



# NGFA

# Newsletter<sup>®</sup>

Volume 57, Number 18, September 15, 2005

## Post-Katrina Recovery Picks Up Steam in Center Gulf

### ...USDA Planning to Announce Additional Policy Responses...

Considerable progress continues to be made in restoring U.S. export grain elevators and related infrastructure to operation as part of the recovery in the New Orleans, La., area following Hurricane Katrina.

Assessments reported to the NGFA and North American Export Grain Association (NAEGA) of hurricane-affected facilities continue to detect relatively limited physical damage. While operating conditions at each of these facilities still is in the process of being restored to normal, progress continues to be made in addressing obstacles through round-the-clock efforts by grain exporters, allied industries (including inspection service providers, barge lines and rail carriers), and multiple U.S., state and local government entities. Nine of the 10 grain export elevators in the New Orleans region have had power restored. Eight of those facilities have resumed operations **to varying degrees**, with six reporting 24-hour-a-day operations. One of the nine elevators was undergoing scheduled renovation prior to the hurricane and remains out of service; however, there are indications this facility – with a storage capacity of 2 million bushels – may be restored to

operation soon to bring more capacity on-line. The eight remaining grain export elevators where power has been restored have resumed at least limited operations. These facilities have a combined storage capacity of approximately 44.1 million bushels of the approximate 52.6 million bushel total capacity in the New Orleans region.

---

*See pages 5-7 for important information regarding NGFA's Trade Rules and Arbitration Rules that may be pertinent to potential trade disputes.*

---

Three floating rigs also have been restored to full or partial operation, with a loading capacity ranging from 30,000 to 60,000 bushels each.

In addition, the U.S. Department of Homeland Security and local parish authorities have assisted in enabling employees of export grain elevators to secure the necessary credentials to access facilities in the New Orleans area on a 24-hour-a-day,

*(Continued on page 3)*

## Agriculture River Recovery Fund Created to Aid Ag Industry Employees, Families Victimized by Hurricane Katrina

An "Agriculture River Recovery Fund" has been established to provide financial assistance to those who work for or provide services supporting U.S. agriculture and its grain industry, and who have been displaced and had their lives and livelihoods disrupted by Hurricane Katrina.

The fund, which was announced Sept. 14, is being spearheaded by a wide range of organizations and individuals involved in U.S. agriculture, including the grain and related industries. The Agriculture River Recovery Fund is designed to serve as a vehicle through which tax-deductible charitable contributions can be made to assist these individuals and their families in restoring their lives and livelihoods.

The concept for the fund was generated by leaders from a diverse spectrum of the grain and allied industries, who

approached the North American Export Grain Association (NAEGA) and NGFA for assistance in organizing the effort.

"Individuals and businesses from across U.S. agriculture and the international grain industry are uniting to help our own and to provide support for the recovery of the vital Mississippi River/Center Gulf region," said NAEGA President Gary C. Martin. "In essence, we are following up on requests received from around the world for information on how assistance can be directed to these dedicated employees and their families, as well as employees of allied industries, such as barge operators, grain inspectors and others, who provide support services to export grain elevators in the region and who have served our industry faithfully over many years. We are gratified by this outpouring of concern! This initiative provides the industry with a mechanism to show our strong support."

*(Continued on page 2)*



# Newsletter

by Randall C. Gordon  
V.P., Communications/Gov't Relations  
E-Mail: rgordon@ngfa.org

## "Recovery Fund" continued from page 1

"The human tragedy associated with Hurricane Katrina is immense," added NGFA President Kendell W. Keith. "Employees and their families who have worked to serve U.S. agriculture have suffered profound personal loss. We hope this unprecedented, agriculture-wide effort will contribute in a meaningful way to the relief and recovery in the region, and most importantly to restoring the lives and livelihoods of the most important assets our industry has – our people."

Organizers of the Agriculture River Recovery Fund said they hope to raise at least \$500,000 in charitable financial contributions to help supplement the financial resources of personnel from grain elevators and supporting service industries in the region who have suffered personal loss or injury, been displaced, and/or suffered economic loss as a result of Hurricane Katrina. Several categories of suggested donation levels for both individuals and businesses have been established.

All funds contributed to the Agriculture River Recovery Fund are fully deductible to individuals and corporations as a charitable contribution for federal income tax purposes. One hundred percent of all donations will be distributed to needy applicants. Contributed funds will be maintained in a segregated account by the National Grain and Feed Foundation – a 501(c)(3) charitable foundation administered by the NGFA. All administrative and operating expenses associated with the fund will be paid by the NGFA.

A web site – [www.ARRFund.org](http://www.ARRFund.org) – has been created that provides information on this agricultural humanitarian-relief effort, including mechanisms for receiving contributions. Donations may be made by checks payable to: Agriculture River Recovery Fund; 1250 Eye Street, N.W., Ste 1003; Washington, D.C., 20005. To send funds by wire, please provide the following instructions to your bank: SunTrust Bank (Atlanta Office), 1 Park Place, Atlanta, Ga., 30303; ABA Routing Number 061000104; Account number 1000025890061; Agriculture River Recovery Fund/National Grain and Feed Foundation.

An advisory board comprised of leaders representing a wide spectrum of U.S. agriculture will provide guidance to an Operating Committee in implementing the Agriculture River Recovery Fund. The actual funds will be disbursed by a grants panel consisting of volunteers. Fund organizers said they hope to generate sufficient funds so that grants can be made to a "significant number of qualified and appropriate individuals who work to serve agriculture

and who have suffered personal loss or injury, been displaced, and/or suffered economic loss as a result of Hurricane Katrina." The number and amount of these individual grants will depend upon the level of contributions received, the organizers noted. No applicant can be assured that he or she will receive grants or the dollar value of such awards, they added.

In addition, from a legal liability standpoint, fund organizers noted that donors; the Agriculture River Recovery Fund and its administrative entities and grant panels; the National Grain and Feed Foundation; and NAEGA are not responsible or liable if funds are unable to be donated, are donated to inappropriate individuals, or are used in an inappropriate manner by grant recipients.

Export grain elevators and support services located in the Mississippi/Center Gulf region and Port of Mobile, Ala., are critically important to U.S. agriculture, which counts on exports to market approximately 50 percent of U.S. wheat, 25 percent of U.S. corn and 35 percent of U.S. soybeans. Export grain facilities in the New Orleans/Mobile region account for approximately 60 to 70 percent of vessel-borne shipments, consisting primarily of corn and soybeans – which combined typically represent about 90 percent of export shipments from the region. The region also is an important export port for U.S. hard red spring wheat.



## Calendar

**Sept. 22, 2005:** NGFA Risk Management Committee  
NGFA Conference Room, Washington, D.C.

**Dec 4-6, 2005:** NGFA Country Elevator / Feed Industry Council  
Conference & Trade Show  
Hyatt Union Station, St. Louis, Mo.

**Dec 4, 2005:** NGFA Country Elevator Committee  
Hyatt Union Station, St. Louis, Mo.

**Dec 6, 2005:** NGFA Animal Agriculture Committee  
Hyatt Union Station, St. Louis, Mo.

NGFA Feed Legislative and Regulatory Affairs Committee  
Hyatt Union Station, St. Louis, Mo.

NGFA Feed Manufacturing and Technology Committee  
Hyatt Union Station, St. Louis, Mo.

**March 5-7, 2006:** NGFA's 110th Annual Convention  
Charleston, S.C.





## "Post-Katrina" continued from page 1

seven-day-a-week basis. Local authorities and law enforcement personnel are recognizing documentation issued by grain export companies to allow employees access in ways that are consistent with continuing curfews implemented in the region to maintain law-and-order.

**USDA Policy Responses:** Meanwhile, the NGFA has learned that the U.S. Department of Agriculture (USDA) as early as Sept. 16 may announce additional measures designed to address the post-Katrina situation. One step believed to be under active consideration involves USDA providing freight differential payments and other incentives to reposition some grain to available terminal storage and areas where port capacity may be "underutilized." In addition, USDA is expected to announce next week that producers with corn marketing assistance loans that mature in September and October will be given 60 days from loan maturity to purchase the corn from the Commodity Credit Corporation (CCC) at the posted county price. CCC would not begin the process of "calling" those loans and setting up a delivery schedule for producers until the 60-day period ends. USDA already has announced that it will allow the use of on-ground farm storage for all farm program commodities harvested in 2005 and 2006. [See related article on page 12.]

USDA's responses are designed to preempt other onerous policy options being considered by some in Congress. One of those under active consideration is legislation authorizing or mandating that USDA allow extensions of 2005-crop marketing assistance loan maturity dates for up to six months.

**Recovery Assessment:** The following are among the noted areas where significant progress in recovery at the Center Gulf has been made during the last few days:

▶ **Continued Improvements in Navigation on Mississippi River:** The U.S. Coast Guard as of Sunday, Sept. 11 at 5 p.m., announced that the Captain of the Port of New Orleans had expressed satisfaction that the Mississippi River below mile marker 116 is clear. But because of a lack of functioning aids to navigation (i.e., signal buoys) south of mile marker 104, the captain of the port has implemented a safety zone from the Southwest Pass to mile marker 104, restricting deep-draft vessel traffic to daylight hours only. The NGFA and NAEGA understand that daylight-only traffic may continue through the Southwest Pass until about Sept. 26, at which time damaged or destroyed aids to navigation should be replaced or repaired, and unrestricted navigation restored. Above the safety zone, two-way, day-and-night traffic up to 47-foot drafts now is permitted, which continues to assist the process of unloading and loading barges. Some barges containing new-crop grain have been among the conveyances unloaded at export elevators in the region.

Vessels drafting up to 45-feet – which includes fully loaded Panamax-sized vessels used to transport U.S. grains and oilseeds – are transiting the Southwest Pass under daylight-only restrictions, and have not encountered any impediments in moving from anchorage to berth. Several grain vessels have been loaded and outbound shipments are resuming. In addition, dredging of the Southwest Pass began on the night of Sept. 12. The Southwest Pass is the channel used by ocean-going vessels to load and unload products, including U.S. grains and oilseeds.

Continuing improvements in infrastructure-related conditions have assisted grain export elevators in the region in restoring operations. However, this is a gradual process. Among the most significant infrastructure-related challenges that continue to remain are:

▶ **Securing Adequate Housing and Living Accommodations at Several Facility Locations to Support Employees, Their Families and Support Personnel:** There continues to be a challenge at several grain export elevators in the region to secure adequate approved housing facilities and the appropriate infrastructure (such as electricity, food and water, and wastewater services) needed to support living conditions for employees and other support personnel necessary for these facilities to operate. Several companies also still are in the process of locating some of their employees, who have not been accounted for yet. There also are reports that there are insufficient living accommodations for the number of vessel pilots needed for 24-hour-a-day operations through the Southwest Pass.

▶ **Relieving Congestion in Lower Mississippi River:** While conditions for discharge, loading and movement of vessels continue to improve, key points of congestion now include delays in discharge of vessels carrying imported dry bulk materials. These vessels are the same vessels scheduled to be cleaned and used to transport U.S. grain cargoes. In addition to the daylight-only navigation restrictions in the safety zone below New Orleans, which continues to slow inbound vessel traffic, some river pilots apparently are reluctant to operate vessels during night-time hours in some areas of the river because of curfew and security concerns. There also are towboat-allocation problems caused by labor shortages, and additional "line boats" are needed to push empty barges northbound and bring larger grain-laden barge tows downstream. Resolving these issues will be important to easing this congestion, as well as to enable additional barge capacity to move north to transport newly harvested grain downriver to the New Orleans region for export.

▶ **Other Infrastructure Needs:** Full restoration of power at one grain export facility, as well as the availability of



fuel, also are important to full resumption of operations. In addition, while basic utilities, including telephone service, have been restored in most areas, high-speed internet and communications service still is lacking at some export elevator locations. Businesses like the grain export industry rely heavily on electronic data transfer for executing transactions and required export documentation.

The NGFA and NAEGA continue to commend U.S. government agencies, as well as state and local authorities, for their tireless efforts to address infrastructure challenges that are critical to the efficient operations of grain export elevators. The two organizations also reiterate the importance of recovery of the Mississippi/Center Gulf region to the competitiveness of U.S. grain exports – particularly corn, soybeans and soft red winter wheat – and to the industry's

ability to serve global markets. There simply is insufficient "surge" capacity to enable significant quantities of grains and oilseeds to be repositioned to different export ports, such as the Texas Gulf, Great Lakes and Pacific Northwest. These alternative ports are supplied to a significant degree from different transportation, bulk grain and oilseed origination, and distribution points than those that supply the Mississippi/Center Gulf. Further, the cost structure, as well as the storage/loading capacity and flexibility of these alternative ports are significantly different and in some cases are somewhat more constrained than what exists through the Mississippi River/Center Gulf system. And indications are that some of these ports, as well as rail and truck movements, already are running at or near full capacity. For these reasons, the NGFA and NAEGA continue to urge that U.S. government prioritize the investment of human and financial resources on recovery and restoration of operations at the Mississippi/Center Gulf port.

## USDA Makes Adjustments to PCPs to Reflect Market Conditions

The effects of Hurricane Katrina also have extended to the methods employed by the U.S. Department of Agriculture to determine posted county prices (PCPs) used to determine marketing assistance loan benefits and loan deficiency payments.

The following are responses provided by USDA's Farm Service Agency (FSA) to questions posed by the NGFA today:

**1. NGFA:** *In the wake of Hurricane Katrina, what changes has USDA made to its system of terminal markets and differentials used to calculate posted county prices?*

**USDA:** Fundamentally, the system for terminal markets and county differentials remains unchanged, in that (USDA's) Commodity Operations Division continues to gather market data on a daily basis to establish PCPs. However, adjustments are being made as necessary to ensure that PCPs reflect local cash market prices while maintaining relatively small differences in marketing loan benefits across state and county boundaries. It should be noted that this same method was being used before Hurricane Katrina.

**2. NGFA:** *Which states and counties have been most affected by these adjustments?*

**USDA:** While states and counties with differentials for the Gulf Terminal Market (GLF) have been affected because of transportation and other issues, states and counties with differentials for other terminal markets may have realized adjustments to minimize discrepancies in marketing loan benefits since the GLF market impacts a wide range of states.

**3. NGFA:** *How is USDA supplementing terminal market prices with cash market values in determining PCP values in the affected region? How often are these adjustments to PCPs being made?*

**USDA:** As usual, FSA gathers price data for terminals and country elevators, and considers other price data, including wire services and USDA's Agriculture Marketing Service. To supplement terminal market prices with cash values in affected regions, FSA has significantly increased the number of contacts with country elevators, by making an additional 200 to 300 calls to various counties each day. Calculated PCPs based upon terminal market prices are reviewed on a daily basis, and adjustments are made as necessary.

**4. NGFA:** *To what extent have "rift lines" developed in PCP values between counties and states for various commodities as a result of these changes? In which states and counties are the rift-line spreads the greatest?*

**USDA:** While PCPs are monitored carefully to prevent large-scale loan forfeitures, FSA strives to limit market gain or LDP rate spreads from one county to an adjacent county or across state lines.

**5. NGFA:** *How soon does USDA plan to revert back to its traditional terminal markets to derive differentials for determining PCP values?*

**USDA:** USDA has not changed terminal market areas or terminal market assignments. With respect to adjustments to differentials for individual counties in response to changes in the basis and escalating freight values, USDA currently is striving to ensure that producers have an opportunity to repay 2004-crop marketing assistance loans. The focus is on the relatively large quantities of corn maturing on Sept. 30 (83.7 million bushels) and Oct. 31 (70.1 million bushels). At the same time, it is fully recognized that LDP spreads are not popular (particularly at harvest time), and harvest will soon be in full swing in the corn belt.



## A Refresher on NGFA Trade Rules and Arbitration for 2005\*

[Editor's Note: The NGFA has received numerous calls from members concerning potential trade disputes that might arise given the market environment following Hurricane Katrina, as well as drought and weather-induced grain-quality issues that have affected this year's crop. The NGFA this week posed a series of questions to NGFA Trade Rules Committee Chair James W. Keistler concerning the potential application of the NGFA Trade Rules and their intersection with the NGFA Arbitration System that may provide useful information as the industry addresses these challenges. Keistler has served the NGFA and the industry for many years in various capacities, including as chairman of the NGFA Trade Rules Committee for more than a dozen years. He is merchandising manager for Twomey Company in Smithshire, Ill., where he has worked for more than 30 years.]

### Application of Contract Terms and NGFA Trade Rules

1. **NGFA:** *Let's start with some basics. In a potential trade dispute situation, one of the first questions that arises pertains to the contractual rights and obligations of the parties, and what remedies might be available. What should they do first?*

**Mr. Keistler:** First, and foremost, the parties always need to look at their contract. This may seem obvious, but it is overlooked too frequently. The terms of the contract between the parties governs the transaction, and are the first point of reference if a trade dispute arises, particularly under NGFA Arbitration.

2. **NGFA:** *What if the contract terms are unclear, insufficient or completely silent on the particular issue in dispute?*

**Mr. Keistler:** Then the parties may be able to rely upon contract default rules, such as NGFA's Trade Rules. These rules only apply to the extent that they are not excluded or inconsistent with the contract terms. The NGFA Trade Rules automatically apply to transactions between NGFA Active member firms, unless expressly excluded. In addition, if the contract contains a specific reference to the NGFA Trade Rules, those rules also govern contract disputes between NGFA members and non-members to the extent that they do not conflict with the contract terms. Remember, even in transactions between NGFA members, the NGFA Trade Rules do not apply if they are excluded or inconsistent with the contract terms.

Further, if the contract between a NGFA member and non-member only references NGFA Arbitration, the NGFA Trade Rules do not expressly govern the transaction even though the Trade Rules may reflect general customs of

the trade. While the arbitrators may consider the NGFA Trade Rules under such circumstances to the extent they reflect normal trade custom, the only way to guarantee that they will do so is to expressly incorporate the NGFA Trade Rules in your contracts. As provided in Arbitration Rule 3(c)(4), a general reference in a contract to "NGFA rules" shall be deemed to incorporate all rules of the NGFA, including the Trade Rules and Arbitration Rules. Again, though, if you want to be certain that the NGFA Trade Rules govern your contracts, you should include a specific reference to "NGFA Trade Rules" in your contracts.

3. **NGFA:** *For those who are less familiar with or have not looked at the Trade Rules in a while, would you give us a refresher?*

**Mr. Keistler:** The NGFA Trade Rules are designed to facilitate the purchase and sale of grain, feed products and barge transportation. In essence, they provide a framework for the trade and a foundation for resolution of disputes under the NGFA Arbitration System.

The NGFA maintains four sets of Trade Rules that are modified periodically to reflect trade custom:

- ▶ The **Grain Trade Rules**, first adopted in 1902, apply to all transactions of a financial, mercantile or commercial nature involving "grain" as defined by the U.S. Grain Standards Act (i.e., corn, wheat, rye, oats, barley, flaxseed, grain sorghum, soybeans, mixed grain and any other food grains, feed grains and oilseeds for which standards are established under the Act).
- ▶ The **Feed Trade Rules**, first adopted in 1921, apply to transactions involving feed and feed ingredients, including mill products or byproducts, as defined by the Association of American Feed Control Officials (AAFCO).

---

\* *Disclaimer: This discussion is for informational purposes only; it does not constitute legal advice. No warranties, guarantees or assurances concerning this information are made, and any responsibility for the use of this information is disclaimed. Competent legal and other experts should be consulted on matters covered herein. Further, the information presented in this discussion does not represent official positions or views of the NGFA or any individual or NGFA member company.*





# Newsletter

- ▶ The **Barge Trade Rules**, first adopted in 1964, **supplement** the Grain Trade Rules and Feed Trade Rules whenever such shipments are designated by contract to be transported by barge.
  - ▶ The **NGFA Barge Freight Trading Rules** (affreightment), first adopted in 1981, apply to disputes of a financial, mercantile or commercial character involving transactions in the purchase or sale of barge transportation, and in the carriage of bulk commodities by barge.
4. **NGFA:** *What if the contract is silent or unclear on the issue that is in dispute and the Trade Rules do not seem to cover it either?*

**Mr. Keistler:** Trade practice or trade custom ordinarily becomes relevant in those situations where the contract between the parties and the NGFA Trade Rules fail to address the issue. In addition, even if the Trade Rules do not expressly govern a contract between a member and non-member because they are not referenced in that contract, the Trade Rules still may be an indicator of the relevant custom of the trade. Importantly, there is no “exclusive or single source” for determining the appropriate customs of the trade. A key advantage of resolving disputes under NGFA Arbitration is that the decision-makers are persons from the trade who are knowledgeable in the type of transaction that is in dispute, and have experience with the relevant trade practices.

## Application of NGFA Trade Rules

5. **NGFA:** *Let's now turn to some of the situations that may be emerging in the marketplace. Which NGFA Trade Rules might be among those most likely to apply?*

**Mr. Keistler:** Each situation is different, of course, and it is impossible to determine accurately in advance which, if any, specific rules might apply to a future dispute. But here are some general examples that could become relevant.

- ▶ If the issue concerns the passing of title as well as risk of loss or damage from the buyer to the seller, NGFA Grain Trade Rule 6 applies to grain transactions, NGFA Feed Trade Rule 6 applies to feed transactions, and NGFA Barge Trade Rule 2 supplements those two sets of rules when the shipment is to be transported by barge.
- ▶ If the issue concerns an alteration of the contract, such as an extension of the delivery period, NGFA Grain Trade Rule 4 and NGFA Barge Freight Trading Rule 5 require the express consent and immediate written confirmation of both the buyer and seller. NGFA Feed Trade Rule 4 is

slightly different, in that it requires that mutual written confirmation occur by the end of the next business day.

- ▶ NGFA Grain Trade Rule 28, NGFA Feed Trade Rule 19 and NGFA Barge Freight Trading Rule 14 describe the buyer's and seller's corresponding obligations upon non-performance or default by either party.

6. **NGFA:** *Let's get into some specific situations. Let's take a situation in which a farmer or other seller of grain alerts a grain buyer that he or she no longer is able to perform under the terms of the contract to deliver grain. What NGFA Trade Rules might apply in this instance?*

**Mr. Keistler:** In this case, among the principal rules that the parties should examine is Grain Trade Rule 28, “Failure to Perform.” Under this Trade Rule, if the seller determines he/she will not be able to complete a contract within the contract specifications – which includes the delivery period – it is the seller's duty “at once” to give notice to the buyer by telephone and confirmed in writing. Once receiving such notification, it is the buyer's responsibility to: 1) agree with the seller upon an extension of the contract; or 2) using due diligence, buy-in for the account of the seller the default portion of the contract; or 3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

If the seller fails to notify the buyer of his/her inability to complete the contract, the liability of the seller continues until the buyer, by the exercise of due diligence, can determine whether the seller has defaulted. In such cases, it is then the duty of the buyer, after giving notice to the seller to complete the contract, to at once: 1) agree with the seller on an extension of the contract; or 2) buy-in for the account of the seller, again using due diligence, the defaulted portion of the contract; or 3) cancel the defaulted portion of the contract at fair market value based upon the close of the market the next business day.

A number of grain companies, for a number of reasons, do not reference the NGFA Trade Rules in some of their contracts. Some only reference that NGFA arbitration applies if trade disputes subsequently arise under those contracts. In these cases, it may prove helpful for the contract to contain specific language similar to Grain Trade Rule 28.

7. **NGFA:** *What about a situation in which a railroad or barge company has imposed an embargo on transportation movements or declared “force majeure” on conveyances?*





# Newsletter

**Mr. Keistler:** Grain Trade Rule 26 may apply in this situation to the extent that contracts are made subject to “embargoes, strikes or cars.” In the case of an “embargo,” this rule states that: “If a contract is made ‘subject to no penalty on account of embargoes’ and an embargo is placed, the final shipment or delivery date of the contract shall be extended for the duration of the embargo plus the number of days remaining in the contract shipment or delivery period at the commencement of the embargo.” Importantly, this rule also states that the burden of proof is on the seller to show that the conditions specified (e.g., embargo, strikes or inability to secure cars) prevented shipment or delivery within the contract specifications. This Trade Rule also makes it the duty of the seller to advise the buyer by telephone, with confirmation in writing, on or before the expiration date of the contract, of his/her inability to make the shipment or delivery within the contractual specifications. If the seller fails to notify the buyer, the embargo, strike and or car clause is deemed void.

8. **NGFA:** *What about a situation in which a buyer no longer is accepting contracted grain because of transportation unavailability, storage congestion or other reasons?*

**Mr. Keistler:** Under the scenario you outline, Grain Trade Rules 26 and 28 again would be among the principal NGFA Trade Rules that may apply. Grain Trade Rule 28 also covers a buyer’s non-performance on a contract, and contains the same basic obligations as apply to the seller in such situations.

## NGFA Arbitration

9. **NGFA:** *Please give us a refresher on the conditions under which NGFA arbitration applies.*

**Mr. Keistler:** The NGFA Arbitration System, formally established in 1901, is the cost-effective and expedient method for settling trade disputes involving grain, feed, barge and barge freight transactions. NGFA arbitration is compulsory for resolving trade disputes between NGFA Active members involving the NGFA Trade Rules or the “warehousing, processing, manufacturing, merchandising, financing, transportation, or distribution of grain, feed, or feed ingredients.” In all cases, to qualify for NGFA arbitration, at least one party to the case must be a NGFA member. NGFA arbitration also is available in disputes involving Associate/Trading members, such as barge lines, and non-members, based upon consent by both of the parties or entry of a court order to compel arbitration. Further, if the contract in dispute specifically provides for NGFA arbitration, the parties typically are deemed to have consented to it.

10. **NGFA:** *Are the railroads and barge transportation companies NGFA members?*

**Mr. Keistler:** Numerous barge transportation companies are Associate/Trading members. All of the Class I railroads and several regional and shortline railroads also are NGFA Associate/Trading members. An important feature of the NGFA Arbitration System involves NGFA Rail Arbitration, first adopted in 1998, to provide for the resolution of disputes between railroads and their customers. All the Class I railroads and some shortline and regional railroads have agreed to be bound by the NGFA Rail Arbitration System to resolve specific classifications of disputes, and to enter confidential mediation on certain rate-related issues upon request by a NGFA member. NGFA-member railroads and their customers also can use the NGFA Arbitration System to resolve any and all other kinds of disputes where both agree to arbitrate after the dispute arises.

11. **NGFA:** *Where is more information available about the NGFA Trade Rules and Arbitration System?*

**Mr. Keistler:** Current versions of the NGFA Trade Rules and Arbitration Rules are available by contacting the NGFA at (202) 289-0873. The NGFA also makes its Trade Rules and Arbitration Rules available online at the NGFA’s website at [www.ngfa.org](http://www.ngfa.org). NGFA Arbitration case decisions also are available on the NGFA’s website. While these prior decisions are not binding precedent upon future disputes, they may be helpful to assess current situations. As always, of course, you should consult with a competent attorney when the need arises.

The NGFA does not – and cannot – provide advice, guidance or interpretations of contract terms or Trade Rules issues. Doing so would conflict with the NGFA’s role as the independent administrator of the NGFA Arbitration System. The NGFA does respond to questions concerning the administrative and procedural nature of the Arbitration System.

There’s also an excellent opportunity coming up next spring to learn more about the relevance of the NGFA’s Trade Rules and Arbitration System to a wide range of commercial and farmer transactions. I strongly recommend attending the biennial NGFA Trading, Trade Rules and Dispute Resolution Seminar, which is scheduled for May 9-10 in Kansas City, Mo. This seminar is offered only once every two years, so I’d advise you to mark your calendars now and reserve the dates to take advantage of this great opportunity. I’m sure we’ll be discussing a number of the situations that arise during this harvest season.



## NGFA's Board of Directors Approves Changes to Arbitration Rules

During its Sept. 10 meeting in Coeur D'Alene, Idaho, the NGFA's Board of Directors adopted several amendments to NGFA Arbitration Rules Section 3(c), which provides general principles for applying the NGFA Trade Rules and other substantive rules in NGFA arbitration cases.

Pursuant to the NGFA's Bylaws, the amended Arbitration Rules take effect on Oct. 10, 30 days after they were approved by the NGFA Board of Directors. These amendments are subject to membership ratification at the March 2006 annual business meeting to be conducted during the NGFA's convention in Charleston, S.C.

The NGFA Arbitration Appeals Panel recommended amending Section 3(c) after an extensive review, which included input from various NGFA committees, member companies and others. Many of the questions considered were directly from NGFA members or arose from arbitrated cases.

► **Paragraph one** of Section 3(c), which was **not** changed, provides for the automatic (default) application of the NGFA Trade Rules in cases involving trade disputes between NGFA member companies unless the NGFA Trade Rules are expressly excluded in or inconsistent with the contract. This paragraph allows for instances in which the contract does not exclude the NGFA Trade Rules as a whole, but specific terms in the contract are meant to vary from particular provisions in the NGFA Trade Rules.

► **Paragraph two** of Section 3(c), which provides for the application of different trade rules (other than NGFA's Trade Rules) when expressly referenced in the contract, was amended in response to questions involving instances when both the NGFA's and another group's trade rules are referenced in the exchange of contracts, confirmations and other documents recording a transaction. This paragraph was amended to clarify that the other group's trade rules do not necessarily trump NGFA's Trade Rules when both sets of rules are referenced. Instead, this provision as amended clarifies that the arbitrators have discretion to decide which organizations' trade rules apply given the contract, the specific circumstances of the case and the matter under dispute.

► **Paragraph three**, in its former version, stated as follows: "A contractual provision referencing these rules, without also referencing the NGFA Trade Rules, shall be presumed to intend NGFA Arbitration without reliance on the NGFA Trade Rules." The terms "these rules" were intended to refer to NGFA arbitration, but the terms required clarification because Section 3(c) as a whole refers interchangeably to various sets of rules, and the immediately preceding paragraph specifically refers to other associations' trade rules. Also requiring clarification was that this para-

graph applies only in cases involving a nonmember. (Under the first paragraph, the Trade Rules apply unless excluded between members). But the most questions arising on this paragraph concerned the terms "without reliance," which were interpreted to mean that arbitrators are not to consider the NGFA Trade Rules in any manner whatsoever in cases with nonmembers in which the Trade Rules are not specifically referenced in the contract. The longstanding established intent of this paragraph is that NGFA's Trade Rules do not expressly govern cases with nonmembers unless they are referenced in the contract. But the rule was amended to clarify that NGFA's Trade Rules should be available as a possible indicator of trade custom and usage when the contract terms alone do not provide a basis for arbitrators to reach a decision. However, NGFA members again are reminded about the importance of referencing NGFA's Trade Rules in their contracts with nonmembers when they intend for the Trade Rules to apply in subsequent disputes arising out of those contracts.

► **Paragraph four** stands for the basic proposition that a general reference to "NGFA rules" in a contract incorporates all applicable NGFA rules. The amendment to this section of the rules deletes the reference to the "Bylaws" because the NGFA Bylaws already apply automatically to NGFA members, and they are not intended to apply to nonmembers. Other language in this paragraph was similarly omitted as extraneous and unnecessary.

The complete text, as amended, of the new NGFA Arbitration Rules Section 3(c) follows [*deletions designated by strike-through; additions designated by underlining*]:

- "(1) In cases between NGFA Active members, the NGFA Trade Rules shall be deemed to apply unless expressly excluded or inconsistent with the express contractual terms governing a transaction;***
- (2) Where the parties to a transaction have expressly provided for the trade rules of another association or group to apply to a transaction in lieu of the NGFA Trade Rules, then such terms shall be used to decide the case;***
- (3) If a contract between a member and nonmember references NGFA Arbitration without also referencing the NGFA Trade Rules, the NGFA Trade Rules do not expressly govern the transaction but they may reflect general customs and practices of the trade.***
- (4) A general reference to NGFA rules shall be deemed to incorporate all rules of this Association including the Bylaws, Trade Rules and Arbitration Rules, and all definitions included in the Trade Rules shall apply under these Arbitration Rules, likewise."***





## Congress Begins Allocation of Funds for Hurricane Katrina Recovery

The flow of funds directed by Congress as part of the Hurricane Katrina relief effort continues in earnest, with a \$51.8 billion emergency supplemental package approved on Sept. 8, bringing the total so far to more than \$62 billion.

The funds include \$50 billion for the FEMA Disaster Relief Fund, which will be earmarked for temporary housing, relief and rescue costs of other government agencies; public works repairs, such as bridges, roads and water facilities; FEMA logistical expenses; the purchase of 100,000 temporary trailers; and other expenses, such as disaster unemployment insurance, damage inspections, counseling and mitigation activities.

An additional \$1.4 billion is slated to be directed to U.S. Department of Defense operations and maintenance, while \$400 million is destined to the U.S. Army Corps of Engineers for restoration and repair work. This has been described as the “tip of the iceberg” for recovery expenses and the government is likely to press for more funding as longer-term needs become clearer – with some suggesting another \$50 billion package in the coming weeks.

The House and Senate on Sept. 15 also approved separate bills that would provide an estimated \$5.28 billion to \$6 billion in tax breaks for individuals and businesses adversely affected by the disaster, and provide incentives for charitable contributions. Among the bills’ provisions are these:

- ▶ Allow workers to borrow from their retirement savings tax-free as long as the amount is repaid within three years.
- ▶ Make a work-opportunity tax credit available on a temporary basis to those who hire workers displaced by the hurricane.
- ▶ Create a tax credit to encourage businesses within the disaster zone that are not yet operating to continue to pay their workers. Employers would receive a 40 percent credit for wages paid up to \$6,000 from Aug. 28 to Dec. 31.
- ▶ Eliminate tax on debts cancelled because of Katrina-related damages.
- ▶ Increase deductions for businesses that donate food and books through Dec. 31.
- ▶ Increase the deductibility of casualty losses.
- ▶ Extend certain tax filings through Feb. 28, 2006.

In addition to legislative measures being introduced, Hurricane Katrina also has altered a congressional deadline to report a budget reconciliation package. The budget reconciliation is a \$34.7 billion package of spending cuts that includes \$3 billion in

cuts from agriculture spending over the next five years. Affected committees previously had to report to the Budget Committee by Sept. 16 as to how those cuts should be achieved. But pressure to hold off has pushed leaders to set new deadlines of Oct. 26 in the Senate and Oct. 24 in the House. The cuts had been focused on Medicaid, food stamp programs, unemployment insurance and student loans – all tricky subjects in light of the natural disaster. There also has been a call to make the postponement permanent, but Republican leaders continue to underscore the need to stay on track with the proposed budget cuts.

**Agricultural Disaster Assistance Bills:** Many congressmen from agricultural states and districts are drafting disaster-assistance packages to further compensate agricultural producers who have sustained losses because of the hurricane, as well as drought and other natural disasters. A bill introduced by Sens. Jim Talent, R-Mo, and Richard Durbin, D-Ill., would provide assistance to producers with yield losses in excess of 35 percent. Those producers would receive payment of up to 65 percent of the “relevant price for the commodity.” The bill also would reinstate the Livestock Compensation Program to offset what the senators described as the “high costs of feed.” A similar disaster bill was introduced by Sens. Kent Conrad and Byron Dorgan, as well as Rep. Earl Pomeroy, all D-N.D., that would include a crop disaster-assistance program and an additional \$100 million for the Emergency Conservation Program. The bill introduced by the North Dakota congressional delegation also calls for extending maturing 2004-crop marketing assistance loans for up to six months. Both bills would provide relief for producers beyond issues related to the hurricane, including drought, flooding and other weather-related losses. Similar bills are being introduced and drafted in the House.

Many farm state legislators are calling on President Bush to include relief for agriculture in his emergency supplemental funding requests related to Hurricane Katrina. To date, the administration has said it currently does not intend to include funding for anything other than losses related to the hurricane. In addition to USDA’s approval of emergency on-farm ground storage, legislators have called for a temporary extension of marketing assistance loans maturing in September and October. Such a policy response would affect a relatively small proportion of the 2004 corn crop – approximately 238 million bushels – represented by unredeemed marketing assistance loans, and would set an unfortunate and unnecessary precedent.

Assessments still are being made as to full extent of funds needed for Hurricane Katrina, as well as other agricultural disaster relief. The flurry of legislative activity in response to Katrina is expected to extend through the end of the congressional session, now pegged for around Thanksgiving.





## FDA Issues Additional Guidance on Bioterrorism Recordkeeping Rules

The Food and Drug Administration (FDA) on Sept. 2 issued its long-awaited guidance responding to questions concerning how it plans to enforce different aspects of its final regulations that require agricultural facilities and transporters to establish and maintain records under the 2002 Bioterrorism Preparedness and Response Act.

The document responds to questions submitted to the agency since the final rule was published on Dec. 9, 2004. They are in addition to those raised during a series of public meetings conducted earlier this year by the agency, in which FDA officials responded to still more questions raised by the wide range of industry sectors subject to the recordkeeping rule. Members receiving the *NGFA Newsletter* electronically may access FDA's question-and-answer guidance document by clicking here.

Under the regulations, persons that manufacture, process, pack, transport, distribute, receive, store or import food in the United States are required to maintain records containing "reasonably available" information that identifies the immediate previous sources and immediate subsequent recipients of agricultural commodities, feed and food – in essence, a one-step-forward, one-step-back product-tracing obligation. The agency notes that the preamble of the final rule states that "information is reasonably available...if you have a system in place to capture the information. FDA does not intend to require the reconfiguration of business operations." Among industry sectors required to establish and maintain such records are grain elevators, feed and feed ingredient manufacturers, grain processors and millers, pet food manufacturers, transporters and distributors.

The records are required to be maintained for **one year** for feed and pet food manufacturers, and **two years** for grain handlers and exporters. The agency notes in its new guidance document that records created when a commodity subject to the two-year retention requirement is received may be discarded after two years, even if the product remains in the facility. However, the agency states that, "if a facility anticipates that it may hold food for longer than two years, it may wish to retain records of receipt for more than two years as a matter of business practice. Such records could be helpful to both the facility and FDA in the event of a trace-back or trace-forward investigation."

The recordkeeping requirements take effect starting on Dec. 9 for affected U.S. firms with 500 or more employees. The effective date for firms with 11 to 499 employees is June 9, 2006, while all remaining firms are required to begin such recordkeeping on Dec. 9, 2006. Importantly, the recordkeeping requirement applies to covered activities (e.g., grain receiving/

load-out, feed manufacturing, milling and transportation) that occur **on or after the effective dates; they are not retroactive.** In addition, **FDA does not have legal authority to routinely access such records;** under the Bioterrorism Act, FDA can access such records only if it has reasonable belief that a product is adulterated and constitutes a credible threat of serious adverse health consequences or death to humans or animals. If such conditions exist, covered firms are required to provide FDA with access to such records as soon as possible, and within 24 hours of the time FDA makes the request.

Here is a review of several of the most important issues addressed by FDA in its latest guidance:

### **Recordkeeping for Commingled Commodities, Ingredients:**

Among other things, the guidance document **attempts** to respond to several major questions raised by the NGFA concerning the recordkeeping obligations of facilities – be they grain elevators, feed mills or processors – that handle commodities, ingredients or products on a commingled basis. FDA responded to one such question by noting that grain elevators are required to establish and maintain records for each inbound shipment of grain delivered by producers, including lot numbers **if they exist;** importantly, FDA's regulations **do not** require firms to create lot numbers if they do not exist. Further, existing records are sufficient if they contain the required information (which includes the name, location and contact information of the immediate previous source – the producer – as well as the type of commodity delivered. In its question-and-answer guidance document, FDA acknowledges as it did in its final rule that the degree of specificity in such records "may be limited by the current physical configuration of the facility." The agency then provides the following example: "...[T]he facility may place 30 lots from farmers into a single storage bin, place another 30 lots into a second bin, and draw from both bins to create a blended product that is transferred to an immediate subsequent recipient. The record created for the outgoing blended product should indicate all immediate previous sources for the component grain; in this example, there may be as many as 60."

In another question, FDA addresses the responsibility of companies to link inbound deliveries with outbound shipments by using the example of a feed mill that receives ingredients and commingles individual shipments into bins that never completely empty. FDA's response states that the feed manufacturer is responsible for establishing and maintaining records that include information "reasonably available" to identify the specific source of each ingredient used to make every lot of finished product, including the lot numbers of such specificity exists.



The agency also references its final regulations that acknowledge that certain business practices are not amenable to linking incoming ingredients with specificity to the outgoing product, and that it “may not always be possible to identify the specific source of an ingredient that was used to make a finished lot of product. **Because shipments of incoming material are commingled in the storage bin, the record created for every lot of food released by the manufacturer that incorporates material from the bin would include all possible sources of material placed in that bin.**” [Emphasis added.]

**The gist of both these responses indicate that grain handlers, feed manufacturers and other industry sectors that handle products on a commingled basis are required to establish and maintain records using “reasonably available information” that links inbound deliveries with outbound shipments. In effect, this means linking records of deliveries of products into bins to outbound shipments drawn from those bins.** Now that the FDA’s guidance document has been published, the NGFA will be developing a guidance document for grain handlers, feed manufacturers, grain processors and exporters concerning the FDA recordkeeping rule.

On a related issue, FDA addressed a question asking if a manufacturing firm is required to maintain records denoting the lot code numbers provided by suppliers for each ingredient they receive, and to track each lot code and link it to the finished product in which the ingredient is used. FDA responded affirmatively, saying that the regulation requires that the manufacture must maintain records that “include both the lot code of the finished product if it exists and the specific source of each ingredient used to make every lot of finished product, to the extent that information is reasonably available.”

**Scope of Exemption for Intracompany Shipments:** FDA’s final regulation generally exempts intracompany shipments from the bioterrorism recordkeeping requirement. However, FDA’s latest guidance addresses a situation in which a company’s intracompany shipment is hauled by a contract transporter. FDA responded by clarifying that the exemption for intracompany transfers applies to situations in which the product “is not released to another person.” In this instance, FDA said, the manufacturing firm “temporarily releases the food to another entity, the contract transporter,” and would be required to keep a record of that transfer.

**Application of Recordkeeping Requirement to Vertically Integrated Companies and Subsidiaries:** The FDA guidance noted that under the bioterrorism recordkeeping final rule, vertically integrated companies are required to identify the sources of all covered products received from their immediate previous sources. But once those products are received, the integrated company is not required to maintain additional records until it releases the product to another entity, at which time it is required to identify the immediate subsequent recipient of the product. In the guidance, FDA responds to a

question as to whether a vertically integrated company must own its own transportation fleet used to transfer products between its facilities to qualify for this exemption. FDA responds that the definition of a vertically integrated company requires that it “continually possess” the covered product. “Therefore, a company is no longer integrated if the food passes out of its control and is released to another person before returning to the company’s possession,” the agency said. “For example, if an independent transporter takes possession of the food in order to transport it between two facilities owned by the same company, the company must establish and maintain records identifying the transporter and nontransporter immediate previous sources and immediate subsequent recipients.”

FDA noted that the same interpretation applies to companies that have a transportation subsidiary and uses that subsidiary to transport products to others. “A subsidiary is a distinct legal person, and records of the transfer of possession from the nontransporter to the transporter subsidiary must be established and maintained,” the agency said.

In response to another question, FDA also said that two corporate entities are **not** considered to be part of the same vertically integrated company even if they have the same controlling parent firm. “If the two corporate entities are legally distinct persons, they are not considered part of the same vertically integrated company, and records of transfers must be established and maintained,” the agency said.

**Responsibility for Keeping Records of Transporters:** FDA responded to a question concerning whether a company is required to maintain records of specific shipping points of a supplier that has multiple shipping points if the company’s computer system currently is not set up to do so. Significantly, FDA responded that the company can keep records of the name, address and specific contact information of the **vendor** that supplied the product, “but does not need to provide information regarding particular ship(ping) points of the vendor.”

**Application of the Recordkeeping Rule to Brokers:** Under the bioterrorism recordkeeping rule, brokers generally are **exempt** from the recordkeeping requirements provided they do **not** “directly” manufacture, process, pack, transport, distribute, receive, store or import commodities. FDA reasons that brokers typically **only** facilitate the distribution, sale or transportation of commodities by processing information or paperwork associated with those functions. However, FDA clarified in its latest guidance that a broker of a **shipping company** is considered to be a transporter – and thereby subject to the recordkeeping regulations – if it enters into a contract to transport a commodity because the broker is deemed to have “control” of the product, even if the actual movement is subsequently subcontracted to another party.



## USDA Authorizes On-Farm Ground Storage for 2005 and 2006 Crops

In the aftermath of Hurricane Katrina, the U.S. Department of Agriculture on Sept. 7 amended its marketing assistance loan program to authorize producers **nationwide** to utilize ground storage on the farm for farm program commodities – including grains and oilseeds – pledged as collateral for marketing assistance loans or for loan deficiency payments (LDPs) for both the **2005 and 2006 crop years**. The policy change was effective immediately.

In essence, USDA's action means that **any 2005- or 2006-crop farm program commodity stored on the ground will be considered approved farm storage**. USDA said its action was designed to "alleviate short-term logistical problems and support local cash prices above distressed levels" that ensued after Hurricane Katrina. USDA said producers will be responsible for ensuring the quality and quantity of any commodity pledged as collateral for a marketing assistance loan during the entire loan period, and the Commodity Credit Corporation (CCC) "will not assume any loss in quantity and quality for any reason." In a notice (LP-2002) issued to its state and county offices, USDA's Farm Service Agency (FSA) said that commodities stored on the ground on-farm must be: 1) under the control of the producer (i.e., stored on the producer's farm); 2) protected from animals; and 3) "safely and securely located so that water drainage will not seriously affect the

quality and quantity" of marketing assistance loan collateral or LDP commodities. The notice also authorizes the use of bag storage for harvested commodities if approved by the FSA county office. The notice also instructed FSA county offices to spot-check outside ground farm storage before approving marketing assistance loans or disbursing loan proceeds. "If it is determined that CCC's interests are at risk, then the marketing assistance loan shall be called immediately," the notice said.

USDA noted that CCC in years past periodically has authorized outside, on-farm storage of commodities offered as collateral for non-recourse marketing assistance loans as long as such storage met CCC guidelines. In recent years, that authority has been utilized in response to requests on a case-by-case basis.

USDA also reminded producers of the availability of the Farm Storage Facility Loan Program, which provides low-interest financing for building or upgrading on-farm grain storage or silage facilities. Eligibility for such loans is based upon the prospective borrower's demonstrated need. Loans cannot be used to finance facilities used for commercial purposes and must be for the sole use of the borrower. The maximum amount a producer is allowed to borrow is 85 percent of the net cost of the eligible storage facility and handling equipment, up to \$100,000. Loans exceeding \$50,000 must be secured with a real-estate lien.



National Grain and Feed Association  
1250 Eye St., N.W., Suite 1003  
Washington, D.C. 20005-3922

**TIME SENSITIVE**