

## **Illinois AgriNews - March 2005**

### ***Focus on Biotechnology—Farmer Liability for Commingled Biotech Crop Shipments***

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Emerging regulations for overseas grain shipments ultimately may result in farmer liability for the commingling of even trace amounts of genetically engineered crops. The European Union now requires labeling of all products (including bulk grain shipments) that contain more than 0.9% of genetically modified organisms (GMOs). Moreover, there is zero tolerance for unapproved biotech products in the European Union, such as StarLink corn.

Governments currently test some shipments for the presence of GM grain. In December 2002, the Japanese government seized a shipment of corn because it contained unapproved genetic material. Total liability for the tainted corn exceeded \$1 million—paid by the farmer-cooperative responsible for shipping the product. In January 2005, protestors halted a ship bound for France and demanded inspection of the cargo for traces of GM grain. Recent reports of StarLink corn in a food aid shipment may prompt further inspections.

Unfortunately, increased inspections may expose U.S. farmers to liability for the adventitious presence (commingling) of GM grain. Farmers should scrutinize the contracts they sign when marketing grain as non-GMO. Although elevators generally test incoming shipments for genetic purity before accepting the grain, more detailed testing may be done if problems arise later in the distribution chain. Depending upon the assurances made at the point of sale, a farmer delivering grain later determined to contain GMOs beyond allowable tolerances may face warranty claims for the lost premium of the entire elevator or even an overseas grain shipment.

Farmers also must exercise diligence when purchasing seed. Seed companies design most seed purchase agreements to disavow all responsibility for impurities beyond the replacement cost of the seed. Although the likelihood that seed marketed as conventional contains genetic impurities is unknown, at least one recent scientific study found low levels of GMOs in conventional corn and soybean seed. Seed purity laws generally do not address the issue of GM seed contamination unless the impurity exceeds 5%—a far cry from the 0.9% required for importation to the European Union. Farmers should also keep in mind that seed labels indicating 98.00% pure soybean seed or 99.5% pure corn seed refer to *varietal*, not *genetic* purity and, therefore, could contain significant amounts of genetically modified seed.

Some steps are available for farmers to reduce their liability risk. First, farmers should review their current insurance policies. At least one major agricultural insurance company has dropped standard coverage for damages resulting from biotech commingling and instead requires a specific GMO endorsement. Farmers considering entering into non-GM contracts or other identity preserved growing arrangements should verify insurance coverage. Second, farmers should retain seed receipts for at least five years. This is mandated by the European Union's traceability regulations and local elevators may start requiring copies for internal traceability auditing. Finally, some commentators recommend independent testing of seed for GM content prior to planting. Although probably not a practicable approach for all farmers, this step may identify potential problems and thus reduce liability risk.