

## Office of Policy and Legal Analysis

Date: April 14, 2021

To: Joint Standing Committee on Environment and Natural Resources

From: Dan Tartakoff, Legislative Analyst

Re: LD 960, An Act To Require Reporting of Perfluoroalkyl and Polyfluoroalkyl Substances, PFAS, in Products and of Discharges of Firefighting Foam Containing PFAS (DEP bill)

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### **Summary of bill**

This bill requires manufacturers of products with intentionally added PFAS to report the presence of those substances in those products to the DEP beginning in 2023. It also requires any person who causes a discharge of aqueous film-forming foam into waters of the State to report that discharge to the department within 24 hours.

### **List of legislators/entities that submitted written testimony and/or spoke at the hearing**

**Proponents** – Department of Environmental Protection, Defend Our Health, Institute for Agriculture and Trade Policy, Maine Organic Farmers and Gardeners Association, Maine Rural Water Association, Maine Water Environment Association, Maine Water Utilities Association, additional members of the public.

**Opponents** – Maine Forest Products Council.

**Neither for nor against** – Maine Municipal Association, Silent Spring Institute.

### **Notes, issues and proposed amendments**

1. *Related legislation* – as noted by multiple speakers there are at least two other related proposals, which have just been printed, that have yet to be heard by ENR. Both are sponsored by Representative Gramlich and their respective titles and summaries are included below.
  - **LD 1503, An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution:** This bill requires manufacturers of products with intentionally added PFAS to report the presence of those substances in those products to the DEP beginning in 2023. It also prohibits the sale of residential carpets or rugs, as well as the sale of fabric treatments, that contain intentionally added PFAS beginning in 2023. Additional product categories containing intentionally added PFAS may also be identified by the DEP and prohibited from sale. Effective in 2030, products containing intentionally added PFAS may not be sold unless the use of PFAS in a product is specifically designated as a currently unavoidable use by the DEP. The DEP is required to create a PFAS source reduction program that provides information, education and, to the extent funds are available, grants to publicly owned treatment works and municipalities to reduce PFAS entering air, water or land.

- LD 1505, An Act To Restrict the Use of Perfluoroalkyl and Polyfluoroalkyl Substances in Firefighting Foam: This bill prohibits, beginning January 1, 2022, the discharge of firefighting or fire-suppressing foam to which PFAS have been added when used for testing or training except when the foam is entirely collected for proper disposal. It also prohibits, beginning January 1, 2022, the manufacture, sale and distribution of such foam unless federal law requires the inclusion of PFAS in the foam. If federal law is changed to allow an alternative to firefighting or fire-suppressing foam to which PFAS have been added, then the foam may not be manufactured, sold or distributed. A person that discharges or causes to be discharged into the coastal or inland waters of the State firefighting or fire-suppressing foam to which PFAS have been added must notify the DEP as soon as practicable but no more than 24 hours after the discharge. By January 1, 2022, manufacturers of firefighting or fire-suppressing foam to which PFAS have been added must notify their customers of these requirements and recall the foam and reimburse the retailer or other purchaser for the foam. The DEP is directed to collaborate with the Department of Defense, Veterans and Emergency Management, Maine Emergency Management Agency and interested parties to develop a framework for the collection and safe storage of firefighting and fire-suppressing foam prohibited by this legislation and not returned to the manufacturer until the foam can be safely disposed of and submit a report including the framework to ENR by March 31, 2022.

2. *AFFF phase out* – multiple speakers recommended the committee go further than the bill and phase out the use of AFFF entirely, given that, according to those speakers, there are viable PFAS-free alternatives to AFFF and significant data to suggest that the use of AFFF has caused environmental contamination. It was noted that 5 states (CO, MN, NH, NY, WA) and the EU and UK have already banned PFAS in firefighting foam.

DEP noted in its testimony that AFFF is already used infrequently for firefighting, there are no resources to help fire departments dispose of AFFF stocks if prohibited and it is expected there will be federal action on this matter.

3. *Technical note, fees* – the bill in new Title 38, §1612(5) requires a manufacturer to pay a fee to the DEP upon submission of the required notification. Under the bill, the DEP would establish that fee through a routine technical rulemaking.

Pursuant to Title 5, §8071(2)(A), agency fees may not be established through routine technical rulemaking unless the authorizing statute provides a set cap to or range for those fees to be adopted. Absent the establishment of a statutory cap or range, the fee must be set through a major substantive rulemaking, although it should be noted that any non-fee-related rules could be adopted through a routine technical rulemaking as proposed in the bill.

4. *Sales prohibition* – the bill in new 38 MRSA §1612(6) prohibits the sale, offering for sale or distribution for sale of a final product containing PFAS unless the manufacturer has submitted the required notification under subsection 2. It is unclear though if this prohibition applies to a manufacturer, a retailer (see subsection 4(A)) or just to any person. This provision may need to be revised to clarify the entities subject to the prohibition.

5. *Regulated products, terminology* – although the bill in new 38 MRSA §1612 mostly describes regulation of “a final product that contains intentionally added PFAS,” this terminology is not used consistently throughout. There are a couple of places where “a final product containing PFAS” or “product containing PFAS” are used instead. Assuming that the intent is to regulate only those “final products containing intentionally added PFAS,” it probably makes sense to standardize the terminology throughout the proposal.
6. *Confidentiality provision, notes* – the bill proposes on page 4, lines 10-11 to make confidential certain records that may be obtained by the DEP in administering the PFAS reporting requirement that would otherwise be public records.
  - If the bill, including that confidentiality provision, is supported by a majority of the committee, that provision would need to be evaluated by the JUD Committee pursuant to Title 1, section 434, prior to being reported out of ENR.
  - It is worth noting that, although the confidentiality provision in LD 960 references the Title 38, section 1310-B process under which most confidential information is addressed in Title 38, in describing only “information submitted to the department,” it could be read as designating all information received by DEP pursuant to the PFAS reporting requirement as confidential.

Most confidentiality language in Title 38, regardless of whether there is a corresponding cross reference in section 1310-B, denotes an identification of confidential information by the submitter. For example, the product stewardship laws generally focus on proprietary information (from 38 MRSA §1776(10):

“Proprietary information submitted to the department by a manufacturer pursuant to the reporting requirements of this section that is identified by the submitter as proprietary information is confidential and must be handled by the department in the same manner as confidential information is handled under section 1310-B.”

Other provisions are more general, such as the recycling reporting requirement established in 2019 (from 38 MRSA §2145(3)):

“Information submitted to the department pursuant to this section may be designated as confidential by the submitting party in accordance with the provisions of section 1310-B and, if the information is so designated, the provisions of section 1310-B apply.”

Accordingly, the committee may want to consider whether the confidentiality language proposed in LD 960 should be amended to align more closely with similar confidentiality provisions in Title 38.

### **Fiscal information**

Not yet available from OFPR.