November 10, 2022

Maine Department of Environmental Protection
Office of the Commissioner
17 State House Station
Augusta, ME 04333

Re: Comments on the 2nd Concept Draft for PFAS in Products Program

Dear Commissioner Loyzim,

Thank you for the opportunity to provide comments on the updated Concept Draft of the future proposed rule that would detail the notification requirements and sales prohibitions for products containing intentionally added PFAS under An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (LD 1503), codified in 38 M.R.S.A. §1614 *et seq*. (the "Act"). Below you will find Defend Our Health's detailed comments on the concept draft rule. Please don't hesitate to contact us if you have any follow up questions or would like clarifications of these comments.

General Comments

We appreciate the updates that the Department has made to some sections of its concept draft rule in response to suggestions we submitted on the previous concept draft. However, we continue to have significant concerns with some of the language from the earlier draft that has been retained in the updated version. Moreover, there is new language in the updated draft that raises additional concerns, and that we believe violates the the clear language and legislative intent of the Act.

1. **Of particular concern, the Department proposes to limit public access to PFAS information in ways neither envisioned by the Legislature nor supported by the language of the Act.**

These include:

A. limiting disclosure to only those chemicals where Chemical Abstract Service Registration Numbers (CASRN) have been assigned;
B. allowing claims of "confidential business information (CBI)" despite legislators' explicit rejection of this approach;
C. narrowing the definition of "fabric treatment" to only those products used by consumers; and

D. granting blanket extensions for disclosure to entire categories of manufacturers and trade group memberships.

2. **Other provisions may not be intended to limit disclosure or public access to information, but due to imprecise language or lack of detail, could have that effect.**

   A. For example, the definition of "Essential for Health, Safety, or the Functioning of Society" lacks critical detail to ensure that exemptions from the law are narrowly construed, as intended by the Legislature.

   B. Likewise, the proposed rule still fails to provide clarity on the specifics of the data elements the Department is intending to collect -- such as the description of the product, the purpose of the PFAS in the product, and the ranges for the amount of PFAS that must be reported.

The Department has suggested these specifics will be made clear in the reporting system. However, these are not minor details. Understanding the Department's approach to classifying these elements is critical to the public being able to comment on the usefulness and completeness of the proposed data collection. On this point, we again refer to our letter of May 4 for specific recommendations on how to address these elements. Additionally, the Department has not taken full advantage of the Legislature's direction to collect "any additional information" it may need, a recommendation also detailed in our May 4 letter.

   C. Further, some of the Department's decisions are likely to create confusion and unnecessary legal issues. On the one hand, reporters may be misled by the note about CBI in the concept draft and infer incorrectly that an exemption from public disclosure on that basis may exist.

   D. Similarly, the concept draft's note to the definition of PFAS linking to an EPA website might be interpreted to limit the definition to only those PFAS on the EPA website. Instead, the Act specifically references a much broader definition of PFAS, and the note serves only to confuse, not elucidate.

   E. On the other hand, the Department's insistence that food packaging already subject to the provisions of 32 M.R.S. Chapters 26-A and 26-B is not exempt, when this is one instance where the Act clearly states otherwise, is mystifying and counterproductive. The Department needs to carefully review its draft rule as well as its FAQs to remove ambiguity and ensure that the rule is consistent with the Act.

Specific Comments on Draft Rule by Section

3. We continue to have significant concerns about some of the definitions in the rule.

§2 Definitions. Some problematic definitions have been carried forward from the first concept draft, and others are new to the revised draft.

I. Essential for Health, Safety or the Functioning of Society. This definition lies at the heart of An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, and it is important for the Department to get it right. Under the statutory scheme, the sale of a product with intentionally added PFAS won't be prohibited as of January 1, 2030 if the product is deemed to meet this definition and the PFAS is determined to be a "currently unavoidable use," 38 M.R.S.A. §1614.5. If the definition adopted in the rule is too broad, not only will the definition undermine the regulatory framework intended by the Act, but it will unneccesarily expose Maine residents to health-harming PFAS.

The definition of essential use in the concept draft is far too broad and will create loopholes in the implementation of the Act. We support the revised definition below because it is consistent with the health-protective purpose of the Act and carries out the regulatory scheme as intended.

> I. **Use of PFAS That is Essential for Health, Safety, or the Functioning of Society.** A "Use of PFAS That is Essential for Health, Safety or the Functioning of Society" means that there are no available safer alternatives to the use of the chemical, that the function of the chemical is integral to the function of the product, and that the unavailability of the product ~~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~~ Uses of PFAS T~~t~~hat are Essential for Health, Safety or the Functioning of Society include those that are required by Federal or State Laws and Regulations. Products ~~E~~essential for the Functioning of Society includes but is not limited to products integral to addressing climate mitigation, providing critical infrastructure or the~~,~~ delivery of health care~~medicine~~, and lifesaving equipment.~~, public transport, and construction~~. For a use of PFAS to be essential, not only must the product meet the essentiality criteria above, but there must also be no safer alternatives to the use of the chemical for the function provided and the function provided by the chemical must be necessary for the product to work.

K. Fabric Treatment. The Department has significantly narrowed the definition of what is considered a fabric treatment in this second draft. The new definition states ""Fabric treatment" means a "consumer product intended to be applied to fabric to give or enhance one or more characteristics, including but not limited to stain resistance or water resistance". The addition of the phrase "consumer product" implies that the Act applies only to products such as a stain

guard that can be purchased in a store by a consumer and added at home. This is clearly not the intent of the law. The original definition in the law states that a "Fabric treatment" means "a substance applied to fabric to give the fabric one or more characteristics, including but not limited to stain resistance or water resistance". This should include any industrial or commercial use such as any treatments that were applied after the product was manufactured, including treatment applied by the manufacturer or the store at the point of sale. Additionally, as mentioned in our comments on the previous draft rule (prior section C) the Department has added an exemption for dyes that is not in the statute nor supported by the statutory context. Dyes clearly "give or enhance" a "characteristic" – color – and therefore fall within the definition. This exemption should be removed.

N. Manufacturer. As we commented on the first draft of the rule, the note under part N (prior part L) states, "Certain online retail platforms may allow for purchase of products directly from a producer. When no other person meets the definition of manufacturer under this Chapter, the importer will be considered the manufacturer." It is unclear who the Department is suggesting has the reporting responsibility under these circumstances, but it is clear that that the intent and structure of the law is NOT to place obligations on individual consumers. We suggest clarifying the intent here it NOT to put an obligation on an individual for a product being purchased online at retail for their own use.

P. Perfluoroalkyl and polyfluoroalkyl substances (PFAS). The Department asserts that the note under section P (prior part N) providing a URL to a list on the U.S. EPA website "provides clarity on what is considered a PFAS." As we discussed in our comments on the first concept draft, the note does the opposite: it inserts ambiguity and is contrary to the plain language of the Act. The information on that website is a list provided by EPA that identifies chemicals that will meet the PFAS definition. But the list is not an exhaustive list of PFAS that meet the Maine definition, nor does it clarify the definition. While the link may be helpful as an example of chemicals included, it shouldn't be cited as clarifying the already clear, and far broader, definition in Maine law.

U. Significant Change. The concept draft definition proposes that "significant change" would include a specific percentage change in the amount of PFAS included in the product. We continue to believe that defining "significant change" by means of a percentage change creates challenges for compliance and fails to provide useful information to the public. For example, a 10% change in a product with 1 ppt, may be difficult to measure or predict from inputs opposed to a 10% change in a product with 1000 ppm. Rather, we would suggest that a significant change of quantity of PFAS be defined as a change that would result in moving between the Department's defined reporting ranges (e.g. from 0 to 1 ppm to 1 to 10 ppm.)

4. We have several concerns about the notifications requirements in the Concept Draft.

§3 Notifications.

Section 3.A(A)(1). Extension of deadline. The Act provides that the Department may extend the deadline for submitting PFAS disclosure information "if the department determines that more time is needed by the manufacturer to comply with the submission requirement," 38 M.R.S.A. §1614.3. The availability of an extension is obviously intended to be a case-by-case decision based on each manufacturer's circumstances. Instead, it appears that the Department is granting extensions on a blanket basis and based on unspecified criteria. For instance, the Department should not simply grant a trade association an across-the-board extension for every entity that is a member of that trade association -- yet this is currently what the Department is doing. This is troubling and inconsistent with the plain language of the statute, and could raise legal questions about the fairness of the process used to grant or deny and extension. The entity requesting an extension should be required to specifically justify the need for the extension, explain why the requested information isn't readily available, and identify the products for which the extension is being requested. Additionally, entities requesting an extension should be required to submit a partial report that includes any information on PFAS they do have and identifies the parts or products for which they have not yet determined if PFAS are present.

Section A

Section 3(A)(1)(a)(ii). The previous concept draft requested the use of UPC codes. A primary purpose of the Act is to inform consumers. Wherever possible, the Department should require information that is understandable by, and accessible to, consumers. The current version of the rule has replaced UPC codes with "Global Product Classification brick category and code". We are concerned that the use of brick categories will make it hard for consumers to identify products containing PFAS. The process should be as transparent as possible and provide information that is easily available for consumers to be able to make decisions on which products they would like to purchase.

Section 3(A)(2)(c). There may be reportable PFAS under the Act for which a CASRN is not yet assigned. In those circumstances, the rule should require a PMN number, EPA accession number, a full chemical name and formula, or at least a generic chemical name. The Department does not make this clear in the draft rule, and incorrectly states in an FAQ on the Department's website that if there is no CASRN number for a particular PFAS, it is not necessary to report on it. The law does not permit this exemption. The intent of the Act's CASRN requirement is to ensure that manufacturers provide detailed information, not to limit the number of PFAS chemicals that must be reported on. If there is no CASRN number available,

the manufacturer must still report on the presence of PFAS using alternative available information. For a useful reference with guidance on alternative nomenclature, we recommend the Terms and Reference Document provided by Bizngo for Safer Chemicals and Sustainable Materials, accessed here: https://www.bizngo.org/public-policies/principles-for-chemical-ingredient-disclosure-terms-references-guidance-document.

Section 3.A.(1)(d). Claims of confidential business information. Nothing in the text of the Act allows industry claims of "confidential business information (CBI)" to shield from the public information about the presence of intentionally added PFAS in products. Indeed, the clear intent of the Legislature was NOT to allow such claims. The subject was directly raised during work sessions on LD 1503 and the Legislature's Environment and Natural Resources Committee specifically rejected suggested language providing for restricting public dissemination of so-called CBI. The final text of the legislation, codified at 38 M.R.S.A. §1614 et seq, reflects the unanimous vote of the committee. The Act is consistent with the provisions of Maine's Freedom of Access statute, which does not define "CBI" nor provide an exemption from public disclosure. It is notable that when the Legislature has chosen to shield such information it has clearly stated that intention, in contrast to the PFAS Act. [See, e.g., 13 M.R.S.A. §800, detailing when trade secrets may be withheld from disclosure under the Maine Emergency Management Agency statute.]

The Department's note on CBI in the concept draft implies that such claims may be allowed. This implication was bolstered by the statement made by DEP staff during the stakeholder discussion hosted by the Department on October 27, 2022 in response to a question about how the Department intended to handle CBI. You responded that the Department is working with IC2 to incorporate CBI flags in the database it is developing on behalf of the State to collect the PFAS product use reports.

The Department is obligated under Maine law to ensure that the information collected under the Act is publicly available, and developing an accessible system should be a priority. If the Department is crafting an interpretation of what can be withheld from public distribution and integrating this interpretation into the design of its data system (which is currently under development), it must issue specific descriptions of what it intends to withhold and the legal justification under Maine law blocking public access. Offering industry the impression that information may be withheld from public view when such an exemption will not stand under Maine law is both unhelpful to reporters and sets up the Department for costly and distracting legal battles. We are also concerned the Department will be creating substantial (and comepletely unnecessary) future administrative burdens for itself, as CBI claims by submitters are challenged by members of the public seeking access. The Department should remove its

note about CBI, which adds ambiguity where there is none, and not waste its limited resources setting up an unnecessary system to flag CBI claims.

While we do not see a justification for withholding any elements of the reports from public view, we note that the Act allows for reporting the amount of PFAS in a product in ranges approved by the Department. Utilizing these ranges, rather than an exact amount, already allows industry reporters to avoid disclosing their exact "recipes." We would have no objection to the reporting system only capturing data within a reasonable set of ranges. We note that it would be a simple matter to program the system to automatically convert an exact quantity to a corresponding range value and then make that range value available as public information. To be clear, however, there is no basis to withhold the identity of which PFAS (including CASRN or other ID) is included in a product, nor to withhold any descriptors of the product or manufacturer (e.g. company name, product name, description, UPC, etc.)

5. DEP's narrow interpretation of the food packaging exemption is problematic

§4 Exemptions

Section 4(2)(3). Food packaging. The Act specifically exempts food packaging from disclosure and other provisions, 38 M.R.S.A. §1614.4.B. As we have discussed above, there are almost no outright exemptions in the Act; this is one of two, the other being where there is federal preemption, 38 M.R.S.A. §1614.4.A.

The relevant statutory text reads:

> **3.** Exemptions. The following are exempt from this section:
> …
> B. A product subject to Title 32, chapter 26-A or 26-B

In Title 32, the products subject to chapter 26-A and 26-B are food packaging. This exemption is covers products subject to the chapter generally, not narrowly for products subject to a sales prohibition adopted pursuant to that authority as interpreted by DEP. Otherwise the Legislature would have specified a much narrower exemption.

A straightforward reading of the text of the Act carves out food packaging as a class of products because it was understood by legislators and advocates to already be regulated under pre-existing law, 32 M.R.S.A. Chapters 26-A and 26-B, which authorizes regulation of toxic chemicals, including PFAS, in food packaging.

Indeed, the Department itself requested this exemption during the legislative hearing on LD 1503, arguing that PFAS in food packaging was already regulated under Title 32.

Even though the Department's current draft rule includes the statutory food packaging exemption verbatim, during both the October 27 stakeholder forum and a October 21, 2022 workshop on the concept draft with the Board of Pesticides Control Department, DEP staff stated otherwise. At both meetings, the Department stated that any entity that uses food packaging with their name on it, such as a small family farm, will have to report information on PFAS use in that packaging to the Department.

The Department has introduced ambiguity and confusion in its statements about the Act's applicability to food packaging where none exists in the Act. This interpretation could also trigger legal challenges.

6. Clarity is needed regarding the final phase-out date to avoid confusion and concern

§5. Prohibition on Sale of Products Containing Intentionally Added PFAS.

Section 5(C). This section should be amended to include the language from the statute exempting a "currently unavoidable use" of PFAS. That exemption is critical to the framework of the prohibition and including it here will add clarity.

7. The fee structure should be progressive, with larger companies paying more

§6. Fees

Section 6(A). The fee structure set up in this law could adversely impact small businesses and manufacturers. Asking small businesses and manufacturers to pay the same fees as larger corporations such as Amazon, Coca-Cola, or Proctor and Gamble, clearly benefits large corporations at the expense of small business. The Department should set up a fee structure based on sales or some other measurable data to ensure a more even playing field. $250 could put an outsized burden on a small company. Conversely, corporations like Amazon could certainly afford to pay more and should be asked to do so.

Section 6(A)(1) states that there will be no fees for product updates or status changes. Nothing in the law prohibits collecting fees for these purposes, and imposing fees for updates could better carry out the Act's purpose in providing public access to information. As previously stated, the onus for any costs should be on the manufacturers, not the State, and charging an

additional, even if lesser fee, for changes is reasonable and associated with the actual costs of maintaining the public database.

Thank you once again for the opportunity to provide these comments. We look forward to continuing discussions with the Department on its implementation of this critical law. Please feel free to contact Sarah Woodbury, Director of Advocacy, at SWoodbury@DefendOurHealth.org if we can provide additional information.

Sincerely,

Sarah Woodbury
Director of Advocacy
Defend Our Health