

STATE SEED DEPARTMENT STUDY - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4016 (attached as an appendix) directs the Legislative Council to study those provisions of North Dakota Century Code (NDCC) Title 4, which relate to the powers and duties of the State Seed Commissioner and the State Seed Department. The resolution states that the reasons for this study include that seed laws have been adopted over the years without regard to the interrelationship of the law, the laws do not have clear objectives or directives for administration, and the laws are duplicative, inconsistent, illogically arranged with unclear intent and direction, and inapplicable to the manner in which agriculture is conducted in the 21st century. The legislative history reveals that the intent of the study is to update language and not make major changes in policy. What may require changes in policy, however, is the reference that some laws are "inapplicable to the manner in which agriculture is conducted in the 21st century." The legislative history reveals the reason for this language is that there has been an increase in legislation involving the Seed Department in the last few legislative sessions which may require other statutory language to be changed to promote consistency.

RECENT LEGISLATION

During the 2003 legislation five bills were introduced that affected the State Seed Department--Senate Bill Nos. 2124, 2256, 2326, and 2206 and House Bill No. 1026. Four of the bills passed and one failed to pass.

Senate Bill No. 2124 updated references to a federal law governing tolerances for seed labeling. This state's tolerances are the same as those used under the Federal Seed Act except that the tolerance for yellow starthistle must be zero, and the State Seed Commissioner may establish tolerances that are more strict than the federal Act.

Senate Bill No. 2256 exempted from this state's open records requirements the records of any plant or seed analysis or testing, any variety or diseased determination conducted by the State Seed Department on a fee-for-service basis for a nonpublic person, and information received by the State Seed Commission from a nonpublic person that the nonpublic person determines is proprietary or trade secret information.

Senate Bill No. 2326 updated and clarified the statutes regarding the licensure of wholesale potato dealers and the process to be followed by the State Seed Commissioner in taking action against the bond of a licensed dealer.

Senate Bill No. 2206 removed the sunset date of August 1, 2003, and retained the tolerance for restricted noxious weed seeds at 25 seeds, instead of a return to 90 seeds, per pound.

House Bill No. 1026, which failed to pass, would have required the creation of a transgenic wheat board. The

State Seed Commissioner was to be a member of the board.

During the 2001 legislative session, seven bills passed which related to the State Seed Department.

Senate Bill No. 2235 authorized the State Seed Commissioner to inspect, analyze, and verify the genetic identity or physical traits of seeds or crops.

Senate Bill No. 2169 expanded the State Seed Arbitration Board to include the State Seed Commissioner.

Senate Bill No. 2103 authorized the State Seed Commissioner, with the approval of the State Seed Commission, to establish and charge fees for making commodity grade inspections.

Senate Bill No. 2104 provided that the director of the Experiment Station is a voting member of the State Seed Commission. The bill also removed the requirement that the commission must hold meetings during each November and June and requires instead that the commission hold meetings at least twice each calendar year.

Senate Bill No. 2389 required that the State Seed Commissioner permit a North Dakota potato grower to sell or transfer certified seed potatoes to another North Dakota potato grower who may, in turn, plant the seed potatoes only for commercial production.

House Bill No. 1442 established procedures that must be followed if a person believes that a farmer has infringed upon the patent applicable to a genetically modified seed.

Senate Bill No. 2204 directed the State Seed Commission to establish, for annual crops and perennial crops, a seed classification system that references tolerances for each restricted noxious weed species.

STATE SEED DEPARTMENT

In 1931 the Legislative Assembly established the State Seed Department. The department's main offices are located on the campus of North Dakota State University. In addition, the department operates a regional facility in Grafton where the primary function is the support of field operations for the potato certification program. The main field operation is to provide the potato industry with official grade inspection services.

The State Seed Department is managed by the State Seed Commissioner and is under the control of the State Seed Commission. The commission is a nine-member commission that sets policy guidelines, approves budgets, approves major program changes, approves fee schedules, and appoints the State Seed Commissioner. The commission is composed of members of various industries that represent a broad cross section of agricultural commodities grown in this state.

This memorandum reviews the chapters and other provisions of the North Dakota Century Code which relate to the State Seed Department. These chapters

include NDCC Chapters 4-09, 4-09.1, 4-10, 4-11, 4-25, 4-26, and 4-42. Chapter 4-09 relates to the department. Chapter 4-09.1 relates to inspections and grading of agricultural commodities. Chapter 4-10 relates to the inspection and grading of potatoes and other produce. Chapter 4-11 relates to the regulation of wholesale potato dealers. Chapter 4-25 relates to seed sales regulations. Chapter 4-26 relates to seed potato control areas. Chapter 4-42 relates to seeds and crops inspection and analysis for genetic identity or physical traits.

These seven chapters may be divided into five different programs--the potato program, the field seed program, the laboratory services program, the regulatory program, and the administration program. The potato program provides for field inspection and certification of seed potatoes, grade inspections for seed growers and commercial growers and processors, licensing and bonding of wholesale potato dealers, approval for seed quality of imported potatoes, winter disease testing, promotion of North Dakota-certified potato seed, and the production and distribution of foundation seed stocks.

The field seed program provides for field inspection and certification of crops, final certification or grading of seed, inspection and approval of certified seed conditioning plants and bulk retail facilities, acceptance of imported seed, development of custom programs, and promotion of North Dakota-certified seed.

The laboratory services program provides diagnostic laboratory testing to determine seed quality. Testing includes germination testing, seed disease and pathology testing, seed trait analysis, and genetically modified organism event testing.

The regulatory program enforces state and federal seed laws. The field staff inspects seed lots offered for sale to ensure proper labeling and adherence to state standards for purity and other quality factors.

The administration program provides for the administration of the facility, equipment, technology, and support services of the department.

Chapter 4-09

North Dakota Century Code Chapter 4-09 primarily relates to the basic structure of the State Seed Department, designates the department as the state agency responsible for seed certification and seed-related issues, provides enforcement authority to the department, and establishes seed labeling and sale regulations for the consumption and use of seed.

Section 4-09-02 places the department on the campus of North Dakota State University and allows the State Seed Commissioner to establish branch offices and laboratories in other locations of this state. Section 4-09-03 establishes the State Seed Commission as the governing board for the department. This section provides for the makeup of and the meetings for the commission. This section requires the commission to appoint a commissioner as the manager of the department.

Section 4-09-06 provides for the powers of the commissioner to regulate seed and enforce seed regulations. This section provides the commissioner authority

over seed-related issues, including access, inspection, testing, prohibiting the sale or movement of seed, and the publication of violations. Section 4-09-15 provides for exceptions to the requirements of the chapter. For example, potatoes, seed not intended for planting purposes, and a farmer who grows the farmer's own seed and sells only this seed and does not advertise are not regulated by the commissioner.

Sections 4-09-07 through 4-09-09 provide the commissioner with the power to create the State Seed Laboratory at North Dakota State University. Section 4-09-07 allows the commissioner to publish lists of certified seed and to publish other explanatory material. The section provides that determinations made by the laboratory are prima facie evidence of the statements in the report. Section 4-09-08 requires the commissioner, with the approval of the commission, to establish and charge fees for laboratory tests and services. Section 4-09-09 allows the commissioner to set sample size and the manner for taking samples.

Sections 4-09-10 through 4-09-11.2 outline the labeling requirements for all agricultural, vegetable, flower, tree, and shrub seeds sold in this state. In addition, these sections outline the specific regulations for various crops and codify the variety identification laws of this state.

Section 4-09-12 requires seed labeling records to be maintained for two years and filed seed samples to be maintained for a period of one year.

Section 4-09-13 is a codification of Senate Bill No. 2124 and requires the tolerances used to determine the correctness and accuracy in labeling seed to be the tolerances under the Federal Seed Act, except that tolerances for yellow starthistle must be zero, and the commissioner may establish tolerances that are more strict than the federal Act.

Section 4-09-14 makes it unlawful for any person to sell any seed if certain requirements have not been met, including requirements related to labeling, advertising, noxious weeds, and the interstate shipping of seed. In addition, it is unlawful for any person to alter a label or seed, disseminate misleading advertisements, hinder an authorized person in the performance of that person's duties, fail to comply with a stop-sale order, disclaim the data on a label required by law, use the words "type" or "trace" in connection with the name and description of a seed, use the name of the State Seed Department without authorization, or plant a seed labeled for "vegetative cover only" with the intent to harvest for seed or grain.

Sections 4-09-14.1 through 4-09-14.4 require a person to be licensed to label seed and create fees for labeling seeds.

Section 4-09-16 requires the commissioner to establish a seed certification program. This section provides for broad authority for and duties of the commissioner in seed classification, production, inspection, and certification functions. This section requires the commissioner to designate varieties and names for seed sources and to establish standards related to seed quality factors. In addition, this section provides the commissioner with the

authority to cooperate with other entities in the creation of suitable seed stocks for the production of certified seed and to establish fee schedules for the services provided by the department.

Section 4-09-17 requires the approval of the commissioner for seed to be represented by use of the term "breeders," "foundation," "registered," "certified," "pedigree," or "elite" seed or any similar term.

Section 4-09-17.1 requires that an official seed certifying agency, for example, the State Seed Department, certify any seed given protection under the federal Plant Variety Protection Act and marketed in this state as a class of certified seed. The Act provides legal protection of intellectual property rights to developers of new varieties of plants. The Act is administered by the United States Department of Agriculture. This agency, upon thorough review of information provided that a variety is distinct from all other varieties of that crop, awards a certificate of protection to the developer. The term of protection is 20 years for most crops. The owner has exclusive rights to multiply and market the seed of that variety and has the ability to deny someone from selling or marketing the variety. However, the producer may grow any legally purchased and protected variety and save seed for future planting on the producer's own land.

Section 4-09-18 requires certain bulletins to be published by the commissioner relating to the rules and requirements for certification of crop seed and seed potatoes.

Section 4-09-19 allows the commissioner to enter agreements and affiliations with entities that are involved with the process of seed quality insurance and certification.

Section 4-09-20 provides for deposit of fees and charges collected in the department revolving fund.

Section 4-09-20.1 provides for a warranty disclaimer for the actions of the commission, department, and employees in the performance of duties as the seed certification and seed regulatory agency of the state.

Sections 4-09-21 through 4-09-23 provide for the enforcement of seed regulations. These sections provide for administrative hearings, prosecutions, seizures, and injunctions. Section 4-09-24 provides for a Class A misdemeanor for violation of Chapter 4-09 or any rules adopted under the chapter. In addition, the section provides for a civil penalty not to exceed \$5,000 for each violation. The civil penalty may be imposed by a court or by the commission.

Section 4-09-25 is the codification of 2003 Senate Bill No. 2256 and creates an exception to the open records law.

Section 4-09-03.1 creates the State Seed Arbitration Board and places the commissioner as a member on that board. Section 4-09-20.2 allows a seed labeler, dealer, or customer to petition the Agriculture Commissioner to settle a dispute involving a seed transaction before the Seed Arbitration Board.

Chapter 4-09.1

North Dakota Century Code Chapter 4-09.1 provides the State Seed Commissioner with the ability to

establish commodity grade inspection services for the agriculture industry. This chapter, in addition to Chapter 4-42, expands the duties of the State Seed Department beyond seed certification and regulation. In practice, this chapter has been used to establish commodity standards in North Dakota Administrative Code (NDAC) Article 74-06 for rapeseed, buckwheat, and mustard.

Chapter 4-10

North Dakota Century Code Chapter 4-10 is similar to Chapter 4-09 except that it provides the commissioner authority to act as the certifier and grade inspector of potato seed. The chapter outlines the specific responsibilities of the commissioner in seed certification, labeling, grading, regulation, enforcement, and fee disposition in much the same manner as Chapter 4-09. The significant differences between the chapters are contained in Sections 4-10-04 and 4-10-06.1.

Section 4-10-04 designates a system of potato grades that is modeled after the United States Department of Agriculture standards. Potato grade designations differ from other certification standards in that the grade denotes a series of physical qualities that are standard throughout the industry as opposed to health and disease standards that may vary from state to state. The grade standards generally reflect physical appearance, for example, potato size, defect, or internal problems that may not be readily visible to the buyer.

Section 4-10-06.1 outlines the requirements and the exceptions to the requirements for a producer to plant certified seed on commercial acreage. In general, the seed potatoes must be certified or field-inspected to be planted for the purpose of selling the crop.

Chapter 4-11

North Dakota Century Code Chapter 4-11 provides the State Seed Commissioner the authority to license and regulate persons or companies engaged in the commerce of potatoes in wholesale quantities. Chapter 4-11 operates similarly to provisions covering the Public Service Commission's regulation of grain buyers and hay buyers and the Agriculture Department's dairy licensing. Chapter 4-11 was rewritten during the 2003 legislative session in Senate Bill No. 2326.

Under Section 4-11-02, before a person may engage in the business of a wholesale potato dealer, the person must be licensed by the commissioner. Under Section 4-11-03 a wholesale potato dealer must make an application in the proper form and under Section 4-11-04 may be required to provide a surety bond. Sections 4-11-06 and 4-11-07 provide for a license fee and for the posting of the license. Section 4-11-08 provides for reasons to refuse to issue, cancel, or suspend a license. Section 4-11-10 requires each agent of a wholesale potato dealer to carry an identification card.

Section 4-11-15 provides for the investigation by the commissioner of a violation of a condition of a dealer's bond and allows the commissioner to hold a hearing to determine if the commissioner must apply to the district court for the appointment of a trustee. In addition, under Section 4-11-20 the commissioner may investigate any

complaint against the dealer. Sections 4-11-22 and 4-11-23 provide for enforcement of the chapter and for criminal violation of the chapter.

Section 4-11-16 allows any interested party to demand inspection of potatoes that are ready for sale or are being transported to market.

Chapter 4-25

North Dakota Century Code Section 4-25-02 applies to seed transactions involving nonresident seed dealers. The rules contained in NDAC Chapter 74-02-02 which effectuate this section relate to the licensing and bonding of nonresident dealers.

Chapter 4-26

North Dakota Century Code Chapter 4-26 provides for the formation and operation of a seed control area for Irish potatoes. This chapter describes the specific steps in formation, the powers and duties of the State Seed Commissioner in the process, and the duties of the Seed Potato Control Area Committee in the operation of the control area. One potato control area presently exists in this state.

Under Sections 4-26-09 and 4-26-10 a person in a seed potato control area may not plant any seed of a quality other than that authorized under the chapter and may not ship potatoes out of the area without first obtaining a permit from the committee. Under Section 4-23-12 violation of the chapter is a Class B misdemeanor.

Chapter 4-42

North Dakota Century Code Chapter 4-42 was enacted in 2001 for the purpose of allowing the State Seed Department to expand services beyond seed certification and regulation to provide the agriculture industry with services related to the testing and identify preservation of agricultural commodities. Sections 4-42-02 through 4-42-08 outline the process by which the State

Seed Commissioner establishes testing, sampling, field inspection, labeling, and identity preservation services.

Under Section 4-42-02 the commissioner must establish procedures for inspecting, analyzing, and verifying the genetic identity or physical traits of seeds or crops. Analysis includes the laboratory examination of seeds, crops, or plant tissue to determine the genetic identity or physical traits of the seeds or crops. Under Section 4-42-07 the State Seed Commission must establish a procedure for the identity preservation, segregation, and traceability of seeds or crops inspected or analyzed under this chapter.

Other Provisions

North Dakota Century Code Section 4-24-13 codifies 2001 House Bill No. 1442. In particular, the section provides for the procedure by which a person holding a patent on a genetically modified seed may enter upon the land farmed by another for the purpose of obtaining crop samples.

SUGGESTED STUDY APPROACH

Because this study involves the technical review of each of numerous statutes to determine if the statutes are drafted so as to clearly explain the law, the committee may want to begin the study with a number of bill drafts relating to the different chapters of the North Dakota Century Code that relate to the State Seed Department. The bill drafts will be drafted by the Legislative Council staff, and the committee may ask the State Seed Commissioner to aid with these drafts. Once a draft is completed, interested persons may be sent the draft and asked to testify on the draft. Interested persons include the Agriculture Commissioner, the North Dakota Farm Bureau, the North Dakota Farmers Union, the North Dakota Ag Coalition, and the Dakota Resource Council. The testimony requested may be on the changes made and any additional changes that may fulfill any of the purposes of the study.

ATTACH:1