

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

AGRICULTURE COMMITTEE

Tuesday, October 29, 2002
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Terry M. Wanzek, Chairman, called the meeting to order at 9:30 a.m.

Chairman Wanzek said the meeting was scheduled to begin at 9:00 a.m., but because of the icy road conditions, he elected to begin later, thereby allowing extra time for both committee members and audience members to gather.

Members present: Senators Terry M. Wanzek, Bill Bowman; Representatives James Boehm, Michael Brandenburg, Thomas T. Brusegaard, April Fairfield, C. B. Haas, Joyce Kingsbury, Phillip Mueller, Jon O. Nelson, Eugene Nicholas, Dennis Renner, Earl Rennerfeldt, Arlo E. Schmidt, Ray H. Wikenheiser

Members absent: Senators Duane Mutch, Ronald Nichols, Harvey Tallackson; Representatives Rod Froelich, Edward H. Lloyd

Others present: See Appendix A

It was moved by Representative Rennerfeldt, seconded by Senator Bowman, and carried on a voice vote that the minutes from the previous meeting be approved.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30145.0100] relating to the requirement that all gasoline having an octane rating of 87 be blended with ethanol. Committee counsel said the bill draft would require all gasoline having an 87 octane rating and offered for sale in this state to be blended with ethanol at the rate of 10 percent. She said the bill draft would provide for an effective date of January 1, 2004.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30146.0100] relating to the requirement that ethanol be sold from at least one pump at each retail location. Committee counsel said the bill draft would require that beginning January 1, 2004, each retail dealer offer an ethanol blend from at least one pump at each place of business. She said, beginning January 1, 2005, such a retailer would have to begin offering an ethanol blend from at least one pump dispensing the lowest octane rating of gasoline at each place of business.

Chairman Wanzek recognized Ms. Jocie Iszler, Executive Director, North Dakota Corn Growers Association and North Dakota Corn Utilization Council. Ms. Iszler presented testimony regarding both ethanol bill drafts. She said 2003 will be a tight budget session and there are only limited resources available

to support their goals. She said ethanol has acquired a larger share of the market. She said North Dakotans are becoming more aware of ethanol and the petroleum retailers have begun to offer ethanol to their customers. She said the groups she represents appreciate the effort to increase the market share of ethanol. However, she said, a mandate will not be popular among the people of this state. She said she would rather work with the retailers and conduct additional marketing campaigns. She said early efforts show that people are very responsive to the marketing efforts by the North Dakota Corn Utilization Council.

In response to a question from Representative Nelson, Ms. Iszler said Minnesota ethanol use is at 97 or 98 percent. She said South Dakota's ethanol use is at 60 percent. She said ethanol blends are taxed at two cents a gallon less than nonblended fuel in South Dakota.

Representative Nelson said when the states around us are at 97 percent and at 60 percent ethanol usage, he does not understand why ethanol market share is in the 25 percent range in North Dakota.

Ms. Iszler said the effects of the North Dakota Corn Utilization Council's marketing efforts have been significant.

In response to a question from Representative Nicholas, Ms. Iszler said Minnesota is the only state that mandates ethanol use. She said in the last five years there has been about a 40 percent increase in corn acreage across North Dakota.

In response to a question from Representative Mueller, Ms. Iszler said the ethanol that is produced in North Dakota is primarily shipped out of state. She said if every North Dakotan were to use a 10 percent blend of ethanol, North Dakotans would annually use all the ethanol that a 30-million-gallon plant could produce. She said that is the amount that is currently produced between our two plants. She said that is also the size of the proposed ethanol plant. She said North Dakota is one of the farthest west ethanol-producing states.

Ms. Iszler said a mandate is not a necessary component of getting a new ethanol plant off the ground. She said a producer incentive is, however, necessary to achieving that end. She said Minnesota plants receive subsidies of \$3 million a year for

10 years. She said after 10 years those plants are capitalized and are then self-sustaining. She said the ethanol plants in South Dakota receive \$1 million a year for 10 years. She said when banks are considering the provision of financing for the plants, they take into account the size of the incentives that are available in the surrounding states.

In response to a question from Senator Bowman, Ms. Iszler said for every dollar Minnesota invests in ethanol, there is a \$12 return to the state. She said there is solid evidence to show what a producer incentive will bring back to the state. She said she does not know if the budget shortfalls that are being felt in Minnesota will impact legislative decisions regarding the continuation or expansion of ethanol incentives.

In response to a question from Representative Schmidt, Ms. Iszler said marketing evidence shows that if a product is priced right, people will use it. She said mandates are philosophical issues. She said it is the goal of the North Dakota Corn Utilization Council to achieve its ends through production incentives. She said a mandate will not help to build a plant. She said a production incentive would help to build a plant.

In response to a question from Representative Rennerfeldt, Ms. Iszler said North Dakota is an oil exporting state, just like it is an ethanol exporting state. She said she believes there is room for both an ethanol and an oil industry.

Representative Brandenburg said a retail incentive such as the one enacted in Iowa in effect brings money into the state coffers.

In response to a question from Senator Wanzek, Ms. Iszler said Congress recessed without any action on the federal renewable fuels legislation. She said Congress is expected to address it after the election. She said some people have discussed not taking any action at the state level until the federal government addresses the renewable fuels legislation. However, she said, all around North Dakota, plants continue to be erected. She said our neighboring states are not waiting to see what Congress will do.

Chairman Wanzek recognized Mr. Russ Hanson, North Dakota Petroleum Marketers Association. Mr. Hanson presented testimony regarding both ethanol bills. He said his group is philosophically opposed to mandating the sale of a particular product. He said retailers want to sell to their customers. He said when the customers want the product, the retailers will oblige. He said he agrees with Ms. Iszler that there has been some significant movement in ethanol acceptance as a result of the marketing strategies being employed. He said marketing strategies offer a more positive direction than mandates.

In response to a question from Representative Nelson, Mr. Hanson said although he does not know the exact number, he does not believe there are many storage tanks in the field that are not warranted for the storage of ethanol. He said the new federal

requirements have caused the replacement of most older tanks.

In response to a question from Representative Brandenburg, Mr. Hanson said small marketers have to deal with the cost of making the changes necessary to handle ethanol. He said if there were incentive dollars available to the dealers, it would make things more palatable.

In response to a question from Representative Schmidt, Mr. Hanson said the availability of ethanol has been a source of frustration for some people. He said there are now dealers that offer the product; whereas, earlier the dealers had difficulty getting the product from suppliers.

In response to a question from Representative Nelson, Mr. Hanson said the gasoline business is price-driven.

Chairman Wanzek recognized Mr. Matt Bjornson, Bjornson Oil, Cavalier, North Dakota. Mr. Bjornson presented testimony regarding both ethanol bill drafts. He said he operates a family petroleum business. He said philosophically he does not agree with mandates. He said a free market system works well. He said if you have a good product, and you market it, people will buy it. He said the price of ethanol has very little to do with the price of corn. He said it has more to do with the price of gasoline. He said the retail price of ethanol depends on the price set by the ethanol producers. He said they can make their product as competitive or as noncompetitive as they want.

Mr. Bjornson said a lot of his gasoline comes from Canada. He said retailers in the Williston area receive gasoline from Montana. He said some facilities do not have the ability to offer ethanol in only one tank. He said there is an extreme expense in updating a station. He said if one of his stores in Lakota were to be reconfigured to handle ethanol, the cost of doing so would be \$60,000. He said there is not enough business in Lakota to justify that. He said he has found that people either want to use ethanol or they do not. He said he is in the bulk fuel business and not one of his agricultural purchasers orders ethanol blended fuel. He said ethanol is a good product, but people have to be sold on it. He said ethanol sales are driven by marketing and price.

Mr. Bjornson said with respect to a third bill draft regarding an ethanol income tax credit, the committee should understand that administering such a concept would be nothing short of a nightmare. He said the biggest threat to his business is the "hyper-markets" such as those created by Wal-Marts. He said those corporations offer gasoline at cost to lure consumers into their stores.

Representative Nicholas said he does not order anything but ethanol for his farm. He said every farm should be using ethanol. He said even after September 11, 2001, our continued dependence on foreign oil is unexplainable.

Mr. Bjornson said his business has offered ethanol since the first plant was built in Walhalla. He said if customers want to buy it, it is available. He said it is available at both independent stations and at the Cenex stations. He said Tesoro and BP Amoco have both added it to their product line.

Mr. Bjornson said if the interest groups come up with promotions and the customers want the product, the dealers will make the product available to their customers.

Chairman Wanzek recognized Mr. Ron Ness, Executive Director, North Dakota Petroleum Council. Mr. Ness presented testimony on both ethanol bill drafts. He said the big picture is to be found in the federal renewable fuels standard. He said the North Dakota Petroleum Council has been most supportive of that legislation. He said state-by-state mandates cause boutique fuel issues which in turn cause problems for dealers. He said if North Dakota could use all the ethanol it makes, it would still only use 30 million gallons. He said if North Dakota becomes a boutique fuel island, suppliers will not be able to pull products from Billings, Montana, and Regina, Saskatchewan. He said North Dakota is not a big enough market to justify boutique fuels. He said not even farmers buy ethanol. He said the suppliers are going to sell the product that the consumers say they want. He said that is how the market works. He said if the lowest octane pump is required to dispense ethanol, the price of gasoline will be raised for those people who choose not to buy ethanol.

In response to a question from Representative Nelson, Mr. Ness said if ethanol replaced 10 percent of the fuel market, it would be a significant burden on the North Dakota refiners. He said the refiners have not been able to produce at their full capacity, because they do not have a market for their fuel now.

In response to a question from Representative Brandenburg, Mr. Ness said blended fuel will not be shipped from North Dakota to Denver, Colorado. He said if anything, ethanol might be shipped to Denver and then blended upon arrival. He said the win-win would be to increase all fuel usage.

In response to a question from Representative Nicholas, Mr. Ness said the North Dakota refinery competes against products coming from all over the United States and Canada. He said North Dakota is at the end of the distribution chain. He said the renewable fuels standard would allow companies to determine where they will sell their products. He said the national renewable fuels standard will allow for fuel banking. He said ethanol will be sold in those parts of the country where people are familiar with it and amenable to using it. He said that means the Midwest.

Ms. Iszler said right now renewable fuels constitute less than 1 percent of our usage. She said the national renewable fuels standard would require that this be raised to 3 percent by 2012. She said if every

American would use a 10 percent ethanol blend, there would be a substantial decrease in the amount of foreign fuel we need.

In response to a question from Representative Nelson, Ms. Iszler said the North Dakota Corn Utilization Council would prefer to see a producer incentive enacted. She said there is no doubt that the best thing would be to use all of the 30 million gallons produced by North Dakota plants. She said if that ethanol is sold in North Dakota, no transportation costs are attached.

Chairman Wanzek recognized Mr. Mike Clemens, President, North Dakota Corn Growers Association. Mr. Clemens presented testimony regarding both ethanol bill drafts. He said his goal is to get another ethanol plant built in North Dakota. He said when the plant is built, many of the concerns about marketing and supply will be addressed. He said the retail station owners need to decide whether they will market ethanol. He said if the people want it, ethanol will be provided. He said this will add profit to those farmers who raise corn and to those individuals who invest in the ethanol plant.

In response to a question from Representative Nicholas, Mr. Clemens said if the plant is strategically placed, it would utilize a significant amount of the corn grown in North Dakota. He said ethanol could be appropriately placed and priced in the retail stream.

In response to a question from Representative Nicholas, Mr. Clemens said a mandate might not hurt an equity drive for the plant, but it will not help. He said there is already a marketing plan in place. He said if a plant is put up it will make a profit tomorrow.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30152.0100] relating to the creation of an ethanol income tax credit. She said the bill draft would provide that a retailer is eligible to claim an income tax credit if the retailer operates at least one retail location at which more than 60 percent of the total gallons of gasoline sold are blended with ethanol. She said the tax credit would equal 2½ cents times the total gallons of ethanol-blended gasoline sold by the retailer which are in excess of that 60 percent threshold. She said the bill draft also contains a taxing mechanism by which the taxes payable on ethanol-blended fuel and nonblended fuel are based on the amount of total consumption in the state.

At the request of Chairman Wanzek, Ms. Joan Galster, Motor Fuel Tax Supervisor, Tax Commissioner's office, presented testimony regarding the bill draft to create an ethanol income tax credit. Ms. Galster said the purpose of this bill draft is to enhance the use of ethanol-based products. She said the bill draft was based upon current Iowa law. She said Iowa and North Dakota law are not the same with respect to the effects of the concept. She said in Iowa the motor vehicle fuel tax was 20 cents and the ethanol-blended tax was 19 cents. She said Iowa

attempted to achieve revenue neutrality by lowering the tax on ethanol and increasing the tax on gasoline. She said in North Dakota the tax is 21 cents on all motor vehicle fuels. She said this bill draft would in effect provide that the tax on gasoline is 21 cents and that the tax on ethanol is 20 cents. She said that would amount to a revenue reduction of approximately \$719,000 per tax year. She said if the next step would go into place where the ethanol blend would be at 50 to 55 percent of market share, the revenue loss would exceed \$2 million. She said the reason the cost increases is because the bill draft is in effect lowering the rate on something for which one expects or requires the consumption to increase. She said this would not be revenue neutral in North Dakota. She said the Tax Commissioner's office would also incur expenses, as would the retailers, for calculating the multiple taxes and reprogramming their computers.

Ms. Galster said with respect to the 2½ cent income tax credit, in Iowa that money comes out of the general fund. She said the Iowa Motor Fuel Tax Division licenses the distributor, not the retailer. She said there would be a cost to license retailers and require reporting from them.

At the request of Chairman Wanzek, Ms. Mary Loftsgard, Supervisor, Corporate Income Tax Division, Tax Commissioner's office, presented testimony regarding the bill draft to create an ethanol income tax credit. Ms. Loftsgard said the bill draft raises concerns that relate to the income tax credit as well. She said the bill draft would provide that the income tax credit is available to both individual and corporate clients. She said there is a concern that gathering the information from retailers would require a licensing of retailers. She said there is no mechanism by which to license, monitor, and audit either the retailers or such credits.

Ms. Loftsgard said this bill draft provides for a refundable credit. She said this is a whole new venue for the Tax Commissioner's office. She said this is something that does not presently exist. She said there is also an issue surrounding the claiming of credits on North Dakota short forms. She said that is not now done.

Ms. Loftsgard said the Tax Commissioner's office does not have the ability to estimate the tax impact of this bill draft at the present time. She said there is also a concern with the apportionment factor that is applied to corporations doing business in multiple states. She said the problem is that one may not be able to disallow a credit for fuel that is sold in Minnesota.

Representative Brandenburg said he thought the cost to the state of Iowa was approximately \$800,000 and there was a significant amount of money returned to the state.

Senator Wanzek said the fiscal impact to Iowa, as represented in the July 10-11, 2002, minutes of the

interim Agriculture Committee, was \$800,000 during the first year because there was a delayed implementation date. He said in succeeding years the impact was respectively \$1.2 million, \$1.6 million, \$2.2 million, and \$2.9 million.

Ms. Galster said Iowa has a different income tax structure. She said the impact in North Dakota would come more from the fact that more product would be sold at a lower tax rate. She said the financial impact would be significant in North Dakota.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30147.0100] relating to ethanol production incentive payments. Committee counsel said this bill draft is somewhat of a placeholder. She said at the time its content was discussed, discussions regarding the type of incentive desired by those who were contemplating the construction of a new ethanol plant had not yet been completed. She said the only thing that was known was that countercyclical payments were to be a factor. She said the bill draft would therefore provide that an ethanol plant is entitled to receive an incentive payment if the plant is located in this state, if it files a request for ethanol incentive payments with the Agricultural Products Utilization Commission, if it demonstrates that the ethanol to be manufactured will be sold at retail, and if it submits a statement regarding profitability to the Agricultural Products Utilization Commission. She said if the plant is determined to be profitable, it is not entitled to an incentive payment. She said if the plant is determined to be not profitable, it is entitled to an incentive payment in an amount per gallon that remains blank. She said the bill draft would provide for prorated payments if the claims exceed the amount appropriated. She said the bill draft would provide for an appropriation from the highway tax distribution fund. She said at the present time the amount of the appropriation also remains blank.

In response to a question from Representative Nelson, Mr. Tom Freier, Department of Transportation, said the Department of Transportation is always very interested in the ethanol incentive packages because most of those dollars do come from the highway tax distribution fund. Mr. Freier said it is his hope that the highway tax distribution fund would be held harmless. He said a reduction in that fund will impact the Department of Transportation and possibly affect cities and counties as well. He said the amount of federal dollars coming to the state is assumed to be about the same as during the previous biennium. He said the Department of Transportation is currently working with the Office of Management and Budget to develop a 2003-05 budget. He said it will be difficult to meet the Department of Transportation's budgetary needs given the current resources. He said any dollars that might be taken away from the highway tax distribution fund is a serious concern.

In response to a question from Senator Bowman, Mr. Freier said most of the major projects are 80 percent federally funded. He said there is only a very small percentage of projects that are funded with state dollars and not matched with federal dollars.

Senator Wanzek said he is working on an ethanol producer incentive bill draft at this time. He said the details were not ironed out in sufficient time to present the bill draft to the interim committee. He said he would like to see the committee support the concept of incentive payments as a way to ensure that another ethanol plant gets built.

Senator Bowman said during the budgeting process we are always concerned about the impact on federal matching dollars. He said, however, we also need to look at what the economic return would be to North Dakota if we invested in some of these concepts.

At the request of Chairman Wanzek, Mr. Jerry Doan, State Board of Agricultural Research (SBARE), presented testimony regarding SBARE's research activities and expenditures. Mr. Doan said SBARE is at a challenging point in that its membership is being turned over. He said it is a real challenge to try to get the new members up to speed. He said following the 2001 legislative session Representative Mueller and Senator Solberg were added to SBARE as its legislative members. He said SBARE was also given the flexibility to maneuver and address problems as they arise. He said there has been discussion that SBARE did not spend enough time listening to people's problems and concerns. He said the board did an extensive survey of producers and asked them what problems need to be addressed. He said the board invited public testimony and set up various subcommittees to address the issues.

Mr. Doan said a lot of time was spent by SBARE trying to figure out how best to use the available dollars. He said after the 2001 legislative session, SBARE tried to determine which areas need time and attention. He said SBARE was told it should focus more on animal agriculture--on feeding and meat issues. He said infectious diseases recently came to the fore, as did crop diseases. He said there is also strong support for seed development and for having a strong extension program that gets information out to the farmers. He said SBARE is continuing to work on barley varieties. He said there are many environmental factors involved in barley production in the western part of the state.

Mr. Doan said SBARE has articulated some capital improvement wishes. He said those include new greenhouses, the completion of the pesticide facility, and support for the Dickinson Research Center. He said Dickinson needs a center similar to that of Carrington. He said SBARE is also involved in balancing the research of genetically modified crops with people's concerns about such crops. He said

policies have been developed to govern biotechnology research efforts.

Mr. Doan said the gas tax fund continues on a decline. He said there are over 100 independent projects being researched through that fund. He said if the fund had \$3 million to \$5 million in it, the opportunities to do exciting things would be plentiful. He said SBARE is in a budget dilemma just like other entities. He said SBARE realizes that it cannot be everything to everybody. He said as SBARE tries to make the tough decisions, he hopes it will have legislative support. He said SBARE cannot be successful by supporting a watered-down system across the board. He said SBARE has to be excellent at whatever it decides to undertake.

At the request of Chairman Wanzek, Ms. Sharon D. Anderson, Director, North Dakota State University (NDSU) Extension Service, presented testimony regarding the role of the Extension Service. Ms. Anderson presented documents regarding the Extension Service. The documents are on file in the Legislative Council office.

Ms. Anderson said the Extension Service is continuing to expand its efforts with marketing clubs. She said there are 43 marketing clubs. She said seven are livestock marketing clubs. She said technology is being used to connect the Extension Service with experts on the NDSU campus. She said the Extension Service has also taken an aggressive role in community development. She said the 4-H program recently celebrated its 100th anniversary. She said the Extension Service has found that young people want to be more involved in making decisions about issues in rural North Dakota.

At the request of Chairman Wanzek, Dr. Ken Grafton, Director, Agricultural Experiment Station, presented testimony regarding the role of the Agricultural Experiment Station. Dr. Grafton said 74 percent of the funds received by the Experiment Station is directed to salaries. He said the hiring of the best and brightest needs to be done to achieve improvements in agriculture. He said the Experiment Station staff are also concerned about a dilution of efforts.

At the request of Chairman Wanzek, Mr. Ken Bertsch, State Seed Commissioner, presented testimony regarding transgenic seeds and crops. A copy of his testimony is attached as Appendix B. Mr. Bertsch said transgenic potatoes and sugar beets have been approved by the federal government but are not planted. He said wheat is the most controversial, heavily scrutinized agricultural product in recent years. He said this fact alone will slow the approval process.

Mr. Bertsch said among the most common points being discussed now are regulatory approvals, domestic market acceptance, export market acceptance, tolerances, and coexistence systems, including segregation, standardized handling, sampling, testing protocols, and liability issues. He said of all those,

market acceptance seems to be the most significant issue for North Dakotans. He said we need to understand that many of these issues may be moot in two to three years. He said transgenic wheat is not yet available.

Mr. Bertsch said 2001 Senate Bill No. 2235 broadened the mission of the State Seed Department so it could develop programs to deal with commodity testing, segregation, and certification. He said the Seed Department's identity preservation programs for soybeans mirror the guidelines of the Association of Official State Certification Agencies. He said our programs are menu-based and are intended to provide flexibility to accommodate buyer preferences and specifications. He said any program applicable to wheat would probably be similar.

Mr. Bertsch said with respect to the testing of transgenic wheat, there is none. He said some laboratories are testing for the presence of genetic modification. He said we also know they are testing for promoter and terminator sequences associated with most transgenic events. He said in other words, the same 35S promoter sequence used in soybeans or canola is being tested for in wheat. He said a positive test will show the presence of genetically modified material. He said it will not necessarily indicate that one has transgenic wheat seeds. He said the State Seed Department has pursued technology and materials necessary to do trait-specific wheat testing in order to provide the agriculture industry assurance of seed stock purity. However, he said, the department has been unable to gain access to this technology for a number of reasons, including the facts that transgenic wheat is a noncommercialized product, that there are certain open records requirements, and that the wheat industry is opposed to genetic modification testing for that particular commodity.

Mr. Bertsch said we do not have a definition of "market acceptance." He said everyone who talks about market acceptance seems to mean something different. He said we also need to find out if a product is released with United States government approval, what effect would a moratorium in North Dakota have. He said we need to ask ourselves how we would enforce a moratorium and how we would overcome the host of trade and commerce issues associated with a moratorium.

Mr. Bertsch said we have a tremendous need to separate the issues within this controversy. He said we need to determine whether we are focusing on only Roundup Ready wheat or on all biotechnology traits.

In response to a question from Representative Fairfield, Mr. Bertsch said technically Roundup Ready wheat could be commercialized without export and market acceptance. He said when genetically modified soybeans were first commercialized, there was no initial call for testing and segregation. He said that did not come into being until the markets decided they

wanted such and the markets themselves established the tolerance levels.

In response to a question from Representative Mueller, Mr. Bertsch said wheat is a staple food product and is therefore more controversial than soybeans and canola. He said maybe all the concerns we have about the commercialization of wheat will be transplanted with other issues in two years. He said it is important for the state to have some control of how the list of issues is framed over the next two to three years.

In response to a question from Representative Fairfield, Mr. Bertsch said he believes in proceeding cautiously but his definition of what constitutes proceeding cautiously may not and probably is not the same as other people's definition of proceeding cautiously. He said he believes it is his role, in his capacity as the State Seed Commissioner, to be at the table when discussions are taking place.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30149.0200] relating to unintended damages caused by transgenic wheat. Committee counsel said at the last committee meeting Senator Bowman said he would be willing to work with Legislative Council staff to draft a bill that addressed some of the concerns he had regarding transgenic wheat. She said the committee agreed with that plan but did not give any direction as to the content of the bill draft. She said Senator Bowman's bill draft begins by providing that the producer of an organic wheat crop can file a claim for damages against the patentholder of a transgenic wheat seed provided the producer intended to plant and did plant and harvest an organic wheat crop; the producer discovered through testing prior to sale that the organic crop had become contaminated with a transgenic wheat; the contamination exceeded a yet to be established tolerance level; and the producer's crop was in fact worth less than it would have been had the contamination not occurred. She said the bill draft allows for this same type of claim by the producer of a nontransgenic wheat and by the producer of nontransgenic wheat seed. She said damages are limited to the difference in payment between what the producer actually received and what the producer would have received had the contamination not occurred.

Committee counsel said if the producer sues and is awarded damages, the producer is entitled to reimbursement for all costs and attorneys' fees associated with bringing the action. If, on the other hand, the producer sues and is not successful, the producer would have to pay the costs and attorneys' fees that the patentholder incurred in defending the case. She said the bill draft also provides that it is a complete defense against any claim for damages arising under this Act if the patentholder can demonstrate that the contamination occurred or may reasonably be believed to have occurred as a result of an act over

which the patentholder had no control. She said examples of such circumstances include the use of a contaminated seed source, use of insufficiently cleaned equipment in the harvesting of the crop, in the transportation of the crop, or in the storage of the crop. She said Senator Bowman specifically asked that this list of things over which the patentholder has no control not include acts of God.

Committee counsel said the bill draft concludes by requiring that the Governor appoint an 8-member to 13-member agricultural biotechnology board to monitor the research, development, and use of biotechnology in the agricultural sector. She said this board would include two academicians, one individual representing the North Dakota Wheat Commission, and four legislators. She said the Governor is directed to serve as the chairman of the board, but he is given the authority to delegate that duty.

Committee counsel said the terms of office are four years and are staggered. She said compensation is to be determined by the Governor for those members of the board who are not already employed by the state. She said the board is to meet at least monthly and report every two years to the Legislative Council.

At the request of Chairman Wanzek, committee counsel presented a bill draft [30148.0200] relating to the creation and duties of a transgenic wheat board. She said this bill draft came into being because at the last meeting of the committee, Representative Mueller said he would work with Legislative Council staff to draft a bill that addressed some of the concerns he had regarding transgenic wheat. She said this bill draft begins by creating a transgenic wheat board. She said members of this board would include the Governor or his designee; three wheat producers, one of whom the Governor must select from a list of three names offered by the North Dakota Farm Bureau and one of whom must be selected from a list of three names offered by the North Dakota Farmers Union; one individual representing the grain elevator industry; one individual representing the grain transportation industry; three individuals who hold doctoral degrees in agricultural research, agricultural economics, law, or a related field; the Agriculture Commissioner; the State Seed Commissioner; and the administrator of the North Dakota Wheat Commission.

Committee counsel said the committee is directed to meet at least quarterly. She said staffing needs and accommodations are to be determined by the Governor. She said compensation is set at \$80 per day for those not already paid by the state. She said the board is given a comprehensive set of duties. She said these duties include soliciting and receiving information on and monitoring scientific, legislative, and regulatory efforts regarding transgenic wheat at state, national, and international levels; soliciting and receiving information on and monitoring national and international wheat markets with respect to the

acceptance or rejection of transgenic wheat; and determining whether the production of transgenic wheat in this state will require state or federal legislation addressing a whole host of issues such as research, grower or planting site registration, inspection, testing, identification, labeling, segregation, identity preservation, tolerances, transportation, liability, assessments, and enforcement.

Committee counsel said this board would have the ability to draft and introduce its own legislation in the 2005 legislative session, to recommend any federal legislation it deems necessary to our Congressional Delegation, and to recommend regulatory changes to the Agriculture Commissioner, the State Seed Commissioner, and to any other state agencies. She said this board would also have the duty to serve as a clearinghouse for economic impact data and marketing information pertaining to transgenic wheat. She said the bill draft carries a sunset of June 30, 2005. She said that gives the board the 2005 session within which to implement its recommendations. She said during the 2005 session, the Legislative Assembly could decide to extend the board's existence or to reconfigure its role and mission.

Senator Bowman said we do not know what the damage would be if the wind cross-pollinates the fields of others. He said his bill draft does not allow a farmer to get rich. He said it merely provides that the farmer would get the difference between the amount for which the farmer actually sold the wheat and the amount the farmer would have received had it not been cross-pollinated.

Senator Bowman said he has not filled in the blanks regarding tolerance levels. He said he does not have the scientific background to provide such tolerance levels. He said others would need to fill that in. He said if we require buffer zones, we will need to determine who has responsibility for the buffer zone. He said we have a lot of issues that still need to be addressed. He said that is why a board such as the one proposed in his bill draft is so important. He said if a product is released and it causes damage to another's livelihood, the patentholder should be held responsible for damages.

Senator Wanzek said there is merit in creating a board that can help the Legislative Assembly deal with the issues.

Chairman Wanzek recognized Mr. Byron Richard, producer, Belfield, North Dakota. Mr. Richard presented testimony regarding transgenic wheat. He said there are benefits to the technology coming down the pipe. He said 98 percent of the producers have genetically modified corn, soybeans, and canola. He said wheat should be no different. He said it too should be available to farmers. He said Senator Bowman's bill has the potential to create problems between neighboring farmers. He said it is not appropriate for us at the state level to put in place regulatory prohibitions regarding genetically modified crops.

He said if any are needed, they should be addressed at the federal level.

Chairman Wanzek recognized Mr. Greg Daws, North Dakota Grain Growers Association, Michigan, North Dakota. Mr. Daws presented testimony regarding transgenic wheat. He said you need to recognize that the door swings both ways. He said if you are going to place liability on one farmer for what he chooses to plant, you better be prepared to impose liability on others for loss they cause, such as when their weeds are not properly controlled.

Chairman Wanzek recognized Mr. Bruce Freitag, President, North Dakota Grain Growers Association, Scranton, North Dakota. Mr. Freitag presented testimony regarding transgenic wheat. He said while he respects Senator Bowman's efforts and his sincere attempts to address issues, he is concerned that wheat is being singled out. He said there is no reason why wheat should be singled out with a special provision for damages. He said wheat has a very low propensity to cross-pollinate. He said this whole issue is tied up with the competitiveness of wheat versus other crops. He said wheat has been a declining crop in this state for years, in part because scientific advances for wheat have not kept pace with those available for other crops. He said we have not progressed as far with respect to disease resistance in wheat. He said the gross returns from wheat have consequently not kept up with the returns from corn and soybeans. He said if a company attempts to address the problems in wheat and it is subject to more liability than with other crops, the result will be to deter wheat research. He said Senator Bowman's liability bill would also turn on its head the practice of the grower who is raising a premium crop being responsible for the buffer zone. He said this bill muddies the waters of common practice. He said it provides that if a farmer does not do a good job, that farmer can make up the economic difference with a lawsuit. He said that is not a good idea.

Mr. Freitag said Senator Bowman's bill draft still has blanks for the tolerance levels. He said nobody today is ready to fill in those blanks. He said the commercialization of transgenic wheat is at least a couple of years away. He said we do not know what the tolerance levels will need to be at that time. He said the concept of this bill draft is simply premature.

Mr. Freitag said with respect to Representative Mueller's bill draft, there is some merit to having a committee that will oversee the development and commercialization of transgenic wheat. He said if he were going to suggest a change to the bill draft it would be to place more wheat producers on the committee. He said the wheat producers are the ones who are most deeply affected by issues surrounding transgenic wheat. He said the other thing to think about is if you want to have a committee of wheat growers, that group already exists. He said we have that through the North Dakota Wheat

Commission and its affiliation with United States Wheat Associates.

In response to a question from Senator Wanzek, Mr. Freitag said other groups are working with the wheat groups as well.

Chairman Wanzek recognized Mr. Donald Dufner, Buxton, North Dakota. Mr. Dufner presented testimony regarding transgenic wheat. He said he has been raising organic crops since 1982. He said contamination will cause the loss of market share. He said these bill drafts will help the big farmers, not the small farmers.

Chairman Wanzek recognized Mr. Donald Vig, Valley City, North Dakota. Mr. Vig presented testimony regarding transgenic wheat. He said Senator Bowman's bill draft is an excellent step forward. He said organic farmers are as responsible as anyone else when it comes to taking care of their weeds. He said weeds are an act of God. He said genetic modification is an act of man.

Chairman Wanzek recognized Mr. John Olson, State Counsel, Monsanto. Mr. Olson presented testimony regarding transgenic wheat. He said while Senator Bowman's efforts are appreciated, the legal reality is that the concept of strict liability applies to defective or inherently dangerous products. He said by the time transgenic wheat is ready for commercialization, the federal government will have approved this product. He said the approval process will find that the product is neither defective nor inherently dangerous. He said Senator Bowman's bill draft places strict liability only on the patentholder. He said the bill draft will create ill will among neighbors. He said the language of the bill draft would keep patentholders out of the state. He said the reality is that a lot of farmers want this product. He said there are protocols that can address the cross-pollination problem. He said our current system of liability works for corn, soybeans, and other crops. He said there is no rational reason for creating a separate liability system applicable only to wheat.

Mr. Olson said Representative Mueller's bill draft allows for continued discussion regarding liability. He said there is no objection to having a board continue to explore and work through issues.

In response to a question from Senator Wanzek, Mr. Olson said we have a general liability system in North Dakota that adopts a negligence theory. He said no one can contract away their own negligence under North Dakota law. He said we have product liability statutes in North Dakota and they apply to inherently dangerous products and defective products.

In response to a question from Representative Mueller, Mr. Olson said manufacturers do place warranties on their products. He said in a previous meeting Ms. Sarah Vogel read to the committee a warranty statement found in a Monsanto technical agreement. He said that was the same warranty

language that comes with the purchase of a new toaster.

Representative Brandenburg said 98 percent of the farmers in the state like using the new technology. He said before we pass a liability bill, we need to have a board to look at the issues.

Chairman Wanzek recognized Mr. John J. Petrik, attorney, Bismarck. Mr. Petrik presented testimony regarding transgenic wheat. He said he represents Crop Life America. He said he shares Mr. Olson's concerns with respect to the bill drafts.

Chairman Wanzek recognized Mr. Wayne F. Fisher, farmer, Dickinson, North Dakota. Mr. Fisher presented testimony regarding transgenic wheat. He said he is not too excited about studying the issue. He said a study will not prevent Monsanto from introducing transgenic wheat. He said there is a failure at the state level and at the federal level to take responsibility for this product.

Chairman Wanzek recognized Mr. Jim Broten, Chairman, North Dakota Barley Council. Mr. Broten presented testimony regarding transgenic wheat. He said right now his largest customer is not interested in purchasing transgenic barley. However, he said, they are very interested in biotechnology research regarding disease resistance in barley. He said there is a need to establish tolerance levels. He said we need time to continue biotechnology research. He said with respect to the bill drafts, he is not supportive of the potential for lawsuits between neighbors. He said with respect to biotechnology, we need to be able to conduct scientific research. He said if we do not conduct scientific research in the field of biotechnology, our competitors will. He said our competitors will have the research and we will not even be in the game.

It was moved by Representative Nicholas and seconded by Representative Nelson that the bill draft [30148.0200] relating to the creation of a transgenic wheat board be approved and recommended to the Legislative Council.

Representative Mueller said this bill draft keeps the discussion and issue alive. He said it takes the issue out of legislative hands, in part because legislators have been unable to come up with a solution. He said it does potentially set up another round of legislative issues. He said the bill draft does not control the introduction of transgenic wheat. He said it does not solve any of the liability and identity issues that have surfaced.

Representative Mueller said the issues surrounding transgenic wheat are very important. He said we need to make sure we do not drop the issues. He said if there are ways to make this bill draft better now or in the next legislative session, he will be right there.

Chairman Wanzek commended Representative Mueller on his efforts. He said the discussion has been informative and that all are a lot more

knowledgeable about the issues. He said our goal has been to find a position that allows all interests to coexist. He said in order to do that, we will need to continue a dialogue regarding the establishment of tolerance levels and the development of handling and segregation techniques. He said we will need a willingness on the part of everybody to work together. He said this bill draft is a start.

After this discussion, **the motion carried on a roll call vote.** Senators Wanzek and Bowman and Representatives Boehm, Brandenburg, Haas, Kingsbury, Mueller, Nelson, Nicholas, Renner, Rennerfeldt, and Wikenheiser voted "aye." Representatives Fairfield and Schmidt voted "nay."

It was moved by Representative Fairfield and seconded by Representative Mueller that the bill draft [30149.0200] relating to damages for contamination from transgenic wheat be approved and recommended to the Legislative Council.

Senator Bowman said the only reason to sue under his bill draft is to receive damages from the patentholder for the difference in the value of a crop that has been contaminated. Senator Bowman said if the committee did not recommend his bill draft, he would introduce it himself during the 2003 legislative session. He said the testimony presented to the committee opens the door for more communication.

Representative Nicholas said he will oppose the motion because the bill draft contains blanks regarding tolerance levels and Senator Bowman has already indicated that he would like the time to do further research before deciding on what those tolerance levels should be.

It was moved by Representative Mueller and seconded by Representative Schmidt that the bill draft relating to damages for contamination from transgenic wheat be amended to fill in the blanks regarding tolerance levels with the amount of 1 percent.

Senator Bowman said he has no problem with putting in a tolerance level of 1 percent. However, he said, there will have to be a discussion during the session regarding whether or not that level is appropriate.

Representative Brandenburg said the issues of tolerance levels and liability need to be discussed and decided by a committee such as that established in Representative Mueller's bill draft. He said these are important issues that need to be researched and addressed by a variety of people. He said tolerance levels should not be thrown in by this committee in its haste to move this bill draft forward.

After this discussion, **the motion to amend carried on a roll call vote.** Senators Wanzek and Bowman and Representatives Boehm, Brandenburg, Fairfield, Haas, Kingsbury, Mueller, Nelson, Renner, Schmidt, and Wikenheiser voted "aye." Representatives Nicholas and Rennerfeldt voted "nay."

After this discussion, **the motion to recommend the bill draft failed on a roll call vote.** Senator Bowman and Representatives Boehm, Fairfield, Kingsbury, Mueller, and Schmidt, voted "aye." Senator Wanzek and Representatives Brandenburg, Haas, Nelson, Nicholas, Renner, Rennerfeldt, and Wikenheiser voted "nay."

It was moved by Representative Nelson, seconded by Representative Nicholas that the bill draft [30145.0100] relating to the sale of gasoline blended with ethanol be approved and recommended to the Legislative Council.

Representative Nicholas said it is very important to increase the demand for ethanol. He said we have done very little in that regard over the last 20 years.

Representative Nelson said this is the group that should speak for production agriculture. He said with this bill draft we would be putting forth a bigger effort to promote and advance ethanol than by any other means, including the erection of an ethanol plant. He said this bill draft creates a market for ethanol. He said investors will see this as the creation of an ethanol market in North Dakota. He said there is no cost to the state of North Dakota. He said if during the 2003 legislative session the budget is very tight, we will still be able to go home saying we did something for production agriculture in this state.

After this discussion, **the motion passed on a roll call vote.** Representatives Brandenburg, Fairfield,

Haas, Mueller, Nelson, Nicholas, Schmidt, and Wikenheiser voted "aye." Senators Wanzek and Bowman and Representatives Boehm, Kingsbury, Renner, and Rennerfeldt voted "nay."

Chairman Wanzek said he is working with the Governor on another bill draft that will provide a production incentive based on countercyclical payments. He said whether a new plant is built in this state is contingent upon passage of a production incentive.

It was moved by Representative Nicholas, seconded by Representative Nelson, and carried on a voice vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.

It was moved by Representative Haas, seconded by Representative Brandenburg, and carried on a voice vote that the meeting be adjourned sine die.

L. Anita Thomas
Committee Counsel

ATTACH:2