report, entitled “AQI Fees: Major Changes Needed to Align Fee Revenues With Program Costs,” differ from the FY 2011 costs outlined on pages 22898-22899 of the *Federal Register* notice. The ABC methodology can result in the over-absorption of overhead costs, and there is no meaningful method of assigning “headquarters-level” overhead costs to services. Indeed, such “headquarters-level” costs, among others listed in the *Federal Register* notice are properly considered “business sustaining,” and should not be considered AQI program costs at all.

In our June 13th letter, we requested additional information to allow us to better analyze the AQI rulemaking. Specifically, we sought an income-and-balance sheet breaking down direct and indirect costs. Such information is essential to give stakeholders a meaningful opportunity to comment and to demonstrate that the additional monies generated by the fee increases will cover just the cost of the service provided and not broader programmatic costs. To our knowledge, APHIS has not yet made this additional data available.

III. APHIS has not considered opportunities to cut costs and improve operational efficiency

On the basis of the proposed rule, it is not clear APHIS has considered opportunities to limit user fees by cutting costs, improving the efficiency of its operations, boosting productivity or taking other steps. Among other things, the agency could consider reducing the amount of the AQI reserve account, as recommended by the GAO. Indeed, the GAO states in the executive summary of its 2013 report:

APHIS’s stated goal is to maintain a 3- to 5-month reserve but the preliminary fee proposal would fund the reserve at a level higher than the 5 month maximum. Further, the 5-month maximum target balance is the amount officials say they would need to completely shut down the program, and therefore does not reflect realistic program risks. Further,

¹ Office of Management and Budget, Statement of Federal Financial Accounting Standards Number 4, “Managerial Cost Accounting Concepts and Standards for the Federal Government,” July 31, 1995.

this is more than the amount required to cover shortfalls during both the 2009 financial crisis and the events of September 11, 2001. . . .

Depending on the similarities between the preliminary fee proposal APHIS provided to the GAO and the pending rulemaking, the concern may still be germane. We cannot make that determination on our own, however, since the the numbers provided GAO have not been made public.

IV. The proposed fee increases are exorbitant and may not be representative of the service provided

Specifically, the user fee proposal increases fees for commercial trucks by 52 percent, commercial trucks with transponders by 205 percent, commercial vessels by 66 percent and commercial aircraft by 218 percent. It also establishes a new \$375 per pest treatment fee, \$2 fee for each international cruise vessel passenger and lifts the fee caps for commercial trucks, vessels and railcars. The maximum amount a commercial vessel presently pays is \$7,440 per year. Under the proposed user fee rulemaking, a commercial cargo vessel with a weekly call to the U.S. from the Caribbean, for example, would pay \$42,900 (nearly five times the current fee) not including overtime fees. Furthermore, some cruise vessels could pay as much as \$600,000 annually.

On top of the increases discussed, the proposed rule to increase fees for overtime services would increase the Monday-Saturday rates by 45 percent and the Sunday rates by 46 percent. APHIS fails to explain how it accounts for overtime fee revenue it receives for AQI services performed during overtime hours. Some services such as pest treatments are performed almost exclusively during overtime, yet APHIS gives the impression in the *Federal Register* notices and the related documents that the costs for this work are not covered. This omission is a significant shortcoming in all of the analyses APHIS cites.

V. The implementation schedule for fee increases and possible fee discrepancies should be addressed

We are further alarmed that an APHIS official noted during the conference call/webinar on July 9 that the rulemaking could be finalized by January 1, 2015, and that another AQI fee increase rulemaking is planned for FY 2016 or FY 2017. Under this scenario, many businesses—including small entities—will be forced to absorb 200 plus percent fee increases in less than six months and will face additional fee increases soon thereafter.

Considering the dramatic paradigm shift in methodology, we believe the agency should have sought peer review of the economic impact of the application of the ABC method and should consider phasing in the fee adjustments over a several year period.

The proposals also fail to demonstrate how APHIS is ensuring that regulated parties are not being double-billed for reimbursable overtime for agricultural services by both APHIS and Customs and Border Protection (CBP), which have in some ports implemented local collection of overtime fees for agriculture services. CBP officials have advised industry that they are charging overtime fees for services provided by CBP's Agricultural Specialists. The APHIS proposal states, however, that APHIS is seeking through its fees to recover CBP costs that are directly charged to AQL activities, including "salaries and benefits for CBP Agriculture Specialists". It is not clear, based on the proposals and their limited supporting documentation that industry is not being billed by both CBP and APHIS for the same exact services.

Our concerns are supported by the FY 2011 cost figures included in the March 2013 GAO report, which differ from the FY 2011 costs outlined on pages 22898-22899 of the *Federal Register* notice. These discrepancies are of great concern and lead us to question where the AQL fees are presently coming from and where these monies are going.

VI. The process has not been transparent and has lacked adequate stakeholder input

Under the Administrative Procedure Act, agencies are required to provide sufficient detail to allow the public to evaluate a proposed action and comment on the proposal. Executive Orders (EO) 12866 and 13563 require regulatory agencies to involve public participation, including affected stakeholders. In its February 2, 2011, memorandum to agencies on implementing EO 13563, the Office of Information and Regulatory Affairs (OIRA) stated,

Section 2 also requires an "open exchange" of information among government officials, experts, stakeholders, and the public. In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made.

In the context of this proposed rulemaking, APHIS made no effort to involve the affected stakeholders, only holding a conference call a week before the agency published the Notice of Proposed Rulemaking in the *Federal Register*. Also, APHIS failed to provide the public an "open exchange" of information that would have assisted the agency in ensuring the accuracy of information it used to decide the level of proposed fee increases. The memorandum continues,

Section 2 also directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public

comment on the rulemaking docket, including comment on relevant scientific and technical findings.

Not only were the two documents on which this proposal is based not peer reviewed or independently verified, we are deeply concerned that neither document was publicly available until they were included in the Notice of Proposed Rulemaking. The documents had been finalized for roughly two years, yet APHIS never provided public an opportunity to review them prior to issuing its proposed rule.

EO 13563 also requires federal agencies to integrate their regulatory efforts when there are overlapping regulatory requirements. Charging a separate AQI fee for inspecting commercial vehicles that CBP is already charging for, and where CBP inspectors are performing those duties, is a redundant and unnecessary fee collection.

Finally, the rulemakings fail to adequately acknowledge or recognize the impact the fee increases and newly established fees will have on small businesses, the additional monies APHIS will realize from the pending 40 percent increase in overtime fees and the cumulative impact of these rulemakings on affected businesses.

VII. Conclusion

We appreciate the opportunity to raise these concerns, and we trust that you will accept them in the constructive spirit in which we offer them. For these reasons, we are unable to support the pending proposals.

Instead, we respectfully request that APHIS withdraw the rulemakings and work closely with a working group comprised of the various affected stakeholders in the development of another round of proposals to adjust user fees and fees for overtime services. We also request that the underlying data used by APHIS in the development of the rulemakings be peer reviewed and verified by both the USDA chief economist and a qualified third party. Finally, we ask that any rulemaking APHIS adopts be implemented over a multiyear period to mitigate the impact on affected stakeholders.

We appreciate your time and consideration of our comments and urge you to contact us if you would like to discuss this matter in more detail.

Sincerely,

American Apparel & Footwear Association
American Association of Port Authorities
American Trucking Associations
Association of Ship Brokers and Agents

ASOEX (Chilean Fresh Fruit Exporters Association)
Canadian/American Border Trade Alliance
Canadian Trucking Alliance
Cargo Airline Association
Chamber of Shipping of America
Cruise Lines International Association
Express Delivery and Logistics Association
Fresh Produce Association of the Americas
Global Cold Chain Alliance
International Association of Refrigerated Warehouses
Maritime Exchange for the Delaware River and Bay
National Association of Manufacturers
National Association of Maritime Organizations
National Customs Brokers and Forwarders Association of America
National Grain and Feed Association
National Pest Management Association
North American Export Grain Association
Pacific Merchant Shipping Association
Passenger Vessel Association
Port of Wilmington
United States Great Lakes Shipping Association
Virginia Maritime Association
World Shipping Council