Comments of Sharon Treat for the Institute for Agriculture and Trade Policy
Submitted to the Maine Board of Pesticides Control
On Proposed Rule Amending Chapter 20
Implementing LD 264, Resolve, Directing the Board of Pesticides Control To Gather Information Relating to Perfluoroalkyl and Polyfluoroalkyl Substances in the State
January 14, 2022

These comments are submitted by Sharon Treat, Senior Attorney at the Institute for Agriculture and Trade Policy on the Maine Board of Pesticides Control ("Board") Proposed Rule Amending Chapter 20 to address PFAS in pesticides as directed by Legislative Resolve LD 264. IATP is a 501(c)(3) nonprofit headquartered in Minneapolis, Minnesota with an office in Hallowell, Maine and other locations. IATP works closely with farmers and seeks to promote local, sustainable and environmentally beneficial agriculture and trade policies.[1] We have been following PFAS issues both across the country and in Maine, and we testified in support of the Resolve LD 264, that these proposed rules are intended to implement.

IATP wants to emphasize the importance of the proposed amendments to Chapter 20 and to encourage the Board of Pesticides Control to exercise the full extent of its legal authority --of which it has a great deal-- to protect the public, the state's natural resources, and our farms and food from PFAS contamination.

Since LD 264 was enacted, even more residential drinking water wells and a third farm, this one in Unity, have been found to be contaminated. In addition, a "do not eat" deer consumption advisory has been issued by the Department of Inland Fisheries and Wildlife for a large geographic area in central Maine.

Farmers have had their livelihoods destroyed or significantly impacted, and they and others have been exposed to toxic substances in their water and food. At the same time, Maine's reputation for clean, healthy and sustainably produced food is taking a beating. And we know that the contamination that's been measured so far is just the tip of the iceberg. Most of the soils, water and farmland in the state hasn't been tested. It is imperative to get PFAS out of our products, our food, and our environment without delay. As a reminder, PFAS exposure has been linked to health problems including kidney and testicular cancer, thyroid disease, infertility and compromised immune systems.

The Board's proposed amendments to Chapter 20 are an important first step, but more needs to be done, and could be done, within the Board's current statutory authority. There are also some ambiguities in the proposed language that should be clarified. Our specific comments are as follows:

[1] IATP also has offices in Washington, D.C. and Berlin, Germany (IATP Europe). Since 1986, IATP has provided research, analysis and advocacy on a wide range of agriculture-related issues including farm to school; climate; agroecology; soil health and water quality and access; farmworker health and economic security; and trade and market policies. For more information, see www.iatp.org.

- ***Definition of PFAS.*** We strongly support the definition of PFAS in Section 1.A, which is consistent with other Maine law and will assist in coordinating policy and enforcement with other agencies, including the Department of Environmental Protection. Unless the full panoply of PFAS chemicals is addressed in the regulation, the Board will be forced to constantly review its policy to update it and will likely miss addressing new PFAS chemicals that should be covered by the regulation.

- ***Requirement of affidavits.*** We are asking the Board to make several clarifications in the rule to align with the intent of the Resolve and improve the effectiveness of the rule.

    - ***Public disclosure of information.*** As a preliminary matter, the Board should clarify in the rule that the affidavits required in Section 1.F, paragraphs 1 and 2 are *public records* under Maine's Freedom of Access Act that will be readily available to the public (preferably on the website, not as a document that must be accessed through a formal freedom of access request).[2] The affidavit required in Section 1.F.2 does not reveal percentages of ingredients or even whether, if PFAS is present, it is part of the active or inert ingredients or a contaminant. There is no legal requirement to keep this general affidavit confidential under either state or federal law. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) limits the types of data that may be claimed as confidential. Public disclosure of the PFAS affidavits required by the proposed rule do not appear to fall into any of the exceptions to the general rule of disclosure laid out in FIFRA in 7 U.S. Code § 136h (which is cross-referenced by Maine pesticide law), since the affidavits don't include any specific data or reveal any detail about manufacturing processes or testing methods.[3]

    - Moreover, since the Board doesn't propose in this rulemaking to prohibit registration of pesticides containing PFAS, keeping the affidavits secret will negate much of the public benefit of the regulation. Neither farmers, home gardeners nor members of the public will have the information they need to avoid purchase and use of PFAS-containing pesticides if these affidavits are confidential, nor will there be any pressure on the manufacturers to act to ensure their products are PFAS-free. Significantly, parallel legislation being implemented by DEP (LD 1503, Public Law 477), from which the Board's Chapter 20 PFAS definition was taken, requires public disclosure of information about PFAS in consumer protects without any confidentiality provision.

    - ***Inert ingredients.*** We appreciate the clarification at the public hearing that proposed Chapter 20, Section 1.F.2 is intended to require those registering their products to disclose inert as well as active ingredients that contain PFAS, and that the reference to "confidential statement of formula" incorporates this requirement. Whether PFAS is being delivered via an

[2] 5 MRSA §400 et al, §402, Definition of Public Record. https://www.mainelegislature.org/legis/statutes/1/title1sec402.html

[3] FIFRA excludes the following information 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 information that discloses the identity or percentage quantity of deliberately added inert ingredients. See also 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

inert or active ingredient is irrelevant; the chemical will end up in the environment either way.[4]

- ***Clarification that adjuvants are included in "inert ingredients" for the purpose of required PFAS disclosure.*** While the Board has separately written a report for the Legislature on additional regulation of PFAS in pesticides as required by LD 264, which discusses more broadly regulating adjuvants, it is not necessary to wait for further legislative direction or authority to include adjuvants as part of the manufacturers' affidavit as to the presence or absence of PFAS. As discussed above, the Board has extensive authority to require information about the formulation and to require other information for registration of a product, and should make clear that adjuvants are covered with other inert ingredients. Otherwise, the affidavits will be misleading (and essentially meaningless) if they claim a product is "PFAS free" while containing adjuvants with PFAS.

- ***Contamination during manufacture.*** The presence of PFAS in pesticide products should be disclosed, regardless of the source – active ingredient, inert ingredient, adjuvant or contamination during manufacture. The potential for harm does not evaporate simply because the PFAS presence may not be intentional. If manufacturers know of PFAS in their products, they should be required to disclose that information regardless of the route the PFAS took to get into the product. Manufacturers are in the best position to ascertain this information.

- ***Container affidavit***. The container affidavit in Section 1.F.A shouldn't be limited to fluorinated high-density polyethylene containers. Although this provision tracks the language of LD 264, other types of containers can be fluorinated (and are marketed for pesticide storage) and thus have the potential to leach PFAS into the pesticide. The Board didn't need LD 264 to give it the authority to regulate PFAS contamination from containers. Its rulemaking authority is quite extensive, and specifically includes authority to regulate pesticide storage, which includes containers as a form of storage [7 MRSA §610.2.B]. Adoption of container regulations to more specifically address PFAS contamination is authorized under the Board's extensive general rulemaking authority cited above, and the Board has already exercised its authority to regulate containers more generally (regulating storage and disposal in Section 3 of Chapter 20, and storing pesticides for wholesale or retail purposes in Chapter 24).

In summary, the proposed rule, with the modifications we suggest, is a good start in addressing PFAS in pesticides. We look forward to the Board's report to the Legislature on further regulating fluorinated adjuvants and taking additional action to protect farmers, the public and the environment from PFAS contamination caused by pesticide use.

[4] The pesticide registration requirements of 7 MRSA §607.3 state: "Submission of formula. The board, when it determines it necessary in the administration of this subchapter, may require the submission of the complete formula of any pesticide, including the active and inert ingredients." The Board also has explicit authority under the registration provisions "to require the submission of other necessary information" by adopting rules under 7 MRSA §610.2, the Board's overall rulemaking authority.