



President, Congress Seek Clarity in Agenda Following State of the Union, Massachusetts Election Shake-Up

Jobs and the economy appear to be the only safe political ground following Sen.-elect Scott Brown's victory in Massachusetts that put a Democrat-held seat in Republican hands for the first time in nearly 60 years and shifted the balance of power, ending Democrats short tenure in the "super" majority.

In the ensuing week, congressional leaders and the Obama administration scrambled to find solid footing on an election year agenda under the new power structure. Democrats hoped the president's State of the Union Address would help bring clarity on a number of issues and present a path forward to winning back many of the independent-minded voters that appear to have swung the Massachusetts Senate race. In addition to abruptly halting further consideration of the highly controversial health care reform package, the political change will usher in procedural and political challenges to a host of Democrat and White House priorities in the 111th Congress. President Obama

already has acknowledged publicly the need to go back to the drawing board and rewrite health care reform so it reflects a far narrower, more focused and less expensive approach. And several moderate Democrats have called on Senate Majority Leader Harry Reid, D-Nev., to withhold all further action on health care reform until Brown is sworn in, and warned him not to use procedural tactics to push through the legislation.

Brown's election, coupled with palpable voter dissatisfaction, appears likely to shift the congressional agenda to one more focused on jobs and the economy. Also likely to be considered by the Senate during the first quarter of the year is comprehensive food and feed safety legislation (S. 510), which enjoys broad bipartisan support. But certain legislation deemed untenable without a super majority likely will fade, such as labor unions' attempts to enact so-called "card-check" legislation that would have made organizing of

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FDA Sampling Distillers Grains for Presence of Antibiotic Residues

The Food and Drug Administration (FDA) is in the midst of its second nationwide sampling plan in which distillers grains are being collected and tested for the presence of antibiotic residues.

During the Jan. 19-21 meeting of the Association of American Feed Control Officials – the professional organization of state and federal feed regulatory officials – FDA officials said the agency will use information collected from the sampling plan as it considers potential policies related to the use of processing aids during the production of distillers grains, and as it evaluates the broader issue of antimicrobial resistance.

In January 2009, FDA made public partial findings from its first nationwide sampling of distillers grains. At that time, FDA said that of 45 samples tested, antibiotic residues were detected in 24 samples. Fifteen of the 45 samples contained residues of virginiamycin, 12 contained residues of erythromycin and five contained residues of tylosin. During that first round of sampling and testing, FDA used a

multi-analyte method calibrated to detect only residue levels of virginiamycin, erythromycin and tylosin. When announcing the results, FDA expressed concern about the types of antibiotics present and the residue levels found within the samples.

Pursuant to the use of antibiotics during the production of distillers grains, FDA has issued a "letter-of-no-objection" for the use of only virginiamycin-based products when such use results in residue levels not exceeding 0.5 parts per million (p.p.m.). Further, FDA now is requiring that such virginiamycin-based products, as well as all other antimicrobial products to be used during the production of distillers grains that will be distributed as a feed ingredient, be approved through a formal food additive petition process administered by the agency.

Second Round of FDA Sampling/Testing: As part of the current round of sampling, FDA officials said that 60 distillers grains samples (40 domestic and 20 import) will be

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non-union workplaces far easier by allowing a simple majority of workers to sign "preference cards" to unionize.

President Obama's State of the Union Address confirmed the likely congressional focus on jobs and the economy, but also called for continued work on several of the "big-ticket" items that have brought about considerable division in Congress – specifically health care reform and climate-change legislation. Obama called on Congress to complete work on both measures, citing their importance to long-term economic viability. Republicans countered that pressing those measures in the way outlined by bills passed in the House would have a negative impact on an already stressed economy. While both sides agree on a few basic elements of both health-care and climate-change legislation, the more comprehensive both bills become, the more the parties diverge and differences are magnified – polarizing the process. This reality remains, and is amplified in an election year putting comprehensive changes in doubt.

A few topics in the president's address did generate initial bipartisan support: 1) tax credits for small businesses that hire additional workers and increase wages; 2) elimination of the capital gains tax on small business investments; and 3) provisions aimed at growing the economy and creating jobs through tax incentives to businesses for expansion, new building and equipment. But his proposal to use \$30 billion repaid by banks from the Targeted Asset Relief Program (TARP) fund for community banks to bolster local lending for small businesses drew a more tepid reaction.

During his address, Obama asserted that one key to securing the long-term foundation for the economy will be to pass a comprehensive financial reform package intended to clamp down on certain risky activities of financial institutions and create a consumer protection agency. While in broad strokes financial reform has enjoyed some bipartisan support, the bill passed by the House in December did so without any Republican votes.

The legislation, also intended to increase transparency and deter attempts at manipulation in the derivatives market, has not been considered yet by the Senate. Consideration there is expected to be difficult, given party-line differences and the new political composition of the Senate chamber.

The president included international trade as another key driver to shoring up the U.S. economy in the long term, and stated his goal to "double our exports over the next five years." He noted the launch of a national export initiative "that will help farmers and small businesses increase their exports." Although at odds with congressional leaders in his party, the President warned that the United States cannot "sit on the sidelines" as other countries sign trade deals. He offered vague commitments to "shape" the World Trade Organization's Doha Round multilateral negotiations to open global markets and "strengthen our trade relations" with countries that currently are awaiting U.S. congressional approval of trade agreements: South Korea, Panama and Colombia.

One area that engendered a decidedly mixed reaction was Obama's outline of important elements of a comprehensive energy and climate-change bill. As a "bone" to congressional Republicans, the president included support for building a new generation of nuclear power plants and possibly developing new offshore gas and oil drilling. However, those would be provisions included in a climate-change bill that would cap greenhouse gas emissions and introduce an artificial market to trade emissions credits. As outlined in current legislation, this type of policy also would result in widespread conversion of cropland to forest and hamper America's ability to compete in global markets. Obama expressed an "eagerness" to help the Senate follow the House's lead and pass climate-change legislation – but the current composition of the Senate would require adjusting many elements of the bill to garner the necessary support to move forward.

NGFA Convention Alert – Early Bird Deadline Jan. 29; Air Fare Sales On!

NGFA members are reminded that this **Friday, Jan. 29**, is the deadline for registering at the money-saving Early Bird rate for the NGFA's 114th annual convention, March 3-5 in Maui! Save \$50 per person (\$20 for spouses) by doing so. Also note that the deadline to book rooms at the Westin Maui Resort and Spa is **Jan. 31!** A reminder that the convention registration rate has been reduced 10 percent and hotel room rates have been reduced by \$20 per night.

In addition, American and United Airlines last week announced new air fare sales to Hawaii from various U.S. destinations that encompass the March dates of the NGFA's convention! The arrival airport in Maui is Kahului (airport code OGG).

But to reduce your airfare even further, you may wish to

price an itinerary with arrival in Honolulu (airport code HNL), and then catch one of the inexpensive, frequent flights to Maui [either to OGG or Maui's second airport, Kapulua Airport (code **JHM**)]. Using the NGFA's convention airline discount **saves an additional 5 percent** off any published fare on American Airlines; just enter the special code **A 2720AA** in the promo code space to get the discount. To take advantage of American Airlines' airfare sale, [click here](#). To take advantage of United Airlines' airfare sale, [click here](#).

[Click here](#) to access an updated flyer on the NGFA convention program and a registration form. [Click here](#) to make your hotel reservations on-line, or call toll-free 1-808-921-4651. Hope to see you in Hawaii!



NGFA's New Electronic Legislative Advocacy Tool – Making It Easier for You to Communicate with Congress

In the Jan. 14 edition of the *NGFA Newsletter*, we discussed the importance of NGFA's Grain and Feed Political Action Committee (PAC) and its role in helping the association achieve its public policy objectives.

This week, we're pleased to announce the NGFA's implementation of a new legislative software tool that will make it easier and more efficient than ever to mobilize the grass-roots strength of the NGFA's membership base to communicate directly with members of Congress.

The gravity of the issues to our industry that are expected to be considered in the current session of Congress – ranging from climate change; rail, waterways and other transportation issues; food-feed safety; international trade agreements; workplace health and safety; and comprehensive financial reform – makes it more likely than ever that we'll need to use an "all-hands-on-deck" approach that leverages our substantial, and growing, membership base to weigh in on public policy matters.

In the recent past, the NGFA has used a more limited "call-to-action" approach that has achieved a few notable successes, including a reduction in the Conservation Reserve Program acreage cap in the 2008 farm law, passing legislation authorizing inland waterways projects, supporting efforts to approve the Central American Free Trade Agreement and defeating efforts to undermine the U.S. Warehouse Act.

But given the growing number and diversity of legislative challenges and opportunities, the time is right for the NGFA to implement a more systematic and easy-to-use online tool to ensure your voice is heard on policy issues that have such an important bottom-line impact on your business.

The program is simple. When a significant policy issue reaches a stage when NGFA-member company involvement would be influential in swaying the outcome, the NGFA will send you an email with a suggested message. In just a few minutes, you'll be able to send a personal letter directly to your congressman, senators or federal policymaker customized to meet your specific business and concerns. Or you'll be able to opt to transmit a sample message provided by the NGFA. The software tool will allow the NGFA to disseminate such calls-to-action broadly to all NGFA member firms, or to focus on specific states, regions or business types that would be affected by the given policy issue.

Meanwhile, the NGFA's staff will continue to do the leg

work in Washington to ensure the association's policy message resonates. But now, we'll be able to do so with the added strength of direct NGFA member interaction with policymakers. Certainly, we won't win every battle. But with this added tool, the NGFA will be bringing to bear as many resources as possible to achieve success.

So how does it work? Here's an example. Suppose the Senate is considering a cap-and-trade climate-change bill that would cost the industry millions of dollars, limit future growth opportunities and possibly result in the conversion of 59 million or more acres of cropland and pasture into forest. The NGFA's staff would prepare a letter to lawmakers specifying the key areas of concern and how the NGFA wants the legislator to vote. The NGFA then would send members a link in a "call to action" email. After clicking on the link, you then either can include a personal/local angle that further strengthens the NGFA's sample letter, or just email the base letter directly to your senators with a couple clicks of your computer mouse. If you'd like to make a personal call to your senators' offices, the software will link you to a few key talking points that you can include in your conversation with legislators or their staffs. Regardless of which method you use, your personal message will convey the "real-world" impacts that misguided policies will have on constituents whose businesses create jobs and economic growth.

The NGFA's public policy electronic advocacy tool, which will be launched shortly in an email to members, will become instrumental to our efforts to represent your business interests before the federal government – giving a stronger voice to NGFA members. The tool is simple and has shown its effectiveness with other clients in getting messages heard and, just as critically, understood by members of Congress and their staffs.

Of course, your active participation will be the key to this tool's success! We pledge to use the tool and its calls-to-action judiciously, recognizing you have a business to operate. So, when you receive these messages, you'll know that the issue is significant and that your involvement is urgently needed!

Together, we can exert an even greater influence in shaping the outcomes on issues critical to your business! If you have any questions, please contact NGFA Director of Legislative Affairs Chris Holdgreve or NGFA Manager of Public Policy Relations Eleanor Rollings at 202-289-0873, or by email at choldgreve@ngfa.org or erollings@ngfa.org.



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collected and tested. FDA said it will analyze the samples using a method recently published by the agency that utilizes liquid chromatography and ion-trap tandem mass spectrometry. The new method has the capability to detect the following 13 different antibiotics in distillers grains: streptomycin, ampicillin, tetracyclines (oxytetracycline, tetracycline, chlortetracycline), bacitracin A, erythromycin, tylosin, chloramphenicol, clarithromycin, penicillin G, virginiamycin M1 and monensin. The analytical method's quantitative range was assessed at a level of 0.1 to 1 p.p.m., depending upon the compound. In addition, FDA laboratories performing the analyses may test the samples for mycotoxin content, officials said.

FDA said it does not anticipate taking regulatory action on the samples collected and tested. But the agency said that if needed, it would support administrative and/or

regulatory actions (including, but not limited to, untitled letters, warning letters, recalls, seizures and injunctions) if residue levels in distillers grains intended for use in animal feeds and that have been or are likely to enter interstate commerce exceed previously approved levels codified in FDA regulations.

FDA officials said the testing of distillers grains samples may be completed by late summer, but that the timing is uncertain. FDA also said that the agency has not determined yet whether it will make the test results publicly available.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access more information from FDA's website about the distillers grains sampling plan.

FDA Revises Policy on Issuing Regulatory Discretion, Informational Letters to Industry

Food and Drug Administration (FDA) officials said recently that the agency has revised its long-standing policies governing the issuance of regulatory discretion and informational letters to the industry.

During the Jan. 19-21 meeting of the Association of American Feed Control Officials (AAFCO) – the professional organization of state and federal feed regulatory officials – FDA officials said the agency no longer plans to routinely issue **regulatory discretion letters** ("letters-of-no-objection") to individual companies or establishments for FDA-regulated products. The agency noted that avenues remaining available for recognition of products include a food- or feed-additive petition; a generally recognized as safe (GRAS) declaration; and compliance policy guides and guidance for industry for classes of products. FDA officials said any of these approaches could serve, if acceptable to the Association of American Feed Control Officials, as the basis for an AAFCO ingredient definition.

FDA officials told the NGFA that the regulatory discretion letter policy was changed for several reasons, including the volume of requests the agency was receiving; the competitive marketplace advantage such letters might provide to companies that receive them compared to those firms with similar products that do not request or obtain such letters; and the difficulty of retaining an accurate record of such letters that have been issued by the agency over time. These letters typically have been issued primarily for various ingredient products. An example of

one such "letter-of-no-objection" is one issued in November 1993 in which FDA's Center for Veterinary Medicine allowed residues of up to 0.5 parts per million in distillers grains of a specific virginiamycin-based product used widely in fuel-ethanol production.

Products already subject to regulatory discretion letters will be grandfathered in under the new policy, FDA officials indicated.

Concerning **informational letters**, FDA officials said the agency no longer will issue such advisory letters to industry firms or establishments if the inquiry pertains to FDA-regulated products already introduced in commerce.

FDA in the past had responded to company inquiries concerning the labeling, claims and other aspects of FDA-regulated products already being marketed. Under the new policy, FDA said it will issue informational letters only for inquiries involving products **not** yet introduced in commerce. Any industry inquiries involving products already being marketed that are deemed by FDA to be out of compliance will be posted in the form of an "untitled letter" on the agency's publicly available website. "If the industry wants FDA's review, it needs to request it before the product is put into the marketplace," an FDA official emphasized. FDA said it would continue under the new policy to issue private letters in response to inquiries from state regulatory agencies regarding products already being marketed.



NGFA, PFI Set Major New Joint Conference for Animal Feed, Pet Food Industries

The NGFA and its strategic partner, Pet Food Institute, have announced a major new joint conference focusing on the most important business trends, food and feed safety developments, and operational challenges facing the animal feed and pet food industries.

The *Feed and Pet Food Joint Industries Conference* will be conducted by the two organizations on Sept. 22-24 in Chicago, Ill., revolving around the theme, "Working in the Rapidly Changing Business, Operations and Regulatory Environment." It will be the first time PFI and NGFA have collaborated to host an event of this magnitude and importance. To co-host the conference, PFI will change both the dates and location of the PFI Annual Industry Meeting, which previously was scheduled for October in Washington, D.C. In addition, the NGFA will reschedule and relocate its annual Feed Industry Conference, traditionally conducted in early December, to coincide with the joint conference.

The joint conference program will cover major business-focused topics, such as the outlook for the supply, quality, cost and availability of vital ingredients used in manufacturing animal

feed and pet food; emerging trends that will shape the future of the two industries; and the increasing demand from retailers and customers for environmental sustainability. The program will explore how these factors may change the business strategies, operations and logistics of animal feed and pet food manufacturers. Another major focus of the conference will be on the new food and feed safety legislation expected to be enacted by Congress this year, as well as the Food and Drug Administration's regulations expected to be proposed this fall that will encompass all feed, pet food and feed ingredients. In addition, concurrent sessions will be organized along two tracks: regulatory and operations. Regulatory track topics will cover preparation for FDA or state inspections and new regulatory oversight by EPA and OSHA of emissions and safety practices, respectively. The operations track will address energy management, preventive maintenance and automation systems.

Complete joint conference program information and registration materials will be available soon at www.JointIndustriesConference.com. Access a joint press release issued by NGFA and PFI on the conference by [clicking here](#). And mark your calendars to be in Chicago Sept. 22-24!

CBS Evening News to Air Two-Part Segment on Antibiotic Use in Farm Animals

The CBS Evening News now is scheduled during the week of Feb. 2 to air a two-part segment focusing on subtherapeutic antibiotic use in livestock and poultry production.

The segments, initially scheduled to air during the week of Jan. 18, were preempted by coverage of the Haiti earthquake.

In preparation for the segments on antibiotic use in food-producing animals, CBS News anchor Katie Couric conducted a series of interviews and site visits of swine and poultry farms in the Midwest and East, including Iowa, Missouri, Pennsylvania and Oklahoma. The visits and interviews have been conducted on both conventional and organic, "antibiotic-free" establishments. Dr. Liz Wagstrom, assistant vice president for science and technology at the National Pork Board, Des Moines, Iowa, was among the few industry experts interviewed by Couric.

CBS also sent a crew to Denmark to cover its ban on subtherapeutic antibiotic use, and the segment likely will portray the Dane's action as a major success. This is despite the vehement disagreement between opponents and proponents of

subtherapeutic antibiotic use over whether the Danish experience has contributed to reduced human resistance to such antibiotics, or primarily resulted in increased animal mortalities and no appreciable reduction of antibiotic use (because of increased therapeutic use in animals).

It is the NGFA's understanding that the CBS News segments likely will paint a largely unfavorable view of antibiotic use in food-producing animals, alleging that use of such products is increasing and not judiciously applied. The segments also are likely to portray a very negative image of modern animal agriculture production practices, with consistent references to "factory farms" and overcrowding of livestock and poultry.

The segments also are expected to focus on legislation offered by Rep. Louise Slaughter, D-N.Y., that would require FDA to review safety issues related to the use of medically significant antibiotics in animal agriculture, and phase out their use unless manufacturers can prove there is no danger to public health from increasing bacterial resistance to these drugs.





House Committee to Begin Examination of Freight Rail Reform on Feb. 11

A House subcommittee plans on Feb. 11 to conduct its initial hearing on reauthorization of the federal Surface Transportation Board (STB), its first foray into potential freight rail reform legislation in this session of Congress.

The hearing has been scheduled by the House Transportation and Infrastructure Committee's Railroads, Pipelines and Hazardous Materials Subcommittee, chaired by Rep. Corrine Brown, D-Fla. The subcommittee plans to invite STB officials, as well as representatives of rail carrier and shipper organizations, to discuss the balance and effectiveness of the STB. Among other things, witnesses are expected to be invited to provide viewpoints on: 1) priorities for changes in how the STB operates; 2) the structure and composition of the agency; 3) opportunities for

shippers to bring rate challenges; and 4) ways to ensure a healthy freight rail system for the long-term.

The Senate Commerce, Science and Transportation Committee on Dec. 17 approved its version of a major rail reform bill (S. 2889). Senate floor consideration is expected sometime during the first half of this year. It still is expected that additional changes will be incorporated into the Senate measure prior to floor consideration, potentially including language modifying freight railroads' current antitrust immunity that is being drafted by Sen. Herb Kohl, D-Wis. [Click here](#) to access a complete report on the Senate bill from the Dec. 17 edition of the *NGFA Newsletter*. No comparable House bill has been introduced yet.

STB Decides to Discontinue Contract Versus Tariff Rate Proceeding

The federal Surface Transportation Board (STB) on Jan. 21 announced that it was discontinuing a rulemaking (Ex Parte No. 646) launched last January that was intended to provide greater clarity in distinguishing between freight rail contract rates versus common-carrier tariff rates, stating that the agency would continue to decide on a case-by-case basis whether individual situations constituted rail movement via contract or tariff.

But when issuing its decision, the agency **encouraged** railroads and shippers to avoid misunderstanding and litigation by including the following language in contract-pricing agreements: *"This agreement constitutes a rail transportation contract. Under certain circumstances, freight railroad customers are entitled to demand and receive a common carrier (non-contract) rate, the terms of which are subject to the jurisdiction of the Surface Transportation Board (STB). For more information, contact STB's Rail Customer and Public Assistance Program at (888) 254-1792 (toll-free) or rcpa@stb.dot.gov."*

The STB said its original proposal, which would have required carriers to provide clear notice that a particular shipment was a contract, rather than a tariff, and therefore generally not subject to legal oversight by the STB, was nearly universally opposed by both carriers and shippers because of the complexity of writing a clarifying rule that was both understandable and provided shippers with full clarity of the nuances of STB's regulatory oversight in this area. The NGFA, along with a number of other shippers and carriers, had submitted statements as part of the STB proceeding.

STB's Decision – What It Means to NGFA Members: Here are the practical implications of the STB decision for NGFA member companies that ship and receive agricultural products by rail.

Under federal law, the STB generally does **not** have legal

jurisdiction over freight rail contracts, although there may be some exceptions. For example, agricultural contracts are different from other rail contracts in one respect – if the STB finds that a particular agricultural contract deprives a shipper of equivalent transportation terms where substantially similar circumstances exist, or if the agency determines a contract results in a destructive competitive practice, the STB can set aside such contracts or require that they be modified. However, once an agricultural freight rail contract is approved by STB, it is the same as any other rail contract; that is, outside the scope of the STB's jurisdiction.

So, if a problem arises with respect to a freight rail contract, shippers (or carriers) generally must file a complaint in the U.S. court system or seek other means of resolving the dispute. If products are shipped under tariff rates, because agricultural commodities have not been declared "exempt (from STB authority)" traffic, disputes on tariff movements generally can be brought before the STB for resolution.

NGFA Active members and Associate trading member companies (the latter of which encompasses railroads, barges and international members) involved in a rail contract dispute are reminded that one option is to bring such a case before NGFA's Rail Arbitration System, which usually would be less costly and time-consuming than a court proceeding. NGFA Rail Arbitration Rule Section 2 (b)(4) explicitly states that "except as otherwise mutually agreed, disputes arising from a contract (are arbitrable under NGFA)...."

There also are other specific circumstances involving tariff rate movements and the application of rail practices that are arbitrable under NGFA's Rail Arbitration Rules. A delineation of NGFA jurisdiction for compulsory arbitration between member companies can be found in the NGFA Rail Arbitration Rules, Section 2, "Matters to be Arbitrated."





Supreme Court to Hear Appeal of Case Involving Government Oversight of Biotech Crops

The U.S. Supreme Court has agreed to review a federal district court ruling that some attorneys have called “precedent-setting” and a “turning point” in the U.S. Department of Agriculture’s (USDA) regulatory oversight of biotechnology-enhanced crops.

In its decision on Jan. 15 to grant the petition for a writ of certiorari filed last October by Monsanto Co. in the case (*Monsanto Co. v. Geertson Seed Farms*, U.S. Supreme Court Docket No. 09-475), the High Court agreed to review a May 2007 order by Judge Charles Breyer of the U.S. District Court for the Northern District of California that vacated the decision by USDA’s Animal and Plant Health and Inspection Service (APHIS) to deregulate alfalfa that had been genetically engineered to resist the Monsanto’s Roundup® herbicide.

Judge Breyer ordered that APHIS prepare a full environmental impact statement and reconsider the petition to deregulate the Roundup Ready alfalfa. In the interim, all future planting of Roundup Ready® alfalfa was prohibited, and certain conditions were imposed on the handling of the crop that already had been planted. Judge Breyer determined that APHIS had not examined sufficiently whether the Roundup Ready alfalfa seeds would share their genes with other crops.

His decision was affirmed in June 2009 by the majority of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, based in San Francisco, Calif. The third member of the appeals panel issued a dissenting opinion, finding that the district court proceeded improperly with a permanent injunction

without conducting a requisite evidentiary hearing.

Among the questions that the Supreme Court specifically has agreed to address is whether the appellate court erred in upholding the district court’s entry of the injunction without conducting an evidentiary hearing. Monsanto also requested that the Supreme Court consider whether the evidence itself supported the permanent nationwide injunction and likelihood of irreparable harm – or whether the less restrictive measures proposed by APHIS would have been sufficient to counter any risk of harm.

The Supreme Court’s review of this case has broader potential implications given other comparable decisions in lower courts. In another case in the U.S. District Court for the Northern District of California, the court granted judgment for a challenge against APHIS’ decision to deregulate Monsanto’s Roundup Ready® sugar beets and ordered the agency to prepare an environmental impact statement. [See the Sept. 24 edition of the *NGFA Newsletter* for more details.] Similarly, other federal judges – in districts from the District of Columbia to Hawaii in cases involving a range of commodities, including grasses as well as corn and sugar cane used as pharmaceutical crops – have upheld comparable challenges and similarly ordered APHIS to more closely scrutinize applications to plant genetically engineered crops.

In the ongoing alfalfa case, the Supreme Court directed that the petitioners’ briefs be filed by Feb. 25, and respondents’ briefs by March 25. Oral argument likely will be scheduled later in the year.

Supreme Court Denies Injunctive Request to Close Inland Waterways

The Supreme Court on Jan. 19 denied a motion for an injunction by the state of Michigan, which would have closed key parts of the inland waterways system in the Chicago, Ill., area.

Michigan, along with several other supporting states, sought the injunction to prevent the spread of an invasive species of Asian carp. The U.S. government, the state of Illinois and the Metropolitan Water Reclamation District of Chicago (“Chicago District”) opposed the injunction on numerous grounds, including the potential impact on barge and recreational boat traffic.

The underlying controversy has a 100-plus-year history, involving the construction of artificial canals, diversion projects, locks and other related infrastructure ultimately affecting the Chicago, Des Plaines, Mississippi and Illinois Rivers, as well as

the Great Lakes. Decisions by the Supreme Court in the ongoing controversy date to the 1920s. Most recently – on Dec. 21, 2009 – Michigan petitioned the High Court to reopen these proceedings, alleging that the facilities operated and maintained by the Chicago District, state of Illinois and U.S. Army Corps of Engineers unlawfully were allowing the introduction of the invasive species into Lake Michigan and other connected waters, causing a public nuisance and threat of irreparable injury to natural resources in Michigan. The states of Ohio, Minnesota, Wisconsin and New York, as well as the Province of Ontario, Canada, submitted filings in support of Michigan’s petition.

In its petition, Michigan also sought injunctive relief, claiming that this species of Asian carp presented a “dire threat” because it is particularly large, voracious and prolific enough to potentially decimate native fish species. According to the petition, the

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From the Bench

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species had spread up the Mississippi River, and closure of certain navigational locks was sought as the “remaining obstacles” between the carp and Lake Michigan. Michigan conceded that closure of the locks adversely would affect barge traffic and recreational boats that transit between Lake Michigan and the waterways around Chicago.

Briefs in opposition to the injunction, including filings on behalf of the U.S. government, raised numerous arguments indicating that the relief requested was premature. They stated that the issues already were under active investigation by the U.S. Army Corps of Engineers. Opponents also pointed to the severity of the potential impact on transporta-

tion and commerce, referring to the volume of waterborne traffic between the Great Lakes and Mississippi River that must pass through the affected Illinois waterways (or else circumnavigate the eastern United States). They also said that severing that link by closing the locks would require many tons of commodities to be shipped by other, significantly more expensive transportation modes – or not at all.

While the Supreme Court rejected Michigan’s request for an injunction, it has not ruled yet on whether the petitioners may proceed with their underlying lawsuit. The NGFA will continue to monitor the case, and keep members informed of future developments.



Newsletter

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CFTC Initiates Rulemaking on Energy Position Limits

The Commodity Futures Trading Commission (CFTC) on Jan. 26 published proposed regulations that would implement speculative position limits on futures and options contracts for certain energy commodities.

The agency took the action in the wake of extreme market volatility and soaring energy prices during 2008, and ensuing CFTC hearings that examined application of speculative position limits to energy contracts.

Currently, energy contracts traded on the New York Mercantile Exchange (NYMEX) and one natural gas contract traded on the Intercontinental Exchange (ICE) are subject only to exchange-set, spot-month speculative position limits during the last three days of trading of those contracts. Outside that period, the contracts are subject to the exchanges’ accountability rules, which generally allow the exchange to request justification from traders for the sizes of their positions.

By contrast, the CFTC proposal seeks to implement federally-established, CFTC-administered all-months-combined, single-month and spot-month speculative position limits for energy contracts. Similar speculative position limits set by the agency already are in place for enumerated agricultural commodities like wheat, corn and soybeans. The CFTC proposal also would establish aggregate position limits that would apply across CFTC-registered entities that list substantially similar energy products. The agency estimates that about 10 traders with

significant positions would be affected by the proposed regulation, if adopted.

A potentially important element of the proposed rule would preclude swap dealers in energy contracts from being given bona-fide hedge exemptions from speculative position limits by the CFTC. Instead, the CFTC proposed to allow swap dealers to seek a limited exemption from the proposed speculative position limits for energy contracts. This proposal potentially could hint at how the agency will view broader potential future action regarding a “concept release” published by the CFTC in March 2009 regarding eliminating or limiting hedge exemptions for swap dealers. The NGFA submitted comments on the March 2009 concept release suggesting that the agency consider issuing hedge exemptions to swap dealers in agricultural futures to the extent the exemptions offset swap dealer positions taken with customers who are traditional, commercial market users.

Submitting Comments: The full text of the CFTC’s proposed rule may be accessed by members receiving the *NGFA Newsletter* electronically by [clicking here](#).

Comments on the proposal are due by **April 26**, and should be submitted to David Stawick, secretary, CFTC, Three Lafayette Centre, 1155 21st St., N.W., Washington, D.C., 20581. Comments also may be faxed to 202-418-5521 or emailed to secretary@cftc.gov. Comments should reference: “Proposed federal speculative position limits for referenced energy contracts and associated regulations.”





EPA Plans New CAFO, Stormwater Rules

The Environmental Protection Agency (EPA) on Jan. 11 announced plans to establish stricter confined animal feeding operation (CAFO) and stormwater regulations in the next two years.

EPA said the new rulemakings were precipitated by efforts to further protect the Chesapeake Bay watershed, but will be national in scope. For CAFOs, EPA said it will propose in 2012 and take final action by late 2013 on regulations that will consider "expanding the universe" of CAFOs to encompass more farms and ranches, while implementing stricter permitting standards on the land application of manure. While some of the regulations will be specific to animal feeding operations affecting the Chesapeake Bay watershed, EPA said the proposal will affect CAFOs nationwide by streamlining the process by which an operation can be designated as a CAFO. In addition, EPA said it

would consider applying new rules to manure transported off-site to strengthen manure management and reduce total maximum daily nutrient loading.

In addition, EPA said it intends to propose a national rulemaking – to be finalized by November 2012 – to tighten stormwater regulations that apply to newly developed and redeveloped sites, and will consider even tighter requirements in the Chesapeake Bay watershed. Among other things, the agency said it would consider more extensively redefining municipal separate storm sewer system (MS4), establishing more stringent stormwater-retention requirements for newly developed and redeveloped sites, and applying these requirements to smaller sites than occurs currently.

States that adopt programs that achieve the same EPA standard will not be subject to the new rules.

OSHA to Conduct 'Listening Session' on Feb. 10

The Occupational Safety and Health Administration (OSHA) has scheduled an all-day "listening session" on Feb. 10 in Washington to solicit public input on nine broad "issues facing the agency."

OSHA said it "in particular" is seeking advice on: 1) what the agency can do to "enhance and encourage" employers, workers and unions to identify and address workplace hazards; 2) the most important emerging or unaddressed workplace health and safety issues, and what the agency should do to address them; 3) how the agency can improve its efforts to "engage stakeholders" in its programs and initiatives; 4) specific actions OSHA should take to "enhance the voice of workers in the workplace," particularly those who are "hard to reach, do not have ready access to information about hazards or their rights, or are afraid to exercise their rights"; 5) additional measures to improve the effectiveness of OSHA's current compliance-assistance efforts and on-site consultation program to assist particularly small businesses; 6) new policies and procedures that could reduce the time it takes OSHA to develop final standards, "given the need for new standards that will protect workers from unaddressed, inadequately addressed and emerging hazards"; 7) new communication tools to reach "high-risk employees and employers" with training, education and outreach, including ideas on what OSHA now is doing that no longer is necessary; 8) new indicators, other than workplace injury and illness logs, that OSHA can use to target its standards-development and inspection resources; and 9) whether to resurrect and improve its previous effort to update permissible exposure limit health standards.

The NGFA will be attending the OSHA listening session and will provide a report to members. In addition, the NGFA's

Safety, Health and Environmental Quality Committee will consider whether written comments to OSHA are warranted based upon the outcomes of the session.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access OSHA's Jan. 19 *Federal Register* announcement of the meeting, which includes information on how to register to attend.



Calendar

March 3-5, 2010: NGFA 114th Annual Convention
Westin Maui, Lahaina, Maui, Hawaii

March 3, 2010: NGFA Waterborne Commerce Committee
NGFA Membership & Marketing Committee
NGFA Country Elevator Committee
NGFA Trade Rules Committee
NGFA Grain Grades & Weights Committee
NGFA Rail Shipper/Receiver Committee
NGFA Risk Management Committee
NGFA International Trade/Agricultural Policy Committee
NGFA Joint Agroterrorism/Facility Security Committee
NGFA Biofuels Committee

March 4, 2010: NGFA Rail Arbitration Rules Committee
NGFA Biotechnology Committee

March 5, 2010: NGFA Feed Legislative & Regulatory Affairs/
Feed Manufacturing & Technology Joint Committee
NGFA Finance & Administration Committee





Membership Matters

by Todd Kemp
Director of Marketing/Treasurer

February Frenzy, 2010 Edition!

It's the time of the year – right before convention – when all NGFA membership recruiters are asked to participate in a frenzy of membership recruiting known as...**February Frenzy!**

Take 15! During the month of February, NGFA members are asked to set aside just a small amount of time devoted to recruiting. Even 15 minutes each week can make a huge impact! That's enough time to call a prospective member and invite him/her to join, then e-mail Todd Kemp, NGFA director of marketing/treasurer, at tkemp@ngfa.org to report your contact and request that follow-up information be sent.

Membership Prizes! Fabulous cash and merchandise prizes

will be awarded at the NGFA's annual convention on Maui in early March. Leading recruiters will be recognized, and all recruiters will be eligible for the annual Nootbaar Prize, which comes with a \$1,000 cash award!

Standings: An abbreviated version of the NGFA Leaderboard appears below. The Leaderboard reports standings in our annual recruiting contest, based upon total points earned by recruiters. Every time you recruit a new member, you move up the Leaderboard into a better position for a major prize! And every company signed, no matter how large or small, earns you points and additional chances at the Nootbaar Prize.

Membership Recruiting Leaderboard

2009-10 Membership Year

(Total Points = New-member dues X 1.25 + 200)

Terry Knutsen	Ag First Cooperative	26,413.75	Joe Kapraun	GROWMARK Inc.	4,275.00
Steve Strege	North Dakota Grain Dealers Assn.	16,362.875	Dave Lyons	Louis Dreyfus Corp.	3,833.75
Scotty McCoy	White Commercial Corp.	10,929.25	Ken Robertshaw	Greenfield Ethanol	3,012.50
Dave Reiff	Reiff Grain and Feed Inc.	9,686.25	Paul Coppin	Reynolds United Cooperative	2,646.875
Steve Domm	Central Farmers Cooperative	5,448.75	Ron Dinga	ADM-Benson Quinn	2,613.75
Ross Tweedy	Granite Grain Co.	4,602.50	Joe Royster	Dacoma Farmers Cooperative	2,263.25
John Heck	The Scoular Co.	4,362.50	JoAnn Brouillette	Demeter LP	2,121.875



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