

CHEMICAL APPLICATION INDUSTRY - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3058 (copy attached as an appendix) directs the Legislative Council to study the chemical application industry and develop a method for assessing or determining damage due to misapplication and for resolution of disputes through mediation.

NORTH DAKOTA LAW

North Dakota Century Code Chapter 4-35 addresses the distribution, sale, and application of pesticides.

Pesticide Control Board

Section 4-35-03 provides that the provisions of Chapter 4-35 must be administered by the Pesticide Control Board. The Pesticide Control Board consists of the Agriculture Commissioner, the director of the Cooperative Extension Division of the North Dakota State University of Agriculture and Applied Science, and the director of the Agricultural Experiment Station at North Dakota State University of Agriculture and Applied Science. The Agriculture Commissioner is the chairman of the board and is responsible for enforcement of Chapter 4-35.

Definitions

Section 4-35-05 defines an "applicator" as any person who applies a pesticide to land. A "certified applicator" is defined as an individual who is certified as authorized to use any restricted use pesticide covered by the applicator's certification. A "private applicator" is "a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator's employer or, if applied without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person." A "commercial applicator" is defined as "a certified applicator, whether or not the applicator is a private applicator with respect to some uses, who uses any pesticide which is classified for restricted use for any purpose or on any property other than as provided for" under the definition of a private applicator.

Section 4-35-05 defines a "pesticide" as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest and any substance or mixture of substances intended for use as a plant regulator, defoliate, or desiccant. A "restricted use pesticide" is defined as a pesticide

formulation that is classified for restricted use by the Pesticide Control Board.

Certification of Applicators

Section 4-35-06 authorizes the Pesticide Control Board to adopt rules to carry out the provisions of Chapter 4-35 including rules prescribing methods to be used in the application of pesticides. The board is required to adopt standards and requirements for the certification of applicators of restricted use pesticides which relate to the use and handling of the pesticides.

Section 4-35-08 authorizes the Pesticide Control Board to classify commercial certificates and to provide separate classifications as to ground, aerial, or manual methods used by an applicator to apply restricted use pesticides. Pursuant to that authorization, the board has adopted several categories of certifications.

Section 4-35-09 provides that an individual may be certified as a commercial applicator within a classification if the individual successfully completes an examination for the classification as prescribed by the Pesticide Control Board and administered by the North Dakota State University Extension Service or the Extension Service designee.

Section 4-35-10 provides that a commercial applicator's certificate expires on the first day of April following two years from the date of issuance and then a certificate is renewable every three years on April 1. A certificate may be renewed upon completion of a seminar approved by the board or upon successfully completing an examination required by the board, or both, if required by the board.

Section 4-35-11 requires a nonresident who is applying for a certification as an applicator to file a written power of attorney designating the secretary of state as the agent of the nonresident upon whom service of process may be had if a suit is brought against the nonresident. That section further provides that the power of attorney gives the courts of this state jurisdiction over the nonresident applicant.

Section 4-35-14 requires private applicators to comply with the certification requirements of the board before the individual can buy, use, or supervise the use of any pesticide classified for restricted use.

Section 4-35-16 requires commercial applicators to maintain records of sales of restricted use and special exemption pesticides and all commercial applications of pesticides. That section also authorizes the board to require restricted use pesticide application records of private applicators.

Section 4-35-17 authorizes the board to require all motor vehicles that are used for the application of

restricted use pesticides to be identified by a license plate or decal furnished by the board.

Section 4-35-18 allows the North Dakota State University Extension Service to issue a certification on a reciprocal basis, without certification, to a nonresident who is certified to use restricted use pesticides in another state under a plan substantially similar to Chapter 4-35.

Section 4-35-19 exempts from the certification requirements any person applying pesticides that are not classified for restricted use. In addition, that section provides that the certification requirements do not apply to a competent person applying restricted use pesticides under the direct supervision of a private applicator, unless the pesticide labeling requires that a certified applicator personally applies the particular pesticide.

Financial Responsibility

The 1997 Legislative Assembly established financial responsibility requirements for commercial pesticide applicators. Section 4-35-09.1 provides that a commercial pesticide applicator certificate may not be issued or renewed unless the applicant furnishes proof of financial responsibility. That section requires that minimum "financial responsibility must be demonstrated annually in the amount of \$100,000, and may be demonstrated by a notarized letter from an officer of a financial institution or from a certified public accountant attesting to the existence of net assets equal to at least \$100,000, a performance bond, or a general liability insurance policy." If a performance bond or insurance policy is used as proof of financial responsibility, the bond or policy must contain a provision requiring the issuing company to notify the Agriculture Commissioner at least 10 days before the effective date of cancellation, termination, or other modification of the bond or insurance policy.

The Agriculture Commissioner is required to immediately request the suspension of the certification of a person who fails to maintain the minimum financial responsibility standards. In addition, if there is any recovery against the certificate holder, the holder is required to demonstrate continued compliance with the minimum standards. An employee of a commercial pesticide application business is not required to meet the financial responsibility standards separately if the business documents compliance with the minimum financial responsibility standards. The following individuals and entities are exempt from the financial responsibility standards requirements:

1. A rancher who is required to obtain a commercial pesticide applicator certificate for controlling noxious weeds on the leased federal acreage as a condition of a federal grasslands lease.

2. A grazing association and its members if either the association or any member is required to obtain a commercial pesticide applicator certificate for controlling noxious weeds on the leased federal acreage as a condition of a federal grasslands lease.
3. A person required to be certified in the right-of-way category.
4. An applicator who holds a commercial pesticide certificate and is controlling noxious weeds on grassland, land producing tame hay, or other lands not devoted to the production of an annual crop.

Enforcement of Pesticide Laws

Section 4-35-15 authorizes the Agriculture Commissioner to deny, suspend, revoke, or modify any provision of any certification issued if the commissioner finds that the applicant or a holder of the certification has committed an act in violation of Chapter 4-35. The commissioner must provide an opportunity for a hearing before the denial, suspension, or revocation of the certification is effective.

Section 4-35-21 provides that the board shall adopt rules requiring the reporting to the Agriculture Commissioner of pesticide accidents. That section further provides that a person claiming damages from a pesticide application inflicting damage on property, except where the claimant was the operator or applicator of the pesticide, must report the loss. A claimant is required to permit the Agriculture Commissioner, the applicator, and the applicator's representatives to observe the lands or property alleged to have been damaged to examine the alleged damage. The failure of a claimant to permit the observation and examination of the damaged lands is an automatic bar to the claim against the applicator.

Section 4-35-21.1 provides that a civil action may not be commenced arising out of the application of a pesticide by an applicator inflicting damage on property unless, within 60 days from the date the claimant knew or reasonably should have known of the damage:

1. The claimant has served the applicator allegedly responsible for the damage with a verified report of loss;
2. If the claimant is someone other than the person applying the applicator alleged to be responsible for the damage, the claimant has served the person who applied the applicator allegedly responsible for the damage with a verified report of loss; and
3. The claimant has mailed or delivered to the Agriculture Commissioner a verified report of loss together with proof of service of the report of loss.

Section 4-35-21.1 provides that if damage is alleged to have occurred to growing crops, the report must be

filed before the time 50 percent of the field is harvested or within 60 days from the date the claimant knew or reasonably should have known, whichever occurs first. The applicator is required to provide anyone who alleges damage with information of the requirement for filing a verified report and that timely filing of a report is a prerequisite to any civil action. The failure to provide that information may be grounds for revocation of the applicator's certification and nullification of the 60-day limitation.

Section 4-35-21.2 provides that a verified report of loss arising out of the application of a pesticide by an applicator must include the name and address of the claimant; the type, kind, and location of property allegedly injured or damaged; the date the alleged injury or damage occurred; the name of the applicator allegedly responsible for the loss or damage; and if the claimant is not the same person for whom the work was done, the name of the owner or occupant of the property for whom the applicator was rendering labor or services.

Section 4-35-23 provides that an applicator, other than a private applicator who knowingly violates any provision of Chapter 4-35, is guilty of a Class A misdemeanor. In addition to the criminal sanctions that may be imposed, a person found guilty of violating the chapter or rules adopted pursuant to the chapter is subject to a civil penalty not to exceed \$5,000 for each violation. The civil penalty may be imposed by a court in a civil proceeding or by the Agriculture Commissioner through an administrative hearing.

Section 4-35-24 authorizes the Agriculture Commissioner to bring an action to enjoin the violation or threatened violation of any provision of Chapter 4-35 and to pursue civil penalties as provided for in Section 4-35-23.

Regulation by Aeronautics Commission

The Aeronautics Commission has authority to license aircraft used in aerial spraying. Section 2-05-18 requires a person engaged in aerial spraying to first obtain a license for each aircraft used in aerial spraying. The license fee for each aircraft is \$15.

Section 2-05-19 authorizes the Aeronautics Commission to serve upon any person engaged in aerial spraying an order to cease and desist when the commission has reason to believe the person is violating, has violated, or is attempting to violate any applicable law or rule.

Section 2-05-20 authorizes the Aeronautics Commission to impose civil money penalties against a person willfully violating an order to cease and desist or any other law or rule in an amount not to exceed \$500 for each violation.

1999 Legislation

The 1999 Legislative Assembly adopted House Bill No. 1439, which included additional exemptions to the

financial responsibility requirements. The bill provided that the proof of financial responsibility requirements do not apply to a grazing association and its members if either the association or its members must obtain a commercial pesticide applicator certificate as a condition of a federal grasslands lease, to a person required to be certified in the right-of-way category, or to an applicator who holds a commercial pesticide certificate and is controlling noxious weeds on grassland, land producing tame hay, or other lands not devoted to the production of an annual crop.

The 1999 Legislative Assembly considered, but failed to pass, House Bill No. 1322, which would have substantially revised the financial responsibility requirements. The bill provided that a commercial pesticide applicator certificate may not be issued or renewed for the category of agricultural pest control, whether by ground or by air, or for the right-of-way category unless the applicant furnishes proof of financial responsibility annually in the amount of \$100,000. Under the proposal, proof of financial responsibility could be demonstrated by a general liability insurance policy that includes comprehensive chemical liability coverage for both drift and misapplication or by an irrevocable letter of credit from a state-recognized financial institution for general liability and chemical liability claims. The bill also would have required the Agriculture Commissioner to obtain the services of a certified insurance adjuster to evaluate the claim if a claim arose against a commercial applicator who would be required to meet the financial responsibility requirements, and who had done so by means of an irrevocable letter of credit. Under the bill, if the adjuster determined that the claim was valid, the commissioner would have been required to direct the financial institution that issued the letter of credit to forward to the commissioner an amount equal to the amount of the claim, together with any handling and adjuster fees. The bill would have required the commissioner to forward the claim amount to the claimant and deposit any remaining fees in the minor use pesticide fund. In addition, the bill would have required the claimant to reimburse the commissioner for any handling and adjuster fees if the adjuster determined that the claim was invalid.

NEIGHBORING STATES' LAWS

South Dakota

Under South Dakota law, pesticide applicators are required to be licensed. South Dakota Codified Laws Section 38-21-18 authorizes the Secretary of Agriculture to adopt standards for certifications of applicators of pesticides. The South Dakota Legislature repealed the financial responsibility requirements for pesticide applicators in 1976.

South Dakota Codified Laws Section 38-21-47 requires the Secretary of Agriculture, upon receipt of a

damage claim resulting from the application or misapplication of pesticides, to inspect damages whenever possible and, if the secretary determines that the complaint has merit, make information regarding the merit of the claim available to the person claiming the damage and to the person who was alleged to have caused the damage.

Minnesota

Under Minnesota law, commercial pesticide applicators are required to obtain a license from the Commissioner of Agriculture. Minnesota Statutes Section 18b.33 provides that a commercial applicator license may not be issued unless the applicant furnishes proof of financial responsibility. The financial responsibility may be demonstrated by either proof of net assets equal to or greater than \$50,000 or by performance bond or insurance of the kind and in the amount determined by the commissioner. The commissioner has established \$50,000 as the minimum amount of performance bond or insurance.

Montana

The Montana Code Annotated requires commercial applicators to be licensed. Montana Code Annotated Section 80-8-214 requires the Department of Agriculture to adopt rules implementing proof of financial responsibility requirements for commercial pesticide applicators. The Department of Agriculture requires proof of financial responsibility in the amount of \$1,500 for aerial applicators and \$500 for ground applicators. Proof of financial responsibility must be provided annually and must be maintained throughout the licensing period for the commercial applicator.

Montana law also requires a person suffering loss or damage resulting from the use or application of any pesticide to file with the Department of Agriculture a verified report of loss within 30 days from the time the occurrence of the loss became known to the person. If the person fails to file the report and that person is the only one injured from the application or use of the pesticide, the Department of Agriculture may refuse to hold a hearing for the denial, suspension, or revocation of a license until the report is filed.

ATTACH:1