

Protecting Food From the Bite of Terrorism

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Food Security Issues

- Real and perceived food safety risks
- Food terrorists – animal rights and environmental extremists, political actors
- Night-time gardeners
- Hoaxes ('LemonGate', precautionary seizures and recalls)
- Litigation blackmail
- Business and financial threats



The Changing Legal Environment

- **New regulations on food security** (Public Health Security and Bioterrorism Response Act of 2002)
- **Liability** (food borne illness, environmental contaminants, GM foods, uninsured risk)
- **Developing new food security strategies**

Fall out from the Bioterrorism Act of 2002

- ↳ Facilities registration requirements
- ↳ Import prior notice
- ↳ Administrative detention
- ↳ Recordkeeping - Traceability and Country of Origin provisions

The CSAV *Rio Puelo* – “LemonGate”

- July 29, 2004 – anonymous email to USDA stating 1 of 5 containers of Chilean fruit contained an unspecified hazardous material (suspected biological agent)
- Coast Guard stopped shipment. Froze fruit to limit ‘spread’ of ‘biological agent’

The *CSAV Rio Puelo* – “LemonGate”

- ✎ Coast Guard tested crew, air, etc. and found nothing
- ✎ 40 US federal and state agencies involved
- ✎ State of New Jersey refused to let ship through federal Custom’s Vehicle and Cargo Inspection system
- ✎ Major concern was protecting first responders, second protecting the urban area

The CSAV *Rio Puelo* – “LemonGate”

- ✎ Ship held 11 miles off shore for 11 days
- ✎ All product lost. Estimated value of US \$1.3 million
- ✎ Shipment uninsured

“Lemon Gate” Causes International Incident

Argentina upset – government not notified of US allegation that a “biological weapon” had been deployed from its port

“LemonGate” – a *new* strategy to get the competition

- ✎ Seller lost other customers who did not want to risk dealing with an ‘unreliable supplier’
- ✎ Buyers scared that this seller’s incoming shipments would be targeted for inspection
- ✎ Delays would cause loss of shelf life and uncertain deliveries making product harder to sell
- ✎ Buyers cancelled programs

“LemonGate” – a *new* strategy to get the competition

↳ Seller suspects that email was from the Canadian buyer who did not want to agree to earlier specified terms

“LemonGate” – Government position

“It is realistic to expect that we will deal with similar situations in the future.”

Coast Guard Lt. Cmdr. B. Benson

Long term implications of “LemonGate”

- Affect truck/rail trade from South America and Europe to Canada?
- Affect land-bridge shipments from Asia to Europe via US West Coast ports?

Impact of new bioterrorism regulations

- ↳ Customs delays
- ↳ Detention and testing of more food – including food samples not for human consumption
- ↳ More paperwork
- ↳ View of US as isolationist – creating barrier to US food exports

Food Security – New criminal provisions

- **Bio/terrorism and agro/terrorism laws (state and federal)** (*e.g.* HR 2795 (2001 Agroterrorism Prevention Act of 2001 (9/10/01))
- **Food Disparagement Laws (state level)**
- **Compliance and reporting requirements (EPA, Security and Exchange Commission, FDA)**

Food Security – New criminal provisions

➤ Effective Counterterrorism Act of 1996

Federal crime to:

- provide support to individual members of a terrorist organization or to a terrorist organization
- test: “**should know X**” involved in terrorist activities

➤ USA Patriotism Act (2001)

➤ **Public Health Bioterrorism & Response Act (2002)**

Food Security – New civil law provisions

- Food disparagement laws (state level)
- Agroterrorism laws (state level)
- Civil penalties for violation of federal regulations (EPA, SEC, FDA)

Food Security – Business issues

- Civil and criminal penalties for regulatory violations
- Tort and environmental actions (civil) including litigation blackmail
- Precautionary detention and recalls
- Terrorism insurance (commercial property)
- Newly uninsurable risks

Specific Provisions of Bioterrorism Law - Generally

Public Health Security and Bioterrorism Preparedness and Response Act of 2002.
June 12, 2002.

- FDA has expanded authority to embargo food
- USDA regulated products are **exempt**
- Farms, retail institutions, restaurants, non-profit institutional food service, fishing vessels ***may be exempt***

Specific Provisions of Bioterrorism Law – Legal Standard

- ↳ **New standard:** ‘credible information’ or ‘evidence’ of a ‘threat’ of serious adverse health consequences
- ↳ **Old standard:** reasonable probability – will cause – serious adverse health consequences

FDA's position is to comply with international trade obligations under WTO, NAFTA and GATT. Agency believes that regulations *are not more* trade restrictive than necessary to meet the objectives of Bioterrorism Act.

Specific Provisions of Bioterrorism Law - Registration

- ✎ Government registration of all food producers.
- ✎ Food producers include: warehouses and holding facilities (cold storage, silos, liquid storage tanks)
- ✎ Food producers include: packers [no change in product form]
- ✎ Food is **misbranded** if it is not from a registered facility

Specific Provisions of Bioterrorism Law - Registration

↳ Facility registration is immediately suspended for:

- failure to permit inspection
- violation of a food safety law

Test: *likely* to prevent a significant risk of adverse health consequences

Specific Provisions of Bioterrorism Law - Imports

- More inspections of imported food.
- Importers must give prior notice (4-24 hr) to FDA. If notice not given, product is held.
- Importer must identify food, country of origin and quantity.
- Delegation of inspections to states possible.
- USDA products are not covered.

Specific Provisions of Bioterrorism Law - Detention

- ↳ Temporary 24 hr holds. Detention of 20-30 days permitted. States must be notified of detention.
- ↳ New regulations for perishable foods.

Specific Provisions of Bioterrorism Law - Records

- ↳ New records regulations (2 yr retention).
- ↳ Must be able to trace product one step up and one step back.
- ↳ Must be able to produce records within hours of an FDA request (applies to P/T and seasonable businesses).
- ↳ Country of Origin

Specific Provisions of Bioterrorism Law

- ↳ Mandatory vulnerability assessments for water supplies. Community systems serving 3,300 persons or more.
- ↳ Assessments for smaller systems with assistance of EPA.

Specific Provisions of Bioterrorism Law

- ↳ Improved training and readiness for attacks.
- ↳ More money for federal, state and local government (infrastructure, labs, training, people).
- ↳ ***No money*** for private sector security programs!
- ↳ ***No insurance likely*** for terrorist related product losses!

Insurance – Losses affecting food

- ↳ **“Physical injury”** = commingling of a defective or contaminated product with good product if segregation would be unreasonably costly or impracticable.
- ↳ **“Loss of use”** = product not useable (*e.g.* for food) or rendered less productive or valuable.

Insurance – Covered losses involving food adulteration

- Food adulteration is a covered loss (involves physical damage to insured's property).
- Includes chemical agents not approved for food use or prohibited by regulation.
- Product damage tied to contract and warranty of fitness are covered.

Insurance – Food terrorism – the bad news

- ↳ “Sistership exclusion” bars recovery of recall costs (prophylactic measures involving undamaged product).
- ↳ Purchase of special coverage (contaminated products, rejection, accidental contamination, malicious contamination, extortion) may be available, but may not be affordable.

Insurance – Food terrorism – the bad news

- ✎ **Insurance** - terrorism risks cannot be covered using traditional insurance models.
- ✎ Specific exclusion for terrorist activities under civil commotion exclusions apply in most policies.
- ✎ Damage for crop loss (“night time gardening”), environmental damage, information destruction are generally excluded from coverage.

Insurance – Food terrorism – the bad news

Political and legislative climate may change suddenly, changing risk

Insurance – Food terrorism – market implications

- ↳ European Union moving towards a strict liability standard (increasing litigation exposure).
- ↳ Uninsurable risks or prohibitive insurance premiums.

Food terrorism – market implications

- ↳ Consumer activism and environmental litigation is used to increase regulation and/or reporting requirements.
- ↳ Spurious tort litigation (*e.g.* McDonald's French fry class action; 'tobacco' style class actions; WA has provided animals with standing to sue.
- ↳ McLibel Round II

Disconcerting Legal Issues from Bioterrorism Act

New standard is *credible information or evidence* of a *threat* of serious adverse health consequences or death.

Disconcerting Legal Issues from Bioterrorism Act

Familiar Old Legal Standard

Class I recall: *reasonable probability* that the use of, or exposure to, a violative product *will* cause serious adverse health consequences or death [21 CFR 7.3(m)(1)].

Disconcerting Legal Issues Changing Standards

Administrative detention of any food FDA *reasonably believes* to be adulterated or misbranded.

Disconcerting Legal Issues Changing Standards

Standard for destruction of an imported food is if the product *“appears”* to present a significant risk to public health.

NFI Jan 27, 2003

Disconcerting Legal Issues Changing Standards

Agency can pull a facility registration if it is *likely* to prevent a significant risk of adverse health consequences

Disconcerting Legal Issues

WHAT do these new standards mean? –
*reasonable, likely, appears, credible
evidence?*

Evidence is not information...

How is threat defined?

Disconcerting Legal Issues

Credible evidence = to display a modicum of evidence for each count of indictment...

↳ (*reg. scientific data*) ... technology is reasonably reliable, valid, falsifiability, error rate, operating standards, peer review, general acceptance.

↳ (*reg. scientific evidence*) ... prejudicial, sufficient, helpful

Disconcerting Legal Issues

(reg. transgovernmental regulatory info.) **useful and credible** information. Regulatory networks frequently exercise power through distillation and dissemination of **administrative and credible** information

Disconcerting Legal Issues

Resolution?

Developing a Security Plan

↳ Prevention and Response

↳ Identify the most vulnerable foods:

- The most readily accessible food processes
 - Foods most vulnerable to undetected tampering
 - Foods that are most widely disseminated or spread
 - The least supervised food production area or processes
- WHO Feb, 2003

Developing a Security Plan

- Develop a comprehensive flow chart for product and operation (primary producer to consumer)
- Determine whether significant food security hazards exist & evaluate likelihood of each risk
- Develop possible control or preventive measures

Developing a Security Plan

- Determine which **control measures** are **critical** for food security
- **Establish limits** or constraints on control measures
- Develop a **monitoring** program
- Develop a program to fix security breaches (similar to a **corrective action plan**)

Developing a Security Plan

- ↳ Test security program and re-verify on a periodic basis and when security issues change
- ↳ Conduct simulated crisis exercises at all levels of management
- ↳ Keep confidential records and supporting documentation

Developing a Security Plan

- **Goal** - to keep people safe and protect assets
- **A plan** - can be based upon HACCP principles
- Have simple well designed responses
- Complicated plans will be impossible to implement or will be ignored

Summary

- ⌘ Safe food has been redefined
- ⌘ Tighter regulatory standards
- ⌘ New regulations are perceived as trade restrictions
- ⌘ Governmental food safety programs will do little to prevent anarchists from targeting food. Companies must develop own security programs.

Greenpeace

"...a band of scientific illiterates who use Gestapo tactics..."

— Patrick Moore, Greenpeace Co-Founder, describing his former organization.



Greenpeace: Not as peaceful as you thought.

ConsumerFreedom.com Find out more about Greenpeace and other extremists.

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