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rulecomments.dep@maine.gov

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Maine Board of Environmental Protection
17 State House Station
Augusta ME, 04333-0017

The Maine Organic Farmers and Gardeners Association (MOFGA) appreciates the opportunity to provide comments on proposed rule Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances.

MOFGA has a strong interest in this rulemaking, which will have a significant impact on the future of farming in Maine. A broad-based community, MOFGA is creating a food system that is healthy and fair for all of us. Through education, training and advocacy, we are helping farmers thrive, making more local, organic food available and building sustainable communities. MOFGA certifies 535 organic farms and processing operations representing roughly $90 million in sales, and we are working hard to create opportunities for Maine's next generation of farmers. Each of these farmers is a Maine businessperson for whom economic health and environmental health are interdependent.

Unfortunately, adhering to organic practices provides no guarantee that the scourge of PFAS contamination won't impact an organic farm business. Whether organic or conventional, farms can produce contaminated crops and animal products, and farm families are vulnerable to health problems, if using drinking and irrigation water contaminated with PFAS, or growing crops on soils once spread with PFAS-contaminated sludge. At least 56 Maine farms, both conventional and organic, have been contaminated and hundreds of wells have been polluted. These investigations are still underway; more farms and wells are likely to be discovered as the Department of Environmental Protection (DEP) completes this 3-year project.

Removing and destroying contaminated soils and restoring healthy agricultural soils currently isn't feasible either technologically or economically. MOFGA has been on the front lines helping farmers dealing with the devastating consequences of PFAS contamination, including by fundraising and administering with the Maine Farmland Trust an emergency relief fund as a bridge to the State's efforts to stand up publicly funded assistance.[1] The costs and scope of that taxpayer-funded assistance is taking shape through the Fund to Address PFAS Contamination, and it is proving to be an expensive proposition.

[1] https://www.mofga.org/pfas/pfas-emergency-relief-fund/

Starting with an initial appropriation of $60 million, the PFAS Fund Advisory Committee's draft implementation plan currently estimates nearly $80 million will be needed over the next several years to mitigate the devastating impact of PFAS on farmers' livelihoods, to purchase contaminated farmland, to pay for PFAS blood testing and health monitoring, to conduct research, and more.[2] This is in addition to the millions of dollars the State is already paying to comprehensively investigate PFAS contamination of soils and water and to pay for water filtration for contaminated wells. Nor does this figure account for the cost to municipalities and their residents to properly dispose of PFAS-contaminated wastewater sludge residuals instead of continuing the polluting practice of land application of sludge and sludge-derived compost.

Thus, it is incredibly important to turn off the PFAS tap and get this pernicious chemical out of products, which is why the Legislature acted decisively in 2021 to enact LD 1503, An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (the "PFAS Law"). Time is of the essence, and it is essential that the Board adopt comprehensive and effective rules to implement the PFAS Law. The first step in removing unnecessary PFAS from products is to find out what products contain PFAS and in what quantities, provisions that Chapter 90 is intended to implement. While we are in strong support of this rulemaking in general, there are some needed revisions to ensure consistency with the language and intent of the PFAS Law. These are detailed below.

(1) The food packaging exemption should be narrowed [Paragraph 4.A(2)(3)]:
MOFGA supports exempting *food* packaging – and only *food* packaging -- from the scope of Chapter 90, which was the clear intent of the Legislature, since food packaging was already regulated by prior legislation in 32 MRSA Chapters 26-A and 26-B.[3] An earlier concept draft of Chapter 90 did not exclude food packaging, and MOFGA joined with other farm and agricultural organizations calling on DEP to revise the concept draft to be consistent with the statute and the agency's own recommendations before the Environment and Natural Resources Committee during its deliberations on LD 1503.[4] However, DEP now has swung too far in the other direction and in the posted version of Chapter 90, Section 4.A.(2) and (3) expands the exclusion to *all* packaging.

The only references to PFAS in either Chapters 26-A and 26-B concern *food* packaging. Chapter 26-B is entirely limited to "Toxic Chemicals in Food Packaging," as it is titled. The only reference to non-food packaging is in Chapter 26-A in connection with heavy metals, 32 §1733.1-3. The specific part of this chapter regulating PFAS is paragraph 3-B, which is titled "Prohibition of sale of food packaging containing PFAS."

[2] https://www.maine.gov/dacf/about/commissioners/pfasfund/advisory-committee.shtml
[3] 38 MRSA §1614.4.B.
[4] See Agricultural Council of Maine letter to Kerri Malinowski (September 9, 2022)

Packaging contributes significantly to Maine's waste problem.[5] Packaging waste is generally landfilled or incinerated, contributing to PFAS contaminating ground and surface waters from landfill leachate and being transported throughout Maine and beyond in air emissions. The Legislature intended in LD 1503 that PFAS-containing packaging that is not otherwise regulated must be subject to disclosure and by 2030, banned. This rue must be revised accordingly.

(2) Clarify the definition of "intentionally added PFAS." [Paragraph 2.M]:
The definition of "intentionally added PFAS" is confusing and inappropriately limits the scope of the law. MOFGA has a particular concern with this definition, which may – or may not – exclude fluorinated containers which have been found to leach PFAS into pesticides and other agricultural chemicals. As written, we are unable to determine DEP's intent. PFAS from fluorinated containers are not a contaminant accidentally or unintentionally introduced during the manufacturing process.

Instead, the properties created by means of fluorinating containers –creating a more impermeable barrier and less leakage through the container wall-- are quite intentional. As the direct result of this intentional process, PFAS are created and then leach into the contents, exposing crops, soil and water, farmers and farm workers.[6] MOFGA strongly supports a definition of "intentionally added PFAS" that clearly includes these containers under the provisions of Chapter 90. Members of the public – consumers and farmers alike -- should be able to find out if PFAS is in or leaching from a container.

Further, these products must be phased out no later than 2030 as the Legislature intended. This example illustrates the likely harm that will result if the final Chapter 90 includes DEP's expansive exclusion of all "packaging" which, as we discuss above, goes beyond food packaging and is without support in the statute.

(3) Regulate all PFAS, not only those with assigned CAS numbers [Paragraphs 2.P; 3.A.(1)(c)]:
The posted draft rule contains this statement: *"NOTE: 38 M.R.S. § 1614 requires notification of intentionally added PFAS by CAS number, therefore chemicals which do not have CAS numbers assigned are not subject to this Chapter."* DEP's interpretation subverts language in LD 1503 intended to provide additional specificity in the disclosure requirement. DEP has created a giant loophole out of whole cloth that exempts ten percent of all PFAS.[7] This exemption apparently is not limited to disclosure, but also would remove these PFAS from the 2030 ban. There is no evidence anywhere in the legislative record that requiring disclosure of CAS numbers was intended to limit the scope of the law; just the opposite, it is intended to promote transparency.

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[5] https://www.nrcm.org/sustainability/new-maine-law-shift-recycling-costs-to-producers-packaging-waste/. Maine's Department of Environmental Protection (DEP) estimated in a 2019 report that it costs Maine municipalities between $16 million and $17.5 million each year to manage packaging waste through recycling or disposal.

[6] See, recent studies including EPA research and academic studies: https://www.epa.gov/pesticides/pfas-packaging; PFAS Found in Widely Used Insecticide, https://peer.org/pfas-found-in-widely-used-insecticide/; Directly Fluorinated Containers as a Source of Perfluoroalkyl Carboxylic Acids; Heather D. Whitehead and Graham F. Peaslee; Environmental Science & Technology Letters Article ASAP DOI: 10.1021/acs.estlett.3c00083.

[7] See, comments submitted by the Natural Resources Defense Council on DEP's second concept draft (November 10, 2022). Ten percent of PFAS listed in EPA's CompTox Dashboard do not have assigned CAS numbers, https://comptox.epa.gov/dashboard/chemical-lists/PFASSTRUCT

This DEP-created loophole is inconsistent with the statute and exceeds the agency's authority. Where a CAS number has been assigned, it provides a useful way to identify and track chemicals. If no number is assigned, that does not mean the chemical isn't identifiable. In those circumstances, DEP should require alternative identifying information such as chemical name, molecular formula, and molecular weight. LD 1503 provides DEP clear authority to request this and other information it deems necessary to implement the law's disclosure requirements; see 38 MRSA §1614.2.A(5).

(4) Defining what is a PFAS [Paragraph 2.P]:
The draft rule introduces confusion and potentially, further narrows the scope of Chapter 90 in a note that references an EPA webpage listing PFAS. DEP says this "provides clarity on what is considered a PFAS." In fact, referencing an EPA database that excludes some PFAS chemicals that meet the definition of PFAS established in Maine law is inconsistent with LD 1503 and encourages non-compliance.

(5) Treatment of confidential business information [Paragraph 3A(1)(d)]:
The draft rule contains a note stating that claims of "confidential business information" (CBI) may be made at the time of notification. There is nothing in LD 1503 that allows information about the presence of intentionally added PFAS in products to be kept secret. To the contrary, there is legislative history underscoring an intention not to allow such claims. The subject was directly raised during work sessions on LD 1503 and the Legislature's Environment and Natural Resources Committee specifically rejected suggested language that would have restricted public dissemination of so-called CBI. The final text of the legislation, which lacks mention of trade secrets or CBI, reflects the unanimous vote of the committee. It is notable that when the Legislature has chosen to shield such information in other legislation it has clearly stated that intention, in contrast to LD 1503.[8]

In summary, MOFGA supports this rulemaking with changes. We appreciate the opportunity to provide comments on the draft rule.

Respectfully submitted,

Heather Spalding, MOFGA Deputy Director

Sharon Anglin Treat, Attorney, on behalf of MOFGA

[8] See, e.g., 13 MRSA §800, detailing when trade secrets may be withheld from disclosure under the Maine Emergency Management Agency statute.