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Report to the Joint Standing Committee on Natural  
Resources

A Proposal for Providing State Cost Share Support  
for the Operation of Municipal and Regional  
Household Hazardous Waste and Universal Waste  
Collection Programs

Submitted by the Department of Environmental Protection

January 2003



## Executive Summary

As requested by the Legislature, the Maine Department of Environmental Protection and the State Planning Office submit this proposal to provide financial support to municipalities and regional waste programs for the development and enhancement of household hazardous waste collection activities throughout Maine. This money is intended to provide approximately 50% of their annual operating costs, and will complement the state infrastructure development grants already provided or soon to be awarded.

Household hazardous waste collection involves the separation of particularly toxic materials from other residential wastes so they can be more carefully managed to prevent or minimize environmental releases. These toxic materials include mercury products, pesticides, paints, solvents, and waste oil. Some of these materials can be recycled instead of disposed, provided they are properly segregated and subsequently managed. Others are disposed at facilities designed specifically to handle more toxic wastes.

To date, some municipalities and regional waste associations in Maine have initiated household hazardous waste collection programs, but the geographic reach and the frequency of such activities are limited. Expansion of these efforts is necessary to comply with the disposal ban on mercury products from household sources that becomes effective in January 2005.

This proposal would collect approximately \$500,000 annually from fees on the sales of paints and pesticides typically sold for household consumption and which represent a substantial share of the volume and/or cost associated with household hazardous waste management. The proposed 20 cents per unit pesticide fee would be imposed at the distributor level because the relevant distributors are already required to report the unit sales of these pesticides to the Maine Department of Agriculture, Food and Rural Resources. Therefore, no new reporting system would be required to administer the fee, and the pesticides covered by the fee should be readily identifiable by the distributors given the existing reporting obligation.

The proposed 20 cents per gallon fee on paints would apply at the retail level since there is no analogous distribution reporting system for paint sales in Maine. However, the paints subject to the fee are readily identified, and an optional system of stickers and/or reports by distributors would be made available to assist retailers in their implementation of the fee system. The proposed 20 cent fee on both paints and pesticides generally constitutes a small fraction of the existing price of these products.

## Section I: Introduction

During its 120<sup>th</sup> session, the Maine Legislature passed a “Resolve, to Study the Design and Funding of a Household Hazardous Waste and Universal Waste Collection Program” (L.D. 1974). The Resolve was the latest step in a process beginning in 1999, to create a statewide collection system for household hazardous waste (HHW) and universal wastes (UW)<sup>1</sup>:

In 1999, the passage of “An Act to Reduce the Release of Mercury into the Environment from Consumer Products” (PL 2000, c.779) and the pending adoption of the Universal Waste Rules by the Board of Environmental Protection necessitated the planning and implementation of a HHW collection program. In 2000, the Maine Department of Environmental Protection (DEP) and the State Planning Office (SPO) presented the Natural Resources Committee with a draft HHW proposal to study the development of a statewide program. The Legislature responded by providing seed money for planning and initial infrastructure development. The DEP submitted a more robust plan<sup>2</sup> in early 2001 that discussed infrastructure options and preliminary funding ideas. In addition, SPO contracted with the University of Maine at Orono to prepare an in-depth document<sup>3</sup> on the costs associated with the infrastructure options that had been identified (Executive Summary, Appendix A).

In early 2002, the Natural Resources Committee discussed the infrastructure ideas and funding options identified in the reports. Four funding ideas were generally discussed. These were to: 1) place a fee on various homeowner products including pesticides and paint; 2) increase the existing hazardous waste transporter fees; 3) increase or expand the current waste handling fee; and 4) use General Fund monies.

The General Fund option was not pursued due to concerns about existing financial commitments. The current hazardous waste fees were found to be consistent with those of other New England states and revenues were decreasing, so that option was also put aside. Similar findings were made about the solid waste handling fees. That left the option of placing a fee on homeowner products that contributed to the HHW problem. Reports concerning household hazardous waste collection events in Maine and other states presented data that showed paints and pesticides typically constitute the largest volume and/or are the most expensive wastes handled at HHW collection events. This, coupled with the complexity of placing a fee on a wider variety of products, led the Committee to focus on the paint and pesticide categories and resulted in the passage of the Resolve this past legislative session.

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<sup>1</sup> For the purposes of this report, household hazardous wastes and universal wastes will be collectively referred to as household hazardous waste, or HHW.

<sup>2</sup> “Plan for the Statewide Collection of Household Hazardous Waste”, March, 2001.

<sup>3</sup> “Cost Analysis for Household Hazardous Waste Collection: A Final Report” by Andrew Files and George Criner. January, 2002.

The Resolve required the Maine Department of Environmental Protection (DEP), in cooperation with the Maine Department of Agriculture, Food and Rural Resources (DAFRR) and the State Planning Office (SPO), to study and report on the feasibility and design of a long-term funding mechanism for state cost-sharing support to municipalities and regions for the operational costs of a HHW collection program. (See Appendix B) The report must include an analysis of a proposed funding mechanism based on the imposition of fees at the point of retail sale on paint and pesticide products. These fees are intended to fund some portion of the operational costs associated with the municipal collection of HHW.

To date, the State has assisted municipalities through infrastructure grants and the November 2002 bond provides another \$900,000 to fund the development of additional infrastructure capacity. Historically, some municipalities have held one-day collection events, but these events have been limited in geographic reach and frequency. (See Appendix C for 2002 collection information.) However, Maine municipalities do not have permanent or ongoing collection programs available to all citizens with reasonable frequency throughout the year, in part because there has not been State support for operational costs that has been provided in other states.<sup>4</sup> It is also important to note the Legislature has imposed a ban on the disposal of many household mercury products effective January 2005, thereby requiring municipalities to provide for the collection, segregation, and recycling of these products. (See Appendix D, 38 MRSA, c. 779 §1666.)

This report describes the process and options considered for development of a fee collection system. If adopted, the recommendations contained in Section VI of this report would result in the collection of approximately \$500,000 annually to fund approximately 50% of the estimated operational costs to municipalities implementing HHW collection. Funding operational costs at this level will encourage more towns to establish a system for the collection of household hazardous wastes, thus serving an ever-present need.

#### Process for collection of data and stakeholder input

The first step in meeting the requirements of the Resolve was to gather data on paint and pesticide sales in the State. State paint sales were extrapolated from national data because no state-specific data are available. DAFRR collects pesticide sales data from wholesale pesticide dealer annual reports, but did not have the information in a database from which the number of statewide units sold could be easily extracted. DAFRR provided the reports and support to DEP staff, who set up a new database, and then entered and quality checked the most recent sales data. In addition, the DEP identified the types of retail businesses that might sell paints and pesticides to the consumer, and therefore could be impacted by the imposition of a fee.

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<sup>4</sup> New Hampshire provides \$0.25/capita from its oil fund for municipal HHW management; Vermont provides a \$250 base grant and 11.5cents/capita from an annual Legislative appropriation; Massachusetts uses unredeemed bottle deposit money to fund HHW infrastructure and collection activities; and Rhode Island operates the EcoDepot one day per month for HHW using landfill fees.

Next, an ad hoc HHW Funding Advisory Committee (referred to as the committee) was convened. The committee's role was to advise the State on the feasibility of, and barriers to, establishing a fee system on paint and pesticide retail sales. Representation of the paint and pesticide retailers on the committee was critical for the success of the discussions. (See Appendix E for the list of committee members and the Mission Statement.)

The committee's discussion was principally focused on designing a fee collection system that was feasible and relatively easy to implement. The basic working premise was that the *products* and *fee payers* must be easy to identify if a fee system is to succeed. Key topics discussed included:

- which paint and pesticide products should be included in or excluded from the fee system;
- how to identify products that carry the fee;
- how to identify retailers that handle these products;
- the amount of the fee necessary to accomplish the goal;
- how retailers could track the fees collected; and
- whether additional or new reporting might be required.

The committee met three times throughout the summer and fall and provided invaluable insight to the state agencies. A draft of this report was distributed to all committee members for review and comment.

## **Section II: Product Selection and Identification**

Paint: National data on paint divides paint products into three categories: architectural coatings, industrial or product coatings, and special purpose coatings. The latter two categories are primarily used in industry. Homeowners typically use architectural coatings, which include exterior and interior latex and oil base paints, architectural lacquers, and 'do-it-yourself' wood and furniture finishes.<sup>5</sup> These coatings are typically sold in quart, gallon, five-gallon containers or aerosols, and are relatively easy to identify. Discussions focused on architectural coatings as the most reasonable paint products to include in a fee system.

Pesticides: Pesticide information is more complex. All pesticide products except those that are food grade, herbal or an 'essential oil', can be identified by the presence of a US Environmental Protection Agency Registration number on the label. Pesticides in Maine fall into one of three classifications: restricted, limited or general use. Restricted and limited use pesticides are not typically homeowner products, and may only be

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<sup>5</sup> Industrial or product coatings are those applied by original equipment manufacturers. Included are motor vehicle and appliance paints and commercial quantities of wood furniture and fixture finishes. Special purpose coatings include industrial maintenance paints, marine coatings, traffic paints, roof coatings, auto refinishing paints and miscellaneous paint products.

applied by a licensed pesticide applicator. They are used primarily by the commercial agricultural community.

General use pesticides are the largest category of pesticides sold in the state and are used by both the homeowner and the commercial agricultural community. Because a HHW collection program would primarily benefit homeowners, discussions on program design considered general use pesticides only. The question then became how to impose a fee on those products sold as general use pesticides for typical home use. The manner in which the pesticide is marketed was identified as an important way to distinguish homeowner type sales.

DAFRR identifies two types of general use pesticide dealers in the state. The first is the general use pesticide dealers who are the manufacturers, distributors and wholesale outlets selling only to other licensed dealers, typically the retail outlet stores. These entities, which will be referred to as Wholesale General Use Pesticide Dealers, distribute to dealers engaged in retail sales and must report their sales annually to DAFRR. The second type, a general use pesticide dealer in retail sales, typically offers the pesticide product to the end consumer. These dealers may be garden centers, hardware stores or lumberyards and will be referred to as Retail General Use Pesticide Dealers. No reporting is required of dealers engaged in retail sales.

Finally, there are also Restricted Use Pesticide Dealers, who sell restricted or limited use products and may also sell general use products. They sell directly to farmers and report those sales to the State. There are an estimated seventeen Restricted Use Pesticide Dealers. The majority of Maine farmers buy directly from these dealers and usually in greater quantities than homeowners. Farmers do not typically go to the garden, hardware or big box store to purchase their pesticides. The homeowner usually purchases pesticides from a Retail General Use Pesticide Dealer and not directly from a Wholesale General Use Dealer or a Restricted Use Pesticide Dealer. Given the quantity and point of purchase distinctions, it would be relatively simple to identify those general use pesticide products that would be subject to the fee - specifically a general use pesticide sold by a retail general use pesticide dealer.

Current DAFRR Exemptions: The committee spent considerable time discussing the general use pesticides that might be excluded from a fee in order to keep the system as simple as possible. The DAFRR administers Title 22, Chapter 258-A, § 1471-W, which contains the following exemptions from licensing and reporting. Because of the exemptions, sales data are not collected for these products.

- (1) *Indoor only* household use pesticide products with no more than 3% active ingredients<sup>6</sup>;
- (2) The following products, which have limited percentages of active ingredients:

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<sup>6</sup> The words '*Indoor only*' are added for clarification and do not appear in the statute. This has historically been the DAFRR interpretation of the statute, and has been supported by the Attorney General's Office. If a product could be used either indoors or outside, such as 'D-Con', it is not included in the exemption.



- (a) Dichlorovos (DDVP) impregnated strips with concentrations not more than 25% in resin strips and pet collars;
- (3) The following products with unlimited percentages of active ingredients:
  - (a) Pet supplies such as shampoos, tick and flea collars and dusts;
  - (b) Disinfectants, germicides, bactericides and virucides;
  - (c) Insect repellents;
  - (d) Indoor and outdoor animal repellents;
  - (e) Moth flakes, crystals, cakes and nuggets;
  - (f) Indoor aquarium supplies;
  - (g) Swimming pool supplies;
  - (h) Pediculocides and mange cure on man;
  - (i) Aerosol products; and
  - (j) General use paints, stains, and wood preservatives and sealants.

To avoid confusion and simplify implementation of a fee on general use pesticides, parallel exemptions from a fee could be adopted for the products above. (Paints would not be subject to a fee as a pesticide, but would have a fee as an architectural coating.)

### **Section III: Identification of Fee Payers**

Retailers of both paint and pesticide products have been identified through the Standard Industrial Classification (SIC) codes database maintained by the Maine Department of Labor. Retailers of pesticide products also require a license from the DAFRR as general use pesticide dealers. Table 1 is the list of retailers that could be involved in a fee program that does not exempt any pesticide, and thus overstates substantially the actual number of retailers that may be affected by a fee system.

**Table 1**  
**Retail establishments that may sell paints and pesticides**

SIC code	Description	Number in Maine
5231	Retailers – Paint, glass, wallpaper	59
5261	Retailers – Garden supplies, nurseries	62
5251	Retailers – Hardware stores	173
5211	Retailers-Lumber yards and building materials	177
53	Retailers-General merchandise and variety stores <sup>7</sup>	310
5411	Grocery and convenience stores <sup>8</sup>	66
0742	Veterinarians	146
NAICS	Retail Pet Suppliers	38
NAICS	Pool Maintenance Companies	49
5912	Pharmacies	189
<b>Total</b>		<b>1269</b>

The proposal to adopt DAFRR's exemptions, thereby excluding some pesticide products, would eliminate veterinarians, retail pet suppliers, pool maintenance companies and many pharmacies from the fee collection system. Some pharmacies, grocery, convenience and variety stores may discontinue the sale of the few products that would otherwise require them to participate in the fee collection program (e.g., D-Con). It is estimated that a fee program on paints and pesticides which incorporated the pesticide exemptions in 22 M.R.S.A., Chapter 258-A, §1471-W would drop the number of stores involved from about 1200 to 600-800 retailers.

As discussed further below, the DEP and SPO recommend that the pesticide fee be collected at the distributor level to take advantage of existing state reporting requirements. If the pesticide fee is imposed at the distributor level, the number of entities involved is reduced further to 80 wholesale general use pesticide dealers and 477 or fewer paint retailers.

#### **Section IV: Fee and Revenue Projections**

The DEP's target revenue goal is approximately \$500,000 annually<sup>9</sup>, based on the state providing a 50% cost share to municipalities for operational costs of HHW collection. Using this as a goal, revenue projections were based on a fee per gallon sold for paint and per unit sold for pesticides.

<sup>7</sup> This includes 89 Retailers-Department stores such as Wal Mart, Sears, K Mart, Mardens etc. It also includes 21 Ames Department stores which have recently gone out of business.)

<sup>8</sup> The number licensed is 66 out of a total of 1111 grocery and convenience stores.

<sup>9</sup> This figure is based on a 2001 study concerning the cost of HHW collection programs done for SPO by the University of Maine, commonly referred to as the Criner Report.

Paint revenue projections: National data on paint sales report that 2.29 gallons of architectural coatings were sold per capita in 2000.<sup>10</sup> Taking a conservative approach, it was assumed that less paint is used in Maine for several reasons:

- Maine is basically a rural state without a lot of heavy industries that might also use architectural coatings.
- Maine houses may be painted less frequently than the average home elsewhere.
- Maine may have a larger percentage of houses with vinyl siding than the national average.

A figure of 1.75 gallons per capita for architectural coatings was selected by the committee as a reasonable figure to use for estimating sales in Maine. Maine's population is 1,275,000, based on the 2000 census.

**Total gallons of architectural coatings sold in Maine = 1.75 gal x 1,275,000 = 2,231,250**

**Table 2**  
**Paint Revenue Projections**

<b>Fee(\$)</b> per gallon	<b>Architectural Coatings Sold in 2000 –gal.</b>	<b>Revenue Potential (\$)</b>
0.05	2,231, 250	111,562
0.10	2,231, 250	223,125
0.15	2,231, 250	334,687
0.20	2,231, 250	446,250
0.25	2,231, 250	557,812
0.30	2,231, 250	669,375

This chart projects revenue based on applying the fee per gallon on units that are one gallon or greater in size. With this type of system, retailers will need to track both the number and the size of the units sold.

Pesticide revenue projections: There are over 7000 pesticide products sold in Maine that come in a variety of package sizes.<sup>11</sup> Therefore a flat fee, regardless of unit size, is proposed as the simplest structure for a fee collection system.

<sup>10</sup> Data based on the *Current Industrial Report Series, MA 325F(00)-1. Paint and Allied Products*, issued 7/01.

<sup>11</sup> Based on the General Use Pesticide Dealers Reports for 2001, DAFRR.

**Table 3**  
**Pesticide Revenue Projections**

<b>Fee(\$)</b> per unit	<b>General Use Pesticide Units – Retail Sales</b> <b>2001</b>	<b>Revenue Potential(\$)</b>
0.10	660,000	66,000
0.15	660,000	99,000
0.20	660,000	132,000
0.25	660,000	165,000
0.30	660,000	198,000

If the fees placed on both paints and pesticides were equal, to raise approximately \$500,000, the fee would need to be 20 cents per gallon of paint and per unit of pesticide product. If projections are accurate, this will raise approximately \$578,000.

Revenue estimates must be considered approximate at this juncture. Moreover, in addition to providing funding to municipalities for HHW operational costs, the Legislature should consider providing some funding to educational efforts in support of the state policy to minimize reliance on pesticides and other toxic chemicals, (see MRSA 22 § 1471-X, and MRSA 38, c.26, §2302, Appendix F). Such educational efforts could include funding to the Board of Pesticide Control to support integrated pest management education and outreach activities, and to SPO and DEP to support education and outreach on other products that become household hazardous or universal wastes.

**Section V: Program Design**

The committee included several merchants, representing both large and small businesses. Most had electronic inventory and scanning systems at the registers. With these systems, tracking the sales of selected products would not present any significant difficulties, although there would be programming needed for product recognition.

To assess the number of stores that don't have electronic scanning and inventory systems, the DEP conducted a survey of retailers that are likely to carry products to which fees might apply (See Appendix G). The results indicate that the majority of these Maine businesses do not have electronic scanning and inventory systems. Therefore, development of an alternative tracking system would be necessary.

The committee was also interested in exploring the possibility of imposing a fee at the wholesale level, instead of at retail. The DEP sought the input of the Attorney General's (AG) office on the possibility of this option. The AG's response indicates that a fee at the wholesale level may be a viable legal option (See Appendix H for the AG's response). When discussed by the committee, representatives of businesses that operate both as wholesale distributors and retailers highlighted that it is very complex and labor intensive to identify products by destination state at the point of distribution,

and recommended that the fee be collected at the retail level. If a fee were levied, those businesses that had both distribution and retail operations could be given the option of deciding at which level they would like to track sales and submit the fee.

Paints: For those merchants selling paint without electronic systems, a sticker system was discussed as a means of tracking sales volume. Like the 'Paid' sticker that is applied at the register of many stores, a sticker could be used to identify the product to which the fee is applied. The merchant could track the number of stickers applied to calculate the fees collected. If a fee on paint is levied based on volume, i.e., per gallon, then different color stickers could be used. Another method of using a sticker system is to apply the sticker when products are put on the shelf. The sticker could then be used to identify the product at the register as one that has a fee, as well as part of an inventory system. It would be left to those merchants using a sticker system to decide if application at the shelf or register would work best for them.

A second tracking option that was discussed very briefly was to have the distributor provide a periodic sales report to the store. Most retail committee members had never requested such a report from their suppliers. For paint distributors, providing such a report to their customers may be a new activity. Still, since most distributors track sales and their customer base, this system may be less burdensome than imposing the need for a tracking system at the retail level. The paint retailers would still have to recognize the product at the register so that they collect the fee from the customer, but the distributor report would negate the need to keep count of the volume of product sold. Since identification of the paint products subject to the fee should not be difficult, a distributor report may be sufficient tracking support for most retailers.

Collection of the paint fee at the wholesale level was also discussed. This would present some additional administrative challenges for the State. The number and identity of paint distributors selling in Maine is presently unknown and would require additional research. Out-of state distributors may not be in the state sales tax system. Therefore a new system for fee collection and reporting for out-of-state entities would have to be created. Enforcement of the fee collection would also be problematic. For all these reasons, imposing the paint fee at the wholesale level did not seem to be a viable option from the State's perspective.

Pesticides: Implementing a fee on pesticides sold at retail is more complex, due to the wide variety of products. It would require employee training to look for the EPA Identification number or a sticker if electronic scanning isn't available. A sticker system would have to be used on hundreds, if not thousands of products. Even if the distributor were required to report annual sales to each merchant, a sticker system for product identification might still be necessary to prompt the employee at the register to charge the fee.

On the other hand, a fee levied at the wholesale level for pesticides is a viable option. It has several advantages. Wholesale general use pesticide dealers who distribute to retail general use dealers already track and report to the State the number of general

use pesticide units sold to retail establishments, so a fee imposed at the wholesale level would not involve additional work on their part. (See copy of a reporting form and typical report, Appendix I.) The wholesale dealers would simply calculate the fee due based on the data in their annual report to DAFRR. The principal benefit of imposing the fee at the wholesale distribution level is that no new, redundant tracking system would be needed at the retail level. This would also eliminate questions from the retailers about which pesticides are subject to the fee and the need for additional employee training.

For State administration, imposing the fee at the wholesale level would also be beneficial. There would not be a learning curve concerning which products have a fee for the wholesale dealers like there would be for retail establishments, so fewer state resources would be needed to implement the system. Also, no new state system for identification and tracking would be needed. Finally, it would shrink the universe of entities involved in the program. There are presently about 80 active wholesale general use pesticide dealers who report sales to the State versus hundreds of retailers who carry general use pesticides. Imposing the fee on pesticides at the wholesale level would limit the number of retail establishments involved in fee collection to those that sell architectural coatings.

State Administration: Businesses involved in the collection of the paint fee could submit the collected revenue to the Bureau of Revenue Services on the same schedule that they submit their sales tax, typically done on a monthly, quarterly, semi-annual or annual basis. The Bureau of Revenue Services would amend the *Sales and Use Tax Return* form to include one line for the fee on paints (see Appendix J). Pesticide fees from the wholesale general use pesticide dealers could be submitted on an annual basis to the Bureau of Revenue Services at the same time they report to DAFRR. Collection from the wholesale pesticide dealers should not be difficult because they are required to renew their sales license annually, and the renewal could be contingent on submission of the fee. Fees on paint and pesticides collected by the Bureau of Revenue Services would be credited to a separate sub-account of the Maine Solid Waste Management Fund to be used exclusively for the purposes described in this report.

It is not anticipated that there would be any new reporting requirements, other than the addition of a line for paint sales on the *Sales and Use Tax Return* form.

## **Section VI: Recommendations**

To create a feasible system for the collection of fees on paints and pesticides, the DEP and SPO recommend the following:

- Develop a state/local partnership program with municipalities and regions to fund the collection and proper management of household hazardous waste.

- Set a annual revenue goal of approximately \$500,000 to fund 50% of the operational costs associated with municipal and regional HHW collection.
- Institute a fee of \$0.20 per gallon, at the point of retail sale, on one gallon and larger sizes of architectural coatings only.
- Adopt a statutory provision similar to Title 36 §1761 requiring that the paint fee may not be advertised as assumed or absorbed by the retailer, so that smaller retailers are not put at a competitive disadvantage by the larger retailers that might advertise they would absorb the minimal increase.
- Require paint distributors to provide their retail customer stores with a periodic report of architectural coatings sales to the retail customer upon request.
- Create a sticker system to help small paint retailers identify and track the products to which the fee is applied.
- Institute a fee of \$0.20 per unit on general use pesticides at the point of wholesale distribution by licensed wholesale general use pesticide dealers to retail general use pesticide dealers, except for those products exempted in Title 22, Chapter 258-A, § 1471-W, 5.
- Collect the fees using the existing sales tax collection system administered by the Bureau of Revenue Services.
- Deposit the revenue collected into a dedicated sub-account of the Maine Solid Waste Management Fund for distribution to eligible municipalities and regional groups by the State Planning Office.
- Allow for allocation of up to 10% of the collected revenues for household hazardous waste education and outreach.
  - Up to 5% may be used by the Board of Pesticide Control to achieve the goals of Title 22 §1471-X.
  - Up to 5% may be used by DEP and SPO to conduct additional HHW education and outreach.

## Appendix A

### Cost Analysis for Household Hazardous Waste Collection: A Final Report

#### Executive Summary





## Executive Summary

Household hazardous wastes (HHW) are items generated by households that are corrosive, toxic, ignitable, or reactive, and as such are hazardous to humans and/or the environment if disposed of improperly. Because of their point of generation, these wastes are exempt from hazardous waste regulation under state and federal hazardous waste management rules. As the number and volume of unwanted household hazardous products has grown, public officials across the country have responded by developing separate and safer management systems for these wastes. An increasing number of municipalities, service districts, counties, and states are implementing specialized collection programs. Nationwide, the number of HHW collection events is in the several thousand per year, the number of permanent collection facilities is over 500.

In 1999, Maine generated 1,696,006 tons of solid waste, of which an estimated one-quarter to one percent (0.25 to 1.0%) was Household Hazardous Waste. Using an average HHW percentage of 0.60% of all waste yields a generation of 10,176 tons or 20,352,000 pounds of HHW. In Maine, almost all HHW collections have been municipally funded and conducted as "one-day events", with low participation, low volumes and costs ranging from relatively low to very high. Over the last two years, 24 regional or individual municipal events have been held, serving 70 communities.

To evaluate different HHW management systems using Maine demographics and geography, The Maine State Planning Office, in conjunction with the Maine Department of Environmental Protection, contracted with the University of Maine's Department of Resource Economics and Policy to perform an analysis of the four primary most common HHW collection scenarios used across the country. The State undertook this work to help Maine's communities reduce the presence of these hazardous materials in the municipal solid waste stream, and, in order to determine what type of collection system would be most economical and effective in terms of capturing HHW.

The factors involved in this analysis included cost, volumes collected, participation rates, municipal solid waste (MSW) toxicity reduction, as well as the role of public education and promotion. Specific elements of the analysis included individual cost components (i.e., administration, labor, materials and supplies, advertising/promotion, buildings, etc.), the types and percentages of waste collected, the expected participation rate for each scenario, and the amount of toxicity reduction of MSW. The four collection scenarios analyzed were: 1) at-door collection; 2) one-day collection events; 3) regional collection facilities; and 4) two "brick and mortar" facilities. In addition, the current state of universal waste collection in Maine was discussed. A summary of initial results are shown in the Executive Summary Table below.

In reviewing this table, it is important to keep in mind that the goal of the HHW collection program is to maximize both the citizen participation and HHW removal, while at the same time keeping costs at a reasonable level. Scenario 1 is an 'at-door' collection and removal service; Scenario 2 has a number of one-day collection events offered across the state; Scenario 3 has permanent storage facilities at a number of locations (seven in this analysis) that would also have one-day collections in 'outlying' areas; and Scenario 4 has two large permanent storage facilities in addition to one-day collections throughout the portion of the state the facility serves. Briefly, while Scenario 2 (the one-day collection event scenario) has the lowest cost, it also has the lowest amount of HHW collected. On the other hand, Scenario 3 (the regional collection scenario) has the second-largest waste collected, but also has the second-highest cost. From a "dollars per pound"

perspective, Scenario 4b (the brick and mortar with truck scenario) has the lowest cost, but it incurs a relatively large amount of capital costs.

In addition, from analyzing the waste stream of a number of HHW collection events from across Maine and the U.S. (see Appendix Table 5), paints comprise roughly 50% of the total waste collected. If some, or all, of this portion of the waste stream could be re-directed, such as through re-use opportunities, then the total cost of the program could be significantly reduced. Two approaches to re-directing paint from the simple to the hi tech are to create a "swap shop" and to create paint "blends". In Keene, New Hampshire, the HHW facility has a room in which cans of paint are stored. Residents are able to access this room and to take any of the paint that they choose. The Metro District of the City of Portland, Oregon, as part of its permanent HHW management operations, has funded a paint blending facility that makes and offers a line of paint products. Also, private companies are remanufacturing and selling paint products collected and recycled through public programs.

### Executive Summary Table: Statistics for Four HHW Collection Scenarios

	Participation Rate (est.)	Total Lbs of HHW Collected	% Capture Rate of HHW <sup>b</sup>	Total Cost (\$/Lb)	\$/Participating Household <sup>a</sup>	Total Annual Cost	Disposal Cost as % of Total Cost	Capital Costs (New)
Scenario 1 -- At-Door								
If entire state were URBAN	4%	2,656,864	13.05%	\$0.75	\$74.88	\$1,989,439	73.5%	n/a
If entire state were RURAL	4%	1,639,428	8.06%	\$0.84	\$83.62	\$1,370,933	65.8%	n/a
Scenario 2 -- One-Day Events								
	2%	1,027,702	5.05%	\$0.56	\$56.43	\$579,920	70.9%	n/a
Scenario 3 -- Seven Regions								
	5%	2,569,255	12.62%	\$0.62	\$62.01	\$1,593,184	64.5%	\$1,575,000
Scenario 4								
4a -- Brick and Mortar	4+%	2,495,848	12.26%	\$0.53	\$53.20	\$1,327,891	75.2%	\$1,100,000
4b -- Brick and Mortar w/Truck	4+%	2,495,848	12.26%	\$0.44	\$43.83	\$1,093,952	68.4%	\$1,168,000
<sup>a</sup> On average, one Maine household contains 2.34 people								
<sup>b</sup> Using an average of 0.60 percent of MSW as being HHW or 20,352,000 pounds (1999 data)								



## Appendix B

Resolve, to Study the Design and Funding of a  
Household Hazardous Waste and Universal Waste  
Collection Program



## CHAPTER 93

H.P. 1473 - L.D. 1974

### **Resolve, to Study the Design and Funding of a Household Hazardous Waste and Universal Waste Collection Program**

**Sec. 1. Feasibility and design review. Resolved:** That the Department of Environmental Protection, in cooperation with the Executive Department, State Planning Office and the Department of Agriculture, Food and Rural Resources, shall report to the joint standing committee of the Legislature having jurisdiction over natural resources matters by January 15, 2003 on the feasibility and design of a long-term funding mechanism to provide state cost-sharing support to municipalities and regions for the operational costs of a statewide household hazardous waste and universal waste collection program. The report must include an analysis of a proposed funding mechanism based on the imposition of fees at the point of retail sale on paint and pesticide products sold within the State. The report must also include proposed legislation necessary to establish and implement the proposed funding mechanism; and be it further

**Sec. 2. Authority to report out legislation. Resolved:** That the joint standing committee of the Legislature having jurisdiction over natural resources matters may report out legislation to the First Regular Session of the 121st Legislature to establish a statewide household hazardous waste and universal waste collection program and to provide funding for the operating costs of the program.





## Appendix C

# 2002 Household Hazardous Waste Collection Summaries



# Maine Household Hazardous Waste Collection Summary for 2002

## Safety-Kleen run collections

Town	Date	Paint (Lbs)	Flammables (Lbs)	Aerosols (Lbs)	Pesticides (Lbs)	Mercury (Lbs)	fluor. Bulbs (lbs)	Labpacks (Lbs)	Misc. (Lbs)	Total (Lbs)	Cost
Wells*	9/14	4000	0	350	400		420	600	60	5,830	\$8,912.00
South Berwick*	10/12	4150	0	200	350	1		275	0	4,976	\$4,604.00
Saco*	10/12	8900	0	400	600		30	800	5430	16,160	\$12,464.00
North Berwick*	10/12	7500	0	300	195		120	180	610	8,905	\$6,410.00
Kennebunk*	10/12	12450	0	725	750		305	523	800	15,553	\$19,532.00
Total		37000	0	1975	2295	1	875	2378	6900	51,424	\$51,922.00

\* Flammables combined in paint figure for collections run by Clean Harbors, formerly Safety-Kleen.

### NOTES:

Collection in North Berwick included the communities of Berwick and North Berwick

Collection in Kennebunk included the communities of Kennebunk, Kennebunkport and Arundel



To: Jerry Hughes  
 From: A. Stockus  
 Re: Household Hazardous Waste Collection, October 5, 2002  
 Date: October 8, 2002

I have totaled the permits collected during the HHHW collection day on October 5, 2002. The number of residents participating increased dramatically over last year. The figures below reflect only the permits turned in during the collection and not the total registered residents, as there were registered residents from most of the communities that did not participate on the day of the collection.

HOUSEHOLD HAZARDOUS WASTE COLLECTION  
 OCTOBER 5, 2002

TOWNS	Pre-Registered	Walk -on Saturday	Community Total
Bangor	341	48	389
Brewer	62	3	65
Clifton	6		6
Dixmont	8	1	9
Eddington	28		28
Etna	4		4
Glenburn	29	1	30
Hampden	39	3	42
Hermon	27	1	28
Holden	37	1	38
Levant	33	1	34
Old Town	24	1	25
Orono	89	2	91
Orrington	17	3	20
Veazie	24		24
Winterport	12		12
	780	65	845

I have also totaled the quantities collected from the packing slips filled out by ONYX. Would you pass these on to Jerry Beland and ask that he verify these quantities. Some of them were a little

confusing and I want to verify before passing them on to the individual communities. Please let Jerry know that it will probably be at least a week before we adjust the community totals based on changes made by the residents on the day of the collection, for the cost distribution. It would also help if he would confirm those communities receiving a rebate from last year and the amount of that rebate.

SUMMARY OF  
Household Hazardous waste  
Collected  
5-Oct-02

PRODUCT	QUANTITY	UNIT
Oil/ Gas/ Kerosene	2,730	Gallons
Oil Paint/Adhesives/Sealant	2,090	Gallons
Diesel	55	Gallons
Anti Freeze	275	Gallons
Aerosols	250	Gallons
PCB Transformer	5	Gallons
Pesticides	770	Gallons
Aluminum Powder	0.75	Pounds
Acids	3.5	Gallons
Acids	640	Pounds
Sodium Arsenate	4	Ounces
Lead Nitrate	0.25	Pounds
Mercurochrome	1.06	Pounds
Mercury	150	Pounds
Propane Cylinders	4	14 Oz. Cylinders
Asbestos	2.25	
TV's and computer parts	578	TV's and Monitors
Mercury Lamps	2,804	Feet of Fluorescent Lamps

Thanks, and if you have any questions, please let me know. Let Jerry know that he can email either of us through bgrme.org

## Appendix D

P.L. 2000, c.779 § 1666  
Household Hazardous Waste Exemption





the joint standing committee of the Legislature having jurisdiction over natural resources matters a plan for the labeling and source separation of automobile component parts to meet the requirements in sections 1662 and 1664. The department shall develop the plan in consultation with automobile manufacturers, automobile dismantlers, automobile recyclers and other interested parties. The plan may provide for alternative compliance plans for labeling and must provide for the safe removal and management of mercury-added parts prior to the shredding of vehicles. The department shall also develop, in consultation with the interested parties, an assessment of whether and how mercury switches or other electrical devices in automobile components should be added to the universal waste rules adopted by the board and submit the assessment with the plan.

In deciding whether to approve an alternative compliance plan for labeling of automobile components, the department may consider the extent to which the plan provides for identification of mercury-added components in vehicles assembled before July 15, 2002.

#### §1666. Household hazardous waste exemption

A person who uses mercury-added products in that person's home is not subject to the provisions of section 1663 or 1664 until January 1, 2005 with respect to those products the person uses in that person's home and is not subject to fines or penalties for noncompliance with the provisions of section 1663 or 1664 with respect to those products the person uses in that person's home.

#### §1667. Dental procedures

By July 15, 2002, the department shall work with dentists and other interested parties to develop a pollution prevention plan for mercury from dental procedures that provides for reasonable measures to reduce mercury pollution from dental procedures and related sources. The plan must include options and strategies for implementing source reduction.

#### §1668. Education program

The department and the Executive Department, State Planning Office shall implement an education program relating to mercury-added products no later than January 1, 2001. The program must provide information to the public about labeled mercury-added products, the requirements of the law regarding the source separation of waste mercury-added products and collection programs that are available to the public.



## Appendix E

### HHW/UW Funding Advisory Committee And Mission Statement



HHW/UW Funding Advisory Committee

<p>Jim Dill University of Maine Cooperative Extension Pest Management Office 491 College Ave. Orono, ME 04473-1295 581-3879 <a href="mailto:Jdill@umext.maine.edu">Jdill@umext.maine.edu</a></p>	<p>John Curtis Clean Harbors Envir. Services, Inc. 17 Main St. S. Portland, Me. 04106 799-8111 <a href="mailto:curtisj@cleanharbors.com">curtisj@cleanharbors.com</a></p>	<p>Bob Batteese Board of Pesticides Control 28 State House Station Augusta, ME 04333 287-7541 <a href="mailto:robert.batteese@state.me.us">robert.batteese@state.me.us</a></p>
<p>Gary Fish Board of Pesticides Control 28 State House Station Augusta, ME 04333 287-7545 <a href="mailto:gary.fish@state.me.us">gary.fish@state.me.us</a></p>	<p>Mike Belliveau NRCM 3 Wade St. Augusta, ME 04330 622-3101 <a href="mailto:mbelliveau@nrcm.org">mbelliveau@nrcm.org</a></p>	<p>Joe Shelton Agway 325 Maine Ave. Farmingdale, ME 04344 582-4604</p>
<p>Jeff O'Donal and Judy Johnson O'Donal's Nursery 6 County Road Gorham, ME 04038 839-4262 <a href="mailto:onurser1@maine.rr.com">onurser1@maine.rr.com</a></p>	<p>Steve Goranson, Manager Mattson's Home Decorating 243 Western Ave. Augusta, ME 04330 623-1106</p>	<p>Debra Hart Hart Public Policy PO Box 5486 Augusta, ME 04332 Tel: 623-9202</p>
<p>Edith Ellis Maine Landscape &amp; Nursery Association 500 N. Parish Road Turner, ME 04282 225-3998 wants notes only</p>	<p>Aaron Feldmus, Manager Aubuchon Hardware 10 Bangor Street Augusta, ME 04330 623-9844</p>	<p>Andy Hackman Consumer Specialty Products Association 900 17th St. NW Washington D.C. 20006 Tel: (202)833-7328  <a href="mailto:ahackman@cspa.org">ahackman@cspa.org</a></p>
<p>George MacDonald SPO 38 SHS Augusta, ME 04333 287-5759</p>	<p>Sam Morris SPO 38 SHS Augusta, ME 04333 287-8054</p>	<p>Anni Pistell DEP 17 SHS Augusta, ME 04333 287-7703 <a href="mailto:ann.e.pistell@state.me.us">ann.e.pistell@state.me.us</a></p>
<p>Jim McGregor, Exec Director Me. Merchants Assoc. P.O. Box 5060 Augusta, Me. 04330  623-1149 <a href="mailto:jim@mamall.org">jim@mamall.org</a></p>	<p>Will Wedge Hannaford Bros Co., Inc PO Box 1000 Portland, ME 04104 Tel: 883-2911 ext.4571 <a href="mailto:Wwedge@hannaford.com">Wwedge@hannaford.com</a></p>	<p>Paula Clark DEP 17 SHS Augusta, ME 04333 287-7718 <a href="mailto:paula.m.clark@state.me.us">paula.m.clark@state.me.us</a></p>

	Carole Cifrino DEP 17 SHS Augusta, ME 04333 287-7703 <a href="mailto:carole.a.cifrino@state.me.us">carole.a.cifrino@state.me.us</a>	
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**HHW / UW Funding Advisory Committee  
Mission/Purpose Statement  
July, 2002**

**The purpose of this advisory committee is to assist the state in developing a funding mechanism proposal to provide long-term state cost share support to municipalities and regions for the operational costs of a statewide household hazardous waste and universal waste collection program.** The funding mechanism proposal must include a feasible and efficient system for the collection of fees on paints and pesticides at the point of retail sale in Maine, and may include discussion of other feasible options. The DEP will present the proposal to the Legislature's Natural Resources Committee in January 2003.





## Appendix F

### Title 38, § 2302

Toxics use reduction and hazardous waste  
management policy

### Title 22, § 1471-X

State policy; public and private initiatives to minimize  
reliance on pesticides



**Title 38, Chapter 26, TOXICS USE AND HAZARDOUS WASTE REDUCTION (HEADING: PL 1989, c. 929, @7 (new))**

**18. Toxics use reduction.** "Toxics use reduction" means front-end substitution, product reformulation or in-plant changes in production processes or raw materials that reduce, avoid or eliminate the use of toxics or the generation of toxic by-products per unit of product to reduce risks to the health of workers, consumers or the environment, without shifting risks among workers, consumers or parts of the environment. [1991, c. 520, §9 (amd).]

**19. Toxics user.** "Toxics user" means a person that is required to report the presence of extremely hazardous substances under the SARA, Title III, Section 312. [1989, c. 929, §7 (new).]

**20. Treatment.** "Treatment" has the same meaning as in section 1303-C, subsection 39. [1989, c. 929, §7 (new).]

**21. Waste assessment.** "Waste assessment" means a systematic planned procedure to identify ways to reduce or eliminate waste. [1991, c. 520, §9 (amd).]

**§2302. Toxics use reduction and hazardous waste management policy**

It is the policy of the State to reduce the amount of the toxic substances used in the State, to reduce worker and environmental exposure to the release of toxic substances, to reduce the hazardous waste generated within the State and to minimize the transfer of toxic pollutants from one environmental medium to another. The State encourages an integrated approach to toxics use reduction, toxics release reduction and hazardous waste reduction based on the hierarchies of pollution prevention management strategies included in this section. It is further the policy of the State that the process of reducing the use and release of toxic substances and reducing the generation of hazardous waste through planning and analysis of manufacturing and commercial processes is ongoing and that the principles of continuous improvement in pollution prevention and open, public accountability must be applied to environmental quality management efforts in both public and private facilities. [1999, c. 348, §1 (amd).]

**1. Toxics use reduction.** The State encourages reducing the use of toxic substances through changes in production or other processes or operations, in products or in raw materials that reduce, avoid or eliminate the use or production of toxic substances without creating substantial new or increased risks to public health, safety and the environment. These changes may be made through the application of any of the following techniques: [1991, c. 520, §10 (amd).]

A. Input substitution, which refers to replacing a toxic substance or raw material used in a production or other process or operation with a nontoxic or less toxic substance; [1989, c. 929, §7 (new).]

B. Product reformulation, which refers to substituting for an existing end product an end product that is nontoxic or less toxic upon use, release or disposal; [1989, c. 929, §7 (new).]

C. Production or other process or operation redesign or modification; [1989, c. 929, §7 (new).]

D. Production or other process or operation modernization, which refers to upgrading or replacing existing equipment and methods; and [1989, c. 929, §7 (new).]

E. Improved operation and maintenance controls of production or other process or operation equipment and methods including, but not limited to, improved housekeeping practices, system adjustments, product and process inspections or production or other process or operation control equipment or methods. [1989, c. 929, §7 (new).]

**2. Toxics release reduction.** The State encourages reducing the release of toxics during manufacturing and other processes through, in addition to encouraging the toxics use reduction techniques specified in subsection 1, in-plant changes in production or other processes or operations that reduce or avoid exposure of workers and the environment to toxics. [1999, c. 348, §2 (amd).]

A. [1991, c. 520, §10 (rp).]

B. [1991, c. 520, §10 (rp).]

**3. Hazardous waste reduction.** The State encourages reducing the generation of hazardous waste through, in addition to any toxics use and release reduction techniques employed by the facility, the application of the following techniques: [1999, c. 348, §3 (amd).]

A. Recovery of toxics from production and other processes for reuse; [1989, c. 929, §7 (new).]

B. On-site recycling of hazardous waste; [1989, c. 929, §7 (new).]

C. Off-site recycling of hazardous waste; and [1991, c. 520, §10 (amd).]

D. Treatment, other than incineration, of hazardous waste to reduce volume or toxicity or both. [1993, c. 732, Pt. A, §12 (amd).]

E. [1991, c. 520, §10 (rp).]

**4. State facilities.** The Commissioner of Administrative and Financial Services, in consultation with the commissioner, shall lead the development of a pollution prevention system for state facilities by January 1, 2005 focusing on compliance with all relevant environmental regulatory and statutory requirements, improved environmental performance, reduction of toxics use and pollution



- (f) Indoor aquarium supplies;
- (g) Swimming pool supplies;
- (h) Pediculocides and mange cure on man; (lice)
- (i) Aerosol products; and
- (j) General use paints, stains, and wood preservatives and sealants. [1989, c. 93, §2 (new).]

B. The board may promulgate rules to exempt the sale of additional general use pesticide products from the dealer licensing provisions of this section. [1989, c. 93, §2 (new).]

[1989, c. 93, §2 (new).]

**Section History:**

1989, c. 841, § 10 (AMD).

1989, c. 93, § 2 (NEW).

1997, c. 139, § 1 (AMD).

1997, c. 454, § 9 (AMD).

**22 § 1471-X. State policy; public and private initiatives to minimize reliance on pesticides**

It is the policy of the State to work to find ways to use the minimum amount of pesticides needed to effectively control targeted pests in all areas of application. The agencies of the State involved in the regulation or use of pesticides shall promote the principles and the implementation of integrated pest management and other science-based technology to minimize reliance on pesticides while recognizing that outbreaks of disease, insects and other pests will necessitate fluctuations in pesticide use. These agencies, in cooperation with private interest groups, shall work to educate pesticide users and the general public in the proper use of pesticides and to determine other actions needed to accomplish the state policy. [1997, c. 389, §2 (new).]

**Section History:**

1997, c. 389, § 2 (NEW).

7 State House Station  
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## Appendix G

### Merchant Survey Results





## Maine Merchant Survey

To assess the number of stores that don't have electronic scanning and inventory systems, the DEP conducted a survey of retailers that are likely to carry products to which the fee might apply. The survey information was to help the DEP determine the potential need for the development of a uniform sticker system to track the sale of products subject to the fee. The DEP sent out 1775 surveys and 39 percent were returned (700 surveys). Retailers were asked three questions:

1. Do they have electronic scanning at the check out registers? – 37% responded yes;
2. Do they have an electronic or computerized inventory system? – 23% responded yes;
3. Do they do inventory manually only? – 77% responded yes.

Merchants were also given the opportunity to submit comments on the survey response card. Eleven wrote that they would like to see the fee imposed at the wholesale distributor level; three wrote that imposing a fee that would fund HHW collections was a good idea; and twenty-one indicated they did not like the idea. Finally, seventy-six merchants (11.5%) said they did not carry paints or pesticides. The results indicate that the majority of Maine businesses do not have electronic scanning and inventory systems. Therefore, development of a sticker system or some other system would be helpful.



## Appendix H

Memorandum from the Office of the Attorney General

The Constitutionality of a Fee (or Tax) on the Sale of  
Pesticides and Paints



# *State of Maine*

*Office of  
Attorney General*

6 State House Station  
Augusta, Maine 04333-0006

Phone: 626-8800  
Fax: 626-8812

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## *Memorandum*

*To:* Ann E. Pistell, DEP  
*From:* Lucinda E. White, Assistant Attorney General  
*Date:* November 19, 2002  
*Subject:* The Constitutionality of a Fee (or Tax) on the Sale of Pesticides and Paints

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### INTRODUCTION

In Resolves 2001, ch. 93 (“Resolve to Study the Design and Funding of a Household Hazardous Waste and Universal Waste Collection Program”) the Department of Environmental Protection (“DEP”), in cooperation with the Executive Department, the State Planning Office (“SPO”) and the Department of Agriculture, Food and Rural Resources (“DOA”) was directed to report back to the Legislature’s Natural Resources Committee by January 15, 2003 on the feasibility and design of a long-term funding mechanism to provide state cost-sharing support to municipalities and regions for operational costs of a statewide household hazardous waste and universal waste collection program. The Resolve further directed that the report include “an analysis of a proposed funding mechanism based on the imposition of fees at the point of retail sale on paint and pesticide products sold within the State.”

You have explained that your working group has been considering a flat tax, of about 15 or 20 cents per item, at the point of wholesale, that would go either directly to the DEP Special Waste Fund or to a special account of the Bureau of Revenue Services. As stated in the Resolve, the fees collected ultimately would be used for a “statewide household hazardous waste and universal waste collection program.”

You have asked that we provide some guidance with respect to the possible impact of the Commerce Clause on the constitutionality of any such tax or fee. This raises two questions that are separately discussed below.

## QUESTIONS PRESENTED

1. Does the U. S. Constitution allow the State to impose a tax or fee on pesticides and paints that are predominantly manufactured out-of-state but sold in-state?
2. Would the imposition of a tax or fee at the *wholesale* level be as likely to survive a constitutional challenge under the Commerce Clause, as one imposed at the *retail* level?

## ANSWERS

1. Yes.
2. Yes, as a matter of law, but there may be practical difficulties recovering the tax or fee in certain situations.

## DISCUSSION

### I. The Constitution Does Not Preclude Imposition Of A Tax Or Fee On Goods Merely Because They Are Brought In From Another State.

In order to assess the working group's proposal, it is necessary to review the way in which challenges to state laws under the Commerce Clause of the U.S. Constitution have been treated by the courts.

The U. S. Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Constitution, Art. I, § 8, cl. 3. "This power includes a negative aspect, known as the dormant Commerce Clause, 'that prevents state and local governments from impeding the free flow of goods from one state to another.' . . . The dormant Commerce Clause prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors. . . ." Grant's Dairy—Maine, LLC, v. Commissioner of Maine Department of Agriculture, Food & Rural Resources, et al., 232 F.3d 8, \_\_ (1<sup>st</sup> Cir. 2000)(internal citations omitted). However, the Commerce Clause has never prevented taxation of goods by the state in which they were found merely because they were brought in from another state. Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935).

The test for measuring the constitutionality of a state's tax statute is slightly more deferential than is the test for fees or other forms of state regulation. This is because the state is presumed to have a legitimate interest in taxing transactions related to its citizens. In reviewing a state tax impacting commerce, the absence of any attempt to interfere with the free flow of interstate commerce is demonstrated by meeting a four-pronged test. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax will be sustained if it:

1. is applied to an activity with a substantial nexus with the taxing State;
2. is fairly apportioned;
3. does not discriminate against interstate commerce; and
4. is fairly related to the services provided by the State.

Id.; General Motors Corp. v. City of Seattle, et al., 107 Wn. App. 42; 25 P.3d 1022, review denied 145 Wn. 2d 1014; 35 P.3d 381 (2001) cert. denied \_\_\_ U.S. \_\_\_, 152 L.Ed. 2d 825, 122 S.Ct. 1915 (2002)(upholding city's tax on out-of-state auto manufacturers for their wholesale auto sales to local dealers).

In reviewing non-tax, state statutes that regulate commerce such as statutes imposing regulatory fees, initially the burden is on the person challenging the statute to show that it discriminates against interstate commerce. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). Economic protectionism may be found where state legislation is:

1. facially discriminatory;
2. facially neutral but has a discriminatory purpose; or
3. facially neutral but has a discriminatory intent.

Id.; Chemical Waste Management v. Hunt, 504 U.S. 334, 344 n. 6 (1992). A facially discriminatory surcharge is per se invalid, unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, \_\_\_ (1994) (\$2.50 per ton surcharge on in-state disposal of waste generated *out-of-state* struck down where surcharge on in-state disposal of waste generated *in-state* was only \$.85 per ton). Where there is facial discrimination, the burden on the State is extremely heavy and any justification is subject to the strictest scrutiny. Id. If the state legislation is not facially discriminatory, but is otherwise found to constitute economic protectionism, it will be overturned unless the state can justify the statute by showing its legitimate goals and the lack of nondiscriminatory alternatives to accomplish those goals. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-4 (1988).

On the other hand, if a state statute has only indirect or incidental effects on interstate commerce and regulates evenhandedly to carry out a legitimate local public interest, the Court uses a balancing test to determine whether that indirect burden clearly exceeds the local benefits. General Motors Corp. v. Tracy, 519 U.S. 278, 298 n. 12 (1997), citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Thus, in defending a regulatory fee, a state may be required to demonstrate that the fee is not excessive in comparison to the purpose for which it has been designated. See New Hampshire Motor Transport Association, et al. v. Flynn, 751 Fed.2d 43 (1<sup>st</sup> Cir. 1984) (fees imposed for licenses on transporters of hazardous materials and waste were not excessive relative to the state's cost to enforce hazardous materials regulations and thus did not violate the Commerce Clause). However, it is not necessary that the amounts expended come from a particular fund or even match the amounts collected through the fees imposed; the test is whether the state expends an amount from *any* source relatively equivalent to the fees collected. Id. Also, the burden of proving excessiveness is on the party challenging the constitutionality of the law, not on the state. Id.

Whether a surcharge is a tax or a fee is a question of law. A classic tax is imposed by a legislature upon many, or all citizens. It raises money to be contributed to a general fund. The money is then spent for the benefit of the entire community. In contrast, the classic regulatory fee is imposed upon those subject to an agency's regulation. It may serve regulatory purposes



directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or it may serve such purposes indirectly by, for example, raising money to be placed in a special fund to help defray the agency's regulation-related expenses.<sup>1</sup> When courts face cases that lie near the middle of the spectrum, they have tended to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays an agency's costs of regulation. See, San Juan Cellular Tel. Co. v. Public Service Commission, 967 Fed.2d 683, 685 (1<sup>st</sup> Cir. 1992)(discussing the difference between taxes and regulatory fees in the context of the federal Tax Injunction Act, 28 U.S.C. §1341, which prohibits federal courts from reviewing state taxes, but not regulatory fees). By analogy, the working group's proposal here more closely resembles a fee than a tax. Indeed, the language of the Resolve suggests that a fee rather than a tax was contemplated by the Legislature.

In summary, the U. S. Constitution does allow the imposition of a fee or a tax on goods manufactured out-of-state, but sold in-state so long as it is neither discriminatory nor protectionist under the tests described above.

## II. Taxing The Wholesale Transaction Is As Defensible As Taxing The Retail Transaction.

Whether we are dealing with a tax, or a fee, placing a surcharge on the wholesale transaction is as defensible as placing a surcharge on the retail transaction. No matter where in the product distribution stream the surcharge is imposed, the tests described in section I are the same and come to the same conclusion. Thus, whether this is a regulatory fee or a tax, it must not be discriminatory or protectionist. More specifically, it must not protect in-state paint/pesticide manufacturers' market share through blocking the purchase or sale of out-of-state paint/pesticides; it must not burden out-of state paint/pesticide manufacturers or distributors by increasing their costs disproportionately to in-state manufacturers or distributors; it must not directly regulate interstate commerce by mandating the price to be paid for paints/pesticides in other states; it must not curtail the export of locally manufactured paint/pesticides. For a recent discussion of this in a different context, see National Electric Manufacturer's Association v. Sorrell, 272 F.3d 104, 108-113 (2<sup>nd</sup> Cir. 2002)(upholding, as valid under the Commerce Clause, Vermont's statute requiring labeling of mercury-bearing light bulbs). The working group's proposal does none of these things.

The concern with taxing further up the product distribution stream may stem from whether the producer or manufacturer has a sufficient connection to the state to warrant being taxed. This concern is reflected in the first and second prongs of the Complete Auto Transit, Inc. test, i.e. whether the activity taxed has a "substantial nexus" with the taxing state, and whether the tax is fairly apportioned.

Recent cases show that the crucial factor governing nexus (with the taxing state) is not actual presence within the state, but rather whether any activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market for the sales. General Motors Corporation v. City of Seattle, supra. Since the paint/

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<sup>1</sup> Whether the proposed legislation were to designate the DEP Solid Waste Fund or, alternatively, a special account of the Bureau of Revenue Services for deposit of the proposed fees would be of no constitutional significance.

pesticide wholesalers are presumably seeking and maintaining a market in Maine, this test would be easily met. With respect to the apportionment part of the test, the question is whether the activity being taxed may be subject to many states imposing the same tax. Obviously, this could have a detrimental impact on interstate commerce. However, the Supreme Court has concluded that “the activity of wholesaling – whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within [one state] that no other state has jurisdiction to tax.” Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 251 (1987). For these reasons, whether the working group elects to propose the surcharge at the retail level or the wholesale level should not affect the constitutional validity of the law under the Commerce Clause.

However, apart from legal problems, placing a fee on the wholesale transaction as opposed to the retail transaction may raise practical problems with respect to enforcement of the fee. If the manufacturer is not located in Maine and has no marketing presence or in-state distributor, there may be difficulty collecting the fee. In addition, mail order or internet sales may be able to entirely escape the fee. The Legislature’s decision ought to ultimately rest on its understanding of the manufacturer/distributor/retailer relationship with respect to the regulated products. If the distribution system is known, practical problems of enforcement may be surmountable. See, Maine Beer & Wine Wholesalers Association, et al. v. State, 619 A.2d 94, 98-99 (Me. 1993), where the industry challenged the State’s beverage container deposit statute requiring them to return a percentage of the unclaimed refund values mandated by statute to the State, and the court found that this charge was a constitutional fee contributing towards the State’s costs of disposing of unreturned containers. Under the beverage container deposit statute’s funding mechanism [for crediting the deposit that was to be returned to the state if unclaimed by the consumer], it was left to the industry to determine whether the refund value was to be initiated at the distributor or the manufacturer level.<sup>2</sup> 619 A.2d at 96-97.

## CONCLUSION

The working group’s proposal of a flat fee of 15 or 20 cents per item to be levied on the distributor of paint and pesticides at the point of wholesale sale, if tailored to raise approximately the same amount of revenue that the State would be spending for household hazardous waste and universal waste collection programs, should not violate the Commerce Clause (whether those fees are deposited into the DEP Solid Waste Fund or a special account at the Bureau of Revenue Services).

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<sup>2</sup> As the Attorney General’s Office was involved in pursuing collection of some of these funds, we can confirm that pursuing out-of-state manufacturers or distributors entailed substantially more work, at a greater cost, than did pursuit of in-state entities. Indeed, in-state entities may have more incentives (such as maintaining good public relations) to conform to Maine law.



## Appendix I

General Use Pesticide Dealers Sales Report Form  
And  
State - Generated Report on Pesticide Unit Sales



# General Use Pesticide Dealer Sales Report for 2001 Distribution

<b>Federal Tax ID Number:</b>		
<b>Company Name:</b>		
<b>Company Address:</b>		
<b>Company Contact &amp; Telephone:</b>		

Pesticide Trade Name	EPA Registration Number	Total Number of Units Sold	Weight/Volume per Unit



Ex? ME EPA # Brand Name State\* 2001 #Units Units Size Total Amount Total Gals or Lbs  
 Total Units: 10722 Total Gals: 8193 Total Lbs: 23051.6

FID: 631215882 Company Name: BAYER-PURSELL LLC Sale Type: Wholesale

Ex?	ME EPA #	Brand Name	State*	2001 #Units	Units Size	Total Amount	Total Gals or Lbs		
<input type="checkbox"/>	3125-502-72155	ADVANCED GARDEN LAWN & GARDEN MULTI INS	L	1440	32 oz	46080 oz	360 gals		
<input type="checkbox"/>	3125-504-72155	ADVANCED GARDEN ROSE & FLOWER INSECT KI	L	3600	24 oz	86400 oz	675 gals		
<input type="checkbox"/>	3125-506-72155	ADVANCED GARDEN & LAWN GARDEN MULTI-INS	S	7695	2 lbs	15390 lbs	15390 lbs		
<input type="checkbox"/>	3125-507-72155	24 HR GRUB KILLER	S	36	15 lbs	540 lbs	540 lbs		
<input type="checkbox"/>	3125-508-72155	ADVANCED LAWN SEASON LONG GRUB CTL RTS	S	1056	14.35 lbs	15153.6 lbs	15153.6 lbs		
<input type="checkbox"/>	3125-514-72155	ADV LAWN FUNGUS CTL FOR LAWNS RTS GRANS	S	420	11.2 lbs	4704 lbs	4704 lbs		
<input type="checkbox"/>	3125-517-72155	ADVANCED GARDEN 2 IN 1 A,C,Z RTU GRANS 16-	S	2025	5 lbs	10125 lbs	10125 lbs		
<input type="checkbox"/>	3125-528-72155	ADV LAWN SEASON-LONG GRUB CONTROL RTU	L	2016	32 oz	64512 oz	504 gals		
<input type="checkbox"/>	3125-545-72155	ADVANCED GARDEN TREE & SHRUB INSECT CTR	L	5904	32 oz	188928 oz	1476 gals		
<input type="checkbox"/>	72155-1	B A LAWN TOUGH WEED KILLER FOR LAWNS RT	L	8928	24 oz	214272 oz	1674 gals		
<input type="checkbox"/>	72155-3	ADV LAWN ALL-IN-ONE WEED KILLER LAWN II CO	L	4752	32 oz	152064 oz	1188 gals		
				Total Units:	37872	Total Gals:	5877	Total Lbs:	45912.6

FID: 951801944 Company Name: BEHR PROCESS CORP Sale Type: Retail

Ex?	ME EPA #	Brand Name	State*	2001 #Units	Units Size	Total Amount	Total Gals or Lbs		
<input type="checkbox"/>	1022-491-32273	CLEAR WOOD PRESERVATIVE & STABILIZER	L	96	1 gals	96 gals	96 gals		
<input type="checkbox"/>	1022-518-32273	BEHR 3-91 DOCK & FENCE POST PRESERVATIVE	L	420	1 gals	420 gals	420 gals		
				Total Units:	516	Total Gals:	516	Total Lbs:	0

FID: 341786510 Company Name: BETCO CORP Sale Type: Wholesale

Ex?	ME EPA #	Brand Name	State*	2001 #Units	Units Size	Total Amount	Total Gals or Lbs		
<input type="checkbox"/>	4170-17	BETCO LEMON	L	187	1 gals	187 gals	187 gals		
<input type="checkbox"/>	4170-36	FOREST 5	L	77	1 qts	77 qts	19.25 gals		
<input type="checkbox"/>	4170-68	SURE BET	L	88	1 gals	88 gals	88 gals		
<input type="checkbox"/>	4170-76	PH7Q	L	525	1 gals	525 gals	525 gals		
<input type="checkbox"/>	4170-8	BETCO-PINE	L	125	1 gals	125 gals	125 gals		
				Total Units:	1002	Total Gals:	944.25	Total Lbs:	0

FID: 061520822 Company Name: BIOSAFE SYSTEMS Sale Type: Wholesale

Ex?	ME EPA #	Brand Name	State*	2001 #Units	Units Size	Total Amount	Total Gals or Lbs
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## Appendix J

### Sales and Use Tax Return Form Maine Revenue Services



# L

## Maine Revenue Services Sales and Use Tax Return

# 010310099

Registration No.                      Business Code                      Period Begin                      Period End                      Due Date

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1. Entity Information

**Use this area only to report changes in your business**

2. **OUT OF BUSINESS?** Check here , return permit to Bureau and complete information at right. Date closed \_\_\_\_\_

3. **OWNERSHIP CHANGE?** If you have changed ownership, indicate the date when this occurred here \_\_\_\_\_ and check off type of change below:

Incorporated                       Partner added or dropped  
 Other (explain on reverse)  
 Sold to \_\_\_\_\_

4. **NAME CHANGE?** Attach explanation to this return.

Mail to:  
 Maine Revenue Services  
 P.O. Box 1065  
 Augusta, ME 04332-1065

**Do Not Use Red Ink!**

<b>Sales Breakdown</b>	Gross Sales	1.						
	Deductions: Exempt Sales	2.						
	Industrial Energy Sales	3.						
	Taxable Sales (lines 1-2-3)	4.						

*With the exception of consolidated filers, this return can be filed over the internet. Go to <http://www.state.me.us/revenue> Then click on "Electronic Filing".*

<b>Sales</b>	Sales of Prepared Food Subject to 7% tax	5.				Tax @ 7%	5A.		
	Sales Subject to 5% tax	6.				Tax @ 5%	6A.		
<b>Rentals</b>	Video Rentals and Long Term Rentals of Autos	7.				Tax @ 5%	7A.		
	Rentals of Lodging	8.				Tax @ 7%	8A.		
	Short Term Rentals of Autos	9.				Tax @ 10%	9A.		
<b>Taxable Sales</b>	Add lines 5, 6, 7, 8 & 9. Total must agree with Line 4	10.				Add lines 5A through 9A	10A.		
<b>Use Tax</b>	Industrial Energy Purchases	11.				Tax @ 5%	11A.		
	Other Taxable Purchases	12.				Tax @ 5%	12A.		
<b>Recycling Fees</b>	Tires and Lead-Acid Batteries	13.				Fees @ \$1	13A.		
<b>Total Due</b>	Total Tax and Fees Due with this Return.		Add lines 10A through 13A		14.				
<b>Credits</b>	Credit Carry Forward From Prior Period				15.				
<b>Amount Due</b>	Line 14 less line 15. Use line 17 if the result is a credit amount.				16.				
<b>Credit Due</b>	If Line 14 less line 15 is a credit amount, enter the amount to the right. If you wish a refund rather than a carry forward to the next period, check here <input type="checkbox"/>				17.				

\_\_\_\_\_  
 Signature                                      Title                                      Date                                      Phone #