



November 10, 2022

VIA EMAIL to PFASProducts@maine.gov

Re: Second Concept Draft for the Maine PFAS in Products Program

3M Company (“3M”) appreciates the opportunity to comment on the “Second Concept Draft for the Maine PFAS in Products Program,” (“Second Concept Draft”) which was provided to stakeholders on October 13, 2022. 3M understands that the Second Concept Draft is a preliminary draft of regulations that the Maine Department of Environmental Protection (“DEP”) proposes to promulgate pursuant to 38 M.R.S. § 1614 (the “Act”) and that stakeholders will have an additional opportunity to comment on DEP’s proposed regulations after DEP initiates the formal rulemaking process.¹

3M is committed to compliance with all environmental laws and regulations, including the Act. 3M encourages DEP to create a regulatory framework that fulfils the legislature’s goals in passing the Act and accounts for risk-based criteria to avoid unnecessarily restricting the delivery of important products to consumers.

3M is concerned that the Second Concept Draft did little to clarify the ambiguities of the first draft. Further, the Second Concept Draft raises additional concerns and does not appear to provide a workable framework for DEP’s rulemaking.² At this late date, 3M is concerned that DEP will not have sufficient time to address all of the issues prior to January 1, 2023. In fact, DEP recently confirmed it will not promulgate regulations implementing the Act until at least April 2023. All of this makes compliance with the Act difficult for manufacturers and potentially risks regulated parties inadvertently reporting inaccurate or incomplete data, despite their best efforts at compliance.

The following summarizes the concerns 3M identified in reviewing the Second Concept Draft and comments on how these challenges may be mitigated.

1. Consider enacting a rolling notification period

The Act states that the reporting requirement will go into effect on January 1, 2023, but it does not clearly state a deadline for compliance with that requirement.³ 3M understands that DEP thus far has taken the position that reporting must be completed by January 1, 2023, unless granted an extension, requiring 3M and other manufacturers to be prepared to report prior to January 1. However, DEP has also stated it will have neither finalized regulations nor will its online reporting portal available by that

¹ 3M’s comments to the Second Concept Draft are intended to be high-level comments and 3M reserves the right to provide additional or expanded comments during the formal rulemaking process.

² 3M cites to and incorporates herein by reference its comments on the First Concept Draft, dated July 18, 2022. Most of these comments were not addressed by DEP or incorporated into the Second Concept Draft.

³ See 38 M.R.S. § 1614(2)(A) (“**[B]eginning** January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the department a written notification that includes. . .”) (emphasis added).

date. This means that manufacturers will have to report by other means and without clear requirements, creating a cumbersome and infeasible administrative burden for both the reporters and DEP.

3M requests that DEP issue regulations clarifying the scope of manufacturers' reporting obligations and committing to open the online reporting system in advance to allow its use. If DEP cannot do so sufficiently in advance of January 1, 2023, 3M requests that DEP extend the reporting deadline by requiring compliance within six months of the date DEP promulgates final regulations. In other words, an alternative would be to grant all regulated parties, including 3M, the same reporting extension that has already been granted to other manufacturers.

2. Approve concentration reporting ranges in advance of reporting deadline

The ability to report by range – as contemplated by the Act – is necessary. Portions of the Act, as well as DEP's recent statements and documents, suggest that it is possible using existing test methods to determine the exact concentration of a particular PFAS in an article. That is not the case. To 3M's knowledge, there is currently no method for determining the "exact quantity" of a PFAS in an article using commercially available analytical methods – as Section 2 of the Act describes. Thus, workable concentration ranges must be approved.

Just as manufactures will largely be dependent on suppliers to identify PFAS in raw materials, they also will be dependent on suppliers for understanding the percent of the PFAS in the raw material so they can then calculate the percent of PFAS in their products. Currently, when suppliers communicate with product manufacturers about percent composition, the information is communicated as a range and manufacturers, in turn, use that range to calculate and communicate the range of composition in their products. Rarely is laboratory testing used to determine product composition and any requirement to do so is not practical.

3M proposes the following reporting ranges. These ranges will provide DEP with a snapshot of the amount of PFAS a product contains while maximizing 3M's (and other companies') abilities to leverage information that may be provided by raw material and product component suppliers.

- Less than 1%
- At least 1% but less than 10%
- At least 10%

Permissible concentration reporting ranges must be published in advance of all reporting deadlines in order to give manufacturers a reasonable opportunity to use them in the first round of reports. If this is unable to be accomplished, 3M recommends DEP use its authority under Section 3 of the statute to extend the reporting deadline or to implement a phased rolling notification period.

3. Reporting obligations unclear for product, part manufacturers that do not sell directly into Maine

3M's comments on the First Concept Draft raised concerns about ambiguities in that draft regarding product and part manufacturers that do not sell directly into Maine. Manufacturers often lack visibility into where their products or parts are sold – particularly manufacturers of complex products that are

sold to third parties, including distributors, retailers, channel partners and OEMs, for further sale. The Second Concept Draft does not address these issues.

4. Approve reporting by category in advance of reporting deadline

3M's comments on the First Concept Draft observed that the draft set forth a detailed reporting requirement for each product containing intentionally-added PFAS unless a manufacturer obtained approval to report by category. However, the First Concept Draft implied that DEP would only approve reporting by category through its online portal. This raised questions about whether a manufacturer would be required first to enter individual product information and then seek approval to report by category. This issue was not clarified in the Second Concept Draft.

Requiring approval to report by category is burdensome for both DEP and the manufacturer. For instance, a manufacturer should have the ability to determine that products that have the same utility and PFAS in their composition for the same function, yet vary by size or color can be reported on as a category.

Furthermore, DEP should not use Brick codes (or not use them exclusively) in any category reporting framework. Brick codes primarily encompass descriptions of consumer and home products, not commercial or industrial products. On that basis, Brick codes are inapplicable to manufacturers of products that fall into the commercial or industrial category. DEP should instead (or in addition to Brick codes) allow the use of OECD/EPA codes, and the ability to describe a product using free text where no pre-existing category code is available.

If the online reporting system is not ready for use on January 1, the Second Concept Draft implies that manufacturers will be required to first report individual products outside the portal, and then report again by category (upon DEP approval) once the portal is live. This is both burdensome and unnecessary to fulfill the aims of the legislation. 3M requests that all manufacturers (and all reports) are placed on the same footing and subject to the same reporting options.

5. Newly defined terms regarding "Currently Unavoidable Uses" are too narrow

DEP added two new defined terms in the Second Concept Draft to begin establishing the framework to determine whether an ongoing use is a "currently unavoidable use." However, the definitions are unnecessarily narrow, meaning it would be prohibitively difficult to obtain exemptions for uses that are, in fact, unavoidable. 3M suggests an alternative definition for the term "currently unavoidable use" that is consistent with other material restriction laws.

6. Assurance needed that confidential business, trade secret information is protected

3M appreciates DEP's acknowledgement in the Second Concept Draft that information in product notifications are subject to the legal protections of the Uniform Trade Secrets Act, 10 M.R.S. § 1542(4)(A)&(B). However, reporting requirements cannot be implemented without protections in place for confidential and trade secret information. DEP's rulemaking should establish and describe a process by which claims to protect CBI will be asserted and approved. 3M looks forward to continuing discussions with DEP on this critical subject.

7. Providing estimate sales volumes is both uncertain and highly confidential

The Second Concept Draft contains a new provision that would require manufacturers to submit to DEP estimated sales volumes for the calendar year following a report. See Section 3.A(1)(a)(ii). DEP is not required under the statute to collect this information. Forward-looking year-long sales projections are highly uncertain and would provide limited utility to DEP. This type of information is also highly confidential, so 3M's concerns about CBI and trade secret information, described above, are particularly relevant here.

8. Allow sale of a product if a manufacturer provides required information within 30 days of notification by DEP

As currently drafted, Section 8 of the Second Concept Draft provides that a manufacturer of a product containing intentionally added PFAS that has failed to comply with the notification requirement must either: (1) provide a certificate of compliance establishing that the product does not contain intentionally added PFAS; or (2) notify Maine sellers and distributors that the product may not be sold or distributed. 3M recommends that Section 8 be revised to allow a manufacturer to continue selling the product at issue in Maine if it completes the notification process within 30 days of being notified that the product contains intentionally added PFAS. This solution would still meet the state's objective in strongly incentivizing manufacturers to report or else face potential business interruption. It would also protect Maine's citizens from supply chain interruptions for potentially critical supplies.

9. Clarify the scope of Section 4 exemptions

The Second Concept Draft does little to clarify Section 4.A of the statute regarding federal preemption. DEP should also clarify that the statute does not apply to federally-regulated products, for example, FDA approved healthcare products and PFAS approved under the U.S. EPA SNAP Program as replacements for ODSs and HFCs.

10. Regulations must reflect the statutory exemption for product packaging

Both the Act and the Second Concept Draft contain a scope exemption for packaging subject to Title 32, Chapters 26-A ("Reduction of Toxics in Packaging") or 26-B ("Toxic Chemicals in Food Packaging"). However, there is an inconsistent definition of "product component" that suggests packaging is included in scope. 3M recommends this phrase be removed. An attempt to regulate product packaging under DEP's regulations would directly contravene the statute.

3M appreciates the opportunity to provide comments on the Second Concept Draft and looks forward to working with DEP to address these and other issues regarding implementation of the Act.