

CROP HARMONIZATION COMMITTEE

The Crop Harmonization Committee was assigned two studies. Section 11 of Senate Bill No. 2009 (1999) directed the Legislative Council to create the committee to, in consultation with the Pesticide Control Board:

1. Identify and prioritize crop protection product labeling needs;
2. Explore the extent of authority given to this state under the federal Insecticide, Fungicide, and Rodenticide Act;
3. Identify the data necessary to enable registration of a use to occur in a timely manner;
4. Determine what research, if any, is necessary to fulfill data requirements for activities listed in this section and communicate its findings to the Agriculture Commissioner;
5. Request the Agriculture Commissioner to pursue specific research funding options from public and private sources; and
6. Report to the Legislative Council in the same manner as do other interim Legislative Council committees.

House Concurrent Resolution No. 3058 directed a study of the chemical application industry to develop a method for assessing or determining damage due to misapplication and for resolution of disputes through mediation. The Legislative Council designated the committee as the committee to receive at least two reports during the interim from the Agriculture Commissioner regarding the efforts to develop a single uniform process for the joint North American labeling of crop protection products as required by Section 5 of Chapter 64 of the 1999 Session Laws.

Section 11 of Senate Bill No. 2009 also provided that the committee was to consist of the chairman of the House Agriculture Committee, the chairman of the Senate Agriculture Committee, and three other individuals appointed by the Legislative Council chairman, one of whom must represent the crop protection manufacturing industry.

Committee members were Representatives Eugene Nicholas (Chairman) and Michael D. Brandenburg; Senators Meyer Kinnoin and Terry M. Wanzek; and Citizen Member Brett Oemichen.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2000. The Council accepted the report for submission to the 57th Legislative Assembly.

CROP HARMONIZATION STUDY

Background

During the 1999 legislative session, there was much discussion regarding the lack of access to crop protection products in this country which are available in Canada. Research by North Dakota farmers and farm groups indicated their Canadian counterparts were permitted to use many crop protection products that were not registered for use in this country. Yet, the Canadian commodities treated with those products were being exported to this country. In addition, the research indicated many crop protection products registered for use in Canada and this country were priced substantially higher in the United States. Thus, notwithstanding the adoption of the North American Free Trade Agreement, producers in this country have been placed at a serious competitive disadvantage in the international marketplace.

Section 12 of Senate Bill No. 2009 appropriated \$15,000 from the minor use pesticide fund, \$15,000 from the general fund, and \$150,000 from special funds derived from grants or donation income to the Legislative Council for the purpose of addressing crop protection product registration and labeling during the 1999-2001 biennium.

Section 13 of Senate Bill No. 2009 stated legislative intent that the Agriculture Commissioner, Agricultural Experiment Station, and the North Dakota State University Extension Service use resources available to them to assist in the registration of crop protection pesticides in cooperation with the crop protection industry for use in the North Dakota agriculture industry during the 1999-2001 biennium.

Federal Law

The federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136a, prohibits the sale or distribution of any pesticide that is not registered under the Act by the administrator of the Environmental Protection Agency. To prevent unreasonable adverse effects on the environment, the administrator is authorized to adopt regulations to limit the distribution, sale, or use in any state of any pesticide that is not registered with the administrator and which is not subject to an experimental use permit or an emergency exemption granted under the Act. Section 136a sets up a registration mechanism for pesticides, provides labeling requirements, and allows the administrator to conditionally register a pesticide if the pesticide and its proposed use are identical or substantially similar to any currently registered pesticide and use of that pesticide.

The administrator is authorized under 7 U.S.C. 136c to issue an experimental use permit to an applicant if the administrator

determines that the applicant needs the permit to accumulate information necessary to register a pesticide. In addition, the administrator is required to establish regulations through which states may authorize experimental use permits for pesticides. The administrator is also authorized to issue an experimental use permit for a pesticide to any public or private agricultural research agency or educational institution that applies for a permit for experimentation.

Under 7 U.S.C. 136o, the Secretary of the Treasury is required to notify the administrator of the arrival of pesticides that are imported into the United States. If a pesticide is determined to be misbranded or injurious to health or the environment, the pesticide may be refused admission.

The administrator is authorized under 7 U.S.C. 136p to exempt a federal or state agency from the provisions of the Act if the administrator determines that emergency conditions exist which require an exemption. In determining whether an emergency exists, the administrator is required to consult with the Secretary of Agriculture and the Governor of the state concerned if they request the exemption.

Under 7 U.S.C. 136v, states are authorized to regulate the sale or use of any federally registered pesticide to the extent the regulation does not permit any sale or use prohibited by the Act. Section 136v also provides that a state may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that state to meet special local needs if registration for that use has not previously been denied, disapproved, or canceled by the administrator. The administrator may under certain circumstances advise a state of a disapproval of a registration for additional uses. A state is prohibited from issuing a registration for a food or feed use if a tolerance or exemption does not exist under the federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., which permits the residues of the pesticide on the food or feed. If the administrator finds that a state is not capable of exercising adequate controls to assure that state registration is in accord with the purposes of the Act or has failed to exercise adequate controls, the administrator may suspend the authority of a state to register pesticides.

The administrator is authorized under 7 U.S.C. 136w-1 to delegate to a state primary enforcement responsibility for pesticide use violations if the state has adopted adequate pesticide use law and regulations, has adopted and is implementing adequate procedures for the enforcement of the state laws and regulations, and will keep compliance reports and records required by the administrator. Under 7 U.S.C. 136w-2, if the administrator determines a state that has primary enforcement responsibility is not carrying out that responsibility, the administrator must notify the state of the aspects of administration that are determined to be inadequate. The state is then given 90 days to correct any deficiencies. If after that time the administrator determines that the state program remains inadequate, the administrator may rescind the state's primary enforcement responsibility.

North Dakota Law

North Dakota Century Code (NDCC) Chapter 4-35 provides for the regulation of pesticides in this state. Section 4-35-02 establishes a Pesticide Control Board consisting of the Agriculture Commissioner, the director of the Cooperative Extension Division of North Dakota State University, and the director of the Agricultural Experiment Station. The board is authorized to regulate the time, place, manner, methods, materials, and amounts and concentrations in connection with the application of a pesticide and to restrict or prohibit the use of pesticides in designated areas during specified periods of time. In addition, the board is authorized to adopt restricted use classifications as determined by the Environmental Protection Agency and to determine state restricted use pesticides for the state or designated areas within the state. Section 4-35-06 provides that regulations adopted by the board may not permit any pesticide use that is prohibited by the Act.

North Dakota Century Code Section 4-35-06.2 authorizes the Agriculture Commissioner to accept, on behalf of the Pesticide Control Board, funds received for expenses paid by the board relating to the registration of pesticides or donations given to the board. The funds must be deposited in the minor use pesticide fund to pay expenses relating to the registration of pesticides or for the specific purpose for which the funds were given.

North Dakota Century Code Section 4-35-07 authorizes the Pesticide Control Board to issue experimental use permits if necessary to accumulate information required to register a pesticide.

North Dakota Century Code Section 4-35-12 prohibits any person from distributing or selling restricted use pesticides or acting as a pesticide dealer without first having obtained certification from the Extension Service or a designee of the Extension Service.

North Dakota Century Code Section 4-35-12.1 authorizes the Agriculture Commissioner to issue a "stop-sale, use, or removal" order to any person who owns, controls, or has custody of a pesticide found by the commissioner to be in violation of Chapter 4-35 or when the registration of the pesticide has been canceled by the state or the Environmental Protection Agency. After receipt of the order, no person may sell, use, or remove the pesticide except in accordance with the order.

Pursuant to its authority to adopt regulations to carry out NDCC Chapter 4-35, the Pesticide Control Board has adopted an administrative rule providing that restricted use pesticides are the same as those declared to be restricted use pesticides by the

Environmental Protection Agency and others declared at the discretion of the board. The board also has adopted rules relating to the use of the minor use pesticide fund.

1999 Legislative Proposals

The 56th Legislative Assembly enacted House Bill No. 1252 (codified as NDCC Chapter 4-40), which authorizes the sale and use of crop protection products having Canadian labels if the Agriculture Commissioner determines that a product having an American label contains substantially similar active ingredients and if its importation and use does not violate federal law. The Agriculture Commissioner also is authorized to use tolerance data established or obtained in North America for purposes of pursuing special local exemptions. As originally introduced, the bill would have allowed the sale in this state of any agricultural chemical approved and registered for use in Canada and would have prohibited a chemical manufacturer from charging suppliers in this state an amount greater than that charged suppliers in the Canadian provinces bordering North Dakota, after taking into account the rate of exchange.

House Bill No. 1335 would have made it a Class B misdemeanor for any person to transport any agricultural product or livestock from another country into or through this state unless the product or livestock has a phytosanitary or sanitary certificate addressing its chemical levels. The Governor vetoed the bill and the Legislative Assembly sustained the veto.

The Legislative Assembly adopted House Concurrent Resolution No. 3035, which urged the Environmental Protection Agency and the Congress of the United States to increase resources for and efforts of the United States-Canada Technical Working Group to harmonize pesticide regulations between the two countries, to commit more resources and efforts toward establishing tolerances for pesticides registered for use in Canada but not in the United States, and to accept registration data currently accepted by Canadian officials in support of Canadian pesticide registrations. The resolution was forwarded to the director of the Environmental Protection Agency, the chairmen of the Congressional House and Senate Committees on Agriculture, and to each member of the North Dakota Congressional Delegation.

Testimony and Committee Considerations Agriculture Commissioner's Harmonization Efforts

The committee received updates at each meeting from the Agriculture Commissioner regarding the commissioner's efforts toward harmonization and the commissioner's efforts to develop a single uniform process for the joint North American labeling of crop protection products as required by 1999 Session Laws Chapter 64. The commissioner reported that he had regularly participated in meetings with representatives of the United States Environmental Protection Agency to discuss harmonization issues. Although the Environmental Protection Agency has granted North Dakota several crisis exemptions for the registration of crop protection products, it was contended that the procedure to request exemptions results in delays in approval of registration of new products. In addition, because the Canadian Pest Management Regulatory Agency is not authorized to grant similar crisis exemptions, Canadian producers and officials are critical of the Environmental Protection Agency for granting such exemptions.

The Agriculture Commissioner reported the Attorney General had issued an opinion stating that the Legislative Assembly did not intend that a one-half time position that was authorized to the Agriculture Commissioner be used to address harmonization issues. The opinion stated harmonization activities were delegated to the Crop Harmonization Committee and the funds for the one-half time employee in the Agriculture Commissioner's budget were to be used for minor use pesticide registration activities. Because the members of the committee generally believed the intent of the Legislative Assembly was for the Pesticide Control Board to use funds from the minor use pesticide fund to assist in the harmonization effort, the committee asked the Attorney General to clarify the opinion. The Attorney General issued a second opinion that again stated that funds in the minor use pesticide fund could not be used to fund an employee to work on harmonization issues.

At the initial meeting of the committee, a representative of the regional Environmental Protection Agency office in Denver, Colorado, indicated the agency may have grant funds available to assist the Agriculture Commissioner in hiring an employee who would be responsible for working on harmonization issues. The committee requested the Agriculture Commissioner to work with the representatives of the Environmental Protection Agency to pursue that grant. A representative of the Environmental Protection Agency announced at a later meeting of the committee that the agency provided funds to the Agriculture Commissioner to fund a position to be devoted to harmonization issues for two years.

Because the state is prohibited under federal law from placing a state registration label on a Canadian crop protection product without the consent of the Canadian manufacturer of the product, the Agriculture Commissioner corresponded with several crop protection product manufacturers to request permission to place a North Dakota label on products manufactured by those companies. None of the manufacturers granted permission to place a state label on the products.

Achieve 80 DG is a Canadian product registered for use in both the United States and Canada but not labeled in the United States. On May 31, 2000, the Agriculture Commissioner issued a state label for Achieve 80 DG so that North Dakota producers and crop protection product dealers could purchase the product in Canada and import the product into this country. However, when the manufacturer of the product protested, the Environmental Protection Agency determined federal law does not allow

the importation of the product from Canada. The Agriculture Commissioner and the Attorney General filed a civil action in federal district court in August 2000 to enjoin the Environmental Protection Agency from implementing any regulation, policy, or practice in violation of the federal Insecticide, Fungicide, and Rodenticide Act that prevents North Dakota farmers or dealers from importing Canadian crop protection products that are identical to products registered for use with the Environmental Protection Agency.

Although committee members generally expressed concern that the lawsuit would damage the relationship between North Dakota officials and representatives of the Environmental Protection Agency, the Agriculture Commissioner described the action as a "friendly" lawsuit that seeks judicial guidance on narrow legal issues and which has the support of some top officials at the Environmental Protection Agency. Committee members also expressed concern that the action of the Agriculture Commissioner in placing a state label on Achieve 80 DG would be construed by representatives of the crop protection product industry as an adversarial action that may discourage industry representatives from working with North Dakota officials to achieve harmonization.

Environmental Protection Agency and United States Department of Agriculture Harmonization Actions

A goal of the North American Free Trade Agreement was to provide for a single submission for registration of crop protection products and routine joint reviews and work sharing in the registration process. In December 1998 the United States and Canada entered a record of understanding which committed the countries to harmonize crop protection product labeling standards. Since the execution of the record of understanding, American and Canadian officials have met several times to address harmonization issues. The Environmental Protection Agency and the Canadian Pest Management Regulatory Agency have established a projected completion deadline in 2002 to achieve harmonization.

At a meeting of the committee in Washington, D.C., a representative of the United States Department of Agriculture stated significant progress has been made pursuant to the 1998 record of understanding, including a program through which grain produced in the United States may be transhipped through Canada. As a result, there has been a significant increase in the amount of commodities exported from this country to Canada. In 1999 approximately \$7 billion in commodities were exported from the United States to Canada, while about \$7.8 billion in Canadian commodities were exported to the United States.

According to representatives of the Environmental Protection Agency, joint reviews of new products can cut the registration process from three years to one year. During the joint review process, the regulatory agencies divide the work and share the results. However, each agency makes a decision based upon the shared results. Because of the resources available to the Environmental Protection Agency and the Pest Management Regulatory Agency, only a limited number of joint reviews are conducted each year. Nonetheless, the regulatory agencies cooperate on other registrations by using basic reviews from the other agency in the review process.

Because data requirements used by the Environmental Protection Agency and the Pest Management Regulatory Agency are substantially harmonized, representatives of the Environmental Protection Agency testified the cost of the registration process is similar in Canada and the United States. Thus, it was suggested the cost of a product should not vary greatly between the two countries. Nonetheless, a 1999 study conducted by the United States Department of Agriculture, Economic Research Service, and Agriculture and Agri-Food Canada indicated most major crop protection products available in Canada and the United States cost more in this country.

Although the Environmental Protection Agency and the Pest Management Regulatory Agency have been working on joint reviews and joint registrations of several new products, the committee received a significant amount of testimony indicating progress has been slow with respect to registration of products in this country which are registered in Canada. Representatives of the Environmental Protection Agency testified the agency is working with representatives of various commodity groups to identify priorities so that the agency can address those priority needs. It was generally acknowledged canola growers have been particularly aggressive in identifying priorities and more successful in having those priorities addressed by the Environmental Protection Agency.

Crop Protection Product Industry Harmonization Efforts

Representatives of the crop protection product industry testified that the industry supports harmonization efforts. However, concern was expressed regarding the slow pace of the regulatory process. Industry representatives asserted that when all regulatory guidelines and submissions have been harmonized, registration timelines and costs can be reduced. Among the greatest concerns of the industry is the ability of the regulatory agencies to handle a significant number of registration applications.

Testimony From Producers and Farm Groups

The committee received testimony from farmers and representatives of various commodity groups. Farmers testified that the

high cost of crop protection products may make the difference in determining whether they will be able to remain in business in future years. Although no evidence of illegal importation of crop protection products was provided, the scenario was presented that if price harmonization does not occur soon, farmers may be tempted to illegally import cheaper Canadian products.

Concern was also expressed because Canadian commodities that have been treated with crop protection products that are not registered for use in the United States are shipped into this country and become part of the food chain. Testimony indicated United States trade officials and the federal Food and Drug Administration are not adequately addressing concerns regarding the importation of commodities treated with crop protection products not registered for use in this country. Furthermore, even if the crop protection products have been proven to be safe, the fact that North Dakota farmers do not have access to those products often puts the North Dakota farmers at a competitive disadvantage because the crops can be grown in Canada for a lower price. Thus, it was argued true harmonization will not occur until the artificial barrier of the international border is removed and crop protection product dealers and farmers are permitted to purchase products in either country and use those products in either country.

Committee Activities and Discussion

At the invitation of the American Crop Protection Association, the committee held a meeting in Washington, D.C. While in Washington, the committee met with the members of the North Dakota Congressional Delegation, the chairman of the United States House subcommittee that has responsibility over matters related to pesticides, and the chiefs of staff of the United States House and Senate Agriculture Committees. At the request of the committee, the chairman of the United States Senate Agriculture Committee communicated with the administrator of the Environmental Protection Agency regarding expediting the process of harmonization of crop protection product regulations in the United States and Canada.

Two members of the committee attended the second meeting of the North American Market for Pesticides held in Ottawa, Ontario, Canada, in April 2000. Although discussion at that meeting indicated significant progress has been made in harmonizing registration standards and streamlining the registration process for new products, concern continued to be expressed regarding the slow pace in harmonizing or recognizing tolerances for existing products. The committee members who attended the Ottawa meeting indicated all parties at the meeting were supportive of the efforts to expedite the harmonization process. A committee member was permitted to actively participate in the discussion at the meeting.

The committee members expressed strong support for the inclusion of a citizen member on the committee. Because the citizen member was associated with the crop protection product industry, that member was able to act as a liaison with the industry as well as provide expertise to the committee.

Committee members generally agreed that creation of the Crop Harmonization Committee provided an avenue to continue the dialogue among state officials, the crop protection product industry, and the Environmental Protection Agency. The continued dialogue has been instrumental in moving the harmonization process forward and, most likely, at a faster pace. Because harmonization is not yet a reality and progress has been slow with respect to existing products, committee members agreed legislative harmonization efforts should continue for at least two more years. Because Section 11 of Senate Bill No. 2009 (1999), which established the Crop Harmonization Committee, did not include an expiration date, the committee did not propose a resolution to direct a study during the next interim.

Recommendation

The committee recommends that the Legislative Council continue the committee in the future and allow the committee to continue working with the Environmental Protection Agency, the Pest Management Regulatory Agency, the American Crop Protection Association, the Canadian Crop Protection Association, and commodity groups in addressing issues related to harmonization.

CHEMICAL APPLICATION STUDY

Background

The 56th Legislative Assembly considered, but did not pass, House Bill No. 1322, which would have substantially revised the financial responsibility requirements applicable to commercial pesticide applicators. 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. Proof of financial responsibility could have been demonstrated by a general liability insurance policy that would include 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 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.

North Dakota Law

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

Pesticide Control Board

The provisions of NDCC Chapter 4-35 are administered by the Pesticide Control Board. The Pesticide Control Board consists of the Agriculture Commissioner, the director of the Cooperative Extension Division of 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

An "applicator" is any person who applies a pesticide to land. A "certified applicator" is 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 that 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 a certified applicator, whether or not the applicator is a private applicator with respect to some uses, who uses any pesticide that is classified for restricted use for any purpose or on any property other than as provided for under the definition of a private applicator.

A "pesticide" is 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

The Pesticide Control Board is authorized to adopt rules to carry out the provisions of NDCC 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.

The Pesticide Control Board has the authority 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.

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. 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.

A private applicator must comply with the certification requirements of the board before that individual can buy, use, or supervise the use of any pesticide classified for restricted use. Commercial applicators must maintain records of sales of restricted use and special exemption pesticides and all commercial applications of pesticides. The board may require restricted use pesticide application records of private applicators.

A person applying pesticides that are not classified for restricted use is exempt from the certification requirements. In addition, 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 55th Legislative Assembly (1997) established financial responsibility requirements for commercial pesticide applicators. North Dakota Century Code 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 one hundred thousand dollars, 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 one hundred thousand dollars, 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 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

The Agriculture Commissioner can 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 NDCC Chapter 4-35. The commissioner must provide an opportunity for a hearing before the denial, suspension, or revocation of the certification is effective.

Under NDCC Section 4-35-21, the Pesticide Control Board must adopt rules requiring the reporting to the Agriculture Commissioner of pesticide accidents. A person claiming damages from a pesticide application inflicting damage on property, except when 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.

Under NDCC Section 4-35-21.1, 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 employing the applicator alleged to be responsible for the damage, the claimant has served the person who employed 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.

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.

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.

An applicator, other than a private applicator who knowingly violates any provision of NDCC 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 Chapter 4-35 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. The Agriculture Commissioner is authorized to bring an action to enjoin the violation or threatened violation of any provision of Chapter 4-35 and to pursue the authorized civil penalties.

Regulation by Aeronautics Commission

The Aeronautics Commission has authority to license aircraft used in aerial spraying. North Dakota Century Code 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.

Under NDCC Section 2-05-19, the Aeronautics Commission can 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. Under Section 2-05-20, the Aeronautics Commission can impose civil money penalties against a person willfully violating an order to cease and desist or willfully violating any other law or rule in an amount not to exceed \$500 for each violation.

1999 Legislation

The 56th Legislative Assembly enacted 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.

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 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.

Testimony

The committee received testimony from a representative of the North Dakota State University Extension Service, which trains and certifies applicators to apply restricted use pesticides. The testimony indicated that the state's financial responsibility law is ineffective and difficult to administer. Because the financial responsibility requirements do not require insurance for misapplication of pesticides and because general liability insurance does not cover misapplication and pesticide drift, the problem of protecting against misapplication and drift accidents is not solved. The testimony indicated another problem with the current law is that only a person applying restricted use pesticides must comply with the financial responsibility requirements. In addition, the requirements are difficult to administer because certifications are granted for three-year periods while the financial responsibility requirements must be provided yearly. The testimony suggested three possible courses of action to address the financial responsibility requirements:

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

Representatives of the Agriculture Commissioner, who is responsible for enforcement of the financial responsibility requirements, testified that enforcement proceedings against applicators who do not comply with the requirements must be accomplished through the administrative hearing process. Because over 700 applicators did not provide proof of financial responsibility in 2000, enforcement of the requirements is cost-prohibitive.

The Agriculture Commissioner receives approximately 60 to 70 complaints regarding pesticide applicators each year. Generally, 50 to 60 percent of those complaints are related to pesticide drift. The testimony indicated in most of the cases, the parties are able to resolve the problems between themselves. There was also testimony indicating that the cost of a pesticide misapplication insurance rider costs approximately 10 times more than the cost of a general liability insurance policy.

Testimony indicated although the 1997 legislation was intended to address problems caused by applicators who do not carry insurance, the law has had little effect on those individuals. Because the number of applicators who do not carry insurance likely has not changed significantly since the financial responsibility requirements were implemented and because of the difficulty in administering and enforcing the requirements, it was suggested the requirements provide no tangible benefit.

Conclusion

Committee members generally agreed that the financial responsibility requirements are ineffective and should be changed. However, because there was no consensus regarding the most appropriate approach to solve the problems associated with drift and misapplication of pesticides, the committee makes no recommendation regarding this study. The committee encouraged the interested parties to assist the Legislative Assembly in pursuing solutions to the drift and misapplication concerns and serious consideration be given to recommending repeal of the existing law.