



November 10, 2022

Ms. Kerri Malinowski
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Submitted via email to PFASProducts@Maine.gov

RE: Comments on Second Concept Draft for the Maine PFAS in Products Program

Dear Kerri,

The Alliance for Automotive Innovation¹ (Auto Innovators) appreciates the opportunity to provide comments on the State of Maine's second "Concept Draft for the Maine PFAS in Products Program" (hereafter "Concept Draft"). Auto Innovators represents the auto manufacturing sector, including automakers that produce and sell nearly 98% of the new light-duty vehicles in the United States. Our association also includes original equipment suppliers, technology and other automotive-related companies, and trade associations. As such, these comments reflect an in-depth assessment of Maine's current approach and identification of the very real challenges that Maine's Concept Draft presents to almost the entire U.S. auto manufacturing sector.

As we have previously stated, the statute substantially impacts the ability of Auto Innovators' members to sell automobiles and the replacement parts necessary to repair them. The proposed expansive data collection effort imposes sizeable obligations on members for information gathering and reporting. Auto Innovators conducted a thorough review of all aspects of the first Concept Draft, and submitted extensive comments on July 18, 2022, regarding the definitions and implementation approaches proposed in the draft. We thank DEP for making some of the changes we suggested in our comments; however, many of our concerns and suggestions remain unaddressed, and so we reattach our prior comments and ask DEP to review each comment again for inclusion in DEP's next proposed draft.

After an in-depth assessment of the current second Concept Draft, we remain extremely concerned that Maine's Department of Environmental Protection (DEP) is focusing on products that are not significant contributors of the PFAS chemicals that are finding their way into Maine's soil and water. We also believe that Maine continues to underestimate the sheer scope and volume of information and data that the current Concept Draft would generate, making the regulation nearly unworkable. The current proposed approach will also have significant unintended consequences for consumers in the state of Maine, considering the remedy for difficulty with reporting is stop-sale.

The statute prescribes an overly broad data call-in that is likely to result in hundreds of thousands of reports that will serve no purpose other than to impose prohibitive collection and management costs on DEP and the regulated community. DEP should take the opportunity of interpretation and regulation-writing to develop a targeted request for data on PFAS chemicals that will better inform DEP as to the sources of PFAS chemicals

¹ Formed in 2020, the Alliance for Automotive Innovation is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, the Alliance for Automotive Innovation represents the manufacturers producing nearly 98% of cars and light trucks sold in the United States. The organization, a combination of the Association of Global Automakers and the Alliance of Automobile Manufacturers, is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, technology and other automotive-related companies and trade associations. The Alliance for Automotive Innovation is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA. For more information, visit our website <http://www.autosinnovate.org>.

found in Maine's soil and water. We recognize that DEP is bound by the requirements of the statute²; however, we believe that DEP can tailor the notification requirements to sectors³ and data that are relevant to the intent of the legislation, pertinent to understanding how PFAS chemicals are finding their way into soil and water, and reasonably available to the regulated community.

A. Improvements in the Second Concept Draft

Auto Innovators recognizes and thanks DEP for a number of refinements to the Concept Draft and the Frequently Asked Questions website⁴ that reflect a positive movement towards a more workable approach.

1. *Clarified Definition of "Carpet or Rug"*

The Concept Draft includes the following clarified definition for the term "carpet or rug":

"Carpet or rug" means any consumer product made from natural or synthetic fabric marketed or intended to be used as a floor covering inside commercial, industrial, or residential buildings. This includes carpeted door mats intended for indoor use.

In turn, the Frequently Asked Questions website now includes the following text in response to the question "What products containing intentionally added PFAS will be prohibited from being sold in Maine?":

Beginning January 1, 2023, fabric treatments for application by the consumer and carpets or rugs intended for commercial, industrial, or residential buildings containing intentionally added PFAS will be prohibited from being sold to consumers in the State of Maine.⁵

We appreciate that this revised definition excludes carpeting used in automobiles and would limit reporting to carpeting intended for use in commercial, industrial, or residential buildings, and thank DEP for making this clarification. This is sensible, as exposure and use patterns for carpeting in vehicles differ from those of carpeting used in residences and commercial buildings.

Auto Innovators is concerned, however, that until a final rule is issued—which may not happen until spring of 2023—this definition remains changeable and does not provide automakers the certainty necessary to plan compliance for the statutory requirements that will come into force on January 1, 2023. Continued uncertainty may result in some products becoming unavailable to consumers in Maine. Therefore, we ask DEP to evaluate and consider other options for providing certainty to the automotive industry regarding its compliance obligations with respect to carpets at the start of 2023.

2. *Limiting Reporting to Chemicals with CAS Numbers*

The Frequently Asked Questions website provides the following answer to the question "Will the Department publish a list of chemicals that meet the definition of PFAS?":

² 38 M.R.S. § 1614.

³ Airports and military facilities in Maine may be major sources of PFAS contamination of soil and water.

⁴ PFAS in Products, Maine Department of Environmental Protection, <https://www1.maine.gov/dep/spills/topics/pfas/PFAS-products/index.html#> (updated Oct. 28, 2022). Auto Innovators recommends that instead of listing an overall update date for the Frequently Asked Questions website, DEP provide "updated" dates on the answer for each of the questions listed on the website, for clearer tracking purposes.

⁵ *Id.*

The statute requires manufacturers to report the amount of intentionally added PFAS in their products by CAS number. Therefore, the Department interprets that PFAS subject to the reporting requirement of the law are limited to those that have a CAS number.⁶

We appreciate the common-sense approach of delineating the universe of chemicals subject to this reporting requirement by those that have a CAS number, as industry commonly uses CAS numbers as the critical identifier for chemical substances, and encourage DEP to make this as clear as possible in the regulatory text as well. While this is a positive start to focusing on PFAS substances that may be impacting soil and water in Maine, we believe that additional delimiters are required, which will be discussed later in these comments.

3. *Recognizing That Refrigerants May Be Exempted*

The Frequently Asked Questions website provides the following answer to the question “How are refrigerants used in HVAC applications handled under this program?”:

The Department is aware that many existing refrigerants either meet or contain a chemical that meets the definition of a PFAS under this program and that future refrigerants may similarly meet the definition.

Currently, under the statute refrigerants would not be subject to a sales prohibition until January 1, 2030. Closer to 2030 the Department may undertake an investigation to determine if refrigerants are, at that time, a currently unavoidable use. Please see the FAQ regarding currently unavoidable uses for more information.

Beginning January 1, 2023 all products, including refrigerants, containing intentionally added PFAS must be reported to the Department via the notification system. Given that refrigerants often have very specific formulations published by organizations such as ASHRAE it may be appropriate for the Department to waive some or all notification requirements.⁷

Auto Innovators is glad to see DEP recognizing the unique status of refrigerants that may contain PFAS chemicals, as the auto industry currently is close to concluding a transition from one refrigerant chemical with a higher Global Warming Potential (GWP) to one with a lower GWP but that may contain PFAS. However, waiting until “closer to 2030” to determine if a particular refrigerant is an “unavoidable use” will provide inadequate time if any substitutions need to be made, since the changeover from one cooling system and refrigerant to another takes several years to implement across all models. Auto Innovators supports DEP’s suggestion that it waive some or all notification requirements for refrigerants.

4. *Added Definition of “Currently Unavoidable Use”*

Auto Innovators thanks DEP for defining the term “currently unavoidable use,” as it is a critical concept for implementation of the statute. We recommend DEP also consider and clarify what is considered “reasonably available,” as alternatives might exist but may not necessarily be available at scale, economically feasible, or available for timely implementation.

B. Statutory Implementation Issues

Auto Innovators is disappointed that DEP did not address many of the implementation issues that we identified in our comments on the first concept draft. There is no reason that a concept draft should be limited to definitions alone; providing some insight into DEP’s thoughts on these implementation issues would have gone a long way in

⁶ *Id.*

⁷ *Id.*

helping the regulated community to better understand how DEP may approach these issues. Where appropriate we have reiterated our earlier comments and we have addressed new or revised information provided by DEP.

1. Lingering Concerns Regarding PFAS Reporting Deadline

Auto Innovators is grateful to DEP for granting an extension to our member companies of the deadline for submission of PFAS data until six months after the effective date of DEP's final rule.⁸ While this extension eases some of the immediate concerns about ability to timely report and the availability of regulations to inform reporting, Auto Innovators is concerned that six months is still an inadequate period of time to put systems into place based on the final rule's contents and to collect the data that DEP will require in the final rule. As we have previously detailed, depending on the level of information and the scope of the product definition that is ultimately adopted by DEP, two to three years is a more appropriate compliance timeframe. The more detailed DEP's information requirements, the more time that industry will need to collect that information—especially for components sourced from foreign suppliers.

We also recommend you review our prior comments on the issue of reporting timeframes, in particular the sections on *Implementation Timetable*, which covers a number of concerns regarding the practicalities of information gathering and reporting for the auto industry.

2. Concerns Regarding January 1, 2023 PFAS in Carpeting Ban

As stated earlier, we appreciate that DEP has clarified the definition of “carpet or rug” in its draft regulation and on the Frequently Asked Questions website; however, until a final rule is issued, that interpretation could change, and is not codified in any regulatory or statutory text.

If DEP does not issue a final rule prior to January 1, 2023, which seems likely, there is no clarity on the definition of “carpet and rug” with respect to the phase-out that is set to commence on January 1, 2023. Therefore, Auto Innovators requests that DEP evaluate its available options and confirm the January 1, 2023 prohibition of PFAS in automotive carpeting will not be enforced unless and until such time as the definition of “carpet and rug” is officially clarified. Without such relief, automakers are left to individually weigh the risks of selling a carpeting product or replacement product based solely off of the proposed definition available in a draft regulation. Automakers may opt to work with their dealer network to pull entire vehicle models or parts from distribution, or to place a stop-sale order on new vehicles or parts in the state of Maine until such time as a final rule is available, in order to ensure compliance as they understand it with the statute. The resulting economic and practical impacts to the state and its residents may be sizeable.

3. Feedback on the Text of the Concept Draft

Auto Innovators provides the following feedback on the text of the second Concept Draft itself.

a. Definitions

Auto Innovators requests that DEP review its previously submitted comments on the terms “alternative,” “commercially available analytical method,” “fabric treatment,” “manufacturer,” “perfluoroalkyl or polyfluoroalkyl substances,” and “product,” which DEP did not address in this second Concept Draft.

“Carpet or rug” means any consumer product made from natural or synthetic fabric marketed or intended to be used as a floor covering inside commercial, industrial, or residential buildings. This includes carpeted door mats intended for indoor use.

⁸ Letter from Blazka Zgenc, Maine Department of Environmental Protection, to Catherine Palin, Alliance for Automotive Innovation (October 25, 2022).

As discussed above, we appreciate that DEP has modified this definition and made it consistent with how other states define a carpet or rug. Auto Innovators requests that this definition be codified in regulation as soon as possible to provide certainty for the regulated community.

“Essential for Health, Safety or the Functioning of Society” means Products that if unavailable would result in a significant increase in negative healthcare outcomes, an inability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Products that are Essential for Health, Safety or the Functioning of Society include those that are required by Federal or State Laws and Regulations. 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.

Auto Innovators recommends the following changes:

Essential for Health, Safety, or the Functioning of Society. “Essential for Health, Safety or the Functioning of Society” means Products, Product Components, and their supply chains that if unavailable would result in a significant increase in negative healthcare outcomes, an inability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Products, Product Components, and their supply chains that are Essential for Health, Safety, or the Functioning of Society include those that are required by Federal or State Laws and Regulations. Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport transportation, and construction.

Auto Innovators recommends that DEP use the term “transportation” instead of “public transport.” A substantial share of the state of Maine is rural, and Auto Innovators expects that both public and private forms of transportation are “essential for health, safety, or the functioning of society” in Maine. In fact, the Governor’s Energy Office notes that “[a]s a rural and geographically large state, Maine people often depend on personal vehicles to get around.”⁹ For example, in the early days of COVID, many governments recognized that auto dealerships that kept citizens’ vehicles functioning were a critical part of maintaining a functioning society and thus exempted them from safety and closure orders—including in Maine.¹⁰

Auto Innovators also believes this definition ought to be more inclusive when it comes to safety factors. It is critical to understand that PFAS use in automobiles is most often a choice based on consumer safety and federal safety standards.

PFAS are critical for the manufacture of electric vehicles, which many—including the state of Maine, per its clean transportation goals—count as key to climate mitigation and reducing greenhouse gas emissions.¹¹ Therefore, PFAS use in vehicles should be considered “essential for health, safety, or the functioning of society” and should be delineated as such in regulation.

Finally, Auto Innovators requests that DEP provide greater detail on how it will evaluate and determine the designation of “essential for health, safety, or the functioning of society.” DEP explained during the October stakeholder meeting that this definition is likely to be a critical element of critical use exemptions, and the regulated community needs more particularity on the evaluation and criteria for meeting this definition. Auto Innovators is looking forward to DEP’s upcoming rulemaking effort on determining a “currently unavoidable use” of PFAS as we believe many vehicles constitute such a use and are interested in applying for that exemption as

⁹ *Clean Transportation*, State of Maine Governor’s Energy Office, <https://www.maine.gov/energy/initiatives/clean-transportation>.

¹⁰ See *Governor Mills Takes Further Steps to Respond to COVID-19, Protect Health and Safety of Maine People*, State of Maine Office of Governor Janet T. Mills (Mar. 18, 2020), <https://www.maine.gov/governor/mills/news/governor-mills-takes-further-steps-respond-covid-19-protect-health-and-safety-maine-people> (“This does not include businesses that provide essential services including, but not limited to: food processing, agriculture, industrial manufacturing, construction, trash collection, grocery and household goods (including convenience stores), home repair and hardware **and auto repair**, pharmacy and other medical facilities . . .”).

¹¹ *Clean Transportation*, *supra*.

soon as is possible.

“Intentionally added PFAS” means PFAS added to a product or one of its product components in order to provide a specific characteristic, appearance, or quality or to perform a specific function. Intentionally added PFAS also includes any degradation byproducts of PFAS serving a functional purpose or technical effect within the product or its components. Products containing intentionally added PFAS include products that consist solely of PFAS. Intentionally added PFAS does not include PFAS that is present in the final product as a contaminant.

Auto Innovators finds the inclusion of “degradation byproducts” within the definition of “intentionally added PFAS” to present compliance challenges. It will be practically impossible for manufacturers to identify degradation products. Automotive OEMs will use the industry’s IMDS system to identify PFAS chemicals with CAS numbers, but this system does not capture degradation products. While an effort to reach into the supply chain may be able to identify PFAS that is not intentionally added, suppliers will not likely have information on degradation products. If this sentence cannot be removed from the definition, Auto Innovators recommends that “degradation byproducts of PFAS” be defined to include “only those known to occur during the chemical manufacturing process of the PFAS.”

Additionally, this current definition of “intentionally added PFAS” is overly broad to the point of being essentially meaningless. The scope of the definition would cause any product that contains even a trace amount of PFAS as part of a substance, mixture, compound, or degradation product to fall within the rule.

Maine DEP should promulgate a definition in its implementing rules that further defines the idea of “added”—i.e., added as pure PFAS; added as part of a substance, mixture, or compound; added before, during, or after production; added by the end product manufacturer or another entity along the value chain.

We also recommend that the rule preamble or other guidance documents developed by DEP provide examples of what “a specific characteristic, appearance or quality or to perform a specific function” would look like in practical, real-world applications. It is not possible to tell if the criteria apply to a manufacturing stage, a facet of a part or component, or only to an end product. It also is not possible to ascertain how the criteria should be weighed, e.g., how important the characteristic is to the product. For example, would the rule apply to a component (or the ultimate end product) where PFAS is added to a compound used in the production of the component, where the PFAS performed a specific function in the compound but not in the component itself (and certainly not in the end product), but where a trace amount of the PFAS remained in the component and thus in the end product?

“Product component” means an identifiable part of a product, including its packaging, regardless of whether the manufacturer of the product is the manufacturer of the product component.

We are concerned about the addition of the term “packaging” in this Concept Draft, particularly given that this term does not appear in the statutory definition of “product component”. DEP needs to better define what it means by packaging and how packaging is considered an identifiable part of the product and a “product component”. Incorporating packaging into this rulemaking will drastically increase the complexity of reporting. For the auto sector, packaging for hard parts, service chemicals, and vehicles will require layers of upstream evaluation and communication with multiple tiers of suppliers as product packaging has not been an area of review for these types of goods before. Presumably the impact on other industries will be similar.

Other states handle PFAS in packaging separately from PFAS in consumer goods, and we recommend the same approach for Maine. It appears that Maine already has a statute in place: in 2019, Governor Mills signed into law An Act To Protect the Environment and Public Health by Further Reducing Toxic Chemicals in Packaging,¹² including PFAS chemicals. We recommend that “packaging” be removed from the definition of “product

¹² P.L. 2019, ch. 277, codified at 32 M.R.S. § 1731 *et seq.*

component” and that PFAS in packaging be managed through regulation under the reducing toxic chemicals in packaging law.

Finally, we continue to recommend the addition of definitions for “de minimis,” “complex consumer goods,” and “complex durable goods” as explained in our prior comments.

b. Notification Requirement

In the second Concept Draft, DEP modified the notification provision to propose collecting information on the “estimated sales volume in the State or nationally for the full calendar year following the year in which the product is being reported[.]”

Auto Innovators recommends the deletion of this requirement. Sales volume has no meaningful relationship to the amount of PFAS that may ultimately enter the soil or water of Maine. In the case of vehicles, autos may be purchased in Maine and moved to a different state, and cars purchased in a different state may be ultimately driven and disposed of in Maine. In addition, state-specific sales volumes by product are often considered confidential business information, and without question should not be publicly available information in a database. Furthermore, sales volumes change annually, and to include them in reporting requirements would potentially necessitate annual notification if this is considered a “significant change” in the reported information.

If DEP insists on including estimated sales volume, Auto Innovators believes DEP should propose a *de minimis* threshold below which the product is not considered an “unreasonable risk.”

c. Product Components

In its second Concept Draft, DEP added the following clarifying text on product components:

For product components for which the Department has previously received notifications which are used in more complex products containing the reported components the manufacturer may report total PFAS in the product including its components, or may refer to the notifications for product components and any PFAS in the remainder of the product.

Then, during the stakeholder meeting, DEP stated that it is continuing to collect information from stakeholders to determine what concentration ranges may be relevant for reporting, and said that it will focus on components and that reporting will need to be specific to each component.

Auto Innovators is confused by this explanation, as it is contradictory to the language in the Concept Draft that “the manufacturer may report total PFAS in the product including its components.” As Auto Innovators has previously explained, because sales of replacement and service parts are an important part of the automotive business, DEP’s treatment of “product” and “product component” are critical. We request that DEP carefully and clearly explain how product components are to be treated, particularly with respect to complex durable goods like automobiles. Auto Innovators recommends that the complete vehicle be reported as the “product,” and that all component parts, including replacement and service parts, be treated as “product components.”

d. Confidential Business Information

Auto Innovators thanks DEP for addressing the issue of confidential business information in the second Concept Draft; however, we are disappointed to see it addressed only as a “note.” These “notes” are not enforceable parts of the regulatory text. We recommend that DEP write its instructions on reporting confidential business information into the actual regulatory text so that it is binding.

e. Fees Proposal

DEP has proposed a fee of \$250 for the first three notifications submitted, and then an additional \$50 for each additional notification. One question that arises for Auto Innovators is what constitutes a “notification”: is a notification counted per product, or if a manufacturer files information on multiple products at the same time, is that considered one “notification”? Clarification, potentially through a definition for the term “notification,” would be helpful. Furthermore, it is difficult for Auto Innovators to provide feedback of these fee amounts without further clarity on how products, and particularly items like replacement parts, should be reported. If replacement parts are to be reported individually as singular “notifications” and are not considered as reported under the complete vehicle or are otherwise exempted from reporting, fee amounts could quickly accumulate into the thousands of dollars, and Auto Innovators would take issue with such an application of the regulation and its required fees.

Finally, as DEP works to refine its draft regulation, we recommend it review our previous comments on a number of suggestions that would develop a regulation that provides useful information to the department and with which it is easier for the regulated community to comply. These include our suggestions on refining the PFAS chemicals covered; setting a *de minimis* threshold; exempting impurities, byproducts, refrigerants, and fluoropolymers; exempting replacement and service parts already manufactured; adopting a tiered approach to reporting; and setting a “known or reasonably ascertainable” standard.

C. Overarching Request: Exempt Automobiles from PFAS Reporting

Auto Innovators requests that DEP consider exempting automobiles from PFAS reporting. The stated goal of the PFAS in products statute is “to address the imminent threat of further contamination of soil and water in the State” through “collect[ing] information regarding the use of PFAS in and to phase out the sale of certain nonessential products containing PFAS[.]”¹³ Assembly and manufacturing of automobiles and the sale of automobiles and automotive replacement parts do not contribute to PFAS contamination in soil or water during their intended use.

Automobiles are assembled using thousands of individual product components manufactured either domestically or by overseas suppliers. These components, which may contain minute quantities of various PFAS chemicals, do not release these PFAS chemicals into the soil or water during the assembly process or as a result of sales within the state of Maine. Small quantities or residues of chemicals used during the manufacturing process usually remain inextricably bound in the vehicle itself. Routine and usual use of complex durable goods such as automobiles by consumers does not result in release of PFAS chemicals to the environment. It is not until a complex durable good reaches the end of its useful life that release of PFAS chemicals may occur during recycling, landfilling or other disposal options. Unlike products such as firefighting foams, where PFAS may enter the environment during intended use, automobiles have limited PFAS releases into the environment.

If Maine is truly interested in understanding whether complex durable goods such as automobiles contribute as a significant source of the PFAS chemicals being found in soil and water, then the focus of this data collection should be on disposal sites and recycling facilities. It is at these types of facilities where releases of PFAS chemicals from complex durable goods would occur and might result in leaching into the soil or water. Knowing if and how much of a PFAS chemical may be in any of the thousands of parts in an automobile will not provide Maine with the information it needs to support the goals of the statute; neither will knowing how many automobiles are sold in the state of Maine, as this figure does not equate to the number of vehicles operating or potentially being disposed of in the state.

¹³ P.L. 2021, ch. 477, preamble.

The types of data that would better inform DEP of the potential sources of PFAS entering the water and soil include information from:

- The federal Toxics Release Inventory (TRI) on domestic facilities that manufacture, process, or use listed chemicals, including a large set of PFAS chemicals. This data includes air, land, and water releases.
- EPA's proposed designation of certain PFAS as CERCLA hazardous substances, which will require reporting of PFOA and PFAS releases (proposed rule in August 2022, final rule expected in summer 2023).
- Permit limitations for landfills and other waste management facilities.
- 30-A M.R.S. §§ 3001, 3755 (the "Junkyard and Automobiles Graveyards" law).
- Rulemakings under the Resource Conservation and Recovery Act to address PFAS.

Therefore, Auto Innovators recommends that DEP reconsider the sectors that should report the enormous amount of data being requested, and which sectors will provide data that is meaningful to understanding the sources of PFAS in soil and water. Requiring manufacturers of automobiles and automotive replacement parts to report on the presence of PFAS in individual components in vehicles sold in the state will provide little if any meaningful data to DEP. Recycling and disposal facilities are better positioned to provide more accurate data on the chemicals released from their facilities.

While the second Concept Draft provides useful insight into the regulatory scope DEP is considering, it would appear that Maine is focused on the most comprehensive PFAS data collection possible. As can be learned from EPA's experience with their proposed TSCA 8(a) PFAS rule, the challenges posed by such a far-reaching data collection effort are significant and need to be worked through before any program is finalized. We look forward to working with you and your staff to further explore these issues.

Sincerely,



Catherine Palin
Alliance for Automotive Innovation

CC: Mark Margerum, Tom Graham, Blazka Zgec
Attachment: July 18, 2022 Letter to Kerri Malinowski re: Comments on Concept Draft for the Maine PFAS in Products Program.