



Agricultural Law Press

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# Agricultural Law Digest

Volume 10, No. 19

October 1, 1999

ISSN 1051-2780

## GENETICALLY MODIFIED CROPS: GUIDELINES FOR PRODUCERS

— by Neil E. Harl\*

With the consumer resistance to products containing genetically modified ingredients in Europe and Asia rising in recent weeks, and processors responding to that resistance, the focus is on how producers can protect themselves.<sup>1</sup> It's especially critical for those producing non-GMO varieties.

Here are some points to consider—

- Several processors have signaled that products must be kept separate and there will likely be differential pricing for GMOs and non-GMOs.<sup>2</sup>
- That means exporters have to keep the products separate if they are to sell into that market.

- In turn, elevators and other first purchasers are expected to request the same of producers.

- As a practical matter, actual testing for GMO germ plasm for the 1999 crop is expected to be spotty with heavy reliance on producer representation as to which loads are GMO and which are non-GMO.

But it is not as simple as stating that a load of corn, soybeans or other crops is GMO or non-GMO. Some of the seed companies concede that their seed purporting to be non-GMO contained low levels of GMO germ plasm. Besides, contamination from pollen drift may have added to the level of GMO germ plasm in non-GMO crop. And there may have been mechanical contamination in augers, wagons, storage bins or even in the combine itself.

All of this adds up to a high stakes legal problem for everyone involved. Eventually, with reliable testing at every point at which the crop is commingled—at the elevator, the processor's bins or at export vessels—it will be possible to monitor more closely what is GMO and what contains only low levels of GMO germ plasm. But the system is not there yet and will not be capable of that type and extent of testing this crop season.

### Producers should be careful

If producers are asked by the first purchaser to promise that the crop is non-GMO, producers should be very careful what they sign or even what oral comments are made.

Here's what they *can* realistically do—

- State that no seed represented by the seed company as GMO seed was planted.
- State that seed represented by the seed company as non-GMO seed *was* planted.
- State that care was taken in avoiding contamination in bins, augers, and in the combine.

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Here's what producers should be careful *not* to do—

- State that the crop in question has no GMO germ plasm.
- State that no contamination has occurred from mechanical handling and storage of the crop.
- State that no contamination has occurred from pollen drift.

There is another worry—the Uniform Commercial Code imposes implied warranties in some situations. An implied warranty of fitness is imposed on the producer as seller if the seller has reason to know any particular purpose for which the goods are required, if the buyer is relying on the seller's skill and judgment in providing the goods.<sup>3</sup> This could very well be invoked against a producer if the conditions are met. Producers can disclaim or nullify an implied warranty of fitness *but it takes a conspicuous, written provision in a contract.*<sup>4</sup>

An implied warranty of merchantability is imposed on *merchants.*<sup>5</sup> Nearly half of the states treat farmers as merchants. One feature of this warranty is that the goods must be fit for the ordinary purposes for which they are to be used. Implied warranties of merchantability can be disclaimed or nullified by the producer as seller *if done orally or in writing in language that mentions merchantability.*<sup>6</sup>

**So what does this all mean for producers?**

Check immediately with likely purchasers. What are they requiring? Some may not yet know. Once the answer to that question is known, check *carefully* the language in any statement the producer is asked to sign. Use caution in responding orally.

Remember, even non-GMO crop likely isn't completely free of GMO germ plasm. But the GMO level may be at an acceptably low level. A key problem—no one has set tolerances. Without tolerances, no one knows for sure where the line will be drawn.

**Certification**

Although testing at every point of co-mingling may be a reality next year or later, for 1999 identity preservation is likely to be attested to by certification. The Office of the Iowa Attorney General and Iowa State University have developed a proposed voluntary certification program for producers wishing to segregate non-GMO hybrids in response to a premium offered for crops meeting the purchaser's requirements.<sup>7</sup> Form 2 below can be completed in part by producers before delivery to the first purchaser, with the form completed at delivery. Form 1 is for first purchasers (such as country elevators) to certify as to their handling of the crop and the fact that they have on file producer certifications.

**FOOTNOTES**

- <sup>1</sup> See generally Harl, "Genetically Enhanced Grains and Oilseeds," 62 *Doane's Agr. Rep.* No. 37-5 (Sept. 10, 1999); Harl, "Marketing Genetically Modified Corn," 62 *Doane's Agr. Rep.* No. 17-5 (April 23, 1999). See Table 1 below for the status of approval of transgenic corn hybrids and Table 2 for a list of hybrids not approved by the European Union.
- <sup>2</sup> E.g., Brinkmann, "ADM Asks Suppliers to Separate Genetically altered Crops," *H&R Bus.*, Sept. 2, 1999.
- <sup>3</sup> U.C.C. § 2-315.
- <sup>4</sup> U.C.C. § 2-316(2).
- <sup>5</sup> U.C.C. § 2-314.
- <sup>6</sup> U.C.C. § 2-316(2).
- <sup>7</sup> The contributions of Steve Moline, Assistant Iowa Attorney General, and Roger Ginder, Professor of Economics, Iowa State University, in the development of certification procedures are acknowledged.

**Form 1**

**PROPOSED UNIFORM CERTIFICATION  
(PRE-DELIVERY PORTION OF CERTIFICATION)**

Source: Office of the Iowa Attorney General and Iowa State University.

I, \_\_\_\_\_, residing at \_\_\_\_\_, have delivered \_\_\_\_\_ in the amount of \_\_\_\_\_ bushels.  
(Name of Producer) (Address) (corn or soybeans)

The delivery(ies) are represented by scale ticket numbers and sample numbers which will be specifically identified after delivery is completed in the "Post-Delivery" portion of this Certification.

With regard to the above-referenced grain, by placing my initials in the corresponding blank, I hereby certify and affirm the following:

\_\_\_\_ 1. The above-referenced grain was grown from the following varieties of seed:

<u>Seed company</u>	<u>Variety No.</u>
a. _____	_____
b. _____	_____
c. _____	_____
d. _____	_____
e. _____	_____

\_\_\_\_ 2. I used ordinary care to clean my harvesting equipment prior to harvesting the above-referenced grain.;

\_\_\_\_ 3. I used ordinary care to clean my on-farm storage facilities prior to placing the above-referenced grain in said facilities;

\_\_\_\_ 4. I used ordinary care to clean the transportation delivery vehicles prior to using said vehicles to deliver the above-referenced grain;

and

\_\_\_\_ 5. (Other) \_\_\_\_\_

**No other warranties, express or implied, including implied warranties of fitness and implied warranties of merchantability, are made as to the commodity in question with respect to the commodity's nature, genetic composition, fitness for a particular purpose or use or otherwise.**

\_\_\_\_ Name \_\_\_\_\_ Date \_\_\_\_\_

\_\_\_\_ Address \_\_\_\_\_

\_\_\_\_ Telephone No. \_\_\_\_\_



**Table 2**

The following hybrids have NOT been approved by the European Union (EU):

<b>Pioneer Hi-Bred Int'l</b>	<b>Agrigold Seed</b>	5029R	
33Y11	6413 RR	4799LL/IMT/Bt	
38B22	6443 RR		
34T14	6483 RR	<b>Golden Harvest</b>	
	XA 2814 RR	H-2404LL	
<b>DeKalb Genetics</b>	XA 4840 RR	H-2553LL	
387RR	XA 6819 RR		
448RR	XA 5844 BTRR	<b>Burrus Bros. &amp; Assoc. Growers</b>	
493RR	6605 LL	671RR	
512RR		575LL	
520RR	<b>Wyffels Hybrids</b>	86LL	
545RR	W1927		
566RR	W7284		
574RR		<b>LG Seeds</b>	
580RR	<b>Beck's Hybrids</b>	LG 2632LL	
589RR	5229RR	LG 2582RR	
607RR	5409RR		
626RR	5727RR	<b>Gutwein</b>	
658RR	5229RR/Bt	2609LL	
560GR			
566GR	<b>Croplan Genetics</b>	*Any Roundup Ready, Starlink, or Bt Xtra Hybrid from any company is unapproved at this time.	
574GR	562Bt/LL		
626GR	592Bt/LL		
687GR	692Bt/LL		
493BtX	D5862Bt/LL	Over 99% of LibertyLink (T25 event) and warranted (Bt11 event) hybrid seed corn that can be treated with Libertyâ Herbicide has been APPROVED for export to the European Union and Japan. The LibertyLink hybrid seed corn based on the T14 event has not been approved for export to the EU. In addition to the hybrids identified above, the following companies may be selling LibertyLink T14 hybrids. The volume from these companies represents less than 13,000 units or roughly 0.004% of the LibertyLink seed corn available in 1999. If you have purchased LibertyLink seed corn from one of these companies, there is a chance it could be based on the T14 event, and therefore not approved for export to the EU. If you have questions regarding the export status of the grain resulting from your LibertyLink seed purchase, please contact your seed company, or if you need assistance contacting your seed company, please call 1-877-GoLiberty.	
566BtX	466RR		
595BtX	496RR		
618BtX	566RR		
626BtX	666RR		
	666RR/BT		
<b>Garst</b>	676RR		
8756RR	D5862LL		
8557RR	286LL		
8349RR	336LL		
8896BLT	402LL		
8773BLT	542LL		
8692BLT	622LL		
8600BLT	722LL		
8585GLS/BLT			
8539BLT	<b>Growmark (FS)</b>	AgriPro Seeds Inc.	Ottillie Seed Farms
8481BLT	6860RR	AgVenture	Patriot Seed
8366Bt/LL	6760RR	Akin Seed	Producers Hybrid
8692LL		Ames Best Hybrids	Renze Hybrids
8539LL	<b>Great Lakes Hybrids</b>	Battleground Hybrids	Sand Seed Company
8481LL	4701RR	Bo-Jac	Seed Cons.
	5701RR	Brown Seed Farm	Select Seed
<b>Cargill Hybrid Seeds</b>	5901BtRR	Cornelius Seed	Schlessman Seed Company
5021Bt/LL		Crow's Hybrid	Sieben Hybrids
7821Bt/LL	<b>Merschmans</b>	Dahlco	Steward Seed
	M-8112	DEF Seeds	Stine Seed Company
<b>Pfister Hybrids</b>		Doebler Hybrids	Top Farm Hybrids
1545RR	<b>Schlessman</b>	Fontanelle Hybrids	Trelay Farms
1553RR	SX-698RR	Gold Country	Triumph
2653RR		Gray's Certified	Wilson Seeds
3053RR	<b>Trisler</b>	Hawkeye Hybrids	
2653Bt/RR	T-5272RR	Hoegemeyer Ent.	
		Hughes Seed	
<b>Asgrow Seed Co.</b>	<b>NC+</b>	Jung Seed	
RX738RR	3544LL	Kaltenberg Seed	
RX740RR	4799LL	Kruger Seed	
RX770RR	5277LL	Kussmaul	
RX770RR/YG	2019R	Legend	
	4339R	Midwest Seed Genetics	