

this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in

the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: February 5, 2010.

**Mary Ellen Callahan,**  
Chief Privacy Officer, Department of  
Homeland Security.

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 354

[Docket No. APHIS-2006-0096]

RIN 0579-AC06

### Agricultural Inspection and AQI User Fees Along the U.S./Canada Border

**AGENCY:** Animal and Plant Health  
Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are adopting as a final rule, with changes, an interim rule that amended the foreign quarantine and user fee regulations by removing the exemptions from inspection for imported fruits and vegetables grown in Canada and the exemptions from user fees for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers entering the United States

from Canada. The interim rule was necessary in part because we were not recovering the costs of the inspection activities we were engaged in at the U.S./Canada border. In addition, our data showed an increasing number of interceptions on the U.S./Canada border of prohibited material that originated in Canada and countries other than Canada that presents a high risk of introducing plant pests or animal diseases into the United States. These findings, combined with additional Canadian airport preclearance data on interceptions of ineligible agricultural products approaching the U.S. border from Canada, strongly indicated that we needed to expand and strengthen our pest exclusion and smuggling interdiction efforts at that border. As a result of the interim rule, all agricultural products imported from Canada are subject to inspection, and all commercial conveyances, with certain exceptions established by this final rule, as well as airline passengers arriving on flights from Canada, are subject to user fees.

**DATES:** *Effective Date:* March 9, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cynthia Stahl, Senior Staff Officer, Quarantine Policy, Analysis and Support, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737; (301) 734-8415.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction of plant pests. Similarly, the regulations in 9 CFR subchapter D prohibit or restrict the importation of certain animals and animal products into the United States to prevent the introduction of pests or diseases of livestock. The regulations in 7 CFR part 354 provide rates and requirements for overtime services relating to imports and exports and for user fees.

In an interim rule<sup>1</sup> effective November 24, 2006, and published in the **Federal Register** on August 25, 2006 (71 FR 50320-50328, Docket APHIS-2006-0096), we amended the foreign quarantine regulations in part 319 and the user fee regulations in part 354 by removing the exemptions from inspection for imported fruits and vegetables grown in Canada and the exemptions from user fees for commercial vessels, commercial trucks,

<sup>1</sup> To view the interim rule and the comments we received, go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0096>.

commercial railroad cars, commercial aircraft, and international air passengers entering the United States from Canada. As a result of the interim rule, all agricultural products imported from Canada are subject to inspection, and commercial conveyances, as well as airline passengers arriving on flights from Canada, are subject to inspection and user fees. We took that action in part because we were not recovering the costs of our inspection activities at the U.S./Canada border. In addition, our data showed an increasing number of interceptions on the U.S./Canada border of prohibited material that originated in Canada and countries other than Canada that presents a high risk of introducing plant pests or animal diseases into the United States. These findings, combined with additional Canadian airport preclearance data on interceptions of ineligible agricultural products approaching the U.S. border from Canada, strongly indicated that we needed to expand and strengthen our pest exclusion and smuggling interdiction efforts at that border.

On November 22, 2006, we published in the **Federal Register** (71 FR 67436) a notice delaying the effective date for the changes affecting user fees for international air passengers until January 1, 2007, and all other user fee-related provisions of the rule until March 1, 2007. We published a subsequent notice on February 26, 2007 (72 FR 8261), that further delayed the effective date for user fees for commercial trucks and loaded railroad cars entering the United States from Canada until June 1, 2007. These delays of effective date did not extend the comment period for the interim rule.

We solicited comments on the interim rule for 90 days ending November 24, 2006. We received 112 comments by that date. They were from private citizens; industry groups; representatives of the Canadian Government and Canadian State governments; individual shipping, manufacturing, and food processing companies; trade groups; representatives of trucking, airline, railroad, and vessel companies; State governments; and representatives of Federal and State agencies.

Eleven commenters supported the interim rule. The remaining commenters expressed concerns with the interim rule. The issues raised by those commenters are discussed below by topic.

#### *Border Delays*

Many commenters expressed concern that the interim rule would cause border delays due to congestion resulting from

increased inspections, which in turn would heavily tax existing infrastructure. Delays were a particular concern for those entities shipping perishable items such as food products, and for express carriers and companies with strict shipping schedules. Some commenters stated that delays at the U.S./Canada border could have an effect on products shipped through the United States to Mexico or that they could lead to increased fuel costs or job losses. One commenter expressed concern regarding delays as a result of insufficient numbers of the Animal and Plant Health Inspection Service (APHIS) employees to conduct inspections.

Although APHIS retains the authority to establish and collect agricultural quarantine and inspection (AQI) user fees, the Homeland Security Act of 2002 (Pub. L. 107–296), which established the Department of Homeland Security (DHS), transferred the responsibility for inspecting imported agricultural products from APHIS to DHS' Bureau of Customs and Border Protection (CBP). Prior to the effective date of the interim rule, CBP was already conducting inspections of APHIS-regulated products at the U.S./Canada border with the exception of Canadian-origin fruits and vegetables; the interim rule did not create a new inspection function. Among other things, the collection of user fees at the Canadian border has already allowed CBP to hire additional inspectors to offset any potential staffing shortages as a result of the increased inspections of Canadian-grown fruits and vegetables required by the interim rule. Since implementation of the interim rule, we are not aware of any increase in delays at U.S./Canada border ports as a result of the rule.

Border delays can be affected by a variety of factors; in addition to the inspections of fruits and vegetables that are necessary as a result of the rule, the past 3 years have seen the implementation of new national security initiatives such as the passport requirement for all citizens reentering the United States from Canada and the commencement of infrastructure improvement projects at several land border crossings on the U.S./Canada border. While we cannot unequivocally state that there have been no additional delays that can be attributed to the interim rule, the fact that CBP was already conducting inspections of conveyances at the U.S./Canada border prior to the interim rule's implementation makes it unlikely that the interim rule has resulted in the delays or other issues cited by the commenters. CBP monitors the flow of traffic across the Canadian border

through ports of entry and will take action to help alleviate future border delays.

Several commenters stated that requiring cash payments at border crossings would also increase border delays because rail and truck crossings are not set up to handle cash payments and because such payments would require having to make change. Many commenters also stated that requiring cash payments renders current programs designed to reduce wait times by allowing the use of pre-paid decals or other means useless.

Because CBP has been collecting customs user fees all along, the user fee collection infrastructure is already in place. AQI user fee payments for importers who move their products by rail are submitted directly to APHIS after-the-fact, therefore there are no user fee collections or resulting delays at rail crossings due to the need to handle cash payments. In addition, as stated in the interim rule, importers who frequently cross the border by truck will benefit from the purchase of a transponder that is good for a calendar year of unlimited border crossings. Over 80 percent of all importers who cross the border by truck are already benefitting from this provision. The remaining importers who must pay the per-entry user fees will be able to pay them at the same time they pay CBP fees. However, as noted previously, since implementation of the interim rule resulting in the collection of AQI user fees and the conducting of additional inspections, we are not aware of any delays at the U.S./Canada border.

Several commenters asked how the 136 new agricultural inspectors that we expected to be hired as a result of the interim rule would be able to manage all border crossings 7 days a week and all 3 shifts during the day. One of those commenters stated that as most CBP personnel work from 8 a.m. to 4:30 p.m. and most agricultural products arrive in the United States overnight, this suggests that trucks will have to sit and wait for inspectors to arrive at work.

Since most border crossings are staffed by CBP agriculture inspectors from 8:30 a.m. to 4:30 p.m. on weekdays, the additional inspectors would not be expected to manage all U.S./Canada border crossings 7 days a week and 24 hours a day. As noted by one of the commenters, trucks arriving after these hours will most likely have to wait until the following business day when inspections resume. However, most border port offices did not have agriculture inspectors available 7 days a week and 24 hours a day before the implementation of the interim rule. Therefore, waiting at the border already

occurred for trucks arriving before or after these hours. As stated previously, since implementation of the interim rule, we are not aware of any delays at the U.S./Canada border as a result of the interim rule, including any delays of this nature.

Two commenters asked over what timeframe the 136 inspectors would be hired. One commenter asked what will happen in the interim before full staffing is reached.

The staffing plan in the interim rule was developed in 2001 before the transfer of inspection duties from APHIS to CBP. CBP staffs all ports according to current and anticipated needs. We are in consultation with CBP regarding their staffing plan and are providing recommendations to them regarding staffing issues. Training for these inspectors commenced in November 2006 and classes continue to be conducted. As of August 1, 2009, there were 181 CBP agricultural inspectors on the U.S./Canada border. The deployment of inspectors has been and will continue to be as quick as possible. In the interim, the number of inspections conducted will be dependent on the resources available. Inspections will also be conducted randomly. As the number of additional staff increases, the number of inspections will increase accordingly.

One commenter cited delays of up to 24 hours due to waiting for plant samples to be identified and stated that money from user fee collection should go to training inspectors in pest identification or should be spent on technology to better help identify samples.

We are continually working to improve our efficiency and cut costs, while carrying out our mission to protect U.S. agriculture from pest and disease outbreaks. This includes funding new technologies that may help expedite pest identification and hiring and training knowledgeable staff to assist with pest identification.

#### *Conducting Inspections*

Several commenters asked how inspections would be carried out and where they would be conducted.

Selective inspections will be conducted at U.S. ports of entry by CBP agriculture inspectors. They will be the same type of agriculture inspections currently conducted at our other ports of entry. The specific means of commercial conveyance to be inspected and the type of inspection provided at a port of entry are determined by APHIS and CBP risk analyses to target conveyances or host material that may carry agricultural pests. Additionally,

CBP will conduct random inspections. As pathways continue to change, random inspections become increasingly necessary to monitor the flow of imports to ensure that agricultural pests are not entering the country via previously unknown means. This dynamic approach to pest interdiction is critical to the success of our programs.

#### *Definition of Commercial Vehicle*

Two commenters asked what the definition of a commercial vehicle is in the context of the rule.

We do not consider the term "commercial vehicle" to have any specialized meaning beyond its commonly understood meaning. Definitions for *commercial aircraft*, *commercial truck*, and *commercial vessel* may be found in § 354.3 of the user fee regulations.

#### *Private Vehicle, Train, and Bus Passengers*

Several commenters asked how other pathways not addressed by the rule, such as private vehicles and train and bus passengers, would be inspected.

Although the interim rule does not directly address the risk from private vehicles or train and bus passengers, these pathways have been subject to inspection based upon risk. The full economic analysis for this final rule includes a discussion of the inspection of passenger vehicles. Those inspections are funded by appropriated funds.

#### *Private Property and Businesses on the Border*

One commenter asked how carriers coming from a place sitting exactly on the border between the United States and Canada would be treated. Examples given were a pulp or sawmill.

Our AQI program is in place at designated ports of entry along the U.S./Canada border and not private properties along the border. Therefore, a carrier coming from a place sitting exactly on the border, such as a pulp or sawmill, would be treated like any other carrier and could be directed to one of these ports.

#### *Empty Containers and Movement of Nonagricultural Goods*

Many of the commenters stated that particular products that are not agricultural goods or conveyances that are not involved in the movement of agricultural goods should be exempt from paying agricultural user fees because they do not present a risk of introducing plant pests into the United States. Other commenters pointed to the hazardous nature of some

nonagricultural commodities or other difficulties inherent in inspecting certain nonagricultural commodities or conveyances. Several commenters asked how empty conveyances would be dealt with or stated that they should also be exempt from the user fees.

Risks to agricultural and natural resources can arise from shipments of nonagricultural goods and from conveyances moving nonagricultural goods. An example given in the interim rule was wood packaging material, such as wooden pallets, which is used to ship nonagricultural products such as electronic items. Wood packaging material can carry pests such as wood-boring insects. Noxious weed seeds, gypsy moths, and other hitchhiking pests that can attach themselves to nonagricultural items as well as the vehicle itself also pose a concern. In addition, prohibited soil may be attached to the articles in a shipment or to the conveyance itself. If the conveyance has traveled through, or if the conveyance or shipment has originated in, an area of Canada quarantined or regulated for plant pests such as nematodes, these agricultural pests may be carried into the United States in soil. Therefore, it is appropriate that all conveyances be subject to the requirements described in the interim rule except as otherwise noted. These same requirements have been in place along the U.S./Mexico border for the past 18 years. With the publication of the interim rule, conveyances entering the United States from all foreign countries are subject to the same AQI user fees.

#### *Commercial Trucks and Railroad Cars—Exempt Movement That Originates and Ends in Canada*

Several commenters stated that a railroad car or truck that originates and terminates in the United States and that does not load or unload cargo in Canada or that originates and terminates in Canada and that does not load or unload cargo in the United States should be exempt from paying the user fees.

The current regulations already exempt from AQI user fees those commercial railroad cars that are part of a train that originates and terminates in the United States and no passengers board or disembark and no cargo is loaded or unloaded while the train is in a foreign country. We recognize that there is a similar risk profile for commercial railroad cars that are part of a train that originates and terminates in Canada and no passengers board or disembark and no cargo is loaded or unloaded while the train is in the United States. Therefore, we have

amended the regulations in this final rule to state that such movements are also exempt from the AQI user fee. However, we do not agree that a similar exemption from the AQI user fee should be granted to trucks that originate and terminate in the United States and do not load or unload cargo in Canada or that originate and terminate in Canada and do not load or unload cargo in the United States. This is because, unlike railroad cars, trucks are not bound to a fixed track where stops and loading or unloading may only feasibly occur at designated stations. Therefore, the risk is high that cargo may be loaded or unloaded at any point.

#### *Vessels That Travel to Canada To Refuel*

One commenter stated that vessels that travel to Canada only to refuel should be exempt from paying an AQI user fee upon their return to the United States.

We agree with the commenter. Although U.S.-origin vessels that travel to Canada to take on fuel are not currently exempt from paying an AQI user fee when they return to the United States, we note that Canadian-origin vessels that travel to the United States solely to take on fuel are exempt from paying an AQI user fee. Because we recognize that there is a similar risk profile for U.S. vessels returning from Canada if they have only traveled to Canada to take on fuel, we have amended the regulations in this final rule to state that such movements are also exempt from the AQI user fee.

#### *Small Aircraft*

Several commenters stated that the user fee exemption should be extended to apply to aircraft that are not currently exempt due to their size or because they contain more than the maximum number of seats to qualify for a user fee exemption, because such planes carry little cargo.

Currently, all passenger aircraft, originating in any country, that have 64 or fewer seats and that are not carrying certain regulated articles specified in § 354.3(e)(2)(iv) are exempt from paying the aircraft AQI user fee. The interim rule and this final rule are focused on AQI user fees for conveyances and air passengers from Canada. Any new AQI user fee exemptions that could impact passengers or conveyances originating from countries around the world, such as the exemption suggested by the commenters, would have to be addressed in a separate rulemaking.

#### *Barges*

Several commenters stated that the user fee exemption should be extended to apply to barges that are not currently exempt due to their size, but that carry little cargo.

We note that ferries, which are not considered to be commercial vessels, and commercial vessels weighing less than 100 net tons are already exempt from paying AQI user fees. While we do not agree that additional exemptions should be given to barges because of their size, we do recognize that barges traveling solely between the United States and Canada are operating in a lower-risk environment: A limited range of waterways between and around the U.S./Canada border such as the Puget Sound and the Great Lakes, which means that such barges present a much lower risk of carrying cargo or hitchhiking pests from a third country. Because of the risk of ocean-going barges traveling to countries outside of the United States and Canada, we have restricted our definition of *barge* to a non self-propelled vessel that transports cargo that is not contained in shipping containers. This definition does not include integrated tug-barge combinations. Further, we are limiting the exemption to barges that carry bulk cargo that originates only in the United States or Canada and that do not carry any plants or plant products or animals or animal products, and that do not carry soil or quarry products from areas in Canada listed in § 319.77–3 as being infested with gypsy moth. Therefore, we are amending the regulations to exempt barges that meet the above conditions from paying the AQI user fee.

#### *Participation in Trade Security Systems*

Several commenters expressed concern that the interim rule removes the benefits of complying with systems such as the Customs-Trade Partnership against Terrorism (C-TPAT) and suggested that those in the trade community who participate in such programs should be waived from having to comply with the provisions of the interim rule.

C-TPAT does not have an agricultural component that specifically addresses sanitary or phytosanitary risks. C-TPAT members' shipments are subject to agricultural inspection regardless of the reduced inspection benefits granted by membership in the program. Therefore, we do not believe it is appropriate to exempt C-TPAT members from being required to pay the AQI user fee.

#### *Transition to Full Staffing and Inspection Levels*

Several commenters expressed concern that the collection of user fees does not mean any additional inspections will be conducted and therefore, stated the user fees are not justified. Some of the commenters expressed concern that the fees for one type of conveyance would be used to subsidize inspections on another type of conveyance because of what the commenters perceived as an apparent disparity in user fees charged between different conveyances or an apparent disparity in the inspection cost projections between different conveyances. Several commenters on the interim rule expressed concern regarding the cost projection for the initial staffing plan: 65 airport pre-clearance inspectors in Canada, costing \$46 million, and 136 inspectors along the U.S./Canada border, costing \$22.45 million.

As stated previously, the staffing plan in the interim rule was developed in 2001 before the transfer of inspection duties from APHIS to CBP. We are in consultation with CBP regarding their staffing plan and are providing recommendations to them regarding staffing issues. Inspections will be fewer and more random until the transition to full staffing occurs, but from then on will be conducted on a greater number of conveyances and agricultural products. The apparent disparity in user fees or the cost of inspections between different conveyance types is due to various factors, including the time and staff needed to conduct the inspections as well as the costs associated with staffing inspectors in Canada versus inspectors in the United States. Any excess of collections over costs remains available from year to year in a dedicated reserve account to be used only to fund agricultural quarantine inspection and related program costs. We take into account the balance in this reserve account, along with our current user fees, volumes, and collections before increasing or decreasing user fees.

#### *User Fee Costs*

The majority of commenters stated that the cost of the user fees is excessive. Several commenters expressed concern regarding how APHIS arrived at the current user fees. One commenter asked how APHIS could have set user fees in 2004 that will be in effect until 2010 when APHIS does not know what costs will be in 2010.

As stated previously, the interim rule was designed, in part, to recover the costs of our current inspection activities at the U.S./Canada border. APHIS has the authority to collect user fees to fund inspections. Until recently, APHIS had determined that increased inspections at the Canadian border were not necessary. However, due to evidence of increased pest risk, APHIS believes it is necessary to increase its inspection regime at the Canadian border and therefore must collect user fees to fund those inspections. Therefore, we are requiring that commercial conveyances from Canada and international airline passengers arriving on flights from Canada be subject to the same agricultural quarantine user fees that are already charged to commercial conveyances and international airline passengers arriving in the United States from all other foreign countries. To calculate the proposed user fees, we projected the direct costs of providing all AQI services in fiscal years (FY) 2004 through 2010 (and beyond) for international airline passengers and for each category of conveyance: Commercial vessels, commercial trucks, commercial railroad cars, and commercial aircraft. The cost of providing these services in prior FYs served as a basis for calculating our projected costs. We then projected our costs using economic factors provided to us in the economic schedules in the President's budget. In publishing our user fees in advance, we are acting on behalf of affected industries who suggested that they would be able to plan for the effects of fee changes more effectively if fees were set in advance. To the extent that costs of inspections and collections of user fees change, we retain the option of increasing or reducing any of the fees.

#### *Taxes Versus User Fees*

Some commenters expressed concern that the user fees will serve as a new tax on cross-border commerce or stated that Government funding should be obtained to hire additional permanent inspectors and acquire other needed resources rather than increasing user fees, or that appropriations have already addressed the need for additional inspectors.

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, loaded

commercial railroad cars, commercial aircraft, and international 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 (FACT) 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. Although appropriations may be used to partially fund certain related aspects of the AQI program, the FACT Act mandates that the majority of the cost must be borne by the beneficiaries of the program's services.

#### *Canadian Costs and Fees*

Two commenters expressed concern that the interim rule would cause Canada to retaliate by imposing user fees on all conveyances crossing the border into Canada regardless of whether inspections will be carried out.

Although we understand the commenter's concern, Canada's actions are not under our control. The interim rule was implemented to address the increased pest risk presented by agricultural shipments and conveyances from Canada and to provide for full cost recovery of our AQI program. The conveyances entering the United States from Canada are not only Canadian-owned; all conveyances, including U.S.-owned conveyances, are impacted by this rule. Also, we note that the user fees have been in effect since 2007. Since that time, there have been no signs of retaliation by Canada.

#### *Inspection Costs*

Several commenters stated that APHIS does not know what the costs of performing inspections are and, therefore, asked how APHIS can comply with the statutory mandate in 21 U.S.C. 136a(a)(2) that fees must be commensurate with the costs of inspections. One commenter expressed concern that the interim rule did not contain provisions for the adjustment of fees if necessary.

The user fees implemented at the U.S./Canada border as a result of the interim rule are the same as those already in place at our other border ports. Those user fees were determined by dividing the sum of the costs of providing each service by the projected number of users subject to inspection, thereby arriving at "raw" fees. We then rounded the raw fees up to determine

the user fees. We consider this approach adequate in our identification of the costs of inspection and related pest identification and mitigation activities. As APHIS assesses its user fees, volumes, collections, and ongoing reserve balances, it will initiate rulemaking to increase or decrease the fees as necessary. We review our fees on a biennial basis to ensure that the fees charged are commensurate with the costs of inspection and inspection-related activities 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. In most cases, we propose user fee increases so that the fees will keep up with inflationary costs as well as any new costs that must be paid. However, 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.

#### *Decals*

Several commenters expressed concern regarding the provision for annual decals. One commenter stated that if the option to purchase an annual decal is available for trucks that it should also be extended to all other conveyances. Two commenters questioned the economic feasibility of an annual decal for some importers because they do not cross the border enough times to justify the cost of the decal or because the decal is vehicle-specific.

Although currently there is not an option to purchase an annual decal for loaded railroad car and commercial vessel border crossings, the regulations do contain maximum charge provisions. For commercial vessels, the maximum user fee is 15 times the AQI user fee per arrival. For loaded railroad cars, the maximum user fee is 20 times the AQI user fee per arrival. The maximum charge provisions provide the same benefits to users as a decal in instances where issuing a decal may not be feasible due to difficulty in electronically reading the decal on a particular type of conveyance or how user fees are collected for a particular conveyance.

#### *Air Industry—Two AQI User Fees*

One commenter asked why air transport is subject to two fees (cargo and passenger) when other modes of transport are only subject to cargo fees. The commenter also asked why all

aircraft are subject to the same aircraft fee, regardless of whether they are cargo or passenger aircraft.

Except as otherwise noted, the fees charged to commercial conveyances from Canada and international airline passengers arriving on flights from Canada are the same fees already charged to commercial conveyances and international airline passengers arriving in the United States from all other foreign countries. As mentioned previously, all passenger aircraft originating in any country with 64 or fewer seats and that do not carry certain regulated articles are already exempt from paying the aircraft AQI user fee. The passenger fee pays the costs of inspecting passengers and passenger baggage, the aircraft galley including garbage, the passenger compartment and the baggage hold, while the commercial aircraft fee pays the costs of inspecting the aircraft, excluding the areas covered under the passenger fee, and the crew and cargo.

#### *Legality*

Many commenters stated that the interim rule is contrary to bilateral efforts and political commitments between the United States and Canada or broader international agreements and serves to undermine them.

APHIS has been in discussions with Canadian officials for many years regarding agricultural risk from agricultural products, commercial conveyances, and air passengers arriving in the United States from Canada. We have also established workgroups with Canada to discuss enhancements within their agricultural programs to complement the U.S. pest interdiction and prevention programs. When the original user fee rules were implemented and the exemption for Canadian conveyances made, we considered commercial conveyances and agricultural shipments from Canada to have a risk profile similar to that of products and conveyances from the United States.<sup>2</sup> As a result of this assumption, few inspections were conducted at the Canadian border. However, recent trends have shown that this assumption about risk is no longer true and inspections have increased accordingly. Therefore, in order to recover the costs of the existing inspection program and to implement an expanded inspection program, we determined the removal of the inspection and user fee exemption was necessary.

#### *Basis of the Rule*

Several commenters questioned the basis of the rule, asking for risk assessments, pest survey data, or other information to support the rulemaking.

Our decision to implement the interim rule was based on the fact that we were conducting inspections on the U.S./Canada border during which we were detecting exotic and dangerous pests, and were not recovering the costs of these inspections. For example, U.S. inspectors have intercepted fruit flies on mangoes from Mexico and Morocco, longans and litchis from various Asian countries, citrus from Spain, *Spondia* spp. from Mexico, *Acanthocereus* spp. from China, and *Musa* spp. from India that were shipped from those countries to the United States via Canada. In each case, the material was from a country other than Canada and was re-labeled as a product of Canada and then shipped to the United States to take advantage of the exemption from AQI user fees for Canadian fruits and vegetables. Therefore, we determined that the inspection exemption for fruits and vegetables from Canada needed to be removed to allow for regular inspections at the border and that AQI user fees were needed to recover the costs of our ongoing inspection activities. We provide more examples/data in our Final Regulatory Flexibility Analysis that illustrate the risks associated with material imported from Canada that originated in Canada and countries other than Canada. We reiterate that the interim rule merely subjected users entering the United States from Canada to the same user fees that are already being charged to users entering from all other countries.

#### *Emergency Rulemaking*

Many commenters expressed concerns regarding the use of emergency rulemaking rather than engaging in talks with interested entities and that the interim rule's comment period ended on the same day as its implementation. Several commenters stated that the delay in implementing the rule illustrates that the rule was not justified as an emergency action.

APHIS has been in discussions with Canadian officials for many years regarding the risk from agricultural shipments and commercial conveyances from Canada. We value our relationship with our Canadian partners, and we continue to communicate with our partners regarding how best to improve mitigation activities as well as to determine where harmonization of regulatory actions between the United States and Canada may be appropriate.

Because the interim rule removed the inspection exemption for imported fruits and vegetables grown in Canada and commercial conveyances from Canada in order to prevent the introduction of plant pests and animal diseases into the United States and removed the user fee exemption for Canada in order to recover the costs of the needed inspections, we found good cause to publish the rule without a prior proposal. However, affected industries and the general public did have an opportunity to comment on the interim rule following its publication. The effective date of the interim rule was delayed in response to strong industry requests for more time to prepare for the implementation of the AQI user fees and to allow time to coordinate the additional inspections and collection of fees with CBP.

One of the difficulties in mitigating the risk of plant pests entering the United States is ensuring that loaded or unloaded railroad cars and trucks that previously carried shipments of non-Canadian origin (i.e., third country origin) cargo are not infested with pests at the time they enter the United States. After the interim rule was published, APHIS met on several occasions with individual companies and industry groups that operate across the land border to discuss agricultural risks associated with rail and truck supply systems. In particular, we hoped to obtain further information regarding the use of containers which previously hauled high risk non-Canadian products. However, we were unable to obtain such information.

#### *Miscellaneous Comments*

One commenter stated that it is impermissible for the Department of Agriculture to charge user fees on behalf of another agency since CBP conducts the inspections rather than the Department of Agriculture. Another commenter stated that collection of user fees adds an additional clerical function on border officers and that not only is it time-consuming, but that it requires additional recordkeeping and financial controls.

While the Homeland Security Act of 2002 transferred certain AQI activities from APHIS to CBP, including conducting inspections, the management of the AQI user fee account, setting fees, and monitoring inspection related expenses and collections continues to be APHIS' responsibility. Since CBP is currently collecting customs fees, the collection of AQI user fees does not present an additional clerical function because the AQI user fees are collected at the same

<sup>2</sup> See the rule published in the *Federal Register* (56 FR 8148–8156) on February 27, 1991.

time as CBP customs fees. In addition, as had been the case prior to the interim rule, CBP continues to conduct inspections and collect AQI user fees at the Mexican border without any collection-related delays. Likewise, we are not aware of any collection-related delays at the Canadian border since implementation of the interim rule.

#### *Comments Regarding the Economic Analysis*

Several commenters expressed concerns regarding the economic analysis for the rule, particularly the accuracy of user fee collection and cost estimates, and asked for a detailed cost-benefit analysis. Several commenters stated that because we did not provide a quantitative comparison of expected benefits and costs of the rule, APHIS failed to satisfy the requirements of Executive Order 12866. One commenter cited the information we presented indicating that most motor carriers qualify as small businesses and stated that, because of this, APHIS should reevaluate the effect of the user fees.

Our economic analysis included a cost-benefit analysis and evaluated the economic impacts on small entities with the best information available at that time. In this final rule, we have provided an updated final economic analysis. The commenters are correct in that we are unable to quantitatively project the benefits that will be attributable to the November 2006 interim rule and this final rule in terms of the reduced risk of animal and plant pests and diseases entering from Canada. It is difficult to determine the animal and plant pests and diseases that may be present in Canada or that may travel through Canada destined for the United States. It is also difficult to trace infestations already established in the United States back to their point of origin. However, we do know that these risks are genuine. U.S. agriculture and other sectors of the economy are unfortunately well acquainted with the costs of pest or disease introductions when interception fails, given the large public and private expenditures devoted to ongoing animal and plant pest control and eradication programs.

Although we are not able to quantify the benefits of this rule, we are confident that the benefits of this rule (costs forgone because the resources made available will help prevent pest and disease entry from Canada) will outweigh its costs. This conclusion satisfies a principal requirement of Executive Order 12866. In addition, Executive Order 12866 does not require that benefits and costs be quantified,

only that they be evaluated as completely as possible.

#### *Alternatives Suggested by Commenters*

Many commenters suggested alternatives to the interim rule. One of these suggestions was to require permits and phytosanitary certificates for agricultural goods from Canada that are imported into the United States. Another suggestion was to utilize preclearance systems to inform CBP about shipment information before arrival at the border in order to target inspections toward shipments of presumed greater risk. A third suggestion was to conduct inspections closer to the third-country source, such as at the production facility, because third-country products seem to hold the most risk.

While permits, phytosanitary certificates, and preinspection systems are valuable ways to gain information about shipments before arrival, they do not prevent plant pest hitchhikers from attaching themselves to vehicles or shipments, or prevent importers from falsifying information or adding additional items to shipments before crossing the border. Therefore, inspection at the border would still be necessary to ensure that any such systems are working as intended. In addition, because pathways change, it is necessary to continue to monitor the flow of imports to ensure that agricultural pests are not entering the country via previously unknown means. Therefore, inspections at the border would still be necessary to mitigate risk. APHIS is continually working with Canadian officials to explore ways to lower and control pest risk.

Therefore, for the reasons given in the interim rule and in this document, we are adopting the interim rule as a final rule with the changes discussed in this document.

#### **Effective Date**

We are making final, with certain changes, an interim rule published in the **Federal Register** on August 25, 2006, that amended the foreign quarantine and user fee regulations by removing the exemption from inspection for imported fruits and vegetables grown in Canada and the exemptions from user fees for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers entering the United States from Canada. Certain provisions of the interim rule became effective on January 1, 2007, and on March 1, 2007, with the remainder becoming effective on June 1, 2007. The changes in this final rule

include user fee exemptions for railroad cars that are part of a train that originates and terminates in Canada where no passengers embark or disembark and no cargo is loaded or unloaded while in the United States and vessels traveling to Canada only to refuel. In addition, this final rule exempts from user fees barges that carry non-containerized cargo that originates only in the United States or Canada and that does not carry any plants or plant products, animals or animal products, or soil or quarry products from areas in Canada regulated for gypsy moth. Because this final rule provides specified exemptions from user fees and thus relieves restrictions, the Administrator has determined that this rule can be made effective less than 30 days after publication in the **Federal Register**.

#### **Executive Order 12866 and Regulatory Flexibility Act**

This rule 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.

We have prepared an economic analysis for this final rule. It provides a cost-benefit analysis as required by Executive Order 12866, as well as a final regulatory flexibility analysis that considers the potential economic effects of this final rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

We are adopting as a final rule, with the changes discussed in this document, an interim rule that amended the foreign quarantine and user fee regulations by removing the exemptions from inspection for certain agricultural products imported from Canada and the exemptions from user fees for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international air passengers entering the United States from Canada. As a result of that action, all agricultural products imported from Canada are subject to inspection, and commercial conveyances, except as otherwise noted, as well as airline passengers arriving on flights from Canada, are subject to user fees.

#### *Expected Benefits*

The objectives of the amended regulations were to expand and



strengthen our pest exclusion and smuggling interdiction efforts at the Canadian border by subjecting all agricultural products and all commercial conveyances, with certain exceptions established by this rule, to inspection and to enable the Federal Government to recover the cost of those inspections through user fees. In 1991, APHIS established AQI user fees for inspections of commercial conveyances and international air passengers arriving in the United States from all foreign countries except Canada. The exemption of Canada from the AQI user fees was based on our understanding that conveyances and passengers from Canada posed little risk of introducing plant or animal pests or diseases into the United States. Since 1991, the nominal value of U.S. agricultural imports from Canada has increased over fourfold, from \$3.3 billion in 1991 to \$15.2 billion in 2007. In addition, with the globalization of trade, shipments of re-exported agricultural products that originate in countries other than Canada but enter from Canada into the United States have increased significantly. For example, total exports of fruits and vegetables to the United States from Canada increased by 167 percent over the 10-year period between 1998 and 2007, while Canada's re-export of fruits and vegetables to the United States increased by 738 percent during this same period. In addition to the growing volume of legitimate re-exports, there is incentive to commingle third-country goods with Canadian-produced goods because of lower U.S. tariffs for goods for Canadian origin. Opportunities to smuggle goods across the border also have increased as the volume of commercial traffic and number of air passengers have grown.

Emergency Action Notifications (EANs) issued illustrate the increasing risks associated with the agricultural products entering from Canada. An EAN is an APHIS form used by CBP to communicate to importers the sanitary or phytosanitary reasons for an emergency action and what the action entails, such as treatment, re-export, or destruction of the goods. The EAN records indicate an increasing number of emergency actions related to agricultural goods entering from Canada. For example, during FY 2007, a total of 1,193 EANs were issued for products shipped from Canada to the United States. Nine hundred thirty-three of these EANs (or 78 percent) were issued for Canadian products and 260 (22 percent) were issued for products of non-Canadian origin. As 22 percent is substantially higher than the 5 percent

of Canada's fruit and vegetable shipments to the United States in 2007 that were re-exports, this represents a disproportionately high quantity of EANs for re-exports in comparison to the total number of EANs issued for shipments from Canada.

Among EANs issued for re-exported products, 126 EANs were for products that originated in Asia and 62 EANs were for products that originated in regions south of the United States, i.e., Mexico, Central America, and South America. In FY 2007, 55 countries other than Canada were reported as countries of origin on EANs for products entering from Canada. Altogether, over 100 pest species were intercepted in FY 2007 and FY 2008. Examples of intercepted pests are the Mexican fruit fly (*Anastrepha ludens* Loew (Tephritidae)), found in containers that originated in Mexico, and the gypsy moth (*Lymantria dispar* Linnaeus (Lymantriidae)), found in shipments of firewood of Canadian origin.

Data generated by the Agricultural Quarantine Inspection Monitoring (AQIM) program also illustrate a greater sanitary and phytosanitary risk associated with agricultural products that enter the United States from Canada than anticipated when we first established AQI user fees and exempted Canada from those fees. Under the AQIM program, CBP agricultural inspectors conduct random inspections within each major pathway to assess their relative risk, and APHIS-PPQ monitors the collected data. AQIM keeps track of Quarantine Material Interceptions (QMIs), which are regulated agricultural materials seized because of prohibition, permit denial, pest risk, or abandonment. Approach rates, defined as the number of QMIs as a percentage of the number of conveyances inspected, for commercial trucks at the U.S./Canada border show a substantial 1-year increase in interceptions, from 0.68 percent of trucks sampled in FY 2006 to 1.73 percent of trucks sampled in FY 2007. This increase cannot be explained by an increase in the rate of inspection for FY 2007 over FY 2006. Applying the FY 2007 approach rate of 1.73 percent to the 6.6 million trucks that CBP reports as having entered the United States from Canada that year, implies that over 100,000 of the trucks may have been carrying quarantine material.

As an example of the risk of foreign pest introduction, plum pox is a disease that was introduced into the United States. It is a devastating viral disease of stone fruit, such as peaches, apricots, plums, nectarines, almonds, and cherries. It is transmitted within an

orchard by aphids and over long distances through the movement of infected nursery stock, propagative material, and fruit. The plum pox virus first appeared in the United States in Pennsylvania in October 1999. In 2006, it was detected in New York and Michigan. APHIS established an eradication program to prevent the spread of plum pox to noninfested areas of the United States. Since 2000, APHIS has set aside \$50.7 million to address plum pox disease. We do not have evidence that plum pox was introduced from Canada, where it is also known to exist. However, the expenses incurred because of this disease exemplify the types of costs that may be avoided or reduced by removing the inspection exemption and providing additional resources for AQI inspections at the U.S./Canada border.

We are unable to quantify either the risk that existed prior to implementation of the interim rule, nor the reduction in risk following its implementation. Our knowledge of the disease and pest threats posed by goods entering from Canada and the extent to which the AQI inspection activities mitigate those threats is currently imperfect. Rarely are we able to precisely trace an established infestation by an invasive species to its country of origin. However, we do know that these risks are genuine. The disproportionately large number of EANs issued for shipments of third-country origin and the approach rates shown in the AQIM program point to significant and growing risks of disease and pest introduction. The intentional or unintentional commingling of products of third-country origin with goods of Canadian origin heightens these risks. Outright smuggling of goods across the U.S./Canada border is also a growing threat due to the increasing volume of commodities and number of travelers that cross the border into the United States each year. U.S. agriculture and other sectors of the economy are unfortunately well acquainted with the costs associated with pest and disease introductions when interception fails. Large public and private expenditures have been devoted to animal and plant pest and disease control and eradication programs, as exemplified by the costs of plum pox. This rulemaking will enable us to increase our inspections and targeting activities at the U.S./Canada border. The inspections will help safeguard against the risk of pest and disease introductions and, therefore, reduce agricultural losses and expenditures for pest and disease control and eradication. The regulations



will also allow us to recover the costs of these activities.

#### *Costs of the Rule*

The amended regulations impose a direct fee on all commercial conveyances crossing the U.S./Canada border, except in three instances: (i) Barges operating solely between U.S. and Canadian ports that carry only bulk cargo that does not originate outside of the United States or Canada and that do not carry any plants or plant products or animal or animal products, and that do not carry soil or quarry products

from areas in Canada listed in § 319.77–3 as being infested with gypsy moth; (ii) railroad cars that are part of a train that originates and terminates in Canada and that does not load or unload passengers or cargo while in the United States;<sup>3</sup> and (iii) vessels returning to the United States after traveling to Canada solely to take on fuel.

In the preliminary economic analysis for the interim rule, we noted the possibility of shipping delays because of the AQI inspections. Additional cost that might arise due to shipping delays was one of the most frequently raised

concerns among our stakeholders. CBP inspectors are required to inspect commercial trucks while maintaining a steady traffic flow. CBP performs inspections based on risk profiles and available resources, as well as randomly.

#### **User Fees**

Four modes of conveyance—trucks, railroad cars, maritime vessels, and aircraft—and international air passengers are assessed AQI user fees, as shown in Table 1.

**TABLE 1—AQI USER FEES FOR CONVEYANCES AND AIR PASSENGERS ENTERING THE UNITED STATES, FISCAL YEARS 2007, 2008, AND 2009**

	FY 2007	FY 2008	FY 2009
Maritime vessels .....	\$490 per crossing (max 15 payments per year).	\$492 per crossing (max 15 payments per year).	\$494 per crossing (max 15 payments per year).
Trucks <sup>1</sup> .....	\$5.25 per crossing or \$105 per year ...	\$5.25 per crossing or \$105 per year ...	\$5.25 per crossing or \$105 per year.
Railroad cars <sup>2</sup> .....	\$7.75 crossing .....	\$7.75 per crossing .....	\$7.75 per crossing.
Aircraft .....	\$70.50 per arrival .....	\$70.50 per arrival .....	\$70.75 per arrival.
Air passengers .....	\$5 per passenger .....	\$5 per passenger .....	\$5 per passenger.

<sup>1</sup> Truck operators have the choice of paying per crossing or purchasing a yearly decal. The cost of the yearly decal (\$105) is 20 times the fee for an individual crossing (\$5.25).

<sup>2</sup> If the AQI user fee is prepaid for all arrivals of a commercial railroad car during a calendar year, the AQI user fee is an amount 20 times the AQI user fee for each arrival.

*Surface conveyances.* All trucks and trains transporting goods to the United States are subject to inspection. A user fee of \$5.25 per crossing, or \$105 per year, is charged for each truck, and a fee of \$7.75 per crossing is charged for each loaded railroad car, other than for railroad cars in transit, as described above.

Trucks, trains, and all other commercial surface conveyances transported goods valued at approximately \$511 billion across the U.S./Canada border in 2007, with \$285 billion in imports into the United States from Canada and \$226 billion in exports from the United States to Canada.<sup>4</sup> Trucks remain the dominant commercial mode of transportation, carrying \$150 billion in U.S. imports and \$174 billion in U.S. exports across the U.S./Canada border in 2007. That same year, railroads transported \$66 billion in U.S. imports and \$25 billion in U.S. exports across the U.S./Canada border. While agricultural shipments are generally the focus of AQI inspections, all commercial surface conveyances crossing the border are subject to inspection.

For commercial trucking, the Small Business Administration (SBA) defines a small entity as one having not more than \$25.5 million in annual receipts. According to the 2002 Economic Census, there were 29,220 general long-distance freight trucking firms in the United States (North American Industry Classification System [NAICS] code 484121). A total of 371 of these firms, or less than 2 percent, had annual receipts of \$25 million or more, the largest revenue category identified. Thus, not less than 98 percent of trucking firms in the United States are small entities. We do not know the number or size of trucking firms that transport products across the border from Canada, but can reasonably assume that they are also mostly small entities.

For commercial railroad transportation, the SBA defines a small entity as one having not more than 1,500 employees for long-haul railroads (NAICS code 482111) and not more than 500 employees for short-line railroads (NAICS code 482112). Of the 571 firms operating as railroad transportation companies in the United States, 18 firms employed more than 500 workers. Therefore, approximately 97 percent of

commercial railroad companies in the United States are considered small entities. We can reasonably assume that this percentage applies to railroad companies that transport products into the United States from Canada.

*Waterborne conveyances.* Commercial vessels transporting goods to the United States (100 net tons or more) are subject to inspection. Beginning March 1, 2007, waterborne conveyances were charged a user fee of \$490 per crossing in FY 2007. In FY 2008, the fee was \$492 per crossing, and increased to \$494 per crossing in FY 2009. Total waterborne trade with Canada was valued at \$18 billion in 2005, \$14 billion in U.S. imports and \$4 billion in U.S. exports.<sup>5</sup> Commodities transported by waterborne conveyances comprised 26 percent of total tonnage crossing the U.S./Canada border in 2005, with this mode of conveyance especially suitable for heavy bulk products such as grain and crude petroleum. As with the surface conveyances, we expect the focus of inspections of waterborne conveyances to be shipments of agricultural commodities.

For commercial water transportation, the SBA defines a small entity as one

<sup>3</sup> The railroad cars are required to be part of the same train when they return to Canada. The current AQI user fee regulations (7 CFR 354.3) provide a similar exemption for all U.S. railroad cars that transit Canada or Mexico and return to the United

States. Sanitary and phytosanitary risks are minimal for these types of shipments.

<sup>4</sup> Bureau of Transportation Statistics, TransBorder Surface Freight dataset, <http://www.bts.gov/transborder/>.

<sup>5</sup> Bureau of Transportation Statistics, North American Freight Transportation, June 2006.

having not more than 500 employees. According to the 2002 U.S. Economic Census for Transportation and Warehousing, 724 firms operated in the United States providing “deep sea, coastal, and Great Lakes water transportation” (NAICS codes 483111 and 483113). Nine of these firms employed 500 to 999 employees and 5 firms employed 1,000 or more employees. Thus, over 98 percent of water transportation firms in the United States employed fewer than 500 workers and can be considered small. Approximately 1,895 vessels were used to move cargo from Canada to the United States in 2005. We can assume that most if not all of the firms owning these vessels are small entities.

**Aircraft and air passengers.** All air cargo and conveyances arriving in the United States are subject to inspection. Commercial aircraft were charged a user fee of \$70.50 per arrival in FY 2008, and the user fee was increased to \$70.75 in FY 2009. The modal share of air cargo as a percentage of total U.S. imports from Canada steadily declined to 4.1 percent in 2006, from a peak of 6.6 percent in 2000. Preliminary data for 2007 indicate a slight increase in air cargo’s modal share, to 4.4 percent.<sup>6</sup>

All air passengers arriving in the United States are charged a user fee of \$5. In FY 2007, the total number of air passengers traveling from Canada to the United States was 11.9 million, an increase over the previous year and a return to pre-9/11 levels for the first time.<sup>7</sup>

For commercial air transportation, the SBA defines a small entity as one having not more than 1,500 employees. According to the 2002 U.S. Economic Census for Transportation and Warehousing, there were 513 firms in the United States classified under “scheduled freight air transportation” (NAICS code 48111), of which only 12 firms employed more than 1,000 employees. Thus, about 98 percent of all air transportation firms in the United States are small.

Clearly, most of the surface, waterborne, and air conveyance entities that are directly affected by the rule are small, although we do not have precise estimates of their numbers.

#### Estimated User Fee Collection and Federal Expenditures

Table 2 shows FY 2008 estimated user fee collections and expenditures for the inspection of conveyances and air

passengers arriving from Canada. Expected AQI expenditures for the U.S./Canada border set forth in this final rule differ from those presented in the preliminary economic analysis for the interim rule. We projected Federal expenditures for a single year for the interim rule that totaled about \$74.8 million, with about \$68.5 million for additional CBP staffing and direct support, and about \$6.3 million for indirect support (agency, departmental, and other administrative costs). In Table 2, we explicitly acknowledge the complementary roles that CBP and APHIS play in fulfilling the AQI mission at the U.S./Canada border by estimating FY 2008 expenditures separately for the two agencies. Broadly speaking, CBP is responsible for AQI inspection activities, while APHIS is responsible for setting policy, providing training, and establishing and collecting user fees to pay for the CBP inspections.

As shown in table 2, we estimated FY 2008 AQI user fee collection to total about \$89.3 million and Federal expenditures for the AQI activities for conveyances and air passengers from Canada to total about \$98.7 million (about \$78.6 million to fund the CBP program and about \$20.1 million to fund the APHIS program). The CBP expenditures are based on the estimated volume of inbound border crossings from Canada for the various modes of conveyance covered by the rule and for airline passengers.<sup>8</sup> Although our estimated figures show a deficit of about \$9.4 million, a reserve fund is maintained to carry on with AQI activities in cases of bad debt, carrier insolvency, or fluctuations in activity volumes.

APHIS performs a number of functions in support of AQI activities at the U.S./Canada border that can be categorized within the following areas: Port operations and policy, science and technical support, training for CBP agriculture inspectors, import analysis and risk management, pest and disease identification, and regulatory enforcement and anti-smuggling programs. The overall cost for APHIS is composed of expenditures on these various functions. Expenditures for both APHIS and CBP also include administrative and other overhead costs.

<sup>8</sup> CBP uses an Activity Based Costing (ABC) methodology, whereby data are collected from various CBP sources and compiled for a cost-of-operations perspective of the organization. ABC is a means of operationally analyzing how an organization consumes its resources (direct and indirect). The focus is on activities performed within given processes.

TABLE 2—ESTIMATED USER FEE COLLECTION AND FEDERAL EXPENDITURES FOR THE U.S./CANADA BORDER AQI SERVICES, FY 2008 (MILLION DOLLARS)

AQI user fee collection .....	\$89.3
CBP expenditure .....	78.6
APHIS expenditure .....	20.1
Total Federal expenditures .....	98.7

Sources: APHIS—Financial Management Division, CBP—Budget Cost Management Division, APHIS—PPQ and APHIS—Budget & Program Analysis.

#### Alternatives

Four possible alternatives to the interim rule were identified, none of which would accomplish the objectives of the rule or minimize effects for small entities.

One alternative would have been to make no changes to the current regulations. However, inspections along the U.S./Canada border have resulted in an increasing number of interceptions of prohibited material that originated from countries other than Canada. The growth in imports and in the number of air passengers arriving from Canada has placed increased demands on CBP staff at U.S./Canada border ports and airports. This rule is necessary in order to strengthen our AQI activities and lessen the risk of introduction of plant and animal pests and diseases. Removing the Canadian exemption from AQI user fees is necessary to recover the costs of our existing inspection activities and to implement an expanded inspection program.

Another alternative to the interim rule would have been to limit our inspections to commercial conveyances and not include international passengers entering the United States from Canada in the AQI inspection program. However, results of AQI preclearance activities at Canadian airports have demonstrated that air passengers from Canada represent an important pest pathway. As stated in the full economic analysis, data gathered at four airports (Calgary, Toronto, Vancouver, and Montréal) over a four-year period (FY 2001–FY 2004) showed that over 6 percent of all U.S.-bound passengers (Canadian and non-Canadian origin) carried prohibited agricultural products. Most of these passengers were taking flights to States such as California, Florida, Arizona, and Texas, where the prohibited products could place major agricultural industries at

<sup>6</sup> Transport Canada, Transportation in Canada 2007 <http://www.tc.gc.ca/policy/report/aca/anre2007/pdf/add2007-e.pdf>. Exports to the U.S. include re-exports and domestic exports.

<sup>7</sup> CBP. The data include air passengers and crews.

risk.<sup>9</sup> Air passengers from all foreign countries, not just Canada, are considered important pest pathways due to the fact they may travel to multiple destinations in one trip and travel great distances over a relatively short amount of time. Therefore, it is necessary for all air passengers, including Canadian air passengers to be subject to AQI user fees. In addition, in surveys and inspection blitzes conducted on passenger baggage at destination airports in the United States, significant amounts of prohibited agricultural materials were found, such as tropical and exotic fruits and vegetables purchased at Canadian markets, as well as prohibited animal products. We would not be able to prevent or control the movement of such regulated articles into the United States if we did not increase our passenger inspection activities at Canadian airports, along with our conveyance inspection activities, at the U.S./Canada border. We could not recover the costs of passenger inspections if we did not charge passengers AQI user fees.

A third alternative would have been to only charge AQI user fees for inspections of commercial conveyances transporting agricultural goods. This alternative would eliminate impacts on conveyances that do not transport agricultural goods by eliminating the need for them to pay user fees. However, animal and plant pests may be found on or in conveyances even if they are not carrying agricultural products and even if they are empty. For example, solid wood packing material, estimated to be present in some 70 percent of all Canadian rail containers, can be a pathway for the Asian and citrus longhorned beetles, pine shoot beetle, emerald ash borer, and other pests. In addition, restricted nonagricultural products, such as Italian tile shipments that could be carrying hitchhiking snails, seat cushions stuffed with restricted grasses, or wooden handicrafts that could be harboring wood-boring insects pose a risk to American agriculture if they enter the United States. Therefore, APHIS employees familiar with the risks presented by the conveyances

themselves and by containers importing nonagricultural products determined that it is necessary for all conveyances from Canada to be inspected. In order to recover the costs of these inspections, AQI user fees would still be necessary, except as otherwise noted.

A fourth alternative would have been to develop new user fees specific to Canada that would be different from the user fees charged to all other countries. However, we concluded that it was not a valid alternative as our intention in the interim rule was to harmonize the inspection requirements and the AQI user fees charged for conveyances entering the United States from Canada with the inspections and AQI user fees for conveyances entering the United States from all other countries in the world. In addition, we have determined that charging different user fees specific to Canada would result in potential delays and increased expenses as a new collection system would have to be developed and implemented to collect those fees.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) has no retroactive effect and (2) does not require administrative proceedings before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

This final rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### 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.

■ Accordingly, the interim rule amending 7 CFR parts 319 and 354 that was published at 71 FR 50320 on August 25, 2006, is adopted as a final rule with the following changes:

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

■ 1. The authority citation for part 354 continues to read as follows:

**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.

■ 2. Section 354.3 is amended as follows:

■ a. In paragraph (a), by adding a definition for *barge* to read as set forth below.

■ b. In paragraph (b)(2)(iv), by removing the word “bunkers” and adding the word “fuel” in its place.

■ c. By adding new paragraphs (b)(2)(vi), (b)(2)(vii), and (d)(2)(i) to read as set forth below.

#### § 354.3 User fees for certain international services.

(a) \* \* \*

*Barge.* A non-self-propelled commercial vessel that transports cargo that is not contained in shipping containers. This does not include integrated tug barge combinations.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(vi) Barges traveling solely between the United States and Canada that do not carry cargo originating from countries other than the United States or Canada and do not carry plants or plant products, or animals or animal products, and that do not carry soil or quarry products from areas in Canada listed in § 319.77–3 of this chapter as being infested with gypsy moth.

(vii) Vessels returning to the United States after traveling to Canada solely to take on fuel.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(i) Any commercial railroad car that is part of a train whose journey originates and terminates in Canada if—

(A) The commercial railroad car is part of the train when the train departs Canada; and

(B) No passengers board or disembark from the commercial railroad car, and no cargo is loaded or unloaded from the commercial railroad car, while the train is within the United States.

\* \* \* \* \*

Done in Washington, DC, this 3rd day of March 2010.

**Edward Avalos,**

*Under Secretary for Marketing and Regulatory Programs.*

[FR Doc. 2010–4949 Filed 3–8–10; 8:45 am]

**BILLING CODE 3410–34–P**

<sup>9</sup> APHIS–PPQ, AQI Monitoring (AQIM) program. For the AQIM program, CBP agricultural inspectors conduct random inspections within each major pathway to assess their relative risk, and APHIS–PPQ monitors the collected data. PPQ and CBP use the AQIM data to evaluate the effectiveness of port-of-entry operations, set goals, and compare performance after making operational changes. The AQIM program was instituted to assist with the mandate of the Government Performance and Results Act (GPRA) of 1993. Source: APHIS AQIM Handbook.