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Sent: Monday, March 20, 2023 7:06 PM
To: Patterson, Megan L (AGR) <Megan.L.Patterson@maine.gov>
Cc: Pesticides <Pesticides@maine.gov>
Subject: Letter Regarding PFAS Affidavits and Confidentiality

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Dear Director Patterson,
Attached is a letter from MOFGA regarding recent BPC discussions about PFAS affidavits and confidentiality. I hope you will include this letter in the board packet being prepared for the upcoming BPC meeting on April 7.
Thank you very much for your consideration.

Respectfully,
Heather Spalding

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March 20, 2023

Director Megan Patterson and Board Members
Maine Board of Pesticides Control
28 State House Station
Augusta, ME 04333-0028

Dear Director Patterson and members of Maine's Board of Pesticides Control,

We are writing to follow up on the Board of Pesticides Control meeting of March 15, 2023, where you discussed several issues important to members of the Maine Organic Farmers and Gardeners Association (MOFGA).

MOFGA has a strong interest in the Board's effective implementation of legislation providing for information and protections relating to perfluoroalkyl and polyfluoroalkyl substances (PFAS) in pesticides. We testified in support of this legislation, LD 264 and LD 2019 (Public Law 2022, Chapter 673), and provided comments during the Board's rulemaking. MOFGA has been on the front lines helping farmers dealing with the devastating consequences of this 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 Over the past year, many more Maine farms have been found to be contaminated with PFAS (56 farms at last count, and investigations are still underway). The seriousness of the PFAS threat to public health is now widely recognized, with the federal Environmental Protection Agency proposing to set enforceable drinking water standards for several common PFAS as [close to zero](#) as is measurable.²

It is in this context that we write to address several issues that were discussed by the Board and staff at the March 15 meeting. Specifically, we wish to provide comments on:

- (1) The validity of chemical industry claims of Confidential Business Information (CBI) with regard to the mandatory affidavits for registering products attesting that the pesticide has or has never been stored, distributed, or packaged in a fluorinated container; and attesting that the pesticide formulation does or does not contain PFAS;³

¹ <https://www.mofga.org/pfas/pfas-emergency-relief-fund/>

² <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas>

³ Chapter 20, §1.F



- (2) The process that the Board will follow in assessing chemical industry claims of CBI with regard to the mandatory affidavits;
- (3) The appropriateness of the definition of PFAS in the Board's regulation and why the Board should not make changes to it; and
- (4) Whether initiating a rulemaking to prevent contamination of pesticides with PFAS from migrating from containers, as the Legislature has directed, would be useful and warranted.

PFAS affidavits are public records.

During the rulemaking proceeding on the Chapter 20 amendments, several organizations, including MOFGA, testified that the Board should make clear that the required PFAS affidavits were intended by the Legislature to be public information, and that they meet the definition of a "public record" under Maine's Freedom of Access Law.⁴ The Board agreed, and in its Summary of Comments it repeatedly stated that it "intends to make affidavits public records" and that while valid claims of CBI may be warranted for the Confidential Statement of Formula, "affidavits themselves will be public documents and will describe whether a PFAS known to the manufacturer is in the product or if it is stored in an HDPE container." [see Attachment]⁵ Director Patterson's February 18, 2022 memorandum to the Board reporting on the public comments summarized as follows:

"Many commenters asked that PFAS reporting-related affidavits in Chapter 20 be made public. Commenters correctly identified that the proposed affidavit information will be considered public information. If it is the Board's preference, staff could prepare and post an annual summary of the results of affidavit reporting. Implementation of this request would not require rulemaking. Staff will be asking the Board if the proposed rule should or should not be modified."

The Board was correct in determining that the affidavits in question are "public records" and not subject to any exemption in Maine's Freedom of Access Law. Maine law broadly defines "public records" to mean "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in

⁴ 5 MRSA §400 et al, §402, Definition of Public Record, <https://www.mainelegislature.org/legis/statutes/1/title1sec402.html>

⁵ Summary of Comments Received Regarding 130th Legislature, LD 264, Resolve, Directing the Board of Pesticides Control To Gather Information Relating to Perfluoroalkyl and Polyfluoroalkyl Substances in the State, Board of Pesticides Control CMR26-01 Chapter 20, https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/Feb22/5-Summary-of-public-comments.pdf.

connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business,” with limited exceptions.⁶

None of the listed exceptions to the public records definition are remotely relevant to the PFAS affidavits with the possible exception of 5 MRSA §402.3.A, “Records that have been designated confidential by statute”. No such confidentiality designation can be found, however, in any of the legislation that the Board relied on in support of its regulations requiring the affidavit information, LD 264 and LD 2019.

PFAS affidavits are not “trade secrets”.

Perhaps the companies seeking to keep information about PFAS in their products out of public view are relying on Maine trade secrets law. That law does not, however, support any claim of confidentiality for these general affidavits. Maine law defines trade secrets as follows:

10 MRSA §1542.4. Trade secret.

“Trade secret” means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Board-required PFAS affidavits do not meet the definition of a protected “trade secret.” Whether a pesticide has PFAS in it as an ingredient or as a contaminant resulting from the manufacturing process is “readily ascertainable” by testing these products, and the same is true for PFAS migrating into pesticides from fluorinated containers. Indeed, the Legislature was prompted to investigate the presence of PFAS in pesticides after EPA and private sector testing revealed PFAS in pesticides stored in fluorinated containers in 2021.⁷ Subsequent studies have confirmed the presence of PFAS in pesticides migrating from containers⁸ as well as PFAS in pesticides most likely as an ingredient or manufacturing process contaminant.⁹

⁶ 5 MRSA §402.3, <https://www.mainelegislature.org/legis/statutes/1/title1sec402.html>

⁷ EPA research: <https://www.epa.gov/pesticides/pfas-packaging>; PFAS Found in Widely Used Insecticide, <https://peer.org/pfas-found-in-widely-used-insecticide/>; see also March 22, 2022 letter from EPA provided to the Board at its April 1, 2022 meeting, https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/Apr22/6c-EPA%20letter-to-fluorinated-hdpe-industry_03-16-22_signed.pdf

⁸ *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.

⁹ Steven Lasee, Kaylin McDermett, Naveen Kumar, Jennifer Guelfo, Paxton Payton, Zhao Yang, Todd A. Anderson, Targeted analysis and Total Oxidizable Precursor assay of several insecticides for PFAS,

Moreover, as Pesticide Toxicologist Pam Breyer has reported to the Board, many PFAS chemicals are listed in [public databases](#) as ingredients in pesticides¹⁰ and container-caused contamination is widespread.¹¹ Nearly 70 percent of all pesticides introduced into the global market from 2015 to 2020 contained PFAS chemicals or related compounds.¹²

FIFRA doesn't require secrecy.

Perhaps the corporations refusing to file the required PFAS affidavits are looking to federal law to prevent public disclosure. 7 MRSA §607.5-A of Maine's pesticide law links the confidentiality of registration data, and potential exclusion from the public records provisions of Maine's Freedom of Access Act, to EPA's determination of confidentiality under federal law.¹³ Data submitted to the Board for registration of a pesticide, including formula, test results and "other necessary information" required by the Board (as described in 7 MRSA §607.3-5) would be considered confidential if EPA made a determination of confidentiality for the same data under the trade secrets provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 USC §136h.¹⁴

This section of FIFRA protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." FIFRA limits the types of data that may be claimed as confidential, however. Safety and efficacy data (such as studies submitted to the EPA) on registered or previously registered pesticides are not considered confidential business information and must be made available to the public. Nonetheless, the following information is excluded from public disclosure:

- information that discloses manufacturing or quality control processes;
- information that discloses methods for testing and measuring the quantity of deliberately added inert ingredients; and

Journal of Hazardous Materials Letters, Volume 3, 2022, 100067, ISSN 2666-9110, <https://doi.org/10.1016/j.hazl.2022.100067>. PFOS was detected in 6 out of 10 tested insecticide formulates (3.92–19.2 mg/kg). Non-targeted techniques suggested additional PFAS species in 7 out of 10 insecticides.

¹⁰ Staff Memo: Feasible Definition of PFAS in Pesticide Products, October 8, 2021, https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/Oct21/5-Staff%20Memo%20on%20PFAS%20Definition.pdf; see also Global Database of PFAS (OECD), <https://www.oecd.org/chemicalsafety/risk-management/global-database-of-per-and-polyfluoroalkyl-substances.xlsx>

¹¹ Memorandum to Board, PFAS Container Contamination Updates, October 21, 2022, https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/Oct22/3a-2022%20PFAS%20October%20Memo%20Tox.pdf

¹² Pesticides Are Spreading Toxic 'Forever Chemicals,' Scientists Warn, <https://www.scientificamerican.com/article/pesticides-are-spreading-toxic-forever-chemicals-scientists-warn/>; *Revisiting pesticide pollution: The case of fluorinated pesticides*, Environmental Pollution Volume 292, Part A, 1 January 2022, 118315, <https://doi.org/10.1016/j.envpol.2021.118315>

¹³ A separate provision makes the improper disclosure for personal advantage of confidential information such as formulas and financial information a prohibited act, 7 MRSA §606.2.C.

¹⁴ 7 U.S. Code § 136h. Protection of trade secrets and other information, accessed: <https://www.law.cornell.edu/uscode/text/7/136h>

- information that discloses the identity or percentage quantity of deliberately added inert ingredients.¹⁵

Public disclosure of the PFAS affidavits required by Board's rule does not fall into any of these exceptions. The affidavits don't include any specific data or reveal any detail about manufacturing processes or testing methods. Even requiring disclosure of PFAS in inert ingredients or as the result of contamination during manufacturing would not reveal whether the PFAS were intentionally added or inadvertent, and no formula or percentage is required to be disclosed. In any event, EPA has not specifically designated this general type of PFAS reporting as CBI under FIFRA, which Maine law requires in order to invoke this exception.

Public disclosure of PFAS in pesticides serves an important purpose, given the larger context of the Board's PFAS rulemaking, including the public health issues, the extent of PFAS contamination that is now documented and the harm it has caused to farmers and the State as a whole, and related legislation being implemented by other Maine departments.

The Board's CBI evaluation process should be open for public comment.

At its March 15, 2023 meeting, Board staff announced that they will be establishing a process to review industry claims of CBI, not only with regard to the submission of pesticide formulas, but also to evaluate claims that the PFAS affidavits are CBI. As we have discussed, there is no legal basis for the industry claim that the yes-or-no PFAS affidavits are protected information they can keep from the public. If the Board persists in setting up a process to review the chemical industry's affidavit claims, then that process should be open to public participation. MOFGA and other interested parties should have an opportunity to submit information about why these affidavits should be public information under Maine's Freedom of Access and pesticide laws.

The Board should stick with the definition of PFAS it already adopted in rule.

The pesticide industry continues to pressure the Board to change the definition of PFAS in its rules¹⁶ so that any regulations will only apply to a small subset of PFAS. The Board has no choice in this matter; its PFAS definition is required by law, part of LD 2019 enacted in 2022.¹⁷ Maine uses this definition in multiple laws, and the Department of Environmental Protection

¹⁵ See EPA webpage, Pesticide Registration Manual: Chapter 15 - Submitting Data and Confidential Business Information at: <https://www.epa.gov/pesticide-registration/pesticide-registration-manual-chapter-15-submitting-data-and-confidential> (accessed January 6, 2022)

¹⁶ Chapter 20, §1.A, "Perfluoroalkyl and Polyfluoroalkyl Substances" or "PFAS" means substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

¹⁷ Section 1 of LD 2019 states: 7 MRSA §604, sub-§22-A is enacted to read: 22-A. Perfluoroalkyl and polyfluoroalkyl substances or PFAS. "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" has the same meaning as in Title 32, section 1732, subsection 5-A. See, <https://legislature.maine.gov/statutes/7/title7sec604.html>

is proceeding with rulemaking to require immediate disclosure of PFAS ingredients in products and a phase-out of all PFAS in products by 2030, using this same definition. Maine's definition has been adopted by other states regulating PFAS, and is consistent with the definition used by the European Chemicals Agency and the Organization for Economic Co-operation and Development (OECD).¹⁸

Regulations implementing the ban on PFAS contaminants from containers are warranted.

We understand that rulemaking proceedings can be involved and expensive, and that the Board is reluctant to initiate another rulemaking unless it is clearly warranted. MOFGA agrees with the Legislature's Agriculture, Conservation and Forestry Committee, as expressed in the committee's recent letter, that regulations implementing the ban on PFAS contamination from fluorinated containers is warranted. We think further clarification will be helpful to both the regulated community, farmers and farm workers, and the public. The broad ban in law provides no details about testing, enforcement or the connection to the container affidavits required by BPC rule. Given the clear-cut science establishing PFAS leaching from fluorinated containers into pesticides, we believe the Board should establish a rebuttable presumption in its regulations that pesticides in such containers are contaminated with PFAS. The burden would then be on the manufacturers to establish through testing or other evidence that their products are not contaminated; or they can switch to alternative packaging.

Thank you for the opportunity to provide these comments.

Respectfully,



Sharon Anglin Treat, Attorney
on behalf of MOFGA



Heather Spalding, Deputy Director
MOFGA

¹⁸ OECD, Reconciling Terminology of the Universe of Per- and Polyfluoroalkyl Substances: Recommendations and Practical Guidance Series on Risk Management No.61, [https://one.oecd.org/document/ENV/CBC/MONO\(2021\)25/en/pdf](https://one.oecd.org/document/ENV/CBC/MONO(2021)25/en/pdf). See also OECD Portal on PFAS: <https://www.oecd.org/chemicalsafety/portal-perfluorinated-chemicals/>

ATTACHMENT

Excerpts of **“Summary of Comments Received Regarding 130th Legislature, LD 264, Resolve, Directing the Board of Pesticides Control To Gather Information Relating to Perfluoroalkyl and Polyfluoroalkyl Substances in the State Board of Pesticides Control CMR26-01 Chapter 20”** relating to affidavits as public records, see full document: https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/Feb22/5-Summary-of-public-comments.pdf

“All reports and affidavits produced by the BPC are already public documents.” [in response to comments from Patricia Rubert-Nason – Maine Sierra Club; Sarah Woodbury – Director of Advocacy for Defend Our Health; and Sharon Treat – Senior Attorney for Institute for Agriculture and Trade Policy that “Required affidavits submitted by registrants should be publicly available.”]

“The BPC recognizes that during the implementation of LD 1503 affidavits were not withheld and intends to make affidavits public records.” [in response to comments of Sharon Treat, IATP, that “Affidavits should not be withheld from the public, as the committee that led the implementation of LD 1503 voted to not keep documents and affidavits confidential.”]

“Information in the CSF itself is confidential business information (CBI) under federal law FIFRA §10(a). Affidavits themselves will be public documents and will describe whether a PFAS known to the manufacturer is in the product or if it is stored in an HDPE container.” And “BPC acknowledges the concern regarding transparency of the affidavits. BPC will consider changing the rule to incorporate this sentiment.” [In response to comments from Sarah Woodbury that “The rule should unequivocally state the affidavits are public and accessible records. While this may be the intent of the proposed language, ambiguity should be eliminated by separately listing the three required items or adding a sentence explicitly clarifying the public nature of the affidavits.]

“BPC agrees that the CSF is confidential and that the affidavits will be public documents.” [In response to comment from Heather Spalding, MOFGA, that “CSF is confidential but affidavits can be made public.”]