

# Rules and Regulations

Federal Register

Vol. 70, No. 179

Friday, September 16, 2005

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 97

[Doc. No. ST-05-02]

RIN 0581-AC42

#### Plant Variety Protection Office, Fee Increase

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Agricultural Marketing Service (AMS) is increasing Plant Variety Protection (PVP) Office application, search, and certificate issuance fees by 20 percent. The last general fee increase in February 2003 is no longer adequate to cover current program obligations for administrative and information technology needs. The PVP Act of 1970 requires that reasonable fees be collected from applicants seeking certificates of protection in order to maintain the program. Also, a technical amendment will allow applicants to send voucher seed samples directly to the public repository.

**EFFECTIVE DATE:** October 17, 2005.

**FOR FURTHER INFORMATION CONTACT:** Janice M. Strachan, USDA, AMS, Science and Technology (S&T), PVP Office, NAL Building, Room 401, 10301 Baltimore Avenue, Beltsville, MD 20705-2351, telephone 301-504-5518, fax 301-504-5291, and e-mail [Janice.Strachan@usda.gov](mailto:Janice.Strachan@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Executive Order 12866

This final rule has been determined to be not significant for the purposes of Executive Order 12866, and therefore, was not reviewed by the Office of Management and Budget (OMB).

## II. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small business entities. There are more than 800 users of the plant variety protection service, of whom about 100 may file applications in a given year. Some of these users are small business entities under the criteria established by the Small Business Administration (13 CFR 121.201). AMS has determined that this action would not have a significant economic impact on a substantial number of these small business entities.

The PVP Office administers the PVP Act of 1970, as amended (7 U.S.C. 2321 *et seq.*), and issues Certificates of Protection that provide intellectual property rights to developers of new varieties of plants. A Certificate of Protection is awarded to an owner of a variety after examination indicates that it is new, distinct from other varieties, genetically uniform, and stable through successive generations. This action raises the fees charged to users of plant variety protection. AMS estimates that the rule will yield an additional \$277,200 during fiscal year (FY) 2006. The cost to private and public business entities will be proportional to their use of the service, and shared equitably. The cost to individual users will increase by \$816 per PVP Certificate issued or by 20 percent per application. PVP is a voluntary service.

AMS regularly reviews its user fee financed programs to determine if fees are adequate. The most recent review determined that the existing fee schedule will not generate sufficient revenue to cover the program's operating costs, depleting the trust fund reserve balance. From 1995 through 2005, federal salaries have increased 43 percent and inflation has increased the cost of supplies and services by 25 percent. The net effect on the PVP Office is an increase in overall expenses of 41 percent since 1995, offset by fee increases of 10 percent in September 2000 and 35 percent in February 2003. The income of the PVP Office is dependent mainly on the number of new applications filed, which fluctuated between 277 and 354 applications since FY 2000, while typical operating expenses remain fixed. During this

period, additional funding was needed for continued technological improvements and office relocation. In FY 2001 through FY 2004, expenses have exceeded income each year, despite earlier fee increases. Program operations were maintained by using the trust fund reserves, thus reducing those reserves. The PVP Office needs to adjust fees to provide adequate revenue for current program operations and to rebuild an adequate trust fund reserve. Without a fee increase, FY 2006 revenues are projected at \$1,496,000; costs are projected at \$1,614,720 for a loss of \$118,720. The trust fund reserve would be inadequate to satisfy Agency policy and prudent financial management by the end of fiscal year 2007.

AMS calculated the new fee schedule by projecting FY 2007 revenues of \$1,496,000 and program obligations of \$1,705,662. This indicates a projected loss to the program of \$209,662 for FY 2007. Without a fee increase, the reserve balance at the end of FY 2007 is projected to drop to \$756,796, which corresponds to 5 months of operating funds in the reserve balance. With a fee increase of 20 percent, FY 2007 revenues are projected to be \$1,773,200 and the trust fund reserve balance is expected to be \$1,867,018, which corresponds to 13 months of operating funds in the reserve balance. This level of trust fund maintenance satisfies Agency requirements.

The final action also amends regulations related to the voucher seed sample. The voucher seed sample is a supplement to the Exhibit C description of the variety and is kept for the life of the certificate. Currently, seed samples are submitted to the PVP Office, which then ships the seed samples to the public repository at USDA's Agricultural Research Service (ARS) facility in Ft. Collins, CO. The amendment permits voucher seed samples to be submitted directly to the public repository. A small seed sample (15-25 seeds), which may be needed for the examination of crops which have distinctive seed characteristics, may be required for some crops at the discretion of the examiner. Periodically, the germination rate of the voucher seed sample is tested to verify that it remains a viable sample for long-term storage. These tests use up the stored seed sample. A larger initial seed sample is

needed to ensure that germination testing does not deplete the stored sample.

A new section is added to give stakeholders guidance in how, when, and where to make the seed deposit. Because the PVP Office was handling the seed deposit, these regulations were deemed unnecessary in the past. Now that applicants will be depositing seeds themselves, they need additional guidance in how to package the seeds, where to send them, and when to deposit them in relation to the filing of a PVP applicant. This new section is based on similar regulatory language present in the U.S. Patent and Trademark Regulations (54 FR 34880, August 22, 1989, effective January 1, 1990). The patent-related text has been adapted to fit the specific circumstances of the PVP Office.

### III. Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect, nor will it preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposed rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of the rule.

### IV. Paperwork Reduction Act

This rule does not contain any information collection or record keeping requirements that are subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

### Background Information

The PVP Program is a voluntary, user fee-funded service, conducted under the Authority of the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*). The Act authorizes the Secretary of Agriculture to provide intellectual property rights that facilitate marketing of new varieties of seed-propagated crops and tubers. The Act also requires that reasonable fees be collected from the users of the services to cover the costs of maintaining the program.

In January 2003, AMS published a rule in the **Federal Register** (60 FR 17188) that increased Plant Variety Protection Office fees and that became effective February 2003.

In February 2004, the AMS Budget Office performed a fee analysis that indicated the need to increase the program fee schedule in order to recover the administrative and information technology costs and maintain an

adequate program reserve balance. For FY 2006, user fee revenues and program obligations are projected to be \$1,496,000 and \$1,614,720, respectively, resulting in an estimated \$118,720 program deficit. AMS estimates that this final rule will yield an additional \$227,100 during FY 2006 that will offset increased program operating costs. With a fee increase, FY 2007 revenues and expenditures are projected to be \$1,773,200 and \$1,705,662, respectively.

AMS used the fees currently charged as a base for calculating the new fee schedule for FY 2006. The fees set forth in Sec. 97.175 as of February 2003 are increased. The supplemental fees that were established in May 2005 will not be increased, including the \$250.00 portion of the allowance and issuance fee that was implemented to recover the costs of improving the PVP program's electronic archiving capabilities. The application fee is increased from \$432 to \$518, the search fee from \$3,220 to \$3,864, and the original issuance fee from \$432 to \$518. The fees for reviving an abandoned application, correcting or re-issuance of a certificate are increased from \$432 to \$518. The charge for granting an extension for responding to a request is increased from \$74 to \$89. The hourly charge for any other service not specified is increased from \$89 to \$107. The fee for appeal to the Secretary (refundable if appeal overturns the Commissioner's decision) is increased from \$4,118 to \$4,942. Reproduction of records, drawings, certificates, exhibits or printed materials, late payment, and late replenishment of seeds is increased by 20 percent. These fee increases are necessary to recover the costs of this fee-funded program.

At the March 2003 annual meeting, the Plant Variety Protection Advisory Board was informed of the anticipated FY 2005 cost increases for maintaining program operations and administration. We also consulted with the Board regarding potential increases to the basic fee schedule for FY 2006. They recommended that fees be increased. This rule makes the minimum changes in the regulations to implement the recommended increased fees to maintain the program as a fee-funded program.

The Plant Variety Protection Board recommended that internal processes related to the handling of seed samples be streamlined. Section 97.6(d) was recently amended to provide that cell cultures for tuber-reproduced varieties need not be deposited until after the examination has been completed, rather than at the time the application is filed. A similar change was made for the establishment of plots of vegetative

material for self-incompatible parents of hybrids. The requirement that 2,500 seeds of the basic variety must be submitted will the application was modified to allow waivers of this requirement. This final rule will further simplify this process by applying the same requirements to seeds and allowing the applicant to submit a declaration that the seed sample will be deposited, rather than requiring that the sample be submitted with the application. This will increase efficiencies in the PVP Office by removing the necessity for the Office to routinely handle the samples and forward them to the ARS National Center for Genetic Resources Preservation (NCGRP) facility in Ft. Collins, Colorado. The NCGRP is the only public depository approved by the Commissioner at the present time.

We also require that a larger initial seed sample be deposited to ensure that germination testing does not deplete the stored sample. We have added of Section 97.7, which provides guidance to applicants in how, when, and where to deposit their voucher seed samples.

### Summary of Public Comment

A notice of the proposed rule was published in the **Federal Register** (70 FR 40921) on July 15, 2005. A 30-day comment period was provided to allow interested persons the opportunity to respond to the proposal, including any regulatory and informational impact of this action on organizations considered to be small businesses. The comment period expired on August 15, 2005, and two comments were received on the proposed rule.

One comment stated that a fee increase would be accepted if stakeholders could feel that the PVP Office conducts its business in a prompt and orderly fashion. Another comment indicated that the fee increase was insufficient to cover the full costs relating to what the commenter believed was a negative impact on the United States with regard to plants and seeds that are introduced into this country. As previously stated, the PVP Act of 1970 requires that reasonable fees be collected from applicants seeking certificates of protection in order to maintain the program. This fee increase will adjust fees to provide adequate revenue for current program operations and to rebuild an adequate trust fund reserve. With regard to the PVP Office conducting its business in a prompt and orderly fashion, the Office continues to improve the quality of its services. Accordingly, no change to the rule will be made as a result of the comments.

**List of Subjects in 7 CFR Part 97**

Plants, seeds.

■ For reasons set forth in the preamble, 7 CFR part 97 is amended as follows.

**PART 97—PLANT VARIETY AND PROTECTION**

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** Plant Variety Protection Act, as amended, 7 U.S.C. 2321 *et seq.*

■ 2. Section 97.6(d)(1) is revised to read as follows:

**§ 97.6 Application for certificate.**

\* \* \* \* \*

(d) \* \* \*

(1) A declaration that at least 3,000 seeds of the viable basic seed required to reproduce the variety will be deposited in a public depository approved by the Commissioner and will be maintained for the duration of the certificate; or

\* \* \* \* \*

■ 3. Section 97.7 is added to read as follows:

**§ 97.7 Deposit of Voucher Specimen.**

(a) *Voucher specimen types.* As regards the deposit of voucher specimen material for purposes of plant variety protection applications under 7 U.S.C. 2321 *et seq.*, the term voucher specimen shall include material that is capable of self-replication either directly or indirectly. Representative examples include seeds, plant tissue cells, cell lines, and plots of vegetative material of self-incompatible parental lines of hybrids. Seed samples should not be treated with chemicals or coatings.

(b) *Need to make a deposit.* Applications for plant variety protection require deposit of a voucher specimen of the variety. The deposit shall be acceptable if made in accordance with these regulations. Sample packages shall meet the packaging and deposit requirements of the depository. Samples and correspondence about samples shall be identified, minimally, by:

(1) The application number assigned by the Office;

(2) The crop kind, genus and species, and variety denomination; and

(3) The name and address of the depositor.

(c) *Acceptable depository.* A deposit shall be recognized for the purposes of these regulations if made in:

(1) The National Center for Genetic Resources Preservation, ARS, USDA, 1111 South Mason Street, Fort Collins, CO 80521-4500, or

(2) Any other depository recognized to be suitable by the Office. Suitability

will be determined by the Commissioner on the basis of the administrative and technical competence, and agreement of the depository to comply with the terms and conditions applicable to deposits for plant variety protection purposes. The Commissioner may seek the advice of impartial consultants on the suitability of a depository. The depository must:

(i) Have a continuous existence;

(ii) Exist independent of the control of the depositor;

(iii) Possess the staff and facilities sufficient to examine the viability and quantity of a deposit, and store the deposit in a manner which ensures that it is kept viable and uncontaminated;

(iv) Provide for sufficient safety measures to minimize the risk of losing biological material deposited with it;

(v) Be impartial and objective;

(vi) Refrain from distributing samples while the application is being examined and during the term of protection but, after control of the sample is transferred by the Office to the depository, furnish samples of the deposited material in an expeditious and proper manner;

(vii) Have the capability to destroy samples or return samples to the Office when requested by the Office; and

(viii) Promptly notify the Office of low viability or low quantity of the sample.

(3) A depository seeking status under paragraph (c)(2) of this section must direct a communication to the Commissioner which shall:

(i) Indicate the name and address of the depository to which the communication relates;

(ii) Contain detailed information as to the capacity of the depository to comply with the requirements of paragraph (c)(2) of this section, including information on its legal status, scientific standing, staff, and facilities;

(iii) Indicate that the depository intends to be available, for the purposes of deposit, to any depositor under these same conditions;

(iv) Where the depository intends to accept for deposit only certain kinds of biological material, specify such kinds; and

(v) Indicate the amount of any fees that the depository will, upon acquiring the status of suitable depository under paragraph (c)(2) of this section, charge for storage, viability statements and furnishings of samples of the deposit.

(4) A depository having status under paragraph (c)(2) of this section limited to certain kinds of biological material may extend such status to additional kinds of biological material by directing a communication to the Commissioner

in accordance with paragraph (c)(3) of this section. If a previous communication under paragraph (c)(3) of this section is of record, items in common with the previous communication may be incorporated by reference.

(5) Once a depository is recognized to be suitable by the Commissioner or has defaulted or discontinued its performance under this section, notice thereof will be published in the Official Journal of the Plant Variety Protection Office or by other methods typically used for dissemination of information related to the procedures of the Office.

(d) *Time of making an original deposit.* An original deposit of materials for seed-reproduced plants shall be made within three months of the filing date of the application or prior to issuance of the certificate, whichever occurs first. A waiver may be granted for good cause, such as delays in obtaining a phytosanitary certificate for the importation of voucher sample materials. When the original deposit is made, the applicant must promptly submit a statement from a person in a position to corroborate the fact, stating that the voucher specimen material which is deposited is the variety specifically identified in the application as filed. Such statement must be filed in the application and must contain the identifying information listed in paragraph (b) of this section and:

(1) The name and address of the depository;

(2) The date of deposit;

(3) The accession number given by the depository; and

(4) A statement that the deposit is capable of reproduction.

(e) *Replacement or supplement of deposit.* If the depository possessing a deposit determines either that the sample viability is low or that the sample quantity is low, and if this finding is made during the pendency of an application or during the term of protection of the certificate, the Office shall notify the depositor of the need for making a replacement or supplemental deposit. Such deposits will be governed by the same considerations governing the need for making an original deposit under the provisions set forth in § 97.7(d). Notification to the Office concerning deposit of the replacement or supplemental sample shall contain a statement from a person in a position to corroborate the fact, stating that the replacement or supplemental deposit is of a biological material which is identical to that originally deposited.

(f) *Term of deposit.* A voucher specimen deposit made in support of an application for plant variety protection

shall be made for a term of at least twenty (20) years. In any case, samples must be stored under agreements that would make them available to the Office during the enforceable life of the certificate for which the deposit was made.

(g) *Viability of deposit.* A deposit of biological material that is capable of self-replication either directly or indirectly must be viable at the time of deposit and during the term of deposit. Viability may be tested by the depository periodically. The test must conclude only that the deposited material is capable of reproduction. No evidence necessarily is required regarding the ability of the deposited material to perform any function described in the application. If a viability test indicates that the deposit is not viable upon receipt or that the quantity of material is insufficient, the examiner shall proceed as if no deposit was made. The examiner will accept the conclusion set forth in a viability statement issued by a depository recognized under paragraph 97.7(c).

(h) *Furnishing of samples.* A deposit must be made under conditions that assure that:

(1) Public access to the deposit will not be available during pendency of the application or during the term of protection, and

(2) All restrictions on the availability to the public of the deposited material will be irrevocably removed upon the abandonment, cancellation, expiration, or withdrawal of the certificate.

(i) *Examination procedures.* The examiner shall determine, prior to issuance of the certificate, in each application if a voucher sample deposit actually made is acceptable for plant variety protection purposes.

■ 4. Section 97.175 is revised to read as follows:

#### **§ 97.175 Fees and charges.**

The following fees and charges apply to the services and actions specified below:

(a) Filing the application and notifying the public of filing—\$518.00.

(b) Search or examination—\$3,864.00.

(c) Submission of new application data, after notice of allowance, prior to issuance of certificate—\$432.00.

(d) Allowance and issuance of certificate and notifying public of issuance—\$768.00.

(e) Revoke an abandoned application—\$518.00.

(f) Reproduction of records, drawings, certificates, exhibits, or printed material (cost per page of material)—\$1.80.

(g) Authentication (each page)—\$1.80.

(h) Correcting or re-issuance of a certificate—\$518.00.

(i) Recording an assignment, any revision of an assignment, or withdrawal or revocation of an assignment (per certificate or application)—\$41.00.

(j) Copies of 8 x 10 photographs in color—\$41.00.

(k) Additional fee for reconsideration—\$518.00.

(l) Additional fee for late payment—\$41.00.

(m) Fee for handling replenishment seed sample (applicable only for certificates issued after June 20, 2005)—\$38.00.

(n) Additional fee for late replenishment of seed—\$41.00.

(o) Filing a petition for protest proceeding—\$4,118.00.

(p) Appeal to Secretary (refundable if appeal overturns the Commissioner's decision)—\$4,942.00.

(q) Granting of extensions for responding to a request—\$89.00.

(r) Field inspections by a representative of the Plant Variety Protection Office, made at the request of the applicant, shall be reimbursable in full (including travel, per diem or subsistence, and salary) in accordance with Standardized Government Travel Regulation.

(s) Any other service not covered above will be charged for at rates prescribed by the Commissioner, but in no event shall they exceed \$107.00 per employee-hour. Charges also will be made for materials, space, and administrative costs.

Dated: September 13, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 05-18511 Filed 9-15-05; 8:45 am]

**BILLING CODE 3410-02-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

**[Docket No. FAA-2005-20364; Directorate Identifier 2004-NM-186-AD; Amendment 39-14274; AD 2005-19-09]**

**RIN 2120-AA64**

#### **Airworthiness Directives; Boeing Model 747 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain

Boeing Model 747 airplanes. This AD requires repetitive inspections of the dual side braces (DSBs), underwing midspar fittings, and associated parts; other specified actions; and corrective actions if necessary. This AD also provides an optional terminating action for the inspections and other specified actions. This AD is prompted by reports of corroded, migrated, and rotated bearings for the DSBs in the inboard and outboard struts, a report of a fractured retainer for the eccentric bushing for one of the side links of a DSB, and reports of wear and damage to the underwing midspar fitting on the outboard strut. We are issuing this AD to prevent the loss of a DSB or underwing midspar fitting load path, which could result in the transfer of loads and motion to other areas of a strut, and possible separation of a strut and engine from the airplane during flight.

**DATES:** This AD becomes effective October 21, 2005.

The incorporation by reference of a certain publication listed in the AD is approved by the Director of the Federal Register as of October 21, 2005.

**ADDRESSES:** For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207.

**Docket:** The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647-5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street SW., room PL-401, Washington, DC. This docket number is FAA-2005-20364; the directorate identifier for this docket is 2004-NM-186-AD.

**FOR FURTHER INFORMATION CONTACT:** Ivan Li, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 917-6437; fax (425) 917-6590.

**SUPPLEMENTARY INFORMATION:** The FAA proposed to amend 14 CFR part 39 with an AD for certain Boeing Model 747 airplanes. That action, published in the **Federal Register** on February 14, 2005 (70 FR 7446), proposed to require repetitive inspections of the dual side braces (DSBs), underwing midspar fittings, and associated parts; other specified actions; and corrective actions