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August 2, 2017

BY ELECTRONIC MAIL

Mr. Randall Jones  
Acting Administrator  
Grain Inspection, Packers and Stockyards Administration  
U.S. Department of Agriculture  
Room 1643-S  
1400 Independence Ave., S.W.  
Washington, D.C., 20250-3604

**RE: Comments on Notice of Intent to Certify Washington Department of  
Agriculture (July 3, 2017) as Delegated Official Agency, Docket #  
GIPSA\_FRDOC\_0001-0664**

Dear Acting Administrator Jones:

The National Grain and Feed Association (NGFA) and North American Export Grain Association (NAEGA) submit this joint statement in response to the Grain Inspection, Packers and Stockyards Administration's (GIPSA) request in the July 3, 2017 *Federal Register* for comments on the quality of services provided by the delegated state: Washington State Department of Agriculture Grain Inspection Program, (WSDA).

NGFA, established in 1896, comprises more than 1,050 member companies that operate more than 7,000 facilities and handle more than 70 percent of the U.S. grain and oilseed crop. NGFA's membership encompasses all sectors of the industry, including country, terminal and export grain elevators; commercial feed and feed ingredient manufacturers; biofuels producers; cash grain and feed merchants; end-users of grain and grain products, including processors, flour millers, and livestock and poultry integrators; commodity futures brokers and commission merchants; and allied industries. The NGFA also has strategic alliances with NAEGA and the Pet Food Institute. In addition, affiliated with the NGFA are 34 state and regional grain and feed trade associations. Canadian and Mexican firms also are NGFA members.

NAEGA, a not-for-profit trade association established in 1912, consists of private and publicly owned companies and farmer-owned cooperatives that are involved in and provide services to the agri-bulk products international trading industry. NAEGA members are exporters of and serve the vast majority of all U.S. grain and oilseeds in international markets. NAEGA's mission is to promote and sustain the development of commercial export. Through a reliance on member action and support, NAEGA acts to accomplish its mission in markets throughout the world.

American farmers, grain handlers and exporters, as well as our foreign customers, depend upon accurate, timely and cost-effective delivery of mandated impartial third-party Official inspection and weighing services administered by the Federal Grain Inspection Service (FGIS) and its designated and delegated agencies. It is essential that the U.S. Official grain inspection and weighing system be recognized widely around the world for its impartial, consistent, reliable and timely measurement and certification of quality attributes and weights. The availability of accurate FGIS inspection results also is important to enable buyers and sellers to determine grain value and to facilitate market price discovery. Further, Official export inspections provide transparency and market information to the entire value chain that contribute to an efficient marketplace, while supporting food security and sustainable supplies.

It is with restoration of these overridingly important goals in mind that NGFA and NAEGA worked to bring about fundamental reforms of GIPSA's operations as part of the Agriculture Reauthorizations Act of 2015 (Reauthorizations Act). The Reauthorizations Act clearly mandates that the secretary of agriculture is **obligated** to intervene to provide Official inspection and weighing services **immediately** if FGIS employees, or personnel of a Delegated State agency or designated domestic entities are unwilling or unable to perform such services – as occurred unpredictably and repeatedly with WSDA during a labor dispute at the Port of Vancouver, Wash., in 2013-14. FGIS's failure to perform in such a manner during an extended length of time put at risk the United States' reputation as a reliable supplier of grain to foreign customers in important Asia-Pacific markets, and tarnished the agency's reputation.

As a result, the Reauthorizations Act contains safeguards to ensure the kind of disruptions in export shipments resulting from the repeated unpredictable and politically motivated withdrawals of Official inspection and weighing services at the Port of Vancouver, Wash., do not recur. To our knowledge, this interruption by a Delegated State agency in uniformly and consistently providing Official services was unprecedented. We believe WSDA's actions created an extremely troubling precedent that could cause irreparable damage to the integrity and reliability of the nation's Official grain inspection system. This development created uncertainty within the U.S. grain export industry regarding potential future disruptions of Official services at facilities operating at other U.S. export ports. Alarming, in the absence of WSDA's reliable performance of its Official inspection duties, FGIS did not intervene to make the necessary arrangements to provide for uninterrupted mandatory Official services.

In response to these failures by WSDA and FGIS, Senate Agriculture, Nutrition and Forestry Committee Chairman Pat Roberts stated the following at the May 15, 2015 committee hearing on the USGSA reauthorization, after issuing an unprecedented apology to U.S. exporters on behalf of the secretary of agriculture:

***“I am particularly interested in ensuring that the Department of Agriculture fulfills its statutory obligation to inspect exports. This responsibility lapsed for 36 days at a facility at the Port of Vancouver (Wash.) last summer. During that period, there was substantial uncertainty about if and when inspection would be restored... That unprecedented event warrants our careful oversight and increased transparency. It is important that we find solutions to ensure the reliability and the quality of U.S. exports continue to be beyond question for years to come.”***

As a result, one of the principal NGFA-NAEGA recommendations incorporated into the Reauthorizations Act and implemented under the U.S. Grain Standards Act (USGSA) was for **Delegated State agencies to submit to GIPSA public notice-and-comment review of their delegation every five years as part of the process for evaluating whether they comply with the requirements for delegation under the USGSA (7 U.S. Code § 800.195 Delegations) and warrant redelegation.** Simply put, prior to the recent change, the process for delegating state agencies to perform Official inspection and weighing services at export facilities was neither open, deliberative nor transparent. This new delegation process closely mirrors the current *Federal Register* notice-and comment rulemaking process that GIPSA uses to determine designation of state or private agencies to perform Official inspections in the domestic market, where such inspections are voluntary.

To maintain their delegated status, the State agency is required to meet the requirements of 7 U.S. Code §79 Official Inspection (f)(1)(A), which lists specific conditions and criteria, including: adequate facilities and qualified personnel; rotation of personnel; training requirements and diligent use of user fees, among others.

The WSDA currently performs Official inspection and weighing services at export port locations in the state of Washington. The NGFA and NAEGA believe that the 2013-2014 repeated, politically motivated disruptions of Official inspection and weighing services at export port facilities by WSDA raises serious concerns about whether it is meeting the requirements of 7 U.S. Code §79 (f)(1)(A).

Of the five states that are delegated to perform Official inspection and weighing services at export port locations, WSDA performs services for nearly 100 percent of the grains and oilseeds that are exported<sup>1</sup>. *Thus, WSDA should be held to an equal or even higher standard as other delegated State agencies due to the volume of grains, oilseeds and grain products that are Officially inspected at export port locations subject to its exclusive jurisdiction.*

***Therefore, NGFA and NAEGA believe WSDA redelegation as an Official inspection agency should be contingent upon FGIS and WSDA entering into a new, transparent and publicly available Delegation of Authority Agreement based upon recommendations we offer below. Until such a Delegation of Authority Agreement is finalized through public notice-and-comment rulemaking and signed by WSDA and FGIS, any redelegation of WSDA to perform Official inspection and weighing services should be made conditional and time-limited. By adopting our recommended changes, we believe the potential for WSDA and FGIS to avoid repeating their significant previous performance failures will be reduced significantly.***

***Specifically, the NGFA and NAEGA recommend that the FGIS and WSDA implement the following processes and procedures to meet the statutory obligations under the Reauthorizations Act to provide Official grain inspection and weighing services at export port locations:***

1. **Prohibit the intervention of political influence in determining whether, how and by whom Official inspections by Delegated State agencies are conducted at export port locations.**

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<sup>1</sup> 2016 FGIS Annual Report to Congress

FGIS should continue to rely upon FGIS career staff members to evaluate the performance of Delegated State Official agencies to ensure they are meeting statutory requirements. FGIS career civil servants also review Delegated Official agencies' financial records to make sure that the user fees, obtained through inspection and weighing services, are not being used to fund other programs operated by the state agency. FGIS also maintains oversight over WSDA and other Delegated State agency inspectors throughout the time between internal audits. An elected or political appointee's involvement is not necessary to determine if a Delegated State agency is meeting its statutory requirements to provide Official inspection and weighing services. FGIS should implement written procedures that automatically and immediately provides for the insertion of FGIS Official inspectors, or Official inspectors from another Delegated State agency or private agency, at export port locations if the State agency delegated to perform Official services is unwilling or unable to continue to provide uninterrupted service. This decision should be automatic and not require the intervention of a political appointee at FGIS or the offending Delegated State agency.

Political motivations never again should creep into the decision-making calculus when determining if a Delegated State agency is meeting its statutory obligations to perform Official inspection and weighing services.

**2. Require FGIS to act with expedited due process to prevent illegal actions that impede or prohibit Official Grain Inspection and Weighing Services.**

If necessary, as has been done in the past by USDA, federal marshals or other federal law enforcement resources should be employed to prevent disruptions that threaten the safety of FGIS or Delegated State official inspectors. USDA exercised such authority previously when producers in 1981 attempted to illegally and forcibly remove grain from a federally licensed grain warehouse in New Madrid, Mo., that had declared insolvency.

**3. Develop processes and procedures if a Delegated Official State agency is to be replaced by FGIS inspectors.**

FGIS should immediately develop and implement a transparent policy that specifies the processes and procedures that the agency must follow if a Delegated State agency is to be replaced by FGIS inspectors. If for some reason, the FGIS is unable to fulfill its statutory obligation to provide Official inspection and weighing services by immediately utilizing its own inspectors, then the agency must develop a contingency plan, to be administered by a career civil servant, that identifies which Official Designated state or private agency or other Delegated State will perform Official services until such time as FGIS inspectors are on site.

**4. Provide for GIPSA to meet its obligations to USDA's Animal and Plant Health Inspection Service regardless of its ability to meet the Statutory Obligation to Provide Official Grain Inspection and Weighing Services at Export Port Locations.**

In the event, as provided for by the Act, Official grain inspection services are waived inspections to provide for APHIS phyto-sanitary certification may be needed to complete exporting requirements.

**5. Make the Delegation of Authority Agreements Uniform, Transparent and Consistent.**

The current Delegation of Authority Agreement between the FGIS and WSDA originally was signed in 1978 and amended in 1984, with no transparency and a total absence of public review and comment. NGFA and NAEGA obtained a copy of the document (see attached) which is not publicly available to stakeholders. The specific document is marked, in handwriting, as “Permanent Retention.”

We are not aware of any other Officially Delegated State agency having a similar agreement with FGIS. Second, this document is outdated and numerous sections of the USGSA referenced no longer are applicable given several subsequent amendments to the Act. Third, the user fee process referred to in the document has since been revised based upon the Reauthorizations Act. Thus, NGFA and NAEGA consider this document to be ***null and void*** and we strongly urge both the FGIS and WSDA to publicly declare that the document is officially nullified and will not apply to ongoing and future activity.

Instead, NGFA and NAEGA – whose member companies via user fees finance the Official inspection and weighing system, believe it is imperative that FGIS as fundamental good governance must develop a new, standardized Delegation of Authority Agreement template that is subject to public notice-and-comment rulemaking and applies to all Delegated State agencies that have met the statutory requirements to provide Official inspection and weighing services on behalf of FGIS. The document should specifically address the purpose and intent of the delegation along with the individual responsibilities of FGIS and the State agency. The terms and conditions of the agreements also must address the specific criteria within the USGSA that each party is required to meet to be qualified to perform their respective services. Moreover, the agreement should emphasize the statutory obligations that both the State agency and FGIS have in conducting Official grain inspection and weighing services on a consistent, predictable and uninterrupted basis, and the ramifications if these requirements are not met. Further, the document needs to identify the process and procedures to replace either FGIS or State agency inspectors that are unwilling to perform their statutorily mandated responsibilities. Finally, and importantly, Delegation of Authority Agreements should be time-limited to coincide with the expiration date of the delegation, which is every five years per the USGSA, so that they can be revised and updated as warranted.

Pursuant to 7 U.S. Code §79 (e)(3), prior to delegating authority to a State agency, the U.S. secretary of agriculture shall consider receipt of a notice from GIPSA as a factor in administering the delegation. This notice is to include: 1) an investigation to determine whether such agency is qualified; and 2) findings based on such an investigation. During the investigation, the U.S. agriculture secretary is required to consult with, and review the available files of, the Department of Justice, the Office of Investigation within USDA (or such other organization or agency within USDA that may be delegated the authority) and the Government Accountability Office.

Based upon the revised notice and comment process, the NGFA and NAEGA believe that the aforementioned information provided to the U.S. secretary of agriculture should be transparent and made available to stakeholders. Therefore, we also urge that all

documentation related to 7 U.S. Code §79 (e)(3) be added to this rulemaking docket, GIPSA\_FRDOC\_0001-0664, within the next 60 days.

### **Conclusion**

Official inspection and weighing services performed by either FGIS or State agencies it delegates to perform such services should never again be disrupted by politically motivated actions. Further, subsequent Delegation of Authority Agreements between the FGIS and Delegated State agencies should be uniform, transparent, consistent, subject to public review and comment and be uniformly applied and enforced.

U.S. competitiveness in global and domestic markets, as well as stakeholders ranging from farmers to end-users, benefit when FGIS and its Delegated State agencies provide state-of-the-art, market-responsive Official inspection and weighing of bulk grains, oilseeds and grain products at export, and do so in a reliable, uninterrupted, consistent and cost-effective manner. It is high time that FGIS restore its reputation in this regard.

The NGFA and NAEGA appreciate GIPSA's consideration of our views and would be pleased to respond to any questions the agency may have, which may be directed to either of us or to NGFA Vice President for Safety and Regulatory Affairs Jess McCluer at 202-289-0873. As always, the NGFA and NAEGA stand ready to work constructively with GIPSA to seek continual improvement in the efficiency and cost-effectiveness of the valued Official inspection system.

Sincerely,



**Randall C. Gordon**  
President  
National Grain and Feed Association



**Gary C. Martin**  
President and Chief Executive Officer  
North American Export Grain Association

Cc: The Honorable Sonny Perdue  
Secretary  
U.S. Department of Agriculture

The Honorable Mike Conaway  
Chairman  
House Agriculture Committee

The Honorable Pat Roberts  
Chairman  
Senate Agriculture, Nutrition and Forestry Committee

Attachment