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## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

#### 7 CFR Part 801

RIN 0580-AA62

#### Official Testing Service for Corn Oil, Protein, and Starch

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) is adopting, without change, the provisions of an interim rule extending the use of the currently approved near-infrared spectroscopy (NIRS) analyzers in its official inspection program to include testing of corn for oil, protein, and starch content as official criteria, and incorporating by reference the Corn Refiners Association Method A-20, Starch method, into the regulations. GIPSA is offering this service to meet a market demand for reliable official testing procedures created by anticipated increases in high-oil corn production.

**DATES:** Effective May 19, 1999.

The incorporation by reference of Analysis for Starch in Corn, Method A-20, Second Revision, April 15, 1986, Standard Analytical Methods of the Member Companies of the Corn Refiners Association, Inc., listed in this final rule, is approved by the Director of the Federal Register as of July 1, 1998.

**FOR FURTHER INFORMATION CONTACT:** Sharon Vassiliades, GIPSA, USDA, STOP 3649, Washington, D.C. 20250-3649; FAX to (202) 720-4628; or e-mail svassili@fgisd.usda.gov; or John Giler, GIPSA, USDA, STOP 3632, Washington, D.C., 20250-3632; telephone (202) 720-0252; or E-mail jgiler@fgisd.usda.gov.

**SUPPLEMENTARY INFORMATION:**

#### Executive Order 12866

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

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have a retroactive effect. The United States Grain Standards Act (USGSA), as amended, provides in section 87g that no State or subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the USGSA. Otherwise, this final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this final rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this final rule.

#### Effect on Small Entities

The Administrator of GIPSA has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Currently, NIRS analyzers are being used to determine protein in wheat and protein and oil in soybeans in both domestic and export markets. This final rule expands the use of currently approved NIRS analyzers to test corn for oil, protein, and starch content; establishes tolerances for corn oil, protein, and starch analyzers. The fees for these services are identical to the fees already established for wheat protein and soybean oil and protein testing services.

There are 53 official agencies (46 private entities, 7 States) designated by GIPSA to perform official grain inspection services. In addition, there are 8 delegated States. Most of the agencies could be considered small entities under Small Business Administration criteria. The extent to which these agencies will choose to provide this service is difficult to quantify because GIPSA is offering this service as official criteria, on a request basis, and locations where service is requested infrequently may make

arrangements with a neighboring agency to provide the service (7 CFR 800.196(g)(1)). GIPSA believes that offering this service would have a beneficial effect on those agencies electing to provide the service.

For the 1998 crop year, high-oil corn production is estimated at 1.5 million acres. Currently, producers, grain handlers, exporters, and feedlot operators rely primarily on private laboratories to determine percent oil, protein, and starch in corn. Further, grain handlers and exporters are using this information to determine value and premiums. While exact numbers are not known, it can be assumed that many of the value-enhanced corn producers, grain handlers, exporters, and feedlot operators could be considered small entities under Small Business criteria. The extent to which these entities will request the official testing of corn for oil, protein, and starch, or the impact of offering this service through the official system, is difficult to quantify.

However, GIPSA believes users of the inspection system will rely on the official system to provide reliable testing procedures and accurate results that the market can rely on to negotiate price, value, and premium. GIPSA performed 2 million inspections for all grains in fiscal year 1998.

To recover the cost of providing this service, GIPSA will charge fees as follows: \$1.50 per test when the test is performed at the applicant's facility; \$8.10 per test if the test is performed elsewhere; and \$15.85 for an appeal. These fees are the same as fees charged for similar tests. The impact on applicants for services will vary depending upon usage since these tests are provided on a request basis.

#### Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995, the recordkeeping and reporting burden imposed by Part 801 was previously approved by OMB under control number 0580-0013 and will not be affected by this final rule.

#### Background

In its 1997-98 report, Value-Enhanced Corn Quality Report, dated April 1998, the U.S. Feed Grains Council defined value-enhanced corn as corn with particular quality characteristics that add end-user value. Value-enhanced

corn, also referred to as speciality corn, includes waxy corn, high-lysine and other essential amino acid corn, hard endosperm corn, popcorn, sweet corn, white corn, and high-oil corn. Additionally, work is under way to develop nutritionally dense hybrid corn, which usually includes some combination of higher-oil, higher protein, and/or altered amino or fatty acid profiles.

The report estimated that value-enhanced corn is produced on 3.3 to 3.7 million acres (representing 4.5 to 5.1 percent of the U.S. harvested corn acreage). It projected the U.S. acreage of value-enhanced corn to remain essentially unchanged, with the exception of high-oil corn, which is considered the fastest growing value-enhanced corn produced in the marketplace. Approximately 1.5 million acres of high-oil corn is projected for the 1998 crop year (up from virtually none in 1993), and the acreage is expected to more than double in 1999. The report suggested that high-oil corn will continue to be a significant part of the value-enhanced corn produced and traded in the marketplace and the market potential for both high-oil and nutritionally dense corn is very high, representing the most significant growth potential for the value-enhanced corn market.

High-oil corn is used by livestock feeders to replace animal fat previously added to livestock rations and to help the animals gain weight more quickly. U.S. No. 2 corn typically averages less than 4.5 percent oil content, while high-oil corn can contain up to 8.0 percent. At this time, depending on the oil content, high-oil corn premiums range from 5 to 24 cents per bushel. High-oil corn is almost exclusively grown through contracts with livestock feeders or companies that will export the grain.

For several years, corn processors and producers have expressed an interest in having corn officially analyzed for oil, protein, and starch content. GIPSA received a calibration database from Optimum Quality Grains, Inc. Optimum Quality Grains, Inc. (a joint venture between DuPont and Pioneer Hi-Bred), is a source of high-oil corn germplasm. The calibration database consists of several hundred samples which represent germplasm from a broad range of sources.

GIPSA used the database to derive calibrations in cooperation with Optimum Quality Grains, Inc. GIPSA then tested the calibrations' performance using an additional set of 92 corn samples not used in the calibration database. The 92 corn samples represent oil, protein, and

starch ranges of 4.0 to 8.5 percent, 8.0 to 12.0 percent, and 64 to 72 percent (dry basis), respectively. Data collected on the 92 corn samples were statistically analyzed.

The standard deviation of differences (SDD) between NIRS oil values and official solvent oil extraction reference results was 0.44 percent. A comparison of near-infrared transmittance (NIRT) analyzer protein values and official Combustion Nitrogen Analyzer reference results yielded an SDD of 0.40 percent. The SDD between NIRS analyzer starch predictions and reference values obtained using the Corn Refiners Association Method A-20 was 2.20 percent. GIPSA has determined that this level of accuracy is commensurate with prospective official customer needs.

To further assure the performance of the NIRT analyzer for corn measurements, GIPSA established the maintenance tolerances for corn oil content at  $\pm 0.20$  percent mean deviation from the national standard NIRT analyzers, which are referenced and calibrated to the GIPSA solvent oil extraction method; for protein content at  $\pm 0.30$  percent mean deviation from the national standard NIRT analyzers, which are referenced and calibrated to the Combustion method, AOAC International Method 992.23; and for starch content at  $\pm 0.35$  percent mean deviation from the national standard NIRT analyzers, which are referenced and calibrated to the Starch method, Corn Refiners Association Method A-20.

On June 30, 1998, GIPSA published in the **Federal Register** (63 FR 35502) an interim rule announcing the immediate availability of official oil, protein, and starch testing service for corn as official criteria under the authority of the USGSA. The interim rule also announced the establishment of performance tolerances between NIRS and reference methods for oil, protein, and starch determinations and established fees for the service. Additionally, a 30-day comment period that ended July 30, 1998, was provided. The fees for the service established by the interim rule were revised and finalized in a rule published in the **Federal Register** December 23, 1998 (63 FR 70990), and became effective February 1, 1999.

#### Comment Summary

During the 30-day comment period, GIPSA received comments from Dow AgroSciences, Iowa State University (ISU), Zeltex Inc., and MBS Inc. A summary of the four comments received is as follows:

(1) Dow AgroSciences, a business unit of the Dow Chemical Co., is a supplier and developer of biotechnology seeds (e.g., nutritionally enhanced corn and high oleic/low linolenic canola). Dow AgroSciences has cooperated with ISU in the development of NIRT corn calibrations. Their concern is that the GIPSA calibration was developed from Optimum Quality Grains, Inc., data that did not include their corn. Consequently, they believe the GIPSA calibration will not accurately measure their commodity, which could put them at a competitive disadvantage.

(2) Iowa State University is a public land-grant institution that provides technical support for NIRS calibration development and operates a grain quality lab that monitors the quality of Iowa's corn production. ISU raised questions regarding the acquisition of GIPSA's calibration data, the representativeness of the calibration data set, and the performance tolerances for the instrumentation.

(3) Zeltex Inc. is an NIRS company that is developing a whole grain analyzer which they plan to submit for approval as a moisture meter under the National Conference of Weights and Measures' National Type Evaluation Program (NTEP). Zeltex Inc. has been cooperating with ISU on the development of corn and soybean calibrations for their instrument. They questioned the calibration development and the approval of a single instrument for analysis. Zeltex Inc. is concerned that the GIPSA calibration sample data set was insufficient in size and was not representative of other corn varieties traded in the marketplace. Additionally, they are concerned that the GIPSA-approved Foss instrument will prevent Zeltex Inc. from marketing their NIRS instrument in the United States.

(4) MBS Inc. is a foundation seed company that develops and markets new soybean varieties and value-enhanced corn hybrids, with characteristics targeted for specific end-users and provides NIRS calibrations and support to the grain and seed industry. They use the calibrations developed at ISU. MBS Inc.'s comments questioned the representativeness and source of the calibration data, and questioned the performance of the calibration. They also questioned how future calibrations would be developed.

Commenters suggested that GIPSA: (1) withdraw the current proposal; (2) promote dialogue among all interested parties regarding calibration development; and (3) develop an open procurement process to obtain calibration data.

## Comment Review

GIPSA believes that the commenters' suggestion to withdraw the current proposal is unwarranted. For several years, high-oil corn processors and producers have expressed an interest in having corn officially analyzed for oil, protein, and starch content. Future crop production estimates identified high-oil corn as the fastest growing value-enhanced corn in the marketplace. For the 1998 crop year, high-oil corn production is estimated at 1.5 million acres and is expected to more than double in 1999. Also, the possible introduction of nutritionally dense hybrid corn makes it necessary to provide the grain industry with a reliable official testing procedure it can use to negotiate price, value, and premium. Additionally, GIPSA is offering this service upon request as official criteria which has no effect on the grade designation. Consequently, GIPSA believes that offering this service will enhance the marketability of specialty corn domestically and for export.

Commenters misinterpreted the information in the interim rule to suggest the calibrations were developed based on only 92 samples. In fact, the calibration was based on several hundred samples and validated with an additional 92 corn samples. Based on its assessment of samples in the database, GIPSA determined that the calibration database obtained from Optimum Quality Grains, Inc., was representative of current samples in the marketing system. When GIPSA explored the possibility of providing official testing of corn for oil, protein, and starch content, other NIRS calibration sources (including ISU and MBS Inc.) were contacted to enlist their cooperation. After reviewing the available sources of NIRS calibration data, GIPSA decided to use the Optimum Quality Grains, Inc., database for the following reasons: (1) Optimum Quality Grains, Inc., is the dominant source of high-oil corn in the current market; (2) their analytical procedures were reviewed and were compatible with GIPSA's procedures for calibration development; (3) their calibration data contained several hundred samples; and (4) they provided their calibration data to GIPSA at no cost and without restrictions on its use.

One commenter suggested that, because GIPSA proposes to charge fees for corn analysis, its choice of the Optimum Quality Grains, Inc. database for purposes of calibration of near-infrared transmittance (NIRT) analyzers represents procurement of an outside service by GIPSA. The commenter

suggests that procurement bidding protocol for government procurements required GIPSA to evaluate other databases or request derived dry basis calibrations from other databases in an organized manner following government procurement procedures.

The Office of Federal Procurement Policy Act provides the following definition of "procurement," in relevant part: "all stages of the process of acquiring property or services." 41 USC 403(2). The Federal Acquisition Regulation (FAR), 48 CFR parts 1-52, which applies to all "acquisitions" (except where expressly excluded) (48 CFR 1.104) defines an "acquisition," in relevant part, as "the acquiring by contract with appropriated funds of supplies or services \* \* \* by and for the use of the Federal Government through purchase or lease, \* \* \*" (48 CFR 2.101).

GIPSA's choice of the Optimum Quality Grains, Inc., sample information as a data standard constitutes neither a "procurement" nor an "acquisition" under these definitions, and the applicability of government procurement laws is not predicated on the fact that the government may charge a fee for a service it may perform. Instead, GIPSA's choice is part of the policy-making process in the development of a rule which includes fees for providing official testing services. The policy basis for the fee charged is based on an already established fee for a specific method of testing. Therefore, GIPSA chose to use the Optimum Quality Grains, Inc., database for calibration purposes because their analytical methods were compatible with the methods employed by GIPSA. GIPSA's choice of an outside data source for incorporation into the regulatory action, which is a practice permitted for rulemakings by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 1, is part of the rulemaking process outlined under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The adoption of an outside reference point, standard, scientific study, or other data as part of the factual basis of a rulemaking cannot be converted from a question of the sufficiency of the rulemaking under the APA into a procurement or acquisition of goods and services subject to Federal statutes applicable to government procurement.

Commenters also indicated that GIPSA's choice of the Optimum Quality Grains, Inc., database creates a monopoly for the company that created the method from which GIPSA derived

the calibration. GIPSA disagrees with this comment.

The initial GIPSA calibration is intended to represent the majority of high oil corn that will be traded in the 1998 crop year. GIPSA's plan for future calibration development will expand the population of the database to other sources of value-enhanced corn. GIPSA intends to provide opportunities for interested parties to supply samples of material from other germplasm sources for inclusion in its calibration updates. Consequently, as additional hybrids reach the feed and food marketing channels, GIPSA will solicit new samples for inclusion in the calibration data set. GIPSA will then maintain and control the NIRS corn oil, protein, and starch calibrations in a similar manner as it maintains and controls other official calibrations (e.g., wheat protein and soybean oil and protein).

After receiving the already established database, GIPSA derived and tested the calibrations using its calibration development software and methodology. Commenters suggested that other calibrations are more accurate than the GIPSA calibrations. This conclusion appears to have been based on results from different sample sets. Also, some assumptions and conclusions reached by ISU regarding the GIPSA calibration performance were based on limited information. GIPSA's assessments of the relative accuracies of the available calibrations support the choice of the calibration based on the Optimum Quality Grains, Inc., database. To further assure the performance of the NIRT analyzer for corn measurements, GIPSA is establishing the maintenance tolerances of  $\pm 0.20$ ,  $\pm 0.3$ , and  $\pm 0.35$  percent mean deviation for oil, protein, and starch, respectively, from the national standard NIRS instruments, which are referenced and calibrated to standardized analytical methods.

GIPSA decided to use current instrument technology because it was already approved and available within the official inspection system. A single instrument model with a single calibration will provide significantly better consistency across inspection laboratories than multiple instrument types or multiple calibrations. This fact has been demonstrated by GIPSA in the past and was actually supported by one of the commenters. Further, GIPSA decided to utilize currently approved equipment because it provided an opportunity to implement a new service with minimal additional cost to the official inspection program. Cross-utilizing instruments already available in the official laboratories is reasonable and cost effective. Allowing multiple

instrument models and/or calibrations for corn measurements would greatly increase the cost of the GIPSA standardization program, would increase the cost of the overall inspection service, and would reduce the reliability of official inspection results. In addition, GIPSA does not regulate or control the use of analytical instruments outside of the official inspection system. Consequently, unofficial inspection service providers may use other instruments and/or calibrations.

This final rule also incorporates by reference the Corn Refiners Association Method A-20, Starch method, into the regulations. GIPSA will use this method as the chemical reference method for determining the starch content in corn.

GIPSA is required to collect fees for providing official testing service to cover, as nearly as practicable, GIPSA's costs for performing the service, including related administrative and supervisory costs. Testing procedures and time necessary to determine oil, protein, and starch in corn using the approved NIRT analyzers are the same as those required for NIRT wheat protein or NIRT soybean oil and protein determinations. Therefore, GIPSA has decided to collect fees identical to the fees established for NIRT wheat protein or NIRT soybean oil and protein testing services. These fees will be \$1.50 per test when the service is performed at an applicant's facility in an onsite Federal Grain Inspection Service (FGIS) laboratory; \$8.10 per test when an original inspection service is performed at a location other than an applicant's facility in an FGIS laboratory; and \$15.85 per test when an appeal inspection service is performed at a location other than an applicant's facility in an FGIS laboratory.

GIPSA has carefully considered the comments received regarding this action and has determined that it is in the best interest of American agriculture to offer this service. This decision is based on the fact that (1) the calibration data set represents a significant part of the 1998 corn market, (2) GIPSA plans to expand the calibration data set to incorporate new germplasm sources as they are released to the commercial market, (3) future calibration enhancements will remain under the direct control of GIPSA, and (4) the performance of the NIRT instruments will continue to satisfy market needs.

#### Final Action

Value-enhanced corn is produced on 3.3 to 3.7 million acres. It is projected that the U.S. acreage of value-enhanced corn is to remain essentially unchanged,

with the exception of high-oil corn. Approximately 1.5 million acres of high-oil corn is projected for the 1998 crop year and is expected to more than double in 1999. High-oil corn will continue to be a significant part of the value-enhanced corn produced and traded in the marketplace (the market potential for high-oil corn is very high, representing the most significant growth potential for the value-enhanced corn market). Also, the possible introduction of nutritionally dense hybrid corn makes it necessary to provide the grain industry with a reliable official testing procedure it can use to negotiate price, value, and premium. Additionally, GIPSA is offering this service upon request as an official criteria, which will have no effect on the grade designation.

For several years, corn processors and producers have expressed an interest in having corn officially analyzed for oil, protein, and starch content. When GIPSA explored the possibility of providing official testing of corn for oil, protein, and starch content, several NIRS calibration sources (including ISU and MBS Inc.) were contacted to enlist their cooperation. After reviewing the available sources of NIRS calibration data, GIPSA decided to use the Optimum Quality Grains, Inc., database for the following reasons: (1) Optimum Quality Grains, Inc., is a significant source of high-oil corn in the current market; (2) their analytical procedures were reviewed and were compatible with GIPSA's procedures for calibration development; (3) their calibration data contained several hundred samples; and (4) they provided their calibration data to GIPSA at no cost and without restrictions on its use.

The initial GIPSA calibration is intended to represent the majority of high oil corn that will be traded in 1998. GIPSA's plan for future calibration development will expand the population of the database to other sources of value-enhanced corn. GIPSA intends to provide opportunities for interested parties to supply samples of material from other germplasm sources for inclusion in its calibration updates. Consequently, as additional hybrids reach the feed and food marketing channels, GIPSA will solicit new samples for inclusion in the calibration data set.

GIPSA has carefully considered the comments received regarding this action and has determined that it is in the best interest of the corn industry to offer this service. This decision is based on the fact that (1) the calibration data set represents a significant part of the 1998 corn market, (2) GIPSA plans to expand the calibration data set to incorporate

new germplasm sources as they are released to the commercial market, (3) future calibration enhancements will remain under the direct control of GIPSA, and (4) the performance of the NIRT instruments will continue to satisfy market needs. GIPSA believes that offering this service will enhance both the export and domestic marketability of speciality corn.

Therefore, GIPSA will offer corn oil, protein, and starch testing services as official criteria under the authority of the USGSA. Upon a request for service, official inspection personnel will determine corn oil, protein, and starch content. Percent corn oil, protein, and starch will be reported to the nearest tenth percent on a dry matter basis (zero moisture basis) unless another moisture basis is requested.

Based on this and other available information, GIPSA has determined that the interim rule amending Part 801 as published at 63 FR 35502 will be adopted as the final rule.

#### List of Subjects in 7 CFR Part 801

Grains, Incorporation by reference.

#### PART 801—OFFICIAL PERFORMANCE REQUIREMENTS FOR GRAIN INSPECTION EQUIPMENT

Accordingly, the interim rule amending 7 CFR Part 801 which was published at 63 FR 35502 on June 30, 1998, is adopted as a final rule without change.

**James R. Baker,**

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

[FR Doc. 99-9518 Filed 4-16-99; 8:45 am]

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#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. FV99-916-2 FR]

#### Nectarines and Peaches Grown in California; Revision of Handling Requirements for Fresh Nectarines and Peaches

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

**ACTION:** Final rule.

**SUMMARY:** This rule revises the handling requirements for California nectarines and peaches by modifying the grade, size, maturity, and container marking requirements for fresh shipments of these fruits, beginning with 1999 season shipments. This rule also authorizes continued shipments of "CA Utility"