

**BEFORE THE U.S. DEPARTMENT OF AGRICULTURE  
ANIMAL AND PLANT HEALTH INSPECTION SERVICE**

**USER FEES FOR  
AGRICULTURE QUARANTINE AND INSPECTION SERVICES  
7 C.F.R. PART 354**

**DOCKET NO. APHIS-2013-2021  
RIN 0579-AD77**

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**COMMENTS OF  
NATIONAL ASSOCIATION OF AGRICULTURAL EMPLOYEES**

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**BACKGROUND**

The National Association of Agriculture Employees (“NAAE”) submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”), published by the U.S. Department of Agriculture (“USDA”), Animal and Plant Health Inspection Services (“APHIS”) in the *Federal Register* of April 25, 2014, 79 *Fed. Reg.* 22895. APHIS announces in the NPRM its proposal to increase the user fees Congress authorizes APHIS to collect pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990, 21 U.S.C. § 136a (the “FACT Act”), in order to recover the costs of providing agriculture quarantine and inspection (“AQI”) services performed in connection with clearing international passengers and defined imports.

NAAE is a federal-sector union of federal employees. The Federal Labor Relations Authority (“FLRA”) has certified NAAE as the exclusive representative of a bargaining unit comprised, generally, of all non-management, non-clerical employees of Plant Protection and Quarantine (“PPQ” or “Agency”), a separate program or unit of USDA/APHIS. NAAE’s bargaining unit members perform AQI services for which APHIS proposes to increase the user fees.

NAAE fully supports and applauds APHIS's plan to order an increase in user fees for AQI services. It represents the first such increase since 2010, a lag that has left the Agency increasingly and significantly short of recovering the full costs of providing AQI services as Congress contemplated when enacting the FACT Act. NAAE agrees with APHIS that the proposed increases are long overdue and are neither excessive nor unwarranted in any category or class of AQI services for which user fees will be charged.

NAAE's comments focus on pinpointing one user-fee proposal, **for treatments**, that, in APHIS's publication of the final rule, would benefit from a tweaking to improve its practicality and another proposal, **for bus passengers**, that should be revised in order to prevent favoring one mode of passenger transportation over another, thus violating, in the process, the spirit of the FACT Act's statutory purpose, recovering the costs of providing AQI services from the beneficiaries of those services. Forcing appropriate funds to increasingly subsidize AQI services is contrary to the intent of Congress, unfair to American tax-payers, and a windfall for one select class of AQI-service beneficiaries.

### **NAAE COMMENTS**

#### **I. The Fumigations/Treatments Proposal Poses Surmountable Practical Collector Issues.**

APHIS proposes imposing for the first time a modest user fee to recover the costs of providing AQI treatment services. This proposed new category in the APHIS user-fee program is a welcomed expansion of the Agency's cost-recovery commitment. It corrects an unjustifiable "exemption" from payment that importers, brokers, and their clients have enjoyed when their commodities receive treatments as a condition of entry or as a remedy for actionable pests

detected in those commodities during the inspection process. The issue for NAAE is how and from whom those fees are to be collected: APHIS's proposal is unnecessarily burdensome and impractical.

APHIS proposes delegating to the treatment provider the obligation to collect the new treatment user fees from the importer and remit them to APHIS. NAAE believes this collector function should be borne by the customs broker or the importer, the entity responsible for engaging APHIS to provide the treatments and for importing, or arranging for the importation of, the commodities requiring treatment in order to eradicate actionable pests. Simply put, the customs broker or the importer is the entity best equipped to shoulder this burden and pass along the collected user fees to USDA/APHIS.

NAAE bargaining unit members are the APHIS/PPQ employees who monitor, oversee, administer, and assess the efficacy of these treatments, primarily fumigations. Based upon their day-to-day experience in dealing with fumigators and other treatment providers, NAAE members are convinced that many of these fumigators will be very reluctant, if not highly resistant, to collect these government fees from importers and remit them to APHIS. Many fumigators are small, typical "mom-and-pop" operators who may remain unaware of their new legal obligation to collect "government fees" from the importer, a party to the commercial transaction most treatment providers never deal with and perhaps do not know at all. (Their dealings in carrying out treatments are usually with the licensed customs broker.) They will also object to undertaking and incurring the added cost of setting up the new accounting procedures and paperwork required to track these collections and remit them to APHIS.

NAAE fears that a number of these small operators will consider their new collect-and-remit regulatory obligations as excessively costly and burdensome, providing them just another reason to abandon their not-very-profitable business of providing treatment services. This disincentive to continue providing treatments poses serious logistical, practical problems, particularly at those inspection sites and ports that have only one licensed, qualified fumigator or treatment-provider. Driving that entity out of business by over-burdening the owner with bureaucratic regulatory red-tape will only serve to deny importers, brokers, and APHIS access to near-by facilities to conduct fumigations and other treatments. The potential adverse impact upon international trade could be significant, another reason not to impose collect-and-remit duties on treatment providers.

Faced with this extra burden, NAAE suspects some treatment providers will simply fail or refuse to collect and remit as the statute requires, 21 U.S.C. § 136a(a)(4). The statute authorizes APHIS to go after these violators and assess them heavy fines; however, NAAE believes APHIS will not be in a position or inclined to pursue a majority of those non-compliant treatment providers, either because they are too small to pursue or because they will simply close their doors and move on. As an alternative to cracking down on non-compliant treatment providers with heavy fines, APHIS could and probably would opt instead to suspend or bar them from continuing to provide treatment services to importers, brokers, and APHIS. This “penalty,” while undoubtedly justifiable, will only serve to exacerbate the shortage of qualified treatment providers.

Instead, NAAE submits that importers and customs brokers are, for the most part, relatively large, well-established commercial institutions and are

already regulated by CBP. For these reasons, they are better equipped than fumigators to pay user fees directly to APHIS. There is no need or acceptable rationale for inserting the fumigator into this collect-and-remit process as the middleman. PPQ employees assigned to arrange and oversee fumigations and other forms of treatment could simply report the completion of each treatment to APHIS, and APHIS could invoice the importer or broker – the user-fee payment obligation (as well as the remittance obligation) should be imposed initially and primarily on the broker as the party actually involved in making the treatment arrangements, not the importer, or upon both – just as APHIS proposes to do in this NPRM when APHIS itself performs the treatment.

## **II. No Justification For Granting Bus Passengers a Free Ride.**

The NPRM's economic impact analysis concedes that, because of choices APHIS has made about who or what must pay user fees (and how much) to offset the costs of providing AQI services, the projected total user-fee collections, once the full user-fee increases go into effect as proposed, will still leave APHIS \$248,800,000 short in FY 2014 of recovering its full costs of delivering those services. *See 79 Fed. Reg.* at 22904. This 26% short-fall in collections means that 26% of the cost of providing AQI services must be borne by and come out of appropriated funds – its source, the general tax-payer. It also means that appropriated funds diverted to “AQI revenue,” totaling one-quarter of a billion dollars annually, are not going to be available to APHIS for use in funding other worthwhile APHIS programs to detect and eradicate plant pests and animal diseases threatening American agriculture.

In proposing to incur an annual user-fee deficit of \$248,800,000, APHIS consciously decides in its NPRM not to impose any user fee on one distinct class or category of international passenger who receives AQI services, the

traveler who elects to enter the U.S. by commercial bus, either from Mexico or from Canada. If that same passenger chooses to fly to the United States on a commercial airline, he or she today is, and would be under the proposal, required to pay a user fee for the AQI services he or she receives. There is no fact- or law-based reason to exempt the bus passenger from paying essentially the same user fee that air passengers are assessed. It is also patently unfair and discriminatory. They receive essentially the same AQI services from PPQ and CBP, and Congress expressly authorizes APHIS to collect user fees from international bus passengers as well as from air passengers. See 21 U.S.C. § 136a(a).

The only rationale APHIS offers in its NPRM for exempting bus passengers is baseless. APHIS contends bus companies would be required to establish “the infrastructure and process ... to collect and remit the fees,” inferring that such an undertaking would be burdensome. However, vessel operators and airlines have developed such systems to collect from their passengers. Why should bus companies not be able or expected to do the same?

APHIS also alleges theoretical difficulties in collecting user fees from bus passengers. This concern is based upon the unsupportable, intertwined propositions that the entry barrier for the bus industry “is much lower compared to air and cruise vessel industries,” thus leading to “more bus companies entering and exiting the industry, which would make fee collection and monitoring difficult.” That rationale is not credible. APHIS overlooks the fact that, unlike the trucking industry, the passenger bus industry remains heavily regulated by the federal government, under the auspices of the Federal Motor Carrier Safety Administration, in terms of entry, service, safety,

insurance, acquisition approval, and financial prerequisites. Yet APHIS collects user fees from commercial trucking companies today and has done so since the inception of the program. There are more trucking companies operating in the U.S. than bus companies by a factor of at least 100, and hundreds of trucking companies enter and exit that business every year, far more than bus companies.

In sum, APHIS can not afford to leave on the table the \$25,000,000 in potential user fees that international bus passenger traffic represent in reliance upon the reed-thin arguments noted above. NAAE urges APHIS to modify its user fee proposal to include the international passengers entering the United States by bus. It is simply unfair to the airline and vessel industries not to do so. It unnecessarily depletes the appropriated funds allocated to APHIS at the expense of APHIS's other programs and the American tax-payer.

Respectfully submitted,



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