U.S. Industry Delegation Headed to China Following Shipment Disruptions Triggered by Alleged Presence of Unauthorized Syngenta Biotech Corn Trait

By Randy Gordon, President

An industry delegation organized and led by the North American Export Grain Association (NAEGA) will be in China during the week of December 16 to meet with key Chinese government and industry officials following the disruption in U.S. corn shipments attributed to the alleged presence of Syngenta’s Agrisure Viptera® (MIR 162) biotechnology-enhanced corn.

The biotech-enhanced corn trait has not been authorized for import by China. Syngenta began the Chinese regulatory process about five years ago, and originally indicated approval was expected in 2012. In the ensuing year, the company frequently has expressed an expectation – as recently as this month – that continued delays in securing Chinese government approval of the trait would be resolved soon. At least 2 percent of U.S. planted corn acreage currently is projected to consist of the trait.

The objectives of the NAEGA industry delegation’s meetings next week in Beijing include restoring access for U.S. corn imports by China while reducing and mitigating related risks and costs to the U.S. supply chain in both the short- and long-term. There is concern that U.S. farmers have lost access to one of the largest markets for U.S. corn, and there are indications that China has begun testing imports of U.S. distillers grains for the trait. The delegation will be working with Chinese industry and government officials to seek a remedy to U.S. corn shipments now being detained at Chinese ports of entry, as well as to avoid similar trade disruptions in the future. In addition, the NAEGA delegation hopes to learn more about the Chinese biotechnology regulatory process and current practices, while sharing information with Chinese government and industry leaders about the nature of the U.S. supply chain and the practicalities of
Arbitration Decisions

The decisions published this week are:

- **2464** - Cargill Inc. (Minneapolis, Minn.) v. Mark Wallace (Farmer City, Ill.)
- **2589** - Cargill Inc. (Minneapolis, Minn.) v. Alan Bland (Rogers, Texas)
- **2598** - South Dakota Wheat Growers Association (Aberdeen, S.D.) v. Robert Hattum (Harrold, S.D.)
- **2650** - Clarkson Grain Company Inc. (Cerro Gordo, Ill.) v. Lackawanna Products Corporation (Clarence, N.Y.)

All NGFA Arbitration decisions and defaults are at ngfa.org/decisions.

Managing crop biotechnology events that may be present in export and domestic shipments.

U.S. industry and government representatives have in the past attempted to resolve the significant time gap that currently exists between U.S. and Chinese government approvals of new biotech-enhanced traits. Given the time lag in obtaining Chinese regulatory approval, several other biotechnology providers have made the decision to delay commercialization of biotech-enhanced traits. For example, one soybean trait – Bayer LL55 – also has been under the Chinese regulatory review process for five years. But Bayer has reassured NGFA, NAEGA and others that it does not intend to commercialize that trait until Chinese approval is granted. The NGFA and NAEGA’s Biotechnology Policies both state that biotechnology providers should secure full regulatory approval for biotech-enhanced events in U.S. domestic and significant export markets.

NAEGA’s assessment of biotech trait approvals currently indicates that Syngenta’s Agrisure Viptera® (MIR 162) biotechnology-enhanced corn is the only U.S. corn or soybean event that expected to be present in the U.S. corn supply that does not have sufficient approvals in place to comply with the Chinese government’s requirements for imported corn, soybeans and derived products. However, CropLife China states that 16 other biotech-enhanced traits in corn, soybeans, cotton and canola have pending Chinese approvals. Of the 16 pending, six are renewals of traits already commercialized, and nine have yet to be commercialized. Hence, MIR 162 stands alone as a trait that is commercialized but does not currently have regulatory approval in China.

Industry efforts to address this and other marketability-related challenges confronting biotech-enhanced traits are being coordinated through a broad-based “U.S. Biotech Crops Alliance” (USBCA) founded by the National Corn Growers Association, American Soybean Association, Biotechnology Industry Organization, American Seed Trade Association, NAEGA and NGFA. Established under a memorandum of understanding signed in 2012, the USBCA now consists of 11 organizations. Representatives from the founding organizations, including NGFA and NAEGA, met with Secretary of Agriculture Tom Vilsack and his key staff on Dec. 12 to coordinate U.S. activities and messaging to China. The USBCA has developed and is working to implement consensus positions on key policy issues designed to improve the introduction, stewardship, domestic and international regulatory policy, and distribution in U.S. and export markets of commodities and processed products containing or derived from modern biotechnology.

During a mid-July 2011 meeting with the NGFA and NAEGA, Syngenta North America officials had projected that the Chinese government would authorize the Agrisure Viptera® corn trait for import by the end of the first quarter of 2012.
The trait had been deregulated in April 2010 by the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), and seed sales were launched by Syngenta with the 2011 planting season. Syngenta said it had applied for approval of the Agrisure Viptera trait and trait stacks containing that biotech-enhanced event for import to China in March 2010, based upon approval previously granted by Brazil.

The Chinese regulatory system requires that a seed company have in place for two years approval from a competent government authority in at least one key export market before beginning the approval process in China. China currently has a zero tolerance for the presence of unauthorized traits in import shipments, which has caused some U.S. domestic buyers who supply grains to exporters to notify producers that they will not be accepting corn with the Agrisure Viptera trait until the situation with China is resolved.

STB Seeks Public Comment on Rail Rate-Case Procedures for Grain Shippers

By Charlie Delacruz, Vice President and General Counsel

The Surface Transportation Board (STB) on Dec. 12 announced a new proceeding [EP 665 (Sub-No. 1)] to review rate complaint procedures in an effort to ensure they are accessible to grain shippers and provide effective protection to grain shippers.

As such, the STB is seeking public comment on grain shippers’ ability to effectively seek relief for unreasonable rates, including input on proposals for modifying existing procedures, or for new, alternative rate-relief methodologies.

In its announcement, the STB noted it recently concluded a separate proceeding to reform freight rail rate regulations generally. The agency referred specifically to comments submitted by NGFA in that proceeding in which NGFA argued that the changes proposed did not provide meaningful relief to grain shippers. The STB further stated in its announcement:

One party [NGFA] also noted that despite increases in rates, no grain shipper has sought rate relief at the Board or the Interstate Commerce Commission since 1981, and that the Board should consider providing more substantial modifications to its rate process to provide a mechanism for grain shippers to challenge rates.

In light of the STB’s Dec. 12 announcement, NGFA’s concerns appear to have been heard.

NGFA will provide comments by the March 12, 2014 due date to the board. For additional information, contact NGFA President Randy Gordon.
FDA Issues Proposed Veterinary Feed Directive to Provide Enhanced Veterinarian Oversight of Antibiotics in Feed

By David Fairfield, Vice President Feed Services

The Food and Drug Administration (FDA) on Dec. 11 published proposed regulations that would change the agency’s current so-called veterinary feed directive (VFD) process to provide for enhanced veterinary oversight over a wider range of certain antibiotics used in food-producing animals.

The proposal reflects many of the changes to the VFD process recommended previously to FDA by the NGFA. The proposed regulation is a key part of FDA’s overall plan to provide for increased veterinary oversight of the use of antimicrobial drugs used in food-producing animals that also are medically important for treating human illness. The agency long has expressed concern that overuse of antimicrobial drugs in human medicine, as well as alleged injudicious use in food-producing animals, have contributed to the emergence of resistance to such products when used to treat human illness.

The proposed VFD regulation, which is open for public comment until March 12, would revise the requirements that veterinarians are to follow when authorizing the use of certain animal drugs in feed, including: 1) reducing the record-retention period for VFDs and associated documents from the current two years to one year; 2) deleting the requirement that the quantity of feed be specified on the VFD order; 3) eliminating the requirement that the feed distributor receive the original signed VFD within five working days of receipt of the facsimile or other electronic order; 4) removing the reference to the defined valid veterinarian-client-patient relationship that currently is required for a veterinarian to issue a VFD, and replacing it with a more general requirement that the veterinarian provide supervision or oversight of the animals in a manner that is in conformance with the applicable veterinary licensing and practice requirements; and 5) removing the requirement that all VFD drugs automatically be classified by FDA as category II drugs.

In conjunction with the proposed VFD regulation, FDA also announced the availability of a final guidance document for industry that advises animal drug companies on how to: 1) voluntarily remove growth-promotion use claims for antibiotics from their FDA-approved product labels; 2) add, where appropriate, scientifically-supported disease-prevention, control and treatment uses; and 3) change the marketing status of such drug products to include veterinary oversight.

Within the guidance document, FDA states that it is “currently pursuing a strategy for the voluntary adoption of these changes in an effort to minimize the
impacts and provide for an orderly transition.” However, FDA adds that it anticipates animal drug companies should be able to complete the changes within the next three years. Further, FDA states that if adequate progress has not been made during the three-year period, the agency will consider whether further action under the existing provisions of the Food Drug and Cosmetic Act may be appropriate.

The NGFA’s Feed Legislative and Regulatory Affairs Committee will be taking the lead in developing NGFA’s response to the proposed VFD regulation. Members with questions about the proposed regulation or FDA’s guidance document may contact Vice President of Feed Services David Fairfield at (712) 243-4035 or at mailto:dfairfield@ngfa.org.

**State Courts Deny Claims by Non-Performing Grain Sellers Seeking Elevators’ Hedging Gains**

*By Charlie Delacruz, Vice President and General Counsel*

In two recent lawsuits, state district courts in Iowa rejected claims by the sellers who failed to perform under a grain contract, and then sought the gains made by the elevator’s futures position.

In both cases, the plaintiffs entered into contracts in 2008 to sell grain to elevators for future delivery. The elevator in each case then executed a corresponding futures position to protect itself from future price changes. The plaintiffs subsequently notified the elevators that they would not be delivering under the contracts. The plaintiffs then sought to recover gains made by the elevators from their hedging positions. The plaintiffs’ arguments were based upon application of the contract terms, trade custom and the NGFA’s Trade Rules. The plaintiffs also presented claims for *unjust enrichment*, which is a cause of action based upon equity when one party is unfairly “enriched” at the expense of the party seeking restitution.

In one of the lawsuits, the state court granted the elevator’s motion for summary, thereby ruling as a matter of law against the plaintiff’s claims and obviating the need for a trial. [*Case No. LACV023850, Iowa District Court for Wright County, Nov. 21, 2013.*]

The court observed, in this case, that a contracting party “certainly could do as the plaintiffs suggest (the elevator) should have done.” However, the court stated it was unable to locate “any competent evidence” to indicate there was a “custom” in the industry to support the plaintiff’s claims in this type of situation. The court noted that the plaintiff failed to fulfill its obligation to
deliver grain whereas the elevator “did nothing contrary to the terms of the contracts.” The court consequently ruled that the plaintiff could not establish a breach of contract claim.

Regarding the plaintiff’s claim under the theory of unjust enrichment in this case, the court ruled:

“This claim must also fail as a matter of law. The plaintiffs failed to perform under the contract and thus have no right to recover under the contract. Accordingly, it cannot be said that the benefit (the elevator) received was at the plaintiffs’ expense. Furthermore, (the elevator) profited because it had the foresight to hedge its positions which exposed (it) to risk had the market gone in the opposite direction. There is nothing unjust about allowing (the elevator) to retain the profits that are a direct result of its own prudence.”

In the second case, the plaintiff’s claims went to trial. [Case No. LACV126304, Iowa District Court for Pocahontas County, Dec. 2, 2013].

The plaintiff testified in that case that he was not engaged in farming at the time of the contracts. Instead, the plaintiff said he was aware of “historic jumps” in commodity prices, and in 2008 developed a plan to “take advantage” of future price increases by entering into grain contracts in several states using various “fictitious” business names and aliases. The elevator testified that when a producer is unable to deliver a given quantity of grain, the elevator determines as an “informal policy” on a “case-by-case basis” whether to 1) extend the contract, 2) relieve the producer from the obligation, or 3) share a portion of any profit from hedging.

The court described this case as “the plaintiff is the party in breach and it seeks to take advantage of its breach.” The court decided that the plaintiff failed to prove that as a matter of course individuals or firms such as the plaintiff are paid profits from hedges of grain sales under these circumstances. According to the court, the plaintiff’s use of aliases, fictitious names and other misrepresentations also voided the contracts and precluded the unjust enrichment claims given that this theory of recovery is based upon equity and fairness.
Congressional Update:
Farm Bill, WRDA and Debt Deal

By Jared Hill, Director of Legislative Affairs

With time running out on the 2013 congressional calendar, the farm bill, Water Resources Development Act (WRDA) and a debt deal remain in flux.

Farm Bill

It has become clear a five-year farm bill will not be passed in 2013. For the second year in a row, Congress was unable to complete work on the farm bill. However, unlike 2012 when the House was not even able to pass a bill, this year’s debate is ending with some optimism that negotiators are closing in on a deal, by early next year.

Senate Agriculture Committee Chairwoman Debbie Stabenow, D-Mich., and Ranking Member Thad Cochran, R-Miss., have been working overtime with their House counterparts, Chairman Frank Lucas, R-Okla., and Ranking Member Collin Peterson, D-Minn., to sort out differences between the Senate and House versions of the farm bill. Commodity programs and the Supplemental Nutrition Assistance Program (food stamps) continue to be the two biggest sticking points.

However, recent reports indicate there may be a compromise on the commodity title. Reports suggest Reps. Lucas and Peterson may have relented on insisting the bill include a target price program tied to actual plantings. Instead, both the revenue program favored by Sen. Stabenow and the target price program favored Rep. Lucas would be calculated on historic base acres, an approach advocated by NGFA. (See NGFA’s recent letter to conferees.) Both Stabenow and Lucas have been cautious when asked to confirm the details of the reported compromise, so uncertainty remains on what the final commodity program will look like.

On food stamps, sources are saying negotiators have agreed to cut the program between $8 billion and $15 billion. If cuts do end up in that range, it remains to be seen whether House leaders will be able to cobble together enough votes to approve the final bill – especially given the House-passed bill called for nearly $40 billion in cuts to food stamps.

The agriculture community will have to wait until January to see if negotiators can finalize a deal that will garner enough votes to pass both chambers of Congress.

In the meantime, do not be surprised to read reports similar to last year about the “dairy cliff.” The dairy cliff is in reference to the fact U.S. Department of Agriculture may have to start paying out supports to dairy producers based on
the 1949 farm law, which likely will result in higher dairy prices for consumers if new legislation or an extension of the 2008 farm bill is not passed by sometime in January.

**Water Resources Development Act**

Farm bill negotiations are not the only casualty of time running out on the 2013 congressional calendar. The negotiators on the WRDA legislation also have been unable to finish negotiations. There continues to be contentious issues which House and Senate conferees need to sort through to finalize the bill.

Some of the back and forth between negotiators has to do with projects that, if included, would appear to violate the earmark ban. Having no earmarks in the bill was one of the selling points used by House Transportation and Infrastructure Committee Chairman Bill Shuster, R-Pa., to get the bill through the House with only three “no” votes.

Despite the conference committee not finishing the work in 2013, there remains optimism they will be able to finish the bill in January. If so, it will be the first WRDA legislation passed since 2007; historically, Congress approves WRDA legislation every two years.

**Debt Deal**


It was an overwhelming endorsement of the budget plan, and welcome relief for appropriators who want to get back to regular order in the budget and appropriation process. The Senate is expected to take up the bill next week, and the President has already signaled he will sign the legislation if it makes it to his desk. Members of Congress are hopeful this deal will allow Congress to move away from the dysfunction that has plagued them for the last three years.

**Phillips Selected as Secretariat of U.S. Biotech Crops Alliance**

*By Randy Gordon, President*

The founding organizations of a broad-based group known as the U.S. Biotech Crops Alliance (USBCA) recently announced that Dr. Michael J. Phillips has been selected as its first secretariat to spearhead collaborative efforts to improve the environment for technology innovation and the market for U.S. crops produced through modern biotechnology.
Established under a memorandum of understanding signed in 2012, the USBCA already has developed and is working to implement consensus positions on key policy issues designed to improve the introduction, stewardship, domestic and international regulatory policy, and distribution in the United States and export markets of commodities and processed products containing or derived from modern biotechnology.

In his capacity as secretariat, Phillips will be the focal point of the group’s efforts to further advance the reach, work and wide range of activities being pursued under the expanding broad-based national initiative that currently consists of 11 influential national organizations representing U.S. biotechnology providers; seed, grain and oilseed producers; grain handlers, feed manufacturers, grain processors and millers; exporters; and other end-users. The secretariat also will serve a key role in helping develop and implement consensus positions on specific policy issues.

Phillips is president of MJ Phillips and Associates LLC, an agricultural consulting firm that specializes in agricultural biotechnology issues. Throughout his career, he has been active in providing leadership and advice on agricultural biotechnology to U.S. and foreign governments, as well academic institutions and all sectors of the agricultural biotechnology value chain.

Before establishing his consulting business, Phillips was vice president for science and regulatory policy for food and agriculture at the Biotechnology Industry Organization (BIO), where he was responsible for developing and implementing policy on the science, regulatory, compliance, stewardship and trade implications of agricultural biotechnology. While with BIO, he also worked with the biotech value chain in advocating establishment of a U.S. and global low-level presence policy for shipments of biotech-enhanced traits that have successfully completed thorough scientific reviews for product and environmental safety in one or more countries, while still undergoing such governmental review in other countries.

Phillips previously served as director of the Board on Agriculture and Natural Resources at the National Academy of Sciences (NAS), where his duties included overseeing studies on a wide range of topics, including agricultural biotechnology, conducted by the NAS at the request of the federal government. In addition, he previously was director of the food and agriculture program at the Congressional Office of Technology Assessment, where he developed and directed policy studies for congressional committees, including several on agricultural biotechnology.

Before his industry and government service, Phillips served on the faculty at Purdue University in West Lafayette, Ind., and was a senior staff member in the Office of the Secretary of Agriculture at the U.S. Department of Agriculture in Washington, D.C.
Phillips received his undergraduate degree with distinction in agricultural economics and animal science from The Ohio State University (OSU), and his master of science and doctorate degrees in food and agricultural policy from OSU and Purdue, respectively. An Ohio native, he grew up on his family’s grain and dairy farm in northwest Ohio, and remains involved in managing the farm’s grain operation.

The USBCA’s founding organizations are the: National Corn Growers Association, American Soybean Association, American Seed Trade Association, Biotechnology Industry Organization, National Grain and Feed Association, and North American Export Grain Association. Other national organizations that subsequently have become participants in the USBCA include: American Farm Bureau Federation, Corn Refiners Association, National Oilseed Processors Association, U.S. Grains Council and U.S. Soybean Export Council.

**Presentations Available from Country Elevator Conference and Trade Show**

Approximately 600 people attended this year’s Country Elevator Conference and Trade Show Dec. 8-10 in St. Louis, Mo. A summary of the conference will be available in the Dec. 27 NGFA Newsletter.

However, members who would like to review the available presentations sooner can go to ngfa.org/cec13. To access the files, members must be logged into their NGFA account. Those without an account, can register online, or contact Heather McElrath for additional assistance.

**Recording of Free AFIA, NGFA, Feedstuffs FSMA Webinar Available**

NGFA, the American Feed Industry Association, and Feedstuffs on Dec. 11 hosted a free webinar that attracted more than 800 attendees. The webinar addressed current good manufacturing practice and hazard analysis and risk-based preventive controls for food for animals.

A recording of the webinar, titled “Food Safety Modernization Act (FSMA) - What You Need to About Know Current Good Manufacturing Practice (CGMP) and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals” is available online.

Key questions answered during the webinar included:

- When will the rule be effective?
• How are different sized companies impacted?
• What CGMPs are proposed; who needs to comply?
• What does FDA propose be addressed in a written hazard identification and preventive controls plan?

Featured speakers were:

• David Fairfield, vice president, feed services, NGFA;
• Dr. Daniel G. McChesney, director of the Office of Surveillance and Compliance, FDA’s Center for Veterinary Medicine.
• Richard Sellers, senior vice president, legislative and regulatory affairs, AFIA; and
• Jolyda Swaim, principal attorney and John Dillard, associate attorney, OFW Law.

The full webinar (approximately 3 hours) is available online.

Registration is Now Open for NGFA's Annual Convention March 30-April 1 in Hilton Head

Registration is open for NGFA's annual convention in Hilton Head, S.C. March 30-April 1, 2014.

The conference features top policymakers, substantive open forums and outstanding general sessions that explore the most important issues facing the industry in the year ahead. It also provides an ideal opportunity to interact and exchange ideas with industry leaders. An agenda will be available in early 2014.

As in past years, the 2014 conference will feature a golf tournament, committee meeting, a new member reception, panels on topical issues, and a closing gala.

For more information on convention programming, see presentations from past conventions at ngfa.org/annualconvention