

January 28, 2025

Kerri Farris
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333

RE: Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Ms. Farris,

Thank you for the opportunity to submit comments regarding the Department of Environmental Protection's (DEP) new proposed rule, Chapter 90, to establish criteria for currently unavoidable use of intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS) in products. The following comments are submitted on behalf of the Conservation Law Foundation (CLF). CLF's mission is to conserve natural resources, protect public health, and build healthy communities in Maine and throughout New England. CLF has been a staunch supporter of the PFAS in Products Program since its inception. CLF generally supports this draft rule with a few strong recommendations on how to strengthen the proposed criteria for a Currently Unavoidable Use (CUU) determination.

Ensuring that the criteria for a CUU determination are adequately precise and rigorous is critical to achieving the program's goal—to protect Maine's environment and residents from the further contamination of PFAS, a class of over 15,000 chemicals that are toxic to humans in very small concentrations. PFAS are linked to a wide array of health harms such as cancers, learning and behavioral problems in children, fertility and pregnancy complications, hormonal disruption, high cholesterol, heart disease, immunotoxicity, and liver, thyroid, and pancreatic dysfunction. PFAS are used in countless products, many of which to this day are untested and unknown. These chemicals do not stay contained in consumer products: they leach from products into our sewers and waterways, into the air we breathe. Given the importance of the PFAS in Products Program, it is imperative that any products containing intentionally added PFAS only receive a CUU determination if the products are truly essential for health, safety or the functioning of society, and no alternatives are readily available. 38 M.R.S. §1614(1)(B-1). This determination should be made using standardized criteria that can continue to align with emerging scientific developments.

Recommendations to Strengthen the Currently Unavoidable Use Determination Criteria:

- (1) As a general recommendation, the DEP should consider adopting the criteria proposed by the European Commission for how to determine if a use is essential for “health or safety” and, separately, for “the functioning of society.”¹ Adopting such criteria would ensure that applications for CUU determinations aim to meet all such criteria, thus limiting the burden on the agency to seek out additional information and clarifying the determination process for those employees tasked with assessing CUU. Using such criteria would also align the agency’s decision-making with international scientific principles and knowledge.
- (2) In the CUU Section 9.A (2), the draft should clarify that the CUU requester must show that the product itself is essential for health, safety or the functioning of society, and then *also* show why the availability of PFAS identified in the specific product is essential for health, safety or the functioning of society. This would conform with the statute which stipulates that one must show that a product becoming unavailable would result in one or more of the negative consequences enumerated in 38 M.R.S. §1614(1)(B-1).
- (3) In the Section 9.A(2), the draft states, “This may include or take the form of a description of the negative impact that would be caused by the unavailability of PFAS for use in the product and the subsequent unavailability or unsatisfactory performance of the product.” “May” should be replaced with “must” to conform with the requirements of the statute. 38 M.R.S. §1614(1)(B-1) requires a showing that if the PFAS in the given product were unavailable there would be either a “significant increase in negative health outcomes”, or, “an inability to mitigate significant risks to human health or the environment”, or “a significant disruption of the daily functions on which society relies.” Therefore, a

¹ European Commission, Communication from the Commission – Guiding Criteria and Principles for the Essential Use Concept in EU Legislation Dealing with Chemicals, April 25, 2024, available at <https://op.europa.eu/en/publication-detail/-/publication/90926c62-0365-11ef-a251-01aa75ed71a1/language-en>.

description of the above negative impact of the aforementioned unavailability is not an option, it is *required* when requesting a CUU determination.

- (4) In the CUU Section 9.A(3)(b), the draft states, “The required specific characteristic or combination of characteristics that necessitate the use of PFAS chemicals.” To conform this rule more closely to the text and intent of the statute, this provision should first require a description of “the specific characteristic or combination of characteristics that necessitate the use of PFAS chemicals” and next require a description of why that characteristic or combination of characteristics is *necessary for the product to perform as intended*. 38 M.R.S. §1614(1)(B-1). Otherwise, the description may merely show that a certain characteristic of the product depends on PFAS, without showing that this characteristic is actually essential for this product to function. Of course, the availability of the product itself must first be shown to be essential for health, safety of the functioning of society, as required by Section 9. A(2) of the draft rule and as currently defined by 38 M.R.S. §1614(1)(B-1). The criteria for assessing what is essential for health, safety or the functioning of society should conform with those outlined by the European Commission.

Thank you for your consideration of the above recommendations on how to strengthen and streamline the currently unavoidable use determination process. We generally support this draft rulemaking and commend the department on this rigorous and critical endeavor in protecting our state from forever chemicals.

Respectfully submitted,



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