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STATE OF MAINE
ONE HUNDRED AND THIRTY-FIRST LEGISLATURE
COMMITTEE ON AGRICULTURE, CONSERVATION AND FORESTRY

March 1, 2023

Megan Patterson, Director, Board of Pesticides Control
Department of Agriculture, Conservation and Forestry
28 State House Station
Augusta, ME 04333

Director Patterson,

We are writing as a follow-up to the Agriculture, Conservation and Forestry (ACF) Committee meeting on February 15, 2023 where you and Assistant Attorney General Mark Randlett answered questions about Board of Pesticides (BPC) rulemaking. At a meeting on March 1, 2023, the ACF Committee voted unanimously (of those members present) in support of this letter.

As you know, a letter from you dated January 5, 2023 was received by the ACF Committee via email on February 3, 2023. In the letter you request guidance on a rulemaking that the Legislature directed be completed no later than January 1, 2023. We were surprised to learn that at this late date (a month after the rule was required to be adopted) the board is at an impasse because, as the letter states, "it is highly likely that any container regulations passed by the board would be pre-empted by federal law."

The ACF Committee has discussed this issue at length for the last two years. LD 264, *An Act to Prohibit Aerial Application of Perfluoroalkyl and Polyfluoroalkyl Substances*, was submitted in response to press reports in late 2020 from Massachusetts that the state environmental officials had sprayed millions of acres from the air and ground with pesticides containing perfluoroalkyl and polyfluoroalkyl substances (PFAS) in an effort to control mosquitoes to reduce the spread of Eastern equine encephalitis. According to the manufacturer of the pesticide treatment known as Anvil 10+10, the underlying pesticide formulation does not contain PFAS. However, according to a report you submitted pursuant to LD 264 (Resolve 2021, chapter 83), the high-density polyethylene (HDPE) container that the pesticide is packaged in underwent further fluorination treatment by a third party to prevent container degradation and this process appears to be the source of PFAS compounds in sampled pesticide products.

In addition to directing the board to submit a report, Resolve 2021, chapter 83 directs the board to:

1. amend its rules governing the registration of pesticides in the State to:
 - a. require manufacturers and distributors to provide affidavits stating whether the registered pesticide has ever been stored, distributed or packaged in a fluorinated HDPE container; and

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- b. require manufacturers to provide an affidavit stating whether PFAS is in the formulation of registered pesticide; and
2. conduct a study to determine if fluorinated adjuvants are being used or sold in the State;
3. explore what is needed to regulate fluorinated adjuvants in the State; and
4. explore what is necessary to impose a prohibition on the distribution or application of pesticides or adjuvants containing PFAS in the State.

In response to the report you submitted pursuant to Resolve 2021, chapter 83, the committee developed a committee bill, LD 2019, *An Act To Require the Registration of Adjuvants in the State and to Regulate the Distribution of Pesticides with Perfluoroalkyl and Polyfluoroalkyl Substances*. The minority report became enacted law, PL 2021, chapter 673.

The law provides that “a person may not distribute in this State... a pesticide that has been contaminated by” PFAS and “[a] person may not... use or *caused to be used* any pesticide container inconsistent with rules for pesticide containers adopted by the board.” All the discussions surrounding this legislation had to do with the spreading of PFAS through pesticide application. The rulemaking directive to the board is to address the issue of containers contaminating pesticides or adjuvants with PFAS. This is an issue we believe to be fully within the power of the board to regulate.

We understand there is a uniformity provision in federal law, which the letter cites as the basis for this preemption comment. However, this issue has been discussed with the Attorney General’s Office and it is clear the board is not at a legal impasse. There appear to be a number of options for achieving the legislative intent in a manner the Attorney General will defend as consistent with the federal uniformity provision and these options were presented in your January 2023 letter.

Per the ACF Committee’s discussion with you and the Assistant Attorney General on February 15, 2023, the ACF Committee would like the board to consider rules that do the following:

1. Require applicants and registrants to provide affidavits stating whether a pesticide is or has been stored or otherwise packaged in a container that contains PFAS; and
2. If a pesticide is or has been stored or otherwise packaged in a container that contains PFAS or if a pesticide is or has ever been stored or otherwise packaged in a fluorinated HDPE container, prohibit the pesticide from being registered or distributed in the state, unless there is clear evidence the pesticide can be applied without risk of PFAS contamination from the container or packaging.

As the board is aware, the PFAS contamination is a serious issue in this State and the directive to require the board to have this rulemaking completed by January of this year was imposed to protect the public health, safety and welfare. It was imposed only after consulting the board as to its feasibility. We would like you to report back in person to the ACF Committee as soon as practicable on the rulemaking process, including providing us a date, well before statutory adjournment, by which rules will be adopted.

Sincerely,



Henry Ingwersen
Senate Chair



Bill Pluecker
House Chair