



May 19, 2023

Submitted via email to: rulecomments.dep@maine.gov

Mr. Mark Margerum
Maine Department of Environmental Protection
17 State House Station
Augusta ME, 04333-001

Re: *Posting Draft for Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances*

Dear Mr. Margerum:

Thank you for the opportunity to provide comments addressing the Maine Department of Environmental Protection's (DEP) Posting Draft for Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) pursuant to 38 M.R.S. §1614 (the Act).

We have commented on prior concept drafts and presented testimony during the April 20, 2023, public hearing, consistently requesting status as "currently unavoidable use" under the Act for state and federally registered pesticide products (1) due to their stringent regulation and (2) as products currently complying with the same disclosure and future ban provisions within the Maine Board of Pesticides Control (BPC) under its law LD 264, the state's pesticide specific PFAS reporting law.

The proposed regulations to implement 38 M.R.S. §1614 represent an opportunity for DEP to limit the negative public health and economic impacts of 38 M.R.S. § 1614, which will ban products intentionally containing PFAS unless they are deemed to represent a "currently unavoidable use." RISE (Responsible Industry for a Sound Environment) ® and CropLife America reiterate their request that DEP exempt pesticides from the requirements of 38 M.R.S. §1614.

The Act defines PFAS solely based on chemical structure and thus disregards the remarkably different physical, chemical, and biological properties that shape the potential human and ecological risk profiles of individual PFAS.¹ The proposed regulation, like the Act, regrettably fails to adopt a priority or risk-based approach to defining PFAS. Nonetheless, the Act provides DEP with the means to exempt "currently unavoidable use" of PFAS from the Act.² In particular, PFAS that DEP "has determined by rule ... to be essential for health, safety or the

¹ The Act defines PFAS as "substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom." 38 M.R.S. § 1614.1.F.

² The current draft regulations copy verbatim the statutory definition of "currently unavoidable use" of PFAS to mean: "a use of PFAS that the Department has determined by rulemaking to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available." 38 M.R.S. § 1614.1.B.

functioning of society and for which alternatives are not reasonably available.” Until DEP promulgates regulations that clearly define those uses of PFAS that represent “currently unavoidable use,” the regulated community remains in the dark as to which PFAS uses are exempt from the Act. The opportunity exists to apply this designation to regulated products meeting existing and PFAS-specific regulatory requirements within other state and federal agencies.

At a minimum, “currently unavoidable use” should include fluorinated pesticides because their ongoing, federal, and state regulated uses are “essential for health, safety, or the functioning of society.” Pesticides are critical in controlling pathogens and disease vectors, protecting homes and infrastructure, and safely growing crops. We, therefore, urge DEP to either amend the current proposed rule or promptly propose a separate rule that exempts fluorinated pesticides as a “currently unavoidable use.” DEP acknowledges that prohibitions on products with intentionally added PFAS will be “balanced with consideration for appropriate exemptions to be determined through the rulemaking process.”³

Pesticides continue to be stringently regulated by the BPC through the Maine Pesticides Control Act and by the Environmental Protection Agency (EPA) through the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In addition, pesticide manufacturers registering products in Maine are already meeting the same criteria proposed in the Posted Draft under a pesticide specific law – LD 264. We urge DEP to defer to the expertise of the BPC in this matter. Precedent also exists for deference to the state lead agency for pesticide regulation. The state of Minnesota passed a similar product reporting and prohibition law, H.F. 2310, during its 2023 legislative session. However, that state’s legislators gave express authority in the matter of PFAS substances and pesticide regulation to the Commissioner of the Department of Agriculture, recognizing the existing regulatory framework and agency expertise for pesticide products.

The European Union’s European Chemicals Agency (ECHA) published a proposal February 7, 2023, for restrictions on PFAS substances. Within the proposal are express exemptions for pesticides regulated under (EC) 1107/2009. The ECHA states “it is recognized that the use of these substances is specifically regulated in the EU with extensive evaluations and approval processes by designated bodies with specific expertise and experience.” This acknowledges the stringent and thorough regulatory evaluation process pesticides must undergo before they can be sold and applied. The EU and EPA assessment and product approval processes are virtually identical.

Pesticides are unique substances because they must meet federal safety standards. All pesticides, including those formulated with fluorinated chemistry, must already be registered by the EPA prior to applying for and receiving a state registration for sale and use. Before pesticides even enter commerce in a state, they must already be deemed safe by EPA. To approve a new pesticide product, EPA must determine based on data that the pesticide will not, when used

³ Testimony of Kerri Malinowski, Safer Chemicals Program Manager, Department of Environmental Protection, Speaking in Support of L.D. 1503 “An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances” Presented by Rep. Gramlich, Before the Joint Standing Committee on Environment and Natural Resources, May 3, 2021.

according to the label, and with widespread commonly recognized practice, cause unreasonable adverse effects on the environment and provides reasonable certainty of no harm to human health. EPA subjects all new pesticide products to rigorous human health and environmental review and testing requirements to satisfy these standards for registration. The testing requirements include, depending on the type of pesticide, reviews of the following:

- Product chemistry,
- Acute toxicity,
- Ecological effects,
- Applicator exposure,
- Physical and chemical properties,
- Environmental fate, and
- Efficacy testing (for public health uses),
- Residue chemistry (for food uses).

EPA's scientific review of the data required for registering pesticides takes more than 10 years to complete and products are continually re-evaluated to ensure they meet current scientific standards. This level of scientific scrutiny and existing regulatory framework must be considered when making any determinations about pesticide products.

Thank you for your consideration of our comments on the Posted Draft and our comments of November 10, 2022. Access to rigorously regulated pesticides is critically important to Maine's consumers, growers, and professional applicators who rely on these products to control pathogens and disease vectors, protect homes and infrastructure, and safely grow crops. Please contact us if we can provide additional information.

Sincerely,



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RISE (Responsible Industry for a Sound Environment)® is the national trade association representing manufacturers, formulators, distributors, and other industry leaders engaged with specialty pesticides and fertilizers used by professionals and consumers. Learn more at www.pestfacts.org.

CropLife America (CLA) represents the manufacturers, formulators, and distributors of crop protection products in the United States. CLA member companies produce, sell, and distribute virtually all the crop protection products used by American farmers. Learn more at www.croplifeamerica.org.