



STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
BOARD OF PESTICIDES CONTROL
28 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

Joint Standing Committee on Agriculture, Conservation and Forestry
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

January 5, 2022

Dear Senator Ingwersen, Representative Pluecker, and members of the Joint Standing Committee on Agriculture, Conservation and Forestry:

In 2022, the 130th Maine Legislature enacted LD 2019 ([PL 2022 c. 673](#)), *An Act To Require the Registration of Adjuvants in the State and To Regulate the Distribution of Pesticides with Perfluoroalkyl and Polyfluoroalkyl Substances*. This law directed the Board of Pesticides Control (Board) to adopt rules regulating pesticide containers as authorized in the Maine Revised Statutes, Title 7, section 606, subsection 2, paragraph H, no later than January 1, 2023.

The Board first discussed LD 2019 and the associated rulemaking responsibilities at its May 6, 2022 meeting. Staff provided a brief overview of the new authorities and responsibilities assigned by LD 2019 and sought guidance from the Board on the rulemaking directive. Following the initial May discussion, the Board has been making a good-faith effort to complete this directive.

The Board has engaged in meaningful discussion of the request at every subsequent public meeting. These discussions are summarized below and are documented, in detail, in the publicly available [meeting minutes](#):

- At the June 17, 2022, Board meeting, LD 2019 was discussed. For Board consideration, staff prepared a memorandum outlining possible actionable items and rulemaking responsibilities. Staff identified that while the Board was directed to conduct rulemaking, staff sought clear guidance on the types of information required by the Board to proceed with informed rulemaking efforts and conceptual discussions. Staff also shared that both Maine state and federal law indirectly and directly address pesticide contamination and the use of pesticide containers. The Board discussed the challenges of potential

MEGAN PATTERSON, DIRECTOR
90 BLOSSOM LANE, DEERING BUILDING



PHONE: (207) 287-2731
WWW.THINKFIRSTSPRAYLAST.ORG

rulemaking and identified several concerns, including possible federal preemption, limited information to aid in decision-making, and the short rulemaking timeline. The Board requested that the staff provide information on existing regulations relative to pesticide containers and research options relative to defining what “contamination” meant in the context of LD 2019.

- At the August 5, 2022, Board meeting, staff invited State Toxicologist, Andrew Smith, to discuss PFAS; however he was unable to attend the meeting. Board members expressed concern about failing to meet the rulemaking deadline in LD 2019. The Assistant Attorney General identified that it was highly likely that any container regulations passed by the Board would be pre-empted by federal law since the EPA has exclusive authority over the regulation of pesticide containers and labeling. Several alternative approaches were suggested, including:
 - Adopt the federal regulation by reference, which would satisfy the legislative directive and bring the federal rule into state law;
 - Reach out to the Legislature and share that the Board has encountered legal issues with federal preemption;
 - Delay rulemaking while researching federal law in an effort to try to find a space that might be available for state regulation;
 - Require registrants to state whether products are stored in containers that contain PFAS; or
 - Possibly create laws about the handling of containers.

Board members expressed concern about inadvertently sidestepping the legislative intent, about failing to complete the directed rulemaking, and asked about the process for informing the Legislature of the identified challenges.

- At the October 21, 2022, Board meeting, staff provided reviews of relevant policy and technical information discussed at the August meeting, including the possible approaches to container regulation. Staff also shared the recently published studies by Lasee et al. and the EPA assessment of fluorinated container leachates. Following staff presentations and Board discussion, the Board members asked staff to send a memo to the Legislature about the progress made.

As noted, the Board has identified federal preemption as a significant challenge to successfully pursuing rulemaking related to pesticide containers. EPA establishes preemptive authority over the regulation of containers in 7 U.S.C. § 136v(b)—Authority of States:

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) UNIFORMITY

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

And EPA further explains that package/packaging is defined in 40 CFR part 152.3 Definitions:

Package or packaging means the immediate container or wrapping, including any attached closure(s), in which the pesticide is contained for distribution, sale, consumption, use, or storage. The term does not include any shipping or bulk container used for transporting or delivering the pesticide unless it is the only such package.

The Board respectfully requests the Committee's guidance on the rulemaking impasse and looks forward to working collaboratively with the Committee on this sensitive and difficult issue.

Sincerely,

A handwritten signature in cursive script that reads "Megan L. Patterson".

Megan Patterson

Director, Board of Pesticides Control