January 28, 2025 Submitted Via Email to rulecomments.dep@maine.gov

Kerri Malinowski Farris
17 State House Station
Augusta, ME 04333

Re: Comments on Proposed Chapter 90 Rule re: Currently Unavoidable Use Designation of Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Ms. Farris:

Established in 1933, CropLife America (CLA) represents the developers, manufacturers, formulators, and distributors of pesticides and plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell, and distribute nearly all pesticide and biotechnology products used by American farmers.

Responsible Industry for a Sound Environment (RISE)® is the national trade association representing manufacturers, formulators, distributors, and other industry leaders engaged with the specialty pesticide and fertilizer products used by professionals and consumers.

CLA and RISE appreciate the opportunity to provide comments on the Maine Department of Environmental Protection (DEP) December 20, 2024 proposed rule, Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (Proposed Rule), which is designed to implement the PFAS in Products Program established by 38 MRSA § 1614.[1] The Proposed Rule represents an opportunity for DEP to limit the negative public health and economic impacts of this law. CLA and RISE reiterate their request that DEP exempt pesticides from the requirements of 38 MRSA § 1614. In the alternative, CLA and RISE urge DEP to issue a Currently Unavoidable Use (CUU) determination for all pesticides and, because the Maine Board of Pesticides Control (BPC) already possesses formulation information for every pesticide sold in Maine, DEP should exempt pesticide manufacturers from notification requirements of 38 MRSA § 1614. We also describe below our continued concern about how DEP proposes to collect confidential business information. CLA and RISE previously commented on these issues and are

[1] Also referred to as the Products Containing PFAS law.

concerned that DEP's Proposed Rule is not a reasonable exercise of the agency's discretion or authority.

A. CLA AND RISE REQUEST THAT PESTICIDES BE EXEMPT FROM 38 MRSA § 1614 OR, IN THE ALTERNATIVE, A CUU DETERMINATION FOR ALL PESTICIDES

CLA and RISE reiterate our request[2] that pesticides be exempt from all requirements of 38 MRSA § 1614. This should be accomplished by listing pesticides in Section 4(A) of the rule. In the alternative, DEP should issue a CUU determination for all pesticides in Section 9(B) of the rule. Pesticides are essential for health, safety, and the functioning of society and are heavily regulated at the federal and state level to ensure safe use and avoid unreasonable adverse effects to the environment.

1. Pesticides are essential for health, safety, and the functioning of society

Access to a wide range of pesticide products with different modes of action for different pests, application situations, and users is essential for health, safety, and the functioning of society. While not an exhaustive list, we provide these examples of the fundamental role pesticides play in food production, quality of life, commerce, and environmental protection.
Pesticide products are:

- Necessary for producing a safe, predictable, and adequate food supply as well as for producing essential fiber and fuel crops. In Maine, pesticides are essential to producing nutritious and abundant food crops available to residents in local supermarkets and farmers markets and for producing commodity crops such as potatoes and blueberries. Pesticide products protect crops from weeds, insects, fungi, rodents, and other pests in the field, after harvest, and during processing, storage, and transportation.
- Crucial for public health protection and controlling and eradicating life threatening, harmful and nuisance pests. Certain pesticide products manage and eradicate ticks, mosquitos, cockroaches, bedbugs, and rodents in homes, hotels, parks, schools, and restaurants. Harmful nuisance and invasive species such as the brown tail moth and emerald ash borer require pesticides for effective control.
- Indispensable for controlling and eliminating poisonous, noxious, and invasive non-native plants such as poison ivy, oak, sumac, rag weed, Japanese barberry, oriental

[2] *See* July 18, 2022 CLA and RISE Comments on "Concept Draft for the Maine PFAS in Products Program," Implementing Reporting Provisions of 38 MRSA Section 1612; November 10, 2022 CLA and RISE Comments on "Second Concept Draft for the Maine PFAS in Products Program," Implementing Reporting Provisions of 38 MRSA Section 1612; May 19, 2023 CLA and RISE Comments on Posting Draft for Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances.

bittersweet, Russian olive, Eurasian milfoil, purple loosestrife, Japanese knotweed, and others on the Department of Agriculture, Conservation and Forestry's (DACF) Advisory List of Invasive Plants that threaten public health, safety, and ecosystems.

- Critical for maintaining safe and accessible green space, including parks, ornamental landscapes, and golf courses. Well maintained turf and landscapes reduce glare, dissipate heat, improve soil restoration and retention, and offer noise abatement. In addition, these areas offer extensive aesthetic benefits contributing to quality of life and mental well-being of residents and tourists. Well maintained golf courses specifically offer recreational activities including physical exercise and overall substantial economic value back into the Maine economy.
- Essential for effective subterranean termite control in homes and commercial buildings, and verification of pesticide treatment for these pests could be necessary to obtain a home mortgage.
- Integral to shielding Maine's energy, transportation, and other public infrastructure from damage and degradation from weeds, insects, rodents, and other pests.
- Protective of public infrastructure as a tool for creating firebreaks, clearing highway and railway rights of way and sight lines of vegetation, and managing noxious and invasive aquatic plants and algae in shipping lanes, lakes, ponds, and other aquatic ecosystems.

As a coastal and border state, Maine and its residents are uniquely subject to increasing pest pressures and disease threats introduced into the state through trade, weather, and other factors. Effective use of pesticides by Maine's agricultural producers, public health officials, forestry and vegetation management professionals, and residents is the first line of effective defense against these extraordinary pressures.

In addition, a wide variety of pesticide formulations with different modes of action are necessary for preventing and managing pesticide resistance in target species. Resistance can develop over time when pesticides with the same mode of action are applied in the same area. The practice of Integrated Pest Management (IPM) ensures pesticide applicators have the tools they need to effectively manage pests and avoid creating resistance. IPM is defined in three federal statutes: the 1996 Food Quality Protection Act (PL 104-170), the Children's Health Act of 2000 (PL 106-310), and the Food, Conservation, and Energy Act of 2008 (PL 110-234), and define it as "a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks." IPM allows Maine's growers and pesticide applicators to make their own, case-by-case decisions to meet pest management needs.

2. **Pesticides are among the most heavily regulated chemical substances at the federal level**

Pesticides are already comprehensively regulated by the U.S. Environmental Protection Agency (EPA) under two federal statutes, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Federal Food Drug and Cosmetic Act (FFDCA). Both statutes require pre-market approval ("registrations" under FIFRA and, for food uses, "tolerances" or "tolerance exemptions" under the FFDCA) before a pesticide may be sold and used in the United States and before any state agency may approve the pesticide for sale or use in that state.

Pursuant to FIFRA, EPA independently evaluates chemical-specific data for active ingredients and all of the components of the formulation applied by the end-user to ensure that pesticides can be used safely and without unreasonable adverse effects to the environment[3] when label directions are followed. EPA's rigorous data review includes analyzing a broad range of toxicity and exposure data and conducting comprehensive risk assessments drawing on all these data, *e.g.*, a human health risk assessment, including worker exposure, dietary risk for proposed food uses, and other aspects of human health, and an ecological risk assessment for pesticides proposed for outdoor use. EPA carefully reviews the scope and specific wording of the labels, which often are dozens of pages long, to ensure that the detailed directions for how, when, and where the pesticide may be used, worker protection, and other aspects of the label carefully and clearly circumscribe the way the pesticide may be used to protect human health and the environment.

As part of this review, EPA has access to detailed confidential, competitive information about the formula, which is carefully protected from public disclosure under federal law. Importantly, EPA is also required to review each registered pesticide at least every 15 years to ensure that each pesticide continues to meet current federal requirements. As part of this registration review, EPA often seeks additional scientific information from registrants to ensure that EPA has the necessary scientific information to conduct its review, based on current standards. EPA can, and often does, require changes to the pesticide or its use as a result of that review.

In addition, specifically with regard to dietary risk, EPA examines proposed food uses under the FFDCA's reasonable certainty of no harm safety standard.[4] No pesticide may be approved for a food use under FIFRA unless it also meets the FFDCA safety standard, again based on extensive toxicity and exposure data and a human health risk assessment. EPA expresses its assessment

[3] FIFRA defines the term ''unreasonable adverse effects on the environment'' to mean: ''(1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346a of title 21.'' 7 U.S.C. § 136(bb).

[4] 21 U.S.C. § 346a(b)(2)(ii).

by issuing a tolerance (the amount of pesticide residue that can be safely present in food) or a tolerance exemption.

All pesticides, including those formulated with fluorinated chemistry, must already be registered by the EPA before an entity may apply for and receive a state registration for sale and use; before pesticides enter commerce in a state, they must already be deemed safe for that use by EPA. To approve a new pesticide product, EPA must determine, based on data, that the pesticide will not, when used according to the label, and with commonly recognized practice, cause unreasonable adverse effects on the environment under FIFRA and for food uses provides reasonable certainty of no harm to human health under the FFDCA. EPA subjects all new pesticide products to rigorous human health and environmental review and testing requirements to satisfy these standards. 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
- Efficacy testing (for public health uses), and
- Residue chemistry (for food uses).

EPA's scientific review of the data required for registering pesticides takes years to complete and products are continually re-evaluated to ensure they meet current scientific standards. This risk-benefit evaluation, in which the benefits must outweigh the risks, involves detailed scientific scrutiny. A finding of "currently unavoidable use" is supported by this well-established, comprehensive federal regulatory oversight of pesticides.

3. Pesticides are already regulated by BPC

At the state level, pesticides also are stringently regulated by the BPC through the Maine Pesticides Control Act. Pesticide manufacturers registering products in Maine already meet the criteria proposed in the Proposed Rule 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. 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. In Maine, we suggest that DEP defer to BPC by exempting pesticide products from all requirements of 38 MRSA § 1614.

4. **The Proposed Rule fails to address variability in PFAS chemistries**

The Proposed Rule incorporates the Act's definition of PFAS: any "substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom." 38 MRSA § 1614(1)(F). This definition is based solely on chemical structure and thus disregards the remarkably different physical, chemical, and biological properties that shape the potential human and ecological risk profiles of chemistries that meet that definition. The Proposed Rule fails to adopt a priority or risk-based approach to defining PFAS, which will result in an arbitrary application of 38 MRSA § 1614, including the CUU determination process. Pesticides should be exempt from the law's requirements, or, at the very least, a CUU determination should be implemented for fluorinated pesticides, as those products are essential to human health, safety, and the functioning of society, as detailed elsewhere in these comments.

5. **The use of PFAS in certain pesticides is essential to their function**

Certain pesticide products may contain fluorinated chemistry that meets the state's definition of this chemistry to enhance performance where there is a desire for additional selectivity, specificity, and stability. Such chemistry supports control of only the target pest and ensures formulated products maintain efficacy and integrity as they move through the product supply chain to application.

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.

B. CLA AND RISE REMAIN CONCERNED ABOUT PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION

Virtually all pesticide formulations constitute highly sensitive confidential business information (CBI) that demands protection by the State (and is protected under federal law). The importance of protecting this information is evidenced throughout Maine's laws and must be equally protected under the Proposed Rule.

1. **The Proposed Rule Requires Disclosure of Protected Information**

Under the Proposed Rule, in order to request a CUU determination, a company would need to submit certain information to DEP, including the following:

- A description of the product, including physical structure, appearance, how it functions, and identifying codes such as the North American Industry Classification System (NAICS) code for the sector or sectors in which the products containing intentionally added PFAS will be utilized;
- An explanation as to why the availability of PFAS in the product is essential for health, safety or the functioning of society; and
- A description of how the specific use of PFAS in the product is essential to its function.

In order to continue selling the product subject to a CUU determination beyond the restriction date, a company would then need to submit a notification to DEP containing the following information:

- A description of the product, including the Global Product Classification (GPC) brick category and code;
- The product's type and intended use;
- The NAICS code for the sector or sectors in which the products containing intentionally added PFAS will be utilized;
- The purpose for which PFAS are used in the product;
- The precise identity of each PFAS used in the product, by chemical abstracts service (CAS) registry number or international union of pure and applied chemistry (IUPAC) nomenclature;
- The exact quantity of each PFAS in the product as a concentration (or in the alternative, the total organic fluorine); and
- The name and address of the reporting manufacturer, and the name, address, email address, and phone number of a responsible official for the manufacturer.

The key elements typically are contained in the Confidential Statement of Formula (CSF) document required to be submitted to federal regulators as part of a pesticide registration application. Such documentation is required for all pesticides, and identifies the specific ingredients in detail, including the amount allowed to be used and the source of the ingredient. In addition, applicants must provide detailed information to federal regulators about the manufacturing process.

As written, the Proposed Rule does not provide adequate assurances that this information will be protected from public disclosure, or how DEP plans to do so. Without a higher degree of confidence in the protection of CBI, it is foreseeable that important pesticide products may not

be available to Maine's agricultural producers, professional applicators, public health officials, and consumers, particularly to address resistance and emerging and future pest pressures.

2. Pesticide-Related CBI Is Protected Under State Law

The importance of protecting CBI from disclosure is underscored by the legislature's inclusion of CBI protections in the Products Containing PFAS law. 38 MRSA § 1614(12) ("Proprietary information submitted to the department by a manufacturer pursuant to the requirements of this section . . . is confidential and must be handled by the department in the same manner as confidential information is handled under section 1310 B.")

3. CLA and RISE Urge Coordination with Maine BPC

When LD 264, the pesticide-specific law, was first enacted, it required the submittal of the same information provided to EPA about formulations to register pesticides with the state. CLA and RISE participated throughout the available opportunities for public comment and public hearings, providing suggestions for how the information could be submitted and protected. BPC ultimately developed an approach to address those concerns. CLA and RISE are available to discuss BPC's actions to ensure appropriate protection in accordance with state and federal law and to support compliance with LD 264.

C. DEP SHOULD EXEMPT PESTICIDE MANUFACTURERS FROM NOTIFICATION REQUIREMENTS

The Proposed Rule would require pesticide manufacturers subject to a CUU determination to submit considerable information to DEP, including CBI, and continue to update that information if there are significant changes or upon request by DEP. Because BPC already has access to confidential formula information submitted pursuant to LD 264 and LD 2019, all pesticide manufacturers should be exempt from the duplicative notification requirements contained in the Proposed Rule.

CONCLUSION

Because pesticides are essential to the health, safety, and the functioning of society, and are subject to science-based federal regulation that requires a comprehensive human health and environmental risk assessment, it is appropriate to exempt pesticides from the requirements of 38 MRSA § 1614. This would be most efficiently accomplished by listing pesticides in Section 4(A) of the rule. In the alternative, DEP should issue a CUU determination for all pesticides in Section 9(B) of the rule and exempt pesticide manufacturers from the rule's notification

requirements. To the extent any final rule would require pesticide manufacturers to submit CBI to DEP, we ask you to work with us to ensure that CBI is adequately protected.

As representatives of developers, manufacturers, formulators, and distributors of pesticides for agriculture and pest management in the United States, CLA and RISE appreciate the opportunity to provide these comments on the Proposed Rule. Please contact us if we can provide further information or if you have questions.

Sincerely,

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