

01 DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

001 FUND TO ADDRESS PFAS CONTAMINATION

Chapter 401: INCOME REPLACEMENT

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**SUMMARY:** The 130th Legislature authorized a Fund to Address PFAS Contamination (7 M.R.S.A., Chapter 10-D). Permissible uses include the provision of income replacement payments to persons whose commercial farm is found to be contaminated by PFAS. Consistent with the legislatively mandated PFAS Fund Implementation Plan, these rules establish the eligibility criteria and administrative procedures for disbursing income replacement payments.

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### § 1. OVERVIEW

Commercial farms that have stopped selling some or all products due to perfluoroalkyl and polyfluoroalkyl substances (PFAS) contamination may apply to the Department of Agriculture, Conservation and Forestry (DACF) for up to two years of lost income, adjusted for inflation.

### § 2. CONSISTENT WITH STATUTE

All terms used in this Chapter shall be defined as indicated in Title 7 M.R.S.A, Chapter 10-B unless specifically provided herein.

### § 3. DEFINITIONS

1. "Commercial farm" means a farm that produces any farm product with the intent that the farm product be sold or otherwise disposed of to generate income.
2. "Dairy Indemnity Payment Program (DIPP)" means the program administered by the United States Department of Agriculture (USDA) that provides payments to dairy producers when a public regulatory agency directs them to remove their raw milk from the commercial market because it has been contaminated by pesticides, nuclear radiation or fallout, or toxic substances and harmful chemical residues thereof.
3. "Depopulated" means farm animals have been humanely euthanized.
4. "Farm product" means those plants and animals useful to humans and includes, but is not limited to, forages and sod crops, grains and food crops, dairy products, poultry and poultry products, bees, livestock and livestock products, and fruits, berries, vegetables, flowers, seeds, grasses, Christmas trees, and other similar products.
5. "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" has the same meaning as in Title 32, section 1732, subsection 5-A.
6. "Primary product" means the main farm product a commercial farm produces (e.g., the primary product of a dairy farm is milk).
7. "Residuals" as that term is defined in DEP Rule Chapter 400(1)(Ss) means solid wastes generated from municipal, commercial or industrial facilities that may be suitable for agronomic utilization.

These materials may include: food, fiber, vegetable and fish processing wastes; dredge materials; sludges; dewatered septage; and ash from wood or sludge fired boilers.

8. “Revenue” means the money generated from normal business operations, calculated as the average sales price times the number of units sold.
9. “Service provider” means the following entities, including but not limited to: individuals, private organizations, public organizations, and agencies of the State; marketing consultants; accounting firms; business support organizations; farm support organizations; engineering firms; law firms; and other organizations that DACF determines may provide valuable services, such as analyzing markets, developing financial forecasts, and recommending production alternatives for the owner or operator of a commercial farm.

#### **§ 4. FUNDING**

The Fund to Address PFAS Contamination (PFAS Fund) is funded by an appropriation from State general funds as provided by Maine Public Laws, 2021, Chapter 635, and any subsequent appropriations, and, whenever possible, any additional funding that may be available from other sources.

#### **§ 5. ELIGIBILITY**

Eligibility for income replacement from the PFAS Fund is limited to commercial farms (see 7 M.R.S.A. § 320-K(4)(G)). A commercial farm is eligible for income replacement if:

1. The commercial farm has DACF-confirmed unsafe levels of PFAS contamination, defined as
  - a. one or more samples of farm products showing PFAS exceeding current Action Levels or deemed of concern by the Maine CDC, and/or
  - b. groundwater test results exceeding Maine’s enforceable interim drinking water standard for PFAS until superseded by either Maine’s Maximum Contaminant Level (MCL) for PFAS or a federal MCL for PFAS, whichever is lowest, for wells servicing the farm or fields; and/or
  - c. soil test results exceeding any current Maine CDC crop-specific screening level; or
2. The commercial farm has a history of land application of residuals or other reasonable expectation that their farm product(s) contain unsafe levels of PFAS and it has pulled its products from the market while test results are pending; and
3. The commercial farm has a demonstrated loss of income due to stopping or reducing sales of farm products at the order, written recommendation, or with the consent of DACF because of PFAS contamination; and
4. The commercial farm has collaborated with DACF to investigate the scope of contamination at the farm and has granted ongoing access such that DACF staff are able to develop an understanding of the farm, its PFAS contamination, and potentially a strategy for recovery.

#### **§ 6. REQUIRED DOCUMENTATION**

Applicants to the PFAS Fund for income replacement payments must submit the following documentation:

1. A completed DACF application form, as may be amended from time to time.

2. Supporting financial documentation, including:
  - a. Complete copy of the applicant's federal income tax return(s) for the year(s) associated with the calculation of gross income as described in Section 8;
  - b. Profit and loss statements by month for all relevant time periods;
  - c. Copy of application(s) for USDA DIPP payments or other federal assistance programs, if applicable; and
  - d. Other relevant documentation demonstrating loss of sales and current financial situation.
3. Documentation of all financial payments received by month from state, federal, or non-profit entities specifically related to PFAS assistance.
4. A completed State of Maine Vendor Authorization Form.
5. DACF reserves the right to waive the requirement for certain documents for good cause.

#### **§ 7. APPLICATION REVIEW**

1. The PFAS Fund director will establish an application review panel comprised of DACF staff and at least one external member familiar with agricultural accounting and tax filings.
2. The role of the application review panel is to review applications, verify baseline income calculations, advise DACF on the sufficiency of the supporting documentation, and recommend the schedule of payments for each farm.
3. DACF reserves the right to consult with external persons with relevant expertise as part of the process.
4. DACF reserves the right to limit the amount of funding for all requests based on available resources.

#### **§ 8. METHOD OF CALCULATING INCOME REPLACEMENT PAYMENTS**

DACF shall calculate income replacement payments using the following method:

1. **Gross farm income.**
  - a. Gross farm income means either:
    - i. the gross income of the year PFAS was discovered, as documented on a filed federal income tax return;
    - ii. the gross income of the year immediately preceding the year PFAS was discovered, as documented on a filed federal income tax return;
    - iii. the average of the top three grossing years out of the five years that include the year PFAS was discovered and the four years immediately preceding the year PFAS was discovered, as documented on filed federal income tax returns; or
    - iv. the average of the top three grossing years out of the five years immediately preceding the year PFAS was discovered, as documented on filed federal income tax returns.
  - b. Commercial farms may choose the option under Section 8.1.a that is most advantageous to them.

- c. DACF will rely primarily on Internal Revenue Service (IRS) Schedule F (Profit or Loss from Farming), Schedule C (Profit or Loss from Business), and/or Schedule E (Supplemental Income and Loss) to determine gross farm income.
  - d. Gross farm income typically does not include long-term capital gains such as those reported on IRS Form 8949.
  - e. Gross farm income may include sales of business property reported on IRS Form 4797 when the sale is part of routine farm operations (e.g., sales of dry dairy cows).
2. **Baseline income.** DACF will calculate baseline income by subtracting an amount equal to any non-revenue payments received by the farm from the farm's gross income. For instance, DACF will subtract any "irregular" (or one-time) payments, such as prior state or federal grant awards reported in the farm's tax filing(s), from the farm's gross income.
  3. **Inflationary Factor.** DACF will account for inflation by referencing the Consumer Price Index (CPI-U, CUUR0000SA0) as published by the U.S. Bureau of Labor Statistics. In January of each year, DACF will calculate the average annual CPI-U percentage increase of the prior five most recent years. This average will be the inflationary factor for all income replacement applications processed within that calendar year.
  4. **Maximum payments.** Total income replacement payments for any twelve-month period shall not exceed the total of baseline income plus the product of baseline income times the inflationary factor. An applicant may apply for up to 24 months of income replacement payments. The initial baseline income will be used for any subsequent applications.
  5. **Payments limited to actual losses.** Income replacement payments will be the sum of baseline income plus the product of baseline income times the inflationary factor, minus current income generated by the farm through the sale of products or services not impacted by PFAS and other income, e.g., DIPP payments, gifts and donations above the federal gift tax exclusion, and income replacement payments made by another entity.
  6. **Overpayments.** If income replacement payments exceed a commercial farm's documented losses, the commercial farm shall reimburse DACF an amount equal to the overpayment.

## § 9. CESSATION OF OPERATIONS

1. A commercial farm will be deemed to have ceased operations when the farm confirms in writing that it no longer produces any farm product with the intent that the farm product be sold or otherwise disposed of to generate income presently or in the future.
2. If a commercial farm produces one primary product (e.g., milk or beef) and that farm
  - a. depopulates the herd that produced its primary product because of PFAS contamination, or
  - b. depurates and sells the herd that produced its primary product because of PFAS contamination,
 and has not initiated a plan that is satisfactory to DACF to transition to a new form or type of production within 180 days of depopulation or sale, the commercial farm will be deemed to have ceased operations on the date the majority of the herd was depopulated or sold. When determining whether a plan is satisfactory, DACF will consider factors such as whether the farm is working with a business planner or other service provider and the degree of cooperation exhibited under Section 5.4.

3. DACF reserves the right to determine that a farm has ceased operations when analysis conducted by DACF in conjunction with a service provider with a degree or professional experience in business planning indicates that continued operation is not economically viable.
4. DACF reserves the right to consult with external persons with relevant expertise and to consider extenuating circumstances when determining the date that a farm ceased operations.

#### **§ 10. LIMITATIONS**

1. A commercial farm that permanently ceases operation within 12 months of the discovery of PFAS is eligible for the receipt of one year's lost income.
2. A commercial farm that permanently ceases operation more than 12 months but less than 24 months after the discovery of PFAS is limited to receipt of income corresponding to the timeframe during which it remained in operation.
3. No farm is eligible for more than 24 months of income replacement payments as calculated according to Section 8 herein.

#### **§ 11. ADMINISTRATION**

1. While a commercial farm continues to produce any farm product with the intent that the farm product be sold or otherwise disposed of to generate income, it can select from one of the following options:
  - a. DACF will issue an initial payment of 30 percent of the established baseline income plus the inflationary factor. DACF will issue subsequent payments based on documentation of actual losses; or
  - b. DACF will not make an upfront payment. Instead, the commercial farm will submit documentation of actual losses and DACF will make corresponding payments.
2. Where a third-party entity has made income replacement payments to a commercial farm because of PFAS contamination and DACF has an existing reimbursement agreement with that third-party entity, DACF is authorized to reimburse the third-party entity according to the same terms as if the payment was made directly to the commercial farm. The amount of the payment to the third-party entity will be counted toward the commercial farm's maximum payment.

#### **§ 12. RIGHT TO APPEAL**

1. If an application is denied in whole or in part, DACF will send the applicant a written notice of its decision. Such notice must include an explanation of why the application was denied.
2. Upon receipt of such notice, an unsuccessful applicant may appeal to DACF. The appeal must be in writing, signed by the applicant, and received by DACF within 45 days of receipt of the denial notice.
3. Within 90 days of the receipt of a written request for appeal, DACF will either grant the appeal or schedule a hearing.

4. Appeal hearings will be held before a DACF hearing officer who has been designated by the Commissioner of the DACF. The hearing officer will make a recommended decision. Final decisions on the appeal will be made by the Commissioner after a review of the record.
5. Appeal hearings will be held in accordance with the adjudicatory proceedings provisions of the Maine Administrative Procedures Act, 5 M.R.S.A. §§ 9051-64.
6. Final decisions will be in writing and contain notice of a right to petition the Superior Court for judicial review.

**§ 13. WAIVER**

Upon the request of any person subject to this Chapter or upon its own motion, the PFAS Fund may, for good cause, request waiver of any requirement of this Chapter that is not required by statute. The waiver may not be inconsistent with the purposes of this Chapter or Title 7, Chapter 10-D. The Commissioner of DACF may grant the waiver in extenuating circumstances.