

January 28, 2025

VIA EMAIL RULECOMMENTS.DEP@MAINE.GOV

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

Re: Comment on Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Ms. Farris:

The Chemical Users Coalition (CUC) is providing comments in response to Maine DEP's proposal of a new rule, Chapter 90, to establish criteria for currently unavoidable uses of intentionally added PFAS in products and to implement the sales prohibitions and notification requirements for products containing intentionally added PFAS but determined to be a currently unavoidable use pursuant to the amended 38 M.R.S. 1614.

CUC is an association of companies from diverse industries interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances.¹ CUC encourages the development of chemical-regulatory policies that protect human health and the environment while simultaneously fostering the pursuit of technological innovation in the context of international markets and the global economy.

The CUC appreciates your consideration of these comments. If you have any questions relating to this submission, please feel free to contact me.

Sincerely,



Judah Prero

Enclosure
cc: L. Culleen

¹ The members of CUC are Airbus S.A.S., The Boeing Company, Carrier Corporation, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, the National Electrical Manufacturers Association, RTX Corporation, Sony Electronics, Inc., and TDK U.S.A. Corporation.

Before the Maine Department of Environmental Protection
Proposed Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substance
under Maine's *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*,
38 M.R.S. § 1614

Comments of the Chemical Users Coalition

Introduction

Chemical Users Coalition (“CUC”) appreciates the opportunity to provide these comments in response to Maine’s Department of Environmental Protection’s (“DEP” or “Department”) proposed rule for notification requirements, sales prohibitions and currently unavoidable use determinations for products containing intentionally added PFAS under Maine’s Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances [PFAS] Pollution (the “Proposed Rule”). CUC’s members will likely be adversely affected by the proposed changes being considered. CUC is an association of companies from diverse industries that typically acquire and use, rather than manufacture, chemical substances. CUC has consistently supported measures that protect health and the environment in a manner that enables the regulated community to pursue technological innovation simultaneously with economic development in the United States. CUC members produce and distribute highly complex materials and products, including critical semiconductor devices to major devices, appliances and intricate equipment. To thrive in a competitive global economy, our members depend on the availability of certain existing substances as well as products that incorporate such substances, which are necessary components of a reliable pipeline for our members’ production of innovative new products upon which the consumer, commercial, industrial, health care, defense, space, and transportation sectors consistently rely. Consequently, our members encourage the Department when implementing PFAS related restrictions or requirements to develop regulatory approaches that responsibly consider existing (and developing) products and technologies on which the US economy and the departments of the US government depend. The availability of such products and the development of new technologies will be unintentionally and adversely restricted if DEP does not develop certain implementation strategies that provide exceptions and varying compliance schedules to enable the continued distribution and use of such materials and products.

Comments

CUC welcomes this opportunity to provide comments on this next step in the rule promulgation process. We note that with regard to many of the areas on which CUC previously commented (enclosed), there has been little to no substantive change, despite the significant policy and practical issues that have been raised. CUC asks that the Department carefully consider comments received by CUC and other stakeholders, implement the requested changes, and upon the issuance of final regulations, explain how and why the issues raised in these comments were addressed in the final rules. Failure to implement these changes will adversely affect the availability of certain products and materials that are of critical importance.

The comments below follow the organizational structure of the Proposed Rule:

Applicability

- The revised Applicability section states that the Chapter applies to all new and used products sold, offered for sale, etc. and removes the reference to product components being subject to the regulations. However, there are references to product components in other sections of the Proposed Rule. For example, the Notification section states that the purpose for which PFAS are used in a product, including PFAS in any component must be reported. It also states that “For product components for which the Department has previously received notifications, which are used in more complex products containing the reported components, the manufacturer of the more complex product shall either report PFAS in the product including its components or refer to the supplier’s submitted notifications for product components and any PFAS in the remainder of the product.” This implies that component manufacturers are subject to the notification requirements. DEP needs to clarify this extremely important detail and harmonize the regulations in this regard throughout.

CUC supports exempting components from the notification requirements as this will address significant compliance challenges. There is a lack of transparency within the value chain concerning the chemical content of manufactured articles, especially with respect to complex products and manufactured items with multiple component parts. Suppliers often are reluctant or unable to provide information on composition of components to customers, often due to confidentiality concerns within and among the value chain. For these reasons, CUC supports removal of “components” from the notification requirements, and the Proposed Rule should ensure that this is appropriately reflected throughout.

- The revised Applicability section states that the Chapter applies to new products. CUC supports the Proposed Rule’s terms that the sales prohibitions do not apply to used products. CUC suggests that the prohibition also should not be applicable to replacement parts that are needed for routine repair and maintenance of existing (and used) products throughout their projected lifecycle. This is especially critical for complex and durable goods (such as consumer use appliances) which if properly maintained can have a lengthier period of use and reduce waste through the unnecessary disposal of such goods. Moreover, as discussed further below, CUC recommends that the regulations be modified to state directly that wholesale and retail distribution of products that were imported or manufactured prior to the effective date of a particular prohibition may continue to be distributed in Maine until existing stocks of such previously manufactured items can be “sold through” without enforcement concerns.

Definitions

- **Commercially available analytical method** The Proposed Rule defines “Commercially available analytical method” as any test methodology used by a laboratory that performs analyses or tests for third parties to determine the concentration of PFAS in a product. Commercially available analytical methods do not need to be performed at a third-party laboratory; however, the method must remain unmodified when not performed by a third-party laboratory.

Many laboratories are using certain tests for Total Organic Fluorine (“TOF”) as opposed to methods that can identify the presence of specific PFAS. There are currently no standardized methods to identify and calculate the quantity of PFAS present in complex goods. DEP should therefore clarify what constitute “commercially available analytical methods” under these circumstances.

- **Product** – The Proposed Rule notes that Product is intended to include packages and packaging components. This is reinforced in Exemptions, 4(A)(2), where the Proposed Rule states that if packaging contains intentionally added PFAS, it is prohibited. CUC believes that product packaging should be exempt, at least until the 2032 prohibitions take effect. Considering how industries and supply chains are still trying to gather information on the use of PFAS in the products themselves, imposing the same requirements on product packaging presets significant compliance challenges and substantially increases the burden on regulated entities.
- **Semiconductor** – CUC appreciates the Department’s revisions to the definition in an attempt to ensure consistency with the federal definition of semiconductor chip product that appears at 17 U.S.C. §901(a)(1). However, CUC believes that additional changes are warranted. Specifically, the text appearing in the final sentence of the proposed semiconductor definition which describes materials that semiconductors “do not include” should be omitted. In its stead, the final sentence should read, “*Semiconductor means both a semiconductor material and a type of product that is a discrete assembled functional object containing semiconductor material which is capable of being incorporated into electronic equipment, such as a CPU.*” Such changes will ensure the final rule makes clear that a semiconductor is not just an etched and layered material, but also a type of assembled functional product described in the semiconductor exemption in section 4.A.(11) of the Proposed Rule, and capable of being “incorporated into electronic equipment”.

In addition, CUC requests that the “NOTE” appearing immediately below the semiconductor definition on page 7 of the Proposed Rule be removed. As currently drafted, its intent is unclear, it does not add any needed information and is likely to simply create confusion.

Notification

- The contents of the notification to be required for materials subject to Currently Unavoidable Use (CUU) determinations can and should be minimized given the extent of

information that already will be in DEP's possession as a result of the CUU application process and the materials concerning the product's contents provided in the application.

- Section 3(A) states that the prohibitions would take effect even for products that are already in the stream of commerce. This imposes a challenge, particularly for manufactured goods that may have a longer shelf life, and which may be with a distributor or retailer for an appreciable amount of time after the manufacturer has sold the item. Furthermore, imposing a sales prohibition on products that have already entered the stream of commerce will result in manufacturers, wholesalers, distributors, and retailers potentially having to discard manufactured products, needlessly creating waste. CUC therefore requests that a sell-through provision be provided.
- Section 3(A)(1)(a) requires information on "the general type of the product." CUC requests that DEP clarify the intent of this provision. Is DEP looking for information on industrial vs consumer use, specific product category, category of use (juvenile vs. adult)?
- Section 3(A)(1)(b) requires companies to submit an estimate of the number of units sold annually. CUC requests that DEP clarify the intent of this provision. Is DEP requiring information relating to the sales from the past calendar year prior to the notification submission date or requiring sales projections for the coming calendar year. Sales projections are often confidential business information, and disclosure of such creates significant economic harm. Accordingly, DEP should focus on the historical data (in ranges), and explicitly state such in the final rules.
- Section 3(A)(1)(d) states that for PFAS substances in which the specific CASRN is unknown, DEP would require the identification of PFAS by a nomenclature of the IUPAC. Suppliers of substances to customers often communicate the use of PFAS without specifying the CASRN or even a generic chemical name due to trade secret (confidentiality) reasons. CUC therefore requests that, in those instances DEC would approve a submission that simply indicates "the use of a PFAS."
- Section 3(A)(1)(e) requires notification of the amount of each PFAS used in the product or product component reported as an exact quantity as a concentration. CUC requests that DEP clarify how an exact concentration can be calculated. If a finished good is sold into the state of Maine, and PFAS is contained within one of the product components that make up the finished good, then is the concentration calculated based on the entire finished good, or is it based on a component?

Furthermore, this section requires reporting on the TOF in a product if the amount of each PFAS is not known or easily reasonably ascertainable, determined using commercially available analytical methods. While TOF is often used to indicate presence of PFAS, it may detect organofluorine chemicals that are not PFAS. As such, TOF does not conclusively indicate the presence of PFAS nor the quantity of any such PFAS, and CUC questions the value of requiring that this number be provided.

Lastly, this provision concludes by stating “For product components for which the Department has previously received notifications, which are used in more complex products containing the reported components, the manufacturer of the more complex product shall either report PFAS in the product including its components or refer to the supplier’s submitted notifications for product components and any PFAS in the remainder of the product.” As mentioned above, the applicability section removed components. Consequently, this provision needs to be eliminated or clarified as to its intent. On its face, however, it is unclear how a product manufacturer would even know if a component manufacturer submitted a notification to rely upon for compliance with the notification requirement.

Exemptions

- Section 4(A)(8) states that an exemption from the requirements of the regulations applies to a product required to meet standards or requirements of the FAA, the National Aeronautics and Space Administration (NASA), the United States Department of Defense (DOD) or the United States Department of Homeland Security (DHS), except that the exemption under does not apply to any textile article or refrigerant that is included in or as a component part of such products.

DEP should provide a rationale as to why notifications are needed for these particular components and what purpose such reporting serves or otherwise simply exempt items. All these products have detailed specifications, including for textile article and refrigerant content. Furthermore, DEP needs to provide clarification as to how and when notifications are to be submitted for these textile and refrigerant parts (which themselves are presumably “components”).

CUC requests that such textiles and refrigerants be exempted when present in such items to avoid confusion and reduce the complexity of the regulations and simplify the administrative burden on Maine DEP.

Prohibition on Sale of Products Containing Intentionally Added PFAS

- Subsection E states that the sales prohibitions do not apply to the sale or resale of a used product. As mentioned above, CUC suggests that the prohibition should also not be applicable to replacement parts that are needed for routine repair and maintenance of existing (and used) products throughout their projected lifecycle. Furthermore, products which are leased following their original manufacture (e.g., rental cars) should be considered within the scope of the exemption for “used” products.
- Subsection H states that the prohibitions do not apply to a retailer in the State of Maine unless the retailer sells offers for sale or distributes for sale in the State of Maine a product containing intentionally added PFAS for which the retailer has received a notification pursuant section 8(2) that the sale of the product is prohibited.

CUC requests confirmation that if a company notifies a retailer that certain products cannot be sold starting 2026, and the retailer continues to sell the PFAS-containing

products despite the company's notification, that only the retailer be held responsible for violating the prohibition rule.

CUC also requests that clarification should be given with regard to the status of wholesalers and distributors of manufactured products.

- Manufacturers or articles that contain multiple components work utilize vast supply chains that may be composed of potentially thousands of suppliers. These suppliers, usually located outside of the United States, are often not aware of new regulatory requirements. Consequently, time and resources are required to ensure this awareness and to facilitate needed disclosure of PFAS presence to downstream customers. It is probable that even with due diligence, an end-product manufacturer may only become aware of the presence of PFAS in their products after the restriction deadline has passed. CUC therefore asks that DEP add a provision that explicitly states that manufacturers will not be penalized in such cases as long as the manufacturers have made a good - faith effort to reasonably ascertain the presence of PFAS their products prior to selling the finished product in the state after the effective date of a specific prohibition.

Fees

- CUC appreciates that DEP has lowered the fee amount. However, for companies that must submit many notifications, the financial burden could still be high. CUC suggests that a single fee be imposed on each reporting entity, regardless how many product notifications are submitted by that entity.

Currently Unavoidable Use

- The Proposed Rule states that The Department will not consider any Proposed Rules for an initial currently unavoidable use determination prior to 36 months in advance of the applicable sales prohibition and no later than 18 months prior to the applicable sales prohibition. Accordingly, it appears that if a product will be subject to the 2032 prohibition, the earliest that proposed CUU can be submitted is Jan. 2029, and the latest is June 2030. CUC believes that the proposed timeframe is too narrow and inflexible. Regulated companies are reviewing uses of PFAS and PFAS alternatives are still being studied. A company may need significant lead time in the event a CUU determination is denied, and 36 months is not sufficient. In the alternative, companies studying alternatives may not have all the needed information to submit 18 months before the applicable sales prohibition.

CUC requests that additional flexibility be provided for "resubmission" of CUC determinations, and that such should not be considered as new submissions but rather renewal of the existing determination. Furthermore, DEP should streamline the regulations because requests for renewal should have minimal information requirements as such details would have been previously provided to DEP.

- The Proposed Rule provides that a CUU Proposed Rule must contain a significant amount of information on alternatives to the PFAS currently in use and information on the human and environmental effects of the PFAS used in a product. For complex product

manufacturers, there is a strong likelihood that they will not possess such information. While the Proposed Rule does state that “known or reasonably ascertainable” information is to be provided, clarification as to the actual level of due diligence required is needed (and the consequences of not being able to supply such information) to determine how practical and/or burdensome this requirement will be.

- The Proposed rule requires Proposed Rules to contain product descriptions based on HTS/GPC and NAICS combinations. Due to the ubiquitous nature of PFAS, CUC suggests that Proposed Rules could be based on industry sector instead (e.g., electronics sector). As the definition of PFAS encompasses more than 10,000 substances, it will take a significant amount of time to understand the uses of PFAS within many industries, and a broader product classification will provide for a simpler process.

Proprietary Information

- The Proposed Rule states that because CUU’s must be determined through a rulemaking, it is DEP’s position that CUU determinations will not be issued for submissions that contain confidential information. This is simply untenable and impracticable for numerous reasons. For example, the composition of a product is very likely to be considered by the applicant to be confidential (for the protection of highly-important trade secrets), and if DEP will not allow such confidential information to be submitted (or will deny a CUU application on the basis of it having confidential content), the CUU exemption process will be unusable for many product manufacturers, who will then be forced not to sell into Maine. DEP’s position also is completely unworkable for products that may have uses that are critical to national security and are subject to a variety of secrecy requirements (which often may extend to numerous products that go beyond those specific items that are exempt due to DOD, NASA, or FAA specifications requirements)
- The provision to which DEP cites in the December Proposed Rule concerning the Department’s ability to protect confidential information is not specifically applicable to the underlying PFAS-in-products law (38 M.R.S. § 1614). DEP must explain how confidentiality will be guaranteed under the Proposed Regulations and the statutory authority for this interpretation.

Conclusion

CUC appreciates the opportunity to submit the foregoing comments and, as mentioned, reserves its right to submit additional or modified comments at a later date. We would welcome the opportunity to meet with DEP staff to address our comments and to assist in refining the Proposed Rule prior its finalization.