NGFA Newsletter®

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FDA to Issue Updated Guidance on May 24 on Electronic Portal for Reporting Serious Food, Grain, Feed Adulteration Incidents

...Agency to Request Public Comment on When Commodities, Products Considered 'Transferred' to Another Party...

The NGFA has learned that the Food and Drug Administration (FDA) on May 24 is scheduled to publish an updated version of its long-awaited guidance to the industry on its electronic portal that facilities are to use to report serious adulteration incidents involving food (including grain and grain products) and feed that pose a risk of causing serious adverse health consequences or death to humans or animals.

The electronic portal – known as the "Reportable Food Registry" – was mandated by Congress under the FDA Amendments Act of 2007 and has been operational since Sept. 8, 2009. The law applies to all U.S. and foreign facilities registered with FDA under the Bioterrorism Prevention Act of 2002, including grain elevators; feed, feed ingredient and pet food manufacturers; grain processors and millers; and exporters. Such facilities are to report to FDA within 24 hours after determining that the use of, or exposure to, an adulterated FDA-regulated product that has left their control would present a "reasonable probability" of causing "serious adverse health consequences or death" to humans or animals. Importantly, it is the facility (company) that makes this determination based upon evidence of the extent of the adulteration and the intended use of the commodity or product. Further, this adulteration threshold equates closely with FDA's current Class I recall criteria, which the agency defines as a "serious emergency situation involving recall of a product that may have an immediate or long-range adverse effect on the life or health of animals or humans.

See the ***NGFA Newsletter*** editions published Sept. 8, 2009 (page 1) and Dec. 17, 2009 (page 7) for complete information on the Reportable Food Registry and the initial guidance document issued by FDA Sept. 8.

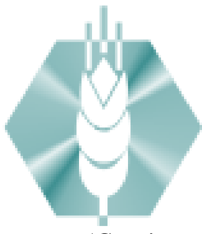
"Transfer" Issue Opened for Public Comment: Importantly, the NGFA also has learned that simultaneously with the May 24 issuance of the revised guidance document, FDA will issue a ***Federal Register*** notice requesting public comments on one of the major unresolved issues pertaining to when a commodity or product is reportable by a facility. That involves the definition of when a product is considered to be "transferred" to another party.

FDA officials have told the NGFA that their dilemma is that the meaning of the term "transfer" in the Bioterrorism Prevention Act's differs from common business practices of when such a transfer occurs, such as when the commodity is physically unloaded and received by the facility or when title (ownership) transfers. For instance, FDA has been unable to resolve yet whether a country elevator or feed mill should consider reporting the delivery of a load of corn that greatly exceeds FDA's permissible aflatoxin action levels for any species, even if the facility rejects the load and never takes delivery of or stores the corn – simply because the conveyance was on the facility's property. Another concern has been when commodities or products transported on common carriers (non-company-owned conveyances) are considered to have been transferred, as well as the use by food companies of independent warehouses for storing ingredients, commodities or products.

It is expected that a 60- to 90-day comment period will be provided on the "transfer" issue. The NGFA, which has submitted extensive comments previously to FDA on the operation of the Reportable Food Registry, will be preparing comments urging the agency to interpret "transfer" in a way that is consistent with normal business practices and the NGFA Trade Rules.

FDA to Temporarily Shut Down Reportable Food Registry May 21-24: In a related development, FDA announced today that the Reportable Food Registry electronic portal will be unavailable temporarily – from 4:30 p.m. on Friday, May 21 until Monday morning, May 24 – as the portal is transitioned to become a part of the U.S. Department of Health and Human Services' new Safety Reporting Portal.

FDA advises that during this interim period, any incidents deemed to meet the reporting threshold should be submitted to the local FDA District Office serving the affected facility. Members receiving the ***NGFA Newsletter*** electronically may click here to access a list of FDA District Offices and their contact information, which are found on pages 433-449.



Forum

by Kendell W. Keith
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(Continued from page 2)

decisions being dictated from the East and West Coasts. Or from Texas, Oklahoma, Mississippi, North Dakota or anyplace for that matter. But to make a change in the process, you/we have to vote. You/we have to talk to that congressman or senator.

I'm not a fatalist, but there are legitimate reasons to think this country is in trouble. As the United States has protected the rest of the free-world defensively and economically in many ways – almost unilaterally, for decades – there is a tendency from even some allies to throw sand in our face and act as if the United States never is doing enough.

By the way, my experience suggests that it's not always who you support politically, but whether you are actually in the ring that matters. The first really active year with our Grain and Feed PAC, we "maxed" out with a $2,000 contribution to Iowa Republican Rep. Tom Tauke, who in 1990 ran a spirited race against Sen. Tom Harkin. Harkin won the race, of course, but our relationship with Harkin's office after that race was never better.

Voting counts, even if you happen to bet the "wrong" way.

On Capitol Hill

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Senate Approves Financial Regulatory Reform Bill

The Senate tonight (May 20) voted 59-39 to approve its version of financial regulatory reform legislation (S. 3217), setting up a conference with the House to resolve several major differences with the House-passed version.

The Senate earlier approved the so-called "cloture motion" by a 60 to 40 vote, the minimum required for passage. The chamber had failed Wednesday to end debate on the measure. On final passage, four Republicans joined Democrats in support of the bill. Democratic Sens. Maria Cantwell of Washington and Russ Feingold of Wisconsin opposed the measure, while Republican Sens. Scott Brown of Massachusetts, Susan Collins and Olympia Snowe, both of Maine, and Charles Grassley of Iowa supported the bill. Sens. Arlen Specter, D-Pa., and Robert Byrd, D-W. Va., were absent and did not vote. Democratic lawmakers have vowed to send the bill to the president's desk for signature before July 4.

The cloture vote limited further debate to no more than 30 hours. During that time span, the Senate failed to consider an amendment sponsored by Sens. Jeff Merkley, D-Ore., and Carl Levin, D-Mich., that would ban banks from proprietary trading, a restriction commonly referred to as the "Volcker Rule" for its primary proponent – former Federal Reserve Chairman Paul Volcker.

Key Amendments: One of the most contentious provisions addressed during two weeks of floor debate is one championed by Senate Agriculture Committee Chairman Blanche Lincoln, D-Ark., that would require banks to place their derivatives businesses into separately capitalized entities, with such transactions cleared on public exchanges. On May 12, the Senate rejected by a 39-59 vote an amendment offered by Sen. Saxby Chambliss, R-Ga., that would have eliminated Lincoln's exchange-clearing requirement for derivatives, and instead would have authorized the Federal Reserve, Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) to determine the types of derivatives transactions required to be exchange-cleared. But Lincoln's language – previously approved by the Senate Agriculture Committee – still is opposed strongly by the Obama administration, Federal Reserve Board Chairman Ben Bernanke and former Fed Chairman and current Obama economic adviser Volcker, as well as several Democratic and most Republican senators, and is likely to be a major focus during the upcoming House-Senate conference committee.

In addition, on May 18, the Senate approved an amendment offered by Sen. Jeff Bingaman, D-N.M., after it was significantly modified to preserve the CFTC's regulatory authority over certain exchange-traded instruments. As initially introduced, Bingaman's amendment potentially would have eroded a portion of the CFTC's authority over exchange-traded products. His initial language was intended to clarify authority of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act and the Natural Gas Act relative to certain agreements entered into pursuant to tariff or rate schedules established by FERC. But concerns were raised that the amendment could impinge on the regulatory authority of the CFTC as contained in the Commodity Exchange Act.

The NGFA joined with a coalition of commodity exchanges, associations and farm groups in conveying concerns to the Senate Agriculture Committee and other senators about the Bingaman amendment. Committee Chair Blanche Lincoln, D-Ark., and ranking member Saxby Chambliss, R-Ga., developed an alternative amendment reinforcing FERC's and CFTC's historical regulatory responsibilities, but stressing that it was the CFTC that has exclusive jurisdiction over U.S. futures markets.

(Continued on page 4)

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(Continued from page 3)

The Lincoln/Chambliss alternative also contained a provision that would have allowed the CFTC to exempt certain transactions traditionally overseen by FERC from CFTC regulatory oversight in favor of FERC when such exemptions were found by the CFTC to be in the public interest – which CFTC said it would do.

Ultimately, Bingaman agreed on the Senate floor to modify his original amendment to include a clause taken from the Lincoln/Chambliss alternative. The modified version, then agreed to by the full Senate by voice vote, clarifies that the CFTC maintains exclusive authority "…with respect to the trading, execution or clearing of any agreement, contract or transaction on or subject to the rules of a registered entity, including a designated contract market, derivatives clearing organization, or swaps execution facility." The approved amendment also includes exemption authority as outlined previously, reinforcing the CFTC's primacy as the regulator of futures markets.

A similar, but not identical, provision is contained in financial reform legislation approved by the House late last year. The NGFA will remain engaged in the discussion to defend the principle of the CFTC serving as the exclusive regulator of U.S. futures markets.

Other Amendments Adopted: In action on other amendments to the 1,500-plus-page bill, the Senate thus far has:

- Rejected, by a 43-56 vote, a proposal by Sen. John McCain, R-Ariz., that would have imposed new capital requirements and underwriting standards on Fannie Mae and Freddie Mac, required their expenditures to be brought under the federal budget; and shut the two agencies down in 10 years. The two entities currently are seeking another $18 billion from the U.S. treasury to compensate for bad mortgage loans. Instead, the Senate adopted an amendment by Dodd that would require the Treasury Department to provide recommendations to Congress by Jan. 31, 2011 on how to reform the housing finance system, as well as on the future of the two agencies.
- Rejected, by a 47-46 margin (60 votes required for passage), an amendment by Sen. Michael Crapo, R-Idaho, that would have required financial losses incurred by Fannie Mae and Freddie Mac to be considered as part of the federal budget, thereby requiring offsetting spending cuts or tax increases.
- Approved, by a 96-0 vote, an amendment by Sen. Bernard Sanders, I-Vt., that would require the Federal Reserve to identify borrowers to which it lends, and require the General Accountability Office – the investigatory arm of Congress – to conduct a one-time, comprehensive review of the Fed's activities (excluding its monetary policy decisions).
- Approved, by a voice vote, an amendment by Sen. Michael Bennet, D-Colo., that would bar funds from the Troubled Asset Relief Fund from being directed to non-bank entities.
- Approved, by a 64-33 margin, an amendment by Sen. Richard Durbin, D-Ill., requiring the Federal Reserve to issue regulations limiting fees credit card companies can charge retailers to process transactions, requiring that such fees be "reasonable and proportional" to the costs of processing the transaction. But it rejected, by a 35-60 vote, an amendment sponsored by Sen. Sheldon Whitehouse, D-R.I., that would have allowed states to cap credit card interest rates.
- Adopted a pair of amendments intended to address conflicts of interest in credit-rating agencies for financial instruments.

NGFA Urges Senate to Take 'Reasoned Approach' to Financial Regulatory Reform Bill: The NGFA on May 12 submitted a statement to the Senate urging that it take a "reasoned approach" during floor consideration of its version of financial regulatory reform legislation (S. 3217). The NGFA's statement urged that the Senate focus its efforts on those financial products and behaviors that led to the 2009 financial crisis and not undermine the ability of financial institutions to provide necessary financing to U.S. businesses. The NGFA's statement urged the Senate to "take great care" when considering statutory changes that could increase business costs, such as through increased capital and margining requirements imposed upon "legitimate end-users" who use risk-management products to hedge business risk. Specifically, the NGFA urged the Senate to retain a provision that would exempt commercial end-users from the requirement to have derivatives (swaps) traded or cleared on exchanges.

The NGFA supported the Senate bill's goal of increasing transparency and reporting of trades involving derivative financial instruments, saying that fostering a better understanding of the nature of participants involved in such trading would benefit market participants and the overall stability of U.S. futures and financial markets. But it cautioned that achieving exchange- trading and clearing of over-the-counter derivatives will be "a daunting task," dependent upon the extent to which such instruments can be standardized and the willingness of exchange-based clearing organizations to assume such market risks. "Legislation should not simply shift risk from largely unregulated markets to clearing organizations that could, in turn, be put at risk in a future financial crisis," warned NGFA President Kendell W. Keith.

In addition, the NGFA's statement reiterated the importance of well-functioning agricultural commodity futures markets in providing critical risk-management tools for commercial grain hedgers and agricultural producers.

by Randall C. Gordon
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USDA to Issue Revamped UGRSA Contract for Warehouse Operators

The NGFA has learned that the U.S. Department of Agriculture's Farm Service Agency (FSA) intends in the very near future to replace the current Uniform Grain and Rice Storage Agreement (UGRSA) contract with a dramatically scaled-back version that would have only limited application in the future.

The NGFA's understanding is that the new UGRSA document will consist of only two pages and contain only two major sections. For grain stored in federal- or state-licensed warehouses, producers now will be able to obtain warehouse-stored marketing assistance loans without the need for the warehouse operator to obtain a UGRSA contract. Importantly, existing UGRSA codes for all warehouses currently listed with FSA and the Commodity Credit Corporation (CCC) will be retained. For warehouses operating in <u>states without a warehouse-licensing program</u>, the revised UGRSA will continue to be required by non-federally licensed warehouse operators who offer warehouse-stored marketing assistance loans to producer-customers. In addition, non-federally licensed warehouse operators will be required to obtain the revised UGRSA before being eligible to accept delivery of <u>CCC-owned</u> grain.

The other new UGRSA contract provision would address the requirement under the farm law that non-federally licensed warehouses (including state-licensed facilities) have a UGRSA contract before being eligible to make quality-loss determinations under the federal crop insurance program, unless such warehouses offer official weights and grades under USDA's Grain Inspection, Packers and Stockyards Administration.

Specifically, the new UGRSA contract is expected to consist of the following two sections:

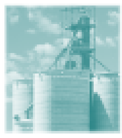
- One section is expected to address storage and handling rates applicable to warehouse-stored CCC-owned commodities for which CCC transfers title in-store. The provision, like the current UGRSA, is expected to state that if CCC transfers title in-store to a third-party buyer, the UGRSA warehouse operator's schedule of rates with CCC will continue to apply for 60 calendar days or until the date the grain is loaded out, whichever occurs first. It also is expected this section will retain the current UGRSA contract provision that the UGRSA warehouse operator's storage and handling rates will continue to apply until load-out if a third-party buyer notifies the storing warehouse in writing of its desire to load out the commodity for immediate shipment within 30 days after the date CCC transfers title.
- The second section is expected to address the UGRSA warehouse operator's obligations for determining quantity and quality of deposited grain. While geared to the farm law's requirement concerning quality-loss adjustment payments for producers, this section is expected to mirror the current contract's requirements that warehouse operators issue warehouse receipts to producers upon request to enable producers to obtain marketing assistance loans, as well as the procedures to be used by warehouse operators to determine the kind, class, grade, quantity and quality of deposited grain.

But importantly, gone under the new UGRSA contract would be provisions in the current version that: 1) stipulate financial standards (e.g., net worth requirements, bonding and letters-of-credit); 2) financial recordkeeping and insurance requirements; 3) obligations for terminal and country warehouses, in response to CCC loading orders, to determine quantity and quality of grain, loadout and delivery requirements; 4) other warehouse practices; and 5) other requirements that have been appendices to the UGRSA, such as the requirement under the UGRSA that facilities implement drug-free workplace policies, as well as conduct vulnerability assessments and implement facility security plans. However, any such requirements that apply under federal or state licensing authorities – and which apply to warehouses licensed thereunder – would <u>**not**</u> be altered by the new UGRSA policy change.

In some states that do not offer state grain or rice licensing programs, such as California, warehouses no longer will be subject to the UGRSA examinations, financial standards, or other minimum warehousing standards currently required under the existing contract.

USDA officials indicate that a letter will be sent in the "very near future" to all warehouses currently having a UGRSA contract with CCC explaining the action and including a revised agreement for review and signature by the warehouse operator. No fees will be assessed for warehouses entering into the new UGRSA. The letter announcing the new policy will amplify the position taken by USDA on April 7, 2009, when the agency issued a ***Federal Register*** notice stating that it generally no longer would require federal- or state-licensed warehouse operators to obtain a UGRSA contract. The notice was part of USDA's final rule implementing the marketing assistance loan and loan deficiency payment programs for the 2009 crop year.

The NGFA's Country Elevator Committee plans to address this issue with USDA officials during its upcoming June 8-9 meeting in Washington.



by Randall C. Gordon
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USDA Implements Farm Law Provision Allowing Retiring Farmers to Transition CRP Land to Beginning, Socially Disadvantaged Farmers

The U.S. Department of Agriculture on May 14 issued a ***Federal Register*** notice implementing a provision of the 2008 farm law that requires it to offer a program that provides financial incentives to retiring producers to sell or enter into long-term leases to beginning and socially disadvantaged farmers to transfer to "sustainable" crop production or grazing some or all of their land currently enrolled in the Conservation Reserve Program (CRP).

Under the so-called "transition incentives program," retired or retiring owners or operators of land enrolled in the CRP are eligible to receive two years of additional CRP rental payments as an incentive to enter into sales or non-revocable leases – lease arrangements are required to be for a minimum of five years – all or a portion of such CRP land to beginning or socially disadvantaged producers, excluding family members. Retired or retiring owners and operators are defined as CRP participants who have stopped farming or expect to stop farming within five years of the CRP contract modification, and who have at least a 50 percent or greater control of the CRP land.

The following criteria apply to "sustainable" plant and animal production practices, which are to be incorporated into a conservation plan by the beginning or socially disadvantaged farmer: 1) Meet human needs for food and fiber; 2) enhance the environment and the natural resource base; 3) efficiently use nonrenewable resources; and 4) sustain the economic viability of the farming or ranching operation.

Meanwhile, beginning farmers are defined as those who have operated a farm or ranch for 10 years or less and have a substantial involvement in its operation. If the beginning farmer is organized as a corporation, partnership or other entity, at least 50 percent of the members or stockholders are required to meet the two previously cited conditions. Socially disadvantaged farmers are legal citizens in the following ethnic groups: American Indians or Alaskan natives; Asians/Asian Americans, Blacks/African-Americans; Hispanics; and native Hawaiians or other Pacific Islanders.

In the case of unexpired CRP contracts, the retired or retiring land owners are required to allow the beginning or socially disadvantaged farmer to begin installing conservation practices consistent with the conservation plan required for the land during the last year of the CRP contract, or begin the organic certification process during that last year. This includes such practices as preparing contour buffer strips; installing filter strips and/or terraces; installing fencing, water wells, pipelines and livestock watering facilities; and other potential improvements for reenrolling a portion of the CRP acres under the CRP continuous enrollment program. Such land improvements do **not** include planting a commodity crop, unless it is to be used as a temporary cover for conservation practices.

Congress authorized up to $25 million for the program. But USDA said it anticipates that expenditures are expected to range from $5.1 million to $17.1 million for fiscal years 2010-12, and likely will be toward the lower end of that range because of the limited amount of eligible CRP farmland likely to be offered and the location of beginning and socially disadvantaged farmers vis-à-vis the location of the available CRP land.

EPA Issues Final Rule Implementing Phased-In Greenhouse Gas Thresholds

The U.S. Environmental Protection Agency (EPA) on May 13 announced its final regulations phasing in Clean Air Act permitting thresholds for greenhouse gas emissions, starting with facilities that the agency said are responsible for 70 percent of such emissions from stationary sources, such as power plants, oil refineries and cement factories.

Importantly, because of the threshold levels incorporated into EPA's so-called "tailoring rule," grain elevators and feed mills are unlikely to be subjected to the greenhouse gas permitting until April 30, 2016 or later – if ever – when the agency is scheduled to further review the issue. Greenhouse gases covered under EPA's final regulations are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6).

However, some grain processing plants and ethanol manufacturing facilities likely will be subjected to the regulations starting on Jan. 2, 2011 – when, under the final rule, Clean Air Act permitting requirements for greenhouse gases will kick in for facilities already obtaining such permits for emissions of other pollutants. At that time, such facilities will be required to include greenhouse gases in their permits if they increase those emissions by at least 75,000 tons per year on a CO_2-equivalent basis.

Under the final rule, EPA said that Clean Air Act permitting requirements will expand on July 1, 2011 to cover all new facilities

(Continued on page 7)

Country/Terminal Corner

by Randall C. Gordon
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(Continued from page 6)

with greenhouse gas emissions of at least 100,000 tons per year on a CO_2-equivalent basis, even if they do not exceed the permitting threshold for any other pollutant. Also affected will be existing facilities that are modified in a way that increases their greenhouse gas emissions by at least 75,000 tons per year on a CO_2-equivalent basis. The permits will require that such covered facilities demonstrate the use of best-available control technologies to minimize greenhouse gas emission increases when facilities are constructed or significantly modified. EPA estimated that as a result of the July 2011 expansion, approximately 900 additional permitting actions covering new sources and modifications to existing sources would be subjected to review annually. In addition, it said, 550 sources would need to obtain Clean Air Act operating permits for the first time because of their greenhouse gas emissions.

In addition, EPA said that in 2011, it intends to undertake another rulemaking – to conclude no later than July 1, 2012 – that will encompass another step in phasing in greenhouse gas permitting requirements, potentially including language permanently exempting from permitting "certain smaller sources" that emit less than 50,000 tons of greenhouse gases annually on a CO_2-equivalent basis. In this rulemaking, EPA said it also plans to "explore a range of opportunities" for streamlining future greenhouse gas permitting to "significantly reduce permitting burdens." EPA reiterated it would not require permits for smaller sources in this phase of its rulemaking "or any other action" until at least April 30, 2016. Even then, the agency said, permitting requirements would not apply until after the agency completes a study in April 2015 on greenhouse gas permitting burdens on smaller facilities.

Members receiving the ***NGFA Newsletter*** electronically may click here to access a six-page EPA fact sheet on the new greenhouse gas regulations. Other EPA documents on this final rule, including the 515-page regulation, may be obtained by clicking here.

The latest EPA regulation follows the agency's announcement in April setting the first national greenhouse gas tailpipe standards for passenger cars and light trucks, which take effect in January 2011. EPA in April 2009 declared that greenhouse gases posed a danger to public health and welfare. The agency's "endangerment finding" was in response to a 2007 Supreme Court decision that found greenhouse gases are air pollutants covered by the Clean Air Act, and directed the agency to determine if they posed a danger to human health or the environment. The Obama administration subsequently did just that, when it acted in 2009 to reverse a Bush administration policy.

Feed Facts

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Elanco to Provide Updated Label for Rumensin® 90

Elanco announced on May 10 that it soon will provide an updated label for its Rumensin 90 Type A medicated article to clarify the product's monensin concentration and package weight.

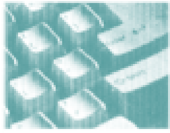
Within the announcement, Elanco stated that the new product label will precisely list the concentration of Rumensin 90 as 90.7 grams of monensin per pound, and provide updated directions for use that reflect that precise concentration. In contrast, the original Rumensin 90 label lists the product's concentration at 90 grams of monensin per pound and provides usage directions based upon that concentration.

The Elanco announcement also noted that the updated label for Rumensin 90 will indicate a package weight of 25 kilograms (kg) or 55.12 pounds. The original label for the product lists the package weight as 25 kg or 55 pounds.

Elanco stated that the new label has been submitted to the Food and Drug Administration for review, and new packaging for Rumensin 90 will be in the marketplace within six months. In the meantime, Elanco noted that the new Rumensin 90 label is available on its website at www.elanco.us.

Importantly, feed manufacturers using Rumensin 90 may wish to consider incorporating the precise concentration level and package weight within their formulation and inventory systems at this time to more accurately mix and handle the product.

In addition, feed manufacturers should be aware that the label for Rumensin 90 states that the product is to be stored at a controlled room temperature of 25 degrees Celsius (77 degrees Fahrenheit), with excursions permitted to 37 degrees Celsius (98.6 degrees Fahrenheit).



Newsletter

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Jury Awards $9.2 Million in Damages for Contract Claims Arising from NGFA Arbitration Awards

The U.S. District Court for the Central District of Illinois on April 26 entered a jury's verdict awarding $9.2 million to The Andersons, Maumee, Ohio, consisting primarily of damages obtained through three separate NGFA arbitration proceedings.

The federal judge presiding over the suit [*The Andersons, Inc. v. Jerry Walker, et al.* (Case No. 08-2083)] described the extensive factual and procedural background of the case in a pretrial opinion issued in March. He detailed how the case arose out of a series of disputes concerning cash-forward grain contracts between The Andersons and Fall Grain for the 2006, 2007 and 2008 crop years. As outlined by the judge, the disputes involved:

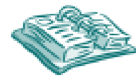
- Corn contracts for the 2007 crop year that resulted in a default judgment award of more than $3.6 million issued by the NGFA after Fall Grain declined to participate in an arbitration proceeding initiated by The Andersons. The court confirmed that award in February 2009.
- Wheat contracts for the 2007 crop year that resulted in an award of more than $1.7 million by an NGFA arbitration committee decision. The court compelled the arbitration of these claims in August 2008, and confirmed the committee's decision in its March 2010 opinion.
- Corn contracts for the 2008 crop year that resulted in a default judgment award of more than $3.5 million issued by the NGFA after Fall Grain declined to participate in arbitration proceedings. The court confirmed that award in August 2009.

In the course of the court litigation involving these cases, the judge rejected both arguments that the NGFA lacked jurisdiction to resolve the disputes and requests that the court enjoin the arbitration proceedings and refuse to enforce the default arbitration awards entered.

Of most significance to the issues presented to the jury, during summer 2007, after Fall Grain advised that its supply of grain was insufficient to meet contractual obligations for the 2006 crop year, the parties met and each of the four named individual defendants signed a personal guarantee whereby they agreed to "unconditionally guarantee payment of current and future obligations owed" to the plaintiff. The Andersons ultimately sought a judgment against the individual defendants based upon the executed guarantees. The judge decided that this aspect of the claims was for a jury to decide. The defendants argued that the guarantees were fraudulently induced, and thus void and unenforceable. They counter-claimed for damages, alleging fraud and that the plaintiff breached the contract by refusing to roll them forward in lieu of cancelling them.

After a six-day trial, the jury completed its deliberations on April 19, reaching separate findings that The Andersons met its burden to prove breach of contract claims against each of the four named individual defendants, and that each defendant failed to prove the affirmative defense of fraud.

By stipulation between the parties, the $9.2 million amount in damages had been assessed in advance – consisting mostly of the NGFA arbitration awards, but also including interest, costs and additional monies.



Calendar

June 8-9, 2010: NGFA Country Elevator Committee
L'Enfant Plaza Hotel, Washington, D.C.

July 14, 2010: NGFA Grain Grades and Weights Committee
Kansas City Airport Hilton, Kansas City, Mo.

July 28-29, 2010: NGFA/Grain Journal Safety, Health and Environmental Quality Seminar
Hilton Hotel, Omaha, Neb.

July 29, 2010: NGFA Safety, Health and Environmental Quality Committee
Hilton Hotel, Omaha, Neb.

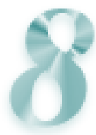
Sept. 7-9, 2010: NGFA Board of Directors
Chicago Marriott Magnificent Mile, Chicago, Ill.

Sept. 22, 2010: NGFA Feed Legislative and Regulatory Affairs Committee; Feed Manufacturing and Technology Committee; Feed and Animal Agriculture Strategic Issues Committee
Chicago Marriott Magnificent Mile, Chicago, Ill.

Sept. 22-24, 2010: NGFA-PFI Feed/Pet Food Joint Industries Conference
Chicago Marriott Magnificent Mile, Chicago, Ill.

Dec. 5-7, 2010: NGFA Country Elevator Conference & Trade Show
Marriott Indianapolis, Indianapolis, Ind.

March 13-15, 2010: 115th Annual Convention
Hotel Del Coronado, San Diego, Calif.



by Jess McCluer
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NGFA, Others Challenge EPA Interpretation of Temporary Storage for Air Permitting

The NGFA and five other grain-processing organizations submitted a formal petition to the U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson on May 14 requesting that the agency reconsider and rescind a 2007 notice relating to the applicability of the new source performance standard (NSPS) for grain facilities to temporary grain storage facilities.

On Nov. 21, 2007, EPA's Office of Enforcement and Compliance Assistance (OECA) issued an opinion that the NSPS for grain elevators *[40 CFR 60 Subpart DD]* encompasses certain types of temporary storage facilities, as well as traditional grain elevator equipment. Were such a policy to stand, it would expand greatly the reach of the NSPS. The types of temporary storage potentially affected are structures that have a concrete/asphalt floor, aeration and a tarp cover, and also have a permanent aeration tower and a conveyer system to move the grain to the temporary storage system. But EPA's interpretation was based upon a dictionary definition of the term "bin."

Following the NGFA's formal challenge to the OECA letter *(see **NGFA Newsletter**, Dec. 6, 2007)*, EPA initiated a review of the NSPS for grain elevators through a formal rulemaking process to determine if any changes need to be made to the standard. The most recent previous review was conducted in 1984. After the review began, the NGFA joined forces in a "shared-cost," joint arrangement with the National Oilseed Processors Association (NOPA), North American Millers Association (NAMA), Corn Refiners Association (CRA), National Council of Farmer Cooperatives (NCFC) and the USA Rice Federation to interact with EPA on the issue. The NGFA and NOPA are co-chairing the effort.

The EPA currently is analyzing the data compiled through the Clean Air Act's required Section 114 questionnaire that was completed by nine companies and industry-supplied data. Once the data is compiled, EPA will begin developing a proposed rule, if it determines changes to Subpart DD need to be considered. If warranted, the agency has indicated its goal is to propose regulations by September, if possible, depending upon other agency priorities like its greenhouse gas standards. If and when issued, it is estimated that it will take a year for the rulemaking process to be completed.

The 16-page industry petition to EPA contains extensive reasons, including the legal basis, as to why EPA should rescind its 2007 notice on temporary storage. The letter emphasizes that temporary storage units are critical in managing costs, maintaining grain quality and preventing adverse environmental impacts on grain quality. The associations also argue that that burdensome regulation of temporary storage units could lead to increased use of emergency ground piles. The NGFA and other associations urge in the petition that EPA consider the matter as part of its NSPS rulemaking process to remove the risk of enforcement for temporary storage structures added to grain elevators prior to completion of the agency's NSPS rulemaking.

For more information, contact NGFA Director of Regulatory Affairs Jess McCluer at 202-289-0873, extension 23 or at jmccluer@ngfa.org.

OSHA to Propose Changes to Injury-and-Illness Data-Collection Process

The Occupational Safety and Health Administration (OSHA) has announced it will conduct two informal stakeholder meetings on May 25 in Washington, D.C., and June 3 in Chicago, Ill., to collect information prior to preparing a proposed regulation on ways to modify its current injury-and-illness recordkeeping regulations and develop a modernized recordkeeping system.

OSHA said its and the Bureau of Labor Statistics' (BLS) data-collection systems provide a vast amount of information, but said both have "limitations" that affect the agency's ability to make policy decisions based upon available data. OSHA specifically cited its OSHA Data Initiative (ODI), which only provides summary data for each establishment and does not enable the agency to identify specific types of hazards or problems in a particular establishment. Further, OSHA maintained there currently is a two- to three-year lag between the occurrence of a workplace injury or illness and the availability of those data for OSHA's use. By contrast, OSHA said BLS data are available in the year following the calendar year that the injury or illness occurred, and provides a wide range of estimates by industry, establishment size and details of the injuries and illnesses. But while BLS data may identify the industries with the highest specific incident rate, OSHA said, they do not identify the specific establishments where they occur.

The stakeholder meetings will focus on the scope, uses and methods of the data collected, as well as the pote economic impacts of the rule.

by Todd Kemp
Director of Marketing/Treasurer

Registration Now Open for New Fall Feed Conference!

…First-Time Collaboration Between NGFA and Pet Food Institute…

The NGFA and its strategic partner, Pet Food Institute, are hosting a unique, new conference on Sept. 22-24 at the Marriott Chicago Magnificent Mile.

Targeted at managers and key employees in feed manufacturing, feed ingredient and pet food manufacturing and supplier sectors, the 1½-day conference will be targeted and business-focused on top-line policy, regulatory and operations issues.

The conference essentially replaces the Feed Industry Conference component of the NGFA's annual December conference, which will continue and retain its emphasis on business issues important to country elevators. Topics and speakers for the new September conference are being selected to address the most important business trends, food and feed safety developments, and operational challenges facing the animal feed and pet food industries.

The conference will convene on the evening of Sept. 22 with a welcome reception for all registrants. The conference program will occur all day on Sept. 23, with an evening reception, and conclude with by noon on Sept. 24. A trade show featuring suppliers of goods and services to the feed and pet food sectors will operate side-by-side with the conference. Don't miss this outstanding premier event!

To Register: **Click here** for online registration and hotel information. Specific program details will be available soon. Don't miss out on the early-bird rates!

Exhibitors: **Only** 30 exhibit spaces are available! **Click here** for more information and to reserve your space. Booth locations will be allocated on a first-come, first-served basis. Sponsorships also are available to exhibitors to heighten your conference profile!

Membership Promotion

…Last Call for Walla Walla Sweet Onions!…

Only 11 more days to sign up a new member and receive your 20-pound box of Walla Walla sweet onions, as reported in previous ***NGFA Newsletters***. Get those prospects to FAX or e-mail their applications now!

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