



FDA Expected to Propose Changes to BSE-Prevention Feed Rule Soon

The Food and Drug Administration (FDA) this week began the process of reviewing more than 1,200 comments submitted in response to the agency's July 14 advance notice of proposed rulemaking concerning potential changes in its feed regulations that are designed to prevent the establishment or spread of bovine spongiform encephalopathy (BSE) in the United States.

FDA officials told the NGFA that the agency was prioritizing its review by focusing first on comments received in response to a dozen different questions it posed on various aspects of its plan to propose a ban on all so-called "specified risk materials" (SRMs) in all animal food and feed. In its advance notice of proposed rulemaking, FDA announced that it had "tentatively concluded" to propose such a ban on all SRMs, as well prohibit the use of dead and non-ambulatory ("downer") cattle in animal feed, as a way to "adequately control" the risk of potential cross-contamination of these materials in ruminant feed. FDA said then that it was planning to define as SRMs the same list of materials banned in January in human food by USDA's Food Safety and Inspection Service: the skull, brain, trigeminal ganglia, eyes, vertebral

column, spinal cord and dorsal root ganglia (nerve endings attached to the spinal cord) of all cattle 30 months or older, as well as the small intestines and tonsils of cattle of all ages.

FDA officials told the NGFA that they expected to "move ahead rather rapidly" to issue a proposed rule after evaluating the comments received on SRM-related issues. They noted that FDA Acting Commissioner Dr. Lester M. Crawford, in an Aug. 2 address to the National Press Club, had cited implementing changes in the agency's BSE-prevention feed rule as being among the priorities he hoped to accomplish within the next six months. "In the coming months, we will...consider additional safeguards for animal feed, particularly imposing a ban on the use of specified risk material in all animal feed," Crawford said at the time. "Such new steps will complement the existing BSE firewalls the U.S. government has put in place, and will provide an added assurance of safety for our food supply and other products we all use that are manufactured with bovine-derived materials."

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Meetings with Congressional Staff Anticipated in Early September on Potential Changes to Federal Grain Warehouse Program

It now appears that it will be shortly after Labor Day before the NGFA, American Farm Bureau Federation (AFBF) and National Farmers Union (NFU) meet jointly with congressional staff members to determine how to proceed on draft legislation that would implement potential changes to the federal grain warehouse program.

The meeting has been delayed until then by conflicting vacation schedules and the Republican National Convention that begins Aug. 30.

The situation was clouded by the decision in early August by the National Association of State Departments of Agriculture (NASDA) and the Association of American Warehouse Control Officials (AAWCO) to drop out of discussions with the NGFA, AFBF and NFU. The groups had been encouraged by Congress to work toward a consensus concerning

federal preemption over regulatory authority at federally licensed grain warehouses, and whether and how to provide enhanced protection for depositors and producer grain payables at such warehouses. NASDA took the action after it could not reach an internal consensus within NASDA on the final draft proposal. When NASDA left the discussions, so did AAWCO – most of whom work for the state agriculture directors and commissioners. [See *NGFA Newsletter*, Aug. 5, 2004.]

The NGFA, AFBF and NFU subsequently met to collaborate on a draft legislative approach for purposes of obtaining a budget estimate from the Congressional Budget Office (CBO). AFBF and NFU have signaled a willingness to stay engaged in the effort at least until it is known whether the proposal is feasible from a budget standpoint.



Snapshots

As folks take off for late-summer vacations and with Congress in the middle of its August break, it's timely to offer some "snapshots" of where we are on some key policy matters that are significant to the health of the industry and your business.

The national economy is starting to grow again, which is a relief to the Bush administration going into the November election. But some railroads are struggling to keep up with the accompanying increased freight demand. In the current "lull" in the shipping season, some railroads have caught up. But others haven't, and concerns are starting to mount about what happens this harvest. The Class I carriers recently provided to the federal Surface Transportation Board (STB) their "service plans" to address the fall peak in demand. Those reports are summarized in the Rails, Rivers and Roads section of this Newsletter (see pages 8-9). The Association of American Railroads is conducting a meeting on Sept. 9 in Kansas City, Mo., to provide a forum for all the major carriers to tell shippers what to expect going into the fall. Based upon what I hear, it may be standing room only, so sign up soon if you have interest; the related article on page 9 provides information on how to register.

With a few exceptions, the railroads seem to be performing well financially. Some carriers in their quarterly reports informed their investors how much revenue they are "earning" with fuel surcharges. For some carriers, those fuel surcharges are projected to increase to 8.8 percent in October. Did you ever wonder what percentage of total rail costs is comprised of fuel expense? It's probably less than you think. Fuel surcharges, higher freight rates and more congestion are part of a growing trend. More than ever, overall rail capacity appears limited and agricultural shippers are going to have to compete against other sectors to move product. The regulators at the STB, try as they may, cannot solve the rail capacity issue. Hopefully the market can.

On another major issue, the Food and Drug Administration (FDA) has been busy developing potential changes to its feed regulations that are designed to prevent the establishment or spread of bovine spongiform encephalopathy (BSE) in the United States. Some, particularly among the so-called consumer-advocate community, have expressed frustration that the agency has not been able to act more quickly. All Americans should be glad that the agency has stuck with its science-based principles, has chosen not to rush to judgment and seems to realize there is a risk of making an irreversible policy blunder. The NGFA and its feed-related committees have been at the forefront in working with other organizations to advise FDA on an approach that will work and not create exorbitant costs for the U.S. animal industry, which is trying to retain its position as a global competitor. While there are advocacy groups that press the case for the

elimination of all animal and/or bovine-based protein in all animal feed, the NGFA's most recent statement to FDA made two factual points that I am confident the federal government will factor into its policy choices:

- ▶ What FDA does with the BSE-prevention animal feed rule has no bearing on human health risk; the potential human health risk already has been addressed by the U.S. government's previous banning of known risk materials in the human food supply; and
- ▶ There are policy choices that achieve virtual elimination of all risk of amplifying BSE through feed at a much lower cost than simply duplicating the human food policy for feed.

Next, we are confronting some very serious trade-dispute matters with the People's Republic of China. One of our strategic partners, the North American Export Grain Association (NAEGA), has been spearheading an effort by the United States and other exporting nations to rectify actions by China that have cut across contracts, created huge financial exposure to exporters and brought soybean trade with that country to a near standstill. The NGFA has been strongly supportive of NAEGA's actions, and this week urged the Bush administration to launch a global leadership initiative to get the problem solved. China is one of the most important customers for U.S. agricultural products, but the United States also is China's single-biggest customer across all products. The United States represents 21 percent of the total value of Chinese exports. Surely both trading partners understand the need for that to continue and for reasonable, World Trade Organization-compliant disciplines to be consistently observed in trade moving both directions.

On the domestic front, the Bush administration has announced an early reenrollment of farmland into the Conservation Reserve Program (CRP) for 16 million acres worth of contracts expiring in 2006 and 2007. This announcement could result in some non-environmentally sensitive whole farms in the top three land classes being enrolled in this land retirement program for 30 years, and increase the total acreage in the program to near the current 39.2-million-acre cap. The administration's announcement comes on the heels of a forecast record U.S. corn crop. Despite the fact that immediate crop prospects have pushed down near-by prices, the forecasts are for global feed grain consumption to continue to outpace global supplies. In the 2002 farm law, the sportsman's caucus in Congress (200+ strong in membership) advocated legislation to increase the size of the CRP to 45 million acres. The NGFA strongly opposed this, but ultimately the cap was increased from 36.4 million to 39.2 million acres. Maybe we should just be thankful for the "small" victories. But at some stage, the



supply and cost of producing food might become as important politically as the supply of wildlife.

Finally, potential changes to the federal grain warehouse program remain in flux. We've been at this effort with task forces and through the NGFA's Country Elevator Committee for the better part of two years, and still there are no changes in the U.S. Warehouse Act. Admittedly, it is frustrating and a grim reminder that in Washington, it's difficult if not impossible to control the process or its timing, and one finds oneself always dealing in the "art of the possible." Legislation always is easier to stop than to achieve. Trust me, this is part of the "Inside-the-Beltway" process that, in general, we want to retain!

But when it comes to the federal-state warehouse issue, if the sole issue being debated was how better to protect farmers' interests as sellers and depositors of grain (which would clearly be accomplished by what's on the table in current negotiations), the program changes already would be in place. While the finish line may not quite be in sight, the NGFA and national farm organizations have made progress toward achieving some important goals, including preserving the concept – at least so far – of regulatory choice between strong and effective federal and state grain warehouse programs. The NGFA will stay

the course as long as there is a realistic potential of ultimate policy-making success for farmer-customers and our industry.

Have a safe and productive harvest!



Calendar

- Sept. 10-11, 2004: NGFA Board of Directors**
Fairmont Copley Plaza, Boston, Mass.
- Oct. 6-7, 2004: NGFA Feed Quality Assurance Workshop**
Holiday Inn Conference Center, Staunton, Va.
- Dec. 5, 2004: NGFA Country Elevator Committee Meeting**
Adams Mark Hotel, Denver, Colo.
- Dec. 5, 2004: NGFA Feed Legislative and Regulatory Affairs Committee Meeting**
Adams Mark Hotel, Denver, Colo.
- Dec. 5, 2004: NGFA Feed Manufacturing and Technology Committee Meeting**
Adams Mark Hotel, Denver, Colo.
- Dec. 5-7, 2004: NGFA Country Elevator/Feed Industry Council Conference**
Adams Mark Hotel, Denver, Colo.



On Capitol Hill

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Full Legislative Plate Awaits Congress

When Congress returns to work after Labor Day, it will face a full plate of legislative issues with only 13 legislative days remaining before its targeted adjournment date of Oct. 1.

Those issues include completing 12 of the 13 annual appropriations bills for fiscal year 2005, which begins Oct. 1; only the defense appropriations measure has been signed into law thus far.

Given the slow pace of progress, it is likely that Congress will extend its targeted adjournment date slightly, although probably not too long with the Nov. 2 elections approaching. Unfinished business then would be subjected to a "lame-duck" session after the election, unless the House, Senate or presidency changes parties. Then, all bets are off.

Here is an update on the status of several of the most important pending legislative issues affecting the grain, feed and processing industry:

► **Appropriations:** Two issues in the appropriations bills

most affect the industry: 1) the outcome regarding the administration's proposal to impose \$6 million in new user fees for USDA's Grain Inspection, Packers and Stockyards Administration to maintain the official U.S. grain standards, which likely would be borne most directly by grain exporters; and 2) funding levels for inland waterways infrastructure construction and maintenance.

Concerning the additional **GIPSA user fees**, prospects are promising, as the House Appropriations Committee's legislative report accompanying its bill rejects the fees and also notes, "these user fees are not currently authorized in law." But the report does add, "the committee does not recommend establishing such fees in annual appropriations acts, but will consider such fees should they receive authorization" by the appropriate congressional committee. Translated, this means the committee is on record as saying it will not establish such fees without the prior consideration and approval of the House Agriculture Committee, which to date has no such plans. Meanwhile, the Senate's

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On Capitol Hill

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budget resolution explicitly rejected the standardization fees. But the Senate has not acted yet on its version of the agricultural appropriations bill.

As for **waterways**, the House Appropriations Committee's Energy and Water Subcommittee increased funding for the U.S. Army Corps of Engineers for waterways projects above and beyond the administration's budget request, which had proposed cuts. But the Senate has not acted yet, and the federal budget deficit may cause Congress to ultimately curtail the increases. The likely outcome is an omnibus bill that wraps into one large measure several appropriations bills, including those for agriculture, perhaps energy and water, and many others. Whether an omnibus bill can be completed before the election is unknown; if not, action will await a "lame-duck" session or current funding levels could be extended until early next year through continuing resolutions that keep the government operating once the new 2005 fiscal year begins Oct. 1.

► **Omnibus Energy Bill:** The energy bill has been in play since the 108th Congress began two years ago. But its prospects appear bleak as the congressional session nears an end. After falling just two votes short of closing debate in the Senate last November, little progress has been made to break the impasse. One energy lobbyist noted that unless the price of crude oil approaches "\$50 a barrel" and gas "hits \$3 a gallon" little will motivate Congress to jumpstart the process. The Senate did include its energy tax incentives in another bill that is more likely to pass; but the House has signaled its desire to strip it from that measure in favor of having the energy bill stay intact. Meanwhile, the renewable fuels standard that would be mandated in the energy bill – which would require refiners to increase ethanol production from 3.1 billion gallons in 2005 to 5 billion gallons by 2012 – remains in the rest of the stalled policy section of the energy bill.

► **Highway Reauthorization Bill:** The highway bill would replace the Transportation Equity Act (TEA 21), which expired in September of 2003 but has been extended five times to keep highway construction projects going. House and Senate conferees have been unable to bridge significant gaps after both chambers passed bills with different funding levels. Causing further trouble, the Bush administration had threatened to veto anything that exceeded its initial spending request or would add to the federal budget deficit. Despite these setbacks, prospects may be brightening, as the administration recently backed down from previous veto threats and signaled a willingness to accept a spending figure close to the middle ground between the House and Senate proposals (\$299 billion over six years). In addition to its importance in maintaining the nation's highway infrastructure, the bill includes a provision that would codify the NGFA-supported truck driver hours-of-service agricultural exemption. The exemption is included in both

versions of the bill and is likely to remain intact if a final version is approved by Congress.

► **FSC/ETI Corporate Tax Reform Bill:** This is another measure that has remained "stuck" in a joint House-Senate conference committee as legislators attempt to resolve significant differences between the bills that passed the two chambers. But there is a motivational factor to resolve outstanding issues – the punitive tariffs being imposed by the European Union that currently amount to 9 percent on a variety of U.S. products. The duties were authorized by the World Trade Organization after it found that the FSC/ETI tax breaks represented illegal trade subsidies. U.S. industry sectors most affected are putting maximum pressure on legislators by showcasing the losses attributable to the increased tariffs. Importantly for the grain, feed and processing industry, the measure includes a reduction in the corporate tax rate and a tax credit for short-line rail infrastructure improvements. The bill has a shot at passing in September, primarily because it would grant \$150 billion over 10 years in tax breaks and credits. Specifically, both the House and Senate versions of the bill would repeal corporate tax breaks deemed illegal by the WTO and replace them with a reduction in the top corporate tax rate from 35 to 32 percent for domestic manufacturers, producers, farmers and small businesses, which would generate \$78.5 billion in tax savings. In addition, both bills would provide \$4 billion in relief from the alternative minimum tax and \$30 billion in tax breaks by reducing double taxation on U.S.-based companies involved in exporting. The two bills – especially the Senate version – also include a variety of "goodies" for constituencies as diverse as tobacco farmers; an archery products manufacturer on Utah; ceiling-fan retailer Home Depot, based in Georgia; taxpayers in those states without an income tax, such as Florida, Texas and Tennessee; and corporate jet manufacturers in Kansas.

The NGFA has been active in supporting the measure because it would: 1) significantly reduce the corporate tax rate; 2) make the tax law compliant with WTO rulings; and 3) provide a tax credit for short line rail infrastructure improvement projects. The short line provision would encourage investment by providing a tax credit of 30 cents per dollar of private-sector investment, with a cap of \$3,500 per year per mile of track. This language was modified from a stand-alone House bill (H.R. 876), which would have provided credit at 100 percent of each dollar invested, with a \$10,000 cap. While the tax reduction and repeal of the offending FSC/ETI tax likely will be included in any final version of the bill, the short line provision is only in the Senate-passed version. The House Republican leadership is concerned with the overall cost of the bill and is looking to strike some of the tax credits. Fortunately for supporters of the short line rail provisions, the House stand-alone bill generated more than 260 cosponsors – making it more difficult for the House conferees to omit it from the final bill.





USDA Issues Request for Comments on Long-Term CRP Policy

The U.S. Department of Agriculture (USDA) is seeking comments by Dec. 8 on 11 questions posed in the Aug. 10 *Federal Register* concerning how to manage its pledge to fill the Conservation Reserve Program (CRP) to its statutorily authorized 39.2 million acres.

In its notice, USDA reiterated that it is “committed to full enrollment” of the CRP and will offer early reenrollments and extensions of existing CRP contracts to current CRP participants given that CRP contracts equivalent to 28.7 million acres are scheduled to expire between 2007 and 2010. As of June 2004, 34.8 million acres were enrolled in the CRP.

USDA specifically requested comments on such questions as: 1) how it should address the large number of expiring CRP contracts and their associated acres “in a manner that achieves the most environmental benefits but is also administratively feasible and cost effective.” Among other things, USDA asked how expiring CRP contracts could be staggered over several-year intervals and the criteria it should use to select and extend expiring contracts; 2) factors that should be used in determining the acceptability of CRP offers “to provide an equitable balance between soil erosion, water quality and wildlife benefits”; 3) whether and how to modify the environmental benefits index (EBI) used to rank CRP offers. Currently, the EBI provides points for wildlife, water quality, erosion, enduring benefits, air quality and cost; 4) how to better target the program on certain environmental practices (such as filter strips and riparian buffers), geographic

considerations or other factors; 5) how USDA could ensure CRP goals are met if it did not require reenrolled acres to compete for reentry into the program; 6) whether and for what purposes to designate acreage for local priorities, such as the Conservation Reserve Enhancement Program (CREP); and 7) how to mitigate potential local adverse economic impacts of the CRP. USDA argued that the 25 percent “limit” on CRP enrollment within a county “limit(s) the economic impact of taking land out of production.”

NGFA Spearheading Industry Response: The NGFA is spearheading the response to the USDA CRP rulemaking, urging that the agency: 1) downsize the CRP; 2) generally prohibit whole-farm enrollments unless the acreage meets EBI standards and competitive bids; 3) allow CRP participants with expiring contracts to exit the program early; and 4) correct some of the most egregious elements of the program, including the deleterious impact of the alleged 25 percent “limit” on CRP enrollment within counties. The NGFA has drafted a joint letter that is being circulated for signatures by other national organizations, as well as by State and Regional Grain and Feed Associations affiliated with the NGFA. In addition, the NGFA’s International Trade and Agricultural Policy Committee will be preparing an in-depth response to USDA.

FDA Clearing Bioterrorism Recordkeeping Regulations with OMB

The NGFA has learned that the Food and Drug Administration (FDA) has developed final regulations that would implement the **recordkeeping** requirements of the bioterrorism-preparedness law, but still is in the process of having those rules evaluated and approved by the White House Office of Management and Budget (OMB).

OMB generally has 60 days to evaluate and approve federal regulations submitted by agencies. FDA officials contacted by the NGFA said they could not provide a “firm projected date” by which time the regulations would be published. They did say that as submitted by FDA, the regulations would be implemented as a final rule rather than as an interim final rule, the latter of which occurred for the bioterrorism law’s facility registration and prior-notice requirements. In an announcement last Dec. 3, FDA initially had projected that the recordkeeping final rules would be issued by March 31, 2004.

As initially **proposed** by FDA on May 9, 2003, the regulations would require food and feed establishments to maintain records for up to two years (one year for commercial feed manufacturers) if they “manufacture, process, pack, distribute, receive, hold or import food” (including feed) intended for consumption by humans

or animals in the United States. In its original proposal, FDA had said that the records would need to be sufficient to identify the “immediate previous” domestic or foreign source of foods received and ‘immediate subsequent’ recipients of such products. For the grain, feed and processing industry, one of the major concerns with FDA’s proposal involved the recordkeeping requirements for commingled commodities or products. In its statement to FDA, the NGFA urged FDA to expressly **exempt** facilities that handle products on a commingled basis from the requirement to identify specific sources of ingredients, unless the products are segregated or identity-preserved for commercial reasons. FDA had proposed that “reasonably available” information be retained to identify the specific source of each ingredient used to make every lot of finished product, so as to link incoming ingredients with outgoing finished products. Until the final regulations are issued, it will not be known specifically how FDA addressed the concerns raised over various aspects of its original proposal. [See related article on FDA prior-notice bioterrorism regulations on page 7.]





("BSE" continued from page 1)

NGFA Statement to FDA: The NGFA submitted an extensive 25-page statement to FDA on Aug. 13 in response to the agency's advance notice of proposed rulemaking. The NGFA told FDA that it would be "prudent and preferable" for the agency to await the results of the U.S. government's expanded surveillance and inspection of the U.S. cattle herd before making substantive changes to the agency's existing animal feed rules that are designed to prevent the establishment or spread of BSE. The NGFA's statement stressed that human health already has been protected adequately by actions previously implemented by USDA and FDA. Those actions include a ban on all SRMs from human food, dietary supplements and cosmetics, as well as prohibitions on certain cattle-slaughter stunning practices.

However, the NGFA said that if the agency decided to proceed before such USDA surveillance data are available, it would be advisable for FDA to propose the removal of brain and spinal cord of cattle 30 months or older from all animal food and feed as the "centerpiece" of a systems-based approach to BSE prevention – instead of pursuing its plan to implement a ban on

all so-called "specified risk materials" (SRMs). The NGFA said it believed that a ban on brain and spinal cord from cattle 30 months or older, coupled with compliance with FDA's existing BSE-prevention feed rule and the removal of certain dead stock from the feed chain, would provide protection that is equivalent to a full SRM ban in protecting animal health. In addition, the NGFA urged that FDA contract with the Harvard Center for Risk Analysis to quantify the additional BSE risk-mitigation that would result from a "policy menu whose centerpiece" is a ban on brain and spinal cord from cattle 30 months or older, combined with the existing BSE-prevention feed rules and the level of compliance with those regulations that far exceeds what Harvard projected in its original 2001 study. The NGFA said it believed a full SRM removal at this stage would represent a "draconian" approach that "could force a dramatic restructuring of an entire industry sector and impose adverse economic and environmental impacts that ultimately may prove to be unwarranted." See the enclosed *Issues and Actions* for a more comprehensive report on the NGFA's statement.

Voluntary Self-Inspection Program for Medicated Feed Establishments Submitted to FDA General Counsel for Final Clearance

The NGFA has learned that a novel new "voluntary self-inspection program" for medicated feed establishments has been cleared by the Food and Drug Administration's Center for Veterinary Medicine (FDA/CVM) and is awaiting review by FDA's general counsel's office.

The voluntary self-inspection program was a concept initially developed and proposed by the NGFA. It subsequently was embraced by the Association of American Feed Control Officials (AAFCO) and incorporated into its Model National Medicated Feed Program that was presented to FDA in October 1999. AAFCO is the professional association of state and federal feed regulatory officials, with which the NGFA interacts extensively.

During a July 15 meeting with the NGFA and AAFCO president, top FDA/CVM officials committed to expediting clearance of the voluntary self-inspection program, which had been moribund within the agency for more than a year because of other priorities. The program, which is designed to encourage self-regulation by the medicated feed industry, would be launched initially as a pilot program to allow the concept to be evaluated fully.

Under the voluntary self-inspection program, FDA would exercise enforcement discretion by designating as a low-

priority for FDA inspection participating establishments that have written quality-assurance programs that meet FDA's current good manufacturing practice (CGMP) regulations. Participating firms would be required to conduct their own self-inspections once a year and to submit summary results to FDA and their respective state feed control agency(ies). During the pilot program, a certain percentage of participating firms also would be subject to spot-check audits to ensure that their quality-assurance programs comply with CGMP requirements. For FDA, the program offers the prospect of enabling the agency to better allocate scarce inspection resources. Several state feed control agencies also have indicated an interest in launching similar programs.

The NGFA has been informed that FDA/CVM asked that the voluntary self-inspection program be designated as a "top 10" priority for review by FDA's general counsel's office, which obligates that office to work on the proposal.

After receiving legal approval, which FDA/CVM officials expect within the next two months, it is anticipated that the voluntary self-inspection pilot program will be implemented through issuance of a *Federal Register* notice with an accompanying FDA compliance policy guide. FDA is hoping to launch the pilot program in early 2005.





FDA, Customs Begin Enforcing Prior-Notice Food, Feed Import Rules

Full enforcement generally took effect on Aug. 13 of the Food and Drug Administration's (FDA) regulations that require prior notice before food, feed or feed ingredient imports are allowed to enter the United States.

But the government said it would exercise enforcement discretion until Nov. 1 for violations involving four information fields the agency requires to be included in prior notices.

Further, in a related development, FDA and the Department of Homeland Security's Customs and Border Protection (CBP) announced that they are deferring until this fall a plan that could gradually shorten the time frames for providing prior notice, and said the decision on whether to proceed "will depend on the level of (industry) compliance" achieved during the assessment period. FDA's prior-notice regulations, issued as an interim final rule on Oct. 10, 2003, require that the agency receive notice before foreign shipments arrive at U.S. ports of entry. FDA's current regulations require that such prior notice be provided two hours before arrival of truck shipments; four hours before arrival of rail and air shipments; and eight hours before arrival of vessel shipments. The prior notice requirements took effect Dec. 10, 2003, and FDA said it has been receiving about 160,000 prior-notice submissions a week since February.

► **Enforcement Discretion:** FDA said it and CBP generally would continue to exercise enforcement discretion – that is, focus on "education and outreach" and not impose fines or penalties – until Nov. 1 on prior-notice submissions that contain the following violations: 1) inaccurate or invalid registration numbers submitted for the manufacturing facility; 2) missing registration numbers for the shipper; 3) inaccurate name(s) and address(es) of consignees because the notice contains the contact information of the express consignment operator or consolidator instead of the ultimate consignee; and 4) missing or invalid bill of lading or airway bill numbers. However, the agencies said they will consider enforcement action for these violations if the offending entity has been notified of such violations in the past and has a "history of repeated conduct of a similar nature." FDA and CBP also said they would continue to exercise enforcement discretion for prior notices that fail to include a required manufacturing facility registration number for food that is imported for quality assurance, research or analysis purposes only – and is not intended for human or animal consumption and is not for resale. The food processing and beverage industries, in particular, have advocated that FDA exempt these "sample

shipments" from the prior-notice requirements altogether. FDA issued a revised prior-notice compliance policy guide that reflects its updated enforcement strategy.

FDA said that since it increased enforcement activity in June, entries submitted to FDA and CBP with no prior notice have been virtually eliminated. "Most prior-notice data are being submitted; however, completion of registration number and bill of lading is lower than completion of most other data elements," FDA said. FDA and CBP said they also are examining more closely the validity and consistency of the prior-notice data. This analysis has found that nearly 2 percent of consignee data indicate an unknown or consolidated consignee, and not the ultimate consignee as required by FDA's interim final rule. FDA and CBP now are actively identifying specific brokers and filers of prior notices whose submissions tend to be "error prone," the agencies said.

► **Issuance of Final Rule Delayed Until June 2005 to Evaluate Reducing Prior-Notice Time Frames:** In a related action, FDA and CBP said they were delaying for three months – until June 2005 – the issuance of joint final rule on prior notice. The agencies said they plan to use the additional time to evaluate whether the prior-notice time frames can be reduced further. Specifically, the agencies are evaluating whether to adopt the time frames used by CBP in its final rule concerning advance electronic cargo notice requirements. Those time frames are half what FDA currently requires. CBP's requirements are that advance notice be received: 1) one hour before arrival by truck (30 minutes for participants in CBP's FAST and C-TPAT security programs); 2) two hours before arrival by rail; and 3) four hours before arrival by air.

► **Contingency Plan for Providing Prior Notice During Computer System Outages:** The two agencies also issued a new guidance document that contains a contingency plan that the industry is to use to provide prior notice on import shipments in the event of computer system outages. The contingency plan outlines seven potential scenarios that could affect the transmission, confirmation and processing of prior-notice submissions, and explains recommended options for dealing with each. In each of the scenarios, where the alternative submission options include both e-mail and fax transmissions, the agencies "strongly encourage" e-mail as the preferred means.



Rail Carriers Assert Higher Rates Needed to Improve Future Service

While expressed in different ways, the responses of most Class I railroads to the Surface Transportation Board's (STB) request for information on how they intend to handle the Fall peak demand for service carried a common theme – rail rate increases will be required to meet future service demands.

Four major Class I carriers – the Burlington Northern Santa Fe (BNSF), Norfolk Southern (NS), Canadian Pacific (CP) and CSX Transportation Co. – said that increased investment in additional capacity could not be justified economically based upon their respective returns on capital. Citing what he termed a “steady erosion” in return on capital investment and a “growing gap” between this ratio and the cost of capital, **Matt Rose, BNSF chairman, president and chief executive officer**, wrote, “...there are significant financial constraints that will not allow the BNSF, or any other railroad, to invest just...to be ready to handle unforeseen, large volumes of additional or new business. We will get through the peak season this year as we have every year. The broader question is: How can our industry, which is not revenue adequate, meet the longer-term demand of a growing U.S. economy.” **NS Chairman, President and Chief Executive Officer David R. Goode** said that if demand continues to grow at the current pace, the rail industry will need to invest “substantially more” than it is today in locomotives, information technology systems, rail yards and terminals, rail cars, track and other infrastructure improvements. “[W]e probably enjoy more breathing room than some, if not all, of the other major U.S. carriers,” Goode wrote, “but it remains obvious to all... – the returns the industry currently earns will not allow it to reinvest enough to meet the demand for rail services that the future appears to hold.” **CSX President and Chief Executive Officer Michael J. Ward** cited the “terrible disparity in capital consumption” between railroads and “all other industries.” **CP President and Chief Executive Officer Rob Ritchie** put it this way: “To proceed with a required substantial investment program, (the CP) will require shipper acknowledgement of the need for higher rates and a stable regulatory environment over the long-term....Any suggestion of reregulation or return to heavy-handed government regulation of railroads would cause immense harm by preventing (CP) from making the investments needed in infrastructure that will benefit North American businesses and communities.”

As for how the carriers intend to meet the fall peak season service demands, here's a brief summary of each railroad's statements. The complete statements are available on the STB's web site at: <http://www.stb.dot.gov/>.

► **Union Pacific (UP):** The UP said it was taking further actions since thus far, it had “managed only to stabilize” its rail system to achieve “modest improvement.” Specifically, the UP said it has added more than 500 locomotives to its fleet during the past nine months, with 425 more expected to be delivered by year's end. The UP also said it planned to

increase its planned hiring for the latter part of 2004 by 1,000 persons, primarily to meet anticipated 2005 demand. It said it had moved “large numbers of conductors” into engineer training, but still expected a shortfall in the number of engineers in the Pacific Northwest during the fall season. Further, since demand has exceeded its ability to add resources, the UP said it would respond during the fall peak season by “limiting carloadings and train operations” in several key corridors and terminals, including “regulating the volume of selected agricultural commodities” to avoid additional congestion.

► **BNSF:** The BNSF projected it will see a 6 to 9 percent growth in volume in the fall, which it said equates to what was experienced in the second quarter. It said it was able to plan, “with fairly decent accuracy,” its capacity needs for the portion of its traffic volume operating under contract or guaranteed freight programs. BNSF said it will add 700 locomotives – 350 of which are leased – to its fleet in time for the fall peak. Other actions have included “extending train lengths by 10 to 15 percent; keeping intermodal velocity close to planned targets; maintaining current improved coal cycle times; and meeting daily targets for grain, which we have been doing for a couple of months.”

► **CSX:** CSX predicted “consistent, continuous improvement” in operations during the next five months. It is targeting on-time originations to reach 55 percent in August, 60 percent in September and October, 65 percent in November and 70 percent in December. CSX maintained it had seen “significant system-wide improvements” in operating performance since July – with originations doubling in the last 45 days; on-time originations averaging 60 percent during the last two weeks of July; and arrivals and dwell times improving by approximately 50 percent and 15 percent, respectively. Weekly average velocity improved more than 1.5 miles per hour in July, it said. CSX said it anticipated handling 150,000 more carloads during the second half of 2004 than a year ago, with the greatest increases coming from forest, metals, coal and chemical markets. CSX said it had obtained 110 additional locomotives in what it termed an “extremely constrained” market. It also said it had hired 1,400 new train and engine employees for the fall peak, which it projected would exceed attrition by 25 percent. CSX said it expected to have 320 additional train and engine employees trained and ready in early 2005. The carrier said it was counting on its new operating plan (“One Plan”) to improve efficiency in freight movements, particularly in its auto and merchandise sectors.

► **CN:** The CN said it had “sufficient capacity” throughout its system to handle customer demand. “We do not make structural changes to our scheduled railroad on a seasonal basis, but rather make adjustments based on changes in





Rails, Rivers and Roads

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customer forecasts throughout the year," wrote CN President and Chief Executive Officer Hunter Harrison. The CN said it was concerned about the "fluidity" of the North American rail network because of congestion at "certain gateways," particularly Chicago, but also Buffalo, N.Y., and Toledo, Ohio. Further, it said that because it depends on interchange with U.S.-based carriers, "any systemic service difficulties that our partners or we experience have a downstream effect on us all."

► **CP:** The CP used grain as its example of the approach it is taking to plan for the fall traffic surge. It said it had "re-designed the entire products and services portfolio" to better match its resources with market demand; implemented a new grain operations planning process to maximize system capabilities; developed service plans with lease-line partners; developed "detailed plans" to maximize Pacific Northwest export grain capabilities; and initiated meetings with interline partners to review joint-operating issues in an effort to maximize interchange fluidity. The CP projected that 55 percent of its U.S.-originated grain will be delivered to connecting carriers. It said it had established cycle-time targets in major corridors and that guaranteed freight commitments would be current by October. The CP also said it had leased 500 additional covered hopper cars – bringing its total fleet to 26,400 to 26,600 cars – and added 75 new locomotives. It also has hired about 160 additional crew.

► **NS:** The NS noted it had changed its operating plan this summer to "further fill out existing trains as well as to establish additional (scheduled) trains" that will replace the extra trains currently being operated on an as-needed basis.

It also noted it had reopened its Sevier Yard in Knoxville, Ky., to provide additional terminal capacity to handle increased volumes from Kansas City, Mo., and St. Louis, Mo., gateways. The NS said that while it is increasing its locomotive fleet – adding 207 new and up to 35 leased locomotives by the fourth quarter – car shortages "have and will continue to be an issue in several commodity areas." Thus, it said it likely will "see our fleet stretched" to handle anticipated business volumes, and will respond by prioritizing unit-train operations. NS said it is not experiencing crew shortages.

► **KCS:** The Kansas City Southern Railway (KCS) said it had improved performance "continuously over the past year" and was "at or near the best performance level of the Class I railroads" in each of the reported metrics. Thus far, KCS said it had been able to retain the 25 percent improvement in train velocity it achieved in 2003. For grain, it said, the increased velocity and "limited success" it has had in adding to its grain car fleet had yielded a 30 percent increase in grain-haulage capacity. KCS said it would take delivery of 76 additional high-capacity (5,150 cubic-foot) grain hopper cars this year that "will be put in quick-turn shuttle service...to effectively and efficiently handle our on-line grain shippers' volume during the fall harvest." However, KCS Chairman, President and Chief Executive Officer Michael Haverly noted service on the Tex Mex Railroad that is jointly owned by KCS had been plagued by UP's "service problems" and "inadequate maintenance and capacity investment by the UP." The result has been a doubling of transit times compared to what Haverly said UP had promised when it was granted trackage rights to the Tex Mex in 1996.

Other Rail News

In other developments of interest to rail users:

► **AAR Says 275-Plus Already Registered for Sept. 9 Rail Service Meeting:** The Association of American Railroads (AAR) told the NGFA last week that more than 275 persons already have registered to attend its Sept. 9 meeting in Kansas City, Mo., that is being billed as an opportunity for carriers to present their plans for handling the "fall peak season." The meeting is scheduled for 8 a.m. to 3:10 p.m. at the Kansas City Airport Marriott adjacent to Kansas City International Airport. The AAR said the senior marketing and operations officers for the Class I carriers will attend and provide information on the current state of their respective railroad, and the process each carrier will implement to "meet the fall peak season demand." A question-and-answer session will follow the presentations, the AAR said.

More information about the meeting, as well as a registration form may, is available on the AAR's web site at http://www.aar.org/About_AAR/events/docs/NEMC_KC.pdf.

► **USDA Expresses Appreciation to NGFA on STB Small Rail Rate Proceeding:** The U.S. Department of Agriculture has notified the NGFA of its appreciation for the association's efforts to engage it in the small rail rate proceeding initiated by the federal Surface Transportation Board (STB).

In an Aug. 9 letter to NGFA President Kendell W. Keith, Undersecretary of Agriculture for Marketing and Regulatory Programs Bill Hawks wrote that USDA shared the NGFA's concerns that rail carriers provide "efficient rail service that does not unduly burden either shippers or producers with excessive rates." Hawks wrote that USDA's statement filed with the STB "makes our position clear, that a well-defined, objective and transparent process is necessary...to ensure that rates charged by railroads are reasonable and, if they are not, that producers and shippers have access to a fair process for challenging those rates" at the STB.

The NGFA had alerted USDA to the STB small rail rate proceeding, and encouraged the department to participate actively in the rulemaking.

Canada Proposes 2 Percent FM Limit in Imported Soybeans

The Canadian Food Inspection Agency (CFIA) has issued a draft standard (D-94-17) proposing that all soybeans imported from the United States be cleaned of all soil material prior to shipment, and that such soybeans contain no more than 2 percent foreign material.

The draft standard, which the CFIA said is designed to reduce the risk of infection from the soybean cyst nematode, would require that the 2 percent foreign material limit be documented either by issuance of an official inspection certificate by the U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration or a phytosanitary certificate declaring that the shipment complies with the limit.

In a related action, CFIA said it planned to add soybean rust (*Phakopsora pachyrhizi*) to the list of Canada's quarantine pests and to provide exemptions from the standard for commercially cleaned and packaged soybeans intended for

consumption (e.g., pre-packaged soybeans for roasting), roasted soybeans and processed soybeans, such as meal and flour.

The CFIA asserted that the new draft standard for bulk soybean imports was developed after the "interception of uncleaned soybeans imported into Canada for processing purposes." Since 1973, Canada has regulated imports of soybean seeds to forestall introduction of soybean cyst nematode into uninfected areas of Canada. The CFIA's draft standard states that serious yield reductions can occur in fields infested with the nematode, a pest found throughout the Midwest and other U.S. soybean-producing areas.

The NGFA and the North American Export Grain Association submitted joint comments on the proposed Canadian draft standard to USDA's Animal and Plant Health Inspection Service for use in the U.S. government's official response to the CFIA. [See enclosed *Issues and Actions* for a report.]

EPA Extends Deadlines for Compliance with SPCC Plan Changes

The Environmental Protection Agency (EPA) in the July 11 *Federal Register*, announced it is extending by 18 months certain upcoming deadlines for complying with the July 2002 amendments to its Spill Prevention, Control and Countermeasures (SPCC) Plan.

In July 2002, EPA finalized changes to its SPCC plan requirements that included: 1) increasing the tank threshold to 1,320 gallons; 2) monthly inspections; 3) 100 percent containment rules; 4) certified tank testing; and 5) enhanced spill reporting. Affected by the EPA extension are those dates when a facility must amend its SPCC plan and the date when the facility must implement the amended plan to comply with the 2002 amendments.

Specifically, under the extension, an onshore facility that:

- ▶ was **operating on or before Aug. 16, 2002** is required to maintain its plan but must amend it, if necessary, to ensure compliance, on or before Feb. 17, 2006. Further, such facilities are required to implement the amended plan as

soon as possible, but not later than Aug. 18, 2006;

- ▶ became **operational after Aug. 16, 2002, through Aug. 18, 2006**, and could reasonably be expected to have a discharge as described in the spill-prevention regulations [40 CFR 112.1(b)] is required to prepare a plan on or before Aug. 18, 2006. Further, such facilities are to implement the plan as soon as possible, but not later than Aug. 18, 2006; and

- ▶ becomes **operational after Aug. 18, 2006**, and could reasonably be expected to have a discharge as described in the spill-prevention rules is required to prepare and implement a plan before it begins operations.

EPA said it is providing the additional time to allow the regulated industry sectors sufficient time to update their spill-prevention plans in the aftermath of a recent partial settlement of a legal challenge filed by the American Petroleum Institute on certain aspects of the rule.

OSHA Approves New Respirator Fit-Testing Protocol

The Occupational Safety and Health Administration (OSHA) has approved a new quantitative fit-testing procedure to assist employees and employers in selecting the proper respirator. In a notice published in the Aug. 4 *Federal Register*, OSHA said the new fit-testing protocol – referred to as the "controlled negative pressure RE-DON protocol – requires three different test exercises followed by two re-donnings of the respirator. The final rule implementing the new fit-testing procedures takes effect **Sept. 3**.

OSHA summarized the testing protocol as follows:

- ▶ **Facing Forward:** In a normal standing position and without talking, the employee breathes normally for 30 seconds. Then, while facing forward, the employee holds his or her breath for 10 seconds during sampling.
- ▶ **Bending Over:** The employee bends at the waist for 30 seconds and then holds his/her breath for 10 seconds during sampling.
- ▶ **Head Shaking:** The employee shakes his/her head back and forth vigorously several times while shouting for



approximately three seconds. Then, while facing forward, the employee holds his or her breath for 10 seconds during sampling.

► **First Re-Donning:** The employee removes the respirator, loosens all face-piece straps, and then re-dons the respirator mask. After putting the mask back on, the employee faces forward and holds his/her breath for 10 seconds during sampling.

► **Second Re-Donning:** The employee removes the respirator, loosens all face piece straps, and then re-dons the respirator mask a second time. Then, after putting the mask back on, the employee faces forward and holds his or her breath for 10 seconds during sampling.

The Aug. 4 *Federal Register* notice contains a complete description of the new respiratory protection fit-testing requirements.

Codex Delays Development of International Vomitoxin Standard

...Takes Action on Several Biotechnology-Related Issues...

During its meeting in March, the Codex Alimentarius Commission's Committee on Food Additives and Contaminants decided to postpone further work on developing an international food safety standard for deoxynivalenol (vomitoxin) in wheat and other cereal grains.

Instead the committee decided to seek additional information on: 1) the occurrence of vomitoxin in cereals; 2) the impacts of processing, decontamination and sorting to reduce vomitoxin levels in a lot; 3) sampling procedures and analytical methods for detecting the contaminant; and 4) national or guidance levels already set for the contaminant. For instance, the U.S. Food and Drug Administration (FDA) has established an advisory level for vomitoxin in finished wheat products, such as flour, germ and bran, at 1 part per million (p.p.m.). For animal feed, FDA has established an advisory level of 5 p.p.m. to 10 p.p.m., depending upon the animal species. The information is to be considered when the Codex committee next meets in 2005.

The committee also decided to delay – at least until 2007 – action on a proposal to establish a 5 part per billion (p.p.b.) limit on the presence of ochratoxin A in wheat, barley and rye. The committee is to use the additional time to collect more information on the occurrence and health effects of the toxin. It also is to begin gathering data on mycotoxin contamination of sorghum to determine if international standards are needed to protect consumer health.

Codex's actions are important since it is recognized under the World Trade Organization as the entity responsible for establishing science-based international standards that protect human and animal health, and facilitate trade. Codex was established in 1962 by the UN's World Health Organization and Food and Agriculture Organization, and operates a various committees that develop international standards for various food- and feed-related issues, including pesticide residues,

toxins, labeling, food hygiene, and commodity-specific standards.

Other Actions: In other Codex-related matters concerning biotechnology, the Codex Committee on General Principles agreed to include the following definition of traceability/product tracing in the Codex Procedures Manual: *"The ability to follow the movement of a food through specified stage(s) of production, processing and distribution."*

Building upon this definition, the Codex Committee on Food Import and Export Certification and Inspection Systems is to attempt to reach agreement on what constitutes a traceability/product-tracing system when it meets later this year in Melbourne, Australia.

In other actions, the Codex Committee on Food Labeling failed to reach consensus on an international standard for labeling foods containing biotech-enhanced ingredients. At issue is whether the standard should permit labeling based upon the method of production, as well as end-use product characteristics. The United States strongly favors the latter approach because it is consistent with U.S. food safety and labeling standards. The United States strongly opposes production-based labeling because it can mislead consumers into believing a health risk may be present. By contrast, the European Union and many developing countries advocate inclusion of production-based labeling in Codex food-labeling codes as a "consumer right-to-know" issue.

Finally, the Codex Executive Committee decided in June to reestablish the Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology to continue work on developing international safety standards for foods containing biotech-enhanced ingredients. Under the plan adopted by the Executive Committee, the first meeting of the task force would occur in Japan in October 2005.



Membership Matters

by Todd Kemp
Director of Marketing

Hiser Wins Membership Month Grand Prize Drawing!...

...Says "I'm Ready to Hit the Slopes!"

Membership Month '04 came to a rousing end on Aug. 13 with eight new NGFA-member companies recruited and in the fold. As a result, eight separate NGFA recruiters qualified for the Colorado Ski Weekend grand prize drawing.

And the winner is...**Lynn A. Hiser**, director of transportation, A.E. Staley Manufacturing Co., Decatur, Ill.! Lynn



recruited PLM Transportation Equipment Co., Chicago, Ill. As his prize, Lynn wins the following:

- Airfare for two to Denver, Colo., – sponsored by **Summit Software**, Ft. Wayne Ind.
- Two nights' accommodations – courtesy of the **Adams Mark Hotel**, Denver, Colo., site of the NGFA's Country Elevator Council meeting on Dec. 5-7
- Lift tickets for two at Winter Park Ski Resort – sponsored by **Colorado Commodity Traders Inc.**, Greeley, Colo.

A big thank-you to our NGFA-member sponsors for their strong support of the NGFA membership program!

And thanks to all recruiters who took the time during Membership Month to invite prospective members to join the NGFA. Remember, at the NGFA, every month is Membership Month!



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