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

Re: Second Concept Draft regarding regulations implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*, 38 M.R.S. §1614

Submitted via e-mail: Kerri.Malinowski@maine.gov; PFASProducts@Maine.gov

Dear Mrs. Malinowski:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on the Second Concept Draft regarding regulations implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) Pollution*, 38 M.R.S. §1614. We are committed to working with Maine DEP to help ensure an accurate understanding of PFAS in products and any associated risks to the public and the environment.

The Association's membership represents 90% of the paint and coatings industry, including downstream users of chemicals. Our membership includes companies that manufacture a variety of formulated products including paints, coatings, sealants and adhesives that may be affected by DEP reporting requirements, due to the broad set of chemicals covered by the requirement, regardless of associated hazards.

ACA appreciates DEP's willingness to interact with stakeholders during this process. We are optimistic that through continued involvement with the public and stakeholder community, DEP will gain a better understanding of PFAS in products and challenges related to reporting.

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

ACA and its members respectfully submit the following comment:

I. Introduction

PFAS encompass a variety of fluorinated chemistries with very distinct physical and chemical properties, used in a variety of products. Maine's adoption of a broad PFAS definition inevitably captures a diverse range of reportable chemicals, whose reporting through one standardized approach proves challenging, due to complexities in the supply chain and difficulty in identifying reportable chemicals across thousands of products. This complexity is compounded by the rapidly approaching reporting date of January 1, 2023.

ACA appreciates DEP's willingness to engage with stakeholders to issue a revised Second Concept Draft addressing issues raised in submitted comments. With this Second Draft, DEP addresses: 1) product groupings for notification, 2) confidentiality of information, 3) notification of sales amounts and/or volumes, 4) fees and 5) currently unavoidable uses. In some instances, DEP proposes modifications beyond notification parameters specified in the act, by requiring notification of sales information and information about product packaging.

A summary of ACA's detailed comments on these topics includes several improvements to the notification process and fees, such as: 1) improving data collection by allowing notification of product groups with similar PFAS within specified concentration ranges, while establishing a *de minimis* reporting threshold, 2) allowing for chemical identification other than by CAS number, 3) capping fees to avoid excessive amounts to any one filer, 4) allowing an exemption to avoid duplicative reporting by downstream users, 5) recognizing that in many instances alternatives are not reasonably available when evaluating essential uses, and 6) exercising DEP's enforcement discretion as it has done with the phthalates reporting program, due to complexity of reporting and the pending deadline.

Additional details are below.

II. DEP should not require submission of sales volumes or sales values since both are CBI

DEP's request for sales information goes beyond reportable information specified in the act at Section 2. The act requires manufacturers to report the amount of PFAS in a product, but not overall sales information or aggregated sales volume of PFAS in a product. Section 2 of the act also authorizes DEP to request, "Any additional information by the department by rule as necessary to implement the requirements of *this Section*." That is, the "additional information" requirement is limited to any information to assist in the gathering of information specified in Section 2. It is not an open-ended requirement allowing DEP to request any information. The paragraph certainly does not support submission of protected confidential business information (CBI) such as sales information.

Sales information disclosed to competitors can affect product placement, pricing and availability. Product manufacturers typically withhold sales information from disclosure. The Second Concept Draft does not clearly specify whether a manufacturer must report sales amount as a dollar value or the volume of reportable product sold. DEP would require manufacturers to report, "Estimated sales volume in the State or nationally for the full calendar year following the year in which the product is being reported." (Section 3(A)(1)(a)(ii), Second Concept Draft). ACA recommends not to require reporting of sales value or volumes since both are CBI (confidential business information).

III. ACA recommends separate guidance for CBI claims related to PFAS notification

DEP has not adequately described procedures for claiming CBI and how CBI will be managed once in DEP's custody. CBI claims are evaluated based on consideration of economic value derived from protection of claimed CBI from disclosure. This concept is adopted into the Uniform Trade Secrets Act at 10 M.R.S. 1542(4) as referenced in the Second Concept Draft. DEP includes one related sentence in the Second Concept Draft that CBI can be claimed at the time of filing and will be managed under the Uniform Trade Secrets Act as adopted in Maine at 10 M.R.S. 1542. The act provides general definitions related to CBI and establishes judicial authority for injunctive relief to protect CBI. The act does not include agency procedures related to claiming, evaluating and managing CBI. Although ACA appreciates DEP's willingness to consider CBI, the current reference to the Uniform Trade Secrets Act does not resolve the issue. Manufacturers face significant uncertainty when attempting to comply with DEP's request for sales information.

IV. DEP should not require reporting of product packaging

With the Second Concept Draft, DEP introduced a requirement for end-use product manufacturers to identify and report a full set of information related to PFAS in product packaging. The requirement is both impractical and beyond notification requirements specified in the statute.

The act also does not support a requirement for notification of intentionally added PFAS in product packaging by a product manufacturer. The notification requirement, as described in section 2 of the act, is limited to a product "for sale in the State that contains intentionally added PFAS." A product is defined as:

> an item manufactured, assembled, packaged or otherwise prepared for sale to consumers, including its product components, sold or distributed for personal, residential, commercial or industrial use, including for use in making other products.
>
> (Section 1, *An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*)

The act includes an "item" packaged for sale in Maine within the definition of a "product," but not the packaging. If the legislature intended packaging be subject to notification, it would have

clearly identified product packaging in the definition of “product” or elsewhere in the act. The legislature did not include such language.

Typically, product packaging is not considered a component of the product. The act includes the following definition of a “product component”:

> "Product component" means an identifiable component of a product, regardless of whether the manufacturer of the product is the manufacturer of the component.

This definition contemplates parts or in the case of formulated products, component raw materials that go into formulation, but not the external product packaging. DEP’s interpretation of packaging as a product component goes against the legislative intent and clear language of the statute. The legislature declined to list product packaging as part of the notification requirement.

V. DEP should establish concentration ranges for reporting identical PFAS while capping fee payment

Manufacturers cannot determine the number of reports required and the associated fees since DEP has not specified concentration ranges for similar products using the same type of PFAS. Establishing concentration ranges would more clearly define product groupings, affecting the number of reports that a manufacturer would file and fee payment.

The Second Concept Draft allows for reporting of product groupings using the same type of PFAS chemicals when contained in the same amount across all products or within a range, with no further specification of ranges. DEP also specifies fees in the amount of $250 for the first three notifications and $50 for each notification thereafter. Considering that even a small or medium sized company can manufacture over a thousand different types of formulated products, at $50 per notification, costs can easily exceed $50,000 in registration fees. Moreover, due to complexities in distribution, companies may not be able to track distribution into Maine. Companies will file notification as a precautionary measure to cover the possibility of distribution in Maine. DEP is likely to receive several notifications to ensure compliance, resulting in excessive fees.

It’s unlikely that fees are proportionate to the cost of administering the program. DEP has not provided any information related to program administrative costs that would justify high fees, issued per notification. ACA suggests capping the fee amount after the first three notifications.

ACA also suggests specifying reporting ranges for the amount of a PFAS chemical in similar products. These reporting ranges should allow for a wide range to balance protection of proprietary information with the public’s need for information and DEP’s fee amounts. ACA suggests reporting in four bands of weight percentage in formulated mixtures: 1-25%, 26-50%, 51-75% and 76-100%. ACA suggests a lower threshold of 1% or at a minimum 0.1% to align with standard disclosure practices in industry and to maintain quality of information submitted to

the agency, as explained in the next section below. If DEP chooses to proceed without a lower notification threshold, ACA suggests DEP modify the first suggested notification band to 0-25%.

VI. DEP should adopt a *de minimis* threshold for notification to preserve quality of information required by the act

Manufacturers of formulated products rely on disclosures from upstream actors to identify fluorinated chemicals and their amounts in raw materials. Amounts below disclosure thresholds typically are not disclosed on Safety Data Sheets. ACA suggests that DEP adopt a *de minimis* threshold for reporting of 1% in mixture, harmonizing with federal OSHA Safety Data Sheet disclosure requirements.[2] ACA further suggests that DEP clarify that downstream manufacturers can rely on disclosures made on an OSHA mandated Safety Data Sheet. Alternatively, DEP could mandate that companies only need to report those PFAS chemicals identified on an OSHA mandated Safety Data Sheet. In effect, companies would not have to report chemicals in trace amounts below SDS disclosure thresholds.

The agency as allowed to interpret Section 2 of the act in a manner consistent with the act's purpose of obtaining information about intentionally added PFAS in products. A reporting threshold is a necessity to preserve the quality of information about PFAS in products. A downstream manufacturer providing estimates about trace amounts in a product is prone to inconsistency and inaccuracy, considering the lack of testing capacity for products.

Downstream formulators face significant barriers to identifying amounts in mixtures when not disclosed. Such information is not readily supplied to downstream users upon request. Because of complexities in the supply chain, suppliers often do not know this information or simply do not want to disclose information about small amounts, even when known. Downstream users often struggle to identify a point of inquiry from a supplier for reportable information. Even if inquiries are submitted, obtaining a response, where information is not compelled or required, is rare.

VII. DEP should allow an exemption for information already reported to the agency

In some instances, a manufacturer of a component or raw material, placing a product on the market in Maine, may report the same information as a downstream manufacturer utilizing the component or raw materials. The coating industry is prone to duplicative reporting since coatings are a ubiquitous component of products. Almost every man-made object has some

[2] Exemptions based on concentration thresholds are common under international systems. For example, under EU REACH, the European chemicals management law, companies manufacturing or importing an amount below 0.1% are exempt from reporting requirements. (See European Commission regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), EC 1907/2006.)

The International Material Data System used by the automotive industry also has a minimum 0.1% concentration tracking requirement. The International Material Data System (IMDS) has been adopted as the global standard for reporting material content throughout the automotive supply chain and for identifying which chemicals of concern are present in finished materials and components. Additional information is available online at: https://public.mdsystem.com/web/imds-public-pages.

type of coating. Consequently, ACA members are the manufacturers of finished products and/or the manufacturer of component products for an extremely broad universe of products ranging from consumer products like pencils and football helmets to durable goods like furniture, toasters, washing machines and medical devices. Every manufacturing industry uses coatings in its processes. ACA suggests that DEP exempt a downstream manufacturer from a reporting requirement where it obtains notification from its upstream supplier that a substantially similar product has been registered.

VIII. DEP should exercise enforcement discretion until sometime after the final rule takes effect

Considering the complexity of gathering relevant information across several products and chemical ingredients, ACA suggests that DEP exercise its enforcement discretion. Enforcement discretion is allowed under the plain language of the act. At Section 2(A) of the act, a manufacturer must submit notification "Beginning January 1, 2023 . . . " The act does not suggest that DEP complete accepting notification shortly after the opening of the notification period. PFAS chemicals are used in a diverse range of products that are essential to the function of society. Allowing for flexibility in submitting information by notifying the regulated community of DEP's enforcement discretion preserves these uses while manufacturers gather information. DEP issued a similar enforcement discretion letter related to a restriction on phthalates in food packaging, issued by DEP in December 2021.

IX. DEP should allow use of alternative chemical identifiers to CAS numbers

The use of CAS numbers for chemical tracking by Maine is problematic, since not all defined PFAS chemicals have CAS numbers associated with them. ACA suggests that DEP allow identification by TSCA accession number or generic name where a CAS number is not available. Section 2(A)(5) of the act allows DEP to require reporting of, "any additional information established by the department by rule as necessary to implement the requirements of this section." Chemical identification is a basic requirement of notification specified in Section 2(A)(3) of the act. DEP would be authorized to allow for additional chemical identification methods to advance implementation of Section 2.

CAS numbers were never intended for regulatory use and are spotty at best. Simply stated, many PFASs do not have CAS numbers assigned. CAS numbers, as their name implies, are developed by the American Chemical Society's Chemical Abstracts Service to aid with identifying chemicals in the literature. As such, they are not exhaustive, may represent broad categories of chemicals, or at the other extreme may be hyper-specific to a specific ion or even to a specific stereoisomer. Unfortunately, they also can overlap with one another (e.g., there can be a CAS number for a mixture of isomers as well as a different one for each individual isomer itself).

U.S. EPA efforts to tackle the long list of PFASs have run into the same problem with missing and overlapping CAS numbers. To avoid these problems, U.S. EPA created its own system of

unambiguous identifiers within the CompTox Chemicals Dashboard (https://www.epa.gov/chemical-research/comptox-chemicals-dashboard) called "DSSTox substance identifier (DTXSID)."

X. DEP should recognize the importance of evaluating substitutes when determining products that are essential for health, safety and the functioning of society

The act authorizes DEP to exempt products by rule where use is unavoidable. As defined in the act, a "currently unavoidable use" is "essential for health, safety and functioning of society," and "alternatives are not reasonably available." With the Second Concept Draft, DEP further explains by providing a definition of "essential for health, safety and the environment":

> "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.

ACA appreciates DEP's recognition of products that are necessary for daily functions on which society relies, including products essential to critical infrastructure. Because of the strength of the carbon-fluorine bond, PFAS chemicals are used in a variety of products, providing products with strength, durability, stability, and resilience. These properties are critical to the reliable and safe function of a broad range of products that are important for industry and consumers, such as preservation of expensive infrastructure elements such as bridges, smart phones, tablets, telecommunications systems, aircraft, solar panels and turbines critical to alternative energy development, medical devices and technology such as magnetic resonance imaging devices and pacemakers, lithium-ion batteries, including those for electric vehicles and engine wirings and gauges. Coatings are often used to enhance performance or as essential to performance and/or safety of products.

ACA emphasizes the importance of evaluating alternatives when identifying unavoidable uses of PFAS. The act also recognizes the importance of considering alternatives in the definition of "currently unavoidable use" by specifying a two-part inquiry into whether a use is unavoidable. First, DEP must determine if the use is "essential for health, safety and functioning of society." Second, DEP must determine that "alternatives are not reasonably available." This second phase is designed to prevent regrettable substitution that could lead to wasted raw materials, products with poor performance or increased safety risks and/or increased environmental footprint. In effect, the inquiry into available alternatives is as important as essentiality when identifying unavoidable uses.

XI. Conclusion

ACA appreciates the opportunity to comment on DEP's Second Concept Draft related to PFAS reporting. ACA suggests the following:

- DEP should not require reporting of sales value or volumes since both are CBI.
- DEP should develop a separate guidance for CBI claims related to PFAS notification
- DEP should not require reporting of product packaging as part of this rule, since it is beyond the scope of the act.
- DEP should cap the fee amount after the first three notifications.
- DEP should allow for reporting of similar products using the same type of PFAS in groups defined by four weight percentages in formulated mixtures: 1-25%, 26-50%, 51-75% and 76-100%, establishing a lower threshold of 1%.
- DEP should allow for chemical identification by TSCA accession number or generic name where a CAS number is not available.
- DEP should exempt a downstream manufacturer from a reporting requirement where it obtains notification from its upstream supplier that a substantially similar product component has been registered.
- DEP should exercise enforcement discretion until some time after the final rule takes effect.
- DEP should allow use of alternative chemical identifiers to CAS numbers.
- DEP should recognize that in many instances alternatives are not reasonably available when determining products that are essential for health, safety and the functioning of society

Please contact us if we can provide any additional information.

Respectfully submitted,

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