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September 10, 2001

BY FAX (503) 986-4786
AND REGULAR MAIL

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635 Capitol Street NE
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Re: Authority to Use Control Areas Under ORS 570.405 to set up Districts to Separate
Conventional and Bioengineered Crops
DOJ File No. 603-707-GN0427-01

Dear Dan:

This letter is in response to your July 19, 2001 letter to Sharyl Kammerzell requesting a legal opinion whether control areas under ORS 570.405 can be used to separate conventional and bioengineered crops. In particular, I understand that the Oregon Department of Agriculture (ODA) has been approached by a grass seed company interested in exploring the idea of using control areas to separate conventional and bioengineered varieties of bentgrass. For the reasons that follow, we believe that ODA has statutory authority to establish control areas for the purpose of separating conventional and bioengineered varieties of bentgrass, as well as any other crop.

ORS 570.405 provides that ODA may establish control areas if:

after careful investigation it determines that such areas are necessary for the general protection of the horticultural, agricultural or forest industries of the state from diseases, insects, animals or noxious weeds or for the eradication or exclusion from such areas of certain plants or their produce, trees, diseases, animals, insects or noxious weeds that may be a menace to such areas and generally to horticultural, agricultural or forestry industries.

When interpreting any statutory language, we apply the interpretive methodology used by the Oregon Supreme Court in *Portland General Electric v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (*PGE*). Under *PGE*, we attempt to ascertain the legislature's intent in adapting a statute by first looking at the text and context of the statute. *Id.*, 317 Or at 610-11. If the legislative intent is clear from the text and context, no further inquiry is necessary. *Id.* at 611.

Daniel J. Hilburn
September 10, 2001
Page 2

ORS 570.405 states that ODA may establish control areas in two situations. First, ODA may establish a control area "for the general protection of the horticultural, agricultural or forest industries of the state from diseases, insects, animals or noxious weeds." Therefore, under this clause, ODA has the authority to establish control areas only to protect agricultural industries from diseases, insects, animals, or noxious weeds. Bioengineered crops do not appear to fall within any of these categories. Thus, ODA cannot create control areas excluding bioengineered crops from such areas based on this portion of ORS 570.405.

ODA appears to have authority, however, under a different portion of ORS 570.405 to establish control areas to assist in the segregation of conventional and bioengineered varieties of bentgrass. This authority is found in the portion of ORS 570.405 permitting ODA to establish control areas for the "exclusion from such [control] areas of certain plants or their produce * * * that may be a menace to such areas and generally to the horticultural, agricultural or forest industries." ORS 570.405(1). Therefore, this text provides ODA authority to establish control areas to segregate conventional crops from bioengineered crops if the latter may be characterized as "certain plants" under ORS 570.405(1) and, where the bioengineered crops may also be found to constitute a "menace." The meaning of "certain plants" and "menace" are discussed next.

We believe that the "certain plants" language of ORS 570.405 allows ODA to identify a class of plants such as "bioengineered bentgrass" or any other particular type(s) of bioengineered crop.¹ This conclusion flows from the fact that "certain" is a word of common usage which should be given its plain, natural, and ordinary meaning. *Carrigan v. State Farm Mut. Auto. Ins. Co.*, 326 Or 97, 101-02, 949 P2d 705 (1997) citing *PGE* at 611. The ordinary meaning of "certain," as used in ORS 570.405, is "particular: of a character difficult or unwise to specify—used to distinguish a person or thing not otherwise distinguished or not distinguishable in more precise terms." *Webster's Third New International Dictionary* (unabridged 1993) at 367 (*Webster's*); see *Carrigan* 326 Or at 101-02 (relying on *Webster's* to ascertain the plain, natural, and ordinary meaning of a word of common usage in the first step of a *PGE* analysis). Thus, to the extent ODA can distinguish between conventional and bioengineered varieties of bentgrass (or any other type of crop), each variety is a certain plant within the meaning of ORS 570.405, and control areas may be established where bioengineered varieties of bentgrass may be excluded.

Additionally, to regulate bioengineered bentgrass (or any other particular bioengineered variety of a particular crop) by establishing a control area, ODA must determine that the bioengineered variety of that crop constitutes a "menace" to the particular control area and the agricultural industry of the state generally. "Menace" is defined as "someone or something that represents a threat." *Webster's* at 1409 (*Webster's*); see *Carrigan* at 101-02 (applying *Webster's* to ascertain the plain, natural, and ordinary meaning of a word in the first step of the *PGE* analysis). Thus, in order for ODA to establish a control area against bioengineered bentgrass (or any other crop), it would need to establish that the bioengineered variety is a threat to the area from which it is excluded, and to the agricultural industry at large.

¹ Based on preliminary research, we also believe that ODA may have authority to create control areas from which all bioengineered crops are excluded. Because this conclusion is preliminary, please contact us for additional advice if you wish to explore creating control areas of this type.

Daniel J. Hilburn
September 10, 2001
Page 3

I understand that bentgrass is wind pollinated and cross pollination between conventional and bioengineered varieties could have serious negative consequences in certain markets. This is the concern that led the grass seed company to approach ODA in the first place. Although additional facts may be necessary to ascertain whether bioengineered bentgrass could constitute a "menace" under ORS 570.405, on the facts presented it appears likely that this is the case. Therefore, if ODA decides to establish control areas for the regulation of bioengineered bentgrass, it needs to ensure that it adequately identifies and documents the harm or threat bioengineered varieties of bentgrass pose to the area(s) from which it is excluded, and to the bentgrass industry at large.

Finally, there also is some concern that the separation of different types of grass (i.e., separation of bioengineered and conventional bentgrass) may not be permissible in light of ORS 570.450. That statute provides ODA specific statutory authority to "establish control areas for the production of rapeseed as provided in ORS 570.405." ORS 570.450. Thus, ODA is concerned that, because specific statutory authority was given to establish rapeseed areas (which is necessary to prevent cross pollination between canola production from industrial rapeseed oil production), specific statutory authority is needed to segregate different varieties of bentgrass. A careful reading of the text and context of ORS 570.450, however, demonstrates that this concern is not warranted for at least two reasons.

First, adequate statutory authority exists under ORS 570.405 to establish control areas to separate conventional bentgrass from bioengineered varieties. Indeed, the fact that ORS 570.405 provides authority to create control areas to separate commercially useful crops to prevent harm to their respective industries is recognized by ORS 570.450. That is, ORS 570.450 explicitly recognizes that rapeseed control areas may be established "as provided in ORS 570.405." Thus, it appears that the legislature, in enacting ORS 570.450, recognized that an additional grant of authority to establish rapeseed control areas was not necessarily required.

Second, this reading of ORS 570.450 does not make any terms of the statute redundant or mere surplusage. *See PGE* at 611 *citing* ORS 174.010 (statutes should be construed to give effect to all parts, if possible). This is because the primary purpose of ORS 570.450 appears to be the authorization of advisory boards to "advise and counsel [ODA] on the boundaries of the [rapeseed] control areas, the type of rapeseed species and varieties which may be produced in the various control areas and the endorsement of control area orders." ORS 570.450. This authority is not found in ORS 570.405 or elsewhere in the control area statutes, ORS 570.405 to 570.450. Thus, the legislature appears to have enacted ORS 570.450 to provide specific statutory authority to regulate rapeseed in a manner different from other crops.

As a result, ORS 570.405 and 570.450, when read together in context, demonstrate that ODA has specific authority to create control areas in order to segregate bioengineered and conventional varieties of bentgrass (or any other particular crop) under ORS 570.405. This interpretation of ORS 570.405 is permissible in light of ORS 570.450 since the primary purpose of that statute appears to be to provide statutory authority to convene and consult advisory boards in its regulation of rapeseed.

Daniel J. Hilburn
September 10, 2001
Page 4

If you have any questions regarding this advice, please do not hesitate to call.

Sincerely,



Justin Wirth
Assistant Attorney General
Natural Resources Section

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cc: Sharyl Kammerzell, Assistant Attorney General