NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

AGRICULTURE COMMITTEE

Monday, March 29, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Phillip Mueller, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Phillip Mueller, Curt Hofstad, Richard Holman, Dennis Johnson, Keith Kempenich, Joyce M. Kingsbury, Shirley Meyer, Gerry Uglem, Benjamin A. Vig, John D. Wall; Senators Arthur H. Behm, Bill Bowman, Tim Flakoll, Terryl L. Jacobs, Curtis Olafson, Terry M. Wanzek

Members absent: Representatives Mike Brandenburg, Mary Ekstrom, Rod Froelich; Senator John Warner

Others present: See Appendix A

It was moved by Senator Bowman, seconded by Senator Jacobs, and carried on a voice vote that the fifth sentence of the third paragraph on page 7 of the minutes of the previous meeting be amended to reference risk "protection" mechanisms.

It was moved by Senator Jacobs, seconded by Representative Wall, and carried on a voice vote that the minutes of the previous meeting, as amended, be approved.

Chairman Mueller welcomed Mr. Ken Bertsch, Seed Commissioner; Mr. Steve Sebesta, Deputy Seed Commissioner; and Mr. Joe Magnusson, Regulatory Program Manager, State Seed Department, Fargo. Chairman Mueller said the committee will begin by looking at a bill draft [10015.0200] that takes provisions that the committee reviewed at prior meetings and rewrites them as new law, taking into account recommendations for changes that the committee had made. He said as before, the committee will focus on the notes that follow each section and make any recommended changes. He said the recommended changes are being based on the general consensus of the committee. He said when the bill draft is in its final form, the committee will take a formal vote with respect to recommending the bill to the Legislative Management.

Chairman Mueller said Dr. Vern Anderson, Animal Scientist, Carrington Research Extension Center, North Dakota State University, Carrington, and Mr. Steven Edwardson, Executive Administrator, North Dakota Barley Council, Fargo, wrote a letter (Appendix B) to the committee thanking it for the opportunity to present information at the January 2010 meeting regarding coproduct integration from agricultural processing.

Chairman Mueller said Mr. Steve Strege, Executive Vice President, North Dakota Grain Dealers Association, Fargo, submitted a resolution (Appendix C) that was adopted by the North Dakota Grain Dealers Association on January 19, 2010. He said the resolution urges the interim Agriculture Committee to focus on the problem areas with respect to bonding requirements for grain elevators, ethanol plants, and processors, and to leave alone those areas of the industry which have shown responsibility. He said the resolution also indicates that the North Dakota Grain Dealers Association opposes making the state the bonder of last resort, especially in those instances where private surety companies would not accept a required level of risk.

SECTION 1. DEFINITIONS

Chairman Mueller said this section combines the current state definition of agricultural seed with that contained in the Federal Seed Act and in the California statutes. He said the proposed language recognizes that there may be additional seeds that fall into the definition. However, he said, instead of referring to such seeds as ones that are "commonly recognized within this state" as agricultural seed, the proposed language parallels the Federal Seed Act requirement that there be an official finding by the Secretary of Agriculture and requires that there be a determination made by the Seed Commissioner.

Representative Mueller said the rewrite attempts to define what is meant by the certification process. He said it means a process that is designed to maintain the genetic purity and varietal identity of crop cultivars and requires a variety of components. He said those components include an examination of records provided by the producer, an inspection of the field in which the plants producing seed for certification are growing, and the testing and grading of representative samples. He said there is a question with respect to whether the bill draft should state that the testing and grading of a representative sample in fact means a sample taken by the producer.

Mr. Bertsch said while the State Seed Department only rarely would take a representative sample, and then only in conjunction with a regulatory effort, it would be preferable to reference just the testing and grading of a representative sample in the bill draft and

eliminate a new reference to who in fact actually takes the sample.

In response to a question from Representative Mueller, Mr. Bertsch said it is not necessary to specify that the steps to certification are being conducted by the State Seed Department.

Representative Mueller said the definition of "conditioning" under current law references operations that "may" change the purity or germination of the seed. He said the Federal Seed Act definition refers to processes that "would" change the purity or germination of the seed. He said even though State Seed Department personnel had suggested defining conditioning as "any process to obtain uniform quality that may change the germination or purity of the seed," it appears that consensus has not yet been reached on the appropriate definition.

Mr. Bertsch said conditioning is a definition that needs to remain in the North Dakota Century Code so that the State Seed Department has something to rely on when it is establishing its expectations of others. He said it is the department's preference to have a very broad general definition and then to lay out in rule or in policy its expectations with respect to the act of conditioning.

In response to a question from Representative Mueller, Mr. Sebesta said the definition of conditioning, which is included in the rewrite, is too detailed. He said scarifying is not used much in North Dakota and is therefore somewhat of a moot term. He said the other processes, e.g., the drying, cleaning, etc., are intended to improve the uniformity of the product. He said the question is whether those processes change the germination and purity. He said they are intended to. However, he said, the germination may not change.

Senator Olafson said he prefers a reference to processes that are intended to improve the quality.

Committee counsel said the statute needs to be specific with respect to the efforts and processes used to improve quality. She said various breeding techniques also are pursued in the interest of quality. She said clearly, that is not what is meant by conditioning. She said it would be helpful if the committee would think about the purpose of conditioning. She asked if conditioning is not in fact a process to remove unwanted material from a seed lot in order to produce a uniform product.

Mr. Bertsch said the process of conditioning is really more involved with the cleaning of seed, and he believes the North Dakota Administrative Code includes an adequate description of the process.

Senator Olafson said he understands committee counsel's concerns about the variety of processes that are intended to improve the quality and or germination of the seed. He said he wonders if it might be preferable specifically to reference seed handling processes that are designed to improve the uniformity and quality of the seed.

Representative Holman said he is getting confused by the reference to "changing" the purity or germination of the seed. He said he wonders if it is necessary to reference such changes.

Senator Wanzek said conditioning is any physical process that is designed to enhance the quality and the purity of the seed and make it better.

Senator Wanzek said conditioning could involve running the seed over a cleaner. He said it could involve use of a gravity table. He said it could involve use of an air screen. He said there are a number of activities that qualify as conditioning. He said these are actual physical activities. He said they are not genetic or biological activities. He said conditioning includes processes that are designed to remove inert matter and weed seeds. He said they are designed to remove unwanted material.

Mr. Bertsch said in addition to the list that Senator Wanzek provided, one also might be trying to remove small seeds. He said one cannot put the definition of conditioning on paper because it is an art as much as it is a science. He said by removing smaller seeds, one is attempting to improve the quality of that particular seed lot.

Mr. Sebesta said one might have a clean lot of seed and then want to select seeds of a uniform size. He said that process does not involve the removal of inert matter or weed seeds. He said that is why keeping the definition vague would allow for the inclusion of a greater number of activities.

Representative Mueller said one of the suggestions that committee counsel had placed in the notes is to define conditioning as "any process to remove unwanted material from the seed lot in order to produce a uniform product."

Committee counsel said if it is the intent to remove smaller seed from a particular seed lot, it would appear that such smaller seed qualifies as "unwanted material."

Representative Mueller said while conditioning may be thought of as improving the germination of the entire seed lot, it certainly does not change the germination of any particular seed. He said that a single seed will germinate the same way regardless of whether there is inert matter in the lot. He said the best definition is the one that is suggested in the notes, i.e., any process to remove unwanted material from a seed lot in order to produce a uniform product. He said this definition allows the State Seed Department to expand what is meant by conditioning in the rulemaking process.

Senator Wanzek said the purpose of conditioning is really to select the best seeds from a lot. He said this is done by removing anything that might be foreign to the selection of the best seeds.

Committee counsel said conditioning is a very simple, very widely understood process. She said given the level of committee discussion, it is also not easy to define. However, she said, from a legal perspective it is important to define conditioning properly. She said if a producer gives a lot of seed to a conditioner, there should be a common and

articulate understanding of what will be done to that seed.

Chairman Mueller said it is a consensus of the committee that the process of conditioning be defined as any process to remove unwanted material from a seed lot in order to produce a uniform product.

Chairman Mueller said the definition of flower seed under current law contains a reference to wildflower seed. He said this reference was removed because the proposed definition appears to include wildflower seed.

Chairman Mueller said the proposed definition of inert matter means anything other than unbroken seeds. He said he wondered if it needs to be stated that an unbroken seed is one in which more than half of the seed is present.

Mr. Bertsch said the law should make clear that an unbroken seed is one that is greater than half the original size.

Mr. Bertsch said the definition of pure seed refers to agricultural and vegetable seed, excluding all inert matter. He said it would be preferable to remove the specific reference to agricultural and vegetable seed and simply reference all seed.

In response to a question from Representative Mueller, committee counsel said it would be appropriate to define pure seed as seed excluding all inert matter and excluding all seed not of the kind or variety being considered. She said in the portion of the chapter referring to tree and shrub seed, there is a reference to pure seed. However, she said, the definition refers just to agricultural and vegetable seed.

Mr. Bertsch said in reviewing the definition of record, it appears that reference also should be made to the inspection process. He said inspections generate so many of the records that are associated with the certification or regulation of seeds.

Committee counsel said consideration should be given to defining records as all information relating to the certification or regulation of seeds. She said this might eliminate certain references such as identification, source, origin, variety, amount, processing, testing, labeling, distribution, etc.

In response to a question from Mr. Bertsch, committee counsel said the record could be defined as all information relating to the certification or regulation of seed and including lot identification, source, origin, processing, etc.

Chairman Mueller said current law provides that a restricted (noxious) weed seed is one that is objectionable in "agricultural crops, lawns, and gardens . . . ." He said the proposed language suggests that for purposes of this chapter, restricted weed seeds are objectionable when they are found in and among various other seeds, and not necessarily when they are found in crops.

Chairman Mueller said the definition of "type" was deleted at the recommendation of State Seed Department personnel. Likewise, he said, the definition of "foundation seed, registered seed, and certified seed" has been replaced with a definition of "certification" and a reworked definition of "certified."

SECTION 6.
STATE SEED COMMISSION - APPOINTMENT OF PROXY

Chairman Mueller said current law provides that a commission member unable to attend a meeting of the commission may be represented by a proxy who has written authorization from the absent commission member. He said the rewrite adds that the authorization must be presented to the chairman and that the vote of the proxy is final. He said neither current law nor the proposed rewrite restricts the number of times that a proxy may be authorized by an absentee member.

SECTION 9.
SEED COMMISSIONER - POWERS

Chairman Mueller said current law provides that the Seed Commissioner may utilize the premises, space, and equipment at North Dakota State University as may be assigned to the commissioner by the university. He said the rewrite authorizes the Seed Commissioner to contract with North Dakota State University for the use of facilities and equipment.

SECTION 10.
SEED COMMISSIONER - DUTIES

Mr. Bertsch said the rewrite authorizes the Seed Commissioner to establish and charge fees for laboratory tests and services. He said he would prefer to reference just "services" because that term is sufficiently broad to include laboratory tests. He said the section should also reflect the fact that the establishment and charging of fees is done by the Seed Commissioner with the approval of the State Seed Commission.

Chairman Mueller said current law provides that the Seed Commissioner shall permit the facilities and services of the official laboratories to be used by the university at convenient times. He said perhaps this could be considered as part of the Seed Commissioner's power to contract with North Dakota State University for the use of facilities and equipment.

Mr. Bertsch said that was acceptable.

Senator Flakoll said it would be best to maintain involvement of the State Seed Commission in the setting of fees.

In response to a question from Representative Mueller, Mr. Bertsch said not all of the duties listed within Section 10 require the approval of the State Seed Commission.

Committee counsel said she will review the requirements with Mr. Bertsch and ensure that they are appropriately placed within either the duties of the

Seed Commissioner or the duties of the State Seed Commission.

Chairman Mueller said Section 4-09-09 provides that the Seed Commissioner may make rules and regulations governing the size and nature of the sample of seed or plant submitted to the laboratory and that the commissioner may prescribe the necessary manner of taking samples from given lots of seed. He said the committee may wish to determine whether this should be a requirement of the Seed Commissioner and appropriately placed in the section setting forth the Seed Commissioner's duties. He said that if the intent is merely to authorize this activity, that authorization already exists by virtue of Chapter 28-32 and does not need to be reiterated.

Mr. Bertsch said the proposed language directing the Seed Commissioner to determine the nature and size of any seed and plant samples required in order to conduct official tests or make official determinations is appropriate. Likewise, he said, the language requiring the Seed Commissioner to prescribe the manner in which the seed and plant samples are to be procured and delivered is appropriate.

SECTION 11. STOP-SALE ORDER - ISSUANCE - ENFORCEMENT - APPEAL

Mr. Bertsch said even though the law states that the stop-sale order shall prohibit any further conditioning, oftentimes they have to allow conditioning in order to make the seed come into compliance with what is in fact on the label.

In response to a question from Representative Mueller, committee counsel said the stop-sale order prohibits any further conditioning, except under the written permission of the Seed Commissioner. She said this allows the Seed Commissioner to authorize further conditioning.

Mr. Bertsch said he is concerned that others might wonder why the Seed Commissioner is allowing conditioning to take place when the first part of the sentence says that the stop-sale order shall in fact prohibit any further conditioning.

Mr. Bertsch said the other issue here is the reference to "written" permission. He said written permission is a burdensome thing.

Mr. Magnusson said the compilation entitled the Recommended Uniform State Seed Law prohibits the various activities under a stop-sale order, except under the approval of the enforcing officer or except with the express permission of the enforcing officer. He said that would allow the State Seed Department the authority to grant permission over the telephone rather than having to create a written document.

In response to a question from Representative Mueller, Mr. Bertsch said by removing the word "written," the State Seed Department could give oral permission for further conditioning and movement. However, he said, the State Seed Department would still authorize sale of the seed by a written document.

Committee counsel said this section might require further work. She said if the Seed Commissioner proposes to use an administrative order to prohibit a rightful owner from doing things that he or she otherwise could do with the seed, there should be concern about granting oral authorization to recondition and or move the seed because there is no evidence of that authorization. She said for the protection of the parties on both sides, one would want to have written documentation. She said if that is not the way business is conducted, it would be appropriate to further discuss this section and ensure that the statutory language gives the Seed Commissioner the flexibility that he believes he needs.

Senator Wanzek said if he had in his possession seed that was subject to a stop-sale order, he would want to have some written documentation authorizing him to move or recondition the seed. He said perhaps the reconditioning is not as critical with respect to the need for written documentation. However, he said, there should certainly be written documentation prior to movement and obviously prior to sale of the seed.

Committee counsel said generally, when a stop-sale order is issued, that order is accompanied by certain conditions upon which the stop-sale order will be lifted. She said she believes that a reworking of the section will result in the flexibility and protections that have been articulated here.

Senator Flakoll said when the bill draft is completed, he would like to have it reviewed either by Legislative Council staff specializing in taxation or by members of the Tax Department to ensure that none of the changes recommended could lead to unintended tax consequences.

SECTION 13. LABEL REQUIREMENTS - AGRICULTURAL SEED

Chairman Mueller said the Federal Seed Act provides that it is unlawful for any person to "transport or deliver for transportation in interstate commerce" any agricultural seed, unless each container bears a label. He said it is important to ensure that the reference to transportation does not need to be maintained in the state law.

Mr. Bertsch said the State Seed Department does not have anything to do with the transportation of seed through the state. However, he said, once the seed is offered for sale or sold in this state, the jurisdiction of the State Seed Department begins.

Mr. Bertsch said subsection 2 requires a label on agricultural seed to be plainly printed in English. He said he would prefer to have that requirement placed in subsection 1. He said he believes that all labels should be plainly printed in English, even those that accompany bulk sales of seed.

SECTION 14.
AGRICULTURAL SEED - LABEL - CONTENT

Chairman Mueller said one of the things that is required to be on a label is the percentage by weight of any other crop seed present. He said it is not clear what is meant by "crop seed." He said perhaps the language should require that the label include the percentage by weight of any other seed present.

Mr. Magnusson said the idea is to require the percentage by weight of any seed other than the one that is required to be on the label. He said a crop seed is something that is not on the label of the seed being considered.

Mr. Sebesta said a crop seed is generally recognized by the public when looking at the label.

Mr. Magnusson said in accordance with the Recommended Uniform State Seed Law, a crop seed is anything other than the pure seed required to be on the label.

SECTION 15.
AGRICULTURAL SEED - LABEL REQUIREMENTS - TREATED SEED

In response to a question from Representative Mueller, Mr. Bertsch said a separate label, when used, has to meet the requirements of the primary label.

Committee counsel said current law requires a cautionary statement if the substance in the amount present with the seed is harmful to humans or other vertebrate animals. At the recommendation of State Seed Department personnel, she said, this has been changed to require a cautionary statement if the substance is harmful to humans.

Mr. Sebesta said they are not in a position to determine how much of a substance was used in the treatment of seed nor whether that particular amount will harm humans. Therefore, he said, the language used in the rewrite is appropriate.

Mr. Bertsch said the cleanest approach is to require that if a substance is present, it must be included on the label.

SECTION 17.
AGRICULTURAL SEED - ADDITIONAL LABEL REQUIREMENT - LIMITED APPLICABILITY

Chairman Mueller said the section references both durum and wheat seed. He said a decision needs to be made with respect to whether durum should be mentioned separately.

Senator Wanzek said he believes that the reference to durum should be left in the rewrite. He said this state recognizes durum as a crop separate and apart from other wheat.

Chairman Mueller said according to the North Dakota State University Department of Agricultural Economics, a "field pea" is also known as a "dry pea." However, he said, Chapter 4.1-07, which pertains to the North Dakota Dry Pea and Lentil Council, consistently uses the phrase "dry peas and lentils" and defines that phrase as including chickpeas, lupins, and fava beans.

Mr. Bertsch said the common term that the State Seed Department deals with is "field pea." He said the seedsmen are accustomed to seeing the term field pea.

Senator Olafson said if the common term is field pea, perhaps the North Dakota Dry Pea and Lentil Council needs to consider changing its name.

In response to a question from Representative Mueller, Mr. Sebesta said yellow peas and green peas are field peas, technically. He said they would probably be considered dry peas by the North Dakota Dry Pea and Lentil Council.

In response to a question from Representative Mueller, Mr. Sebesta said in his interpretation, field peas and dry peas are synonymous.

SECTION 18.
SELLING OF SEED BY BRAND - REQUIREMENT

Chairman Mueller said the law provides that certain seeds listed in the section may be sold by brand, provided the true variety name or number is clearly stated on the label in a type size equal to greater than that of the brand.

In response to a question from Representative Mueller, Mr. Bertsch said in crops such as soybeans, there is a lot of branding and one variety may be licensed or sold to a number of different seed companies. He said the true variety is the variety name that is designated by the variety owner. He said the name may be licensed out to any number of different companies. He said the reference to a true variety name is in distinction to a brand variety name.

Mr. Sebesta said he would like to remove language requiring that the true variety name or a number be stated on the label "in a type size equal to or greater than that of the brand." He said that is difficult to enforce and impractical. He said the State Seed Department is content with having the information on the label. He said it does not need to be in a font size that is equal to or greater than that of the brand.

SECTION 19.
CANOLA SEED - ADDITIONAL LABEL REQUIREMENTS

Chairman Mueller said the law requires that the label on each container of canola seed must include a statement indicating that the seed has been certified as meeting the standards of this state or certified by another state or province as meeting its standards, provided the standards of the other state or province are determined by the Seed Commissioner to be equal to or greater than the standards in effect in this state. He said this section appears to prohibit the sale of any canola seed that is not certified. He said if that

is the intent, perhaps the section should be reworded and then relocated.

Mr. Bertsch said in 1999 a legislator was concerned that canola seed coming from Canada was not of the same quality as canola seed being produced in this state. He said it is the intent of this section that only certified canola seed may be sold.

Chairman Mueller said if the committee would change the requirement that canola seed sold in the state has to be certified, that would be a major policy decision. He said that would be better addressed in a separate bill. However, he said, if there is a more logical place to insert this section, rather than in the middle of labeling requirements, a relocation should be undertaken.

SECTION 20. AGRICULTURAL SEED COMPONENTS - LABEL REQUIREMENTS - MIXTURE DESIGNATION

Committee counsel said under current law, each of the agricultural seed components may not exceed 5 percent of the whole. She said if the requirements of the section are met, the word "mix, mixed, mixture, or blend" must be as on the label. However, she said, under current law, "mixture" is defined as "seed consisting of more than one kind, each in excess of five percent by weight of the whole," and "blend" is defined as "seed consisting of more than one variety of a kind, each in excess of five percent by weight of the whole."

Mr. Bertsch said the State Seed Department has a number of issues with the language of this section, which parallels current law. He said he would appreciate having the time to work with committee counsel and create a section that actually meets the needs of the department and the seed industry.

SECTION 21. LABELING REQUIREMENTS - VEGETABLE SEED

Chairman Mueller said as with agricultural seed, the Federal Seed Act provides that it is unlawful for any person to "transport or deliver for transportation in interstate commerce" any vegetable seeds, unless "each container bears a label . . . ." He said he presumes that the prior discussion regarding transportation with respect to agricultural seeds is also pertinent to vegetable seeds.

Mr. Bertsch said a number of the issues raised in the footnotes for purposes of the legislative record should be made consistent across all seeds.

SECTION 22. VEGETABLE SEED - LABEL - CONTENT

Chairman Mueller said current law requires that the label include the calendar month and year the germination test was completed and a statement stating the sell by date that may be no more than 12 months from the date of the test, exclusive of the month of the test, or the percentage germination and the calendar month and year the test was completed to determine the percentage if the germination test was completed within 12 months, exclusive of the month of the test.

Representative Mueller said a question arose about the option to allow "the percentage germination . . . provided the germination test was completed within twelve months . . . ." He said current law is not clear whether this is to be within 12 months of the date on which the product was labeled or within 12 months of the date on which the product must be sold. He said the language recommended by State Seed Department personnel, which has been incorporated in this section, allows a labeler to select a sell by date but does not set an outer limit for the date.

Mr. Bertsch said Section 4-09-14, which lists various prohibitions, also includes the length of time after a germination test that a seed may be sold.

Representative Kempenich said it would make sense to reference the section containing the window of time during which seed may be legitimately sold in this state, rather than expecting people to know that the additional and pertinent information is in fact in another section.

Mr. Sebesta said this section contains labeling requirements. He said another section--the one dealing with prohibitions--includes the dates beyond which seed may not be sold.

SECTION 25. VEGETABLE SEED - LARGER UNITS - LABEL REQUIREMENT - EXCEPTION

Committee counsel said subsection 2 provides that if a person purchases more than one pound of vegetable seed, the container into which the seed is placed is exempt from the label requirement provided the seed is removed from the properly labeled container and weighed in the presence of the purchaser. She said she questions whether this is enforceable. She said one option might be to provide that if a person purchases more than one pound of seed, the container into which the seed is placed is exempt from the label requirement for this section and not even address whether seed needs to be removed and weighed in the presence of the purchaser.

Mr. Sebesta said this provision should pertain not only to vegetable seed but also to agricultural seed. He said often one can go into a hardware store with the intent of purchasing a pound or a pound and a half of grass seed and there is no expectation that the paper bag or plastic bag into which the seed is placed should be labeled. He said people have probably gone to a local nursery and found small bags with "corn seed" written on them or a sign indicating that the bags contain corn seed. He said that is a violation of the law. He said those bags need to be filled and weighed in the presence of the purchaser.

In response to a question from Representative Mueller, Mr. Sebesta said it is important to retain the reference requiring that the seed be removed from a properly labeled container and weighed in the presence of the purchaser.

Representative Mueller said even if the reference to the removal and weighing in the presence of the purchaser is removed, there is still the issue of enforceability.

Mr. Bertsch said even though there is the legitimate issue regarding enforceability, it is important that State Seed Department personnel have the ability to point to a particular section and inform retailers about how things should be done in this state. In addition, he said, while it is not practical to require that a State Seed Department inspector be present to verify that sections such as this are in fact being followed, enforcement can take place if an inspector happens to be in the store and sees that a violation of this section is taking place.

Senator Bowman said this is really a consumer protection issue. He said the consumer can see the label on the box from which the seed is being taken.

SECTION 26.
TREATED AND VEGETABLE SEED - ADDITIONAL REQUIREMENTS

Chairman Mueller said the questions regarding this section parallel the ones that were raised with respect to treated agricultural seed. He said the responses are consistent between agricultural and vegetable seeds.

SECTION 29.
FLOWER SEED - LABEL CONTENT

Committee counsel said current law references flower seed in packets prepared for use in home gardens or household plantings. She said similar provisions with respect to vegetable seed were changed to reflect Federal Seed Act weight categories, i.e., containers of one pound or less and containers of more than one pound. She said this change has been made in the rewrite for purposes of consistency.

Mr. Sebesta said the State Seed Department does not deal very much with flower seed. He said there are issues within the flower seed section that could be consolidated, and he would like to work with committee counsel and propose additional changes to the flower seed sections.

SECTION 33.
TREATED FLOWER SEEDS - ADDITIONAL REQUIREMENTS

Chairman Mueller said when vegetable seeds are treated with certain substances, the information pertaining to that process may be placed on a separate label. He said confirmation is needed with respect to whether this is the case with flower seeds as well.

Mr. Sebesta said it also is applicable to flower seeds.

SECTION 34.
LABELING REQUIREMENTS FOR TREE SEED AND SHRUB SEED

Mr. Bertsch said the State Seed Department, during the course of his tenure, has not done any work in the area of tree and shrub seed.

Senator Flakoll said committee counsel should contact the State Forester and ask for his assistance in the rewriting of this portion of the bill draft.

SECTION 39.
INVOICE AND RECORDS

Chairman Mueller said current law requires a labeler to retain records for three years. He said because current law does not clarify when the three-year period begins, the rewrite adds that the records must be retained for three years after final disposition of the lot.

Chairman Mueller said the committee is asked to review another bill draft [10045.0100]. He said because this is the first meeting at which the committee will review these particular sections, the bill draft was written using amendments to current law, rather than being crafted as new law. He said this gives committee members an opportunity to see suggested changes with greater ease. He said this bill draft likewise was provided to committee members before the meeting.

SECTION 1.
AMENDMENT OF SECTION 4-09-14 - PROHIBITIONS

Mr. Bertsch said this section references agricultural seed and prohibits its sale unless the test to determine the percentage of germination has been completed during the preceding nine months. He said agricultural seed is defined as including grass seed. However, he said, grass seed is given a longer period of time within which sale is appropriate. Therefore, he said, subdivision a of subsection 1 should exclude grass seed.

Mr. Magnusson said subdivision b of subsection 1 provides that one may not offer for sale or sell flower seed, vegetable seed, native grass seed, or forbs seed unless a test to determine the percentage of germination has been completed during the preceding 12-month period. He said he would suggest that the rewrite remove the reference to native grass and refer only to grass seed. He said they do not know with certainty what is a native grass.

Mr. Bertsch said most times agricultural seed includes grass seed.

In response to a question from Representative Mueller, Senator Olafson said an Internet dictionary

defines forbs as herbaceous flowering plants that are not graminoids. He said graminoids are grasses, sedges, and rushes. He said the term is frequently used in vegetation ecology, especially in relation to grasslands. He said examples of forbs include clover, sunflower, and milkweed.

In response to a question from Representative Mueller, Mr. Bertsch said the reference in subdivision c of subsection 1 to "cool season" lawn and turf grasses could be replaced by simply referencing lawn and turf grasses.

Committee counsel said if the suggested amendments are incorporated, subdivision c would preclude the offering or selling of lawn and turf grasses unless a germination test has been completed during the preceding 15-month period and subdivision b would prohibit the selling of grass seed unless a germination test has been completed within the preceding 12-month period. She said she believes a qualification is in order. She said one alternative might be to reference in subdivision b all grasses except those referenced in subdivision c, which are the lawn and turf grasses.

Mr. Magnusson said the grasses included within the definition of agricultural seed are primarily those planted on conservation reserve program acreage. He said they include brome grasses, warm season grasses, Indian grasses, and bluestem grasses. He said cool season grasses include Kentucky bluegrass and the fescues. He said the 15-month tolerance for lawn and turf grasses is based on the Federal Seed Act.

In response to a question from Representative Mueller, Mr. Sebesta said the definition of agricultural seed will include lawn seed.

Mr. Sebesta said they would prefer that subdivision g of subsection 1 prohibit the offering for sale or selling any seed that contains prohibited weed seeds. He said the rewrite currently prohibits the offering for sale or selling of any seed that "exceeds the stated tolerances for prohibited weed seeds." He said the tolerances are already referenced in Section 4-09-13.

Committee counsel said this language reconciles the two provisions. She said without it, there would be one section that authorizes tolerances and another section that makes it a Class A misdemeanor to sell any seed containing any prohibited weed seeds.

Mr. Sebesta said this section pertains to the public's perception of how seed can be labeled. He said labeling according to tolerances is not permitted. He said the label must accurately reflect what is in that container of seed. He said the tolerances come into play under regulatory functions wherein an inspector finds that a product contains certain prohibited weed seeds. He said in those cases, the federal tolerances would be applied to the product. He said if they were permitted to label according to tolerances, they could knowingly have a certain number of weed seeds in the seed lot. He said this is a labeling issue that has to do with regulatory functions.

Committee counsel said one is expected to label the seed accurately, but one may still sell the seed with prohibited weed seeds as long as those prohibited weed seeds fall within the tolerance levels.

Mr. Bertsch said there are certain tolerances that they are permitted to apply to label claims. However, he said, the label claims have to be based on a laboratory analysis of the seed. He said seed may contain certain restricted seeds but not prohibited seeds. He said from an agency perspective it would be better not to mention any tolerances because the agency does not want people to think that they can sell seed with prohibited weed seeds provided those prohibited weed seeds fall within the tolerance levels.

Mr. Bertsch said even though the current law prohibits the offering for sale or selling any seed that contains prohibited weed seeds, the State Seed Department has always understood this to include the tolerances.

Committee counsel said it appears that State Seed Department personnel are following the proposed language. However, she said, it appears that State Seed Department personnel would prefer not to have that language in the law.

Committee counsel suggested that she be given time to work with State Seed Department personnel on this particular subsection with a view to ensuring that the department is not hampered in its regulatory functions while at the same time ensuring accuracy with respect to what is defined as a misdemeanor.

Chairman Mueller said Section 4-09-24 states that any person who violates this chapter is guilty of a Class A misdemeanor. He said Sections 4-09-10 and 4-09-11 require all containers of agricultural seed and vegetable seed that are sold, offered for sale, exposed for sale, transported for sale, or held in storage with the intent to sell for planting purposes within this state to bear a label. He said those sections also set forth the information that must be on a label. He said it appears that this subdivision is redundant with respect to one particular piece of information that must be on the label, i.e., the rate of occurrence of restricted weed seeds.

Mr. Bertsch said many of the prohibitions listed in this section appear to be redundant. He said many of the requirements are already in the sections pertaining to labels. He said even though there are redundancies, it is nice to have one section of the code to which the State Seed Department as an agency and individuals as producers can refer to in order to quickly and easily determine what is and is not permissible under the law.

Committee counsel said as we approach the second bill draft, we will be able to move sections and perhaps put them in a clearer more logical order. She said this in and of itself will help people understand their duties and obligations under the law.

Chairman Mueller said subdivision c of subsection 3 indicates that a person may not

disseminate any false or misleading advertisement regarding seeds.

In response to a question from Representative Mueller, committee counsel said it appears that the intent is to prohibit anyone from engaging in false or misleading advertising rather than merely prohibiting the distribution of such advertising.

Chairman Mueller said even though the current law simply prohibits false or misleading advertisements with respect to agricultural or vegetable seeds, it appears that this needs to be expanded to flower seed and tree and shrub seed as well.

Chairman Mueller said subdivision j of subsection 3 provides that a person may not "plant any seed labeled for vegetative cover only with the intent to harvest for seed or grain." He said it appears that one's intention at the time of planting would be hard to prove.

Committee counsel said it appears that the intent of the section is to prohibit the harvesting of a particular field if it were seeded with seed labeled for vegetative cover only.

Mr. Bertsch said this section was trying to ensure that if a protective variety is used as a cover crop it cannot then be harvested. He said it would be sold without any assurance that the protection would remain in place.

Chairman Mueller said it is not likely that anyone is going to use a protected seed as a cover crop because it would be an additional expense.

Representative Meyer said she does not recall seeing a seed label that specifically states the seed must be used for vegetative cover only.

In response to a question from Representative Meyer, Mr. Bertsch said if a particular seed is intended to be used only for vegetative cover, the seed must be labeled with that intent.

Representative Meyer said this particular subdivision does not preclude the sale of seed labeled for vegetative cover only. She said it precludes a producer from planting seed labeled for vegetative cover only with the intent to harvest for seed or grain.

Mr. Sebesta said occasionally people ask if they can sell something for vegetative cover only. He said State Seed Department personnel indicate that as long as it is not harvested for seed, it does not have to be labeled for variety name.

In response to a question from Senator Wanzek, committee counsel said the issue is whether the prohibition is on the planting with the intent to harvest or whether the prohibition is in fact on the harvesting itself.

Senator Wanzek said if an individual is harvesting the field, that indicates intent.

Representative Meyer said in western North Dakota someone might plant a cover crop with no intention to harvest. However, she said, if there is a significant amount of rain and if that results in a very lush crop, an individual who may not have started with the intention to harvest for hay might very well change his or her mind. She said it might not have been planted with the intent to harvest. She said at the time of planting there might have been an assumption that harvest was not even a possibility. She said in the scenario she described, the situation changed.

Chairman Mueller said the reference in the subdivision is to harvesting for seed or grain.

Representative Meyer said someone had earlier indicated that hay was included.

Chairman Mueller said perhaps this section needs to be looked at again by committee counsel and State Seed Department personnel.

Chairman Mueller said the rewrite clarifies that one may not offer for sale or sell hermetically sealed packages of tree, shrub, agricultural, flower, wildflower, or vegetable seeds, unless a test to determine the percentage of germination has been completed during the preceding 36-month period. He said the law goes on to provide that if, however, seed in a hermetically sealed container is offered for sale more than 36 months after the last day of the month in which the seed was tested before packaging, the seed must be retested within the 12-month period, exclusive of the calendar month in which the new test was completed. He said this was stricken because it appears to be in conflict with the preceding language stating that offering for sale or selling seed in a hermetically sealed container with the germination tested more than 36 months old was a prohibited act. However, he said, if the intent of the subdivision is to provide an option under which the outdated seed may still be sold, appropriate language needs to be drafted clarifying this point. He said perhaps committee counsel and the State Seed Department personnel need to do additional work on that subsection.

SECTION 2.
AMENDMENT OF SECTION 4-09-14.1 - SEED LABELING PERMIT

Committee counsel said current law requires the labeler to remit fees required by Section 4-09-14.1 to the State Seed Department. She said that particular section provides that a person may not label agricultural, vegetable, flower, or tree or shrub seed within, or for delivery within, this state unless a seed labeling fee permit has been obtained from the Seed Commissioner. She said the section does not require any fees. She said she reviewed the State Seed Department website and tried to reconstruct what was intended by Sections 4-09-14.1 and 4-09-14.2. She said it would be helpful to have department personnel comment on the accuracy of the rewrite.

Mr. Sebesta said the rewrite is very close to how business is conducted. He said, however, it would be the department's recommendation that the language of Section 4-09-14.2, as rewritten, be reordered so that the content of subsection 2 precedes the content of subsection 1. He said by doing this, each person issued a seed labeling permit would be required to keep the appropriate records and then such persons

would be required to submit appropriate fees on the seeds that are sold.

In response to a question from Representative Mueller, committee counsel said during the prior biennium, when the chapters pertaining to the various agricultural commodity groups were being rewritten, the committee adopted a standardized order for sections pertaining to the collection of fees, the submission of fees, and the retention of records.

Mr. Bertsch said one of the differences between the sections being discussed herein and the other agricultural commodity groups is that the seed labelers do not collect fees on the seeds sold. They remit the fees based on the amount of seed sold.

In response to a question from Senator Olafson, Mr. Bertsch said the intent of Section 4-09-14.1 is to cover all seed sold in the state. He said it is not particularly relevant whether the seed is delivered into or within the state.

SECTION 4.
AMENDMENT OF SECTION 4-09-14.4 - CIVIL PENALTY

Chairman Mueller said this section sets forth civil penalties that are applicable in case a seed labeler fails to remit assessments or reports. He said current law provides that the various submissions must be delivered to the Seed Commissioner not later than 31 days after the end of each reporting period. He said 30 days is the standard period of time used for commodity assessments and in the interest of consistency is suggested here as well.

Chairman Mueller said current law provides that a penalty "will be assessed" on reports that are not filed in a timely manner. He said when commodity assessments are not filed in a timely manner, the governing boards have the authority to assess a penalty but are not required to do so. He said the committee may wish to discuss the imposition of a penalty and ensure that the appropriate directive is used.

In response to a question from Representative Mueller, Mr. Sebesta said the State Seed Department would prefer that it have the authority to assess a penalty but not a mandate to do so. He said the department also would prefer that the authority to assess a penalty be in the statute but not the amount that must be assessed.

In response to a question from Representative Kempenich, Mr. Bertsch said it would be the department's intent to establish the penalty by rule. He said the current statutory fine of $10 is almost not worth pursuing. He said in many cases a penalty is not even levied.

Chairman Mueller said if a bill contains an open-ended penalty, it generally encounters problems on the floor.

Senator Flakoll said the rewrite should reflect the amounts as they exist in current law. He said if the State Seed Department wishes to have those amounts changed, they should introduce a separate bill to do so, much as was done last legislative session with changes to the commodity assessments.

Chairman Mueller said current law requires a permitholder to "show any information in connection with the permit as the commissioner may require as part of the label on all seeds sold." He said it is not clear what is intended by that sentence.

Mr. Bertsch said this is just another one of several sentences that is beyond comprehension. He said that particular subsection could be cleaned up by eliminating the last phrase so that it would provide that "any person issued the seed labeling permit shall show any information in connection with the permit as the seed commissioner may require."

Committee counsel said the point at which a seed labeler is applying for a permit is the point at which the commissioner may ask for one's name, address, and any other information that the commissioner requires. She said this sentence is not necessary at all. She said in addition, the Seed Commissioner has the authority to obtain records from seed labelers.

Mr. Bertsch said he concurs with that conclusion and would also recommend that the sentence be removed from the statute.

SECTION 5.
AMENDMENT OF SECTION 4-09-15 - EXEMPTIONS

Chairman Mueller said one of the exemptions provided for in this chapter pertains to seed or grain that is not intended for planting purposes. He said under current law each seller of seed or grain must indicate on a form provided by the seller the purpose for which the seed or grain is purchased. He said this appears to require that each seller create or provide his or her own form. He said he wonders if this results in any inconsistencies, especially given the fact that the statute is silent with respect to any other information that needs to be on the form, e.g., the purchaser's name and address.

Mr. Sebesta said when State Seed Department personnel reviewed the section, they concluded that it would be clearest just to provide that this chapter does not apply to seed or grain that is not intended for planting purposes and eliminate the succeeding four sentences.

In response to a question from Representative Mueller, Mr. Sebesta said he presumes this line was put in to discourage brown bagging.

Chairman Mueller said one of the problems with this section stems from the use of the word "intended." He said current law provides that the chapter does not apply to seed or grain that is "not intended for planting purposes." Again, he said, proving intent is somewhat problematic.

Mr. Bertsch said the intent of this section is to exempt grain from the chapter. He said the reference to intent is problematic. He said sometimes grain is left in a bin and when that grain is sold to another, an

issue exists with respect to whether it was sold for the purpose of planting or for the purpose of providing chicken feed. He said it is certainly impractical to expect a seller to make, keep, and ultimately provide to the State Seed Department records regarding the purpose for which certain seed or grain is purchased.

Senator Olafson said if subdivisions a, b, and c of subsection 2 are removed because in large part they pertain to recordkeeping, then we should also consider removing subdivision d because that in effect exempts a farmer selling the farmer's own seed or grain to a commercial establishment from having to abide by the recordkeeping requirements of the section.

Mr. Bertsch said it is important to retain certain sections of the code that State Seed Department personnel can reference when answering questions. He said it is important to point to language that says if a farmer is selling the farmer's own seed or grain to a commercial establishment, that farmer does not have to engage in certain recordkeeping requirements.

In response to a question from Representative Mueller, Mr. Bertsch said the State Seed Department does not rely on the provisions of subdivisions a, b, and c of subsection 2. However, he said, the department frequently relies on invoices from commercial establishments if it is conducting a regulatory examination that involves brown bagging. He said perhaps State Seed Department personnel should review this section and work with committee counsel to draft verbiage that accurately reflects the intent of this section.

Chairman Mueller said the reference to seed or grain needs to be looked at for accuracy. He said one may purchase seed but end up not using it as seed.

Chairman Mueller said in other sections of this chapter, current law provides that each container of seed which is sold, offered for sale, exposed for sale, transported for sale, or held in storage with the intent to sell for planting purposes must have a label. He said within the scope of the rewrite, the references to transportation have been removed. He said because the references to transportation have been removed, it is probably not necessary to include an exemption for common carriers.

In response to a question from Representative Mueller, committee counsel said it appears that the subsection indicating that the chapter does not apply to a common carrier could be removed. Mr. Bertsch said he concurs with that assessment.

Mr. Sebesta said subsection 5 provides that the sale or transfer of protected varieties between farmers for the purpose of planting without the approval of a variety owner or developer is prohibited. He said this sentence should be moved to the prohibition section and not left in the exemption section. On the other hand, he said, the language could be duplicated in the prohibition section and retained here for ease of reference.

Mr. Bertsch said even though the earlier discussion focused on exempting farmers who sell their own seed or grain to commercial establishments, this particular subsection focuses on the sale or transfer of a protected variety without the approval of the variety owner or developer. He said selling or transferring a protected variety without the approval of a variety owner is a serious prohibition and should be very clearly stated in the prohibition section.

Chairman Mueller said rather than focusing on duplicating sections within the Century Code for ease of reference, the State Seed Department should, if it is not already doing so, provide brochures and other publications that list activities which are prohibited and activities which are exempt from the chapter.

No further business appearing, Chairman Mueller adjourned the meeting at 4:30 p.m.

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L. Anita Thomas
Committee Counsel

ATTACH:3