



THE CENTER FOR FOOD SAFETY

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Comments Opposed To Proposed Amendment of the Control Area and Regulations for Growing Canola in the Willamette Valley and in Favor of Maintaining the Current Rule

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I. BACKGROUND

On August 10, 2012, the Oregon Department of Agriculture (ODA) issued a Notice of Proposed Rulemaking concerning amendment of the 2009 rule governing canola control areas in the Willamette Valley. The 2009 rule allowed unrestricted production of canola in Oregon except in four protected districts: Central Oregon, Northeast Oregon, a three-mile strip along the Malheur County-Idaho Border, and the Willamette Valley.¹ ODA established the protected districts because those are regions where specialty seed and Brassica family vegetable crops are grown, and, as the agency concluded in the rule, “[p]roduction of rapeseed for oil or seed is incompatible with production of crops of related species grown for seed or vegetables.”²

On August 10, in addition to the Notice of Proposed Rulemaking, ODA issued a temporary rule replacing the 2009 canola control area rule. The temporary rule for the first time slashed the Willamette Valley Protected District in half, opening 1.7 million of the District’s 3.7 million acres to canola production. To justify this sudden and dramatic change, ODA explained that the temporary rule was required to allow canola growers to plant in Willamette Valley by September 1,³ which is when canola planting must generally be completed. Accordingly, on

¹ OAR 603-052-0880(3).

² *Id.* at 603-052-0880(2). Similarly, Idaho and Washington both have canola control areas. IDAHO ADMIN. CODE 02.06.13, Rules Relating to Rapeseed Production and Establishment of Rapeseed Districts in the State of Idaho (2012); WASHINGTON ADMIN. CODE 16-326-010 to 16-326-060 (2008).

³ See *ODA Adopts Canola Control Area Rule for Willamette Valley*, ODA (Aug. 3, 2012), <http://www.oregon.gov/ODA/Pages/news/120803canola.aspx>.

August 15, in an effort to protect Oregon’s specialty seed growers, Center for Food Safety (CFS), Friends of Family Farmers, and several individual farmers and businesses filed an emergency motion to stay ODA’s temporary rule.⁴ Acting promptly in response to the risks of opening Willamette Valley to canola production, the Oregon Court of Appeals granted a stay on August 31.⁵ The Court of Appeals held that the petitioners had shown a “very substantial likelihood” of prevailing on their claim that the temporary rule was illegal.⁶ The Court went on to conclude that the petitioners had demonstrated a “sufficient likelihood of severe and irreparable harm” from any fall canola planting, and thus stayed the temporary rule.⁷

Now, ODA’s proposed rule is substantially similar to the temporary rule halted by the Court of Appeals. Thus, just like the temporary rule, the proposed rule would open 1.7 million acres of the Willamette Valley Protected District to canola cultivation. In light of the certainty of irreparable harm if the proposed rule is enacted—to Willamette Valley specialty seed growers, CFS members, and Oregon’s agronomic and environmental interests at large—CFS submits the following comments, calling on ODA to leave intact the canola control areas and other protections established in the 2009 rule.

CFS is a non-profit, membership organization that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting forms of sustainable agriculture, such as organic.⁸ CFS represents more than 200,000 members throughout the country, including specialty seed growers in the Willamette Valley and other Oregonians. CFS has offices in Portland, Oregon, San Francisco, California, and Washington, D.C.

CFS is also submitting separately: scientific comments and references, as well as 2,312 individual comments combined from its Oregon members on two petitions. Those documents and comments are incorporated here.

A. *High Value of Willamette Valley’s Specialty Seed Production*

The Willamette Valley, which has an ideal climate for the production of seed crops, is one of only five remaining premier seed growing areas in the world.⁹ In recent years, the region has been a major producer of seed crops in the Brassica family.¹⁰ The Brassica family includes the genus *Brassica* with popular vegetable crops such as broccoli, turnip, mustards, rutabaga, and Brussels sprouts.¹¹ Radish, in the genus *Raphanus*, is also in the Brassica family. The

⁴ Pet’rs Mot. for Stay Pending Judicial Review of Agency Rule, *available at* http://www.oregon.gov/ODA/docs/pdf/canola_petition%2c111kb.pdf (last visited Sept. 27, 2012).

⁵ Order Granting Mot. to Stay, *available at* http://www.oregon.gov/ODA/docs/pdf/canola_stay_continuance.pdf (last visited Sept. 27, 2012).

⁶ *Id.* at 1.

⁷ *Id.* at 2.

⁸ *See What We Do*, CFS, <http://www.centerforfoodsafety.org/what-we-do/> (last visited Sept. 27, 2012).

⁹ Russ Karow, *Canola in Western Oregon – Information from the Literature and OSU Research Activities and Some Speculations* 2 OSU W. OR CANOLA RESEARCH REPORT (Jan. 16, 2010), *available at* <http://cropandsoil.oregonstate.edu/bioenergy/sites/default/files/jan10summary.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

Willamette Valley grows the majority of the world’s Brassica family seed, including “nearly all (>90%) of the European cabbage, Brussels sprouts, rutabaga, and turnip seed, and a substantial portion (20 to 30%) of radish, Chinese cabbage, and other oriental *Brassica* vegetable seed.”¹²

The Willamette Valley’s specialty seed industry is substantial and quite profitable, grossing \$32 million per year, and the annual value of Brassica family seed production alone is estimated to be \$25 million.¹³ Oregon’s clover industry grosses \$15 to \$20 million a year, and the grass seed industry was the state’s 6th top commodity in 2011 and had estimated 2010 sales of over \$228 million.¹⁴

B. Canola’s Burden on Taxpayers

Unlike the Willamette Valley specialty seed industry, which generates tax and local jobs and does not receive subsidies, oilseed canola production is heavily dependent on government handouts. That is, oilseed canola production receives substantial state and federal subsidies, including a significant credit of \$.05 per pound from Oregon.¹⁵ As one study asserts, “The main effect [of subsidies for canola] is to lower the costs for oilseed growers and biodiesel processors—while at the same time raising the costs borne by taxpayers.”¹⁶ That study goes on to explain:

The full social cost with these programs in place includes the indirect cost of subsidies because they are financed through taxation. Public finance economics recognizes that taxes introduce distortions and thus inefficiencies in the economy; as a result, an additional cost is associated with any government program funded with taxes. The cost is referred to as the “deadweight loss” or “excess burden” of the tax.

To finance biofuel subsidies, governments must either raise funds through additional taxation or reduce funding for other programs. In either case, there is a cost of financing the program. Extensive literature on the topic estimates the cost in the United States ranges from 20 to 40 cents per dollar of tax revenue. This means that for every dollar paid in subsidies, the public pays an additional 20 to 40 cents in added distortionary cost associated with the subsidies’ financing¹⁷

Beyond being generally burdensome on Oregon taxpayers, production of canola in the Willamette Valley is especially inefficient, because land in that region has high profitability for growing other crops, such as specialty seeds, and thus there is an “opportunity cost” associated

¹² *Id.*

¹³ *Id.*

¹⁴ Morton Decl. ¶ 14, available at http://www.oregon.gov/ODA/docs/pdf/canola_morton.pdf (last visited Sept. 27, 2012).

¹⁵ William K. Jaeger & Ryan Siegel, *Economics of Willamette Valley Oilseed Crops and Biodiesel Production* 21 (May 2008), available at <http://arec.oregonstate.edu/jaeger/energy/SR%201081%20Oilseeds.pdf>.

¹⁶ *Id.*

¹⁷ *Id.* at 31.

with growing canola, which is worth much less per acre.¹⁸ As economists explain, because much land in Oregon is devoted to higher value crops, canola is “at best, a secondary rotational crop.”¹⁹

C. *Risks of Producing Canola in the Willamette Valley*

Separately submitted CFS scientific comments and citations will cover these risks in greater detail, but a brief summary is included below.

Canola, which is a member of the *Brassica* plant genus, is most commonly cultivated for its oil. Canola poses a number of significant threats to other species of *Brassica*, whether grown for seeds or as vegetables, because it: (1) easily cross-pollinates with some other *Brassica* species, thereby contaminating desired seed crops; (2) commonly escapes from intended growing areas and is difficult to control as a weed; and (3) creates significant threats for increasing pest and diseases in other crops. For example, as the Willamette Valley Specialty Seed Growers Association has noted, “Risks and damage from these pests have already eliminated or greatly curtailed radish and *Brassica* seed production in France, Germany, and Denmark, each of which allowed rapeseed production for oil to infiltrate established seed production areas.”²⁰ Canola poses a similarly significant threat to radish crops in the genus *Raphanus*.

1. *Cross-Pollination*

Canola presents a widely acknowledged risk of cross-pollinating with other *Brassica* family species grown for seed. For example, a study ODA relied on in establishing the 2005 canola control area rule reports that oilseed canola’s frequency of gene flow from outcrossing is “high” both with similar crops and wild relatives.²¹ Cross-pollination creates an “out-crossed” seed that would contaminate a desired seed crop of *Brassica* or *Raphanus* and render it unsellable. According to one study, “From an agronomic point of view, the transfer of novel genes from one crop to another could have a number of implications, including depletions in the quality of conventional and organic crop seed leading to a change in their performance and marketability.”²² That is, if even one out-crossed seed were found within 10,000 *Brassica* seeds, the entire lot of seeds would be rejected for use as foundation seed.²³ In fact, even commercial seed would be rejected if more than 3 of 1,000 seeds were out-crossed.²⁴

In addition to the risk of GE (or even conventional) canola cross-pollinating other

¹⁸ *Id.* at 21.

¹⁹ Gregory M. Perry et al., *Biofuel Production and Consumption in the United States: Some Facts and Answers to Common Questions*, <http://cropandsoil.oregonstate.edu/bioenergy/sites/default/files/jan10summary.pdf> (last visited Oct. 2, 2012).

²⁰ WILLAMETTE VALLEY SPECIALTY SEED ASS’N, *Position Statement, Opposition to Rapeseed Production for Oil (Canola) in the Willamette Valley* 1 (Sept. 18, 2012), available at http://www.friendsoffamilyfarmers.org/wp-content/uploads/2012/08/WVSSA-position-on-rapeseed_080912-1.pdf.

²¹ Katie Eastham & Jeremy Sweet, *Genetically Modified Organisms (GMOs): The Significance of Gene Flow Through Pollen Transfer*, ENV’T L ISSUE REPORT NO. 28, 9 (2002), available at http://www.eea.europa.eu/publications/environmental_issue_report_2002_28.

²² *Id.* at 10.

²³ Karow, *supra* note 9, at 3.

²⁴ *Id.*

Brassica family crops, there is the near certainty of GE canola cross-pollinating related weed species, because Oregon already has wild Brassica family weeds. Cross-pollination between GE canola and Brassica family weeds would create wild *Brassica* and *Raphanus* species with herbicide resistance.

There is no real dispute about the potential for canola to out-cross with other Brassica family species. An Oregon State University (OSU) report on the impacts of canola cultivation in Willamette Valley plainly recognized that “[c]anola and certain specialty seed crops can successfully cross-pollinate and produce viable seed under Willamette Valley environmental conditions.”²⁵ The same study reported that bees can carry canola pollen that cross-pollinates *Brassica* crops that are up to 5 miles away,²⁶ highlighting the magnitude of the risk created by even a small level of canola production in the Willamette Valley.

2. *Adverse Impacts from Canola Weeds*

However, canola need not cross-pollinate Brassica family crops or weeds to cause serious harm to Oregon agriculture. Canola itself is a weedy plant that is prevalent in and around fields and roadways wherever it is grown or transported. A study cited by ODA in the Statement of Need for its 2005 rule reported that “volunteer canola has weedy characteristics such as seed dormancy and at least a 3 year persistence in the soil.”²⁷ As the OSU report explained:

We know that canola will persist in the seedbank in Valley soils for at least two years, so each acre of canola that is grown is a potential problem for several years. For example, if 1000 acres of canola were planted in each of three years, in the third year of planting, 6000 acres would need to be monitored for pests or volunteer plants.²⁸

Indeed, other studies show that canola seeds can survive for up to 10 years in the soil.²⁹

Weedy canola occurs in two forms. “Volunteer” canola plants sprout in the following season’s crop from abundant seeds left in the field after harvest. Wild or feral canola grows near fields and along roadways, from seeds that are well-documented to escape many miles from fields via spillage from trucks, animals, wind, floods, or human error, and are then very difficult to control.

One aspect of weediness is difficulty of control. Most of the canola grown in the United States is Roundup Ready, genetically engineered for resistance to glyphosate (the active ingredient in Monsanto’s Roundup herbicide). Some canola is resistant to other herbicides. Resistance makes canola plants much harder to control, because they are, as intended, immune to glyphosate; and glyphosate is the most important and widely used herbicide in Oregon and the

²⁵ *Id.*

²⁶ *Id.* at 1.

²⁷ Gary Martens, *From Cinderella to Cruella: Volunteer Canola*, www.umanitoba.ca/afs/agronomists_conf/2001/pdf/martens.pdf (last visited Oct. 2, 2012).

²⁸ Karow, *supra* note 9, at 1.

²⁹ Tina D’Hertefeldt, Rikke B. Jørgensen, & Lars B. Pettersson, *Long-Term Persistence of GM Oilseed Rape in the Seedbank*, 4 BIOL. LETT. 314 (2008), available at <http://frankenfoodfiles.files.wordpress.com/2010/10/gmos-persist-10-years-2008.pdf>.

Willamette Valley.³⁰

Thus, it is not surprising that canola resistant to glyphosate and other herbicides is one of the most abundant weeds in western Canada.³¹ Feral Roundup Ready canola emanating from a tiny 2007 field trial is emerging as a difficult to control new weed in California.³² In North Dakota, the principal canola growing state, 86% of feral canola plants along more than 3,300 miles of roadway contained at least one herbicide-resistance transgene.³³

Unwanted glyphosate-resistant canola would have numerous adverse impacts. Seed growers, as well as no-till crop farmers who rely on glyphosate, would be forced to use tillage and/or more toxic herbicides, at greater cost, to control it. Feral/volunteer GE canola would also contaminate valuable Brassica seed crops. First, it would act as a “bridge” for cross-pollination. Second, GE canola seeds would directly contaminate seed crops, such as clover³⁴ and mustard,³⁵ which can destroy the value of an entire seed lot, because many international and domestic buyers have strict prohibitions against GE content.

The proposed rule implicitly acknowledges that canola would spread by requiring producers to address “volunteer and uncontrolled” plants.³⁶ However, this provision would utterly fail to address the problem, because it only requires producers to prevent the inadvertent spread of canola within a quarter mile of their fields.³⁷ It is questionable whether growers could or would accomplish this daunting task. Yet even if they could, it would not be enough. Any canola plants within at least 2 kilometers (1.24 miles) of a Brassica seed growers field poses contamination risks. And as Oregon State expert Jim Myers states: “[d]etecting and eliminating volunteers from a 2-kilometer radius around a seed field would be onerous and perhaps impossible.”³⁸

3. *Harm to Willamette Valley’s Position as a Global Seed Producer*

Given the Willamette Valley’s preeminent role as a global seed producer for Brassica family and other temperate zone crops, even the potential for seed contamination, whether from

³⁰ Oregon Department of Agriculture. Pesticide Use Reporting System: 2008 Annual Report, June 2009, <http://www.oregon.gov/ODA/PEST/docs/pdf/pursreport08web.pdf>.

³¹ Rene Van Acker et al., *What’s up? Preliminary Results from the 2002 Manitoba Survey of Weeds in Cereal and Oilseed Crops*, 3 PROC. MANITOBA AGRON. CONF. 109 (2002), available at http://www.umanitoba.ca/afs/agronomists_conf/2002/pdf/vanacker.pdf.

³² Douglas J. Munier, Kent L. Brittan & W. Thomas Lanini, *Seed Bank Persistence of Genetically Modified Canola in California*, ENVIRON. SCI. POLLUT. RES. (2011), available at http://wric.ucdavis.edu/PDFs/Seed_bank_persistence_of_genetically_modified_canola.pdf (last visited Sept. 27, 2012).

³³ Meredith G. Schafer et al., *Evidence for the Establishment and Persistence of Genetically Modified Canola Populations in the U.S.*, <http://eco.confex.com/eco/2010/techprogram/P27199.HTM> (Aug. 6, 2010).

³⁴ Morton Decl. ¶ 15.

³⁵ Mary MacArthur, *GM Canola Found in Mustard Load*, THE WESTERN PRODUCER (Mar. 6, 2003), available at <http://www.producer.com/2003/03/gm-canola-found-in-mustard-load/>.

³⁶ OAR 603-052-0870(1)(b)(G), (1)(d)(F), (2)(g).

³⁷ *Id.* at 603-052-0870(1)(b)(F)(i), (1)(d)(E)(i), (2)(f)(A).

³⁸ Myers Decl. Ex. B, at 3, available at http://www.oregon.gov/ODA/docs/pdf/canola_myers.pdf (last visited Oct. 2, 2012).

cross-pollination or contamination from seeds of escaped canola plants, would seriously impact Oregon growers' hard-earned position.³⁹ These concerns are especially true for the international market, where buyers are closely following the prospect of canola production in Oregon's specialty seed regions. As the OSU report explained, "Because of the potential for contamination, some specialty seed customers have threatened to pull all seed contracts, not just *Brassica*, from Western Oregon if canola production is allowed."⁴⁰ At a minimum, if canola production entered the Willamette Valley, seed buyers would require Oregon's growers to conduct expensive seed contamination testing on every lot of seeds.⁴¹

4. *Increased Pest and Disease Risks*

It is also well documented that canola production would increase the level of high-impact pests and diseases in the Willamette Valley. As explained in the OSU report:

Disease and insect pests can cross over between canola and the *Brassica* seed crops and between these two groups and the *Brassicaceae* that are grown for root vegetables in western Oregon. Cabbage maggot (*Delia radicum*—a crown and root infesting fly larva) and white mold (*Sclerotinia sclerotiorum*—a stem rotting fungus) are the pests of greatest concern.⁴²

The report also listed results from field studies of experimental canola plots in Oregon:

- "White mold was found in all monitored grower canola fields at low to high levels. We do not know how 5–10,000 acres of canola would affect white mold levels, as well as levels of other diseases that also affect vegetable and specialty seed crops."⁴³
- "Experience with *Brassica* specialty seed and vegetable crops suggests that if canola acreage increases and crops are nearer to each other in time and/or space, cabbage maggot could become a problem."⁴⁴

Similarly, the OSU report stated that pollen beetles, which constitute a significant threat to *Brassicaceae*, were found in the experimental Willamette Valley canola fields.⁴⁵

II. HISTORY OF THE CANOLA CONTROL AREA RULE

Oregon first established canola production rules in the early 1900s to ensure separation between edible-type canola and industrial oil-type canola.⁴⁶ In 1989, because of conflicts caused by canola production, the Oregon Legislature empowered ODA to establish "rapeseed control

³⁹ See Karow, *supra* note 9, at 3.

⁴⁰ *Id.*

⁴¹ Morton Decl. ¶ 21.

⁴² Karow, *supra* note 9, at 3.

⁴³ *Id.* at 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ ODA Response Ex. 101, at 1, 2005 Rule, *Statement of Need and Fiscal Impact* (June 15, 2005), available at http://www.oregon.gov/ODA/docs/pdf/canola_response_document.pdf.

areas.”⁴⁷ ORS 570.405 governs establishment of these areas, granting the agency broad authority to prohibit any plants that are a menace to an agricultural industry. In its entirety, ORS 570.405 reads:

(1) The State Department of Agriculture may establish, in accordance with the provisions governing the procedure for the declaring of quarantines contained in ORS 561.510 to 561.590, control areas within this state, if after careful investigation it determines that such areas are necessary for the general protection of the horticultural, agricultural or forest industries of the state from diseases, insects, animals or noxious weeds or for the eradication or exclusion from such areas of certain plants or their produce, trees, diseases, animals, insects or noxious weeds that may be a menace to such areas and generally to horticultural, agricultural or forestry industries. Whenever eastern filbert blight is found to exist, the department may declare it a hazard and may establish a control area without having to prove how the disease is transmitted.

(2) The power and authority to establish such control areas and for the eradication or exclusion of certain plants or their produce, trees, diseases, insects, animals or noxious weeds existing therein or to be excluded therefrom shall be exercised reasonably and justly considering the exigencies of the particular situation, the danger to the interests sought to be protected and the immediate and continuing effect upon the property and the owners of the property in the areas established. Such powers shall in no case be exercised unreasonably, unjustly or arbitrarily.

(3) The department in such determination shall define the boundaries of the areas and specify the character and kinds of plants or their produce, trees, diseases, insects, animals or noxious weeds to be eradicated or excluded and the manner and method of such eradication or exclusion. The provisions of ORS 561.510 to 561.590 apply to this section.

ORS 570.450, which specifically permits canola control areas, states:

The State Department of Agriculture may establish control areas for the production of rapeseed as provided in ORS 570.405 (Department may establish control areas). The department may appoint advisory boards to advise and counsel the department on the boundaries of the control areas, the type of rapeseed species and varieties which may be produced in the various control areas and the enforcement of control area orders.

In 2005, as a result of concerns that canola production in the Willamette Valley would endanger the established specialty seed industry, ODA adopted a rule prohibiting canola production in that region absent a special permit. In its 2005 Statement of Need and Fiscal Impact, the agency explained:

Current rules prohibit rapeseed/canola production in half of the state. These

⁴⁷ ORS 570.450.

proposed changes would open up these areas to commercial production and should financially benefit growers. The changes in protected districts would prevent production for oil, but promote seed production. Seed producers should benefit; but some potential, oilseed growers would not be able to grow this crop. Current prices for oil rapeseed/canola are too low to be attractive to most farmers in these districts.⁴⁸

In other words, ODA asserted that the 2005 rule loosened the century's more severe restrictions on canola production, benefiting canola producers. However, despite that windfall, canola growers still were not content, instead advocating for industrial-scale production of canola oil in the Willamette Valley protected region. Thus, in 2006, and again from 2007 to 2009, the Legislature granted ODA research funds to study issues surrounding the potential for harm from production of canola in the Willamette Valley.⁴⁹ As explained in the Board of Agriculture's February 2009 meeting minutes, "Funding [wa]s provided so that ODA c[ould] obtain the information it need[ed] to make informed decisions about canola production zones in the state."⁵⁰ ODA contracted with the OSU to do the research work.⁵¹

In 2009, OSU researchers presented the results of their research, which culminated in a report, to the ODA Canola Advisory Committee. As summarized above, the OSU report identified a number of potential harms to specialty seed growers if canola production were permitted in the Willamette Valley. The report admitted that "[t]he research work that was done resulted in as many questions as answers,"⁵² concluding "given the potential risk, precaution suggests not allowing canola production at this time."⁵³

In sum, the OSU report's results were inconclusive, and it not only failed to assuage concerns about the potential harms, but also actually confirmed many of the specialty seed growers' fears. As a result, it was not surprising that the Canola Advisory Committee was unable to reach a consensus about altering the 2005 prohibition on producing canola in the Willamette Valley. Thus, in 2009, ODA reestablished the 2005 rule with only minor changes.

In anticipation of obtaining new research results in the interim, ODA decided to commit to revisiting the issue in 2012. The 2009 rule requires ODA to begin a rule review at the end of 2012, but the rule did not sunset, and it does not require ODA to amend its terms.⁵⁴ According to the agency's FAQs, "[n]ew information and research results will be reviewed at that time and the rules may be modified."⁵⁵ Unfortunately, funding dried up and there was no further research, so ODA has not overseen any more scientific studies about the potential harms of lifting the prohibition on producing canola in the Willamette Valley, although other studies since 2009 have supported the OSU report's findings. Thus, the scientific findings that resulted in establishment of the prohibition in 2005 and 2009 still govern.

⁴⁸ ODA Response Ex. 101, at 1, 2005 Rule, *Statement of Need and Fiscal Impact* (June 15, 2005) (emphasis added).

⁴⁹ Karow, *supra* note 9, at 1.

⁵⁰ February 2009 Bd. of Agric. Meeting Minutes at 13.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2.

⁵⁴ See OAR 603-052-0880(4)(g).

⁵⁵ (Emphases added.)

A. 2009 Canola Rule

In 2009, in arriving at its decision to reissue the control area rule, ODA balanced various factors that included: (1) “[t]he unique growing characteristics of the Willamette Valley that make it conducive to specialty seed production”; (2) “[t]he number of fresh vegetable operations, including smaller farm operations whose markets include local buyers, all of which could be negatively impacted by canola pests and diseases”; and (3) the canola advocates’ “opportunity to grow canola in many other regions in Oregon.”⁵⁶ As Dan Hilburn, an ODA Administrator explained at a May 2009 Board of Agriculture meeting, “the Willamette Valley is full of specialty seed growers and the industry footprint is huge. Any type of canola production will produce more pests, disease, and fields can serve as reservoirs for their proliferation.”⁵⁷ Thus, according to the 2009 canola control area rule:

Production of rapeseed for oil or seed is *incompatible* with production of crops of the same or related species grown for seed or vegetables. Therefore, protected districts are established where rapeseed production for oil or seed is prohibited except under special permit. Production of rapeseed for forage or cover crop in these protected production areas is subject to measures to minimize undesirable cross-pollination, disease and pest buildup, and volunteers [i.e., weeds].⁵⁸

The rule’s Statement of Need and Fiscal Impact further explained that “[c]ross-pollination or contamination of seed crops by unregulated canola would have serious negative economic impacts on the seed and vegetable industries.”

The 2009 rule applied to approximately 3.7 million acres in the Willamette Valley Protected District, including in Lane, Linn, Benton, Marion, Polk, Clackamas, Yamhill, Washington, and Multnomah counties, as well as a portion of Columbia County. As noted above, the 2009 rule prohibited canola cultivation without a special permit from ODA and placed strict controls on any cultivation allowed by special permit.⁵⁹

In explaining the 2009 rule, Hilburn stated: “It looks to us like the specialty seed and vegetable industry and commercial canola production can’t be grown in the same area The (Willamette) Valley has historically been for specialty seed and vegetables, and we’re going to keep it that way.”⁶⁰ He explained: “There are not a lot of areas in the world where you can grow specialty seed We have a special situation in Oregon—but there are a lot of places where you can grow canola. For now we’re protecting an existing industry rather than develop a

⁵⁶ *Canola Growing Regulations: Frequently Asked Questions*, ODA (updated Sept. 25, 2009), <http://library.state.or.us/repository/2009/200910201346122/index.pdf>. Alternative oilseed crops can be grown in the Willamette Valley including camelina, flaxseed, and soybeans.

⁵⁷ May 2009 Bd. of Agric. Meeting Minutes at 7.

⁵⁸ OAR 603-052-0880(2) (emphasis added).

⁵⁹ *Id.* As a result, very few acres of canola were planted and, to CFS’s knowledge, no canola was planted in the Willamette Valley Protected District after 2010. Morton Decl. ¶ 19.

⁶⁰ Mitch Lies, *Canola Study Validates State’s Prohibitions*, CAPITAL AG PRESS (Feb. 4, 2010, 11:00 a.m.), <http://www.capitalpress.com/oregon/ml-canola-research-020510>.

new one in canola.”⁶¹ Hilburn then proceeded to conclude: “I am comfortable, and (ODA Director) Katy (Coba) is comfortable that the research supports what we’ve done.”⁶²

However, despite the soundness of its representatives’ conclusions, and without putting forth any scientific findings demonstrating why canola suddenly no longer poses the agronomic and environmental threats that ODA previously recognized, ODA dramatically reversed its position in the proposed rule and removed the protections it previously held warranted.

B. *Effects of the Proposed Rule*

The proposed rule would weaken regulation of the canola control area in a number of ways that significantly and adversely affect specialty seed growers. First, the proposed rule would open 1.7 million acres of land within the Willamette Valley Protected District to canola production. In its FAQs, ODA refers to the 1.7 million acres as “Protected Subdistrict 1(b).” ODA asserts that within this area only 480,000 acres would actually be suitable for canola production. However, as shown by ODA’s map, even if this number is correct, those highlighted 480,000 acres are not contiguous or limited to one portion of the Willamette Valley, but instead sprawl across the entire region, ensuring that the adverse impacts of the canola production would affect a broad range of highly productive Willamette Valley farmland.

Second, the proposed rule would entirely remove the requirement that canola be separated from other Brassica family crops by at least three miles. Instead, the proposed rule states that “[i]solation distances to prevent cross-pollination shall not be required for production of *Brassica spp.* or *Raphanus spp.*”⁶³ However, as the OSU report observed, three miles of isolation “seems a reasonable distance based on wind dispersal of pollen and bee travel.”⁶⁴ Further, ODA’s own FAQs acknowledge that “[s]pecialty seed crops have to be separated from crops that they cross-pollinate by distances of 1 to 3 miles.” Allowing planting within the protected zone and completely removing the 2009 rule’s isolation distances would make irreparable harm to Willamette Valley’s specialty seed growers a virtual certainty.

In lieu of actual isolation distances, the proposed rule advocates pinning as a way to separate canola and the specialty seed crops it threatens. However, the two practices are not equivalent. That is, rather than requiring canola producers to maintain a distance from specialty seed production areas, pinning merely alerts specialty seed growers to the presence of canola in certain fields, which could easily be close enough to permit cross-pollination. The result is that specialty seed producers would only be able to protect themselves by foregoing crop production in areas near canola. Even worse, canola seeds can persist in the soil for three⁶⁵ to ten⁶⁶ years, so risk of contamination does not end when the canola crop is harvested. Moreover, locations of feral canola will not be known. As the OSU report (upon which ODA has until now relied) concluded: “Would the use of an electronic pinning system solve the problems of canola

⁶¹ Eric Mortenson, *Canola Good for Bio-Fuels, but Dangerous for Other Crops*, THE OREGONIAN (updated Oct. 23, 2009, 1:18 p.m.), http://www.oregonlive.com/business/index.ssf/2009/08/canola_good_for_biofuels_but_d.html.

⁶² Lies, *supra* note 60.

⁶³ Proposed Rule at OAR 603-052-0870(1)(D)(b)(iv).

⁶⁴ Karow, *supra* note 9, at 3.

⁶⁵ Martens, *supra* note 27.

⁶⁶ D’Hertefeldt, Jørgensen, Pettersson, *supra* note 29.

production? The short answer is no”⁶⁷ Thus, pinning would not compensate for harm caused by removing the isolation distance.

Third, the proposed rule would increase the frequency with which canola is grown. ODA’s previous rule prohibited growing canola on a given field more than one of every four years “to prevent buildup of blackleg, blackrot, and other diseases and pests”⁶⁸ The proposed rule increases the number of years that canola can be grown in a given location from one of every four years to two of every five years.⁶⁹ This proposed change increases the percentage of time canola can be grown on a given plot from 25% of the time to 40% of the time, heightening the effects of canola-related disease and pests that can spread to other at-risk crops, as well as the frequency of contamination risk.

Fourth, the proposed rule would eliminate the requirement that any canola grown for forage or cover crop “shall not be allowed to flower” in order to prevent cross-pollination, increasing risk of contamination.⁷⁰

Finally, the proposed rule would dramatically weaken enforcement provisions by removing the current civil penalty of up to \$10,000 for violating the control area regulations, instead leaving third-party destruction actions as the only way to combat any lack of compliance.⁷¹

III. THE PROPOSED RULE SHOULD BE REJECTED AND THE CURRENT RULE RETAINED IN FULL. ANYTHING LESS WILL CAUSE IRREPARABLE HARM.

A. The Proposed Rule Exceeds ODA’s Statutory Authority

A court must declare invalid a rule that exceeds an agency’s statutory authority.⁷² The proposed rule exceeds ODA’s authority in at least two ways. First, it is inconsistent with the stated agency conclusion that “production of rapeseed oil or seed is incompatible with production of crops of the same or related species grown for seed or vegetables.”⁷³ While the agency can determine control areas as part of its delegated authority, it cannot do so without explanation. Instead, changes require the development and support of a complete administrative record.⁷⁴ As discussed above, there is zero new scientific study or data supporting shrinking the protected zone by approximately half. Instead, as discussed in the CFS scientific comments, scientific studies since 2009 have actually supported the 2009 rule. Further, there is no change in ODA’s legal authority. If anything, the Valley’s seed production is even more valuable to the state than it was in 2009. Since ODA has failed to provide adequate justification, or really any justification, for the proposed rule in its statements of need and other documents, it is acting

⁶⁷ Karow, *supra* note 9, at 10.

⁶⁸ OAR 603-052-0880(2)(c).

⁶⁹ Proposed Rule at OAR 603-052-0870(1)(D)(d).

⁷⁰ *Id.* at 603-052-0880(2)(f).

⁷¹ *See id.* at 603-052-0880(2).

⁷² ORS 183.400(4)(b).

⁷³ OAR 603-52-880(2) (emphasis added).

⁷⁴ *See* ORS 183.335.

outside of the range of its discretion.⁷⁵

Second, the proposed rule exceeds ODA's authority because it disregards the agency's statutorily mandated responsibility for protecting Oregon agricultural industries. ODA is authorized to establish control areas for "the eradication or exclusion of certain plants or their produce, trees, diseases, insects, animals or noxious weeds existing therein that may be a menace to such areas and generally to horticultural, agricultural or forestry industries."⁷⁶ The word "menace" is not defined in the related laws and rules, but *Black's Law Dictionary*, the *Oxford English Dictionary*, and *Merriam-Webster's Collegiate Dictionary* all agree that it broadly means "threat." Thus, ORS 570.405 authorizes ODA to protect areas and agricultural industries from threats caused by plants, and ORS 570.450 recognizes canola, in particular, as such a threat. Since an industry is a distinctive, profit-making enterprise, jeopardizing an industry's ability to make a profit must constitute a menace and a threat. Therefore, protecting the Willamette Valley specialty seed industry from economic harm is quite plainly ODA's responsibility.

In exercising its broad authority to establish control areas, ODA must consider, among other things, "the danger to the interests sought to be protected."⁷⁷ Thus, ODA is required to consider the danger of economic harms to specialty seed producers that would likely result from canola production in the Willamette Valley, but it declined to do so. ODA has failed to protect or even consider these interests. Accordingly, by disregarding this statutory mandate, ODA is acting outside its permissible range of discretion.

B. *The Proposed Rule Is Unreasonable, Unjust, and Arbitrary*

An agency is prohibited from exercising its powers unreasonably, unjustly, or arbitrarily.⁷⁸ Thus, a court must set aside any agency decision that is "inconsistent with the agency rule, an officially stated agency position, or a prior agency practice if the inconsistency is not explained by the agency."⁷⁹ ODA's proposed canola control area rule violates this mandate because it is inexplicably inconsistent with other longstanding ODA practices, lacking in rationale, and also unjust and arbitrary.

In particular, ODA has failed to show any reason why the scientifically supported conclusions underlying the 2009 rule have changed. For example, although it cited four scientific documents assessing canola impacts in the 2005 rule establishing the Willamette Valley Protected District, and it cited the OSU report in the 2009 rule reaffirming that region, the proposed rule does not cite a single scientific study. (This is not completely surprising, since the scientific conclusions from 2005 and 2009 have not changed. Rather, as discussed in the CFS scientific comments, research since 2009 further supports the 2009 rule.) However, tellingly, although ODA did not arrive at a new scientific conclusion, there is a novel economic interest in canola as a biofuel crop. But that is about it. In its FAQs, ODA's entire response to its own question "What has changed?" was:

⁷⁵ *Id.* at 183.482(8)(B)(b).

⁷⁶ *Id.* at 570.405(2).

⁷⁷ *Id.* at 570.405(1) (emphases added).

⁷⁸ *Id.*

⁷⁹ *Id.* at 183.482(8)(b)(B).

Not much. The positions of grass seed growers wanting to plant canola and vegetable growers opposing it (also joined by clover, organic, and anti-GMO interests) have mostly remained entrenched. ODA has brought the parties together several times to attempt to reach an agreement.

As ODA concluded in the 2009 rule, canola production in the Willamette Valley is “incompatible” with specialty seed production in that region. The bottom line is that in the proposed rule and related information, ODA failed to show how canola production is now somehow magically compatible with specialty seed production. In fact, the proposed rule states that it relied on the Washington Administrative Code’s *Brassica* production limitations. However, unlike the proposed rule, Washington rules protect the state’s specialty seed industries by strictly limiting canola production to growing for seed in some areas and also requiring a two-mile distance between canola and other *Brassica* crops.⁸⁰ Thus ODA’s reliance on Washington’s rules, and citation to them for support, is arbitrary. Given that the science showing a need to prohibit canola production in the Willamette Valley, as determined by ODA itself first in 2005 and then again in 2009, has not changed, and in fact has been buttressed by newer research, it is arbitrary and unreasonable for the agency to now suddenly permit canola production in that region.

That said, the discussion below addresses each of ODA’s non-scientific explanations of its choice to significantly weaken the 2009 rule. Those explanations are similarly arbitrary, unreasonable, and inconsistent, rendering adoption of the proposed rule unjust.

1. ODA’s Alleged Rationale for the Proposed Rule

i. Purported rationale of protecting seed growers

The proposed rule states that it “provides growers in the control area with protection from certain plants [i.e., canola] that may be a menace to *Brassica spp.* and *Raphanus spp.*” However, that assertion merely explains why a canola control area is necessary now, and was necessary in 2009. What the statement does not do is clarify why ODA is significantly weakening the 2009 rule. So doing cannot logically be considered a way of providing “protection” from canola.

ODA’s “protection” justification ignores the fact that, by prohibiting all canola production in the Willamette Valley, the 2009 rule provided significantly more protection for specialty seed growers than the proposed rule, which opens 1.7 million acres to canola. There is essentially no dispute that canola presents a serious threat of contaminating *Brassica spp.* and *Raphanus spp.* in the Willamette Valley. Indeed, ODA recognized that threat in the 2009 rule when it asserted: “Production of rapeseed oil or seed is incompatible with production of crops of the same or related species grown for seed or vegetables.”⁸¹ It is arbitrary and unreasonable to

⁸⁰ WASHINGTON ADMIN. CODE 16-326-010 to 16-326-060. See Carries H. Wohleb, Area Extension Educator – Vegetable & Vegetable Seed Crops, *Vegetable Seed Notes* (Apr. 2009), available at <http://county.wsu.edu/grant-adams/agriculture/Documents/Vegetable%20Production/Vegetable%20Seed/Vegetable%20Seed%20Notes%20New%20letter/VegSeedNotes2009-04.pdf>.

⁸¹ OAR 603-052-0880(2) (emphasis added).

claim purported “protection” of growers as a justification for amending the 2009 rule while simultaneously reducing actual safeguards for those growers. Rather, this would only be a proper rationale for deciding to maintain the status quo.

ii. Claim that it facilitates orderly production of crops

The rule summary asserts that the proposed rule is necessary “to facilitate the orderly production of crops affected by the control area.” However, the proposed rule does not facilitate orderly production in the Willamette Valley in a way superior to the 2009 rule. Instead, the 2009 rule provided more certainty to farmers by providing a bright line ban on canola production in the Willamette Valley without a special permit. Indeed, ODA asserted in the 2009 Rule Summary that the districts, which included the Willamette Valley Protected District, “would streamline the department’s rules for production of rapeseed.” Thus, the 2009 rule is more conducive to orderly production than the proposed rule, which divides the Valley, with the result that this rationale is arbitrary. Moreover, as with the statement about “protecting” specialty seed growers, this explanation satisfactorily explains why the 2009 rule was necessary and would support maintaining the status quo, but not why any proposed amendment of that rule is reasonable or justified.

2. ODA’s Reasoning in FAQs

i. Asserted reasoning that growers need to produce canola for biofuels

In its FAQs, ODA explains:

Legislative restrictions on field burning and a declining demand for grass seed led growers to seek alternative crops. These growers found that canola . . . is the best plant to produce high yield with minimal inputs, and lends itself to the same general equipment used in grass seed production.

In other words, Willamette Valley’s would-be canola growers asked to grow canola for biofuel because grass seed is no longer as profitable as it once was, and growing canola might result in more financial gain than growing the species of oil crops (e.g., soybeans) that are permitted in the region.

Critically, canola can be grown in almost every other part of Oregon without jeopardizing the livelihoods of Willamette Valley’s specialty seed growers. Thus, ODA’s purpose in amending the 2009 rule is to allow a few producers to chase temporary economic incentives to plant canola, instead of another crop, for biofuel. As Sonny Ramaswamy, Dean of Oregon State University, explained in a March 2012 ODA meeting, the Willamette Valley

is a very unique environment. There is no environment like this in the world, literally, in terms of being able to grow these specialty seeds. The purity of it and things like that. That’s the reason why these pinner want to maintain their integrity as it were. However, I mean, you know, canola growers and the grass seed growers that want to look for rotational crops and alternatives, and the

opportunity to make some decent money and this like that. . . .⁸²

In contrast to the alleged economic benefits for a minority of growers wishing to crop canola in the Valley, which would likely be fleeting, the resulting harm to specialty seed growers could be permanent, irreparable, and devastating. Contamination and weed resistance, as well as pest and disease harms are not merely economic in nature (although those economic losses are considerable at tens of millions of dollars) but are also irreparable agronomic and environmental harms, such as changing the DNA of plants and unleashing engineered superweeds in the Valley. Putting the short-term benefits of a few canola producers above the long-term viability of the Valley's unique specialty seed production, which is both economically and environmentally valuable, is arbitrary, unreasonable, and unjust.

ii. Claim that ODA lacks authority to consider market-based economic issues

According to the agency's FAQs, "ODA authority for control districts does not extend to protecting agriculture from market based threats or concerns." Thus, ODA asserts that it cannot consider the economic impacts of growers' crop production when making decisions. However, ODA's assertion is completely inconsistent with ODA's broad statutory authority to create control areas to protect industries, as well as with the agency's own actions.

First, this claim is flatly contrary to ORS 570.405(1), which explains that control districts can be established

*for the general protection of the horticultural, agricultural or forest industries of the state from diseases, insects, animals or noxious weeds or for the eradication or exclusion from such areas of certain plants or their produce, trees, diseases, animals, insects or noxious weeds that may be a menace to such areas and generally to horticultural, agricultural or forestry industries.*⁸³

As outlined above and discussed in the CFS scientific comments, canola's decimation of the market for pure, specialty *Brassica* and *Raphanus* seeds and other seeds such as clover would clearly constitute a "menace" to the specialty seed industry in the Willamette Valley in the form of substantial economic harm. Therefore, canola falls within "certain plants" that "may be a menace" to an agricultural industry, as stated in the statute. ODA's decision not to protect the Willamette Valley specialty seed growers from canola is inconsistent with the agency's statutory authority, and thus unreasonable, unjust, and arbitrary.

A second unexplained inconsistency is that several aspects of ODA's previous actions contradict this statement. First and foremost, the canola protection district itself was put in place in 2005 and reaffirmed in 2009 in order to protect against economic/market harm to Willamette Valley growers, including contamination harm. The point of the rule is to protect growers from canola's harms, which will adversely impact their thriving seed industries. As noted above, a court must remand any agency decision that is "inconsistent with . . . a prior agency practice if

⁸² Jerger Decl. Ex. 4, Minutes, State Bd. of Agric. Meeting Mar. 5–7, 2012 at 9, *available at* http://www.oregon.gov/ODA/docs/pdf/canola_jerger.pdf.

⁸³ (Emphases added.)

the inconsistency is not explained by the agency.”⁸⁴

In addition to previous actions protecting against economic harms, the fundamental purpose behind the proposed rule is economic in nature. That is, as ODA recognizes, the proposed rule would give some producers in the Willamette Valley an opportunity to earn more from their land, at least while biofuel production is profitable. Certainly, ODA was considering economic consequences when it observed that some producers want to produce canola in the Willamette Valley because restrictions and declining demand reduced the profitability of growing the grass seed they had been producing.

Indeed, ODA’s proposed version of OAR 603-052-0860 states that the agency “is required to protect the public interest in well-developed and protected food, industrial, seed, and commodity markets.” That is, the proposed rule specifically targets protection of markets, including the seed market. Moreover, ODA’s website announces that part of the agency’s mission is “to promote economic development and expand market opportunities for Oregon agricultural products.”⁸⁵ A statement that ODA is obligated to protect seed markets is inconsistent with ODA’s position that it cannot consider harm to the specialty seed industry resulting from market preferences. Such inconsistency is impermissible, as well as arbitrary and unreasonable.

A third unexplained inconsistency is that several other ODA rules state that ORS 570.405 authorizes establishment of a control area to protect the viability of seed production based on market-based, economic concerns about contamination. Of course the 2009 rule was intended to do just what ODA now says it cannot do. In addition to the 2009 rule, four other rules create control areas because production of a crop “would pose a potential threat of contamination to currently established grass seed production in the area,” drawing authority from ORS 570.405.⁸⁶ Therefore, ODA’s sudden determination that it cannot consider market-based economic issues concerning *Brassicacae* is impermissibly inconsistent with the canola protection district itself as well as other similar ODA rules. Such inconsistency is unreasonable and arbitrary.

iii. Argument that this is the most viable compromise

In its FAQs, ODA identifies three options concerning the 2009 rule: (1) leave it as is; (2) remove it; and (3) amend it by allowing almost half of the Willamette Valley to host canola. ODA concludes that (3) “is the most viable for co-existence and mutual benefit of the parties.” The FAQs explain that (2) “might create a chaotic situation with no good communication tools for growers,” but are silent as to why having canola in the Willamette Valley at all is necessary. Absent science contradicting the OSU report ODA relied on in 2009, the only justification for changing the rule to allow canola in the region is for the economic benefit of the would-be canola producers. However, ODA states elsewhere in the FAQs that it cannot consider market issues. ODA’s choice to promote canola producers’ economic interest while simultaneously justifying amendments to the 2009 rule by saying that it cannot consider economic issues affecting the specialty seed industry is arbitrary and unjust, as well as lacking in reason.

⁸⁴ ORS 183.482(8)(b)(B).

⁸⁵ *About Us*, ODA, http://www.oregon.gov/ODA/Pages/about_us.aspx (last visited Sept. 27, 2012).

⁸⁶ OAR 603-052-1030; OAR 603-052-1040; OAR 603-052-1050; OAR 603-052-1060.

iv. Assertion that the 2009 rule was scheduled for review in 2012

According to ODA’s FAQs, the 2009 rule “was in effect while research was conducted [and] was scheduled for review in 2012.” Undoubtedly, when ODA passed the 2009 rule, it intended to conduct further research into the stated incompatibility between growing specialty seeds and canola in the Willamette Valley and to use that data to reassess the 2009 rule in 2012. However, funding dried up, and ODA could not direct further research. Thus, any implication that ODA somehow has external pressure to reconsider the 2009 rule (let alone any statutory mandate to do so) regardless of the fact that the anticipated research never materialized is misleading. As ODA Director Katy Coba explained:

The [2009] rule itself asks for review. The rule doesn’t sunset, if nothing happens the rule stays as it is.⁸⁷

Thus, it would be completely permissible, and indeed most reasonable, as well as the only decision supported by science, law, and the agency’s mission, for ODA to leave the 2009 rule in place until and unless new scientific data establishes that canola does not pose threats to specialty seed growers in the Willamette Valley.

v. Purported rationale that growers have the right to decide what to grow

ODA states in its FAQs that “growers have the right to decide what to grow on their land unless there is an imminent threat of disease, pest, or menace that may require an area-wide effort coordinated by ODA.” First of all, the inclusion of “imminence” is ODA’s addition, and is from whole cloth. As noted above, under Oregon law:

The State Department of Agriculture may establish . . . control areas within this state, if after careful investigation it determines that such areas are necessary for the general protection of the horticultural, agricultural or forest industries of the state from diseases, insects, animals or noxious weeds that may be a menace to such areas and generally to horticultural, agricultural or forest industries.⁸⁸

The word “imminent” is notably absent from the actual law.

More importantly, as demonstrated by the statute authorizing control areas, a grower’s right to decide what to grow on her land is of course not without limit. That is, one grower’s freedom of choice is unrestricted until it becomes incompatible with another grower’s freedom of choice, at which point it is impossible for the two growers to simultaneously further their interests. Property interests are not absolute and are limited by basic precepts of common law, as well as statutory law. Here, the Legislature authorized ODA to establish control areas when agricultural interests are incompatible; the 2009 canola rule is but one example of ODA’s exercise of this authority.

⁸⁷ Jerger Decl. Ex. 4, Minutes, State Bd. of Agric. Meeting Mar. 5–7, 2012 at 7.

⁸⁸ ORS 570.405.

vi. *Theoretical balance achieved by advocating co-existence*

In its FAQs, ODA advocates “co-existence” and asserts that “it is believed that acreage will not be sufficiently large to harm the vegetable seed industry in the protected zone.” However, the FAQs explain that the proposed rule would open a total of 1.7 million acres in the Willamette Valley to canola production, and that at least 480,000 of those acres are suitable for canola. According to Director Coba, as few as 75,000 to 100,000 acres of canola in the Willamette Valley, and possibly even anything over 25,000 acres, would pose a threat to specialty seed growers.⁸⁹ In other words, harm to specialty seed growers is possible, or even likely, if just one-fifth or one-sixth, or less, of the suitable acres granted by the proposed rule were planted in canola. Director Coba recognized the magnitude of that uncertainty when she observed that “clearly, you get to scale, you do have a negative impact, but there is no way to really say at five thousand acres in this geographic area, you’re fine; but at ten thousand, now you’re in trouble. There’s no way to say when you trigger [harm]. . . .”⁹⁰ Thus, it is clear that the amendments to the 2009 rule would protect one industry (canola biofuel producers) at the expense of another (specialty seed growers) without scientific justification. Such an action is arbitrary and unjust.

Moreover, the very idea of “coexistence” in this context is a misnomer. Canola is not harmed in any way by the existing related Brassica family and other seed industries. Rather, the harms in question are a one-way ratchet. A proper term for protecting a crop within this sort of relationship is “contamination prevention.”

vii. *Claim that ODA cannot treat GE crops differently*

According to the agency’s FAQs, “[i]t is not within the purview of ODA to address GM organisms,” and thus “ODA does not differentiate between or treat conventional and GM canola differently.” This statement is both wrong and largely irrelevant. First, ODA need not focus on transgenic canola per se, since the harms in question here will occur whether or not the canola is genetically engineered. That said, many of the harms are indeed exacerbated by the fact that canola is mostly the transgenic, “Roundup Ready” variety. Weedy volunteer and feral Roundup Ready canola plants will plague seed and other crop growers; increased use of glyphosate will worsen the glyphosate-resistant weed epidemic. Contamination will cause organic growers to lose their customers and markets, since organic consumers demand their products be free of transgenic content. In addition to their reputation and markets, organic growers can also lose their organic certification, since U.S. Department of Agriculture (USDA) organic standards prohibit genetic engineering and require that all inputs in organic production must be 100% organic.

Moreover, ODA certainly can and does account for the transgenic nature of some plants. There is no bar to state regulation of GE crops. In fact, the federal oversight of GE crops has been widely criticized by scholars, courts, and independent government reports as fundamentally

⁸⁹ Eric Mortenson, *Oregon Defines Acreage where Controversial Canola Can Be Grown*, OREGONLIVE (updated Aug. 07, 2012, 9:54 a.m.),

http://www.oregonlive.com/business/index.ssf/2012/08/oregon_defines_acreage_where_c.html.

⁹⁰ Jerger Decl. Ex. 4, Minutes, State Bd. of Agric. Meeting Mar. 5–7, 2012 at 10.

flawed and seriously lacking in scope and enforcement. Oregon's own GE bentgrass contamination incidents, which continue, should serve as a telling reminder of how inadequate USDA's oversight is.⁹¹ And, since USDA does not undertake any post-market monitoring, further data about the extent of these harms is woefully inadequate. This reality should provide more, not less, impetus for states like Oregon to properly account for any harms related to transgenic organisms.

Finally, ODA's position is inconsistent with ODA's own rules. In fact, ODA explicitly asserted its authority to require physical separation between conventional and GE crops and otherwise treat the two differently in its "Bentgrass Control Area in Jefferson County":

As authorized in ORS 570.405, a control area is established in Jefferson County to regulate the production of bentgrass. *This control area is designed to provide physical separation between varieties of bentgrass produced using techniques of modern biotechnology and conventionally bred varieties with which they might cross-pollinate.*⁹²

In that rule, ODA further elaborated upon the division:

Varieties of bentgrass that have been developed using the techniques of modern biotechnology may not be planted in Willamette Valley counties in order to prevent cross-pollination with traditionally bred varieties.⁹³

Moreover, in addition to distinguishing GE bentgrass from traditional varieties, ODA recognized the difference between GE canola and traditional canola in 2006, when it issued a permit to allow research on the Central Oregon agricultural experiment stations only if GE canola was excluded from the trials.⁹⁴ ODA's new claim on lacking authority to treat GE canola differently is inconsistent with its previous recognition that it is authorized to create a control area to protect traditional crops from GE versions, as well as its differentiation between GE and traditional canola in Central Oregon, and is therefore arbitrary and unreasonable.

C. *The Proposed Rule Is Inconsistent with ODA's Mission*

The proposed rule, which threatens a unique and internationally recognized specialty seed market, is inconsistent with ODA's stated mission. The agency's mission has three objectives: "(1) to ensure food safety and provide consumer protection; (2) to protect the natural resource base for present and future generations of farmers and ranchers; and (3) to promote economic

⁹¹ See generally Lies, *supra* note 60; Jay R. Reichman et al., *Establishment of Transgenic Herbicide-Resistant Creeping Bentgrass (Agrostis solonifera L.) in Nonagronomic Habitats*, 15 MOLECULAR ECOLOGY 4243, 4245 (2006), available at http://scholar.google.com/scholar_url?hl=en&q=http://gentechnologie.ch/pdfs/Reichman_Bentgrass.pdf&sa=X&scisig=AAGBfm1LwR1_1-Xa_4FQnBs0Cbsk-KP-gA&oi=scholar.

⁹² OAR 603-052-1240(2) (emphasis added).

⁹³ *Id.* at 603-052-1240(5)(h).

⁹⁴ D.T. Ehrensing, *Canola 9*, (Feb. 2008), available at <http://extension.oregonstate.edu/catalog/pdf/em/em8955-e.pdf>.

development and expand market opportunities for Oregon agricultural products.”⁹⁵ In proposing the canola control area rule, ODA fails to pursue this mission.

First, in advocating for one industry’s short-term gain over the long-term ability of an ecosystem to support another industry, ODA fails to protect a natural resource base for future generations. As discussed above, harm to specialty seed production from seed lot contamination and cross-pollination of canola, and especially from GE canola, does irreparable damage to the industry. Oregon already has one issue with an herbicide-resistant, GE crop spreading into the wild unexpectedly (i.e., creeping bentgrass)⁹⁶ and does not need another, especially when what is at stake is the future of a unique industry.

Second, in proposing this rule, ODA not only fails to promote the internationally renowned specialty seed industry, but also actually jeopardizes it. Worse, ODA attempts to simply renounce responsibility for considering economic impacts on unique Oregon industries. In its FAQs concerning its proposed rule, ODA asserts that it cannot attempt to protect agricultural industries from market-based threats. However, this is directly contrary to the third prong of the agency’s stated mission and historical stance.

As just one example of ODA’s former support for considering economic issues, ODA’s own online “Oregon Department of Agriculture history” observes that in the 1940s, then-Director Ervin Peterson “correctly noted the importance of markets” when he wrote:

It has long been recognized that we must depend on distant markets for the use of most of our agricultural production. . . . Merchandising our output demands constant attention. Consumer preference must constantly be studied.⁹⁷

That website further notes that “[t]oday, ODA’s Agricultural Development and Marketing Division stresses the need for offering an Oregon product that the consumer wants. Roughly 40 percent of the state’s agricultural products are exported to foreign markets.”⁹⁸ ODA’s new stance that it cannot consider consumer preferences and market perceptions is plainly inconsistent with its previous position on the issue.

D. ODA Failed to Identify Impacts on Small Businesses

Finally, in addition to ODA failing to promote its stated objectives, the required Statement of Need and Fiscal Impact accompanying the proposed rule is impermissibly lacking in information. Under ORS 183.335(2)(b)(E), in each notice of proposed rulemaking, an agency must include, among other things:

A statement of fiscal impact identifying state agencies, units of local government

⁹⁵ *About Us*, *supra* note 85.

⁹⁶ See generally Lies, *supra* note 60; Reichman et al., *supra* note 91; *Spread of Herbicide-Resistance from Genetically Modified Creeping Bentgrass into the Wild*, THE NATURE INST. (2008), http://natureinstitute.org/nontarget/reports/bentgrass_001.php.

⁹⁷ *Oregon Department of Agriculture History, The 1940s: The War Years*, ODA, http://www.oregon.gov/ODA/pages/oda_history.aspx (last visited Sept. 27, 2012).

⁹⁸ *Id.*

and the public that may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, *the agency shall utilize available information to project any significant economic effect of that action on businesses* which shall include a cost of compliance effect on small businesses affected.⁹⁹

However, ODA neglected to provide information about the significant economic impact the proposed rule would have on specialty seed growers. Instead, ODA's statement of the impacts on small businesses merely states that:

A specific number of small businesses is unknown. The rules will predominantly affect persons [and] small businesses that produce, handle, process, or transport Brassica spp. or Raphanus spp. within the Willamette Valley. The rules will also affect any small business that transports or handles Brassica spp. or Raphanus spp. within the state of Oregon.

Failing to discuss, or even mention, the significant economic effects of opening the Willamette Valley to commercial canola production contravenes ORS 183.335(2)(b)(E). This absence is particularly glaring given that the agency stated in the 2009 rule's Statement of Need and Fiscal Impact that "[c]ross-pollination or contamination of seed crops by unregulated canola would have serious negative economic impacts on the seed and vegetable industries," which has not changed. Pursuant to its statutory mandates, ODA cannot ignore the devastating impacts of the proposed rule.

Similarly, although required by ORS 183.336(a), ODA neglected to include "[a]n estimate of the number of small businesses subject to the proposed rule." As indicated above, in lieu of complying with this requirement, ODA merely notes that "[a] specific number of small businesses is unknown." Yet providing information about the number of small, specialty seed growers who would be affected by the proposed rule would allow ODA and the public to understand the total impact on small farmers of allowing canola production in the Willamette Valley. As discussed, these impacts on small farmers and agricultural businesses that rely on the Valley for seed will be significant. ODA's disregard for compliance with this mandate is impermissible.

IV. CONCLUSION

ODA's proposed rule is unnecessary and unsupported by sound science, policy, or law. The agency's proposal would open the Willamette Valley to unprecedented canola planting and portend its agronomic, environmental, and economic downfall. ODA must shelve its misguided and unlawful proposal.

⁹⁹ ORS 183.335(2)(b)(E) (emphasis added).

Respectfully submitted,

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