



November 29, 2022

Submitted Via Email

Megan Patterson
Director
Maine Board of Pesticides Control
28 State House Station
Augusta, ME 04333
Megan.L.Patterson@maine.gov
pesticides@maine.gov

Re: December 2, 2022 Board of Pesticide Control Meeting Written Comments Regarding 2023 Pesticide Registrations Extension Proposal

Dear Ms. Patterson,

We write on behalf of CropLife America (“CLA”) and RISE (Responsible Industry for a Sound Environment)® in response to the Board of Pesticide Control’s (the “Board”) invitation to provide comments in advance of its Friday, December 2, 2022 meeting. This letter specifically relates to the Board’s proposal to use its discretion to provide for a two-month extension for companies to complete their 2023 pesticide registrations. CLA and RISE strongly support an extension, although, for the reasons provided below, the extension to implement LD 264 should be longer than two months and should apply to all companies without need of individual company requests and individual approvals.

CLA and RISE have worked quickly in the short time available to formulate this input after learning of the Board’s extension proposal over the Thanksgiving holiday. Thank you for taking these comments into consideration on this important matter.

CLA and RISE have significant concerns about the Board’s implementation of requirements, pursuant to LD 264, that product registrants provide (1) the confidential statement of formula (“CSF”) and (2) “affidavits” regarding (a) storage in fluorinated high-density polyethylene containers and (b) per- or poly-fluoroalkyl substances (“PFAS”) content of the product.¹ Barriers to compliance with these requirements, even for companies granted a two-month extension, could result in supply interruptions of critical pesticide products to Maine for both the crops and professional pest control uses important for growers and public health.

¹ See 01-026 CMR Ch. 20 § 1(F).



These confidentiality concerns and concerns about the affidavits are common across regulated stakeholders. As such, requiring individual extension requests and individual review and approval of such requests would be an unnecessary use of scarce government resources.

CLA and RISE respectfully request that the Board use its established administrative authority to extend implementation of the new registration requirements added pursuant to LD 264 until the next registration renewal cycle beginning November 1, 2023, and further engage stakeholders on how best to implement LD 264 without jeopardizing access to products on which Maine growers and professional pest control operators rely to the benefit of all Maine residents. We hope that the Board will grant our request to extend the deadline for all regulated entities until the next registration renewal cycle as promptly as possible in light of the currently impending deadline.

Board Authority to Extend Its Timeline for LD 264 Implementation

The Board has the authority to extend its timeline for implementation of its own regulations, including LD 264 requirements for product registration, because the Board has broad discretion to interpret its own rules, regulations, and procedures.² Neither LD 264 nor the rule the Board adopted in response to LD 264 include a specific deadline by which registrants must provide either the CSF or affidavits contemplated in LD 264.³ With no specific deadline for Board action, the Board is free to set a reasonable timeline that will allow it to engage with the regulated community and other stakeholders to determine the best means of effecting LD 264 with minimal disruption to Maine's farmers and other important users who rely on regulated pesticides to control agricultural and public health pests.

The Current Affidavit Forms Are Unworkable

The Board should extend its timeline for the LD 264 reporting requirements so the Board can revisit the form of the LD 264 affidavits. The Board's current submission portal offers a reporting company no opportunity to put the content of its responses to yes-or-no questions into any context. LD 264 does not require registrants to bind themselves or their employees to such absolute answers. The individual providing responses to the questions is not protected from liability (civil or even criminal) if those good-faith responses ultimately prove incorrect. This is particularly concerning given that the information requested may not be within the registrant's knowledge. A complex supply chain, nonresponsive upstream suppliers, and other unavoidable gaps in a company's ability to ascertain whether or not a particular product contains PFAS or was ever stored in a fluorinated container are all sources of uncertainty that make simple yes or

² See *DownEast Energy Corp. v. Fund Ins. Review Bd.*, 756 A.2d 948, 951 (Me. 2000) (applying rule that courts give "considerable deference to an agency's interpretation of its own internal rules, regulations, and procedures and will not set it aside, unless the rule or regulation plainly compels a contrary result") (citations and quotation omitted).

³ 01-026 CMR Ch. 20 § 1(F).



no responses to the Board's affidavit infeasible and legally concerning. With the Board's current forms, a company that cannot meet the Board's impossible standard of certainty is left with the choice between risking significant penalties if it unknowingly completes the affidavit incorrectly or exclusion from selling its products in Maine.

Confidentiality of CSFs and Affidavits

CLA and RISE also have significant concerns regarding the confidentiality of information provided to the Board that require additional time to resolve. We understand the Board has taken steps to ensure CSFs are not mishandled when submitted, but this issue is so fundamental that it requires more clarity and safeguards. The Board has an obligation to first ensure it complies with State and Federal laws to protect CSFs from disclosure before it mandates wholesale submissions of detailed CSF data and thousands of documents into a system that may not be ready to properly protect such valuable company trade secrets over many years to come. The Board should also treat affidavit responses as confidential business information because the responses themselves may disclose proprietary information. Neither LD 264 nor the Board's rules require public disclosure of those responses and protection against such public disclosure of confidential business information is of utmost importance.

The Board plainly has the authority to effect protections for registrants' affidavit responses and to take further steps to ensure all confidential and trade secret information is protected. Based on its actions to date, the Board needs more time to address these issues and ensure adequate protections and important procedural safeguards are in place before implementing LD 264's requirements.⁴

A Two-Month Extension Is Insufficient

A two-month extension given the form of affidavits and protections for confidential information, is not sufficient to address the fundamental issues with the implementation of LD 264 discussed above. The Board should instead defer implementation of LD 264 to the next registration renewal cycle, to give itself time to implement a reporting process that achieves the objectives of LD 264 without unnecessary and unintended consequences for reporting companies and, ultimately, impacting growers, professional pest control operators and other users in Maine.

CLA and RISE look forward to working with you further on these important issues.

⁴ In addition to protections for CSFs in 7 M.R.S. § 607.5-A, the Maine Freedom of Access Act excepts from the definition of "public records" "records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State." 1 M.R.S. § 402(3)(B). Maine rules of evidence provide the owner of a trade secret the privilege to refuse to disclose, and to prevent others from disclosing, a trade secret. Me. R. Evid. 507. Proprietary information that a registrant submits to the Board, therefore, is not a "public record" under Maine law and is protected from disclosure.



Sincerely,

A handwritten signature in black ink that reads "Chris Novak".

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A handwritten signature in black ink that reads "Megan J. Provost".

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