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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

[Docket No. APHIS-2013-0021]

RIN 0579-AD77

User Fees for Agricultural Quarantine and Inspection Services

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final interpretive rule.

SUMMARY: On May 13, 2016, the Air Transport Association of America, Inc., and the International Air Transport Association filed suit against the United States Department of Agriculture, the Animal and Plant Health Inspection Service (APHIS), the Department of Homeland Security, Customs and Border Protection Agency (CBP), the Secretary of Agriculture, the Administrator of APHIS, the Commissioner of CBP, and the Secretary of Homeland Security, claiming APHIS' 2015 final rule setting fee structures for its Agricultural Quarantine and Inspection (AQI) program (Docket No. APHIS-2013-0021, effective December 28, 2015) (2015 Final Rule) violated the Food, Agriculture, Conservation and Trade Act of 1990 (FACT Act) and the Administrative Procedure Act (APA). In its March 28, 2018, Order, the U.S. District Court for the District of Columbia affirmed APHIS' cost methodology and the sufficiency of its data. *Air Transport Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 303 F. Supp. 3d 28 (D.D.C. 2018). However, the Court held that in the rulemaking for the 2015 Final Rule, the ground upon which APHIS relied to justify setting fees at a level that enabled APHIS to maintain

a reasonable balance in the AQI user fee account was an expired provision in the FACT Act. The Court remanded to APHIS the reserve portion of the 2015 Final Rule updating user fees for the AQI program. Accordingly, on April 26, 2019, APHIS published in the *Federal Register* a interpretative rule and request for comments, titled "User Fees for Agricultural Quarantine and Inspection Services" (Docket No. APHIS-2013-0021) (the Interpretive Rule). The Interpretive Rule clarified the agency's statutory authority to collect a reserve fund in support of AQI inspection activities, including by citing unexpired provisions of the FACT Act as the basis for collecting and maintaining a reserve. The Interpretive Rule requested public comment related to the legal authority for the reserve component of the AQI User Fee Program. This document responds to comments received on the Interpretive Rule and finalizes that rule.

DATES: This final interpretive rule is effective [Insert date 30 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Mr. George Balady, Senior Regulatory Policy Specialist, Office of the Executive Director-Policy Management, PPQ, APHIS, 4700 River Road Unit 131, Riverdale, MD 20737 1231; (301) 851-2338; email: AQI.User.Fees@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

On May 13, 2016, the Air Transport Association of America, Inc., and the International Air Transport Association filed suit against the United States Department of Agriculture, the Animal and Plant Health Inspection Service (APHIS), the Department of Homeland Security, the Customs and Border Protection Agency (CBP), the Secretary of Agriculture, the Administrator of APHIS, the Commissioner of CBP, and the Secretary of Homeland Security, claiming APHIS' 2015 Final Rule setting fee structures for its Agricultural Quarantine and Inspection (AQI)

program (80 FR 66748, Docket No. APHIS-2013-0021, effective December 28, 2015, referred to below as "the Final Rule" or "the 2015 Final Rule") violated the Food, Agriculture, Conservation and Trade Act of 1990 (FACT Act), 21 U.S.C. 136a, and the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.* In its March 28, 2018 Order, the U.S. District Court for the District of Columbia affirmed APHIS' cost methodology and the sufficiency of its data. *Air Transport Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 303 F. Supp. 3d 28 (D.D.C. 2018). The Court rejected the plaintiffs' claims that the Final Rule's imposition of the commercial aircraft fee is duplicative of the air passenger fee; that the Final Rule results in cross-subsidization; and that the Final Rule relied on unreliable data that was not disclosed to the public. However, the Court held that APHIS improperly relied on an expired provision in the FACT Act to justify setting fees at a level that enabled APHIS to maintain a reasonable balance in the AQI user fee account. The Court remanded to APHIS the reserve portion of the 2015 Final Rule updating user fees for the AQI program. The Court expressly did not vacate the rule pending further explanation by the agency. *See Air Transport Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 317 F. Supp. 3d 385, 392 (D.D.C. 2018).

In its memorandum opinion on summary judgment, the Court stated that the agency unreasonably relied on the "reasonable balance" allowance in 21 U.S.C. 136a(a)(1)(C) of the FACT Act to justify its continued fee collection to maintain a reserve, as that allowance expired after fiscal year 2002. The Court did not rule on whether APHIS had authority for continued fee collection to maintain a reserve under any other subsection of the FACT Act and, therefore, remanded to the Agency for "reconsideration of its authority to charge a surcharge for the reserve account." *See Air Transport Ass'n*, 303 F. Supp. 3d at 57. The Court expressly declined to consider APHIS' explanation in its legal filings that, consistent with its past explanations and

practice, APHIS justified its authority to collect such fees under other subsections of 21 U.S.C. 136a(a)(1). *Air Transport Ass'n,* 303 F. Supp. 3d at 51; *see, e.g.*, User Fees for Agricultural Quarantine & Inspection Services, 71 FR 49984 (August 24, 2006). The Court did "not evaluate or rule on the agency's . . . argument that it had authority to fund a reserve under" a different part of the statute, and instead remanded the rule to the agency without vacating for further consideration of the agency's authority. *Air Transport Ass'n,* 303 F. Supp. 3d at 51. The Court ordered APHIS to complete notice and comment rulemaking to address whether "there is support for APHIS authority to set a reserve fee elsewhere in the statute [other than 21 U.S.C. 136a(a)(1)(C)]." *Air Transport Ass'n,* 317 F. Supp. 3d at 392

Accordingly, on April 26, 2019, APHIS issued an interpretive rule and request for comments (Interpretive Rule)[1] (84 FR 17729-17731, Docket No. APHIS-2013-0021) to the 2015 Final Rule. In the document, APHIS clarified that subsections 136a(a)(1)(A) and (B) of the FACT Act provide adequate authority to continue setting user fees in amounts to maintain the AQI reserve, irrespective of the expiration of subsection 136a(a)(1)(C).

APHIS took comments on its Interpretive Rule for 30 days ending May 28, 2019. We received 10 comments by that date. The received comments were from an organization representing the pork industry in the United States, an organization representing the trucking industry in the United States, an organization representing commercial airlines, an organization representing county agricultural commissioners in one State, a maritime exchange, and private citizens. Three commenters supported APHIS' interpretation of the FACT Act without further

[1] To view the Interpretive Rule and the comments that we received, go to https://www.regulations.gov/docket?D=APHIS-2013-0021. The comments received on the correction can best be accessed by clicking on "view all" next to the Comments field, and then sorting by "date posted" on the resulting screen.

comment, and two comments were not germane to the AQI User Fee program or the Interpretive Rule.

Two commenters generally agreed with APHIS' interpretation of the FACT Act, but also provided comment on how the reserve should be maintained or used in order to fully comply with the intent of the FACT Act. Three commenters disagreed with APHIS' interpretation of the FACT Act and provided reasons why they considered a reserve to be in violation of the Act.

The issues raised by the commenters are discussed below, by topic.

Comments Expressing Concern Regarding Transparency

Two commenters, one of whom supported APHIS' interpretation of the FACT Act and one of whom disagreed with it, stated that a reserve maintained to administer the User Fee program could theoretically be used for any program purpose. The commenters expressed concern that this would not allow the general public to know how large an amount was maintained in the reserve, how it was derived, and for what purposes it was being used. One of the commenters stated that, if APHIS wished to use subsections 136a(a)(1)(A) and (B) of the FACT Act as a basis for maintaining a reserve to administer the AQI User Fee program, it should make the user fee sources from which the reserve had been derived publicly available, indicating the percentage of the reserve drawn from each user fee group, and should make the total amount of the reserve publicly available as well.

The reserve is not drawn from specific user fee sources by percentage. Rather, AQI user fee rates are calculated so that a percentage allocated for the reserve (currently 3.5 percent) is built into each fee collected (see the 2015 Final Rule at 80 FR 66753).

While we do not believe the statute requires us to make the amount in the reserve publicly available, we have decided to post the amount in the reserve on APHIS' AQI user fees

webpage and update it on an annual basis. The page will indicate that the amount listed represents the amount in the reserve at a particular moment in time, and will further indicate that it does not include accounts due to APHIS or accounts payable from the reserve. We plan to announce the amount in the reserve, as well as the schedule for future announcements, through a notice published in the *Federal Register* in calendar year 2020. With respect to the purposes of the reserve, this notice will also provide examples of one-time expenditures from the reserve that were made in previous fiscal years; other expenditures cannot easily be itemized in the manner requested by the commenter.

Comments Regarding Cross-Subsidization

One commenter stated that, if the reserve is drawn from all user fee groups but is used on an activity that only benefits a particular user fee group, this amounts to cross-subsidization of that activity.

Subsection 136a(a)(2) of the FACT Act requires that APHIS ensure that, when setting fees, the amount of an AQI user fee is commensurate with the costs of agricultural quarantine and inspection services with respect to the class of persons or entities paying the fee. APHIS considers this subsection to prohibit us from setting fees for one AQI program in a manner that would knowingly cross-subsidize another AQI program. In contrast, the commenter's interpretation would preclude us from using fees for activities necessary for the overall administration of the program, which would run counter to the intent of subsection 136a(a)(1)(B) of the FACT Act.

The same commenter stated that, if the reserve were used to cover revenue shortfall due to delinquent accounts, this would also constitute cross-subsidization, since the delinquent party would effectively receive services paid for by another party. The commenter also expressed

concern that using the reserve in this manner could encourage delinquent parties to remain in arrears.

We do not consider this practice to constitute cross-subsidization, as it does not implicate how APHIS sets its user fees. Once again, the FACT Act only requires that, "*in setting the fees* …the Secretary shall ensure that the amount of fees is commensurate with the costs of agricultural quarantine and inspection services with respect to the class of persons or entities paying the fees." 21 U.S.C. 136a(a)(2) (emphasis added). Furthermore, we do not believe use of the reserve fund poses a significant risk of encouraging delinquent parties to remain in arrears. We note that there are several procedures in place within the AQI User Fees program to discourage delinquency; delinquent accounts are sent multiple billing notices, sent a letter of warning, and ultimately referred to the Department of the Treasury for collection.

Comments Regarding Congressional Intent

Two commenters disagreed with APHIS' interpretation that subsections 136a(a)(1)(A) and (B) of the FACT Act provide authority to set user fees in amounts to maintain an AQI reserve. The commenters opined that this would effectively render subsection 136a(a)(1)(C), which explicitly authorized maintaining the reserve through fiscal year (FY) 2002, superfluous and thus ineffectual. Both of the commenters suggested that the FACT Act establishes three distinct bases for collecting AQI User Fees: (1) To recover costs of providing AQI services in connection with the arrival at a port in the customs territory of the United States; (2) to recover costs of administering the program; and (3) through FY 2002, to maintain a reasonable balance in the AQI User Fee Account. The commenters stated that APHIS' interpretation of the FACT Act thus contravenes Congressional intent.

We disagree that our interpretation of subsections 136a(a)(1)(A) and (B) as allowing collection and maintenance of a reserve following the end of FY 2002 renders subsection 136a(a)(1)(C), which authorized the maintenance of a reasonable balance in the AQI User Fee Account through the end of FY 2002, superfluous. Congress enacted the 1996 amendments in order to respond to escalating budget pressures and increasing demand for AQI services due to consistent annual increases in passenger and commercial air travel by changing AQI's funding structure to transition from being funded from an account subject to annual appropriations to a true "user fee account." Revoking APHIS' ability to maintain a reasonable balance in the reserve at the same time that Congress was transitioning the AQI User Fee Account to one for which fees could only be adjusted through notice-and-comment rulemaking is inconsistent with the purpose of ensuring that the funding structure responded to the needs of the program.

The same commenters stated that a plain reading of the FACT Act limits APHIS' authority to maintain a reserve to the time period between the passage of the amended act in 1996 and the end of FY 2002.

We disagree. A plain reading of the FACT Act gives specific authority to maintain a reasonable balance until the end of FY 2002, but does not address whether a reserve could continue to be maintained after FY 2002 to recover costs associated with providing AQI services or administering AQI programs. As we discussed in the Interpretive Rule, we consider the FACT Act to grant such authority.

One commenter stated that APHIS' interpretation of the FACT Act as stated in the Interpretive Rule violated the precedent established in *Corley versus United States* (556 U.S. 303), *Marx versus General Revenue Corporation* (568 U.S. 371), *Michigan versus the Environmental Protection Agency* (135 S. Ct. 2699), *Chevron versus Natural Resources*

Defense Council (467 U.S. 837), and *Laurel Baye Health Care of Lake Lanier, Inc., versus National Labor Relations Board* (564 F.3d 469 (D.C. Cir. 2009)).

We consider the APHIS' interpretation of the FACT Act to be consistent with relevant legal precedent and authorities. The agency's legal position has been expressed in full in briefs in the *Air Transport Ass'n of Am., Inc. v. U.S. Dep't of Agric.* litigation and APHIS continues to hold the views expressed therein. Specifically, APHIS' view is that its interpretation of the FACT Act gives effect to each of the Act's provisions.

Comment Regarding Commensurability of Fees

One commenter pointed out that section 136a(a)(2) of the FACT Act stipulates that in setting AQI User Fees, APHIS must ensure that the amount of each fee be commensurate with the costs of providing AQI services to the class of users paying the fees. The commenter opined that this section precludes fees from being set at a level that exceeds actual costs of providing services.

APHIS disagrees with the commenter's interpretation of section 136a(a)(2) of the FACT Act, which would, *inter alia*, render ineffective subsection 136a(a)(1)(B)'s authorization to collect fees at a level necessary for the administration of the program. Administrative costs often impact the AQI program as a whole; therefore, it is not possible to divide these costs based on individual user fee groups. For example, the development of policies regarding inspection procedures and sampling of agricultural commodities at ports of entry, the maintenance of manuals regarding the entry requirements for agricultural products, and the issuance of permits for agricultural commodities intended for import into the United States are not rendered to a particular user group but to the program as a whole.

Comment Regarding Calculation Process

One commenter stated that the 2015 Final Rule that set the user fee schedule for the AQI program was based on a Grant Thornton, LLC guidance document, and the Grant Thornton document appeared to calculate the fee model on the presupposition that subsection 136a(a)(1)(C) of the FACT Act was still operative. The commenter also stated that nowhere had the Grant Thornton document made it explicit that the reserve fee calculation was based on actual or imputed costs of providing AQI services or administering the AQI program. The same commenter also stated that the 2015 rule itself indicated that the reserve fee had been calculated based on the assumption that subsection 136a(a)(1)(C) of the FACT Act was still operative. The commenter believed that 136a(a)(1)(A) and (B) provide a more limited basis for collecting and maintaining a reserve.

The 2015 Final Rule took the recommendations of Grant Thornton into consideration, but the final calculation of the reserve fee was ultimately determined by APHIS. The calculation of the reserve fee was not based on the assumption that subsection 136a(a)(1)(C) of the FACT Act was still operative; the specific methodology used for calculation of the fee is set forth at length in the 2015 Final Rule (see 80 FR 66752-66753) and makes no reference to subsection 136a(a)(1)(C) of the FACT Act. Finally, we disagree with the commenter's assertion that subsections 136a(a)(1)(A) and (B) provide a more limited basis for collecting and maintaining a reserve than subsection 136a(a)(1)(C). APHIS' final calculation for the reserve is supported by subsections 136a(a)(1)(A) and (B) of the FACT Act and enables full cost recovery under the FACT Act for all the reasons stated above.

Comment Disagreeing With APHIS' Interpretation of Previous Rulemakings

In the Interpretive Rule, we stated that our interpretation of the FACT Act was consistent with long-standing practice, which had been explained to the public through multiple rulemaking

proceedings, beginning in 2002. *See* 67 FR 56217, Docket No. 02-085-1; 69 FR 71660, Docket No. 04-042-1; 71 FR 49985, Docket No. 04-042-2.

A commenter stated that each rule cited by APHIS as evidence of the long-standing nature of the APHIS' interpretation of the FACT Act instead provided evidence that reserve fees have consistently been calculated based on the assumption that subsection 136a(a)(1)(C) was still operative. The commenter stated that APHIS had therefore deliberately mischaracterized prior rulemakings in the correction.

We disagree. Since 2004, we have consistently stressed the need to maintain a reserve in order to administer the AQI User Fee program and ensure continuity of services, thus effectively claiming subsections 136a(a)(1)(A) and (B) as the bases for the reserve. For example, in a 2004 rulemaking, the first rulemaking APHIS initiated after FY 2002, APHIS "included a reserve-building component in the user fees." *See* 69 FR 71660, 71664. In that rulemaking, APHIS stated that "the FACT Act, as amended" directed that "user fees should cover the costs of" only three things: [(1)] Providing the AQI services for the conveyances and the passengers listed . . . , [(2)] Providing preclearance or preinspection [services], and [(3)] Administering the user fee program." 69 FR 71660; *see also id*. (not mentioning FACT Act's "reasonable balance" language). Nonetheless, in that same rulemaking, APHIS set fees that "includ[ed] a reserve-building component." *Id*. at 71664. APHIS stated that it was doing so because "[m]aintaining an adequate reserve fund is . . . essential for the AQI program," and explained why it "need[s] to maintain a reasonable reserve balance in the AQI account." *Id*. ("The reserve fund provides us with a means to ensure the continuity of AQI services in cases of fluctuations in activity volumes, bad debt, carrier insolvency, or other unforeseen events.") This explanation in that 2004 rulemaking makes clear that, of the three items the cost of which user fees should cover,

APHIS was justifying its inclusion "of a reserve-building component" directly on the third—"[a]dministering the user fee program." As noted previously in the Interpretive Rule and in this document, this rationale effectively relies on subsection 136a(a)(1)(B) of the FACT Act as a basis for the reserve.

The 2004 rulemaking also aligned administering the program with ensuring continuity of AQI services by indicating that one of the ways in which APHIS administers the program is by maintaining sufficient funds in reserve to ensure continuity of AQI services within the program. As noted previously in the Interpretive Rule and in this document, this rationale effectively relies on subsection 136a(a)(1)(A) of the FACT Act as another basis for the reserve.

In the 2006 final rule that responded to comments on the 2004 rulemaking, we again aligned administering the program with maintaining sufficient funds in reserve to ensure continuity of AQI services. *See* 71 FR 49985.

APHIS' 2014 proposed rule to revise the AQI user fee schedule again aligned administration of the user fee program with maintaining sufficient funds to provide AQI services. *See* 79 FR 22896.

Comment Requesting Assistance for Domestic Programs

One commenter asked that APHIS fund domestic control and eradication programs undertaken by State cooperators using AQI user fees.

The FACT Act prohibits such subsidization.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq*.), the Office of Information and Regulatory Affairs designated this action as not a major rule, as defined by 5 U.S.C. 804(2).

Authority: 7 U.S.C. 7701-7772, 7781-7786, and 8301-8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 13th day of January 2020 .

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

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