



Oregon

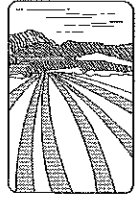
John A. Kitzhaber, MD, Governor

Department of Agriculture

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BRIEFING DOCUMENT



September 7, 2012

To: Senate Environment and Natural Resource Committee

From: Lisa Hanson, Deputy Director

Subject: Recent Developments with ODA's Canola Control Area Rules

Background: After nearly a year of meeting with growers and specialty seed interests, the Oregon Department of Agriculture refined the boundaries of an existing control area in the Willamette Valley to allow canola to be grown in specific locations while protecting specialty seed crop production. Using a temporary administrative rule, ODA attempted to balance the interests of both canola and specialty seed producers.

ODA adopted the temporary rule to allow Willamette Valley growers to make important planting decisions by September 1, 2012 as requested by both specialty seed and canola growers. The new boundaries went into effect on August 10, 2012. ODA simultaneously filed a notice for permanent rulemaking and scheduled a public hearing for September 28, 2012 in Salem.

ODA's statutory authority to create control areas, ORS 570.405 - 450, is based on protecting the agriculture industry from diseases, insects, animals, plants, or noxious weeds that may be a menace. ODA authority for control areas does not extend to protecting agriculture from purely market-based threats or concerns.

Under both the temporary and proposed administrative rule, the Willamette Valley is designated as a protected district, which includes the entire counties of Lane, Linn, Benton, Marion, Polk, Clackamas, Yamhill, Washington, Multnomah, and portions of Columbia County. The protected district has two zones. The central core district is a fully protected zone that prohibits the growing of canola for oil and protects 84 percent of the acreage of Oregon's specialty seed production over the past three years. A second zone, including all areas for the counties listed above with the exception of the central core district allow for canola production but provides specialty seed growers with additional protections by requiring that all canola and specialty seed producers use an electronic pinning system to provide notice of what they intend to grow and where they intend to grow it. The second zone focuses on coexistence of specialty seed growers and canola growers. As much as possible, ODA used recognizable landmarks such as highways, roads, and rivers to refine the boundaries to protect the central core of the specialty seed acreage and help growers easily determine which zone of the protected district they are farming.

Neither the temporary or proposed rule addresses the production of genetically modified (GM) canola. GM canola has been deregulated by the US Department of Agriculture. Through a strong regulatory framework, USDA thoroughly evaluates GM organisms to verify they are just as safe for agriculture and the environment as traditionally bred crop varieties. Since canola has been deregulated by USDA, ODA does not differentiate between conventional and GM canola or treat them differently.

In both the temporary and proposed permanent administrative rules, the protected district includes about two million acres in which canola cannot be grown. Of the remaining 1.7 million acres in the protected district, only about 480,000 acres are actually suitable for canola production. As proposed in the rules, canola could be used as a rotational crop that can only be grown two out of every five years.

On August 15, 2012, a group of petitioners sought judicial review of ODA's temporary rule and also moved to stay the effect of the temporary rule. The court granted a temporary stay of ODA's temporary rule on August 16, 2012 pending briefing on petitioner's request for a stay. On August 31, 2012, the court granted a full stay of the temporary rule, thereby suspending the temporary rule's effect. The court's stay effectively continues the prohibition on planting or growing canola in the control area until the court completes its review of the temporary rule, the temporary rule expires, or a new permanent rule is adopted by the agency.

Attached is an FAQ to provide additional background, a map of the revised control area boundaries and a timeline of activities related to growing Brassicas in Oregon.

Canola FAQ

Q. What is "Canola"?

Canola is an oilseed crop from plants in the mustard family (Brassicaceae). The members of the genus are collectively known as cruciferous vegetables, cabbages, or mustards. Common types of brassica used for food include cabbage, cauliflower, broccoli, Brussel sprouts, and radish. The term "Canola" is widely used to refer to rapeseed. Canola is a variety of rapeseed bred to have both low erucic acid and glucosinolates aimed at oil for human and livestock consumption as well as biodiesel production.

Q. How long has this been an issue?

In the past two to three decades, growers in the Willamette Valley and a couple other specific areas of Oregon started to develop vegetable seed production, including some brassica crops. Because this family of crops can potentially share diseases and pests, and can cross-pollinate if not carefully managed, the growers and seed companies developed protocols for production. Protocols included pinning (putting pins in a map to identify the location of fields for other growers), imposing isolation distances or buffers ranging up to three miles between fields, and tightly managing control of weeds.

Meanwhile, Willamette Valley grass seed growers had a need for rotational crops, especially broad-leaf, deep-rooted plants that could help break disease/pest cycles in grass seed fields. Legislative restrictions on field burning and a declining demand for grass seed led growers to seek alternative crops. These growers found that canola (the low erucic/glucosinolate variety) is the best plant to produce high yield with minimal inputs, and lends itself to the same general equipment used in grass seed production. Growing canola for **oil** was the intent of these growers.

Vegetable seed producers have grown canola for **seed** in the Willamette Valley.

In the late 1990s and early 2000s, vegetable seed production started to flourish. Specialty seed growers feel that their management practices— which include using small plots highly managed for weeds and pinning fields to notify other growers of locations, buffer distances, and rotations— have created an ideal growing environment. They feel this would be threatened by the introduction of canola, arguing it would be grown on large scale, without the same management for rogue plants and concern for impacts on other growers. Grass seed growers counter that they have no interest or intention in harming other growers and are open to various conditions for canola production.

Q. What happened in 2005?

The two sides could not come to agreement about co-existence and the Oregon Department of Agriculture (ODA) was asked to assist the parties in coming to some agreement. ODA started on this endeavor by seeking resources from the legislature to conduct research through Oregon State University to gain as much information as possible about co-existence issues surrounding these crops. The research took place over a three-year period, and the information and reports can be found at: <http://cropandsoil.oregonstate.edu/bioenergy/overview>

Q. What's a "control district?"

While the research was being conducted, ODA took a precautionary approach and set up "control districts" based on possible concerns with pest and disease menace issues. Within control districts, canola production was allowed only by permit from the ODA director. Permits were issued for the purpose of conducting OSU research in cooperation with growers under field conditions on plots

ranging from five to 20 acres. Areas outside control districts are available to grow canola for oil production.

Because control districts affect what farmers can grow, ODA uses considerable care to ensure that the imposition is according to laws that protect for unmanageable pests diseases, or other menaces. ODA does not have authority to regulate what farmers may choose to plant for purely "market" concerns.

In other words, foreign buyers for vegetable seeds can be very picky about seed purity, not wanting any canola intermixed with other brassica vegetable seeds. But ODA does not regulate for market specifications through control districts. Zero tolerance, if that is the buyer desire, is a market issue, not a regulatory issue — every seed purity tolerance (or regulation) in international trade allows for some inert, weed, etc., recognizing that 100 percent purity is virtually impossible.

Q. What did the research find?

These four main and sub-points of the research were identified in the 2006 Emergency Board authorization language:

1. Understanding interactions between canola and other specialty seed and vegetable crops grown in Oregon. Key areas of information need include isolation distances, flower synchrony, pollen flow, local weather and topological needed conditions for canola and specialty seed production; need to better understand the threat of increased infestations of cabbage maggots and plant diseases on other vegetable crops.
2. Development of potential management strategies for production of canola crops while protecting the specialty seed and vegetable crop industry
 - Need a well-developed GIS system to identify areas of least risk to locate canola field trials and potential sites for future production where conflicts with vegetable seed and seed production are minimized.
 - Need better understanding of how to design and maintain isolation zones.
 - Need to better understand problems of cross-pollination and weedy establishment of volunteers.
3. Investigation of alternative oilseed crops that do not conflict with specialty seed and vegetable crop production. Need updated enterprise budget for growing oilseeds in no- or low-till production systems.
4. Need a system to share oilseed information among researchers, industry, and agency personnel

There are no easy answers. Without doubt, crops in the brassica family must be isolated from each other and growers need to communicate where they are planted. Pests and diseases could be a concern if large acreages of any brassica are grown. However, what constitutes large acreages that could trigger pests and disease outbreaks is not easily identifiable. Vegetable growers are already managing for these issues. But rogue/wild varieties of mustard could be vectors for moving genes around. That's why vegetable seed production in the central regions of the Willamette Valley arguably needs some extra precautions. The question is where the control district boundaries should lie.

Q. Where did the department originally draw the boundaries?

While the research was conducted, and out of an abundance of caution, ODA established a large area that included all counties in the Willamette Valley. This was later revised (2009) as a large rectangular boundary that made it easier to define location. The large boundary was drawn in an area that could clearly be articulated to those inside and outside the control district. Three other control districts were established, including one in central Oregon covering the counties of Crook, Deschutes, and Jefferson; one in Northeast Oregon covering Baker, Union, and parts of Wallowa counties; and one covering part of Malheur County bordering Idaho. Production of canola for oil or seed in any of these areas requires a special permit. All brassica seed production requires "pinning" and isolation distances between fields

Q. What has changed?

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 agreement.

Q. Why is the rule being changed now, and what was the process?

The "canola rule" that was in effect while research was conducted was scheduled for review in 2012. Early in the year ODA brought the sides together again and proposed three alternatives:

1. **Leave the rule as is**, excluding all canola from the Willamette Valley (although the continued justification for this is growing thin given the management alternatives available);
2. **Do away with the rule entirely** and leave the parties to work out the situation themselves with no ODA involvement or control area; or
3. **Modify the boundaries to enable some canola production for oil in limited areas**, away from the center of vegetable seed production.

Option 1 continues the current large rectangular control district and excludes canola production. Option 2 might create a chaotic situation with no good communication tools for growers. ODA and the Board of Agriculture believe option 3 is the most viable for co-existence and mutual benefit of the parties.

Several meetings were held and common ground was found on tightening the boundaries, but not all parties agreed. ODA feels the parties need to move ahead on this issue for collaboration and co-existence. To enable all parties to have knowledge of planting decisions, a September deadline was established. ODA facilitated as much agreement as possible on new boundaries and filed an emergency rule so it would become immediately effective for planting decisions this year.

Q. What is the justification for adjusting the boundaries?

After years of research, talking to growers and experts around the world, and evaluating the purpose of control districts, co-existence management strategies, and ODA statutory authority, the department concludes:

1. There is justification for exclusion of canola/brassicas grown for **oil production** on large scale from much of the immediate vegetable seed growing areas. The proposed rule protects over 85 percent of the production areas where vegetable seeds have been grown in the past three years in the Willamette Valley. No changes are made to boundaries of the three other control districts.
2. There is justification for allowing some canola/brassicas grown for oil in perimeters outside the new protected area or exclusion zone in the Willamette Valley. Due to rotation requirements,

pinning/notification, and cropping preferences of growers, it is believed that acreage will not be sufficiently large to harm the vegetable seed industry in the protected zone.

3. Co-existence is a situation that farmers have faced since agriculture began. It can be managed adequately with field buffer separation, pinning or other notification systems with neighbors so they know what each other is growing, good weed and pest control, management of planting dates and subsequent flowering times to minimize cross-pollination, and proper care of equipment and transportation of product.

In summary, 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. Those situations are rare and the boundaries of restricted areas need to be justified and carefully evaluated. The department does not have authority to "control" for market perceptions.

State Board of Agriculture policy statement on grower responsibilities and rights:
http://oregon.gov/ODA/docs/pdf/big_tent.pdf

Q. What does the rule say about genetically modified canola?

The rule does not address the production of genetically modified canola within the protected district. GM canola has been deregulated by the US Department of Agriculture. Through a strong regulatory framework, USDA thoroughly evaluates GM organisms to verify that they are just as safe for agriculture and the environment as traditionally-bred crop varieties. If that determination is made, it is USDA's decision to deregulate the crop. It is not within the purview of ODA to address GM organisms, nor does the agency have the expertise and resources to review federal decisions on deregulations. Since canola has been deregulated by USDA, ODA does not differentiate between or treat conventional and GM canola differently.

ODA authority for control districts is based on protecting the agriculture industry from pests and diseases, including insects, animals, certain plants, or noxious weeds that may be a menace. Based on data analysis, USDA has determined that GM canola exhibits no plant pest characteristics: it is no more likely to become a weed than non-GM varieties; is unlikely to increase the weediness potential for any other cultivated or wild species with which it can interbreed; it will not cause damage to raw or processed agricultural commodities; and it will not harm threatened or endangered species or other organisms, such as bees, that are beneficial to agriculture. Consequently, GM canola may not be determined a menace that is within the ODA's authority to control.

As part of the review, ODA reiterated that its legal authority to establish control areas is based on protecting the agriculture industry from diseases, insects, animals, plants, or noxious weeds that may be a menace. In addition, this authority must be exercised reasonably and justly. ODA authority for control districts does not extend to protecting agriculture from market based threats or concerns.

Q. Why was a temporary rule adopted instead of going through permanent rulemaking?

ODA adopted a temporary rule to allow Willamette Valley growers to make important planting decisions by September 1 as requested by specialty seed and canola growers. It was important for all growers to provide the required pinning information by the September 1 deadline. Adopting a temporary rule would have allowed that deadline to be met. The temporary rule was filed August 10, 2012 and expires in 180 days. ODA has also filed for permanent rulemaking that allows for

public input and possible future revisions. ODA's intention is to have a permanent rule in place by the time the 180-day period is over.

Q. What is the status of the temporary rule?

Parties have filed a petition for judicial review of the temporary rule and a motion to stay the effect of the temporary rule pending review by the Oregon Court of Appeals. On August 31, 2012, the court issued a stay on the temporary rule. This means that the temporary rule is suspended and of no effect, while the existing permanent rules governing ODA's canola control area will remain in effect. The end result is that the prohibition against the planting of canola in the Willamette Valley continues.

Q. Under the temporary rule, why are the boundaries of the protected district drawn the way they are?

In order to create an adequate spatial buffer and, as much as possible, to help growers easily determine which zone of the protected district they are located in, ODA used recognizable landmarks such as highways, roads, and rivers as boundaries.

Q. How much canola can be grown in the protected district under the temporary rule?

The protected district includes about 2 million acres in which canola will not be allowed to be grown. Of the remaining 1.7 million acres, only about 480,000 acres are actually suitable for canola production. Canola is a rotational crop that can only be grown two out of every five years. Therefore, it is not expected that a large number of acres of canola will be planted in the Willamette Valley.

Q. Who is responsible for the electronic pinning system? The electronic pinning system required for use by growers in the zone available for canola production was developed and funded initially by legislative funding through ODA, and under contract by Oregon State University and the Willamette Valley Specialty Seed Association (WVSSA). The system is now managed by WVSSA.

Q. How does the temporary rule prevent rogue/wild canola from spreading?

The rule requires that all transport and handling of canola seed be done in suitable packaged, covered or sealed containers to prevent the inadvertent spread of seed or production of volunteer plants. Transportation is limited to certain highways. Producers are also required to clean up any volunteer or uncontrolled canola within a quarter mile of their fields.

Q. Does the temporary rule have an enforcement component?

The temporary rule does address enforcement. The ODA has the authority to require destruction of any canola production that violates these rules.

Q. What is the next step?

ODA has filed for permanent rulemaking on Willamette Valley canola production. A public hearing has been scheduled for Friday, September 28, 2012, 9:00 a.m., at Cascade Hall at the Oregon State Fairgrounds. Information on the canola control area issue and the proposed permanent rule can be found at <http://oregon.gov/ODA/Pages/canola.aspx>. The process allows for the proposed permanent rule to be modified based on public input. ODA hopes to adopt a permanent rule by early 2013.

Canola in Oregon: Timeline

- 1970-1990:** Brassica (mustard family) crops in the rapeseed species were divided into industrial crops used as lubricants, and those bred for characteristics that created varieties suitable for human and animal consumption. Growers of these crops in various areas of the state managed informal "districts" or growing areas through communication to ensure adequate isolation so the two varieties of rapeseed did not cross-pollinate and contaminate the specific use of the other.
- 1985:** Oregon State University begins research on edible oil rapeseed varieties for production around Oregon:
http://oregonstate.edu/dept/coarc/sites/default/files/publication/86_spring_rapeseed_variety.pdf
[http://oregonstate.edu/dept/coarc/sites/default/files/publication/88%20winter%20rapeseed%20variety%20\('87\).pdf](http://oregonstate.edu/dept/coarc/sites/default/files/publication/88%20winter%20rapeseed%20variety%20('87).pdf)
<http://cropandsoil.oregonstate.edu/bioenergy/sites/default/files/72-1986-87Sept1988.pdf>
- 1987:** Legislature creates authority for ODA to establish control areas (ORS 570.405) "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."
- 1989:** Legislature creates specific authority for rapeseed control areas: **ORS 570.450 Rapeseed control areas.** "The State Department of Agriculture may establish control areas for the production of rapeseed as provided in ORS 570.405. 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."
- 1989:** OSU research continues to evaluate production capacity and varieties of canola/rapeseed in Oregon.
<http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/20890/NewCropsOregonRapeseed.pdf>
- 1991:** http://cropandsoil.oregonstate.edu/bioenergy/sites/default/files/1991_Columbia_Basin_Agricultural_Research.pdf
- 1990-93:** ODA adopts rules (OAR, Chapter 603, Division 052) to establish rapeseed production districts and isolation requirements for producers. A system of pinning maps was established in the Linn and Marion county Extension offices to facilitate maintenance of isolation distance between vegetable seed fields. Under this system, growers or seed companies mark out areas on a map with pins to identify vegetable production fields on a first-come, first-served basis. Producers attempt to maintain a 3-mile isolation distance between Brassica crops that are probable cross-pollinators.
- 1998:** OSU document outlines canola rules: "Rapeseed production is regulated in Oregon and other Pacific Northwest states. The Oregon Department of Agriculture (ODA) has established rapeseed production districts. In order to grow rapeseed, even as a cover crop, you may need to "activate" the production district in your area. Before you seed, check with ODA or your county office of the OSU Extension Service about possible production restrictions. Much of the Willamette Valley is a restricted production zone due to potential cross pollination between rapeseed and other brassica seed crops."
<http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/15235/em8700.pdf>
- 2005 -** With the advent of renewable fuels and interest in biodiesel, canola has emerged as the lead crop alternative when evaluated for yield and return to growers. OSU continues research.
<http://extension.oregonstate.edu/catalog/html/sr/sr1074-e/08.pdf>

The challenge of co-existence between vegetable seed growers and grass seed growers looking for a rotational crop in canola grew into a stand-off. ODA was asked by the Legislature Emergency Board to assist the discussion by working with OSU in conducting research and evaluating options for resolving the conflict. \$150,000 was provided for a three-year research effort. In the meantime, to minimize concerns of vegetable growers, ODA revised the Brassica rules in 2005, restricting areas in the state where canola can be grown as an oilseed crop.

Districts where vegetable seed production is protected were created for the Willamette Valley, Central Oregon, NE Oregon, and Malheur County.

2006: Exemptions to the canola restriction were granted for OSU to conduct limited canola trials in the Willamette Valley as part of a program to assess the commercial potential of a number of oilseed crops in the area.

http://oregonstate.edu/dept/kbrec/sites/default/files/chapter_02_-_2006_canola_variety_screening.doc

2007: The rules were reviewed and maintained without change in fall 2007 due to the ongoing OSU research.

2008: OSU reports: <http://extension.oregonstate.edu/catalog/pdf/em/em8955-e.pdf>

http://cropandsoil.oregonstate.edu/bioenergy/research_trials

2009: OSU final progress reports were submitted to ODA:

<http://cropandsoil.oregonstate.edu/bioenergy/overview>

ODA makes some minor changes in the rules. Overall, ODA determines there is need to maintain some canola exclusion zone for vegetable seed production. ODA also determined that isolation distances, management practices, pinning and grower cooperation, planting times, and other efforts can provide significant protection and prevention of concerns voiced by vegetable and other specialty seed growers. The discussion on where to draw boundaries and potential scale of canola acreage remain the central issues.

2010: With the help of the Legislative funding through ODA's budget, OSU staff finalizes development of a digital, electronic pinning system so the industry can manage planting decisions, isolation distances, and other needed management issues. The system is turned over to the Willamette Valley Specialty Seed Association for administration: <http://www.thewvssa.org/documents.htm>

The rule is left intact while ODA encourages the parties to work together with the pinning system to find workable co-existence strategies. 2012 is designated as a time to review the rules and find alternatives unless the parties put something forward themselves.

2012: The pinning system is being used by vegetable seed growers, but not yet available to canola production.

ODA reconvenes representatives from vegetable seed growers, and grass seed growers interested in canola production, and with guidance from the State Board of Agriculture, evaluates these options:

1. **leave the rule as is**, excluding all canola from the Willamette Valley (although the continued justification for this is growing thin given the management alternatives available);
2. **do away with the rule entirely** and leave the parties to work out the situation themselves with no ODA involvement or control area; or
3. **modify the boundaries to enable some canola production for oil in limited areas**, away from the center of vegetable seed production.

The department and the Board conclude option three is the best alternative.

March – July, 2012: Advisory Committee meetings (about 40 people, representing both sides), were held on March 22, April 19, and June 29, 2012. A subset, representative Advisory Group (3 from each side) met with ODA on July 13, July 20, and on July 30, at which meeting ODA Director Katy Coba attended.

Parties agree to have some conceptual working adjustments proposed by September 1 to allow for fall planting decisions and pinning of fields. The parties worked with ODA to modify the boundaries in the Willamette Valley to ensure protection of primary specialty seed acreage. There is general agreement on boundaries that included over 85% of pinned vegetable seed. While disagreement still remains about canola production in the Willamette Valley, ODA believes enough agreement has been reached to move forward.

August 10, 2012: Temporary rule is filed to modify the protected district boundaries, and provide some outlying areas where canola will be allowed. http://oregon.gov/ODA/Pages/canola_temporary_rule.aspx

The map is included in the rule: http://oregon.gov/ODA/docs/pdf/CanolaBase8x11_Aug3.pdf

Permanent rule is also filed and date is set for public hearing on September 28, 2012. Public comment is

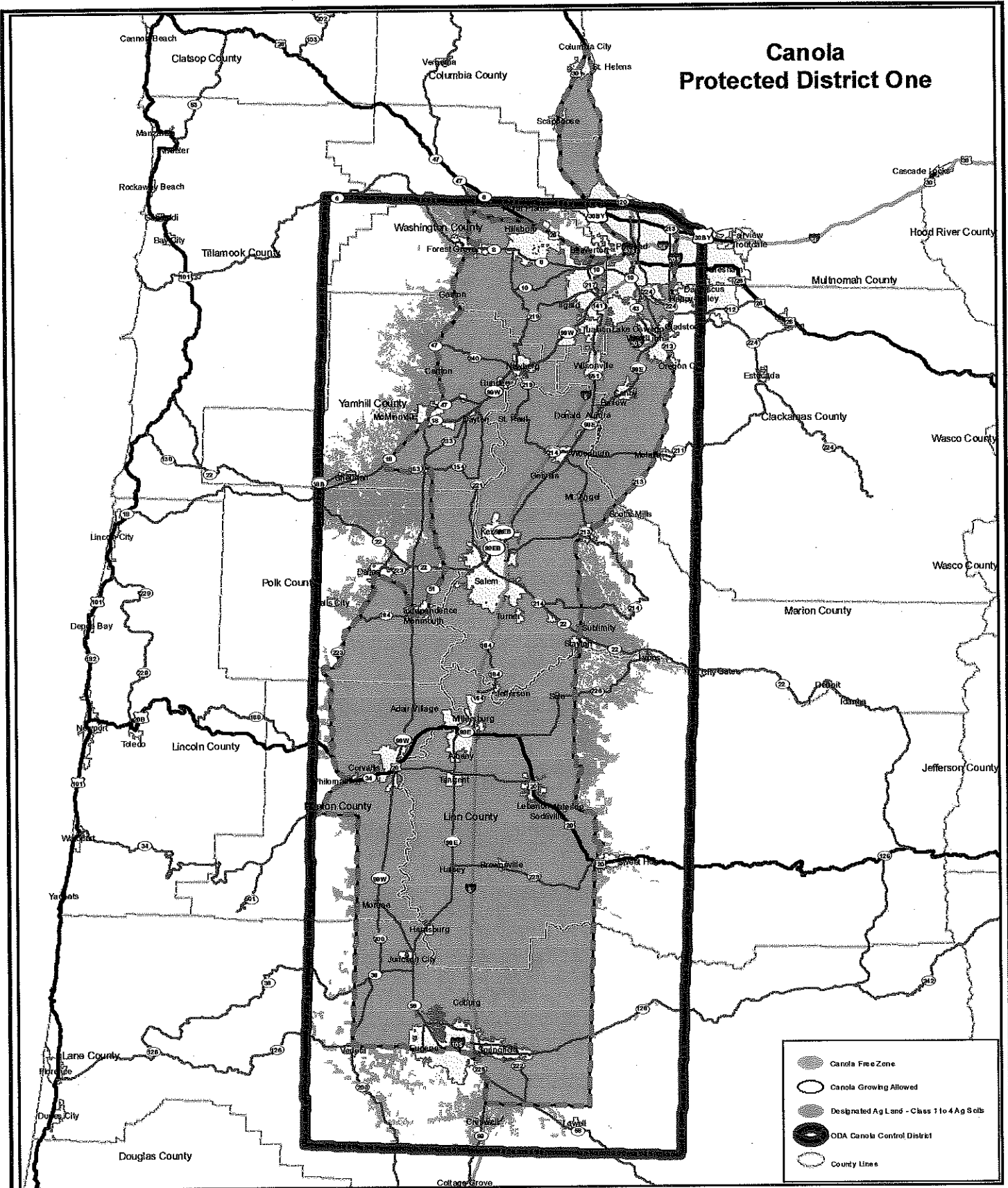
open until October 5, 2012. http://oregon.gov/ODA/docs/pdf/canola_proposed_rule_making.pdf

August 15, 2012: Petitioners Friends of Family Farmers, Frank Morton dba Wild Garden Seed, Universal Seed Company and Wild West Seed, Inc. filed a petition for judicial review of the ODA's temporary rules and a Motion for Stay Pending Judicial Review of Agency Rule.

August 16, 2012: the Appellate Commissioner issued an order granting a temporary stay pending the submission of briefs on why the stay should or should not continue during the pendency of judicial review.

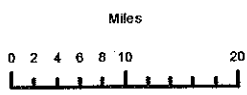
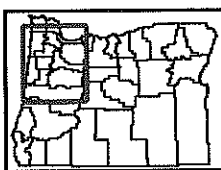
August 31, 2012: After reviewing the briefs submitted by petitioners, the ODA and amicus, the Oregon Court of Appeals rules that the stay of ODA's temporary rule in OAR 603-052-0870(1)(c)-(d) (2012) will remain in effect. The court's action means that ODA's temporary rule remains suspended while the court considers the legal challenges. In summary, until the court rules on Petitioner's motion, ODA's permanent rules governing its Rapeseed Control area, which exclude growing canola in the Willamette Valley, remain in effect.

Canola Protected District One



- Canola Free Zone
- Canola Growing Allowed
- Designated Ag Land - Class 1 to 4 Ag Soils
- ODA Canola Control District
- County Lines

This is a cartographic representation of the legal description and is not the legal description of the boundary.



This product is for informational purposes and may not have been prepared for, or be suitable for legal, engineering, or surveying purposes. Users of this information should review or consult the primary data and information sources to ascertain the usability of the information.

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