

State of Vermont
Legislative Committee on Administrative Rules (LCAR)
115 State Street
Montpelier, VT 05633-5701

December 29, 2022

by e-mail: charlene@leg.state.vt.us

Re: Coalition Comments post-LCAR Dec. 15th Hearing on the Final Proposed Rule for Vermont’s Regulations for Control of Pesticides

Dear Chair MacDonald, Vice Chair Squirrell, and members of the Committee:

Lake Champlain Committee, Vermont Public Interest Research Group, Conservation Law Foundation, Rural Vermont, Audubon Vermont, Vermont Natural Resources Council, and the Vermont Chapter of the Sierra Club are grateful for the opportunity to provide additional comments regarding the Final Proposed Rule (Final Rule or Rule) for Vermont’s Regulations for Control of Pesticides. Based on our analysis, the Rule remains notably deficient and ill-equipped for effective implementation. For reasons expressed below and in past comments, we recommend that the Committee object to the Final Rule, request the Agency to amend it accordingly, and refer specific policy-based issues that have surfaced to the respective committees of jurisdiction.

RECOMMENDATIONS

I. LCAR Should Object to the Final Rule.

a. The Permitting Requirements under Section 6 of the Final Rule are arbitrary, inconsistent, and illogical.

The Permitting Requirements under Subchapter 2, Section 6 of the Rule squarely fit the definition of arbitrary under Vermont law due to numerous inconsistencies and deficiencies, which lack a factual basis, are not rationally connected to a factual basis, and would not make sense to a reasonable person.¹ For example, eight types of pesticide use permits are described in Section 6:

- Two of the eight require environmental monitoring (before or after pesticide application) and six do not.
- Three of the eight permit types require Integrated Pest Management (IPM) plans and five do not.

¹ See 3 V.S.A. § 842(b)(3) (explaining that LCAR may object to a rule if “a proposed rule is arbitrary”); see also 3 V.S.A. § 801(b)(13)(A)–(B) (defining what “arbitrary” means when applied to an agency rule), and *Beyers v. Water Resources Board*, 2006 VT 65; compare with *In re Town of Sherburne*, 154 Vt. 596 (1990).

- For three of the eight permit types, a provision is included which could result in decreasing buffer widths established in Section 5 for protecting drinking water sources and pollinator foraging areas.
- For some types of permits, widths of buffers around drinking water sources are 100 feet but are established at 50 feet for other permits.
- Roadside spraying for mosquitoes requires a permit but backpack spraying of the same chemicals does not (backpack spraying for adult mosquitoes is a common activity in the Otter Creek Watershed Insect Control District).

Accordingly, LCAR should object to the Final Rule and require these inconsistencies and deficiencies to be cured by the Agency.

b. The Final Rule’s inconsistent and ineffective application of Integrated Pest Management is arbitrary.

It is arbitrary to require that only certain types of pesticide application under the Final Rule follow the principles of IPM.² Conclusions in the Agency’s Filing Application analyses (for example, the Environmental Impact Analysis) explicitly attribute positive outcomes of the Rule to IPM. However, there is no requirement for, or mention of, following the principles of IPM in the Final Rule’s General Standards for Pesticide Use (Section 5). Submitting an IPM plan is a requirement for only three of the eight categories of pesticide permits described in Section 6. Put simply, most permits under the Rule are not required to implement IPM. The Agency’s conclusions that the Rule’s use of IPM will provide positive environmental and economic benefits for Vermont are undermined by the Rule’s failure to functionally include IPM. These inconsistencies are plainly arbitrary.³ Objecting to the Final Rule and requiring the Agency to establish a consistent-effective approach to IPM throughout the Rule is critical before approval and implementation.

c. The Final Rule’s failure to include recommendations by Act 83’s Pollinator Protection Committee is contrary to the intent of the Legislature.

The Final Rule is contrary to the intent of the Legislature because it fails to include explicit reform recommendations from Act 83’s Pollinator Protection Committee (PPC) about Vermont’s Regulations for the Control of Pesticides.⁴ Examples include, but are not limited to, tracking all pesticide use (including treated article seeds) and setting clear target-goals for reduction; failing to include wild pollinators (not just managed bees) in section 5.04 of the Rule; prohibiting the application of neonicotinoid products applied by drench, trunk injection or foliar and basal bark sprays on ornamental plants accessible to pollinators; classifying all pesticides with active ingredients that are highly toxic to bees as restricted-use products, and; setting specific IPM

² *Id.*

³ *Id.*

⁴ VT. POLLINATOR PROTECTION COMM., REPORT TO THE VERMONT LEGISLATURE AS REQUIRED BY ACT 83 OF 2016 SESSION 6 (Feb. 2017), <https://agriculture.vermont.gov/sites/agriculture/files/documents/Pollinator%20Protection%20Report-FINAL.pdf> (detailing a list of recommended “Changes to the State pesticide regulations”).

thresholds prior to the use of pesticides and identifying less toxic alternatives for conventional farmers. Accordingly, LCAR should object and require the Agency to amend the Final Rule to include recommendations by the PPC.

d. The Final Rule’s Environmental Analysis fails to recognize a substantial environmental impact and runs counter to the Climate Action Plan.

A core component of a rule’s filing application with the Secretary of State is the inclusion of an environmental impact analysis detailing how the rule impacts greenhouse gas (GHG) emissions and climate in Vermont.⁵ By law, LCAR may object to a rule if the rule’s “environmental analysis fails to recognize a substantial environmental impact of the proposed rule.”⁶ In this case, the Final Rule’s Environmental Analysis failed to analyze the Rule’s actual impact on Vermont’s GHG emissions and climate. Specifically, without any substantive-quantifiable support, the Agency broadly concluded the Rule will result in an overall reduction of GHGs and climate effects because of IPM (which notably is not consistently or appropriately required by the Rule). Not only is this false and misleading, but it treats the requirements of the application process as a mere paper exercise while simultaneously defying directives in Vermont’s Climate Action Plan. LCAR should object to the Rule and require the Agency to submit a revised Environmental Analysis explaining the Rule’s true impact on GHGs and climate.

II. Policy Issues to Request the Committees of Jurisdiction to Review During the 2023 Legislative Session.

Numerous important policy issues surfaced during comments and deliberation about the Final Rule. In response, we recommend that LCAR request the respective committees of jurisdiction to review the following issues:

a. Necessary preventions, protections, and prohibitions related to PFAS in pesticides.

The presence of PFAS in pesticides and the detrimental effects on human health and the environment at-large are scientifically proven. While we disagree with the Agency’s position related to suggestions concerning PFAS as it relates to the substance of the Rule, we strongly encourage the Committee to request the committee of jurisdiction to review proactive preventions, protections, and prohibitions related to PFAS in pesticides.

b. Ensuring there are clear-accessible pathways for public participation related to decisions involving the use of pesticides.

As drafted, there is no clear pathway in the Final Rule for citizen involvement, which is a fundamental democratic “check” on the system of pesticide regulation and use in Vermont. We suggested a process similar in design to what is in place for decisions by the Agency of Natural

⁵ 3 V.S.A. § 838(a)(3).

⁶ 3 V.S.A. § 842(b)(7).

Resources. We recommend the committee of jurisdiction review the need for clear-accessible pathways for public participation related to governmental decisions involving pesticide use.

c. Protections for pollinators from pesticides.

If the Committee opts not to object to the Final Rule as recommended above in part I (c), we encourage the Committee to refer the issue and need for protections for pollinators from pesticides to the committee of jurisdiction.

CONCLUSION

To summarize, the Final Rule is not prepared for approval and implementation. In response, our organizations recommend that the Committee object to the Final Rule, direct the Agency to amend and cure the associated deficiencies, and refer the above-referenced policy issues to the committees of jurisdiction. Thank you for your time and attention to this matter.

Respectfully submitted,

Dated: December 29, 2022

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Lake Champlain Committee

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Policy and Water Program Director
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