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To: Board Members
From: Megan Patterson, Director
Subject: Staff Observations on Rulemaking Comments
Date: February 18, 2022

The staff has discerned a few apparent themes in the rulemaking comment record that we believe merit careful Board consideration. They are as follows:

1. Many commenters identified that the proposed definition of “invasive invertebrate pests” and the associated clarifying conditions in Chapter 41 was far broader in scope than intended by the term used in LD 155—“emerging invasive insect pests.” Staff agree that the proposed term is general and are interested in better addressing the original request. While a list may appear to be a simple solution, staff are concerned about the time and expense of repeated rulemaking to update a species list. Emergency rulemaking is only valid for 90 days and may not be justifiable for all proposed changes. Staff is also concerned about the inadvertent exclusion of invasive mites and nematodes that may result from focusing solely on insects.

Staff has prepared a new draft definition. The new and originally proposed definitions were reviewed during meetings with DACF experts in horticulture, forestry, IPM, and invasive species. The new draft definition uses a definition of invasive species and other language referenced in testimony and in the original text of LD 155. Staff are now asking the Board to consider this new definition and provide additional direction for addressing identification species relevant to the proposed Chapter 41 exemption.

“Emerging Invasive Invertebrate Pests” means any invertebrate, including its eggs or other biological material capable of propagating that species, both known now and unknown now but showing up at a later date, that occurs outside of its eco-region and its introduction causes or is likely to cause economic or environmental harm, or harm to human, animal, or plant health including but not limited to Asian long-horned beetle, emerald ash borer, and hemlock wooly adelgid. EPA has defined eco-regions as ecosystems (with respect to the type, quality, and quantity of environmental resources) that are generally similar.

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2. Some commenters indicated that the timeline for implementation in Chapter 41 of the prohibition of neonicotinoid use permitted continued use of residential ornamental applications of neonicotinoids through the 2022 growing season. Commenters suggested that the timeline for publication of a list of restricted products and the prohibition of use was longer than intended by LD 155. Staff have concerns about an inequitable application of a prohibition of use that may result from the publication of a partial list of restricted products. Staff are also concerned about compliance challenges that may result from a shortened timeline for implementation. While staff are interested in the timely implementation of regulations, changes to implementation timelines may require revisiting rulemaking, thereby prolonging the rule adoption process. Staff will be asking the Board for direction on how best to address a shortened timeline for list publication and restriction of use.
3. 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.
4. Some commenters stated that the proposed identification via an affidavit of fluorinated HDPE containers should be broadened to include other types of containers. While staff recognize that many types of containers—including those used in food and cosmetics packaging—are fluorinated, LD 264 directs the Board to amend regulations to address fluorinated HDPE containers. The Board needs to consider if the proposed rule should also address other types of pesticide packaging.
5. Some commenters stated that the Board should ban pesticides containing PFAS. The bill language in LD 264 directed staff to report back to the legislature on a process for a similar prohibition. As noted in the report by staff, 38 MRS § 1612 *et seq.* (LD 1503) prohibits the distribution of products containing intentionally added PFAS by 2030As for PFAS as a contaminant, EPA considers the presence of PFAS in a pesticide to be adulteration where the identified PFAS are not a part of the Confidential Statement of Formula. Staff continues to research the level and types of PFAS EPA considers to be adulterants as well as the process by which EPA will address this issue. While outside the scope of the rulemaking requested by LD 264, the Board needs to consider what its expectations will be relative to the prohibition of the use of pesticides containing PFAS as a part of the known formulation or as contaminants.