



# News & Views

*A Monthly Publication Dedicated to the Feed, Seed, Grain and Farm Supply Industries of Wisconsin*

## Somebody Asked ■

*This month we have two questions that we believe will be of interest to the general membership. They are as follows:*

**Q #1.:** A grain buying customer of mine has pre-paid for a January/February '09 delivery slot purchase. The buyer called and told me their auditors wanted to know if they, the buyer, could receive warehouse receipts for that grain today and then load out those receipts come the delivery period. Can I do this? And if so, is there anything I need to be concerned about regarding the process?

**A.:** We have received a couple calls similar to the situation outlined above. The underlying assumption regarding the request points up a concern that bankers refer to as "counter-party risk." It probably isn't the "auditors" that are making the request but rather the buyer's lending institution. They are concerned with what would occur if this business were to file bankruptcy and the grain had not yet been delivered. Depending on the fact set, the buyer could be left as an unsecured creditor at the end of the line. The buyer would still owe the lender on their credit line that was used to buy the grain, and you quickly understand how folks can get concerned in today's unique credit environment. You should also be aware; this is not a circumstance peculiar to this business specifically; instead this conversation is occurring in many places.

Now onto the question itself. The important point on which the whole issue hinges is that pre-payment in full has occurred, but delivery has not. The buyer not only has price risk, but also credit, or counter-party risk. If pre-payment had not occurred, the buyer would only be facing price risk and could manage that using strategies beyond the scope of this question and answer. Assuming the warehouse receipt-issuing facility is compliant with relevant

warehouse laws, and the facility has the *required amount of grain on hand and in store*, it would not be a problem to issue the receipts. Obviously, maintaining depositor-owned inventory in a facility removes some of the flexibility for the facility regarding merchandising activities. This issue could be addressed in negotiations by requiring a storage fee be paid by the receipt holder to compensate the warehouseman. Remember this request and action is altering the original sales contracts and this alteration can not be solely demanded by the buyer. Changing the original contract into a warehouse receipt will be at the agreement of both parties, and before that can even occur, the conditions stated earlier must be in place.

Issuing a warehouse receipt in this particular situation would not remove all risk (for example, theft of the grain itself) but the issue of a financial default by the seller prior to delivery would be. If the seller/receipt issuer were to default prior to delivery, the receipt holder would then notify the relevant parties concerning their assets being held by the defaulting party. While they may not waltz out with their inventory, they would be far ahead did they not have a warehouse receipt.

**Q #2.:** Under the VeraSun bankruptcy ruling, I understand VeraSun can with 10 days notice pick and choose which contracts they will allow to deliver to their facilities. (Editors note: More information on this is included later in this edition.) I have producers asking if this were to occur in Wisconsin, and either my elevator or one of my farmer customers had a contract that was cancelled under these circumstances, could either of us make a claim against the Wisconsin Producer Security program?

**A.:** You should first be aware the Wisconsin indemnity program or Agricultural Producer Security (APS) program, as it is formally known, does **not** cover dealer-to-dealer transaction in merchandising. (Commercials are covered under the warehouse portion of the APS, as it covers “depositors” and doesn’t differentiate between commercial interests and producers. This is the one exception in the whole program in which non-producers have eligibility for claims. However, this is not the situation under discussion here.)

The other point is an important difference that is highlighted by the language used in the question. We were asked if “either of us make a claim” against the program. We are not trying to be smart-alecks here, but anyone can make a claim against the fund. The real question is whether they have an *eligible claim* against the fund. We have already discussed above the elevator’s ineligibility regarding claims against the fund in this case. However, in the case of the producer, their eligibility rests on one all-important point; and that is whether title to the grain has transferred from the seller to the buyer. In the question that was asked, the producer had not yet delivered the grain. The scenario involves a VeraSun-like 10-day notice of cancellation of delivery contracts (and we are clearly not discussing deposited warehouse grain here).

Specifically, neither the Wisconsin APS program nor any other state program in the nation covers losses in which title did not pass. In the case outlined above, this is not an eligible claim against the program and the producer would not receive compensation from the fund. The producer and the elevator who have suffered a loss resulting from rejection of non-delivered contracts would file a claim with the bankruptcy court in order to share with other unsecured creditors any funds that may be available to pay those claims. This claim would be the net of the contracted price and what value the seller was able to realize immediately following notice of cancellation of the contract. If such a claim were not filed, these individuals will **not** receive any share of funds that may be available.

## VeraSun Update ■

**U**nder a procedure approved by the Bankruptcy Court earlier this month, VeraSun has recently sent contract rejection notification to many sellers with contracts for delivery prior to January 31, 2009. VeraSun will not need Court approval to reject them. VeraSun may send future notices if they decide to reject more contracts.

In some cases, those letters provided sellers with several alternatives. Under one alternative, the seller would be released from contract obligations if they agree to give up any claim to damages from the rejection of the contract. Under a second alternative, the seller and VeraSun would both agree to extend the contract until December, 2009 with the understanding that VeraSun may either reject or assume the contract at any time prior to December 2009. If the seller accepts neither alternative, then the contract will be rejected and the growers will have a claim for damages, which may or may not prove to have any value. The seller may wish to confer with their own legal counsel to decide which alternative to choose.

All of these notices deal with contracts that call for delivery prior to January 31, 2009. VeraSun will be making decisions regarding contracts that call for delivery after January 31, 2009, at a later date and will be communicating with sellers regarding such contracts.

*Please note: The preceding information has been gathered from industry sources and is accurate to the best of our knowledge at press time. Please keep in mind, this information is relevant to the VeraSun bankruptcy only and may not be relevant to other or subsequent bankruptcy filings by other entities.*

## Who Pays for PPE ? ■

**T**he Occupational Safety and Health Administration (OSHA) recently published a final rule on who pays for personal protective equipment (PPE). This final rule becomes effective on Wednesday, February 13, 2009 and must be implemented by all employers by May 15, 2009.

Many OSHA standards applicable to agribusinesses (General Industry- §1910; Marine Terminals- §1917;

and Construction- §1926) specify that employers are to provide their employees with PPE, when such equipment is necessary to protect the employees from job-related injuries, illnesses, and fatalities. While these standards state that the employer is to provide the PPE, some do not specify who must pay for the PPE.

The rule does not require employers to provide PPE where none has been required before. Instead, it merely states that the employer must pay for all required PPE, except as specified in the applicable standards. The exceptions include: ordinary safety-toed footwear, ordinary prescription safety eyewear, logging boots, ordinary work clothing, and weather-related gear. The final rule also clarifies OSHA's position regarding the payment for employee-owned PPE and for replacement PPE.

If you have any questions on how this new rule could affect your operations, feel free to contact the WASA office at your convenience. To obtain the complete text of the OSHA standards, go to the OSHA website home page at: [www.osha.gov](http://www.osha.gov).

## **Safety Audits on the Increase**

In addition to the requirement that all motor carriers obtain a USDOT ID number, the Federal Motor Carrier Safety Administration is required to perform a safety review on all carriers to establish their Safety Rating. While these reviews have typically been done on those carriers with a history of out-of-service inspections and crashes, they are also being done on carriers with good records, especially those that have not updated their carrier information within the past 2 years, as required.

As a motor carrier, you are required to maintain files on your commercial motor vehicles (CMV) and your drivers. It is important to point-out that a CMV includes trucks and trailers over 10,000 lbs. In addition, an employee does not need to hold a CDL to be considered a "driver."

While the required files can be maintained in either an electronic format on your computer or in folders in a cabinet, they must contain specific information. Failure to maintain the files as required could result in significant penalties and fines for both you and your drivers.

For more information on what is required in the driver and CMV files, along with how to review and update your company information on-line, contact the WASA office at your convenience.

## **WASA Directory Update**

The following updates should be made to your WASA Directory.

### **Changes:**

**Country Visions Cooperative**  
formerly Country Horizons Co-  
operative

**110 Lincoln St.**

**Whitelaw, WI 54247**

**Phone: (920) 732-3143**

**Country Visions Cooperative**  
formerly Valders Cooperative

**PO Box 10**

**Valders, WI 54245**

**Phone: (920) 775-4131**

**M3 Insurance Solutions, Inc.**

formerly Mortensen, Matzelle &  
Meldrum

**3113 W Beltline Hwy.**

**Madison, WI 53**

**Phone: (608) 288-2835**

**Fax: (608) 273-1725**

Changes are indicated in **bold**. As additions or changes are made throughout the year, we will notify you here in WASA N & V.

## **Looking Down the Road**

**Jan. 28**      **WASA Safety Day**  
**Kalahari Resort, Wisconsin Dells**

**Jan. 29 - 30**   **WASA Annual Convention &**  
**Trade Show**, held in conjunction  
with the Wisconsin Corn/Soy Expo  
and the Wisconsin Pork Producers  
**Kalahari Resort, Wisconsin Dells**

**Sep. 10**      **WASA Golf Outing**  
**Northern Bay Golf Resort, Arkdale**

**Route:**

- General Manager
- Feed Department
- Grain Department
- Agronomy
- Safety Director
- Personnel
- \_\_\_\_\_

**WASA Board of Directors**

Tom Lefeber, President  
(920) 773-2505

John Van De Wiel, Vice-President  
(608) 744-2287

Kim Lamp, Secretary/Treasurer  
(920) 674-8513

Doug Cropp (608) 882-2620

Erik Huschitt (608) 329-3900

Tim Lange (608) 676-2255

Bob O'Donnell (608) 838-4354

Dennis Schultz (715) 654-5134

David Wiederholt (608) 739-3103

**WASA Staff** (608) 223-1111

John Petty, Executive Director

RB "Bob" Willder, Loss Control Dir.

Denise Poindexter, Office Manager

**The WASA office will be closed on  
Dec. 24 & 25 and Dec. 31 & Jan. 1,  
in observance of the Christmas and  
New Year's holidays, respectively.  
We wish you a happy and joyful time  
with your family and friends during  
this time.**

