

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CROP HARMONIZATION COMMITTEE

Thursday, September 28, 2000
Roosevelt Room, State Capitol
Bismarck, North Dakota

Representative Eugene Nicholas, Chairman, called the meeting to order at 8:45 a.m.

Members present: Representatives Eugene Nicholas, Michael D. Brandenburg; Senators Meyer Kinnoin, Terry M. Wanzek; Citizen Member Brett Oemichen

Others present: See attached appendix

It was moved by Representative Brandenburg, seconded by Senator Kinnoin, and carried on a voice vote that the minutes of the June 8, 2000, meeting be approved as distributed.

CROP HARMONIZATION STUDY

Chairman Nicholas said he had visited with representatives of the United States Environmental Protection Agency last week and it appears the representatives of the Environmental Protection Agency are exhibiting a good attitude regarding moving toward harmonization within two years. He said the effort toward harmonization appears to be continuing on the schedule provided by the representatives of the Environmental Protection Agency at the committee's meeting held in Washington in March 2000. He said there seems to be a commitment on behalf of the Environmental Protection Agency to moving the harmonization process along.

In response to a question from Citizen Member Oemichen, Representative Nicholas said representatives of the Environmental Protection Agency are continuing to discuss the harmonization of existing product tolerances with the Canadian Pest Management Regulatory Agency. He said the Environmental Protection Agency seems to be making some progress as a result of increased attention on harmonization. He said the effort was advanced significantly as a result of action taken by the 1999 Legislative Assembly and the work of this committee.

Representative Brandenburg said there was not any discussion of harmonization until about two years ago, but now many of the candidates for statewide office and Congress are focusing on the issue.

Representative Nicholas said the biggest obstacle in achieving harmonization is the slow movement of the Environmental Protection Agency. He said it may be necessary for this committee to continue into the next biennium to see that the effort toward harmonization continues on schedule.

Chairman Nicholas called on Mr. Roger Johnson, Agriculture Commissioner, for an update regarding harmonization activities undertaken by Commissioner Johnson. Commissioner Johnson submitted written testimony, a copy of which is on file in the Legislative Council office.

Commissioner Johnson said his office continues to make efforts to work with growers, industry, and government to achieve harmonization. He said until price harmonization is aggressively pursued by making it legal to cross the international border with approved products, the issue will not be solved. He said the decision to register a product in the United States and Canada is in the discretion of the crop protection product company. Thus, he said, it is important that government officials and industry groups encourage companies to register the products for use in both countries.

Commissioner Johnson said the 1999 Legislative Assembly gave the Agriculture Commissioner the authority to authorize the sale and use of a crop protection product that has a Canadian label if the product contained substantially similar active ingredients to an American-labeled product and if its importation and use do not violate federal law. He said the Environmental Protection Agency also authorized him to grant 24-C special local needs exemptions for Canadian products with the same active ingredient and similar to currently labeled American products in some cases where there is a substantial price discrepancy between the American and Canadian products. However, he said, the official request for the special local needs exemptions must come from the Canadian registrant, and no companies have made such a request despite repeated offers for the companies to do so.

Commissioner Johnson said although he has been working on the harmonization issue since February 1997 when he brought a resolution to the National Association of State Departments of Agriculture, progress has been slow. He said the issue that no one seems to want to address is the price differential between the same products available in both Canada and the United States. As a part of the memorandum of understanding between the United States and Canada, he said, there was an agreement to study price differentials. He said that study revealed there

were substantial differences in prices on several products, and in the vast majority of the cases, the price disadvantage was in the United States.

Commissioner Johnson said in late May, with the advice of Attorney General Heidi Heitkamp, he published the Environmental Protection Agency label for Achieve 80DG on his office web site. He said that action enabled North Dakota farmers and dealers to buy the product in Canada and import it into the United States. He said the manufacturer, Zenica Ag Products, filed a complaint with the Environmental Protection Agency protesting the action, and the Environmental Protection Agency determined that federal law does not allow the importation of Achieve 80DG from Canada into North Dakota. Although he has continued to work administratively and legislatively to eliminate the pricing differentials, he said, he and the Attorney General decided to file a civil action against the Environmental Protection Agency in federal district court in August. He said the complaint seeks to enjoin the Environmental Protection Agency from implementing any regulation, policy, or practice in violation of the federal Insecticide, Fungicide, and Rodenticide Act that prevents North Dakota farmers or dealers from importing Canadian pesticides that are identical to pesticides registered for use with the Environmental Protection Agency. In addition, he said, the complaint seeks an order declaring that the Environmental Protection Agency has exceeded its statutory authority by expanding, through regulation, the definition of "produce" and "producer" beyond the meanings intended by Congress. He said the civil action has not altered the good relationship between the Environmental Protection Agency and his office. He said the lawsuit is a "friendly" lawsuit seeking judicial guidance on narrow legal issues, and certain top officials with the Environmental Protection Agency support the action to obtain the use of Canadian pesticides.

Commissioner Johnson said Congressman Earl Pomeroy introduced a "Pesticide Harmonization Act" in Congress on September 14, 2000. He said the legislation would allow chemical dealers, states, and others to act as registrants to import certain pesticides from Canada. He said the legislation is a result of a collaborative effort between Congressman Pomeroy's office, his office, the Environmental Protection Agency, and other agricultural organizations. If enacted, he said, the legislation would effectively eliminate the ability of crop protection product companies to sidestep the issue of disparate pricing practices and force the companies to compete in a free and open market.

In response to a question from Representative Brandenburg, Commissioner Johnson said he agrees that harmonization must be pursued at the highest levels of the Environmental Protection Agency and the Pest Management Regulatory Agency. He said there appears to be a willingness from all sides to move

forward toward harmonization, and there has been discussion regarding the number of registrations done each year. He said registrants have been unwilling to push registration of existing products because each company is unwilling to use its limited number of "chips" with the Environmental Protection Agency on existing products. He said there are many products available in Canada that are not available here, but the list of products is narrowing with respect to products available for use on canola. He said the number of products available in Canada has been higher because the canola industry began in Canada. He said another concern is that reevaluation of old products sometimes results in changes in the registration status of the product.

In response to a question from Senator Wanzek, Commissioner Johnson said the Environmental Protection Agency is bound to follow the rules it has adopted even if certain officials agree with the interpretation taken by Commissioner Johnson.

In response to a question from Citizen Member Oemichen, Commissioner Johnson said the pricing differential for Achieve 80DG was a business decision because the same product is available in both countries. He said North Dakota producers need a mechanism to address pricing issues, particularly when crops grown in Canada are competing with the crops grown by North Dakota growers who pay a higher price for crop protection products. He said he followed the directive of the 1999 Legislative Assembly to address pricing differentials and permit movement of products across the border.

In response to a question from Representative Brandenburg, Commissioner Johnson said supporting the lawsuit and the legislation introduced by Congressman Pomeroy will help move the harmonization process along. He said the process has been slow since the North American Free Trade Agreement was adopted. He said the issue of addressing the importation of commodities from Canada on which crop protection products available in Canada but not available in the United States were used was addressed by legislation in 1999. However, he said, the Governor vetoed that legislation.

Representative Brandenburg said this committee made a bipartisan effort in March to address harmonization issues at the federal level. However, he said, he is not sure why Congressman Pomeroy waited until this month to introduce harmonization legislation.

Commissioner Johnson said Congressman Pomeroy and Senator Byron Dorgan introduced legislation two years ago, but the legislation has not been successful. He said the legislation recently introduced by Congressman Pomeroy addresses the issue that resulted from the lawsuit instituted against the Environmental Protection Agency. He said all parties must continue working together on the issue.

In response to a question from Representative Nicholas, Mr. Paul Germolus, Attorney General's

office, said the crop protection product manufacturers were not named in the lawsuit because the lawsuit involves a very narrow legal and technical issue. He said the lawsuit addresses only the Environmental Protection Agency regulations and interpretations. He said there appears to be some disagreement within the Environmental Protection Agency regarding the interpretations in dispute. However, he said, the Environmental Protection Agency Office of Enforcement is not willing to disregard laws or rules that representatives of that office believe prohibit the importation of Achieve 80DG from Canada.

In response to a question from Senator Wanzek, Mr. Germolus said representatives of the Office of Enforcement were unwilling to change their decision, and filing the lawsuit was the only option to address this problem other than legislation.

Chairman Nicholas called on Mr. Curt Trulson for comments regarding harmonization. Mr. Trulson said because the price differentials between the United States and Canada for crop protection products cost his farm approximately \$50,000 a year, the young men that farm with him are unable to purchase health insurance. He said money is being taken out of the producers' pockets by chemical companies, and the Environmental Protection Agency and Pest Management Regulatory Agency are also a part of the problem. He said he could be assured of staying in business with the extra \$50,000 a year he has to spend on crop protection products. He said the inequitable cost of crop protection products is part of the overall farm problem.

Chairman Nicholas said the work of the committee has been instrumental in raising the issue of harmonization. He said the committee and individual legislators have developed a dialogue with representatives of the Environmental Protection Agency. He said the meeting in Northwood and the farm tour in which the committee participated were a good means to demonstrate to the representatives of the Environmental Protection Agency how careful producers are in the handling of pesticides. Through the efforts of the committee, he said, great strides have been made in advancing harmonization, and the committee should continue its efforts. He said the committee should use the funds available to it and keep the private sector involved in discussions with governmental officials relating to advancing harmonization. He said having Citizen Member Oemichen on the committee has helped open doors with the crop protection product industry. Although there has been criticism of the committee's trip to Washington, D.C., he said, the committee was specifically authorized to accept donations and to seek the input of industry as well as government and producers.

Senator Wanzek said the work of the committee has helped draw attention to the issue of harmonization and the problems that producers are facing. In particular, he said, the importation of products from

Canada on which crop protection products were used that are not available in this country is an area that merits attention. Although the committee cannot control the Environmental Protection Agency, he said, the committee has had a major impact on the work of the Environmental Protection Agency and has accomplished its intended purpose.

Citizen Member Oemichen said he appreciates the opportunity to be involved as a stakeholder in the harmonization process. Although the pace of change is a source of frustration, he said, it is important to realize that the process involves working with a large bureaucracy. Because harmonization is a journey and not a destination, he said, the next step in the process is to address the harmonization of existing products.

Representative Brandenburg said the committee has done a good job in addressing the problems facing producers. He said he believes the work of the committee has had an impact on the process.

It was moved by Senator Kinnoin, seconded by Representative Brandenburg, and carried on a voice vote that the Legislative Council be requested to continue this committee in the future and allow the committee to continue working with the Environmental Protection Agency, the Pest Management Regulatory Agency, the American Crop Protection Association, the Canadian Crop Protection Association, and commodity groups in addressing issues related to harmonization.

Mr. Lance Hagen, North Dakota Grain Growers Association, said he supports the continuation of the committee and thanked the committee for holding a meeting in conjunction with the association's Environmental Protection Agency tour in June.

Mr. Cal Rolfson, American Crop Protection Association, thanked the committee for its efforts to achieve a bipartisan and multiprofessional solution to the problem of harmonization. He said he encourages the continuation of the committee's efforts and looks forward to working with the committee in the future.

CHEMICAL APPLICATION STUDY

At the request of Chairman Nicholas, committee counsel reviewed a background memorandum entitled *Chemical Application Industry - Background Memorandum*.

Chairman Nicholas called on Mr. Andrew A. Thostenson, Pesticide Program Specialist, North Dakota State University, for comments regarding the North Dakota financial responsibility law for pesticide applicators. Mr. Thostenson presented written materials, copies of which are on file in the Legislative Council office. He said the Extension Service trains and certifies applicators to apply restricted-use pesticides. In 1997, he said, the Legislative Assembly enacted financial responsibility requirements which have proven to be difficult to administer. He said the

requirement of a general liability insurance policy does not address misapplication of a pesticide. Another problem with the law, he said, is that only certified applicators are required to provide financial responsibility. Because certification is granted for a three-year period and proof of financial responsibility must be provided yearly, he said, there is much difficulty in administering the program.

Mr. Thostenson said the Agriculture Commissioner's office is responsible for enforcement of the financial responsibility requirements. However, he said, because of the difficulty in administering the applicator certification process, the requirements are essentially unenforceable. He said it appears three courses of action are available:

1. Repeal the financial responsibility requirements.
2. Enact broader language that would require pesticide misapplication coverage instead of just general liability, require financial responsibility for all commercial applicators regardless of certification status, and require the financial responsibility law to be administered by a licensing agency rather than an educational organization.
3. Modify the existing law to streamline its administration.

Mr. Thostenson said the existing law could be improved by requiring an affidavit of proof of financial responsibility rather than the actual filing of proof of responsibility. He said the affidavit would be similar to the affidavit required to obtain a driver's license. In addition, he said, it would be helpful if the affidavit of proof be filed only at the time of certification rather than annually. He said meaningful enforcement provisions would also improve the existing law.

In response to a question from Representative Brandenburg, Mr. Thostenson said although insurance is available, the cost of the insurance may be an issue. He said the current law requires an enormous amount of staff time and resources for little effect.

In response to a question from Citizen Member Oemichen, Mr. Thostenson said the financial responsibility law has had little influence on payments or settlements with respect to losses for misapplication. He said 30 to 40 lawsuits are filed annually, but very few end up in court.

In response to a question from Senator Wanzek, Mr. Thostenson said although the financial responsibility requirements were intended to prevent "fly-by-night" operators from applying pesticides, the requirements have not worked because of the lack of licensing standards. He said fly-by-night operators will not comply with the financial responsibility requirements regardless of the law requiring financial responsibility.

Chairman Nicholas called on Mr. Jeff Olson, Department of Agriculture, for comments regarding the pesticide applicator study. Mr. Olson said the

Agriculture Commissioner is responsible for enforcing the financial responsibility law. However, he said, because of the cost of holding an administrative hearing and the large number of applicators who do not submit financial responsibility proof, the law is extremely difficult to enforce. He said over 700 applicators did not show proof of financial responsibility this last year. He said representatives of the Agriculture Commissioner continue to work with Mr. Thostenson in attempting to find ways to make the law work. However, he said, they have been unable to find a way to enforce the law.

In response to a question from Citizen Member Oemichen, Mr. Olson said the Agriculture Commissioner receives approximately 60 to 70 complaints each year with respect to pesticide applicators. He said about 40 of the complaints usually are related to pesticide drift. In most cases, he said, the parties are able to resolve the problem. Although the law needs more teeth, he said, he does not want to see state government involved in litigation between two private parties.

In response to a question from Citizen Member Oemichen, Mr. Thostenson said misapplication insurance riders generally cost 10 times the amount of general liability policies.

In response to a question from Senator Wanzek, Mr. Thostenson said there is some evidence that applicators that have insurance may be bothered with nuisance lawsuits.

In response to a question from Citizen Member Oemichen, Mr. Thostenson said the certification process is a large paperwork burden on the Extension Service. He said it costs approximately \$20,000 per year to administer the program, and there are no tangible benefits.

Mr. Gerald Thompson, Department of Agriculture, said approximately 10 percent of the applicators did not carry insurance before the 1997 legislation, and the number likely has not changed. He said the 1997 legislation originated from the aerial applicators who proposed provisions requiring drift liability. Ultimately, he said, the legislation ended up being passed as requiring general liability insurance, bonds, or proof of assets. He said the general liability policy does not help a producer that is damaged as a result of misapplication. He said there are likely more drift incidences of damage than the number that are reported.

Senator Wanzek said the financial responsibility requirements may give producers a false sense of security.

Mr. Thompson said he agrees there may be a misconception among producers regarding the effect of the financial responsibility law.

Senator Wanzek said because the law does not work, the financial responsibility requirements probably should be repealed. He said there appears to be a significant problem with the cost of misapplication or drift insurance, and there are significant

differences and needs in the various areas of the state.

Senator Kinnoin said it is clear that the current law is not workable. However, he said, there will always be individuals who will cause problems regardless of the status of the law.

Mr. Gary Ness, State Aeronautics Commissioner, said the Aeronautics Commission licenses 200 individuals. He said he agrees that something needs to be done to address the financial responsibility law.

It was moved by Senator Wanzek, seconded by Senator Kinnoin, and carried on a roll call vote that the interested parties be encouraged to assist the Legislative Assembly in pursuing solutions to address the drift and misapplication concerns and that serious consideration be given to recommending repeal of the existing law. Representatives Nicholas and Brandenburg, Senators Kinnoin and Wanzek, and Citizen Member Oemichen voted "aye." No negative votes were cast.

It was moved by Senator Kinnoin, seconded by Senator Wanzek, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and to present the report to the Legislative Council.

It was moved by Senator Kinnoin, seconded by Senator Wanzek, and carried that the meeting be adjourned sine die. The committee adjourned sine die at 11:50 a.m.

John D. Bjornson
Committee Counsel

ATTACH:1