January 28, 2025



Melanie Loyzim Commissioner, Maine Department of Environmental Protection 17 State House Station Augusta, ME 04333

Re: Comments on Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances and Currently Unavoidable Use Determinations

Dear Commissioner Loyzim,

On behalf of the Maine Organic Farmers and Gardeners Association (MOFGA), I am pleased to submit these comments on Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances and specifically, on provisions relating to "Currently Unavoidable Use" determinations. In general, MOFGA supports the draft, which is part of a long-overdue implementation of Maine laws intended to "turn off the PFAS tap" and eliminate future PFAS contamination at the source. We do have several suggestions to clarify the rule and ensure that the regulations reflect the language and intent of the underlying enabling statutes.

About MOFGA.

A broad-based community, MOFGA is transforming our food system by supporting farmers, empowering people to feed their communities, and advocating for an organic future. MOFGA certifies 537 organic farms and processing operations representing roughly \$120 million in sales. We're working hard to create opportunities for Maine's next generation of farmers. Each of these farmers is a Maine businessperson for whom economic health and environmental health are interdependent.

MOFGA'S interest in the rulemaking.

MOFGA has a strong interest in this rulemaking. Unfortunately, adhering to organic practices provides no guarantee that PFAS contamination won't impact an organic farm business. Whether organic or conventional, farms can produce contaminated crops and animal products, and farm families are vulnerable to health problems, if using drinking and irrigation water contaminated with PFAS, contaminated feed, or growing crops on soils once spread with PFAS-contaminated sludge. Since 2016, when PFAS was first found to have contaminated water, milk and soils at a Maine dairy farm, MOFGA has been on the front lines working with farmers experiencing PFAS contamination of farmland.

According to Maine Department of Environmental Protection (DEP or the Department) reports, of October 30, 2024, 82 farms, both conventional and organic, have been affected by PFAS contamination, with 5 going out of business as a result, and 3 more with substantially diminished



businesses. 66 farms exceeded the Maine Department of Agriculture, Conservation and Forestry (DACF) soil screening level, and 35 farms exceeded Maine's interim drinking water standard.¹ Both conventional and organic farms have been affected. Farm families have been tested and found to have unimaginably high levels of PFAS in their blood.

PFAS contamination has been costly. Maine's investigation of PFAS contamination is ongoing, and additional farms are likely to be found to be contaminated as the Department continues its investigatory work through 2025 and subsequent years. Since July 1, 2018 through the end of 2024, DEP spent close to \$20 million investigating contamination from land-based sewage sludge and septage applications and paying for drinking water filtration systems for residential wells contaminated with PFAS from sludge or septage spreading.²

Annual costs for DEP's PFAS investigation and drinking water remediation are expected to rise substantially as additional contamination is discovered and as stricter federal drinking water standards are enforced. The Department's recent status report determined that it would cost the state over \$1.3 billion to furnish every private well owner in Maine with a whole-home filtration system, and annual maintenance and monitoring costs for these systems could amount to almost \$1.9 billion annually.³ This figure doesn't include the costs to community drinking water systems, many of which are also contaminated with PFAS. Whether the cost is paid by the State with taxpayer funds, or locally through property taxes, or by individual households, Maine is paying a high price for PFAS contamination of drinking water caused by PFAS in products which ends up contaminating sewage sludge, landfill leachate, and ground and surface waters.

These eye-popping figures don't include the costs of addressing agricultural impacts. As of March 2024, more than \$2,657,000 has been provided by DACF for financial assistance to farmers impacted by PFAS contamination. This funding includes \$1,413,000 to 10 farms for income replacement; \$884,000 to 11 farms to support farm viability and infrastructure (including funding for clean feed, new equipment, greenhouses, water delivery, fencing); and \$96,000 for 5 water filtration systems.⁴ Ongoing, Maine has established a PFAS Fund to assist farmers,⁵ with initial funding of \$65 million (60M from state funds, 5M from the U.S. Department of Agriculture).⁶

This costly PFAS burden has directly impacted MOFGA as an organization. MOFGA has expended significant staff time and financial resources helping farmers deal with the devastating consequences of PFAS contamination, including by fundraising and administering with the Maine Farmland Trust an emergency relief fund as a bridge to the State's efforts to stand up publicly funded assistance.⁷ Through this fund, financial assistance has been provided to more than 100 Maine farmers to investigate PFAS contamination risks, and to help farmers and farm workers cope with stress related

¹ Legislative briefing January 22, 2025 and Maine Department of Environmental Protection, "Status of Maine's PFAS Soil and Groundwater Investigation at Sludge and Septage Land Application Sites" (January 15, 2015), p.19,

https://www.maine.gov/tools/whatsnew/attach.php?id=13144983&an=1

² Status of Maine's PFAS Soil and Groundwater Investigation, p.39

³ Status of Maine's PFAS Soil and Groundwater Investigation, p.48

⁴ Maine Department of Agriculture, Conservation and Forestry Update, January 31, 2024, https://legislature.maine.gov/doc/10699 ⁵ https://legislature.maine.gov/legis/statutes/7/title7sec320-K.html

⁶ Maine PFAS Fund Plan (2023), <u>https://www.maine.gov/dacf/ag/pfas/docs/pfasfund/admin-plan-pfas-fund-final.pdf</u>

⁷ https://www.mofga.org/pfas/pfas-emergency-relief-fund/

to contamination. It is anticipated that at least \$80 million will be needed to address just the agriculture-related costs of PFAS.

MOFGA's Comments.

Given the economic, health and environmental havoc already caused by widespread PFAS contamination of soils, water, food, people and the natural environment, further regulation is needed – not only to investigate and clean up past PFAS pollution, but to prevent future harm caused by this ubiquitous and persistent family of chemicals. For this reason, MOFGA supports Chapter 90, which is aimed at eliminating PFAS at the source. We do, however, recommend some changes in the posting draft to more closely align with legislative intent and ensure the rule doesn't create loopholes.

Comments on definitions.

<u>"Chemically formulated</u>." This definition is never used in the body of this rule, although it is used (but not defined) in PL 2023, c. 630, which the rule is intended to implement. In the statute, it is used in the context of "air care products" and "automotive maintenance products." Without context, it is hard to comment on the appropriateness of this definition within the rule.

<u>"Clothing item.</u>" This definition excludes footwear, scarves and other clothing that is worn on or about the human body. This definition is narrower than, and inconsistent with, the legislation this rule is supposed to implement. PL 2023, c. 630 bans "textile articles" as of January 1, 2026, and shoes and other articles of clothing excluded in DEP's draft rule are not excluded from the definition of "textile articles" in the law, which also does not include a separate definition of "clothing." The only apparel exclusion in the law for textile articles is for "outdoor apparel for severe weather conditions." [38 M.R.S. §(1)B-1(7)(a)] This definition should be revised to be consistent with the law, which covers any item of clothing except for some outdoor apparel, for which separate criteria apply.

"<u>Commercially available analytic method</u>. "This definition, when cross-referenced with the notification provisions of the rule, §3.A(1)(e), would allow manufacturers to self-test for the amount of each of the PFAS in the product or any product component. This testing would determine whether the product is covered by Maine's law or not – a test showing no PFAS would bypass requirements in the law to manufacture the product with alternatives – as well as various notification provisions when the amount of PFAS in a product changes. This testing should be conducted by an independent, third-party laboratory, which the proposed rule doesn't require.

"*Consumer products."* This definition isn't in the law and isn't used elsewhere in the proposed Rule 90. What is the purpose of this definition? It appears to be surplusage and should be deleted.

"<u>Cookware product</u>." This definition is inconsistent with the law, which did not carve out an exemption for commercial cookware, see 38 M.R.S. §1614(1)A10. What would be the justification for this distinction, given the potential exposure of the public, as well as restaurant and food service workers? What about school kitchens? The law specifically focuses on the need for enhanced protections for children from products designed for their use. There is nothing in the law that indicates that the Legislature did not intend to regulate commercial cookware.

"*<u>Cosolvent</u>."* This definition isn't in the law and isn't used elsewhere in the proposed Rule 90. What is the purpose of this definition? It appears to be surplusage and should be deleted. If there is a reason

for it, then it should be revised to delete "in small amounts" so that it reads: "Cosolvent" means substances added to a primary solvent to increase the solubility of a poorly soluble compound." Otherwise, it unnecessarily limits the application of the definition.

<u>"Fluorinated container</u>." The law includes a prohibition on the sale of "products listed in subparagraphs (1) to (9) that do not contain intentionally added PFAS but that are sold, offered for sale or distributed for sale in a fluorinated container or in a container that otherwise contains intentionally added PFAS." 38 M.R.S. §1614(5)B-1. The proposed rule limits the prohibition to fluorinated containers where the container has been treated with fluorine atoms "to create a permanent barrier." There may be other reasons to treat a container with fluorine, and the law does not include this limiting phrase, which should be deleted from the proposed rule. This provision is of particular importance to MOFGA, since fluorinated containers used in agricultural settings have been found to leach PFAS into liquids stored in those containers.

"*Product."* "Product" is defined at 38 M.R.S. §1614(1)(G) – not paragraph (H).

"*Reasonably available*." The concept of an alternative being "reasonably available" is linked to the definition of "alternative" and "essential for health, safety or the functioning of society" in PL 2023, c. 630, which this rule implements.⁸ Neither of these definitions mention cost as a factor in determining if alternatives are available. In fact, under the definition of "essential for health, safety or the functioning of society" a product must be "unavailable" to trigger the analysis of its essentiality.⁹ This is a high bar to meet; the manufacturer must show that the cost of modifying the product or process is so high that the manufacturer would not make the product at all and it would become "unavailable."

The provision in the draft rule that an alternative to a PFAS product is considered "reasonably available" only at a "comparable cost" would potentially allow manufacturers to avoid reformulating their products or processes even where alternatives do in fact exist at a cost that is financially viable for the company. There is a long history of environmental regulations spurring research and development and technological change, where affected manufacturers claimed -- as it turned out, incorrectly -- that high costs would prevent compliance. Indeed, innovation in response to regulatory requirements can lead to "innovation compensation" – that is, profit – that exceeds the cost of complying with regulations.¹⁰

⁸ " 'Alternative' means a substance or chemical that, if used in place of a PFAS in a product, would result in a functionally equivalent product and would reduce the potential for harm to human health or the environment or that has not been shown to pose the same or greater potential harm to human health or the environment as the PFAS. "Alternative" includes: (1) A reformulated version of a product in which the intentionally added PFAS in the product has been removed; and (2) Changes to a product's manufacturing process that result in the removal of the PFAS from the product." PL 2023, c. 630, §1. A-5.

⁹ " '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." PL 2023, c. 630, §1. B-1.

¹⁰ Ma L, Ma S, Tang Q, Sun M, Yan H, Yuan X, Tian W, Chen Y. Environmental regulation effect on the different technology innovation-based the empirical analysis. PLoS One, Jan 5, 2024, <u>https://pmc.ncbi.nlm.nih.gov/articles/PMC10769098/</u>

The definition also includes a performance standard that isn't in the law and should be removed. The law requires only that an alternative be "functionally equivalent product." 38 M.R.S. §1614(1)A-5.

"<u>Semiconductor</u>." This is a health and safety-based regulation. The Department should make every effort to narrowly construe exemptions; the definition of "semiconductor" in the draft rule includes the vague phrase "intended to perform electronic and other related functions." The National Institute of Standards and Technology (NIST) glossary for semiconductors defines the function as "material that can act either as a conductor or an insulator of electricity, depending on small changes in voltage."¹¹

"<u>Significant change</u>." We recommend revising this standard to match the Department's PFAS reporting ranges. A "significant change" would be the addition of PFAS in an amount that causes the total amount of PFAS to move from one range to another. This is simpler than the approach in the draft rule and helpful from an enforcement perspective. We agree with the provision in the draft rule that a change in the "responsible official or contact information" should also trigger the notification requirement.

Comments on information requirements and criteria for determining "currently unavoidable use."

The lynchpin of the regulatory framework of PL 2023, c. 630 is the requirement that manufacturers of PFAS-containing products must demonstrate that the PFAS-containing product is "essential for health, safety or the functioning of society" in order to remain on the market. 38 M.R.S. §1614(1)B-1. Significantly, even though the 2023 legislation amended the earlier 2021 PFAS law to modify various compliance deadlines and provide for additional exemptions, it simultaneously narrowed and clarified the definition of "essential for health, safety or the functioning of society" to make clear that this is not a routine claim, but a specific finding that an "unavailable" product 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."

It follows that the rule must include clear requirements for information to be submitted by manufacturers seeking an exemption from the law. To reiterate, the burden is on the manufacturer to establish the scientific and health basis for any exemption. The rule should detail what information and analysis meets this standard. The draft rule is too vague in this regard.

Some of the language in in Section 9.A.(7), Currently Unavoidable Use, is inappropriate and potentially confusing in suggesting scenarios that might justify a manufacturer's claim that even though it is complying with a similar PFAS prohibition in another jurisdiction, it should be exempt in Maine.

 Paragraph (7)(a) suggests a manufacturer could claim that suppliers can't meet its need due to increased demand for PFAS alternatives. The second sentence of (7)(a) should be struck out, so that this paragraph reads in its entirety: "A justification explaining how products available in compliance with other similar sales prohibitions are not reasonably available alternatives for the product subject to the proposed CUU in the State of Maine."

¹¹ https://www.nist.gov/semiconductors/semiconductor-glossary

 Similarly, Paragraph (7)(b) suggests a claim that Maine's climate renders alternatives ineffective. Again, this is unnecessary language which almost suggests an additional exemption for weather. Paragraph (7)(b) should read in its entirety: "Documentation that products containing PFAS alternatives in other jurisdictions would not perform as intended in the State of Maine."

To the extent that the Department believes explanatory language of this nature is important and helpful, it should only be included in an interpretive note, not as part of the rule text.

Proprietary information.

We appreciate the note in Section 9 on Currently Unavoidable Use discouraging claims of confidentiality in CUU proposals. In addition, in Section 10, Proprietary Information, the Department should make clear that information on health or environmental impacts must never be classified as confidential.

Conclusion

Thank you for the opportunity to submit these comments. MOFGA strongly supports removing PFAS from products sold in the State of Maine, which has been the source of significant contamination of our environment and farm soils and water. Exclusions should be narrowly construed, and the evidentiary bar high for establishing that an exception is applicable.

Respectfully submitted,

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Heather Spalding Deputy Director Maine Organic Farmers and Gardeners Association