

**OCCUPATIONAL SAFETY
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JUNE 20, 2003

Tom Mitchell, Senior Industrial Hygienist, called the meeting to order at approximately 10:15 a.m. Also present from Board staff were Michael Manieri, Principal Safety Engineer, and Donna Lively, Staff Analyst. Committee members present were Emanuel Benitez, CRLA, Inc., Carl Borden, California Farm Bureau Federation, Bob Falconer, California Association of Nurserymen, Fadi Fathallah, University of California-Davis, Roy Gabriel, California Farm Bureau Federation, Marta Guzman, United Farm Workers of America, Anne Katten, California Rural Legal Assistance Foundation, Ted Kubota, California Floral Council, Thomas Lanini, University of California-Davis, Richard Matteis, California Seed Association, Julie Montgomery, California Rural Legal Assistance Foundation, Cynthia Rice, California Rural Legal Assistance, Inc., Mark Schacht, California Rural Legal Assistance Foundation, Steve Smith, Division of Occupational Safety and Health, and Michael Webb, Western Growers Association. Also present were Howard Rosenberg, University of California Berkeley, Kristy Schultz, Division of Occupational Safety and Health, and Rick Hight, Division of Occupational Safety and Health. A. G. Kawamura, Grower, participated by speakerphone.

Mr. Mitchell briefly discussed the role of advisory committees in the rulemaking process and the Board staff's proposed amendments to Section 3456, which were distributed at the beginning of the meeting. He explained that the staff proposal is a starting point for discussion, and that it is based on the petitioner's proposal but is somewhat different in structure and approach. He said that the proposal would be discussed in detail after the committee briefly reviewed some of the key points of the previous two meetings, and had an opportunity to read and become more familiar with the staff proposal.

Mr. Mitchell summarized the presentation made by the labor group at the first advisory committee meeting on February 6, 2003, and the presentation made by the growers group on March 24, 2003. He then presented the following items, which he identified from the minutes of the previous two meetings as areas that the two groups generally agreed upon:

1. Support the development and use of agricultural practices and weed control methods that minimize the need for hand weeding.
2. The use of long-handled hand tools is not practical for weeding where plastic mulch or woven cloth is used.
3. The use of long-handled hand tools is not always practical for all crops and growing conditions.
4. Some hand weeding, including that done intermittently and/or occasionally is necessary and should not be prohibited.

5. The use of short-handled hand tools should not be permitted.
6. Currently, there are instances where hand weeding is performed all day and may continue for at least a few days.
7. Long-handled hand tools are currently used on many crops.
8. Hand weeding should only be done as a last resort after other available weed control methods have been implemented.
9. More research is needed on the issues related to hand weeding.
10. The issues raised regarding hand weeding can be resolved.

Ms. Montgomery commented that item nine regarding the need for more research was a little vague. Mr. Mitchell noted that there are specific issues surrounding each of the areas of general agreement, and that labor and management might not agree on all of these issues. He explained that the comments he heard from both groups indicated that there was general agreement that more research and information related to the broad issue of hand weeding, including alternative tools and health effects, would be a good thing.

Mr. Borden stated that item five, which states that short handled tools should not be permitted, should more accurately specify that their use should be prohibited when used in a bent, stooped, or squatting position. Mr. Mitchell agreed.

Ms. Montgomery commented that she did not like the use of the word “some” in item four. She thought it was too broad and needed to be replaced with something very limited. Mr. Webb said that then it wouldn’t be an area of general agreement. Ms. Montgomery responded that then it (item four) needs to be taken out. Mr. Webb proposed to strike out the word “some”. Mr. Mitchell said that item four was intended to recognize that there are times when hand weeding is necessary. Ms. Rice said that items 2, 3 and 4 should all be modified by the adjective “currently” reflecting the fact that more research is needed regarding alternatives. Mr. Mitchell said that he wasn’t suggesting that the language, which he used to summarize the areas of general agreement, should be used in the proposal. Ms. Montgomery said she appreciated Mr. Mitchell’s intent but she was concerned that the items of agreement would go into the record as they are, when in fact the committee could spend considerable time marking up the text. Mr. Mitchell said that the current discussion, including the concerns she expressed, would go into the record. He said that it was fine to bring up these concerns but he didn’t think that the committee needed to wordsmith the list of items, that there will be an opportunity to be very precise about the language of the proposal, and that the comments regarding this general objection to the list will be recorded in the minutes. Mr. Borden said he liked the use of the word “some” because it was vague and that he doesn’t object to the use of the word “currently”, however he thinks it is redundant because of the use of the word “is”, which denotes present tense.

Mr. Mitchell said that the minutes would recognize that the two groups did not agree with some of the specific issues surrounding the areas of general agreement, and that some committee members objected to the wording used in some of the items listed.

Mr. Mitchell directed the committee's attention to a handout containing the following list of items, which he compiled from the grower's presentation, of crops and/or conditions that might require hand weeding or thinning:

1. Hard to see weeds because of dense crop and/or plant cover. (cabbage)
2. Little spacing between plants. (carrots, onions, leeks, garlic)
3. Must remove weeds (and any damaged plants) from plant bed before harvesting. (spring mix lettuce, parsley)
4. Weeds growing immediately next to plants.
5. Removing doubles.
6. Nursery plants in containers.
7. Weeds under organic grapes on steep hillsides.
8. Various plants grown for seed.
9. Use of drip tape.
10. Use of plastic mulch or woven cloth.
11. Use of netting to support flowers.
12. Use of long-handled hoe might not kill the weed.
13. Use of long-handled hoe can be cumbersome when one hand is required to carry a bag to dispose of weeds, move aside large leaves, or gather the harvested plants.

Mr. Mitchell said it might be useful to discuss the list before discussing the proposal. He proposed that the committee review the list for commonality, which might be used to describe any exceptions to the use of long handled tools rather than listing specific crop-by-crop exceptions. He noted that the Board staff proposal attempted to avoid listing exemptions for specific crops.

Mr. Borden said that the issue of a hoe turning up dirt, which contaminates organic spring mix when harvested, was missing from the list. Mr. Schacht said the farm workers strongly disagree with the grower's assertions, that the list should not be characterized in any manner that implies that labor agrees with the statements, and that labor has presented information that disputes the assertions made on the list. Mr. Mitchell said that the list, although attached to the list of areas of agreement, was not intended to represent areas of agreement, but was intended to be a tool for discussion of issues. Mr. Webb said he believes that the list is not comprehensive.

Ms. Montgomery said that she would prefer to discuss the proposal and discuss the issues as part of that discussion, rather than discussing them separately now. She also said that she wanted to clarify that labor does not agree that more medical research is needed on the effects of hand weeding, which could be assumed from reading item nine in the list of general areas of agreement.

Mr. Schacht reiterated that labor does not agree with the list of circumstances that might require hand weeding, and agreed with Ms. Montgomery that the discussion should move to the

proposal. The committee adjourned for 15 minutes to give everybody a chance to review the staff proposal.

After the break, the committee began discussion of the Board staff proposal. Mr. Webb asked Mr. Mitchell if he would begin the discussion by explaining the rationale behind the amendments that he made. Mr. Mitchell said that the staff proposal, like the original petitioner's proposal, requires the use of a long handled tool, and provides exemptions for circumstances where a long handled tool cannot be used; however, the staff proposal takes a slightly different approach than the petitioner's proposal.

There was no discussion of subsection (a).

Mr. Schacht began the discussion of subsection (b) by requesting to restore the language that was removed, so that it is clear that there is no relaxation on the prohibition on the use of short handled tools. He stated that restoring the language would not be redundant, and does not harm the regulation. Ms. Rice concurred with Mr. Schacht and said that the prohibition on short handled tools is not adequately stated in subsection (d)(1). Mr. Borden noted that the petitioner's proposal did not preserve the ban on the use of short handled tools. Mr. Meuter responded that that was because the petitioner's proposal was for a new, separate regulation in addition to the existing section 3456. Mr. Schacht said that DOSH commented that the petitioner's proposal might be read to no longer prohibit short handled tools and recommended that the proposal be modified to address that concern. Mr. Schacht said that if the prohibition is not clear, they agree with the DOSH recommendation. Mr. Borden noted that the introduction to the petitioner's proposal states that the purpose of the petition is to amend the existing regulation. Mr. Schacht stated that labor would not support any regulation that might appear to dilute the existing prohibition on short handled tools. Mr. Meuter asked if this wasn't just an academic discussion, since the growers support the existing prohibition on short handled tools. There was general agreement expressed by Mr. Webb and other grower representatives to restore the stricken text.

Mr. Kawamura said that stooping, squatting, and kneeling was inherent in agricultural work. He was concerned about extending the prohibition from weeding and thinning to other activities such as harvesting. Mr. Smith said the proposal just continues the language that was codified twenty years ago. Mr. Schacht said that labor is concerned about workers being injured when stooping, squatting and bending while performing agricultural work other than weeding and thinning, but that is not the subject of this petition. The subject of the petition is to close a loophole in the existing ban on short handled tools used to weed, thin, or hot cap, so that hand weeding, thinning, and hot capping is not treated as a permissible alternative to the use of short handled tools.

Mr. Schacht wanted to clarify that labor and management are not bound by any agreement reached by the subcommittee members today, because there are others, including the committee members, that need to be consulted before signing off on a final proposal. Mr. Webb said he

agrees with Mr. Schacht and that he would need to share today's discussion with growers. He said that today's meeting is a good opportunity to ask questions and identify and discuss issues, but he could not say what is acceptable language on behalf of others that are not here and need to be consulted. Mr. Smith noted that at the previous meeting the committee agreed to form a subcommittee to develop a proposal that would be presented to the full committee for their consensus.

There were no changes suggested to subsection (b)(1) so Mr. Mitchell directed the discussion to subsection (b)(2). Ms. Montgomery said that labor would not concede that this subsection would allow hand weeding in furrows between the mulch. Mr. Gabriel said he thought the intent of the language is to allow hand weeding under the plastic. Ms. Rice suggested changing text to, "for weeding of the crops that are grown under". Mr. Borden asked who has the burden of proof when the use of a long handled tool is not possible, as that term is used in subsections (b)(2) and (b)(4). He asked if there was any precedent in regard to enforcement and use of the term "possible" in other Cal/OSHA standards. He objected that "not possible" is such a high standard. He asked if the grower would have to prove that it is impossible, which he said could not be done since it would require proving a negative. Mr. Smith asked if he proposed to eliminate the last part of the sentence after "and". Mr. Borden responded that that is correct. Mr. Manieri asked about using the word "impractical" or "infeasible". Mr. Borden said that that is better but he is still concerned with the burden of proof standard. Mr. Manieri said that there is precedent in using the term impractical in the fall protection standards and the burden falls on the employer. Mr. Schacht that they used the word "impossible" in all of their proposals because a high standard is necessary in this case since meeting the condition would provide an exemption from the entire standard and all of its provisions. Mr. Schacht said he was not as concerned with lowering the standard by replacing the word "impossible" in subsection (b)(2), as he would be in other subsections, such as (b)(4). He stated that labor wants to preserve the distinction between "impossible" and other suggested terms like "impractical" or "infeasible". He said labor's intent was to provide an exception for mulch, but to require the use of a long handled tool in the growing hole, when possible.

Mr. Mitchell asked if the issues surrounding the exception for mulch were restricted to weeding only, or is thinning and hot-capping also a concern. Mr. Kawamura noted that strawberries send out runners under the mulch, which must be trimmed, and could be considered a type of thinning. Mr. Mitchell proposed that the subsection be revised to state; "Weeding and thinning of crops grown under..." and several members indicated the revision was acceptable. Mr. Schacht said that it was his understanding that weeding and thinning under the mulch was not possible, so the last part of the sentence beginning with "and" could be deleted if his concern with weeding in the growing hole was addressed. Mr. Smith said that the term "infeasible" is used in Cal/OSHA regulations more often than the term "impossible". Mr. Schacht said that he would review case law interpreting use of the word impractical, infeasible, and impossible. He acknowledged that Mr. Borden raised a legitimate point about the use of "impossible" and the burden of proof. Mr. Manieri said that another approach is to specify or clarify in the regulation the conditions that

make the use of the long handled tool infeasible. Mr. Gabriel asked if the concept of economic hardship came into this. Ms. Rice said that economic hardship goes beyond the interpretation of feasibility in regards to OSHA regulations. Mr. Smith said that “feasible” is more often interpreted as “technically feasible”. Ms. Rice said that during lunch she would consider additional language to define the portion of the crop that could be hand weeded, such as that portion growing under the mulch. Mr. Gabriel asked Ms. Rice if she could not see that hand weeding in the growing hole might be necessary in some circumstances. Ms. Rice said that if that were the case the other exemption would apply. Mr. Lanini said that weeds generally do not grow under the mulch, so most of the weeding would be in the growing hole. Mr. Benitez said that a lot of weeds grow through the plastic. Mr. Lanini said that weeds with sharp spines could puncture the mulch. Mr. Schacht said that there are many plants grown under mulch, some of which are not as dense as strawberries and not as difficult to weed in the planting hole. He again expressed that the exemption needs to be precise.

The meeting adjourned for a one-hour lunch break and when it reconvened Mr. Borden suggested that the text at the end of subsection (b)(2), “is not possible” be replaced with “would likely damage the mulch or sheets”. Mr. Schacht responded that he preferred replacing “possible” with “feasible”. Mr. Manieri said that the burden of proof is on the employer to demonstrate why it is not feasible to implement a requirement. Mr. Manieri described a pile driving regulation, which requires establishing an exclusion zone of a specific diameter around an erect pile, however compliance with this provision may not be feasible when there are existing structures in the area. In this case the regulation specifies that the employer develop and implement a written safety plan when the prescribed safety zone is not feasible. Roy Gabriel said he did not want to create a situation that would require a written analysis be developed for Cal/OSHA and meanwhile the crop can't be hand weeded and is rotting in the field. Mr. Schacht said that he understands why the employer would want to have some guidelines in the standard regarding the burden of proof necessary to demonstrate long handled tools are not feasible, but he thought this could be done and it is important to include a feasibility requirement as part of the exemption for mulch. Mr. Meuter said that he is concerned with Mr. Borden's proposed language regarding damaging the mulch because a poorly designed tool would be more likely to damage the mulch than an appropriate tool. He proposed adding language to subsection (b)(2) that was in the petition, i.e. “The exception provided herein does not apply to spaces between crop beds or any other circumstance where continuous plastic mulch or woven cloth sheets are not present.” Mr. Webb explained that using a long handled tool to remove a weed growing through or immediately next to the mulch would likely damage the mulch so that is why Mr. Borden's proposed language is necessary, and it would also fit labor's definition of between the crop beds, etc. Mr. Mitchell asked Mr. Meuter if subsection (d)(2) would address his concern about the employer's obligation to use the best available tool. Mr. Mueter said that it might. Mr. Schacht said he was concerned about the use of the term minimize in subsection (b)(2). Ms. Rice said that it is not clear what would constitute damage to the mulch, and use of this term would place a burden on enforcement. Mr. Benitez said that a long tool could be used to weed under the edge of the mulch without damaging it. Mr. Gabriel replied that it is not that simple in the field. Mr. Borden asked if there

were objections to incorporating both “damage to the mulch” and “feasible” in the subsection. There was a pause in the discussion while this was considered. There was no clear response indicating either agreement or disagreement. Mr. Schacht suggested adding language to the effect that the exception does not apply when use of an appropriate long handled tool in the growing hole is feasible. Mr. Mitchell said that the growing circle and area between the rows seem to be addressed by labor’s suggested additional language. Mr. Mitchell suggested considering adding “significant” before damage or defining damage as that which would allow weeds to grow. Mr. Smith suggested that the language, which clarifies what constitutes damage in terms of the effectiveness of the tarp to prevent weed growth, could be added to the end of the subsection. Mr. Mitchell asked if the language could be included as a note in the regulation. Mr. Manieri said that the note would not be enforceable and therefore it might be better to include the language in the text of the standard. Mr. Borden asked how standards are interpreted when the language is not clear as to how it applies to a specific situation. Mr. Smith said the DOSH policy and procedure cannot substantively interpret what is written, but it can guide staff on how to enforce a standard, for instance, based on a Decision after Reconsideration by the Appeals Board. Mr. Manieri recommended being as specific as possible when developing the regulation. Mr. Borden agreed with Mr. Manieri. Mr. Borden said they would discuss the suggested language with the growers to clarify and address the issue of damage to the mulch. Mr. Schacht summarized the agreed upon language of subsection (b)(2), as follows: “Crops are grown under continuous plastic mulch or woven cloth sheets; the exception herein does not apply to spaces between crop beds or any other circumstances where continuous plastic mulch or woven cloth sheets are not present; and the exception provided herein does not apply when the use of an appropriate long handled tool to weed and thin in the transplant circle is feasible.”

Mr. Meuter proposed adding a third exception to address Mr. Benitez’s description of weeding under the edge of the mulch. Mr. Benitez explained that the situation he was talking about is not the same as what Mr. Meuter described. Mr. Mitchell suggested that the exception regarding damage to the mulch might cover the proposed exceptions regarding between the beds and within the transplant circle. Mr. Schacht said that he objects to the concept of damage and that it is not related to the other issues. He also said that he would like to have labor’s concerns spelled out in the regulation. Mr. Kawamura said that some species of weeds, which are growing between the rows, would continue to grow if they are cut out with a hoe, which is one reason why they remove the weed by hand, which is done intermittently but may need to be done more frequently by the organic growers. Mr. Schacht suggested that the situation Mr. Kawamura described might not be a problem because he stated that it was intermittent, which is allowed. Mr. Kawamura responded that he thought the group was trying to eliminate more extensive hand weeding, which is done for long periods of time. Mr. Schacht responded that they are not trying to eliminate occasional, intermittent hand weeding. They are trying to eliminate unnecessary hand weeding, which could be done with an appropriate long handled tool. Mr. Lanini said that he thought that, in most instances, long handled tools could be used in the furrows between the beds, even for large weeds like malva. Mr. Smith suggested that staff could propose language to complete

subsection (b)(2), which could then be considered at the next meeting. Mr. Mitchell said that suggestions could also be sent to him to share with the subcommittee.

Mr. Mitchell asked for comments on subsection (b)(3). Mr. Kawamura asked what the grower must do to “demonstrate that a long handled tool can reasonably be expected to significantly damage the crop”. Is it sufficient to just attempt to weed with the tool and show an inspector the damage that it causes? Mr. Smith replied that that would seem to satisfy the requirement. Mr. Webb asked what “significantly damage” means. Mr. Mitchell said one interpretation is that the crop doesn’t survive or cannot be marketed. Ms Rice said that brings up the question of what is a crop. She remarked that even hand weeding kills some plants when they are stepped on, etc., so the damage to one plant can’t be considered significant. Significant damage would need to affect the integrity of the whole crop, not just a plant. Mr. Webb said that you have to look at the situation where the value of the crop is reduced. He said the term significant is open to interpretation. Ms. Montgomery said the point is that “crop” is not one plant but is the entire field and significant damage should be judged on damage to the field not just a plant. Mr. Schacht said the subsection could be improved by requiring that the employer demonstrate that any appropriate tool or method, such as a flame, can reasonably be expected to damage the whole crop. Mr. Webb asked why the burden of making a demonstration is placed on the employer. Ms. Rice replied that hand weeding is unsafe according to the 1993 memorandum from the DOSH Medical Unit, and the employer must demonstrate that there is no other available alternative. Mr. Matteis asked why the exemption is restricted to a specific stage in the plant’s development. Mr. Mitchell said that the grower’s presentation indicated that, for example, a crop might be weeded with a hoe when the plants are small but might require hand weeding when the plants are larger, because the weeds cannot be seen under the plant’s leaves or the plants grow together so there is not enough space between the plants for a hoe, such as a mature lettuce bed. Mr. Matteis remarked that there are other reasons that a crop might be damaged that have nothing to do with the stage of development. Mr. Falconer commented that it might be possible to use a long handled hoe but not practical if you had to be so careful around the plant that it took too long to weed to be economical. Mr. Borden asked what the word “crop” was intended to mean when staff developed the proposal. Mr. Mitchell said Heidi Smith chose the word “crop” and not “plant”, but he could not say what her intent was, other than she usually chooses her words carefully. Mr. Matteis said that the seed industry does have some plants that are so valuable that damaging just a few plants would be a significant economic loss. Mr. Webb said that the word “crop” could mean any number of plants and that he didn’t agree that it could not refer to one plant.

Ms. Guzman asked Mr. Webb if his use of the term “mature plant” meant “ready to harvest”. Mr. Webb replied that that is not what he meant. He said the term “mature” is vague, that he meant larger, and that it would probably be better to say, “more mature plant”. Mr. Schacht asked if the growers did not have some ballpark estimate on the number of plants that might be damaged by the use of a long handled tool before it became a significant economic loss. He thought there should be something that they could agree upon, but a single plant is not acceptable

because it exempts the entire standard and that would force labor to propose removing the exemption. Mr. Borden said he didn't think that the growers have the type of quantitative risk assessment that Mr. Schacht is suggesting. Mr. Borden said he believes that growers rely upon their own experience in managing their fields. He didn't think that there is a clear line that defines when a long handled tool would significantly damage a field. Mr. Schacht said that the burden appropriately falls on the grower to demonstrate damage, so that they might fall under the exemption. Mr. Kawamura said that labor was missing the concept that the regulation should focus on hand weeding that is done continuously for long periods of time. He said management has not agreed that hand weeding is unsafe, and labor's assertion is that hand weeding all day is unsafe. He said labor's proposal punishes the grower who has a weed problem, such as when heavy rains cause weeds to grow faster than new plants, and would cause growers to lose entire fields in some conditions. He wants to address the worker who weeds all day long for several consecutive days. Mr. Borden said the DOSH report states that hand weeding for substantial lengths of time is unsafe. The proposal's approach ignores the time factor. He doesn't feel labor has met the burden of proof from the standpoint of providing epidemiological evidence, which is applicable to hand weeding, and that the studies referred to in the DOSH Medical Unit memorandum are not analogous to hand weeding.

Ms. Rice said that subsection (b)(3) is an exception to the whole rule; it is not an exception for pulling out the occasional weed. It presupposes that upon demonstration of significant crop damage the employer could implement hand weeding all day, so the application of the exception must be dramatically limited by crafting the subsection carefully. She noted that the grower's presentation stated that hand weeding is generally more expensive than using a tool, so the growers must make an assessment of when to incur that extra expense and weed by hand. Labor is asking the growers to make that assessment in terms of something that can be quantified in terms of a lost yield. Mr. Schacht said that if the growers object to having a burden placed on them to demonstrate damage to the crop and project the damage to the entire field, then labor would propose to remove the exemption because it would provide a means to circumvent the standard. He said that it is reasonable, for example, that an employer provides workers with an appropriate tool to weed, and 20 minutes later shows an inspector that the activity has significantly damaged the crop. Without the demonstration the employer can walk right into the exemption. Mr. Smith suggested adding "feasible" to the subsection to say: "it is not feasible to use a long handled tool without significantly damaging the crop". Mr. Schacht said that the current language makes it clear that the burden is on the employer to make a reasonable, objective demonstration. Mr. Borden said that, when an inspector did not agree with the grower's assessment and cited the grower, it would be difficult for a grower to prove the significant damage requirement in an appeals hearing. He is concerned that the exception does not provide any protection for the employer who has to make a decision in the field about how to weed a field. Mr. Borden also disagreed with labor's approach that, to him, seems to use the opinion expressed in the memorandum from the DOSH medical unit, which asserts that bending while hand weeding causes back injury if done for extended periods or time, to support a proposal that requires carving out exemptions to a ban on all hand weeding, including activities that are not

addressed in the memo, such as stooping and squatting, and bending for much shorter periods of time.

Mr. Mitchell suggested trying, as much as possible, to align agricultural practices, which attempt to limit hand weeding, with the language of the regulation. In response to Mr. Borden's comments, Mr. Schacht said that labor's position is not a leap, because the Carmona decision turns on whether safer alternatives are available in this area. He stated that bending over just once is a marginal ergonomic work practice. Hand weeding requires that this be done lots more than just once, and over the course of a work career. He doesn't think labor would have a problem demonstrating hand weeding is unsafe, if the proposal is crafted to allow hand weeding only when there is no appropriate long handled tool available. Mr. Matteis said the language that was proposed, which used the word "feasible", would work better for the seed industry because "damage" is not always the issue but rather the ability to remove the weed, such as when weeding under water in rice fields, thinning plants by sex, weeding through the mesh that is used to support plants, or when removing a weed that is wrapped around a plant. Mr. Schacht said that this may be a case for providing another separate exception. Mr. Matteis responded that it could be. Mr. Schacht said that the burden should be on the employer to demonstrate, by some objective means, their way into an exemption. Mr. Schacht suggested that growers could be provided informational materials about what is needed to demonstrate that a specific exemption applies in a specific instance, for example a video of the damage caused by use of an appropriate tool. Mr. Schacht said that he acknowledges there are instances where tools cannot be used and that these should be exempted, but he is concerned about where the burden of proof falls and that it is appropriately high. Mr. Schacht suggested that the proposal include a provision that recognizes that the use of a short handled tool, in a specific instance, is conclusive proof that a long handled tool can be used. He also suggested that the regulation state that failure to provide personal protective equipment (PPE) for hand weeding would disallow an exemption. Mr. Borden said that it was not logical to conclude that a long handled tool can be used wherever a short handled tool can be used, whether it is for hand weeding or for harvesting, and labor has agreed that such is not the case for harvesting. Mr. Benitez said he has seen instances where short handled knives were replaced with long handled knives for hand weeding. He said he was also aware of an instance where Cal/OSHA cited an employer for weeding broccoli with a short handled tool. In response, the grower told the workers to weed by hand.

Mr. Kawamura commented that subsection (b)(4) provides an exemption to certified organic growers that is not available to non-certified growers who choose not to use pesticides. He also noted that some pesticides have plant back restrictions, which prevents planting many types of plants in a field where the pesticide has been used previously. He does not support having a subsection that separates out different kinds of agriculture. Ms. Rice said that subsection (b)(4) was redundant with subsections (b)(2) and (b)(3). She agrees with Mr. Kawamura that different types of agriculture should not be separated out. Mr. Webb asked why subsection (b)(4) was added. Mr. Mitchell replied that, at this time, he could not think of anything other than the obvious reason, which is that organic growers cannot use chemical herbicides, which are one of

the most commonly used weed control options. Mr. Manieri said that a further explanation might be found by referring to the organic growers presentation on page seven of the minutes from the last advisory committee meeting. Mr. Matteis asked why other organic crops were not included. Grapes were mentioned during the ensuing discussion, and Mr. Lanini said he thought that it would be possible to use a long handled tool to weed grapes. Mr. Webb said he would have to see what the organic growers position is regarding eliminating subsection (b)(4). Mr. Borden noted that non-organic growers do not have a similar exemption that would allow them to hand weed, even if the use of a long handled tool is not possible, which is an extremely high burden. He asked if that was consistent with labor's position. Mr. Schacht said that their position is that a tool must be used for hand weeding when it is available or can be developed. He said that tools are being developed and mentioned, as an example, a tool that was developed in Salinas Valley for weeding lettuce. He said there should be a burden on industry to develop and use such tools. Mr. Webb asked that information, such as the tool that Mr. Schacht referred to, be shared with the group, so it can be evaluated. Mr. Schacht said he has a brochure on the tool he mentioned and some literature on other tools that they acquired by searching the Internet, and that they would provide these to the committee Chair to distribute.

Mr. Mitchell summarized that the discussion regarding subsection (b)(4) was primarily to consider deleting it. Mr. Schacht said that labor opposes any blanket exemption to organic growers, certified or otherwise, and that organic growers should have the burden of demonstrating that long handled tools cannot be used and must provide very specific information on specific crops in order for labor to consider an exemption. Mr. Webb asked if (b)(4) would be struck from the revised proposal. He asked Mr. Schacht if it would be acceptable to labor to leave it in until Mr. Webb circulated it to the organic growers. Mr. Schacht suggested noting in brackets that labor wanted (b)(4) stricken. Ms. Rice noted that it was not just labor that suggested striking it. Mr. Borden said that the concept of (b)(4) was not subsumed in (b)(2) and (b)(3) because the latter subsections did not go far enough in addressing all of the circumstances where it is not practical to use long handled tools. He wants an exemption that would address all of these instances regardless of crop. Mr. Mitchell asked Mr. Borden to submit suggested language to him for (b)(3). Mr. Schacht said he totally opposes that type of exemption, because it guts the regulation. He recommended that any suggested language should include how the employer will demonstrate that it is impractical. Ms. Guzman said her communications with organic growers indicated that their operations would not need special consideration other than what could be addressed in subsections (b)(2) and (b)(3).

Mr. Mitchell asked if there were any comments on subsection (c). After hearing none, he moved on to subsection (d) and (d)(1). Mr. Schacht said that, as written, use of the term "prohibit" did not prevent the employer from allowing the use of a short handled tool, and he wanted the language changed so that the employer could be cited whenever a short tool is used. Mr. Smith asked if (d)(1) was needed if the prohibition was reinserted in subsection (b). Mr. Webb and Mr. Schacht agreed that (d)(1) was not needed in that case. Mr. Borden noted that California

Administrative Code should be changed to California Code of Regulations and that “or” should be “of”.

Mr. Kawamura said that he supports protecting workers from continuous hand weeding for long periods but he thinks the direction the proposal is taking would increase herbicide use and mechanization and be a financial burden on growers who are not able to do these things, and would also limit farm worker jobs.

Mr. Webb asked what is meant by “administrative and/or engineering controls” as used in subsection (d)(2). Mr. Smith explained that both terms are commonly used in the OSHA regulations. Engineering controls typically correct a hazard through the use of some sort of mechanical device. Administrative controls typically involve some sort of work practice such as rotating workers to limit the time they are exposed to a hazard. Mr. Schacht suggested beginning the subsection with “reduce or eliminate” in place of “minimize”. Mr. Matteis said that he did not have a problem with “reduce”, but he did with “eliminate”. Mr. Smith noted that the subsection would encourage the use of alternatives other than a long handled tool. Ms. Montgomery noted that subsection (b)(1) would also allow the use of appropriate alternatives to a long handled tool. Mr. Matteis asked if subsection (d)(2) would require the use of genetically engineered crops. Mr. Schacht said a note could be added to clarify that the regulation does not require the use of genetically engineered crops. Mr. Webb said that if engineering and administrative controls include cultural practices, like plant spacing and the location of plantings, as they appear to, he thought that the growers might have a problem with the subsection, in which case he would try to provide alternative language to address their concerns. Mr. Matteis suggested the group develop revised language to discuss at the next meeting. Mr. Mitchell agreed, and asked that suggestions be provided to him before the meeting. Mr. Schacht said the subsection is acceptable to labor, and he was opposed to any revision that would exclude cultural practices from the required controls. Ms. Rice suggested reversing the phrases in the subsection; i.e. “implement ... controls to reduce ...”. Mr. Matteis said that the employer group would consider that suggestion.

The discussion moved to subsection (d)(3). Ms. Katten said that personal protective equipment (PPE) should be provided without workers having to request it. She also asked that “at the minimum” be inserted between “including” and “gloves” to indicate that there might be other PPE that is appropriate and should also be provided. Mr. Manieri said that the Labor Code and Article 10 of the General Industry Safety Orders require that all necessary PPE must be provided. Ms. Rice stated that the proposed language is not duplicative because it specifies PPE for a specific operation. Mr. Borden asked if employers would meet their obligation if they provided PPE but the employee did not use it. Mr. Manieri said that there are employee obligations stated in the Labor Code that might apply, and that some regulations actually state the employee shall use PPE, such as seat belts. Mr. Matteis asked if gloves were necessary for all hand weeding and thinning operations. Mr. Benitez said that gloves are needed to reach under plastic mulch because there are toads, snakes and scorpions under it. Mr. Smith restated the

question and asked whether gloves are necessary in every instance or should they only be required when requested. Ms. Rice said that employees might not be comfortable asking for gloves even though they might need them to protect their hands. Mr. Matteis said he was concerned that workers might be performing precision work that does not allow for, or require, gloves. Mr. Meuter said that that situation could be addressed by using a different type of glove, and that a glove should always be provided when it is necessary to prevent skin contact with dirt. Mr. Borden said that if the first sentence is revised to require that PPE always be provided, rather than only when it is requested, then the second sentence is not needed. Mr. Meuter asked that language from the petition be added so that failure to provide required protective equipment to a worker would deny an employer access to an exemption. Mr. Webb disagreed with that approach. The Board and Division staff noted that the language would be unnecessary from the perspective that the employer would be subject to a citation for violating subsection (b)(3), which requires PPE. Mr. Meuter said it might be necessary for computation of penalties, which might be set by the legislature in the future. Ms. Rice said that another subsection should be added under subsection (d) to require employers to provide rest or relief periods. Mr. Smith said that that would be an administrative control, which is addressed in subsection (d)(2), and asked Ms. Rice to provide suggested language.

The discussion moved to subsection (e). Mr. Borden asked if the subsection included bending down to pick up a weed that was cut with a long handled tool. Mr. Webb suggested that hand weeding that is incidental to harvesting also be specifically included and exempted. Mr. Schacht said they don't want to disassociate occasional hand weeding from the use of a long handled tool, and that any suggested language should be added as a subsection of subsection (e). He also mentioned that there have been previous discussions of what constitutes "occasional", that labor has suggested different objective criteria, and that the concept still needs to be defined more precisely in the regulation.

Mr. Mitchell said that he would put together the meeting minutes and distribute them to the subcommittee. He would also update the proposal based on the comments made during the meeting. Mr. Schacht informed the group that it was necessary for labor to submit a hand-weeding bill in the legislature as a placeholder, so that they could pursue that avenue in the event that the advisory process was not successful. The group agreed to send Mr Mitchell proposed language by July 11, 2003.

The next subcommittee meeting was scheduled for August 1, 2003 at 9:30 a.m. at the same location. The meeting adjourned at approximately 4:15 p.m.