Conservation
Law Foundation

For a thriving New England

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Senate Committee on Agriculture
Vermont General Assembly
115 State Street
Montpelier, VT 05633

By email to: lleehman@leg.state.vt.us

Re: DR 23-0138, Draft 2.3, An act relating to protection from nuisance suits for agricultural activities.

Dear Chair Starr and Members of the Committee:

Conservation Law Foundation ("CLF") is pleased to submit written testimony to the Vermont Senate Committee on Agriculture ("Committee") regarding DR 23-0138, Draft 2.3, An act relating to protection from nuisance suits for agricultural activities ("Draft 2.3").

CLF advocates for a food system that stewards the environment, creates opportunity for farmers and food professionals, and provides everyone access to healthy, affordable, local food. Our work includes operating the Legal Food Hub, a unique service that connects New England's income-eligible farmers and food professionals with free legal assistance. We believe that a thriving, innovative farm sector is crucial to Vermont's future wellbeing.

CLF opposes Draft 2.3 because the bill does not solve a problem: nuisance and trespass lawsuits against farms are rare and do not threaten Vermont's farm economy. Moreover, Draft 2.3, like DR 23-0138, Draft 2.2 ("Draft 2.2"), curtails property rights; limits Vermonters' recourse to the courts when they have no other option to protect their property, health, and welfare; and upsets the careful balance established by Vermont's existing right-to-farm law.[1] Last, Draft 2.3 introduces new concerns: it applies a "generally accepted agricultural practices" standard[2] that further erodes property rights; it establishes a mediation requirement[3] that is unlikely to resolve disputes between farmers and neighboring landowners; and it creates factual issues that are likely to complicate court proceedings.

For these reasons, CLF opposes Draft 2.3. We urge the Committee to preserve Vermont's existing right-to-farm law.

I. NUISANCE AND TRESPASS LAWSUITS DO NOT THREATEN VERMONT'S FARMS OR ITS FARM ECONOMY.

Vermont's farms face a long list of challenges: production costs that exceed prices; unfair

[1] *See* 12 V.S.A. §§ 5751–54.
[2] Draft 2.3, Sec. 1, p. 4.
[3] *Id.* at pp. 6–7.

federal pricing, insurance, and subsidy programs; competition from underregulated megafarms beyond Vermont's borders; limited access to markets; accelerating farm consolidation; rising coop fees and surcharges; pressure from development; rising land prices; diminishing access to technical assistance; and more.[4] Vermont Farm to Plate summarized the factors contributing to the loss of dairy farms this way:

> Vermont's dairy farmers are actors in a system that does not account for geographic, social, environmental, or consumer considerations of farming, and thus must compete with least-cost producers in other states where mega-dairies and lax environmental regulations are the norm.[5]

Nuisance and trespass lawsuits do not make the list of problems threatening Vermont's farms or its farm economy. Vermonters, whether they have lived in the state for generations or weeks, rarely sue farmers in nuisance and trespass. To CLF's knowledge, *Aerie Point v. Vorsteveld Farm*[6] is the first nuisance or trespass lawsuit filed against a Vermont farm in years.

Aerie Point illustrates something else: when Vermonters do sue a farm, they usually do so for good reason. The *Aerie Point* plaintiffs did not dislike farming. In fact, one of the plaintiffs was described by the court as having "an extensive background in farming":

> She was raised on a 5000 acre family farm in Kansas where they had at times between 1,000-2,500 head of cattle. She was involved in 4H and took beef cows to the fair. She values farming, the need for farming, and the importance of productivity. She respects the hard work and devotion farmers give to their farms. She does not wish to stop the [farmers] from farming on their property. [7]

Moreover, there was a farm on the plaintiff's land that raised "grass-fed beef, sheep, and chickens" and managed "200-300 acres for grazing."[8] The plaintiffs understood, practiced, and valued farming. What they objected to was what the court described as the defendant farm's failure to "meet the obligation of every business or property owner to dispose of its own waste products rather than discharge them onto their neighbor's land."[9]

Right-to-farm laws should protect farmers from unfair nuisance lawsuits without denying landowners recourse to the courts to prevent injury. Vermont's existing right-to-farm law already does that. Nuisance and trespass lawsuits against Vermont's farms are rare, and when they occur, they have proven justified. There is no problem for Draft 2.3 to solve.

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[4] *See, e.g.,* RECOMMENDATIONS, TASK FORCE TO REVITALIZE THE DAIRY INDUSTRY 8 (2021), link here ("The primary reason for the exit of dairy farmer operations is that Vermont dairy farmers still cannot control the price of their raw product supply. The fundamental cause is the increasing impotence of the federal Milk Market Order (FMMO) program to establish sustainable minimum pay prices for dairy farm producers. . . . Moreover, the regulation has allowed cooperatives, unlike proprietary companies, to impose unlimited fees and surcharges as costs of marketing and transporting member milk, thereby further reducing pay prices.").
[5] *Product Brief: Dairy*, VERMONT FARM TO PLATE, link here (last visited Feb. 19, 2023).
[6] *Aerie Point Holdings, LLC v. Vorsteveld Farm, LLP*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision (Mar. 28, 2022).
[7] *Id.* at p. 3.
[8] *Id.* at p. 4.
[9] *Id.* at p. 29.

II. DRAFT 2.3 DOES NOT RESOLVE IMPORTANT CONCERNS THAT CLF PRESENTED IN TESTIMONY RELATED TO DRAFT 2.2.

Draft 2.3 builds on Draft 2.2 by adding a "generally accepted agricultural practices" standard and a mediation requirement. These amendments do not address concerns that CLF presented in oral testimony on February 3, 2023 and in written testimony dated February 6, 2023.

A. Draft 2.3 limits property rights by expanding right-to-farm to include trespass.

Draft 2.3, much like Draft 2.2, provides that "[n]o activity shall be or become a nuisance *or trespass* when the activity . . . has been in operation for more than one year and was not a nuisance or a trespass at the time the activity was initiated; or . . . the activity is conducted in accordance with generally accepted agricultural practices."[10] By contrast, Vermont's existing right-to-farm law extends only to nuisance.[11]

Vermont should not expand right-to-farm to include trespass. The law of trespass protects the right to exclusive possession of property. It guarantees Vermonters the right to grant or deny another person permission to enter or use their property. It provides Vermonter's recourse when another person interferes with their property, causing damage or harming health.

Draft 2.3 limits property rights by creating circumstances under which a farm could cause a trespass on a landowner's property without the landowner's permission. In doing so, Draft 2.3 facilitates situations that may threaten property, health, and welfare, and it denies landowners who find themselves in those situations the legal tools necessary to respond.

B. By eliminating the existing right-to-farm law's rebuttable presumption, Draft 2.3 excessively limits Vermonters' recourse when their property, health, and welfare are threatened.

Vermont's existing right-to-farm law carefully balances the need to prevent unfair nuisance lawsuits against farms with the need to provide landowners legal tools to protect themselves, especially when the government fails to act. Normally, a landowner who brings a nuisance lawsuit must establish evidence showing that the defendant is "substantially and unreasonably" interfering with their use and enjoyment of property.[12] However, when the defendant is a farmer, the defendant can qualify for extra legal protection under the existing right-to-farm law. This protection, referred to as a "rebuttable presumption," applies if the farmer can show that the agricultural activity complained about (1) is consistent with the law; (2) is consistent with good agricultural practices; (3) existed before surrounding nonagricultural activities; and (4) has not changed significantly since the surrounding nonagricultural activities began.[13]

The existing right-to-farm law wisely declines to make this protection absolute. Instead, it gives the landowner the opportunity to overcome the rebuttable presumption by showing that the harm caused by the agricultural activity is particularly severe. To do this, the landowner must submit

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[10] Draft 2.3, Sec. 1, p. 5 (emphasis added); *see* Draft 2.2, Sec. 1, pp. 4–5.
[11] 12 V.S.A. § 5753.
[12] *Coty v. Ramsey Assocs., Inc.*, 149 Vt. 451, 457, 546 A.2d 196, 201 (1988); *Aerie Point Holdings*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision, at p. 23; *Alberino v. Balch*, 2008 VT 130, ¶ 25, 185 Vt. 589, 596, 969 A.2d 61, 70 (Skoglund, J., dissenting).
[13] 12 V.S.A. § 5753(a)(1).

evidence that the agricultural activity "has a substantial, adverse effect on health, safety, or welfare, or has a noxious and significant interference with the use and enjoyment" of the neighbor's property.[14] This is a high bar to clear.

Draft 2.3, like Draft 2.2, eliminates the rebuttable presumption. Under Draft 2.3, if a farm shows that an agricultural activity either has been ongoing for more than one year or is conducted in accordance with generally accepted agricultural practices, then the court may not find that the agricultural activity causes a nuisance or a trespass.[15] It does not matter if the neighbor establishes evidence of severe harm. Nor does it matter if the neighbor establishes evidence of an adverse effect on health, safety, or welfare. The neighboring landowners' ability to protect their property, health, and welfare through the law of nuisance and trespass is simply cut off.

This unbalanced structure excessively limits Vermonters' recourse when their property, health, or welfare is threatened by nuisance or trespass.

C. Draft 2.3 establishes a statutory deadline that is too short to provide Vermonters meaningful recourse under the law of nuisance and trespass.

Draft 2.3, like Draft 2.2, provides that "[n]o agricultural activity shall be or become a nuisance or trespass when the activity . . . has been in operation *for more than one year* and the activity was not a nuisance or a trespass at the time the activity was initiated . . . ."[16] This gives landowners just one year to file a lawsuit if they believe that a farm is causing a nuisance or a trespass.

One year is an unreasonably short period of time. It is not enough time for a landowner and farmer to discuss an issue and settle on a resolution. Nor is it enough time for a landowner and a farm to pursue mediation. Nor is it enough time for the relevant agency's response to a complaint to run its full course. For example, the harms that gave rise to *Aerie Point v. Vorsteveld Farm* developed over roughly five years.[17]

D. Draft 2.3 relies too heavily on the Agency of Natural Resources ("ANR") and the Agency of Agriculture, Food and Markets ("AAFM") to protect neighbors' property, health, and welfare.

Draft 2.3 prevents Vermonters from using the law of nuisance and trespass to protect their property, health, and welfare from harm in a wide range of circumstances. By limiting nuisance and trespass, Draft 2.3 depends on ANR and AAFM to protect landowners by diligently enforcing Vermont's agricultural laws and regulations. This is a risky approach.

First, *Aerie Point* demonstrates that enforcement is not always enough to protect landowners. The defendant farm "acknowledged noncompliance with both state and municipal regulations,"[18] and it settled "regulatory enforcement actions" with both ANR and a municipality.[19] Despite these enforcement actions, the plaintiffs continued to experience harms that ranged from flooded fields that prevented the rotational grazing of cows, sheep, and chickens to E. coli in their

[14] *Id.* § 5753(a)(2).
[15] Draft 2.3, Sec. 1, p. 5
[16] *Id.* at p. 5 (emphasis added); *see* Draft 2.2, Sec. 1, pp. 4–5.
[17] *Aerie Point Holdings*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision, at pp. 4–17.
[18] *Id.* at p. 20.
[19] *Id.* at pp. 5, 20.

pond.[20]

Second, the Clean Water Act Withdrawal Petition ("CWA Petition") that CLF, Vermont Natural Resources Council, and Lake Champlain Committee filed with the U.S. Environmental Protection Agency documents systematic problems with ANR and AAFM's approach to agricultural water quality regulation.[21] In particular, the CWA Petition highlights a broken collaboration and stubborn rivalry between the agencies that led Secretary of ANR Julie Moore to call for the creation of a single agricultural water quality program within ANR, a call that the Agency of Administration declined to act on.

Last, AAFM acknowledges that its efforts have not yielded widespread regulatory compliance. AAFM's testimony to the Committee on January 11, 2023 indicates that 30 percent of farms are out of compliance with Vermont's agricultural water quality laws and regulations. Moreover, as noted in the CWA Petition, AAFM's 2019, 2020, and 2021 inspection reports for Large Farm Operations, Medium Farm Operations, and Certified Small Farm Operations document nutrient management planning deficiencies during 76 percent of inspections.[22]

ANR and AAFM are not yet able to guarantee that Vermonters will be free from harms that originate on farms. Now is not the time to deny Vermonters' use of nuisance and trespass to protect their property, health, and welfare.

III. DRAFT 2.3'S "GENERALLY ACCEPTED AGRICULTURAL PRACTICES" STANDARD AND MEDIATION REQUIREMENT INTRODUCE NEW CHALLENGES.

A. Draft 2.3's "generally accepted agricultural practices" standard weakens landowner rights by using industry custom, not injury, to determine whether an otherwise unregulated agricultural practice is causing a nuisance or a trespass.

Draft 2.3 provides that "[n]o activity shall be or become a nuisance or trespass when the activity . . . is conducted in accordance with generally accepted agricultural practices."[23] It defines "generally accepted agricultural practices" to include otherwise unregulated "practices conducted in a manner consistent with proper and accepted customs and standards *as established and followed by similar operators of agricultural activities* in a similar municipality or region of the State and under similar circumstances."[24]

In other words, to determine whether an agricultural activity is causing a nuisance or trespass, Draft 2.3 asks whether an otherwise unregulated agricultural activity is common on similar farms. If the activity is common, then it causes neither a nuisance nor a trespass.

This standard ignores that a common agricultural practice might cause substantial harm if implemented in the wrong circumstances. *Aerie Point* illustrates this. The primary injury in *Aerie*

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[20] *Id.* at pp. 7, 13–14, 21.
[21] CLF et al., Joint Petition for Corrective Action or Withdrawal of the National Pollution Discharge Elimination System Program Delegation from the State of Vermont (Mar. 16, 2022), link here.
[22] This claim is based on a review of the 139 reports that CLF received from AAFM that documented AAFM inspections conducted on Large Farm Operations, Medium Farm Operations, and Certified Small Farm Operations between April 9, 2019 and October 13, 2021.
[23] Draft 2.3, Sec. 1, p. 5.
[24] *Id.* at p. 4 (emphasis added).

Point was damage caused by the discharge of agricultural waste from tile drains. Farms often install tile drains to improve farmland's productivity. Usually, tile drains cause no harm to neighbors. However, in *Aerie Point*, newly installed tile drains caused increasing quantities of wastewater the color of "chocolate milk",[25] that contained E. coli at levels higher than Vermont standards,[26] and that burst from an agricultural tile drain outlet as if "from a fire hose" to overrun the plaintiffs' property.[27] The result was E. coli in the plaintiffs' pond, foam and toxic algae where the plaintiffs once swam, a muddy delta where the plaintiffs once enjoyed summer fires,[28] and flooded fields where the plaintiffs rotationally grazed cows, sheep, and chickens.[29]

Nuisance and trespass are meant to protect neighbors from harm. Whether an agricultural activity causes harm has little to do with whether it is common. It has more to do with how the activity is implemented given the circumstances. Draft 2.3's "generally accepted agricultural practices" standard ignores this. It consequently exposes Vermonters to unnecessary risk.

B. Draft 2.3's mediation requirement is unlikely to resolve disputes between farmers and landowners because it does not extend or pause Draft 2.3's one-year statutory deadline to accommodate mediation.

Under Draft 2.3, a landowner may not bring a nuisance or trespass lawsuit against a farm unless the landowner and the farmer have already attempted to resolve the dispute through mediation.[30] Draft 2.3 does not account for how its mediation requirement interacts with the one-year statutory deadline it establishes for nuisance and trespass lawsuits against farms.[31] Instead of clearly extending or pausing the deadline upon a landowner's decision to pursue mediation or some similar event, Draft 2.3 allows the clock to run as mediation proceeds. This creates the possibility that the statutory deadline will pass before mediation concludes, denying the landowner the right to pursue a nuisance or trespass lawsuit even if mediation is unsuccessful. Moreover, this gives farms an incentive to treat mediation as an opportunity for delay, not as an opportunity to identify a mutually agreeable resolution.

C. Draft 2.3's mediation requirement and its "generally accepted agricultural practices" standard are likely to complicate and prolong court proceedings by adding fact-intensive issues to nuisance and trespass lawsuits.

Draft 2.3 requires the court to answer two questions that Draft 2.2 did not require the court to answer: (1) did the landowner and the farmer "at least once, attempt to resolve through mediation the issue or dispute" raised by the landowner,[32] and (2) did the farmer conduct the agricultural activity "in accordance with generally accepted agricultural practices."[33] Both questions are

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[25] *Aerie Point Holdings*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision, at pp. 6, 7, 13.
[26] *Id.* at pp. 13, 14, 21.
[27] *Id.* at p. 10.
[28] *Id.* at p. 7.
[29] *Id.* at pp. 4, 8, 17, 24, 28.
[30] Draft 2.3, Sec. 1, p. 6–7.
[31] *Id.* at p. 5 ("No agricultural activity shall be or become a nuisance or trespass when the activity . . . has been in operation for more than one year and the activity was not a nuisance or a trespass at the time the activity was initiated . . . .").
[32] *Id.* at p. 6.
[33] *Id.* at p. 5.

likely to prolong court proceedings.

First, Draft 2.3's mediation requirement is both ambiguous and factual. It is ambiguous because Draft 2.3 does not clarify what a landowner and farmer must do to "attempt mediation." What if the landowner and the farmer abandon mediation after just one meeting? Is that a sufficient attempt? It is factual because the landowner and farm must bring evidence to prove that mediation was or was not attempted.

Second, Draft 2.3's "generally accepted agricultural practices" standard is intensely factual. It requires the landowner and farmer to bring evidence establishing whether the agricultural activity meets agricultural water quality regulations, whether it conforms to pesticides regulations, and whether it reflects industry custom.[34] This last element—whether the agricultural practices reflects industry custom—raises yet another battery of issues that the landowner and farm will dispute: which farms should the court treat as "similar operators of agricultural activities"; what area should the court treat as "a similar municipality or region of the State"; should the court focus on similar municipalities or should it focus on similar regions; what circumstances should the court treat as "similar circumstances"; and what "proper and accepted customs and standards" are established by a thorough review of the "similar operators."[35]

AAFM testified on January 18, 2023 that one of the existing right-to-farm law's shortcomings is that it raises too many factual questions. Between its "generally accepted agricultural practices" standard and its mediation requirement, Draft 2.3 raises even more.

Conclusion

There is no problem for Draft 2.3 to solve. Vermont's existing right-to-farm law continues to protect farmers from unfair lawsuits without denying landowners recourse to the courts. By contrast, Draft 2.3 would limit property rights, limit recourse to the courts, and complicate court proceedings. For these reasons, we urge the Committee to set aside Draft 2.3 and preserve Vermont's existing right-to-farm law.

Respectfully Submitted,

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[34] *Id.* at p. 4.
[35] *See id.* at p. 4.