

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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Website address [www.dr.ca.gov/bshsb](http://www.dr.ca.gov/bshsb)**MINUTES OF HAND WEEDING ADVISORY SUB-COMMITTEE**  
**AUGUST 1, 2003**

Tom Mitchell, Senior Industrial Hygienist, called the meeting to order at approximately 9:45 a.m. Also present from Board staff was Donna Lively, Staff Analyst. Committee members present were Bill Hoerger, California Rural Legal Assistance (CRLA), Inc., Bob Falconer, California Association of Nurserymen, Robert Roy, Ventura County Agricultural Association, Ted Kubota, California Floral Council, Carl Borden, California Farm Bureau Federation (CFBF), Chris Bunn, Grower, Emanuel Benitez, CRLA, Inc., Anne Katten, California Rural Legal Assistance Foundation (CRLAF), Elizabeth Ecks, California Labor Federation, Julie Montgomery, CRLAF, Richard Matteis, California Seed Association, Michael Webb, Western Growers Association, Vanessa Bogenholm, California Certified Organic Farmers, Roy Gabriel, CFBF, Steve Smith, Division of Occupational Safety and Health, Mark Schacht, CRLAF, Fadi Fathallah, University of California-Davis, and Martha Guzman, United Farm Workers of America. Also present were Howard Rosenberg, University of California Berkeley, Kevin Thompson, Cal-OSHA Reporter, Eric Stein, Wine Institute and Rick Hight, Division of Occupational Safety and Health.

Mr. Mitchell notified the committee members of the handouts that were available, i.e., a list of various types of long-handled tools available on the market, minutes from the June 20, 2003 advisory sub-committee meeting and a copy of the revised Board staff proposal based on discussions from that meeting. Mr. Mitchell opened with self-introductions and reviewed the agenda for the meeting. Mr. Mitchell discussed the rationale behind the revisions made to the proposal and stated that where no consensus was reached, he had asked both parties to submit suggested language to him prior to this meeting, but to date, had not received proposed revisions from either party. Mr. Mitchell stated that the committee would review the revised Standards Board staff proposal section by section as was done before, and that both parties would have the opportunity to present their revisions.

Mr. Borden commented that though they had committed to submit some proposed language by August 11<sup>th</sup>, they informed Mr. Mitchell that they would be unable to meet that deadline. He then presented copies of a proposal that the growers felt was workable. Mr. Borden expressed that the growers' proposal articulates how they think the issue should be dealt with. Mr. Schacht responded by submitting copies of the employees' proposal, expressing gratitude to the Standards Board staff for their efforts in drafting a proposal while noting a need to make revisions due to the language contained in Senate Bill (SB) 534, submitted by the labor

representatives. Mr. Schacht noted for the record that at the end of the last meeting, the labor representatives indicated that they would probably introduce a placeholder bill comprised primarily of the text of the first Board staff draft proposal. Upon further review of the proposal, however, labor representatives decided that the provision for the complete exemption for organic farming operations was objectionable and would put them into political difficulty. Thus, this provision was revised, along with other substantive changes that were made to the proposal. One of the major revisions was a four-prong test for employers to carry the burden that “significant damage” had been done to the crop to qualify for the broad exemption. Mr. Schacht routed what the employees are calling a “concept proposed final draft rule”. Mr. Schacht stated that their proposal provides a framework to identify outstanding issues and resolve them so that this process can move forward as expeditiously as possible. Mr. Schacht introduced Rosalind Escobar, the legislative director for Senator Romero, and stated that he wanted to make sure she received a copy of their revised proposal.

Mr. Webb asked Mr. Mitchell for clarification as to whether the first Board staff draft proposal, which was used to start the discussion, was the Board staff’s recommended proposal. Mr. Mitchell replied that the draft text provided at the last meeting was Board staff’s proposal based on the petitioner’s original proposal and the discussions which took place prior to the meeting, i.e., a framework that incorporates what the petitioner was requesting in regards to limiting hand work in order to start discussions. Mr. Mitchell directed the committee to review the revised Board staff proposal as the committee’s joint proposal and to look at putting in language that both sides can agree upon, rather than working off the various proposals submitted. Mr. Mitchell stated that there may not be agreement on every point, but that it would be a means of moving forward on the proposal.

The committee asked for clarification as to which proposal they would be working from, having now three proposals in front of them. Mr. Mitchell stated that they would be working off of the Board staff proposal, stating that he felt there were structural similarities in all of them. Mr. Smith pointed out that the growers’ proposal appeared to be a new section. Mr. Borden responded that the growers took a fresh look from the standpoint of what the growers would be comfortable with while at the same time providing Cal-OSHA with a mechanism by which they can go after those instances where the work can be performed in a manner other than by hand. Mr. Borden stated that it admittedly comes at the problem from a different angle and they felt they needed to do that given the problems of proof as required in the Board staff proposal. Mr. Schacht stated that labor disagrees, and that Board staff’s framework, as amended by their proposal, is the appropriate framework. He stated that the growers’ framework appears to be a complete substitute for the existing proposal and that it is riddled with loopholes. Mr. Schacht stated their willingness to discuss the growers’ proposal, so long as they can incorporate the provisions of their proposal. Mr. Schacht asked Mr. Mitchell for direction.

Mr. Mitchell stated that the committee needs to review and discuss everything that has been introduced and believed that the Board staff's proposal should be the framework, while reviewing and determining whether the provisions of both parties' proposals should or can be incorporated.

Mr. Schacht began the discussions by stating that they were in agreement with Board staff proposal's subsection (a), which is existing text. No further comments regarding subsection (a) were made.

Mr. Mitchell then discussed the revisions made to subsection (b) of the Board staff's proposal, stating that there was consensus to reinsert the language that was previously deleted, which prohibited the use of short-handled hoes. Mr. Schacht stated that on lines 13 and 14 of page one of their proposal, a modifier was added to emphasize the employer's obligation to provide tools, unless otherwise directed by law, i.e., when an employee is earning 2xs or more the minimum wage. Mr. Hoerger stated that the language in all three proposals is unclear as to when and what tools the employer must provide and recommends that in the final version, the language which requires the employer to provide tools be set out in a new subparagraph that addresses whatever tool may be used under the provision be provided by the employer. Mr. Hoerger believes that there seems to be a distinction between long-handled tools and any other implement. A brief discussion ensued regarding what existing laws govern tools (e.g., Wage Order 9-B) and who is required to provide them, and the distinction between ordinary tools vs. safety equipment. Mr. Schacht stated that the requirement that the employer provide the tool should be clarified. Mr. Borden expressed concern that employers would be required to provide the latest technologically-designed tool regardless of the cost. Mr. Schacht stated that this concern is addressed in lines 29-30 of page 2 of their proposal, which states in part that nothing in this subsection shall require the use of administrative or engineering controls which are cost prohibitive. Mr. Schacht noted that the term "cost prohibitive" would need to be defined.

Mr. Roy asked for clarification as to whether labor believes a long-handled tool is considered safety equipment, or a tool necessary to perform the work; his concern being that if it is considered safety equipment, it would be required all the time. Mr. Hoerger stated that in the context of the proceeding as a whole, which addresses a worker safety issue, the clarification of whether a long-handled tool is safety equipment or not needs to be considered. Mr. Roy emphasized that the issue is not the tool itself, but rather, the work being performed, i.e., hand weeding. The point was further made that it is the activity of hand weeding that is being addressed, not the tool itself.

Mr. Borden expressed his concern regarding the practicality of the labors' proposal and the burden-of-proof that they require. Mr. Borden stated that the grower's proposal, with modifications, may more easily and effectively address these concerns.

Mr. Schacht stated that the approach taken by the Standards Board staff is the appropriate, middle-of-the-road approach, and that the additional exceptions and qualifications made in the

employee approach eliminates any legitimate concern that an employer might have that the proposal is burdensome. Mr. Roy stated that the committee as a whole agrees that certain practices should be outlawed, such as forcing workers to hand weed for excessive periods of time. He expressed the concern that growers would have to videotape their practices to justify some of the exceptions noted in the labors' proposal and questioned how else would the employer prove that the use of a long-handled hoe or tool would cause "significant damage" to a particular crop.

Mr. Schacht responded by stating that the purpose of the petition and final rule is to do two things: First, it is to close the hand weeding loophole to the short handled tool ban, so its not just excessive use of hand weeding that is the focus of what they are doing. They are interested in giving OSHA a limited enforcement authority, in the context of when short-handled tools are being used in which an alternative long-handled tool is available, to cite the employer for removing the tool and resorting to hand weeding. Mr. Schacht stated that what is clear throughout the last 10 years is that Cal/OSHA has no policy regarding hand weeding. Secondly, there are crops where hand weeding is being used while other employers growing the same crop are using long-handled tools. In terms of the burden-of-proof, nothing in their proposal requires documentation; that there are lots of ways an employer can prove their way into the exception. Mr. Schacht concluded by stating that he disagreed that this is an unfair and unworkable approach and that if farmers are unclear as to whether they meet the exception and could be cited, purchasing a video camera to document their reason for utilizing hand weeding would not be an unreasonable, burdensome investment.

Mr. Roy responded, stating that the issue is not the expense, but the "loophole" labor refers to is one that labor has created in the minds of a lot of people. Mr. Roy continued stating that he also doesn't believe the lack of a Cal-OSHA policy is unreasonable, since no other state in the United States including Fed-OSHA has adopted such a policy. A brief discussion ensued between Mr. Roy and Mr. Schacht regarding the 1993 DOSH Medical Unit findings and the lack of additional, current medical research regarding the physical effects of hand weeding.

Ms. Montgomery asked Mr. Roy to clarify his position as to whether he believes that hand weeding is safer than weeding with short-handled tools. Mr. Roy stated that he thinks that in some instances, weeding with a short-handled tool is just as safe, depending on the conditions. Mr. Roy expressed his personal belief that this is a major governmental intrusion telling private industry how they're going to run and/or perform their business. Mr. Roy and Ms. Montgomery briefly continued their discussion. Mr. Schacht interjected that the examples used by Mr. Roy would meet the exceptions outlined in their proposal.

Mr. Gabriel expressed concern that the comment made by Mr. Schacht at the last meeting, that labor is concerned about workers being injured when stooping, squatting and bending while performing agricultural work other than weeding and thinning, although it was not the subject of the petition, is interpreted by the growers to mean that this is only the first step with regard to their agenda. Mr. Schacht replied stating that Rosalinda Guillen mentioned at the first advisory

committee meeting that there are obvious concerns regarding worker injuries related to harvesting, but that it is unrelated to the petition and that that is not where labor is headed.

Mr. Roy asked how labor proposes to enforce this standard, whether there would be general violations, serious violations, penalties to be assessed on a one-time basis or per employee, etc. Mr. Schacht responded that according to the bill, there are no minimum penalties and penalties are not characterized. Their approach is to try to strike at something both parties can live with. Mr. Schacht re-emphasized that Board staff efforts captured the middle ground and that those in the middle should try to take advantage of the middle ground nature of these proposals. He stated that he has people on his side that want an absolute ban on hand weeding in California, and that he knows that the growers have people on their side who are at the other end of that extreme. He concluded by stating that this proposal is squarely in the middle of those two things and assured the growers that labor wants to work with them to find the middle ground.

Mr. Roy expressed that perhaps his question would be best directed at the Standards Board and asked how Cal-OSHA would view the enforcement; are we looking at something analogous to a field sanitation kind of “general”, or serious violations for the potential for significant bodily injury or would there be any type of assessment along the lines of the field sanitation criteria you adopted last year? Or, are we talking about per occurrence, per employee? Mr. Roy emphasized that these are significant issues that have to be evaluated by the industry.

Mr. Smith asked Mr. Roy whether he had examples of employers being cited for short-handled tools. Mr. Roy responded that for the last 26 years he’s never had a client cited for short-handled tools. Mr. Smith stated that Cal-OSHA can look at citation records regarding short-handled tools, stating that he presumes that citations under this proposal would be similar. Mr. Roy responded by stating that the citations would probably be “serious”, and that based on the framework of the short-handled hoe, Cal-OSHA’s position would be that it causes significant bodily injury. This automatically would place the citation cost at \$18,000.00, and with mitigation factors, would result in at least several thousands of dollars for a single instance. The question then becomes whether this applies to each employee or on a one-time basis. Mr. Roy argued that the committee needs to look at this proposal from an economic standpoint, too.

Mr. Smith stated that the assessment will not differ from how things are assessed today, i.e., whether it is serious, something other than serious, number of occurrences, etc., and the best he can do would be to run our citation experience with regards to the short-handled tool. Mr. Smith gave an example of an employer who sought a variance because he was cited three times for the short-handled tool and stated that he can see how this employer was cited, whether serious or general. Ms. Bogenholm gave an example of a large organic grower, who in 2002 was cited \$500.00 per violation per employee, and with 65 employees. The employees had long-handled hoes but were using them in the middle of the hoe and it was a short-handled violation at \$500.00 per employee. Even though the employer provided the long-handled hoes, the employees felt they could see the crop better by holding the hoe in the middle. The violation in

this case was “general”. The ultimate fine amount for the employer was approximately \$30,000.00, which was compromised down to approximately \$4-5,000.00. Mr. Smith stated that it could’ve been cited this way if all employees were utilizing the hoes in this manner. Mr. Roy stated that this could have a significant economic impact if one is citing per instance vs. per employee.

Mr. Borden asked to go back to the Medical Unit report in response to Mr. Schacht’s “middle-ground” approach. Mr. Borden stated that he thinks it goes back to or beyond what the medical report states. The report repeatedly uses the phrases, “over long periods of time”, “workers doing this most of the time”, “over substantial periods of time”; the specific instance that the Medical Unit was looking at – the work according to the owner lasted an average 10-12 hours with 10 minute breaks every 2 hours and a \_ hour lunch break; the “repetitious bending, prolonged non-neutral posture”, etc., etc. By creating essentially a complete ban on the practice, does not take into consideration these concepts. Mr. Borden went on to address Ms. Montgomery’s question stating that he felt that the use of the short-handled tool in many instances probably is safer than hand weeding, but unfortunately that isn’t an alternative. Mr. Borden stated that in his opinion, the Standards Board position on the short-handled tool was too broad, too, because it was not consistent with the medical evidence. Mr. Borden reminded the committee that during his presentation, he reviewed “frequency times duration” and that this proposal does not take this into account. Mr. Borden provided examples that although they would not meet the labor’s proposal exceptions, are not proven to be injuries based on the Medical Units findings. Mr. Borden emphasized that the focus is on prolonged, substantial use and that the Standards Board proposal essentially mirrors the petition to ban all instances of hand weeding. He concluded by stating that he doesn’t necessarily feel that this is the proper approach.

Mr. Hoerger responded that his problem with Mr. Borden’s perspective is that they’re hearing a posture of trying to create an enforcement mechanism to regulate conduct, because we’re dealing with how an enforcement agency will regulate the conduct. Mr. Hoerger stated that he interprets Mr. Borden’s comments as meaning that the medical evidence might support a ban on excessive, lengthy stooping/bending. The problem with that as a practical enforcement mechanism is that it is difficult to do unless each worker is fitted with a meter, like Mr. Fathallah is using, which measures each time the worker bends over. Mr. Hoerger stated that he thinks the only way that one can enforce it would be when it is permitted on a limited basis. An enforcement agency will not spend 4-6 hours observing the practice and making the medical determination whether it is harmful or not. Mr. Hoerger stated that from a practical standpoint, one must acknowledge that you need an enforcement tool that an enforcement agency can implement.

Mr. Borden responded by stating that obviously a complete ban on the practice such as with the short-handled tool makes enforcement quite easy. Mr. Borden stated that regardless of the burden-of-proof as required under the proposal, there is still the matter of having to convince someone. He stated that there is a big difference between “prolonged use” or “substantial

amounts of time” and isolated, brief instances, and although he appreciates the enforcement mechanism concerns, he doesn’t see the justification for a regulation on that basis when the science doesn’t necessarily support it. Mr. Hoerger re-stated his point that from an enforcement perspective, exceptions are more easily observed.

Mr. Stein stated that his concern is from a practicality standpoint from the grower’s perspective. He stated that if we put something together that is so difficult for interpretation, that if we go back to the enforcement aspect, we are going to have violations. He emphasized that their concern is that there are best management practices to ensure the safety of the worker and not to have the enforcement arm come down on the grower. If we put things together that have loopholes in them and that can be misinterpreted, that’s where their concern comes in.

Mr. Hoerger agreed that they certainly don’t want language that is subject to misinterpretation. Mr. Stein continued stating that there are those out there that are trying to take care of their workers and are concerned about the clarity of the standard. He stated that their industry does everything they possibly can to protect their workers and that the majority of the wineries and vineyards have returned workers year after year, but that this is now putting another obstacle in how to manage their workers.

Ms. Ecks responded stating that that is what we’re here for. She countered Mr. Roy’s earlier statement that this puts a burden on private industry by stating that we have IWC orders and Cal-OSHA regulations and that we are responsible for making sure that the workers in our state are safe. Ms. Ecks emphasized that labor does view the existing requirement as having a loophole that needs to be closed. She stated that the proposed language is clear and that the exceptions are outlined, and that in her opinion, the proposal is modest and generous to employers in the state. She concluded by stating that with regards to growers concerns that the proposal is an intrusion, we shouldn’t go there; we’re here because we need some closure on some language.

Mr. Schacht wanted to make two points in response to Mr. Borden’s earlier comments. The first point being that the medical literature shows that bending is a marginal, at best, ergonomic activity no matter how few times it’s done. The second point was that the basis for the Carmona case, in part, was that there was an alternative tool available that was not utilized which did not present the health risk. Mr. Schacht emphasized that there are alternative tools that some growers are using when other growers and labor contractors are using short tools or hand weeding. He stated that they are trying to capture both of these things in this rule. Mr. Schacht concluded by stating that they (labor) believe the committee’s employer representatives are the good guys and that the bad guys are never here. They are trying to get at the folks that are abusing the loophole and that there is no other way to get at it than with this approach.

Mr. Web asked Mr. Schacht what we’re doing with SB 534 if we’re doing such good work here. Mr. Schacht responded stating that per Mr. Steinberg in the Appropriations Committee, we are providing a failsafe against an impasse on this committee’s work. If this regulatory process

expeditiously produces a rule we will not move forward with the bill. But we are going to put a bill on the governor's desk if we can, unless we can get down to business and resolve the issues in dispute now or next week or the following week; we want to get this work done. It has been ten years or more; there's no more reason for delay. There's an acceptable construct out there that the staff has put together and there is no acceptable reason from our standpoint to delay this thing any more. Let's resolve the issues and move forward. If we can't, we will pursue our legislative option.

Mr. Gabriel stated, "so we have till September 15<sup>th</sup>, basically." Mr. Schacht responded stating that he is not giving any drop-dead date, but that let's work on resolving the issues today. He continued stating that they will not let anyone opposed in philosophy to doing anything about this from adopting a reasonable policy.

Ms. Katten wanted to return to Mr. Borden's interpretation of when this might be needed, stating that there isn't enough in the medical report to determine what is enough. We have statements from grower's employees who, at the end of a day of hand weeding, state that their back hurts. Also, although we are only addressing hand weeding in this rulemaking, we can't look at it in isolation of all the other bending, stooping and squatting that the agricultural workers do that we do not have available alternatives for, and this is one of the reasons that we are trying to craft a standard that reduces unnecessary hand weeding as much as possible, since it is an area that we can reduce the stooping. She also stated that the way she understands the grower's proposal, if someone can show any damage economically, the grower doesn't have to provide any additional protection to the workers.

Mr. Roy asked Mr. Schacht to clarify the term "crop" used in their proposal (vs. "commodity"), and whether there would be a failsafe/good-faith provision added. Mr. Roy stated that there may be instances where an employer does everything they can to comply with this and yet the employee chooses to violate the regulation. Mr. Schacht stated that labor has a lot of problems with "good faith" defenses in general because they crop up in a number of different contexts, but that they are not putting anything off the table, if there is a will to reach an agreement.

Mr. Hoerger said that he heard Mr. Stein raise two concerns regarding burdensomeness. One is the burdensomeness that flows from any kind of regulatory control and that's the substance of where we are at this point. The other being that the employer who does not know what is expected of him, i.e., the control is not clear. Mr. Hoerger stated that labor does not want that either; that it was not to their advantage either. He emphasized that to the extent that the growers see burdensomeness as a result of a lack of clarity, the committee should focus on clarifying the language.

Mr. Bunn stated that adding to the confusion is the question as to where the tool is coming from that would solve the loophole. Mr. Hoerger responded referring to a conversation he had with Mr. Fathallah who stated that it would not take a significant amount of money to get University

agricultural experiments underway to develop appropriate alternative tools, and that to his knowledge, there was only one other University (University of North Carolina) who was studying it, but in context of harvest only. He emphasized that it appeared that no one is supporting it and questioned what drives the research.

Mr. Bunn responded by stating that the organic farmers are being killed by the cost of hand weeding and would welcome a viable economic alternative. Mr. Benitez responded by stating that based on his field experience, there are already growers that provide effective alternative tools in lieu of hand weeding. Ms. Bogenholm stated that the committee is all talking about the same thing. She stated that there are growers breaking short-handled hoe regulations all the time and that most growers want that stopped. She doesn't believe that providing the right tool to workers would be an economic burden on growers.

Mr. Schacht responded to Mr. Bunn's and Ms. Bogenholm's concerns by directing them to two of the exceptions provided under labors' proposal. Exception (3) permits hand weeding when the grower can show that proper use of an appropriate long-handled tool (Cal-OSHA has the burden of determining "appropriate") and any reasonably available mechanical or cultural non-pesticide, non-hand weeding alternative would significantly damage the crop; and (e) permits brief, isolated hand weeding. He stated that their bill provides the needed exceptions to legitimate employers.

Mr. Gabriel asked Mr. Schacht to define "significant damage". He responded by stating that he's sure the committee will get to that. Mr. Borden pointed out what he felt was an inconsistency in labors' proposal: Mr. Schacht's statement that Cal-OSHA has the burden of determining what an "appropriate" tool is vs. lines 33-34 of labors' proposal which states that the burden of proof falls on the employer. Mr. Borden stated that he interprets the employer's burden of proof to require the employer to have knowledge of and purchase all reasonably available appropriate tools, try them, and show that they cannot be used, along with cultural non-pesticide practices. Mr. Schacht responded by stating that he would ask Mr. Smith if that is how Cal-OSHA would interpret "reasonable."

Mr. Smith stated that he doesn't think that Cal-OSHA expects that the growers purchase every tool on the market. Mr. Borden directed the committee to item (b)(3)(B)(i) of labors' proposal, which states that the employer must demonstrate that "there was a serious effort to attempt to properly use each reasonably available appropriate long-handled hand tool and each reasonably available non-pesticide, non-hand weeding alternative to weed or thin the field for which the exception is claimed." Mr. Borden stated that these would be enforcement and compliance issues on the part of the grower to know what this means, purchase these tools and keep up-to-date on the latest tools available. Mr. Schacht stated that according to Mr. Bunn, growers are already doing this and that these are normal "knows" and "should knows" kind of approach. Mr. Bunn clarified his previous statement that there is no tool to suffice the loophole. Mr. Schacht responded stating that for enforcement purposes, the test that the Standards Board staff has

devised is the only way to go, so if growers want to get in the exemption, they will have to show that a long-handled tool would cause significant damage to a representative portion of the field. Mr. Bunn stated that if a long-handled tool would do a better job, why would growers utilize hand weeding at all? Mr. Borden clarified that the burden of proof falls on the grower, not Cal-OSHA; the issue is not whether there is a feasible tool available, but whether the grower has gone through the multiple steps (tests) to meet the exception. Mr. Roy emphasized that the burden is always on the party claiming the exemption. Mr. Schacht responded stating that experienced agricultural employers who are familiar with their tools and their inapplicability to their crops are going to be able to make a pretty convincing show that the use of a particular tool or tools will cause significant damage. Mr. Schacht stated that labor is willing to narrow language to meet concerns. Mr. Roy responded by stating that the question is to what extent would an employer have to go to in order to prove they've reasonably looked into available alternatives. He also asked what is meant by "significant" in terms of crop damage assessment. Is it to an entire block, or a few plants? In terms of due process in proving that a crop would be damaged significantly, some clear language is necessary.

Mr. Hoerger stated that what he's hearing is the argument move from who has the burden of proof to let's clarify what is the burden of proof. Mr. Roy concurred. Mr. Bunn responded by stating that it puts farmers in what is usually considered a normal practice to now having to request a variance to do a normal practice. Mr. Hoerger stated that the burden of proof would only be required as a defense if Cal-OSHA found them to be in violation. Ms. Bogenholm said that that brought up a good point: Would the burden of proof be required every time you weeded a new field, a new crop; would it be required every year, or would once be enough? Mr. Schacht stated that their proposal is clear in that it's to a particular crop planted in that field at the crop's current state of development. He stated that it requires an analytical process not dissimilar to what is in the proposal.

Mr. Borden stated that in response to that, what the growers are now doing is going through an informal analytical process based on their own experience and made reference to their earlier video presentation whereby the growers demonstrated when the use of a long-handled was impractical. Mr. Borden stated that to now require the grower to complete a four-prong test every time they consider hand weeding is unreasonable and unduly burdensome. Mr. Borden stated that he felt that the approach whereby Cal-OSHA makes the determination as to whether an alternative tool exists would be very productive.

Mr. Schacht rephrased his position that when Cal-OSHA comes out to a field, they will deal with growers knowledgeable in their cultural practices; Cal-OSHA will gather experience under this statute. He emphasized that labor does not intend to put the burden on OSHA, but what they're hearing is the need to make the burden reasonable.

Mr. Falconer stated that the issue of practicality is missing in the proposal. He stated that there is talk of crop damage, but even in those instances where the use of a long-handled tool is

possible, it may not be practical in terms of the amount of time it takes to weed a nursery container using a tool vs. by hand. The use of a long-handled tool may not be effective in all instances. Mr. Hoerger asked for clarification as to whether this falls under the incidental hand weeding provision in (e), or whether Mr. Falconer is referring to a vast amount of pots requiring hand weeding. Mr. Falconer stated that it would probably fall under the incidental provision, although there may be those instances where many pots require hand weeding, depending on their location in the nursery. Mr. Schacht stated that they've purposely stayed away from discussions as to what is feasible, since feasibility is in the eye of the beholder and is subjective. Mr. Schacht stated that they can not define every ambiguity out of the regulation. Mr. Falconer asked who would determine at what rate a worker should weed, stating that it would take longer to weed with a long-handled tool when one is taking precautions not to cause significant damage to the commodity. Mr. Schacht responded stating that the committee will never be able to define that. He pointed out that the exception regarding container production in (b)(5) recognizes that there is a serious issue there. Employers can impose a reasonable productivity standard.

Mr. Matteis stated that with regard to employers having to prove that significant damage to their crop would occur when using a long-handled tool over hand weeding, he hopes the committee is not going so far as to suggest that any portion of the crop must be damaged in order to qualify for the exemption. He stated that there are obvious instances (e.g., tulip bulb operation) where no tools would work.

Mr. Hoerger pointed to (b)(3)(A), emphasizing that the "can reasonably be *expected* to damage the particular crop" might satisfy this concern. Mr. Roy pointed out an inconsistency, however, in (b)(3)(B)(ii), whereby the employer must demonstrate that the use of these tools and alternatives *caused* significant damage. Mr. Borden suggested using similar language to that drafted for container plantings in (b)(5), thus minimizing proof hurdles. Mr. Hoerger stated that (b)(5) had specific application and cautioned its use for general application. Mr. Matteis asked Mr. Mitchell and Mr. Smith about the enforceability of the proposed standard as to what Cal-OSHA would require. Mr. Smith referred to Mr. Matteis' example of a tulip bulb operation and concurred that few, if any, alternatives existed. Mr. Matteis also asked what would constitute a representative sample.

Mr. Matteis asked Mr. Mitchell and Mr. Smith how enforcement would determine "significant damage", and asked if there are other regulations that have defined this term. Mr. Smith stated he wasn't aware of any other standard using this term and said that it comes down to a judgment call by enforcement personnel. He stated that we shouldn't have to define every single term used; that is why we have an appeals process – a mechanism to overturn any unreasonable interpretation of an OSHA inspector.

Mr. Matteis stated that this answers his first question, but with regard to his second question pertaining to a "representative sample", he asked how much of his crop would he be expected to destroy under this rule: 1%, 4%, 5%...? Mr. Schacht stated that it doesn't work that way

because they're talking about a representative sample. Mr. Matteis responded saying that that addresses the demonstration issue, which is separate from making a determination, crop-wide, whether there is significant damage or not. Mr. Schacht stated that the dictionary definition of "significant" means large or substantial; they don't have a set number, and asked Mr. Matteis what he thought the number should be. Mr. Matteis responded stating that it would depend on the crop and what the margin is. Some years, any damage would hurt him economically. Mr. Falconer stated that with regard to nursery operations, any nick at the ground level is a pathway for disease, i.e., crown mold, and by Food and Agriculture regulations, the trees must be certified free from disease and pests for commercial planting or they are unsellable.

Mr. Schacht stated that "significant" may vary from crop-to-crop and that they're prepared to allow the agency (OSHA) to define, through experience, what that is.

Mr. Borden stated that complicating this issue is whether significant damage applies to all of the farmer's fields, or one in particular. Another concern he expressed was with regard to the concept of minimum penalties, e.g., the field sanitation issue, and how OSHA interprets and enforces something like a temporary lapse in field maintenance. Mr. Matteis emphasized that his question still stands with regard to how OSHA will interpret/enforce the regulation; what kind of guidance will they receive?

Mr. Schacht asked for a threshold determination from the growers about whether they're willing to proceed in clarifying the employee proposal and incorporate the growers concerns. Mr. Mitchell emphasized that the committee need not be concerned with being too language specific at this point and referenced a court case which backed an Appeals Board ruling that the language of a regulation is viewed in context of the regulation as a whole. He stated that inspectors have to make various judgments based on their knowledge of alternative methods, the cost of those alternative methods, and that this is done frequently. Mr. Smith pointed out that these same inspectors typically only respond to a complaint and that it still involves a judgment call on behalf of the inspector. The grower can demonstrate at that time that hand weeding was not a viable option. Mr. Smith stated that OSHA prides itself on being reasonable and working with employers and employees in resolving the issue in question; it will be a judgment call on a case-by-case basis and inspectors can rely on managers to assist them if/when necessary.

Mr. Hoerger followed up on Mr. Schacht's earlier question asking whether the growers are in a position of looking at the employee proposal. Mr. Webb asked whether he was proposing that the other two proposals be banned and work exclusively off the employee proposal. Mr. Hoerger responded stating that no, that is not what he is suggesting. He stated that an additional half-hour for lunch would not be needed if the growers have already decided that the employee proposal is unworkable. He continued stating that several issues have been brought up that the growers may want to review and discuss given a longer lunch hour. The growers agreed to a longer lunch hour and the meeting was adjourned for a 1 \_-hour lunch break to be reconvened at 1:30 p.m.

Upon returning from lunch, Mr. Mitchell proposed that the committee start reviewing the sections again, incorporating the suggestions of committee members. Mr. Meuter asked for a commitment from the employers that the employee proposal is workable - conceptually. Mr. Roy, speaking on behalf of the growers in attendance and without making any commitments, stated that conceptually, they are willing to continue their review of the employee proposal, although there are a number of issues to be addressed and resolved. Mr. Gabriel asked whether labor is suggesting that the committee reach an agreement today, stating that he sees the need for additional meetings along with consultations with their constituents. Mr. Meuter stated that if the committee can reach agreement today, great, if not, the committee can meet next week. Mr. Gabriel expressed concern about the press for time and being unable to discuss the proposal with their constituents. Mr. Schacht stated that labor is not in a position to allow any more delays in formalizing a proposal, stating that they have legislation they will pursue. Mr. Gabriel responded saying that labor will pursue legislation no matter what. Mr. Schacht reiterated his position stating that they will not wait another six weeks to meet. Mr. Gabriel asked what their deadline is, to which Mr. Schacht stated that if agreement is not reached today they would like to meet next week. Mr. Gabriel asked what if they don't reach agreement next week? Mr. Schacht responded that the committee can meet again the following week. Mr. Webb pointed out that at a previous meeting, Board staff noted that this process could take a year or more, and that now, somehow, labor wants to put this on fast-forward because of a bill they introduced. He stated that they can't operate this way and that labor needs to be realistic and reasonable about this. Mr. Schacht stated that they are in the thirteenth month after the petition was filed. Mr. Webb interjected that this is not the employer's timing and that they have not done anything to delay the process. Mr. Schacht stated that they disagreed with staff's determination that the process can take a year or more to arrive at a final rule. He stated that they feel they are extremely close to achieving a workable and reasonable rule and that if the committee is unable to reach closure in an expedited manner, labor will conclude that the committee has reached an impasse and they will pursue a legislative solution. Ms. Montgomery stated that when the staff was talking about the timing, they were referring to the rulemaking process, not the advisory committee process. The committee asked for clarification from the chairman. Mr. Mitchell responded referring to a range given by Mr. Manieri whereby the committee process can take anywhere from one day to over a year, depending on the complexity and controversial nature of a proposal. After review of the rulemaking time frame, Mr. Gabriel stated that they are not suggesting that they will string out the committee meetings for a year from today. Mr. Roy emphasized that they have no control over procedural processes. Labor was in agreement that there is no way to cut short that process. Mr. Bunn stated their need to get it back to the farm community and to discuss the proposal with their people. Mr. Schacht stated that the bill was printed on July 3<sup>rd</sup> and the bill is substantially identical to the staff proposal and their proposal. The changes that have been made since then are exemptions designed to increase the flexibility for employers and there is no problem with increasing those exemptions. He stated that the farm community has had this product for a long time. Mr. Schacht threatened to pass their bill, with amendments, if the committee does not reach agreement. Mr. Schacht stated that the two processes, the bill and the

rulemaking process, are interconnected. Mr. Schacht emphasized that the longer growers put off an agreement, the shorter the time frames become for labor, which makes it imperative for them to move the bill.

Mr. Mitchell continued that with that understanding, the committee will try to move forward with seeking agreement on the proposal. Mr. Roy expressed that there are about five or six concerns that they would like to address, beginning with (b)(3)(A) regarding “significant damage”. There needs to be clarification as to the quantity of plants for assessment purposes. Also, clarification is needed with regard to the standard of proof discrepancy between (b)(3)(A), “...can reasonably be expected to significantly damage...”, and (b)(3)(B)(ii), “...caused significant damage...” Mr. Roy continued stating that they would like to see a “good faith” provision, i.e., someone who has done everything to comply and yet an employee willfully violates a provision. Rest breaks, addressed in (d)(3), is yet another concern and is outside the jurisdiction of OSHA, but rather IWC. The concern was expressed regarding whether a long-handled hoe can effectively be used in the hole in the top of the plastic mulch where strawberries are grown, but it was pointed out that the employee draft already addresses this concern. Mr. Roy then continued his list of concerns stating that in subsection (e), they would like to see occasional hand weeding permitted that is not necessarily incidental to the use of a long-handled hoe to weed, thin, and hot-capp, but is incidental to activities other than weeding, thinning, and hot-capping. Mr. Borden stated that in (b)(2)(B), line 26, the term “if possible” is too low a standard that does not consider damage to the mulch; the word “possible” is a loophole which doesn’t take into account effectiveness or damage of the mulch.

Mr. Matteis brought up another concern from growers regarding damage to drip tape. Mr. Borden stated that this was addressed in line 7-8 of their (the grower’s) proposal. Mr. Falconer reiterated his earlier concern regarding the practicality of hand weeding vs. weeding with a long-handled hoe, stating that there are instances where one can weed using a long-handled hoe and not damage the crop, but that it would be cost prohibitive. He stated that he would like to see cost prohibitive language added next to the crop damage language in the proposal. Mr. Borden stated that there was one final point that hasn’t been discussed regarding whether the term “administrative or engineering controls” includes the spacing of crops or rows. Mr. Roy stated that this is a catch twenty-two situation because one of the ways California farmers are able to compete internationally is to get larger yields. Mr. Hoerger stated this to mean increased plant densities. Mr. Roy responded that this has been the practice for years in order to keep up with demand. Ms. Bogenholm stated that the more spacing there is between the crop, the more weeds there are growing in between the crops. Mr. Borden stated that this also doesn’t address those weeds growing close to the desirable plant. Mr. Roy also stated that they prefer the term “agricultural commodity” over “crop”, which would cover any type of fruit or horticultural issues. Mr. Roy concluded stating that within this conceptual framework, these were the grower’s concerns.

Mr. Schacht stated that labor has a number of issues that they would like to bring to the table as well. The first being the employer-provided tool issue. Mr. Schacht stated that they have a proposed definition for “reasonably available” where it occurs, and that they also want to discuss “significantly damaged” and what that means. Mr. Schacht stated that they want to deal with the issue when in a particular field, the use of a long-handled tool is able to be used; how to require that. Mr. Roy asked in what context does that arise, to which Mr. Schacht replied that it is in the exception provided in (3) and the standard of proof in line 44-45 of page one. Mr. Roy asked for clarification. Mr. Schacht stated that they want it made clear that long-handled tools or hand weeding alternatives are used in the field at all times where it is possible (see lines 1-2 of page 2 of the employee proposal).

The committee agreed to address these concerns via Mr. Mitchell’s approach, i.e., to begin review of the proposal section by section and when they come to one of these concerns, to talk about it. Mr. Mitchell suggested working off of the employee’s proposal, since nearly all of the discussion up to then referred to that proposal. Mr. Borden pointed out that the word “hand” is missing in line 8 of the employee’s proposal in the term “short-handled tool.”

Mr. Hoerger stated that with respect to the issue he raised this morning regarding clarification that all tools be provided by the employer, he proposes that starting in line 13 of subparagraph (b), after “the California Code of Regulations”, a period be inserted there and the rest of that sentence, i.e., “provided by the employer as otherwise required by California Law or regulations”, be deleted from subdivision (b) and a new subdivision (f) created to read in part, “Employers shall provide any (hand) tool that may be used by employees under this section (in accordance with applicable IWC Wage Orders).” Mr. Hoerger stated that although the “twice the minimum wage” issue is yet to be addressed, setting this requirement in a separate subsection clarifies that it is the employer’s obligation to provide whatever tool is required under this section. Mr. Roy asked whether this is even necessary in light of existing law, which requires that the employer provide any tool necessary to perform the work. A discussion ensued regarding a “note” in the law, which could be misinterpreted, although the law has not been challenged in the twenty plus years its been in effect. Also discussed, was whether a hoe is considered safety equipment or an ordinary tool to perform work. Mr. Roy asked whether the word “hand” to describe the type of tool in Mr. Hoerger’s proposed subsection (f) added clarification. Mr. Hoerger agreed that that would work. Mr. Borden suggested revising the requirement to read, “To the extent that the employer is legally required to do so, the employer shall provide any hand tool required under this section.” To which Mr. Hoerger responded saying that it sounded circular to him. Mr. Roy and Mr. Schacht suggested adding the phrase, “in accordance with applicable IWC Wage Orders.” Mr. Hoerger was in agreement.

Mr. Schacht continued the discussion directing the committee to line 20 of their proposal. He stated that they substituted for the additional qualifiers in the staff proposal, and deleted the requirement to weed within the transplant circle and the notion of damage to the mulch or sheets. Mr. Schacht stated that they added the limitation of the exception to circumstances where the use

of an appropriate long-handled tool to weed under or near the continuous plastic mulch or woven cloth sheets is possible. The committee was reminded of Mr. Borden's concern with the use of the term "if possible". Mr. Schacht stated that this language was chosen to avoid the terms "practicable" or "feasible". Mr. Schacht suggested amending this to include, "...without causing significant damage to the mulch or sheets." Mr. Borden suggested language based on previous committee discussions to read, "without damaging the effectiveness of the mulch." Mr. Schacht disputed that suggestion stating that Mr. Benitez came up with circumstances where weeds or crops breach the mulch, and added that there are times while in the furrow that the mulch can be pushed aside to weed with a long-handled tool.

Mr. Hoerger, in looking ahead, asked whether "significant damage" as applied to crops or equipment has the same meaning. Mr. Roy and Mr. Schacht concurred that there is a qualitative difference. Mr. Borden stated that if one were to define it, delete the term "significant" and define it' application to read, "...without causing damage to the mulch or sheets to the extent that..." and list the conditions. Mr. Hoerger expounded on his comment explaining that to his understanding, mulch typically has a one-time use and there is a certain acceptance that the mulch is going to get worn. Any small amount of damage to the crop, however, represents an economic condition. Mr. Roy concurred, and Mr. Hoerger stated that he wanted to clarify that significant damage to a crop has a different impact than significant damage to mulch. Mr. Schacht stated that in recognition of Mr. Hoerger's point, the committee may want to have different definitions for the term "significant" when it applies to crops vs. mulch. Mr. Schacht suggested inserting a placeholder with ["major damage"] in brackets, while Mr. Roy suggested putting the term "significant" in brackets.

Mr. Hoerger brought up the growers concern regarding damage to drip tape and expressed his concern that according to his recollection with regard to the short-handled tool issue, in northern Santa Barbara County/southern San Luis Obispo County they were finding a wholesale transfer to hand weeding and inevitably the rationale was that long-handled hoes would damage drip tape. Ms. Montgomery stated that they would have a problem with drip tape being a flat out exemption. They've seen weeding with long-handled tools in fields containing drip tape and that the use of drip tape alone should not be a valid exemption. Mr. Bunn described various applications of drip tape, stating that the grower would have to prove there would be significant damage to the tape when using long-handled tools. Mr. Roy suggested adding language at the end of (3)(A) that would address this issue. Mr. Borden suggested inserting the language at the end of line 7 of the grower's proposal, i.e., "...or other materials used in the production of the commodity." Mr. Hoerger asked for clarification between the terms "materials" vs. "equipment", stating that "materials" can include fertilizer. Mr. Bunn suggested leaving it open for both terms, arguing that even compost can be damaged in terms of what it was intended to do for the crop with respect to how it was originally laid down. Labor argued that this interpretation is then a complete exemption for organic growers and they cannot agree to such a broad definition of any and all conceivable equipment and materials used. Ms. Montgomery stated that it would need to be narrowed to materials necessary or integral to the operation. Mr. Roy asked what about

damage to materials that impact production. Mr. Matteis suggested using brackets to address later. Mr. Schacht agreed, suggesting placing them at the end: "...or [significant] damage to [irrigation systems], [equipment], [material] and used in the production of the commodity."

Ms. Katten pointed out that with regard to the selection of tools, there are some hoes that do not have sharp edges, like the scuffle hoe or circular hoe. Mr. Schacht stated that this would be a reason for them to oppose a blanket exemption for damage, stating that the variance process is available. He added that labor would not be able to give growers a comfort level with regard to every possible cultural practice or equipment change or other change in agriculture. Mr. Roy asked Mr. Mitchell about variances to which Mr. Mitchell discussed the availability of a permanent variance for any regulation. Mr. Schacht expressed concern regarding growers seeking permanent variances, stating that they would seek minimizing such variances via the language used in the proposal. Mr. Matteis stressed that his understanding of variances is that the employer must demonstrate equivalent safety and that the Board is very cautious of erring on the side of safety.

Mr. Schacht continued discussions on the proposal, directing the committee to (3)(A). He stated that earlier, growers expressed concern as to what is "reasonably available", contained in lines 29 of page 1, and line 27 of page 2 of the employee proposal. Mr. Schacht stated that labor intended the term is a "know/should know" standard. Mr. Roy responded stating that he interprets that to imply a cost factor; something is reasonably available if the cost is right and whether or not it is effective with regard to the operation. Mr. Schacht stated that there is disagreement with regard to "effectiveness", and that labor has made some concessions with regard to the cost factor, e.g., administrative and engineering controls as a means of mitigating the need for hand weeding. Mr. Roy asked for clarification as to how labor interprets "reasonably available", i.e., is it on the market, easy to obtain, doesn't cost very much, etc. Mr. Schacht reiterated labor's interpretation that this is a knowledge test, i.e., what do you or should you know is out there. Mr. Roy responded stating that if the employer doesn't know, they qualify for the exemption. Mr. Schacht stated that this is the inherent weakness in this approach and that there needs to be a duty upon employers to seek innovative solutions. Mr. Roy stated that the language is ambiguous and imposes upon the cultural practices of the grower, and/or potentially their profit margin. Ms. Guzman stated that growers can start utilizing precision farming techniques. Mr. Roy stated that they already are, while Ms. Bogenholm emphasized that this could be cost prohibitive for some smaller growers. Mr. Hoerger asked for clarification on the cost issue, stating that there are capital/operating costs vs. effectiveness. Mr. Schacht stated that unless other labor reps feel otherwise, knowledge and prohibitive cost should be in both of them. Ms. Bogenholm asked Mr. Smith how Cal-OSHA views/enforces the cost issue; do they make a determination as to whether the employer can or cannot afford a piece of equipment? Mr. Smith stated that they look at regulations in terms of their feasibility and gave an example of noise control measures for canning operations, emphasizing at what point do you stop throwing money at various solutions and just provide employees with earplugs. He also stated that they look at what the current industry practice is as to what is considered feasible.

Mr. Hoerger asked for clarification as to where the feasibility concept comes into play when you have various-sized operations. Mr. Smith stated that it is usually viewed as industry-wide. Mr. Matteis responded stating that his cost concerns were primarily regarding the spacing of crops and requiring expensive equipment. Ms. Bogenholm expressed her concern that Cal-OSHA would impose this broad cost determination on individual growers regardless of cultural practices or profit margin consideration. Mr. Schacht suggested putting a bracketed space holder at the end of (3)(A) (and the additional language) to read: [For purposes of this paragraph, a reasonably available, mechanical or cultural, non-pesticide, non-hand weeding alternative is one which the employer knows or should have known was available and was not cost prohibitive to implement.] The growers were in agreement.

Mr. Schacht continued the discussion of their proposal by reviewing the following clarifying changes to (3)(A) and (B) (excluding the previously discussed bracketed language, and with the proposal's underscored and deleted language incorporated):

(3)(A) The employer can demonstrate that proper use of an appropriate long-handled hand tool and any reasonably available mechanical or cultural non-pesticide, non-hand weeding alternative can reasonably be expected to significantly damage the particular crop planted in *THE AREA IN* the field at the crop's current state of development *FOR WHICH THE EXEMPTION IS CLAIMED*.

(B) To meet the burden of proof required for the exception provided in subparagraph (A), an employer must be able to demonstrate all of the following:

(i) There was a serious effort to attempt to properly use each reasonably available appropriate long-handled hand tool and each reasonably available non-pesticide, non-hand weeding alternative to weed or thin the *AREA OF THE* field for which an exemption is claimed.

(ii) The attempt to use these tools and alternatives caused significant damage to the particular crop planted *IN THE AREA* in that field at the crop's current state of development- *AND*

~~(iii) The attempt was conducted in an area of the field *FOR* which was representative of weed conditions observed throughout the entire field at the time the exception is claimed.~~

~~(iv)(iii) Where weed conditions in the field permitted it *EXCEPT AS PROVIDED IN (i) OR (ii) ABOVE*, appropriate long-handled hand tools or available non-hand weeding alternatives are used at all times.~~

Mr. Schacht then continued discussions regarding "significant damage". Mr. Roy asked if it refers to qualitative vs. quantitative. Mr. Matteis stated that there are factors to consider such as what the crop is and what the current market conditions are, etc. Mr. Roy stated that some

crops can sustain some damage and still be marketable, others, however, cannot. Mr. Hoerger stated that he assumes that most growers would agree that it pertains to harvest proceeds; its not a cosmetic issue, unless it affects its sellability. Mr. Matteis stated he agreed that generally this is the case. Mr. Hoerger stated that some percentage of loss is expected during harvest, transportation, etc. Mr. Roy agreed, but stated that intentional damage is not accepted. Mr. Hoerger asked if there is any commonality as to determine what is an acceptable loss. Mr. Matteis stated that the proposal expects a certain amount of loss to a certain amount of crop at a particular stage of development. Mr. Schacht stated that they are not expecting growers to destroy a percentage of their crop for test purposes. Mr. Matteis stated that he was o.k. with the demonstration part, but that he was more concerned with the potential damage caused by hoes vs. hand weeding, and that to achieve labor's safety goal, a percentage of the crop would have to be sacrificed.

Mr. Roy suggested tabling the concept of "significant damage" until the next meeting due to time constraints and the need to meet with their constituents to get different ideas. Mr. Schacht suggested that alternatively, they can put a placeholder that would define it as either substantial or 15% of the crop, and work up some demonstration language. The growers expressed concern over quantifying it and suggested doing it on a comparative basis, i.e., if the crop where to be weeded by hand. Mr. Schacht suggested placing "significantly damaged", where used, in brackets, revising the language himself and circulate the language to the committee members for review/discussion by Monday morning. Mr. Borden emphasized that a comparative basis language would probably work for the growers.

Mr. Borden asked if there was any reason as to why this is limited to hand weeding and not hot capping. Mr. Schacht stated that there was not, that it was merely a shortcut, but that it applies to both and he would insert this language in the next version.

Mr. Schacht directed the committee to lines 4-10 on page 2 of their proposal, stating that this was drafted with the assistance of Mr. Matteis, and expressed his concern regarding the language in lines 9-10 regarding third party contracts. Mr. Matteis responded, stating that this refers specifically to bailment contracts, i.e., they are interested in preserving their intellectual property rights – the growers don't own the seed or crop, they are only performing a service. Mr. Schacht asked whether there was ever a mixing of seed crop with traditional crops by these growers and expressed his concern that the exemption would be applied to an entire farm vs. a seed production operation only. Mr. Matteis offered to revise this section for clarity purposes.

Mr. Roy asked to review lines 41 and 42 of page 1 stating that as it's written, its requiring the grower to incur significant damage to qualify for the exemption as opposed to line 30 in (3)(A) whereby the demonstration involves the expectation of damage. Mr. Roy proposed the language read "could cause" for consistency and so that the grower need not damage the crop to prove the exception. Mr. Schacht responded that that would not be acceptable to labor, but that he hopes

to draft and incorporate a representative test in proposed new subsection (3)(B)(iv), which would encompass all areas with minimal damage.

Mr. Borden suggested replacing “effective” for “possible” in line 13 of page 2 of the employee proposal, but Mr. Schacht stated that they would have a problem with it. Mr. Roy suggested taking out the phrase, “is not possible without” and changing “causing” to “causes”. All parties were in agreement.

Mr. Schacht directed the committee to (d)(1) of the staff proposal, which was proposed for deletion, and stated that there is a need to retain that language. Mr. Schacht pointed out that they changed the phrase “minimize the degree of hand weeding” in (d)(2) of the staff proposal to read, “reduce or eliminate the degree of hand weeding” in line 26 of page 2 of their proposal; and, upon Board staff and Mr. Matteis’ suggestion, added the language that genetically engineered crops or use of administrative controls that are cost prohibitive are not required. Mr. Roy asked Mr. Schacht what he meant by placing a mandatory burden on employers to reduce or eliminate the degree of hand weeding and how will it be enforced or monitored. Mr. Schacht stated that the intent is not to make the exemptions permanent, but rather, stimulate innovation. Mr. Roy expressed concern that someone could arguably use this language later on to apply to labor in different contexts. Mr. Schacht conceded that though this could happen, he assured the growers that this is not their intent in utilizing this language.

Mr. Schacht addressed the committee stating that by the next meeting, everything that was bracketed should be defined. He then turned to the added language regarding rest breaks in (d)(3), and a discussion ensued regarding whose jurisdiction this falls in. Mr. Montgomery expressed her opinion that this would fall under the administrative controls mentioned in the proposal. Mr. Mitchell clarified that administrative controls might include a job rotation that limits an employee’s time of exposure to a hazard, but not necessarily a paid employee rest period. Mr. Borden clarified how rest periods are defined in the Wage Order. Ms. Ecks asked, even if the issue were not jurisdictional, what is the problem of giving an additional rest break? Mr. Roy responded that it depends on the nature of the work; there’s an assumption being made that any hand weeding is damaging. Growers asked for clarification as to when sporadic/intermittent hand weeding becomes continuous hand weeding. Mr. Schacht stated that they tried to avoid those problems by imposing this obligation only on entities which successfully exempted themselves entirely from the standard. The discussion on rest breaks continued with no agreement being reached. Mr. Schacht suggested bracketing the section to be reviewed at a later date.

The last item to be covered was subsection (e). Mr. Schacht addressed the grower’s concern regarding brief, isolated hand weeding incidental to use of a long-handled hoe. Mr. Schacht suggested dividing subsection (e) into two parts to address brief, isolated hand weeding that is incidental to a non-weeding operation, i.e., laying irrigation pipes, and placing the entire subsection in brackets to be reviewed/considered.

Mr. Schacht stated that there were a number of other issues that had not been addressed, including the good faith defense and the “crops” vs. “commodity” definition. Mr. Hoerger stated that the issue of unapproved employee activity is always the defense available for the prosecution of the violation of any standard. Mr. Hoerger stated that procedurally the employer is still in the same position of having to argue his case and that having a good faith defense wouldn’t change this. Mr. Roy said he’d give some thought as to further examples.

Mr. Schacht addressed the committee stating that he would prepare a revised draft and submit it to Mr. Mitchell and the committee members as quickly as possible, and that for the next meeting the committee should be prepared to define/resolve the bracketed issues raised during this meeting, including the good faith defense and the “crops” vs. “commodity” definition mentioned above. He suggested the committee meet again the following week. There was much debate as to how soon everyone was available to meet. Labor emphasized that they are not willing to wait more than a week to meet and suggested meeting outside of the Cal-OSHA advisory committee meeting platform. In addition to schedule conflicts, the growers argued that this may not give them time to review the proposal with their constituents and pointed out that labor is looking at legislative deadlines. Finally, the committee tentatively agreed to meet the following Friday, August 8<sup>th</sup> and Mr. Schacht stated that he would have the revised proposal e-mailed to committee members by Saturday, August 2<sup>nd</sup>.

The meeting adjourned at approximately 4:00 p.m.