AmericanCoatings
ASSOCIATION℠

January 28, 2025

Kerri Malinowski
Safer Chemicals, Office of the Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Draft rule, *Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances*, implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*, 38 M.R.S. §1614, including amendments of April 2024.

Submitted via e-mail: rulecomments.dep@maine.gov

Dear Mrs. Malinowski:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on MDEP's draft rule towards implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*, 38 M.R.S. §1614. We are committed to working with Maine DEP to help ensure an accurate understanding of PFAS in products and any associated risks to the public and the environment.

The Association's membership represents 90% of the paint and coatings industry, including downstream users of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture a variety of formulated products including paints, coatings, sealants and adhesives and their raw materials that may be affected by MDEP requirements, due to the broad set of covered chemicals, regardless of associated hazards.

ACA appreciates DEP's willingness to consider stakeholder perspectives. ACA appreciates that implementing a PFAS reporting requirement and ban presents many challenges. ACA also

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

appreciates the legislature and MDEP's willingness to consider industry perspectives and modify requirements, while considering the public's interest in limiting use of PFAS in products.

Recognizing MDEP's goals, ACA is providing recommendations to enhance administrative implementation of rules while further refining the rule's focus on potentially harmful PFAS substances. ACA provides several suggestions related to the CUU (currently unavoidable use) application process and the agency's evaluation. ACA recommends including text in the rule previously found on MDEP's website during the prior CUU application period providing examples of products that would be considered CUU. The timing of CUU applications of 36-18 months prior to prohibition could also be extended so applicants could file earlier, and MDEP would make earlier decisions on applications. This would assist with planning for compliance. ACA recommends establishing case-by-case time limits for CUU determinations, instead of a standard five-year period for all CUU designations.

ACA appreciates DEP's expanded criteria relevant to evaluating PFAS alternatives as part of the CUU process, as included in the proposal. ACA supports the inclusion of criteria, including evaluation of health, safety and environmental impact of the alternative, commercial availability, cost differences and effect on manufacturing processes.

ACA suggests improvements to the proposal addressing fees, confidentiality, notification of products and prohibition of PFAS. ACA recommends establishing a fee cap and reduced fees. ACA also recommends establishing stronger procedures for protection of confidential information submitted in a CUU application, while also ensuring that confidential information is given the same weight as publicly disclosed information in the agency and Board's decision-making process. ACA further recommends establishing unlimited sell-through for products manufactured prior to the prohibition date, where such products are not associated with contamination. Regarding updates to product notifications, ACA recommends establishing an annual reporting period to update previously filed notifications, rather than requiring updates on an ad-hoc basis, which can prove difficult for manufacturers to track. ACA also recommends additional flexibility in measuring PFAS amounts, allowing reasonable estimates and measurements based on modifications of commercially available analytical methods. ACA also suggests public engagement when identifying products associated with PFAS contamination.

ACA suggests changes to definitions in Section 2 of the draft rule to enhance clarity. ACA recommends changes to definitions of the following terms:

- *significant change*
- *commercially available analytical method* and
- *intrinsic to the design or construction of a building.*

ACA and its members respectfully submit the following comment:

I. ACA recommends adopting into the rule, MDEP's prior online statement regarding products that are essential to the daily functioning of society.

In its Concept Draft, MDEP references the definition of "Essential for Health, Safety or the Functioning of Society" from the statute at 38 M.R.S. §1614(1), as amended in April 2024.[2] The definition incorporates consideration of products whose removal from the market would disrupt "daily functions on which society relies." To provide further clarification, ACA recommends adding text into the rule from MDEP's prior online guidance explaining, "Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction."

MDEP offered this guidance on its website in May 2023 in relation to applications for CUU (currently unavoidable use) designations, prior to the amendment of April 2024. The guidance is aligned with the new definition's reference to "daily functions on which society relies." It would provide CUU applicants with additional context and information when filing a CUU application. This additional context could enhance the quality of information provided to the agency by applicants.

II. ACA recommends expanding the time for submission of CUU applications with a clear time frame for MDEP determinations on applications.

At Section 9(A), MDEP requires that a manufacturer submit CUU applications between 36 to 18 months prior to prohibition of its products. The suggested timing can be logistically difficult in situations where MDEP does not grant the CUU application. In this case, inevitably, the manufacturer would have a very short time to remove a product or multiple products under one product grouping from market. With coatings, this can result in consumers not having access to desired home restoration products, commercial construction products, etc. Coatings manufacturers would have a very short time to identify all affected formulations and coordinate with distributors to remove products from Maine.

The concept draft does not address timing of DEP's determinations on CUU applications once submitted. Earlier decision-making would assist with planning for compliance, when a CUU application is rejected. ACA requests MDEP stipulate by rule, that it will reach a decision on all

[2] The amendment of April 2024 provides the following definition:
"Essential for health, safety or the functioning of society" means a use of a PFAS in a product when the function provided by the PFAS is necessary for the product to perform as intended, such that the unavailability of the PFAS for use in the product would cause the product to be unavailable, which would result in: (1) A significant increase in negative health outcomes; (2) An inability to mitigate significant risks to human health or the environment; or (3) A significant disruption of the daily functions on which society relies.

CUU applications at least one year prior to the prohibition date, where applications are submitted in advance.

III. ACA recommends procedures for rolling CUU applications.

Section 9 of the Concept Draft does not include a clear procedure for new products that may qualify for a CUU designation after the January 1, 2032 product ban or for seeking a CUU designation for existing products after 18 months prior to prohibition. Such procedures are needed to encourage individual evaluation of products and to prevent premature bans of essential products. ACA can envision a scenario where a new product incorporating an environmentally benign fluorinated chemistry can replace a more toxic existing product.

Under the current proposed CUU procedure, the ban of January 1, 2032 prohibits introduction of any new products containing fluorinated chemistries. The proposed rule includes a provision that CUU applications after that date will be considered in a separate rulemaking. ACA requests clarification regarding the intended rulemaking cycle for CUU applications after January 1, 2032, preferably based on a rolling applications process. In the alternative, DEP may consider an bi-annual filing period for new applications.

ACA encourages DEP to recognize the broad variations of PFAS-types and to provide adequate avenues to introduce beneficial chemistries, when health and environmental risk are minimized. PFAS chemistries include over a thousand chemicals, many of which are not associated with environmental contamination and health effects. Many of these provide critical functionality to specialty products used in critical infrastructure, water delivery systems and other applications.

IV. ACA recommends options to issue a CUU designation with extended expiration dates or no expiration date.

ACA recommends that MDEP determine expiration of CUU designations on a case-by-case basis considering potential for alternatives, functionality of the fluorinated chemistry in a product and degree of potential risk to environment and human health. The proposed rule, in Section 9(B) establishes a uniform duration of five years for all CUU designations. Due to the broad range of PFAS chemistries, their varying functions and potential risks, a uniform five-year CUU duration is unnecessarily short for certain uses that cannot be phased out within that time.

Although MDEP proposes a CUU renewal process, this process introduces significant risk for long-term project planning, where critical products may include coatings with fluorinated chemistries. Project planners must consider the possibility that MDEP will not renew a CUU designation, potentially removing a critical coating from use for the project. To avoid this scenario, MDEP should designate duration of the CUU designation on a case-by-case basis, leaving open the possibility of designations that remain in effect longer than five years, including designations with no expiration date, when the chemistry is non-toxic and deemed essential. For example, ACA urges the agency to consider fluoropolymers that are typically non-

toxic. These are required to meet certain product performance standards. Substitutes are not as effective, resulting in more frequent coating application and less effective protection, requiring greater resource use. ACA would welcome the opportunity to provide additional information about this topic as needed.

V. Reporting should be required on an annual basis or upon request from MDEP.

ACA recommends updates to initial product notifications on a schedule that could be easily incorporated into a regulatory calendar. Requiring updated reports or revised reports upon changes in a formula, supplier, or contact information is difficult to monitor and track. Changes in formulas could occur with each new shipment of raw materials to a coatings manufacturer. This could result in numerous reports being required over the course of a year. Tracking and monitoring these changes across all required reporting data points is a complex task. The agency may also face challenges evaluating multiple updates over the course of a year that could prove confusing and taxing on agency resources. An annual reporting schedule is more likely to serve MDEP's needs, while easing the administrative burden on manufacturers.

VI. ACA recommends flexibility to modify commercially available analytical methods to provide reasonable estimates of PFAS in products.

ACA commends the agency in providing flexibility in estimating the amount of PFAS in products. The redrafting of requirements related to notification of PFAS amounts from the first concept draft demonstrates a deep understanding of the challenges faced by end-use product manufacturers in identifying trace amounts of PFAS, not identified on an SDS (Safety Data Sheet). At Section 3(A)(1)(e) of the proposal, MDEP stipulates four methods of measuring PFAS amounts for notification:

- As an exact quantity using commercially available analytical methods, Section 3(A)(1)(e)(i).
- As a measurement of total organic fluorine using a commercially available analytical method, Section 3(A)(1)(e)(ii).
- Based on information provided by the supplier or as falling within a range approved by the Department, in Section 3(A)(1)(e)(iii).
- Total weight of the product, if specific quantities are not known, Section 3(A)(1)(e)(iv).

ACA is not aware of commercially available analytical methods for measuring PFAS in products and total fluorine is not an accurate measurement of PFAS in products. Further, total weight of a product provides no meaningful information regarding PFAS content in a product, although ACA supports inclusion of this option as a last option, when no other information about PFAS content is available.

Most downstream product manufacturers will develop estimates based on information provided by a supplier as allowed in Section 3(A)(1)(e)(iii). As currently drafted, MDEP indicates that amounts based on supplier information can be made based on calculations of inputs and outputs during a manufacturing process and/or reported as an approved range. ACA

recommends adding language explaining that manufacturers can provide reasonable estimates based on ranges provided by raw materials suppliers. MDEP should recognize that measuring PFAS quantities is not an exact process using any of the listed options. Even if commercially available analytical methods were available, these would have significant variance based on the type of product. They would also typically require modification based on the type of product. Similarly, using a total organic fluorine measurement has a high degree of variance rendering the test an unreliable substitute for measuring PFAS content.

Recognizing variability in measurement and methods of estimation, ACA recommends adding explanation that downstream product manufacturers can make "reasonable estimates" of PFAS amounts based on information provided by a supplier and/or publicly available information. This flexibility is needed as most companies will rely on their internal scientific staff to calculate PFAS amounts. Based on ACA's experience, company scientists are diligent about complying with all parameters written into a regulation, aiming for exact measurements specified in regulations. Without some flexibility written into the regulation to provide estimates, analytical chemists are unlikely to provide reasonable estimates. Instead, company scientists will provide total weight of the product, since that is the only measurement that can be made within desired level of accuracy.

A. Commercially available analytical methods are not available for products.

Currently, manufacturers are not aware of standardized analytical methods for PFAS identification in articles and chemically formulated products. EPA's test methods are not designed for products. MDEP's reporting requirement would inevitably require third-party testing and development of analytical techniques by a third-party. This could entail modification of an existing commercially available analytical method so it is suitable to measure PFAS in a product.

On its PFAS webpage, EPA identifies analytical methods identifying PFAS in water and air. EPA explains that it is currently developing test methods for PFAS to understand PFAS contamination across other environmental media. Notably, EPA has not developed analytical methods for PFAS in products, and it has not identified existing analytical methods for products. As explained on EPA's PFAS webpage:

> EPA scientists are developing validated analytical methods for drinking water; groundwater; surface water; wastewater; and solids, including soils, sediments, biota, and biosolids, which may eventually become standard methods or research methods.[3]

To the extent possible, ACA requests MDEP to clearly identify analytical methods for reporting of PFAS in chemicals, formulated products, articles and other types of products, while providing

[3] See additional information here: PFAS Analytical Methods Development and Sampling Research | US EPA

flexibility to provide reasonable estimates that could be based on supplier's information or a modified commercially available analytical method.

B. The definition of "commercially available analytical method" may need to be modified to allow for modifications.

In the definition of *commercially available analytical method* in Section 2 of the proposal, MDEP stipulates that third-party laboratories cannot modify the test method. As noted above, commercially available analytical methods measuring PFAS in products typically are not available. To provide a measurement, a laboratory would need to modify an existing method or develop a new test method. ACA further notes that this is a costly option, suggesting companies should explore other methods of measurement allowed by the regulation. Nonetheless, some companies will want to invest in providing test data and measurements. ACA suggests allowing modifications of existing commercially available analytical methods so they are suitable to measure PFAS in a particular product. Modifications would be product specific. That is, ACA is not aware of an analytical test method generally applicable to multiple products.

MDEP should also note that the proposed definition, in Section 2 of the proposal, unnecessarily creates a distinction between third-party and in-house laboratories while noting that in-house laboratories must *not* modify an analytical method, but makes no mention of whether third party laboratories must not modify an analytical method. Any restriction or allowance for modifications should apply to both in-house and third-party laboratories.

C. Total organic fluorine is not an accurate substitute for measuring PFAS content.

ACA cautions against adoption of a total organic fluorine test as an indicator of intentionally added PFAS. Total fluorine testing does not distinguish types of fluorinated chemistries from overall fluorine content, resulting in inaccurate and over-inclusive reporting. Noting limitations of total fluorine measurements, a study concludes, "Measurement of total fluorine (TF) is inexpensive, but it is not as reliable of a proxy for PFAS because it includes inorganic fluoride in addition to organic fluorine."[4] Instead of testing for total organic fluorine, end-use product manufacturers can identify and report intentionally-added PFAS by relying on disclosed information from raw materials suppliers, above SDS thresholds with appropriate due diligence requirements and/or by providing reasonable estimates based on suppliers information.

VII. ACA recommends mitigating excessive fee payment with a fee cap and reduced fees.

ACA appreciates MDEP's revised proposal of an administrative fee of $1,500 per notification, lowering the $5000 notification fee suggested in the most recent Concept Draft. ACA notes that this fee could remain potentially excessive for ACA members, who manufacture a variety of

[4] Young, Anna, et. al., *Organic Fluorine as an Indicator of Per- and Polyfluoroalkyl Substances in Dust from Buildings with Healthier versus Conventional Materials*, Environ. Sci. Technol. 2022, 56, 23, 17090–17099, available online at: https://pubs.acs.org/doi/10.1021/acs.est.2c05198#

formulated products, depending on how manufacturer's group their products. The fee rate of $1,500 per notification encourages manufacturers to group coatings products that use the same type of PFAS together in one notification, although downstream uses might vary. Downstream uses might be more readily detailed where fees are lowered such that coatings manufacturers might differentiate products with individual applications.

ACA strongly recommends MDEP incorporate fee mitigation strategies into a rule. For example, MDEP should consider waiving the fee for notifications filed by a manufacturer after the first notification. MDEP may also require a lower fee amount after the first notification. Another alternative is a fee cap to prevent excessive fees. Additional information related to the agency's costs to evaluate each notification would assist with evaluating the relevance of the proposed fee amount.

VIII. ACA recommends providing adequate protections for confidential information with equal consideration of confidential information as publicly disclosed information.

ACA recommends that MDEP consider all information submitted as confidential in the same manner it would consider information disclosed to the public as part of the CUU rulemaking process. As such, ACA recommends altering the note included at page 20 in Section 9. Here, MDEP "strongly recommends that all proposals for currently unavoidable use determinations do not contain claims of confidentiality," and that if such claims are included, "the Department may determine that there is insufficient publicly available information to justify a rulemaking" allowing a CUU designation.

To justify a CUU rulemaking, MDEP is requesting manufacturers submit details about PFAS functionality in products, assessment of alternatives, etc. A detailed CUU application is likely to contain proprietary information, that could include information about chemical formulations, confidential specific chemical structure, amounts of PFAS in products and how, use function and volume compare to potential alternatives. Maintaining confidentiality in a manner that does not result in compromising consideration of the application is critical to non-discriminatory application of the rule.

DEP should take note that confidential information would be available to the agency and Board, just not for public review. The public would still have access to summaries and general information, just not proprietary uses, chemical structure, etc. For example, a manufacturer may provide a generic trade name for a product, while claiming confidentiality of the specific chemical name since it would disclose chemical identity. The generic name with accompanying descriptions would enable public participation.

Failure to consider confidential information in the same manner as disclosed information would undermine protections important legal requirements for protection of confidential business information. These protections are in place to encourage businesses to invest in developing new products that benefit society, often replacing products with greater potential for harm to

the environment or human health. Companies often spend several years and millions of dollars in research and development to formulate effective coatings products, while minimizing potential harm. As such, this information deserves complete protection without undue prejudice in the CUU application process. MDEP should also be aware that if confidential business information is disclosed in the State of Maine, the effect is to waive confidentiality in other jurisdictions, including at the federal level and globally. The impact of not providing adequate confidentiality protections is not just localized to Maine.

IX. ACA recommends an unlimited sell-through period for certain products manufactured prior to January 1, 2032.

ACA recommends allowing a sell-through period for covered products manufactured prior to January 1, 2032 that are not listed as products associated with contamination described in Section 5(G) of the concept draft. ACA members typically do not track products through distribution. A distributor may warehouse certain products for distribution as needed, across several regions. As such, controlling distribution of multiple warehoused products into the Maine market is logistically difficult. To address this concern, ACA requests an unlimited sell-through period for products with a manufacture date prior to January 1, 2032, where the product has not been identified as being associated with contamination.

X. ACA recommends adequate public participation when listing products associated with contamination.

In Section 5(G) of the Concept Draft, MDEP is authorized to list products associated with contamination while establishing a phase-out date for these products. Since these will be listed by rulemaking, ACA emphasizes the importance of public participation in the rulemaking process. Product manufacturers typically have information about their products that can assist the agency in understanding product hazards, risks and current risk mitigation strategies. ACA encourages DEP to leverage industry expertise in making decisions about products. ACA also recognizes the importance of engaging NGO's and other stakeholders who provide important perspectives about risk and impacts on the public. ACA encourages MDEP to publish detailed reasoning for proposing a product listing under Section 5(G), in its fact sheets that are typically made available when proposing a rule or prior to a formal proposal.

XI. Comments regarding definitions in Section 2 of the Concept Draft.

ACA suggests the following changes to enhance clarity of definition in Section 2 of the Concept Draft:

1. Definition of *significant change*. ACA recommends modifying the definition of *significant change* to clarify that companies must report any intentional increases in PFAS amounts, but not inadvertent changes less than the 10% threshold. DEP must also consider the lack of "commercially available analytical methods" to measure changes in PFAS amounts. Any analytical methods for products will be developed by a laboratory and will be specific to the

product at issue. These will not be commercially available analytical methods. In any case, developing test methods, even if not commercially available, is generally cost prohibitive.

ACA suggests the following change to the definition of *significant change* regarding the intentional addition of PFAS, as noted in brackets:

> *Significant change* means a change in the composition of a product which results in the [intentional] addition of a specific PFAS; a change in the amount of PFAS of more than a 10% increase, above the method variability allowed by the commercially available analytical method used [or excluding any inadvertent variances occurring during the product's usual manufacturing process] of the concentration that has been reported when compared to the existing notification; or a change in responsible official or contact information.

2. Definition of *commercially available analytical method*. As noted above, the definition unnecessarily creates a distinction between third-party and in-house laboratories while noting that in-house laboratories must *not* modify the test method, but makes no mention of whether third party laboratories must not modify a test method.

   ACA recommends allowing modified test methods, since modifications are necessary to measure PFAS in products. MDEP must further consider that modifications are product specific. If the agency decides to proceed with not allowing modifications, the requirement should apply to both in-house and third-party laboratories. To address the discrepancy in the current proposal, ACA suggests modifying the definition as follows:

   > *Commercially available analytical method* means any test methodology used by a laboratory that performs analyses or tests ~~for third parties~~ to determine the concentration of PFAS in a product and can be used by a third-party laboratory or other laboratory. Commercially available analytical methods ~~do not need to be performed at a third-party laboratory; however, the method~~ must remain unmodified when used to determine the concentration of PFAS in a product. ~~not performed by a third-party laboratory~~.

3. Definition of *intrinsic to the design or construction of a building*.

   The definition places an unnecessary emphasis on structural elements as the critical element of enhancing building functionality. To recognize the potential for other elements as being critical to functionality, ACA recommends adding the phrase "other elements" as noted in italics to the definition below:

   > "Intrinsic to the design or construction of a building" means those elements of a building or structure which are necessary to perform its intended purpose. Intrinsic to the design or construction of a building may include structural elements and *other* elements meant to block light, wind, or precipitation.

> Intrinsic to the design or construction of a building does not include elements which are solely decorative or otherwise merely enhance the attractiveness of a structure or its function or those elements that are quickly or easily removed from the structure.

ACA further notes that the last sentence excluding decorative elements is vague. ACA anticipates that determination of decorative versus functional elements will be made on a case-by-case basis.

XII. Conclusion

ACA and its members suggest the following changes to the proposed rule:

- Add text to the rule explaining that, "Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction."
- Extend the time-period so manufactures can submit CUU application at an earlier date while requiring MDEP to make earlier CUU determinations, at least one year prior to prohibition, but preferably earlier.
- Clarify procedure and timeframe for CUU applications after prohibitions take effect and after the initial CUU application process.
- Establish CUU expiration dates on a case-by-case basis, instead of a standard five-year CUU duration.
- Establish an annual reporting requirement, instead of ad-hoc updates to notifications.
- Allow modifications to commercially available analytical methods to provide reasonable estimates of PFAS in products.
- Implement a fee cap and reduced fees for notification fees.
- Eliminate preference for disclosure of confidential information during the CUU application process.
- Establish an unlimited sell through for products manufactured prior to the prohibition date.
- Maintain adequate public participation when listing products associated with contamination while providing detailed reasoning for the proposed listing.
- Implement changes to the following definitions as described herein: *significant change*, *commercially available analytical method* and *intrinsic to the design or construction of a building*.

ACA appreciates that DEP expanded criteria to evaluate PFAS alternatives to include availability of an alternative. ACA supports the alternatives criteria included in the proposal.

ACA appreciates MDEP's willingness to consider stakeholder perspectives. Please feel free to contact me if I can provide any additional information.

Respectfully submitted,

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