



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 800

[Doc. No. AMS-FGIS-19-0062]

Exceptions to Geographic Boundaries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) is issuing this advance notice of proposed rulemaking (ANPR) in response to recent changes to the United States Grain Standards Act (USGSA or Act). The Agricultural Improvement Act of 2018 (Farm Bill) amended the USGSA to allow customers to obtain grain inspection services from other than the designated official inspection agency (OA) for the customer's geographic area if the customer has not been receiving services from the designated OA. AMS is seeking public comment on criteria to evaluate requests submitted under this provision, known as the "nonuse of service" exception. The Agency is also seeking input on criteria to evaluate requests submitted under another USGSA exception provision, "timely service."

DATES: Comments must be received by [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through the Federal e-rulemaking portal at <http://www.regulations.gov> and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice will be included in the record and will be made available to the public.

Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Sophie Parker, Deputy Director, Quality Assurance and Compliance Division, Federal Grain Inspection Service, AMS, USDA; phone: (202) 720-9170 or email: FGISQACD@usda.gov.

SUPPLEMENTARY INFORMATION: Under the USGSA (7 U.S.C. 71 *et seq*), each OA in the United States is assigned a specific geographic area in which it performs all official grain inspection and weighing services for customers within that geographic area (7 U.S.C. 79(f)(2)(A)). This ensures effective and efficient delivery of official services to all customers within the OA's designated territory and enhances the orderly marketing of grain. The USGSA also provides that customers may obtain services from other OAs under certain circumstances. For instance, OAs may cross geographic boundaries to provide services to requesting customers if: (1) the designated OA for the customer's geographic area is unable to provide necessary services on a timely basis; (2) the customer requires probe inspection on barge-lot basis; or (3) the OA for the customer's geographic area agrees in writing with the adjacent official agency to waive the current geographic restriction at the customer's request (7 U.S.C. 79(f)(2)(B)(i),(iii), and (iv)). These allowances are considered exceptions to the USGSA's standard requirements regarding the use of designated OAs to perform inspection services within specified geographic areas. Exceptions must be approved on a case-by-case basis by AMS's Federal Grain Inspection Service (FGIS), which administers the regulations under the

USGSA.¹ The regulations at 7 CFR part 800 provide the limitations for use of these exceptions.

Service Exceptions

A notable exception that has been implemented in the past is known as the “nonuse of service” exception. In that exception, a customer who had not obtained inspection services from the designated OA in the customer’s geographic area for a specified length of time could obtain services from another OA. At times, the regulations required customers to have not used their designated OA for at least 90 consecutive days; at other times the regulations specified a 180-day nonuse period before the customer could request service from another OA. However, lack of clarity about how FGIS determined whether to grant “nonuse of service” exceptions fostered confusion and conflicts among involved parties and created a perception of inconsistency regarding the handling of such requests. Congress eliminated the “nonuse of service” exception from the USGSA in 2015;² FGIS subsequently removed that exception from the regulations.³

Although the “nonuse of service” exception was eliminated from the USGSA in 2015, Congress reinstated authority to implement a “nonuse of service” exception through an amendment to the USGSA in the 2018 Farm Bill.⁴ FGIS must now consider regulatory options related to the reinstatement of the “nonuse of service” exception (see 7 U.S.C. 79(f)(2)(B)(ii)).

¹ FGIS, formerly part of USDA’s Grain Inspection, Packers and Stockyards Administration, was merged with USDA’s Agricultural Marketing Service in 2018.

² The Agricultural Reauthorizations Act of 2015, enacted September 20, 2015 (Pub. L. 114-54 sec. 301(b)(3)(A)).

³ 81 FR 49855, July 29, 2016.

⁴ The Agricultural Improvement Act of 2018, enacted December 20, 2018 (Pub. L. 115-334 sec. 12610(a)(1)(D)).

With this ANPR, AMS is requesting public input into the development of criteria FGIS could apply to determinations about whether to grant “timely service” or “nonuse of service” exceptions to requesting customers. Particularly, AMS seeks input from industry participants and OAs who use and provide official services and are familiar with grain inspection services under the USGSA. A list of criteria and/or questions commenters may address is provided below. AMS welcomes the submission of data and other information to support commenters’ views.

Restoration of Previous Nonuse of Service Exceptions

Subsequent to the 2015 amendments to the USGSA and the 2016 changes to the FGIS regulations, a number of “nonuse of service” exceptions were terminated. The 2018 Farm Bill directed USDA to allow for restoration of those exceptions where appropriate. Interested parties were given an opportunity to submit restoration requests to FGIS, as described in a Notice to Trade published by AMS on March 5, 2019.⁵

Termination of Nonuse of Service Exceptions

The amended USGSA provides that the “nonuse of service” exemption may only be terminated if all the parties to the exception jointly agree on the termination.⁶ This means that the customer, the designated OA in the customer’s geographic area, the OA that has been providing service under the exception, and FGIS must agree to terminate the exception. This ensures that: (1) all parties are aware of the change and (2) the designated OA for the assigned area will resume providing service to the customer.

⁵ Restoring Certain Exceptions to the U.S. Grain Standards Act, published March 5, 2019. <https://www.ams.usda.gov/content/restoring-certain-exceptions-us-grain-standards-act>

⁶ Pub. L. 115-334 sec. 12610(a)(1)(E).

The requirement for all parties to jointly agree on termination of the “nonuse of service” exception does not apply if the designation of an official agency is terminated.⁷ If the designation of an official agency is renewed or restored after being terminated, the exceptions that were previously approved, under 7 U.S.C. 79(f)(2)(B), may be renewed or restored by requesting a determination from FGIS.

Request for Comments

AMS is considering use of the following information for evaluating exceptions requests under 7 U.S.C. 79(f)(2)(B)(i) and (ii). We invite comments, as well as suggested alternative or additional criteria.

i. Timely Service.

- a. The requesting facility would submit a verbal or written request for a “timely service” exception.
- b. The requesting facility would provide documentation that the designated OA cannot provide service within six (6) hours from the time of the request. Valid documentation may include voice mail message, text message, or email which shows the date and time of the request.
- c. The services requested from the designated OA would be within the time frames established in the OA’s approved fee schedule.

ii. Nonuse of Service.

- a. The requesting facility would submit a written request for a “nonuse of service” exception.

⁷ Pub. L. 115-334 sec. 12610(a)(2).

b. The requesting facility would demonstrate it has not had official sample-lot inspection or weighing services for 90-consecutive days from its designated OA.

c. The request would document, in writing, why the requesting facility has not received official sample-lot inspection or weighing services for 90-consecutive days from its designated OA. Reasons would be based on data and facts regarding the designated OA's operational capacity to provide requested service.

d. Prior to finalizing a decision for a "nonuse of service" exception, AMS would take the following into consideration:

1. The location of the specified service point(s);
2. Services offered/requested;
3. The ability of the alternate OA to take on additional customers;
4. The ability to staff an onsite laboratory;
5. Impact of weather conditions on the designated OA's ability to provide service; and
6. Whether the requesting facility has ever utilized the official system (i.e., facilities that have never used the official system before do not automatically qualify for "nonuse of service").

Additional Considerations for Comment

AMS received several questions from industry members regarding factors that could impact decisions on exceptions. We are sharing these questions to receive public input on whether and/or how these concerns should be included in the process for making decisions on geographic area exceptions under 7 U.S.C 79(f)(2)(B):

1. How should FGIS determine whether someone has not been receiving official services? Should FGIS use time (e.g., 90 days or 180 days) as a basis for

establishing “non-use?

2. How should FGIS determine if OA is unable to provide services in a timely manner? Should timely results be considered under the timely service exception? If so, what should the baseline for determining timeliness?
3. Should the approval under timely service be granted on a one-time basis or for a longer period of time? If longer, what should that timeframe be?
4. What process should be put in place to make sure all parties are aware of an exception?
5. Should there be baseline performance measures or qualifications established for an OA to be considered as a part of an exception request? If so, what should they be?
6. Should any of the following factors be considered in granting a “nonuse of service” exception request: (1) Distance between a facility and the closest office of each OA, (2) fees charged, (3) services offered, (4) number of exceptions already approved for an OA, (5) number of facilities already lost by exceptions to other OAs, (5) ability and willingness to staff an onsite lab? Why or why not?
7. Should requests for “nonuse of service” exceptions be restricted to OAs that only cross into an adjacent OA’s designated geographic area? Why or why not?
8. Should customers be able to switch back and forth between official agencies when they have received a “nonuse of service” exception?
 - a. Why or why not?
 - b. If switching was allowed, should there be any restrictions and why?

9. Is it difficult to receive accurate, timely and effective service from your officially designated inspection agency?
 - a. If so, how does this impact your facility's operations?
 - b. How can this be corrected?
10. Should FGIS continue to grant "nonuse of service" exceptions to grain handling facilities that make the request? If so, what parameters should the agency use to base the decision upon?
11. Should revenue be a factor considered in evaluating and determining "nonuse of service" exceptions?
 - a. What is the rationale for using or not using such a factor?
 - b. What type of financial documentation should be required from a requesting facility to justify their claim?
 - c. Should the financial impact on the designated OA be taken into consideration? Why or why not?

Comments in response to any or all of the above criteria and questions should be submitted to the address provided in the ADDRESSES section of this notice and must be received by [Insert date 30 days after publication in the FEDERAL REGISTER] to ensure consideration.

Authority: 7 U.S.C. 71-87k.

Bruce Summers, Administrator,
Agricultural Marketing Service.
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