

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

November 30, 2022

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

Re: Comments on the Final Proposed Rule for Vermont's Regulations for Control of Pesticides

Dear Chairman MacDonald and Members of the Committee:

Lake Champlain Committee, Audubon Vermont, Conservation Law Foundation, Beyond Pesticides, Vermont Public Interest Research Group, Vermont Natural Resources Council, and the Vermont Chapter of the Sierra Club appreciate the opportunity to provide the following comments regarding the Final Proposed Rule (Final Rule) for Vermont's Regulations for Control of Pesticides. For your reference, we have also attached to these comments our collective comprehensive comments on the Draft Rule for Vermont's Regulations for the Control of Pesticides submitted on June 23, 2022.¹

At the outset, we cannot emphasize enough the importance of this Rule and the need to get it right given the onslaught of climate change and shifting demands facing Vermont. However, based on our analysis of the proposed Final Rule and review of the Agency of Agriculture, Food and Markets' (Agency) response to comments, we believe specific aspects of the Rule rise to the level of being arbitrary whereas other portions simply appear to do the bare minimum—continuing to maintain the status quo for pesticide use in Vermont.

This is the opposite of what Vermont needs during such unprecedented times when visionary-proactive regulatory efforts are critical to our ability to nimbly and successfully confront the multitude of challenges on the horizon. The revision of the antiquated 1991 regulations was long-overdue and presented Vermont with an opportunity to fill sizeable gaps left by the porous federal system governing pesticides while simultaneously advancing resilient measures to protect Vermonters, non-target organisms and the environment at-large in the face of climate change.

Our intent with these comments is not to cause unnecessary delay or attempt to prohibit approval and implementation of the Rule. Rather, it is our hope that this Committee will take these comments into consideration and work with the Agency to find a solution where some of the larger deficiencies in the Rule are thoughtfully addressed prior to approval and implementation.

FINAL PROPOSED RULE FOR VERMONT'S REGULATIONS FOR CONTROL OF PESTICIDES

¹ The Agency of Agriculture, Food and Markets' response to those comments can be found [here](#) beginning on page 31.

a) The Final Rule’s Environmental Analysis is arbitrary because it is based on broad inaccurate generalizations and assumptions without any quantified-substantive support.

As mentioned in our previous comments on the Draft Rule², we agree with the Agency’s original discussion about the life cycle of pesticides, ranging from manufacturing processes to application, and how those contribute to green-house gas (GHG) emissions. However, we strongly disagree and are disappointed with the Agency’s response broadly asserting that the Rule will result in fewer emissions.³ Indeed, the irony of this response is that there is a strong emphasis on reduced emissions stemming from the deployment of Integrated Pest Management (IPM), yet IPM was not originally defined in the Draft Rule until our coalition suggested a definition and encouraged its inclusion. Moreover, in the Agency’s response to our comments about the lack of substantive support for the broad conclusions of GHG reductions from the Rule, the Agency conceded that IPM is an economic tool that is “*encouraged*, but not mandated.”⁴ We raise this particular issue to the Committee for a number of reasons. First, it is illustrative of a greater theme associated with the Rule whereby overly broad characterizations are made without thoughtfully detailing how the Agency arrived at the conclusion. This is especially important given where the State is with confronting climate change and the ongoing implementation of the Climate Action Plan. Put differently, we must be careful about making broad conclusions without showing our work. Further, the Legislature expressly articulated in 3 V.S.A. § 842(b)(7) the importance of recognizing and detailing substantial environmental impacts from the proposed rule.⁵ Here, if this Rule will in fact result in reduced emissions, Vermonters have the right to review the supportive reasoning for the conclusion.

b) Failing to include a preamble in the Final Rule will cause confusion among the regulated community and citizens alike.

On the Draft Rule, we commented that a Preamble was noticeably absent despite the antiquated 1991 regulations surprisingly featuring one. In response, we submitted draft language for a Preamble in an effort to both set a clear policy goal for the Rule and to clarify the Rule’s overall intent and purpose. The Agency disagreed—arguing that “non-enforceable language would only create more confusion among the regulated community.”⁶ We disagree. Preambles are bedrock contextual sections for regulations, rules, and legislation. Here, including a Preamble provides the Agency with the opportunity to set the stage in an era of climate change by emphasizing the importance and need of reducing pesticide use, when possible, and carefully evaluating alternative pest management measures. Instead, electing not to include a preamble resembles a teacher intentionally deciding not to explain their classroom rules on the first day of school—

² Lake Champlain Committee et al., Comments on the Draft Rule for Vermont’s Regulations for Control of Pesticides 4 (June 23, 2022).

³ State of Vermont, Agency of Agriculture, Food and Markets, Vermont Regulations for Control of Pesticides: Public Comment Response Summary 39 (September 15, 2022), https://agriculture.vermont.gov/sites/agriculture/files/doc_library/Pesticide%20Rule%20Public%20Comment%20Summary%20Response%20%282%29.pdf.

⁴ *Id.* at 39.

⁵ See e.g., 3 V.S.A. § 842(b)(7) (detailing that a ground for objection can be if “the environmental analysis fails to recognize a substantial environmental impact of the proposed rule.”)

⁶ State of Vermont, Agency of Agriculture, Food and Markets, *supra* note 3, at 36.

leading to confusion and frustration when the time comes to enforce the rules. We raise this concern before the Committee because there is no question the State will need to utilize and wield this Rule in the future—further underscoring the importance of surgical clarity. Moreover, the omission of a Preamble in the Final Rule highlights a consistent theme—whether intentional or not—of maintaining the status quo and not going beyond the bare minimum in a time when Vermont needs to think outside of the box with the tools available to it.

c) The Agency’s response regarding treated article seeds under the Final Rule is contrary to the intent of the Legislature.

Our organizations requested that the definition of the “use” of pesticides in section 1.66 of the Draft Rule include the use of treated article seeds.⁷ The definition proposed by the Agency includes mixing, loading, recommending, and applying pesticides, but not the use of treated article seeds, and therefore does not accurately reflect the use of pesticides in the State. To our request, the Agency replied that “the exemption exists in federal law and . . . the Agency will continue to regulate treated article seed not as a use,” until the federal law changes. We disagree. From our perspective, the federal law (40 C.F.R. § 152.25(a)) serves as a floor for allowing for stricter state standards, and that recent discussions in the Legislature regarding treated article seeds underscore an intent and desire for stricter practices on their use than the federal law provides.

Federal law is commonly used as a floor upon which, unless specified otherwise, states can impose stricter standards. Therefore, the Agency can regulate treated article seeds as a use of pesticides if it so chooses. Seeds are pre-treated as a means of prophylactic application of a pesticide whether it is needed or not. In many cases, no specific pest has been identified, but pretreatment is performed as a precaution, so a specific pesticide treatment is unnecessary. Therefore, common-sense dictates it is a use of a pesticide. More recently, in Vermont’s recent 2022 Legislative Session, the Legislature passed, and the Governor signed, H.626—an act relating to the sale, use, or application of neonicotinoid pesticides.⁸ The measure requires that the Agency adopt, by rule, best management practices for the use of neonicotinoid treated article seeds, and that the Agriculture Innovation Board report back to the Legislature on whether best management practices are necessary for other treated article seeds. With this, the Legislature clearly intends that there should be some required practices for the use of treated article seeds as pesticides. For these reasons, the Agency’s response to this issue under the Final Rule is contrary to the intent of the Legislature. Finally, this issue again shines a light on the common thread of electing to provide the bare minimum in the Final Rule versus including proactive-helpful protections for the future.

d) Proactively including and defining “ineffective pesticides” is a public health issue, not a consumer protection issue.

On the Draft Rule, we recommended that the Agency include and define “Ineffective Pesticide Product” and suggested a process for the Secretary to assess what constitutes as “ineffective.” In response, the Agency took the position that the ineffectiveness of a pesticide is a consumer

⁷ Treated article seeds are seeds pre-treated with pesticides before being sold to the public.

⁸ See H.626 (Act 145), 6 V.S.A. § 1101 *et seq.*, <https://legislature.vermont.gov/bill/status/2022/H.626>.

protection issue, rather than product selection criteria. This is incorrect. Current efficacy standards set by the Environmental Protection Agency (EPA) do not evaluate pesticide alternatives, the availability of less hazardous pesticides, or an assessment of the adverse human health and environmental effects of these alternative approaches. EPA assumes pesticide benefits up front and conducts efficacy determinations primarily to evaluate certain label claims.⁹

If the ineffectiveness of a pesticide is a consumer protection issue, and not a product selection criterion, how does that absolve the Agency here of the responsibility, or a role, in ensuring consumer protection? Here, the Agency squarely has the authority under the Federal Insecticide Fungicide and Rodenticide Act to add additional protections to the baseline standards set by EPA. In this way, the Agency is empowered to make determinations over the regulation of pesticides in the state and ensure that consumers are purchasing pesticide products that will not only work for their intended purpose but will also not pose undue hazards to human health or the environment. Moreover, the Agency has the ability to make certain that consumers are using a product that will cause the least amount of harm to their own health, the health of their neighbors, their local wildlife, and wider environment. Consumers have a desire to select products that are sustainable, yet still effective, as evidenced by the growing sector of organic products and alternative practices available today. The Agency's response appears to indicate that it is not its role to ensure consumer protection. We ask for the Agency to further clarify its determination not to include a definition of "ineffective pesticide" in the Final Rule. Finally, like the other issues that we have raised, this too represents achieving the bare minimum versus going the distance.

e) There is not a clear-accessible pathway for public participation and "aggrieved persons" under the Final Rule.

For the Draft Rule, our organizations requested that the Agency provide a clear and easy path for public participation opportunities and a comprehensive process for citizens to engage with the Agency. In particular, we suggested that the Agency include in the Rule, and allow, "aggrieved persons" to appeal Agency decisions under the Rule to a third party (likely the Vermont Superior Court Environmental Division). This process is successfully utilized by the Agency of Natural Resources, without the frivolous abuse of the process that some claim will occur.¹⁰ As drafted, there is no clear pathway in the Final Rule for citizen involvement, which is a critical "check" on the system of pesticide regulation and use in Vermont. Furthermore, there is ample academic literature underscoring the importance of citizen involvement in environmental regulations and how clear pathways for citizen participation improve the overall regulatory system and lead to better decisions.¹¹

⁹ U.S. ENV'T PROT. AGENCY, EFFICACY TESTING FOR PESTICIDES TARGETING CERTAIN INVERTEBRATE PESTS (2022), <https://www.epa.gov/pesticide-registration/efficacy-testing-pesticides-targeting-certain-invertebrate-pests>

¹⁰ See, e.g., Vt. Stat. Ann. tit. 10, § 8504(a) (allowing any "person aggrieved by an act or decision of the Secretary . . . under the provisions of law listed in section 8503 of this title [listing ANR related decisions] [to] appeal [the decision] to the Environmental Division . . ."); see also the ability under 10 V.S.A. Chapter 220 where "aggrieved" persons have the ability to appeal approved Notices of Intent for Coverage under Vermont's NPDES Pesticide General Permit. Vt. Stat. Ann. tit. 10, § 8504.

¹¹ See e.g., Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 1, [2] (2012), available at <http://www.lawschool.cornell.edu/cei/upload/FINAL-FARINA-12-20- Rulemaking-v-Democracy.pdf>; Cynthia R.

As the use of pesticides affects public health and the environment, the public should be able to weigh in on Agency decisions. Section 3.10 of the Final Rule allows for the party whose license or permit is under review to appeal the Agency decision within 15 days but does not include an avenue of participation for the broader public. In comparison, the Agency of Natural Resources, under 10 V.S.A. § 8504, provides an avenue for “any person aggrieved by an act or decision” to appeal to the Environmental Division of the Vermont Superior Court. Of course, certain provisions apply, such as involvement in the initial public comment period, identifying issues of concern, among other provisions. This allows for greater public participation in the Agency decision-making process. For the use of pesticides, particularly the issuance of a permit that may impact public health, more options for public engagement should be available.

f) It is a mistake not to include and define “allowed substances” as utilized by the National Organic Standards Board (NOSB).

In the Final Rule, the Agency rejected our coalition’s suggestion to include a definition of “allowed substances” into the Rule’s definitions section because “the NOSB is a marketing program, and a marketing program has no place in registration.”¹² This response is inaccurate and again misses the mark of where the Rule could and needs to go. First, the NOSB is not a “marketing program.” As indicated on the U.S. Department of Agriculture’s website for the NOSB, “The National Organic Standards Board (NOSB) is a Federal Advisory Board made up of fifteen dedicated public volunteers from across the organic community. Established by the Organic Foods Production Act (OFPA) and governed by the Federal Advisory Committee Act (FACA), the NOSB considers and makes recommendations on a wide range of issues involving the production, handling, and processing of organic products.”¹³

Upon reviewing the Agency’s response, we thought they may have confused the NOSB with the USDA’s Agricultural Marketing Service (AMS). According to USDA, “The Agricultural Marketing Service (AMS) administers programs that create domestic and international marketing opportunities for U.S. producers of food, fiber, and specialty crops. AMS also provides the agriculture industry with valuable services to ensure the quality and availability of wholesome food for consumers across the country and around the world.”¹⁴ The National Organic Program (NOP), of which the NOSB is a component, is housed within AMS, but it is certainly not a marketing program. According to USDA, “NOP is a federal regulatory program that develops and enforces consistent national standards for organically produced agricultural products sold in the United States.” Thus, NOP, the National List, and NOSB, as cited in our recommended language on the Draft Rule, function as a federal regulatory program. The relevance here is

Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 102 (2012); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005); Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENV’T. & ADMIN. L. 173–83 (2012).

¹² State of Vermont, Agency of Agriculture, Food and Markets, *supra* note 3, at 38. (“ . . . the NOSB is a marketing program, and a marketing program has no place in regulation.”)

¹³ U.S. DEP’T OF AGRIC., NATIONAL ORGANIC STANDARDS BOARD (last visited Nov. 29, 2022), <https://www.ams.usda.gov/rules-regulations/organic/nosb>.

¹⁴ U.S. DEP’T OF AGRIC., AGRICULTURAL MARKETING SERVICE (last visited Nov. 29, 2022), <https://www.ams.usda.gov/>.

again, this is a place where the Rule could take a proactive step forward providing more depth yet takes the path of least resistance.

g) It is negligent to exclude a prohibition of pesticides containing or contaminated with per-and polyfluoroalkyl substances (“PFAS”) in the Final Rule.

For space and efficiency reasons, we would like to refer the Committee to our comments on the issue of pesticides containing or contaminated with per-and polyfluoroalkyl substances (“PFAS”) on the Draft Rule as well as the Agency’s response to our comments.¹⁵ In short, on the Draft Rule, given the severity of the global PFAS crisis our organizations suggested that the Agency: (1) expressly prohibit pesticides containing, or contaminated with PFAS; (2) prohibit the usage of pesticides which contain PFAS; (3) explicitly prohibit the storage of pesticides in containers known to have PFAS and/or leach PFAS, and; (4) require/encourage active sampling of pesticide products used in Vermont for PFAS. These are reasonable uncomplicated requests, which fit squarely under the Rule’s purpose and jurisdiction. The Agency declined these suggestions arguing that there is already existing authority under the Rule, which it could utilize, if elected. The supporting literature on PFAS is clear and underscores the need to take protective action versus maintaining the status quo. To this end, we recognize that this particular set of issues may not technically rise the level of being “arbitrary” under 3 V.S.A. 842(b)(3).¹⁶ However, it highlights an area of importance where the Rule could go further but elected not to—at the expense of Vermonters’ health and the health of our natural resources. In response, we request that the Committee refer this issue to Senate Committee on Health and Welfare.

h) The need for robust protection of pollinators in the Final Rule.

On the Draft Rule, we submitted substantial comments and language suggestions regarding the need for protection of pollinators. In response, the Agency argued that changes proposed by the Pollinator Protection Committee (PPC) are included in the Final Rule. This is false. There are a number of recommendations which were omitted from the Final Rule. Indeed, the pollinator provisions of the Rule fail to even include wild bees. Yet the PPC was clear in its 2017 Report that their recommendations included both managed and wild pollinators. Further, by a vote of 8-0-1, the PPC recommended classifying all pesticides “highly toxic to bees” as restricted-use pesticides. This is not included in the Rule. By a vote of 9-0-0, the PPC recommended a statewide moratorium on “applications to ornamental plants accessible to pollinators with neonicotinoid products” for three years or until such time research demonstrates that applications by drench trunk injection, foliar and basal bark sprays are safe. This is also not in the Final Rule. Moreover, the Agency argued that “all insecticides fall into the category of ‘highly toxic to bees’ and such a change in classification would incur dramatic economic impacts in the State.”¹⁷ This position ignores the recommendation of the PPC and fails to recognize the differing toxicity levels of certain pesticides (e.g. neonicotinoids toxicity to bees). In addition, our suggested amendment would simply make specific pesticides Restricted Use, meaning that they could only

¹⁵ Lake Champlain Committee et al., *supra* note 2, at 22–25; State of Vermont, Agency of Agriculture, Food and Markets, *supra* note 3, at 40–41, 51.

¹⁶ 3 V.S.A. § 842(b)(3) (detailing that one of the possible grounds for objection of a proposed rule is if a “rule is arbitrary.”)

¹⁷ State of Vermont, Agency of Agriculture, Food and Markets, *supra* note 3, at 41–42.

be applied by trained applicators. All of the pesticides highly toxic to bees would still be allowable but requiring that they be applied by trained professionals. Finally, the Agency argued that the PPC's 9-0-0 vote was not a recommendation for a change to this Rule. This too, is incorrect.

i) The Permitting Requirements under Section 6 of the Final Rule are arbitrary, inconsistent, and deficient.

The Final Rule will guide pesticide regulation in Vermont for years or decades and should present an unambiguous, cautious, and science-based approach that protects and improves the health of the State's people, environment, and economy. Instead, multiple inconsistent and arbitrary requirements are included throughout the Rule. Such inconsistencies are confusing, and some create regulatory loopholes. As an example, here, we have highlighted the permitting requirements under Section 6, which illustrate these inconsistencies. For these reasons, the Final Rule does not provide confidence that it has been carefully crafted to perform well, either today, or in the uncertain times ahead.

a. Arbitrary requirements for environmental monitoring.

The Final Rule requires environmental monitoring for some but not all types of pesticide use. For example, the Final Rule arbitrarily requires specific procedures for monitoring environmental parameters on golf courses but not for monitoring populations in mosquito breeding grounds in insect control districts.

Monitoring environmental parameters (e.g., soil health, pest populations) before and after pesticide application is a critical part of responsible pesticide regulation and should be a part of all permits granted by the Agency.

b. Arbitrary lack of regulation for certain pesticide application.

The Final Rule does not apply to all pesticide application in Vermont but instead arbitrarily exempts some pesticide application. For example, truck-mounted spraying of mosquito chemical adulticides is regulated, but application of the same pesticides with a backpack sprayer is not regulated. Backpack spraying of domestic yards is routinely performed in the Otter Creek Watershed Insect Control District (OCWICD) and risks contamination of drinking water sources, pollinator foraging areas, and domestic living and play areas. Such loopholes can erode public confidence that pesticide regulations are designed to protect them.

c. Arbitrary duration of permits for different types of pesticide application.

The Final Rule suggests that permits for some types of pesticide application (e.g., golf courses, mosquito adulticide) must be renewed every year, but other types of pesticide application (e.g., mosquito larvicide) require permit renewal every five years. Permits for the application of pesticides on golf courses and for mosquito control are required to include an integrated pest management plan. It is arbitrary

that the IPM plan for golf courses must be renewed every year but the IPM plan for mosquito adulticide needs renewal only every five years. These and other unjustified inconsistencies will lead to confusion, lapses in regulation, and public concern about the suitability of Vermont's pesticide regulations.

d. Arbitrary buffer zones.

The Final Rule establishes buffer zones to protect water bodies, drinking water sources, and pollinator foraging areas from pesticide contamination. The widths of the protective buffers required by the Rule are arbitrary as are the buffer requirements for different types of pesticide application.

For example:

- 1) Buffer zone widths differ from those used in other New England states.
- 2) No buffers are established around school yards and school playing fields.
- 3) Buffers are established in Section 5.02(m) (50-foot buffer) for drinking water sources, but different buffers are required on golf courses in 6.05(d)3G (100-foot buffer).
- 4) Buffer widths are established in Section 5.02(m) and 5.02(n) for drinking water sources and in 5.04(b)2 for pollinator foraging sites. But the Rule provides no guidance on the width or presence of buffers for pesticide applications in rights-of-way (6.01(e)4D), on golf courses (6.05(d)4), and for mosquito control (6.07(g)D). Instead, the Rule bypasses further legislative oversight by granting the Secretary of AAF&M the authority to establish at a later date all buffer widths for those pesticide applications.

Consistent, justified, and transparent buffer zone widths should be a minimum requirement for the Final Rule.

e. Integrated Pest Management is required arbitrarily.

It is arbitrary to require that only certain types of pesticide application in Vermont should follow the principles of integrated pest management. No mention of, or requirement for, following the principles of integrated pest management are included in the Rule's General Standards for Pesticide Use (Section 5).

Submitting an IPM plan is required in the sections of the Rule for rights-of-way, golf courses, and mosquito adulticides, but not in the sections on Bird or Other Vertebrate Pests, Mosquito Larvicide, Terrestrial Invasive Plants, Aerial application, or Experimental applications.

Integrated pest management is the foundational principle of pesticide regulation in states throughout New England and the country. A minimum requirement for all pesticide permits granted by AAF&M should be a detailed IPM plan and protocols for strict enforcement of those plans.

CONCLUSION

As we expressed in our comments on the Draft Rule, Vermont has always stood on the forefront of pressing issues with proactive consideration of effective solutions and necessary responses. Ensuring that Vermont develop and implement forward thinking protective management regulations for pesticides to ensure the safety and health of our communities, natural resources, and environment at-large is vital. For the reasons expressed above, we respectfully request that the Committee object to the Final Rule as drafted due to its arbitrary portions and direct the Agency to cure the associated deficiencies prior to approval and implementation. In addition, we request that the Committee refer the PFAS-pesticide contamination issue to the Committee on Health and Welfare for consideration, investigation, and a recommendation.

Most importantly, we appreciate the opportunity to submit these comments, and for your thoughtful attention to this matter. Our organizations remain available to discuss the issues in the comments at any time.

Respectfully submitted,

Dated: November 30, 2022

/s/ Lori Fisher
Executive Director
Lake Champlain Committee

/s/ Paul Burns
Executive Director
Vermont Public Interest Research Group

/s/ David Mears
Executive Director, Audubon Vermont
Vice President, National Audubon Society

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Staff Attorney
Conservation Law Foundation Vermont

/s/ Jon Groveman
Policy and Water Program Director
Vermont Natural Resources Council

/s/ Drew Toher
Community Resource and Policy Director
Beyond Pesticides

/s/ Robb Kidd
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