



House Committee Nears Passage of Climate Bill

As the *NGFA Newsletter* went to press, the House Energy and Commerce Committee was nearing completion of a four-day marathon that is expected to result in its passage of the contentious energy and climate-change legislation (H.R. 2454) that would cap the emissions of greenhouse gases and introduce a trading system for carbon allowances.

Negotiations between Committee Chairman Henry Waxman, D-Calif., and Democratic moderates on the committee resulted in sufficient support for the massive, 932-page bill (H.R. 2454), which could make it easier for utilities, coal companies and other emitters of greenhouse gases to earn carbon offsets through planting of trees and biomass on U.S. farmland.

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NGFA Conducts Ag Transportation Symposium



The NGFA on May 12-13 conducted a major Agricultural Transportation Symposium in Kansas City, Mo., attracting nearly 150 transportation leaders who focused on major developments affecting rail, barge and vessel movement of grain, feed and grain products. Among the featured speakers was federal Surface Transportation Board Chairman Frank Mulvey (center), shown here with NGFA President Kendell Keith (left) and NGFA Rail Shipper-Receiver Committee Chairman Dan Mack, vice president, transportation for CHS Inc., St. Paul, Minn.

Waxman to Issue Discussion Draft of Food/Feed Safety Bill

The NGFA has learned that House Energy and Commerce Committee Chairman Henry A. Waxman, D-Calif., is expected in early June to issue a discussion draft of a major food/feed safety bill that will serve as the vehicle for action in the House this year.

The NGFA earlier this year joined other agricultural producer and agribusiness groups in a meeting with Waxman's staff to discuss concerns over a bill (H.R. 759) introduced by Rep. John Dingell, D-Mich., that is expected to serve as the starting point for Waxman's development of a bill. [See *NGFA Newsletter*, April 23, 2009.] Like Dingell's bill, Waxman's version is expected to require all facilities registered with the Food and Drug Administration (FDA) under the Bioterrorism Act of 2002 to conduct a hazard analysis of their operations, and develop and implement written food/feed safety plans that control to an acceptable level hazards that could "reasonably likely occur" given the types of agricultural commodities or food/feed products being stored, handled, manufactured or distributed. **Importantly, this would encompass all U.S. grain elevators, feed mills, grain processing plants and export facilities, as well as other types of food and commercial agribusiness facilities registered**

under the Bioterrorism Act. Waxman's bill also is expected to require such facilities to develop procedures to "ensure a safe and secure supply chain" of ingredients or components used in making food or feed manufactured, processed, packed, stored or transported by the facility.

Further, Waxman's discussion draft bill is expected to propose significantly expanding the product-tracing requirements of the Bioterrorism Act – which currently requires registered facilities to maintain records identifying the immediate previous source and next subsequent recipient, as well as the transporter of such products. Waxman is contemplating requiring that FDA issue regulations for domestic and imported agricultural products (including grains, processed commodities, food and feed) that would require facilities to: 1) maintain a complete history of the origin and previous distribution history of the product; 2) establish unique identification numbers for each facility; 3) establish lot numbers for all products, if FDA chooses to so require; and 4) establish a standardized format and interoperable system to enable such information to be linked to the subsequent distribution history of the product.

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During the four-day markup, the bill faced hundreds of amendments, mostly from Republicans. Several other, less-controversial amendments were approved by voice vote, while others were rejected narrowly after significant, lengthy debate. Earlier today, Waxman and the ranking Republican on the committee, Rep. Joe Barton of Texas, agreed to limit debate on each new amendment to 10 minutes after a second marathon session that extended past midnight. Earlier in the week, the committee had spent most of a morning debating a relatively minor change related to nuclear power, while spending much of an evening discussing a proposal to auction off all carbon allowances – an amendment that eventually was defeated by a 52-4 vote.

But passage by the House Energy and Commerce Committee will be just the first step – albeit an important one – in achieving House passage in what is expected to be a lengthy process that ultimately may include review of the bill by up to eight additional committees. Those include the House Committees on Agriculture, Ways and Means, Natural Resources and Foreign Affairs. Earlier today, House Agriculture Committee Chairman Collin Peterson, D-Minn., said that a group of 40 to 45 Democratic congressmen were prepared to vote against the climate-change bill unless their concerns over new Environmental Protection Agency regulations of ethanol and granting carbon credits for agriculture were addressed.

Amendments: Republicans, largely shut out of negotiations in drafting the bill, sought to use the committee amendment process to influence the outcome and to have their views publicized. Among the defeated Republican amendments were ones that would have expanded the definition of biomass harvested on federal lands that would count as renewable energy sources, and that would roll back the bill's carbon-emission-reduction mandates if China and India did not adopt similar measures within a year after the bill's enactment. The international issue, specifically the implications for U.S. competitiveness with China and India, were key Republican themes throughout the debate. During Wednesday's debate, Republicans were able to secure approval of an amendment that would require the EPA administrator to report to Congress annually on climate-change policies in those two countries.

On May 20, the committee rejected an attempt by Republicans to allow states to count energy from new nuclear power plants toward new renewable energy quotas. The amendment, offered by Rep. Cliff Stearns, R-Fla., was rejected 26-30 after nearly two hours of debate. Five committee Democrats voted with Stearns, but were not enough to secure passage.

Waxman finally had to use his authority to close out debate and consideration of further amendments to wrap up consideration before Congress recessed for the Memorial Day holiday.

Carbon Allowances: The House bill would allocate carbon allowances under its cap-and-trade approach in the following manner:

- ▶ 35 percent of allowances would be allocated to the electricity sector, representing 90 percent of current utility emissions.
- ▶ Local electric distribution companies, whose rates are regulated by states, would receive 30 percent of the allowances and would be required to use those credits to protect consumers from electricity price increases.
- ▶ Coal companies and long-term power purchase agreements would receive 5 percent of the total allowances, distributed by a formula recommended by the utility industry.
- ▶ The allowances for the electric and coal sectors would phase out over a five-year period from 2026-30.
- ▶ Natural gas distribution companies, whose rates are regulated by states, would receive 9 percent of the carbon allowances – which also would phase out over a five-year period from 2026-30 – and would be required to use them to protect consumers from natural gas price increases.
- ▶ Starting in 2030, the electric, coal and natural gas industries would be required to purchase carbon allowances from the U.S. government at auction. The bill also proposes to allocate 15 percent of the carbon allowances in 2014 to “energy-intensive, trade-exposed industries” (such as steel and cement) to compensate for increased costs; these allowances would decrease in subsequent years before being phased out after 2025 unless the president determines they still are necessary.
- ▶ Oil refiners would receive 2 percent of allowances starting in 2014 and ending in 2026.
- ▶ 2 percent of the carbon allowances from 2014-17 – and 5 percent starting in 2018 and thereafter – would be given to electric utilities to encourage installation of carbon- capture and sequestration technologies.
- ▶ States also would receive carbon allowances to encourage investments in renewable energy and energy efficiency, as would auto companies to encourage investment in electric vehicles and other “advanced” automobile technology.
- ▶ One percent of allowances would be directed to “Clean Energy Innovation Centers” at research universities and institutions for applied research and development of clean-energy technologies.



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▶ Other carbon allowances would be sold at auction in an effort to finance the bill's cost.

Emission Reduction Targets: Waxman, when introducing the bill, also agreed to reduce the bill's short-term targets for reducing greenhouse gas emissions, changing it from to 17 percent below 2005 levels by 2020 as opposed to the 20 percent reduction initially proposed. Former Committee Chairman John Dingell, D-Mich., and several other committee Democrats support President Obama's suggested reduction of 14 percent, but moved to support the bill with the potential to amend it later on the House floor. In accepting the 17 percent compromise, Waxman refused to budge on his original proposal to require a 42 percent reduction by 2030 and 83 percent by 2050.

In addition, committee Democrats involved in the negotiations agreed to require 15 percent of electricity by 2020 to be derived from renewable sources, such as wind, solar, biomass and geothermal, with another 5 percent improvement coming from energy efficiency. The original bill proposed to require 25 percent of electricity to be derived from renewable sources by 2020. States could petition the U.S. Environmental Protection Agency to go as low as 12 percent from renewable energy to as

high as 8 percent in energy-efficiency improvements.

Next Steps: With the measure being referred to eight other House committees, the House Democratic leadership is expected to meet with the other committee chairmen once Congress returns June 1st following its Memorial Day recess. Given House Agriculture Committee Chairman Peterson's previously noted open hostility toward the bill, that committee likely will be called upon to include its perspectives on the bill before it is considered on the House floor.

Meanwhile, House Ways and Means Committee Chairman Charles Rangel, D-N.Y., has indicated his interest in the bill's provisions concerning auctioning of carbon-emission permits, but has stressed that health-care reform is his top priority. House Natural Resources Committee Chairman Nick Rahall, D-W.Va., has noted his preference to include a provision that would allow new oil and gas production offshore and on federal lands. These additional priorities and interests could result in the House considering the measure on the floor much later in the year, despite the Democratic leadership's desire to approve the measure before Congress adjourns in late July for its August recess.

House Subcommittee Conducts Hearing on Rail Antitrust Legislation

The House Judiciary Committee's Courts and Competition Policy Subcommittee conducted a May 19 hearing on legislation (H.R. 233) that would eliminate rail carriers' antitrust exemption, thereby subjecting them to the same antitrust laws that apply to other transportation modes.

The usual shipper-carrier disagreements over rail legislation were on full display during the hearing, as Union Pacific Railroad General Counsel Michael Hemmer implored the subcommittee to work with the industry and other committees to "craft a coherent, national rail policy that integrates regulation with antitrust jurisprudence." By contrast, Mark Cooper, research director for the Consumer Federation of America, cited a study by that organization that indicates the pricing power of railroads has allowed them to overcharge customers by an estimated \$3 billion annually, and that reforming the industry's antitrust exemption is a much-needed step toward addressing carriers' market power.

Association of American Railroads (AAR) President Edward Hamberger warned that passage of the antitrust bill "could drag us back to pre-regulation days of weak investment and withering rail networks."

The House bill, introduced by Rep. Tammy Baldwin, D-Wis., is similar to a Senate version (S. 146) approved March 5 by the

Senate Judiciary Committee. Like its Senate counterpart, the House measure would eliminate the current antitrust exemption granted to carriers for rail mergers and collective ratemaking, giving the U.S. Justice Department's Antitrust Division authority to review such matters. In addition, the bill would provide greater legal remedies against carriers that engage in activities contrary to antitrust laws. The bill also would empower the Federal Trade Commission to regulate and engage in antitrust enforcement actions concerning collective rate agreements, railroad mergers and acquisitions. The House subcommittee and the full Judiciary Committee are expected to consider the bill in June.

Sen. Herb Kohl, D-Wis., lead sponsor of the Senate rail antitrust bill, has indicated he expects his legislation to be considered on the Senate floor sometime after the congressional Memorial Day recess. Complicating that, however, is the effort by Sen. John Rockefeller, D-W.Va., chairman of the Senate Commerce Committee, to craft a rail competition bill.

It is uncertain whether Congress will have the desire to address two separate – and distinctly different – bills on freight rail regulation. As a result, consideration ultimately may be given to combing the concepts in the two bills if sufficient consensus can be achieved to ensure passage.



USDA Clarifies Legal Stance on Expiration of Lien Notices on Loan Grain

The U.S. Department of Agriculture's (USDA) Office of General Counsel this week issued a statement that attempts to clarify its legal stance concerning the expiration dates of lien notifications issued by the Commodity Credit Corporation (CCC) – using Form CCC-681-1 – on grain pledged as collateral for marketing assistance loans.

The confusion arose because Form CCC-681-1 contains a general statement in the section headlined "Notification of CCC's Security Interest" that states, in relevant part: "CCC's security interest has not lapsed and will not lapse **until the earlier of the date specified in the financing statement executed by the producer or until written notification is given to the buyer by CCC** that such interest has lapsed." [Emphasis added.]

In a May 20 letter to the acting state director of USDA's Iowa Farm Service Agency (FSA) office, USDA's Office of General Counsel stated that the "specific expiration date" appearing on Form CCC-681-1 (found in block 12 of the form) is the date to which the general statement in the lien notice applies. "The intent of this letter is to clarify the policy that **CCC will not be looking to the elevator for payment for any grain delivered after the marketing authorization expires, as shown in Block 12 of the form.**" stated Ruth M. Worthington, a regional attorney with USDA's Office of General Counsel based at USDA's Kansas City Commodity Office. "As a matter of policy and according to the CCC-681-1 form, elevators are not obligated or required to include CCC's name on a grain check for any grain delivered after the expiration date in Block 12 of the form." [Emphasis added.]

USDA/FSA officials told the NGFA that the letter is intended to resolve interpretation questions that had arisen among Iowa elevators concerning the language used in the general statement in the first paragraph of the CCC-681-1 form. They emphasized that while that was the reason the letter was sent to the Iowa FSA office, the policy statement articulated by the USDA general counsel's office **applies nationwide.**

While discussing the matter with the NGFA, USDA/FSA officials also surfaced a related issue: complaints received from producers concerning the practice of some elevators in issuing two-party checks (payable to both the producer and CCC) for delivered grain that exceeds the quantity of loan grain specified in block 4 of the CCC-681-1 form on which CCC has asserted a security interest. USDA/FSA officials stated that two-party checks made payable to the producer and CCC should be issued only for deliveries up to the quantity specified on the CCC-681-1 form, not on quantities delivered by producers that exceed the quantity on which CCC has a lien (security interest). For instance, USDA/FSA said some elevator companies issue two-party checks for all warehouse deliveries made by producers during the crop year, even though that quantity far exceeds the bushels against which CCC has a security interest.

The NGFA's Country Elevator Committee will be discussing these issues further with USDA officials – including possible clarifying modifications to the CCC-681-1 form – during its June 2-3 meeting in Washington.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access the USDA Office of General Counsel's letter.

EPA Extends Comment Period on E15 Waiver Application

The U.S. Environmental Protection Agency (EPA) on May 15 announced a 60-day extension in the comment period – to July 20 – on the petition submitted by Growth Energy and 54 other fuel-ethanol manufacturers urging the agency to permit up to 15 percent ethanol (E15) by volume to be blended into gasoline.

Previously, the comment period was scheduled to expire May 21. The current limit on the amount of ethanol that can be blended into gasoline is 10 percent by volume for conventional (non-flex-fuel) vehicles.

EPA said an extension of the comment period would not delay the Dec. 1 deadline for it to make a decision on the petition. By law, EPA has 270 days after submission of the petition (which occurred March 6) to decide whether to grant, deny or modify the current E10 ceiling.

Under the Clean Air Act, EPA is required to determine that ethanol blends exceeding the currently allowed limit do not affect adversely vehicle emission-control systems, including catalytic converters, that would cause vehicles to violate air-emission standards. When publishing its initial notice announcing receipt of the petition, EPA had stated that "one potential outcome" after reviewing scientific and technical information on the impact of an increase in the ethanol blend rate "may be an indication that a fuel up to E15 could meet the criteria for a waiver for some vehicles and engines, but not for others." EPA also said at that time that it wanted to be "assured that prior to granting a waiver, sufficient testing has been conducted to demonstrate the compatibility of a waiver fuel with engine, fuel and emission-control system components."





Feed Facts

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Waxman's discussion draft bill also is expected to grant FDA the authority to issue mandatory recalls of products that are adulterated or misbranded to an extent that it "presents a reasonable probability" of posing a risk of serious adverse health consequences or death to humans or animals. FDA also would be authorized to issue orders to cease distribution, as well as emergency recall orders.

Several other major provisions apparently still are under discussion and have not been resolved yet. These undecided sections of Waxman's planned discussion draft bill include the following:

- ▶ Whether and to what extent to impose user fees, starting in fiscal year 2010, on domestic facilities registered with FDA under the Bioterrorism Act – which includes grain elevators, feed mills, grain processors, grain exporters and a wide array of other agribusiness facilities – to help fund the agency's food and feed safety activities. However, like Dingell's bill, Waxman's discussion draft is expected to propose a \$10,000 annual fee on importers.
- ▶ The type of risk-based inspection program that FDA would be required to implement under the bill, including the factors to be used in developing an inspection frequency schedule and the reporting obligations to Congress.
- ▶ Whether to incorporate other legislation already introduced in the House and Senate that would phase out within two years the subtherapeutic use in feed of seven important classes of antimicrobial drugs used in food-animal production (penicillin, tetracycline, macrolides, lincosamides, streptogramins, aminoglycosides and sulfonamides).

Once the discussion draft bill is issued and reviewed, it is expected that Waxman and potential co-sponsors will provide a short time window for review and comment, before revising and officially introducing the legislation. Hearings on the bill likely will be scheduled sometime this summer, although the timing is uncertain given the House Energy and Commerce Committee's other major legislative priorities, which include approving energy and climate-change legislation, and overhauling the U.S. health care system.

The Senate also is expected to consider its separate version of a major food/feed safety bill sometime this year

White House Food Safety Working Group Conducts Public Meeting: In a related matter, the NGFA was among about 100 invited participants (about 60 from the private sector)

when the White House Food Safety Working Group conducted its first public meeting – dubbed a "listening session" – on May 13 in Washington. The federal inter-agency working group is co-chaired by Secretary of Health and Human Services (HHS) Kathleen Sebelius and Secretary of Agriculture Tom Vilsack, and is charged with submitting recommendations by July to President Obama on ways to further improve the U.S. food and feed safety system.

During breakout sessions involving the NGFA and other participants that were observed by administration and congressional staff members, the Food Safety Working Group particularly sought input on five key areas of their anticipated report: 1) prevention of food safety incidents; 2) strengthening surveillance and risk analysis; 3) expanded risk-based inspection and enforcement; 4) rapid response to outbreaks and facilitating recovery of affected companies and industries; and 5) efficient targeting of government resources. Top officials from USDA, FDA, the Centers for Disease Control and others participated, as did an eclectic group of consumer, small-farm and organic agriculture advocates. In addition to the NGFA, among the more "mainstream" agricultural and food organizations participating were the Food Marketing Institute, Grocery Manufacturers Association, National Pork Producers Council and National Chicken Council.

The breakout sessions followed presentations from key advocates of food/feed safety legislation in Congress, including Sen. Dick Durbin, D-Ill., lead sponsor of the principal Senate legislation (S. 510) that would require all commercial food and feed facilities, including grain elevators, feed mills and processing plants, to develop written risk-based controls to address commodity or product safety hazards. Durbin called for "real reform" in the current Congress, and urged that Capitol Hill set aside jurisdictional rivalries to establish the most effective food safety system possible. Other congressional food-safety advocates addressing the meeting included Rep. John Dingell, D-Mich., author of a major House food/feed safety bill (H.R. 759), who said he had been promised that the House Energy and Commerce Committee would take up the issue in June after returning from the congressional Memorial Day recess. Dingell, whose bill includes major user fees – including an unspecified amount annually for all U.S. facilities required to register with the Food and Drug Administration (FDA) under the Bioterrorism Act of 2002, and \$10,000 a year for importers – hammered away at what he called the need for substantial increases in resources to reverse "the sorry mess" that exists at FDA, at one point calling the agency "a travesty and a mockery."

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Meanwhile, another principal House food-safety advocate, Rep. Rosa DeLauro, D-Conn., who chairs the House Appropriations Committee's Agriculture, Rural Development, FDA and Related Agencies Subcommittee, alleged that the current "fragmented" federal structure, in which food safety oversight is divided among 13 different federal agencies, protects neither public health nor industry. DeLauro, who co-founded the Congressional Food Safety Caucus, referenced her legislation (H.R. 875) that would relocate all of FDA's food safety functions into a new Food Safety Administration within HHS. And she called for legislation that would impose science-, risk- and performance-based standards on agricultural, food and feed facilities; enhance product traceability; require equivalency standards by foreign governments and risk-based inspection for imported products; authorize mandatory recalls for product-safety infractions; and require sampling and testing of products for contamination, with results reported to the federal government.

Breakout Group Outcomes: Generally, the outcomes of the breakout group discussions were fairly moderate, focusing on the importance for science and risk to drive government policies and inspection programs, and a recognition that the government cannot – and should not – try to inspect its way to product safety. Another major theme, advocated by the NGFA, was the importance of working cooperatively with foreign governments – again, based upon sound risk-assessment and risk-management principles – to enhance their capacity for addressing food-safety challenges, and the importance of preserving trade in agricultural products. The use of third-party inspection programs to enhance food or feed safety emerged as a recommendation only for imported products – not for domestic facilities – during the breakout group reports.

White House Food Safety Working Group Website: The White House has established a website for the Food Safety Working Group, which can be accessed by [clicking here](#).

FDA Commissioner Confirmed by Senate

The Senate on May 18 confirmed the nomination of **Dr. Margaret (Peggy) Hamburg** to be commissioner of food and drugs.

The Senate Health, Education, Labor and Pensions Committee on May 13 by a voice vote had recommended approval of her nomination, with ranking member Sen. Michael Enzi, R-Wyo., urging the Senate to act quickly given her "expertise in emergency preparedness and public health." Hamburg cited reorganizing the nation's food safety system to further reduce foodborne illness and recall incidents as being among her top two priorities during a confirmation hearing before the Senate committee earlier this month. At that time, she identified pandemic flu preparation, including ensuring sufficient quantities of flu vaccine, as her top priority.

Since 2001, Hamburg has been vice president of biological programs and senior scientist for the Nuclear Threat Initiative, a think tank headed by former Senate Armed Services Committee Chairman Sam Nunn, D-Ga. She also has served since 2003 on the Board of Directors of Henry Schein Inc., a medical-equipment wholesaler. She was New York City's health commissioner from 1991-97. From 1997-2001, she was assistant secretary for policy and evaluation at the U.S. Department of Health and Human Services during the Clinton administration.



Calendar

June 2-3, 2009: NGFA Country Elevator Committee
L'Enfant Plaza Hotel, Washington, D.C.

June 15, 2009: NGFA Executive Committee
Four Seasons, Toronto, Canada

June 25, 2009: NGFA/GEAPS Joint Grains Grades and
Weights Committee
Renaissance St. Louis Grand & Suites Hotel
St. Louis, Mo.

July 28-29, 2009: NGFA Feed and Animal Agriculture
Strategic Issues Committee
NGFA Conference Room, Washington, D.C.

July 28-29, 2009: NGFA/GEAPS Grain-Quality Management
Seminar
Marriott St. Louis Airport Hotel, St. Louis, Mo.

July 29, 2009: Joint Agroterrorism/Facility Security Committee
Marriott St. Louis Airport Hotel, St. Louis, Mo.

July 30, 2009: NGFA Feed Legislative and Regulatory Affairs
Committee
Hyatt Regency Capitol Hill, Washington, D.C.

Sept. 9-11, 2009: NGFA Board of Directors
L'Enfant Plaza Hotel, Washington, D.C.





Canadian Grain Commission Issues HACCP-Based Programs for Grain

The Canadian Grain Commission (CGC) on May 20 announced the availability of two voluntary programs for Canadian grain companies that may wish to use hazard analysis and critical control point (HACCP)-based programs as part of their product-safety and identity-preserved quality-management systems.

The CGC said that the two programs – “CGC HACCP” and “Canadian Identity-Preserved Recognition System (CIPRS) + HACCP” – are designed to help ensure the safety and dependability of Canadian grains marketed to other countries. The CGC said it worked with the Canadian grain industry to develop the content of the programs, which incorporates the experiences gained by CGC since launching its identity-preserved quality-management program in 2003.

Through the two programs, the CGC said it will certify companies’ grain quality and product safety-assurance processes. CGC HACCP certifies a grain company’s food safety program, while CIPRS + HACCP certifies a grain company’s food safety and identity-preservation program. Certification is based upon the results of an audit conducted by a third-party audit company accredited by CGC. Grain companies participating in the program(s) are audited against CGC’s Food Safety and Identity-Preserved Quality-Management System Standard.

HACCP is an internationally recognized science- and risk-based approach to enhancing food safety through the use of a systematic program designed to identify, evaluate and control food safety hazards. Implementing HACCP within a manufacturing process requires extensive documentation and recordkeeping associated with standard operating procedures, hazard identification and analysis, monitoring of identified process-control points deemed “critical” to product safety, corrective action procedures and verification procedures to ensure the effectiveness of the HACCP program. Within the United States, currently the U.S. Food and Drug Administration mandates the use of HACCP programs for seafood and juice sold as or used in beverages. In addition, the U.S. Department of Agriculture requires the use of HACCP programs for meat and poultry slaughter and processing operations. There currently are no HACCP regulations for the U.S. grain and feed sectors.

Members receiving the *NGFA Newsletter* electronically may [click here](#) to access more information about CGC HACCP and CIPRS + HACCP, including information about CGC’s Food Safety and Identity-Preserved Quality Management System Standard, sample good operating practices, a sample HACCP plan and other application documents and tools.



Creditors’ Meeting Scheduled on Aventine Renewable Energy Bankruptcy

The U.S. Bankruptcy Court for the District of Delaware has scheduled a May 27 meeting in Wilmington, Del., of creditors in connection with the bankruptcy proceedings initiated by Aventine Renewable Energy in April.

On April 7, Aventine Renewable Energy Holdings Inc., and various affiliated entities, became the latest renewable energy company to file a petition for relief under Chapter 11 of the U.S. Bankruptcy Code (*In re: Aventine Renewable Energy Holdings Inc., et al.* Case No. 09-11214). Chapter 11 (reorganization) bankruptcy – in contrast to Chapter 7 (liquidation) bankruptcy – generally provides for reorganization of a corporation. The debtor usually proposes a reorganization plan to keep its business operating and to pay creditors concurrently through a court-approved plan of reorganization. The plan can provide that the debtor reduce its debts by repaying only a portion of its obligations and discharging others. The plan also can permit the debtor to terminate “burdensome” contracts, recover assets and rescale its operations in an attempt to return to profitability. Significantly, the moment a bankruptcy petition is filed, it results in an automatic stay that enjoins lawsuits, arbitration proceedings, foreclosures, garnishments and all collection activities

against the debtor.

In November and December 2008, the NGFA issued a two-part *NGFA Focus on Industry Issues* series focusing upon bankruptcy-related proceedings and developments. Part 1 of the series provided general information to members concerning the bankruptcy process. In Part 2, the NGFA solicited the expertise of Christopher Giaimo, a bankruptcy attorney with NGFA’s outside law firm, Arent Fox, Washington, D.C., to respond to several questions posed by NGFA members in response to the VeraSun bankruptcy filing. The extensive information and principles reviewed in these articles remain largely relevant to all bankruptcy proceedings, including the most recent filing by Aventine Renewable Energy. Both of these articles have been combined into a single document, which members receiving the *NGFA Newsletter* electronically may access by [clicking here](#). [Editor’s Note: The bankruptcy process is highly complex, involving an extensive body of detailed laws, rules and procedures. The NGFA does not provide legal assistance or advice in this capacity. Individuals or companies involved (or potentially becoming involved) in a bankruptcy case should consult competent legal counsel.]



Senate Confirms Gensler as New CFTC Chairman

The Senate on May 19 confirmed the nomination of **Gary Gensler** to be the new chairman of the Commodity Futures Trading Commission (CFTC).

The vote on Gensler's nomination was 88-6, with five senators not voting. Gensler spent 18 years with Wall Street investment firm Goldman Sachs, eventually becoming its co-head of finance. Although tapped by President-Elect Obama on Dec. 18 [See *NGFA Newsletter*, Dec. 18, page 3], Gensler's nomination had been delayed by congressional concerns over whether his background – both at Goldman Sachs and as an assistant treasury secretary during the Clinton administration – would predispose him to be against additional government regulation when Congress considers legislation reforming the financial regulatory structure.

According to CFTC staff members, Gensler is expected to be sworn in and assume his duties early next week. His arrival will bring the CFTC to its full complement of five commissioners for the first time in several years.

The CFTC chair position has been vacant since the resignation of previous chairman Reuben Jeffery in June, 2007, when he assumed a post at the State Department. Since then, CFTC commissioners Walt Lukken and Mike Dunn have served as acting chairmen. Gensler's term as CFTC chair will run through April 13, 2012. Traditionally, CFTC commissioners have served five-year terms, but the seat being assumed by Gensler already is one year into that term.

Chilton Nominated to New Term: In a related development, President Obama on May 19 announced his intention to nominate current CFTC commissioner **Bart Chilton** to another term. Chilton became a CFTC commissioner in August 2007 for a term that expired last April. Commissioners are allowed to continue serving following a term's expiration until their successor is confirmed. If approved by the Senate, Chilton's additional term would run through April 13, 2013. In his nearly two years at the agency, Chilton has demonstrated keen interest in the United States adopting a carbon-trading regime, and has advocated that the CFTC be the government agency regulating such a market.

CFTC Extends Comment Period on 'Risk-Management Exemption'

The Commodity Futures Trading Commission (CFTC) announced May 19 a three-week extension – to June 16 – in the deadline for comments on replacing the agency's current "swaps exemption" with a more limited "risk-management exemption."

The CFTC's concept release was published as an advance notice of proposed rulemaking, with the comment deadline originally set for May 26. As such, the agency is not proposing to adopt the risk-management exemption, but is seeking feedback from futures market participants and the public on the concept. If it determines the concept should be developed further, a "proposed rule" would need to be published for additional comment prior to the agency adopting it.

The NGFA's Risk Management Committee is leading development of the Association's comments on the risk-management exemption concept. In theory, the risk-management exemption might create a new hedge-exemption

category for swap dealers whose clients meet particular criteria. For instance, a hedge exemption might be granted to a swap dealer allowing the dealer to exceed speculative position limits to the extent the dealer's client or clients would be considered "commercial" participants eligible for a hedge exemption if participating directly in the futures market. The new risk-management exemption, if adopted, could replace the CFTC's swap-exemption policy that has existed since 1991 and which essentially grants a hedge exemption to any swap dealer participating in the futures market, regardless of the nature of its clients' business in over-the-counter markets.

NGFA members wishing to submit comments directly to the CFTC may do so to: David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st St., N.W., Washington, D.C., 20581. Comments also may be FAXed to 202-418-5521 or e-mailed to secretary@cftc.gov.





North Dakota Considering Action on Temporary Storage Air Permitting

The NGFA has learned that the North Dakota Department of Health's Environmental Health Section (NDEHS) is considering classifying certain types of temporary grain storage in the state as permanent storage for purposes of air-permitting requirements.

In so doing, the North Dakota agency is relying – inappropriately in the NGFA's view – upon the U.S. Environmental Protection Agency's (EPA) Nov. 21, 2007 letter to the NGFA, in which EPA said it tentatively had concluded that certain classes of temporary storage constitute permanent storage based upon the *Webster's Dictionary* definition of a "bin." That determination, if allowed to stand, could subject affected facilities to costly requirements under the Clean Air Act. Several NGFA-member companies subsequently have reported that the NDEHS is requesting data on the number of permanent and temporary storage structures at their facilities based upon EPA's letter, even though EPA also stated that it planned to resolve the matter through a new comprehensive rulemaking on its new source performance standard for grain elevators [40 CFR 60 Subpart DD]. According to the NDEHS, it is updating their records to determine if the facilities are covered by the standard.

NDEHS officials said the agency would consider an aeration tower on a concrete slab that is connected by a conveyor to a permanent structure to be permanent storage. In addition, they said they would only interpret an open ground pile to qualify as "temporary" storage, and that any structure that would be "difficult" to disassemble would be considered permanent storage. Further, they maintained that if it appeared that a "temporary" storage structure could be used annually, the North Dakota agency would classify it as permanent storage.

Under the new source performance standard, any commercial grain elevator built after 1978 that has a permanent storage capacity exceeding 2.5 million bushels is required to comply with stricter air-permitting and emission standards. The requirement also applies to any facility that has been modified since 1978 to expand its permanent storage capacity to more than 2.5 million bushels. Also subject to the standard are grain storage elevators with a permanent storage capacity exceeding 1 million bushels that are located at wheat flour mills, wet or dry corn mills (manufacturing products for human consumption), rice mills or soybean oil extraction plants. Grain-handling facilities located at feed mills, pet food manufacturing plants, cereal manufacturers, breweries and livestock feedlots are not covered by the current standard.

NDEHS officials told the NGFA that the agency has received numerous complaints over the past three years from residential homeowners concerning alleged chaff and odor emissions from grain-handling facilities. During the process of investigating those complaints, NDEHS officials said they discovered numerous grain-handling facilities had made modifications, such as adding temporary storage space and updating rail-loading stations, without receiving permits. The North Dakota agency maintains that the increased grain throughput made possible

through these modifications has contributed to increased emissions.

During its interaction with the NDEHS, the NGFA informed the agency about the current EPA new source performance standard review process, and requested that the agency delay any re-classification of North Dakota facilities until the EPA process was completed. In so doing, the NGFA noted that the definition of temporary storage could change once the EPA review is completed, rendering the 2007 letter invalid. NDEHS officials responded by indicating they had not been informed by EPA that a review process was underway, and said they would continue to use the 2007 letter to determine which facilities are covered by the Subpart DD standard until EPA issues a guidance document to override it.

Update on EPA New Source Performance Standard Review: In a related matter, the NGFA and five other grain processing organizations that are working together to address EPA's review of the new source performance standard will ask the agency to issue a clarification to North Dakota during a previously scheduled meeting with EPA on May 26. During the meeting, the NGFA and other groups will work with EPA to finalize the Clean Air Act's required Section 114 questionnaire that will be used for obtaining information from facilities during the review process. Based upon EPA's response to the North Dakota issue, the organizations may decide to get involved to assist in delaying the determination process until the review of the new source performance standard is completed.

The NGFA will continue to keep members apprised of developments. Questions should be directed to NGFA Director of Regulatory Affairs Jess McCluer at jmcluer@ngfa.org, or by contacting him at 202-289-0873, ext. 23.

NGFA Nominee Appointed to USDA Grain Advisory Committee

The NGFA has been informed that **Jerry Cope**, transportation manager and wheat merchandiser at South Dakota Wheat Growers Association in Aberdeen, S.D., will be appointed as a new member of the U.S. Department of Agriculture's Grain Inspection Advisory Committee.

Cope had been nominated by the NGFA to serve on the board, which advises USDA's Federal Grain Inspection Service on the operation of the official grain inspection and weighing program, as well as the official grain standards. Since 2002, Cope has served as a member of the NGFA Rail Shipper/Receiver Committee and as an NGFA arbitrator. He also is a member of the South Dakota Grain and Feed Association's Board of Directors. A public announcement by USDA is expected soon.





Membership Matters

by Todd Kemp
Director of Marketing/Treasurer

NGFA Membership Millennium (and Onions!)

Readers of the *NGFA Newsletter* will recall an announcement in the last edition that the Walla Walla sweet onions have returned as a tasty incentive for membership recruiters and prospective members.

Through June 15, any NGFA member recruiting a new member company – and the new member firm, too! – will receive a 20-pound box of these sweet and delicious Walla Walla onions, generously provided again this year by **Northwest Grain Growers Inc.**, Walla Walla, Wash., and its general manager, **David Gordon**. Sponsors should look for their onion shipment to arrive toward the end of June.

Onion Educational Note: In the last edition, the author suggested that Walla Walla onions may be even sweeter and more delicious than south Texas sweet onions or the more-famous Vidalia onions. However, an alert reader noted that Vidalia onions are grown in Vidalia, Ga., not Vidalia, Calif., as the article stated. Apologies to any Vidalia growers or citizens who may have been offended!

Membership Millennium: However, there will be no apologies for encouraging NGFA recruiters to sign up new members. On the heels of the best NGFA recruiting campaign in 20 years, the

Association's membership rolls again have swelled to the **1,000-company mark!** Now, that's sweet! Why has membership grown so much in recent years? There are important business reasons – even beyond getting a box of onions – for your prospect to join the 1,000-company-strong NGFA now:

- ◆ Ensured access to the NGFA Arbitration System and Rail Arbitration System.
- ◆ Automatic application of the NGFA Trade Rules.
- ◆ Unparalleled information resources like the *NGFA Newsletter* and *NGFA E-Alert* that convey important, timely business information.
- ◆ Matchless representation before federal legislators and regulators – very important right now!
- ◆ Education and training opportunities, like the NGFA's new web-based distance learning program on feed quality assurance.

In today's volatile markets and uncertain economy, NGFA membership is not just nice – it's essential! Invite your prospect to join the Association's 1,000 member companies, and to receive a sweet onion incentive in the bargain!



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