

EXHIBIT 1
DATE 02/06/07
HB 493

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LEGAL MEMO

TO: DON ALLEN, WESTERN ENVIRONMENTAL TRADE ASSOCIATION
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: HB 0493 BILL MEMO
DATE: FEBRUARY 5, 2007

PURPOSE AND DISCLAIMER

You have asked me to prepare a brief summary of some of the legal implications associated with HB0493. This is provided below.

PLEASE NOTE:

1. This memo is based on preliminary research and additional research may need to be completed based on testimony in Committee and other relevant information received.
2. I do not attempt to review any of the numerous science-related issues associated with this bill.

BILL: HB0493:

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING A MANUFACTURER TO PRINT ACCEPTED PRACTICES FOR THE HANDLING OF GENETICALLY ENGINEERED WHEAT ON ALL GENETICALLY ENGINEERED WHEAT SEED PACKAGE LABELS; LIMITING THE LIABILITY OF A FARMER THAT PLANTS GENETICALLY ENGINEERED WHEAT; PROVIDING FOR A LIABILITY DEFENSE FOR MANUFACTURERS OF GENETICALLY ENGINEERED WHEAT SEED; DEFINING IN WHAT INSTANCES A MANUFACTURER IS LIABLE FOR INJURY SUFFERED AS THE RESULT OF GENETICALLY ENGINEERED WHEAT; PROVIDING FOR THE RECOVERY OF DAMAGES, ATTORNEY FEES, AND OTHER REASONABLE COSTS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the Legislature finds that Montana's wheat industry is a central and vital component of the state economy, that Montana's export markets have recognized Montana wheat to be among the finest in the world, and that Montana is the leading producer of organic wheat; and

WHEREAS, Montana has a unique national reputation for producing high-quality crops, and the state's economic viability is dependent on maintaining this reputation; and

WHEREAS, Montana's economic and environmental health are dependent on family farms that make up the backbone of a healthy rural economy; and

WHEREAS, supporting current and future family farmers is a part of Montana's heritage; and

WHEREAS, once planted, genetically engineered crops have been shown to be dispersed into the environment through means such as pollen drift, seed mixing, and the inadvertent transfer of seeds by humans, animals, and extreme weather events; and

WHEREAS, scientific evidence supports the claim that genetically engineered wheat cannot be successfully segregated from wheat that is not genetically engineered through current agronomic science, agricultural practices, or the agricultural infrastructure; and

WHEREAS, the introduction of genetically engineered wheat may cause significant harm to domestic and foreign market acceptance and a loss of value of Montana agricultural crops for Montana farmers and the grain handling and grain processing industries; and

WHEREAS, liability for the effects of genetically engineered crops has unfairly fallen as much on farmers who do not plant genetically engineered crops as on farmers who do, and it can be expected that liabilities associated with the growing of genetically engineered wheat in Montana will be passed by the manufacturer of genetically engineered wheat to the grower of the engineered variety and to farmers who do not plant genetically engineered wheat; and

WHEREAS, the burden of ensuring that farmers are not harmed by genetically engineered wheat technology should not fall on neighboring farmers or farmers who plant genetically engineered seeds if proper planting instructions are followed; and

WHEREAS, the manufacturer of genetically engineered seeds can help prevent improper handling of seeds by printing accepted practices for use on the seed package labels; and

WHEREAS, the Legislature finds that Montana's wheat industry is a central and vital component of the state economy, that Montana's export markets have recognized Montana wheat to be among the finest in the world, and that Montana is the leading producer of organic wheat; and

WHEREAS, Montana has a unique national reputation for producing high-quality crops, and the state's economic viability is dependent on maintaining this reputation; and

WHEREAS, Montana's economic and environmental health are dependent on family farms that make up the backbone of a healthy rural economy; and

WHEREAS, supporting current and future family farmers is a part of Montana's heritage; and

WHEREAS, once planted, genetically engineered crops have been shown to be dispersed into the environment through means such as pollen drift, seed mixing, and the inadvertent transfer of seeds by humans, animals, and extreme weather events; and

WHEREAS, scientific evidence supports the claim that genetically engineered wheat cannot be successfully segregated from wheat that is not genetically engineered through current agronomic science, agricultural practices, or the agricultural infrastructure; and

WHEREAS, the introduction of genetically engineered wheat may cause significant harm to domestic and foreign market acceptance and a loss of value of Montana agricultural crops for Montana farmers and the grain handling and grain processing industries; and

WHEREAS, liability for the effects of genetically engineered crops has unfairly fallen as much on farmers who do not plant genetically engineered crops as on farmers who do, and it can be expected that liabilities associated with the growing of genetically engineered wheat in Montana will be passed by the manufacturer of genetically engineered wheat to the grower of the engineered variety and to farmers who do not plant genetically engineered wheat; and

WHEREAS, the burden of ensuring that farmers are not harmed by genetically engineered wheat technology should not fall on neighboring farmers or farmers who plant genetically engineered seeds if proper planting instructions are followed; and

WHEREAS, the manufacturer of genetically engineered seeds can help prevent improper handling of seeds by printing accepted practices for use on the seed package labels; and

WHEREAS, the manufacturer of genetically engineered seeds can help to reduce the litigation surrounding the introduction of genetically engineered seeds by providing accepted practices instructions to the farmer.

MSK Comments: I question many of these assertions but will not comment on this section unless specifically requested to do so.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 3] may be cited as the "Farmers' Limited Liability for Genetically Engineered Wheat Act".

MSK Comments: None needed.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 3], the following definitions apply:

(1) "Accepted practices" includes scientifically sound handling practices that reduce the opportunity for injury as well as the possible risks of injury as determined by extensive research. The accepted practices must include instructions for handling the genetically engineered wheat as well as the possible risk of injury.

MSK Comments:

- ***How is "scientifically sound" defined;***
- ***What is the difference between reducing "the opportunity for injury" as opposed to reducing "the possible risks of injury"; and***
- ***What is meant by requiring the instructions to include "the possible risk of injury"?***

(2) "Extensive research" means research found in government reports, peer-reviewed scientific journals, professional society reports, or personal observations of at least two reputable scientists or agronomists regarding the use and consequences of genetically engineered wheat.

MSK Comments:

- ***From the use of the plurals above, I assume that at least two sources from at least one of the above categories is required to qualify as "extensive research";***
- ***How do you determine whether or not a particular scientist or agronomist is "reputable"; and***

- *What is a "consequence" of using genetically engineered (GE) wheat? Please note the use of the conjunctive in this section meaning that the personal observations must include observations of both use and consequences.*

(3) "Farmer" means a person responsible for planting, managing, or harvesting a crop.

(4) (a) "Genetically engineered wheat" means wheat seed or a whole wheat plant or plant part modified by methods including cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology, such as gene deletion, gene doubling, introduction of a foreign gene, and changes in the position of genes when achieved by recombinant DNA technology. The term includes scions identified by the national organic program of the U.S. department of agriculture that are intended for planting and that are produced using a variety of methods to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes.

(b) The term does not include modification by the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

(5) "Handling" means the transportation, planting, storing, and harvesting of genetically engineered wheat.

(6) "Injury" includes but is not limited to:

(a) loss of any price premium that would have accrued to a farmer by contract or other marketing arrangement and that would have been otherwise reasonably available to the farmer or grain warehouse operator through ordinary commercial channels;

(b) any additional transportation, storage, or related charges or costs incurred by a farmer that would not have been incurred in the absence of crop contamination;

(c) any judgment, charge, or penalty for which a farmer of a nongenetically engineered crop is liable because of breach of contract, including loss of organic certification for failure to deliver a crop or shipment free of genetically engineered material or for delivering a crop or shipment that exceeds any contractually agreed tolerances for the presence of genetically engineered material;

(d) market price reductions incurred by farmers that result from the loss of wheat exports, including foreign and domestic markets; and

(e) a farmer's loss of livelihood or reputation caused by genetically engineered wheat.

(7) "Manufacturer" means a person, corporation, or other entity that produces genetically engineered wheat for commercial purposes.

MSK Comments: What does "produces" mean in this subsection? If a farmer plants GE wheat, does that farmer then become a "producer" under this bill?

NEW SECTION. Section 3. Labeling of genetically engineered wheat seed packages -- liability. (1) A manufacturer must print on all genetically engineered wheat seed package labels the complete accepted practices for the handling of the genetically engineered wheat.

MSK Comments: Note the requirement for including the "complete" accepted practices on the label. "Complete" is not defined, nor in my opinion, is it definable. It will be whatever the courts say it is. See also my comments to subsection (2) below.

(2) A farmer who follows the accepted practices for the handling of genetically engineered wheat is not liable under this section for any injuries, claims, losses, or expenses, including attorney fees, caused by the use of the genetically engineered wheat.

MSK Comments: Note that only if the farmer follows the accepted practices is that person not liable. In other words, even if the farmer follows the label exactly, if the label does not contain the "complete" accepted practices, the farmer is still liable.

(3) A farmer who unknowingly comes into possession or uses genetically engineered wheat as a result of natural reproduction and cross-pollination, seed mix contamination, or other contamination is not liable under this section for any injuries, claims, losses, or expenses, including attorney fees, caused by the use of the genetically engineered wheat.

(4) A manufacturer is entitled to a liability defense under this section if:

(a) the complete accepted practices instructions were printed on all genetically engineered wheat seed package labels received by the farmer with whom the manufacturer has a seed contract;

MSK Comments: See again my comments above regarding "complete accepted practices" above.

(b) the farmer or a third party acted in gross negligence in causing contamination with genetically engineered wheat;

MSK Comments: How is "contamination" defined?

- (c) the farmer signed a contract with the manufacturer;
- (d) the farmer received a training manual from the manufacturer; and
- (e) the farmer would not have caused injury through the use of genetically engineered wheat seed if the farmer had followed the manufacturer's contract, the accepted practices, and the training manual.

MSK Comments:

- *Note the inconsistency by the use of "accepted" and not "complete accepted" practices in this subsection; and*
- *Note also the use of the conjunctive "and" requiring that all these conditions must be met before liability is limited.*

(5) A manufacturer is liable for injury suffered by any party because of genetically engineered wheat in Montana if:

MSK Comments: *See again my comments regarding the definition of the term "manufacturer", page 5 above.*

(a) the accepted practices were not printed on all genetically engineered wheat seed package labels;

MSK Comments: *Note again the inconsistency by the use of "accepted" and not "complete accepted" practices in this subsection.*

(b) there is evidence to suggest that the provided instructions and accepted practices were not complete;

MSK Comments:

- *See again, generally, my comments regarding the definition of "complete accepted practices" on page 5 above.*
- *The manufacturer is liable if there is "any" evidence regarding this issue. Does this mean even if the evidence was disputed in trial?*
- *Note also that liability is imposed as long as the evidence "suggests" the practices were not complete. Usually, evidence is required to prove a fact, not merely suggest.*
- *This is an extraordinarily low standard of proof.*

(c) there is evidence to indicate that the manufacturer misrepresented or underrepresented the possible risks of injury to the farmer with whom the manufacturer has a contract or to neighboring farmers; or

MSK Comments: *See again my comments regarding the "any" evidence, and issue above. I also question the use of the term "indicate". How does "indicate" differ, legally, from "suggest"?*

(d) the manufacturer learned of the incorrect language printed on the label after the sale of the genetically engineered wheat seed and failed to contact the farmer with whom the manufacturer has a contract.

MSK Comments:

- *Does “incorrect language” equate to “incomplete” accepted practices?; and*
- *Note also the use of the disjunctive “or” requiring only one of these conditions to find liability.*

(6) A plaintiff who prevails in an action under this section may recover compensable damages, reasonable attorney fees, and other litigation expenses as part of the costs of the action.

MSK Comments:

- *Note that this section only awards attorney fees to a successful plaintiff. If a defendant wins, that person must pay his or her own fees.*
- *“Compensable damages” is not defined.*

NEW SECTION. Section 4. Codification instruction. [Sections 1 through 3] are intended to be codified as an integral part of Title 80, chapter 5, and the provisions of Title 80, chapter 5, apply to [sections 1 through 3].

NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.

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