November 10, 2022 *via* electronic submission

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Maine Department of Environmental Protection
17 State House Station
August, Maine 04333-0017

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

Dear Ms. Farris,

The Household & Commercial Products Association[1] (HCPA) appreciates the opportunity to provide comments to the Maine Department of Environmental Protection (DEP) on the Second Concept Draft to implement Public Law c. 477, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (LD 1503, 130th Legislature).[2]

HCPA is a voluntary, non-profit U.S. trade association representing approximately 240 companies engaged in the manufacture, formulation, distribution, and sale of products for the household, institutional, commercial, and industrial use. HCPA member companies manufacture and/or market products that may be impacted by this program.

HCPA supports the responsible production, use, and management of fluorinated substances, including regulatory requirements that are protective of human health and the environment for those substances which are persistent, bioaccumulative, and toxic (PBT). HCPA recognizes that DEP is bound by the broad definition of PFAS found within the law but believe that it is critically important to take into consideration the diversity of chemicals which meet this injudicious definition and their distinctive applications. A singular policy approach toward PFAS in products is not reflective of the current marketplace. Further, we advise the agency to closely monitor related activity conducted by the U.S. Environmental Protection Agency (EPA) and other state regulators.

[1] The Household & Commercial Products Association (HCPA) is the premier trade association representing companies that manufacture and sell $180 billion annually of trusted and familiar products used for cleaning, protecting, maintaining, and disinfecting homes and commercial environments. HCPA member companies employ 200,000 people in the U.S. whose work helps consumers and workers to create cleaner, healthier and more productive lives.
[2] 38 M.R.S. § 1614

With respect to the PFAS in the Products Program as described by DEP in its Second Concept Draft, HCPA would like to provide the following comments and requests for clarity.

I. HCPA Requests an Extension of the Notification Requirement

The law requires companies to report certain information beginning January 1, 2023, if they sell a product which contains intentionally added PFAS. However, HCPA requests that DEP utilize its authority under Section 3 of the law to grant a broad extension of the deadline by at least six months after the finalization of the regulatory rulemaking from Maine DEP for all stakeholders. The need for the extension is evidenced by the significant confusion and enquiries DEP has received about who needs to report, the information which companies need to provide, how confidential information will be protected by the Department, and where the reporting must finally occur.

HCPA will discuss later in this letter why clarity is needed regarding a hierarchy of determining who reports. Without clarification, HCPA is concerned that multiple entities will report information to the Department for the same product. Such confusion will distort reporting of the quantity of PFAS substances in the state of Maine. Moreover, it will increase the burden on the Department to collect and aggregate the collected information.

The Second Concept Draft also requests that companies provide additional information beyond what is required in the law. While the Department has the authority to request such information through a rulemaking, companies cannot be expected to provide information until a rulemaking has been completed. An extension of the notification timeline would allow DEP to complete rulemaking, provide regulated companies clear instructions and receive orderly notifications once and reduce the risk of duplicative efforts.

Furthermore, HCPA strongly opposes additional requests of sales data and market share without clear protection of this information from public disclosure. These data are confidential business information and should not be made public. HCPA does not oppose the publication of aggregate data such that any confidential business information is protected.

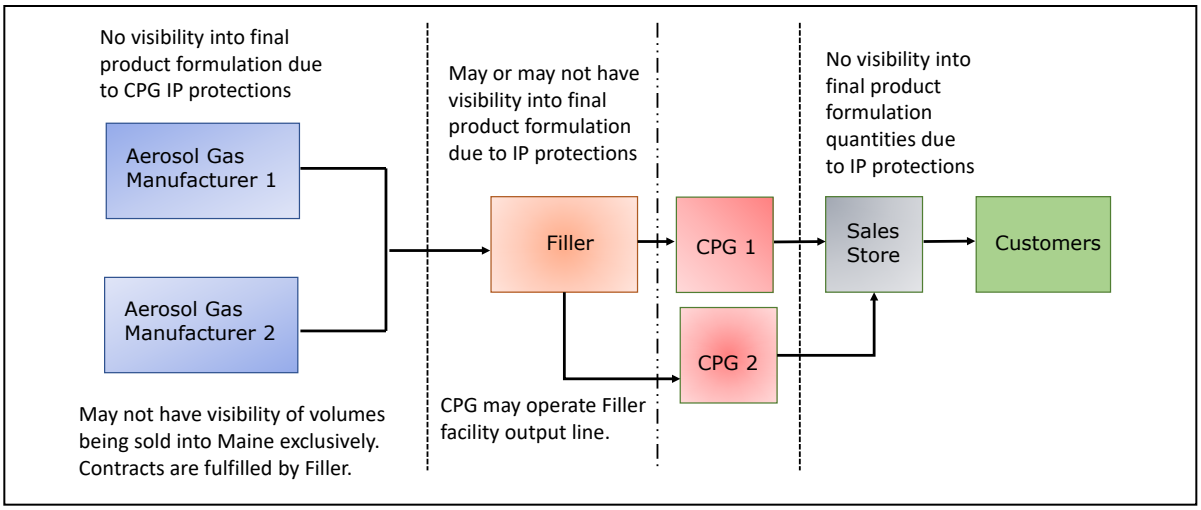
Lastly, an extension is warranted because Maine does not have an adequate and secure electronic database. HCPA believes it is imperative that data submitted to the state be located in one place to reduce the risk of jeopardizing confidential business information via theft, IP breach, or inappropriate dissemination. Furthermore, HCPA is unclear if companies that submitted notifications on January 1, 2023, will be required to report the same information again 90 days after the availability of the digital reporting system. This would be a waste of time and resources for the state and regulated companies.

II. Additional Input from HCPA Concerning Notification

a. HCPA Requests Hierarchy for Determining the Responsible Party to Report to DEP

HCPA is concerned about the confusion that exists over exactly which companies are required to report applications of PFAS as defined by the law to DEP. HCPA's interpretation of the law is that the responsible party is the company which markets the product and whose name appears on the product label. In circumstances where a marketing company is not located within the United States, the importer is the responsible party. However, based on the current wording of the Notifications section of the Concept Draft, there are questions as to whether or not there are reporting obligations for the rest of the supply chain. The term "Product" is defined in the draft as "an item manufactured, assembled, packaged, or otherwise prepared for sale to consumers, including its product components, that is sold or distributed for personal, residential, commercial, or industrial use, including for use in making other products." It is conceivable that a company might sell a component into Maine to a company that assembles the end-use product in Maine, who then sells the fully assembled product to consumers and other users in the state. In this instance, there is confusion as to whether the supplier of the component would be subject to reporting requirements. In other scenarios in which a component is sold to a company that assembles the final product outside the state of Maine, but then the end-use product is sold within the state, there are questions as to exactly who is responsible.

For example, there are different ways aerosol spray manufacturers design their products. Often for aerosolized products the manufacturer of the gas may sell large volumes of a gas to a Filler. The Filler may source raw materials from several gas manufacturers in the industry. After receiving the necessary materials, the Filler may work with a Consumer-packaged goods (CPG) firm on the product development. The manufacturing process depends on the manufacturing procedures set by the CPG in question. The Filler and gas manufacturers may not have any visibility on the final concentration of the product that ends up in the consumer good. In that



case, if DEP were to receive information separately from the gas manufacturer, the Filler, the CPG as the store that finally carries the product then, the same information/quantity of PFAS would be counted on 4 instances - making the data collection meaningless. The Draft does not demonstrate an understanding of complex, multi-tiered global supply chains. They include an array of manufacturers, from small private firms to multinational corporations, providing chemicals, component parts, and assemblies that come together in a final manufactured article.

As such, HCPA recommends DEP draft a definition for the term "responsible party", which describes the reporting hierarchy so that companies can make appropriate determinations and utilize clear terminology within the Notification section of the Concept Draft so there is clarity amongst stakeholders compelled to report.

b. HCPA Comments on the Identity of Substances

HCPA believes it is critical to note that not all substances which fall within the broad definition of PFAS have a Chemical Abstracts Service (CAS) Registry Number. We acknowledge that in the Department's October 28, 2022, Frequently Asked Questions[3], the Department says, "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." This interpretation should be codified in the text of the regulation.

Additionally, HCPA would appreciate clarification of how companies are to report degradation byproducts of PFAS. Many companies are not aware of the exact structure of those degradation byproducts. Further, as the amount of degradation byproducts is often a result of conditions which are out of the control of a manufacturer, stakeholders are unsure of how to report an amount, especially in light of the fact that there are not yet validated test methods to measure the amount in various finished products.

c. HCPA Comments on the Use of Brick Category and Codes

In the Second Concept draft, DEP has introduced the use of brick category and codes as part of the notification process. HCPA questions the value that this information provides to the Department and the residents of Maine. The GS1 Global Product Classification (GPC) standard assist global trading partners to group products in the same way around the world resulting in a common business language that is clear and understandable; however, the value of such categorization is at best limited for consumers in Maine. Furthermore, small businesses who do not sell products around the world do not utilize brick categories and codes as they are able to operate business utilizing English. Thus, the requirement for brick categories and codes would result in a burden to small businesses that does not provide justifiable value.

[3] Accessed November 7, 2022, at https://www1.maine.gov/dep/spills/topics/pfas/PFAS-products/index.html#.

d. HCPA Feedback on the Use of Theoretical Calculations

HCPA appreciates DEP for providing the pathway for responsible parties to use a theoretical calculation based on the inputs and outputs of the manufacturing process. This is critical as there are not yet "Commercially Available Analytical Methods" to accurately determine the content of various PFAS substances in complex product mixtures and articles. However, manufacturers may rely on this allowance for reporting PFAS only if they are reporting PFAS as falling within a Department-approved range found in the Department's online notification system. Unfortunately, the system, to the best of HCPA's knowledge, does not yet exist. DEP should not proceed without commercially available analytical methods for most products and the online notification system, complete with Department-approved ranges for PFAS reporting. It behooves DEP to delay the notification requirement of January 1, 2023.

e. HCPA believes More Consideration must be given to Confidential Business Information

As previously noted, HCPA is concerned over how DEP will handle "trade secrets" or confidential business information. HCPA anticipates that there will be numerous claims for confidential business information by many companies across several reporting elements.

To highlight another example beyond sales data, the very presence of a specific byproduct and impurity within a formulation can be considered CBI if it might divulge proprietary processes or formulation related information. Suppliers should not be required to reveal commercial trade secret information to their downstream customers and the final rule should simplify electronic reporting in a manner that enables "joint submissions".

DEP should acknowledge in the Second Concept Draft that companies are able to assert claims of CBI for any PFAS for which a claim has already been approved by EPA for inclusion on the TSCA Confidential Inventory or for which a claim of protection exists under the Uniform Trade Secrets Act. The final rule should also make clear what information elements can be claimed as confidential, and allow for simplified substantiation procedures for confidential business information claims, so that each individual claim does not require the submitter to complete the Department's substantiation questions on a chemical-by-chemical basis.

Furthermore, HCPA has concerns with DEP's potential use of the Interstate Chemicals Clearinghouse (ICC) Platform, which is a third-party, non-governmental organization, for which there is no public accountability. It is entirely unclear to HCPA what steps, technologies, processes, or tools the ICC Platform uses to protect CBI. Moreover, if the CBI is accessed inappropriately, what penalties or remedies are available to the state and impacted companies?

f. HCPA Requests Clarification on the Inactive Status

Under the Notification section of the Second Concept draft, D(2) states "A manufacturer may update the notification to inactive status whenever a product is modified such that it no longer contains any intentionally added PFAS." HCPA would appreciate more details on when a stakeholder should inactivate the status of a product. Should stakeholders inactivate as soon as they reformulate a product in which the PFAS substance(s) is removed and start production? Or when supply of the reformulated product becomes available in Maine? Or should stakeholders inactivate a product when the previous version of the product which contained PFAS is no longer available for consumers to purchase? It is critical that manufacturers have clarity on when they should inactivate the status of a product, because as written, it appears as though this would happen when a manufacturer starts production of the reformulated product without PFAS; however, it is possible for someone to test a product that is still within the supply chain that was manufactured before the start of when the reformulated product was produced and thus the company would have to respond to questions about the presence of PFAS in an older version.

HCPA would also appreciate clarity on what happens within the public database when a stakeholder inactivates the status of a product due to the removal of PFAS. Does the entry get removed at this point? If not, when does the product which no longer contains PFAS gets removed from the public forum? HCPA would greatly appreciate DEP addressing these questions.

g. HCPA Recommends Exploring All Avenues for Shared Reporting Services with Other States and EPA

HCPA is concerned that the Second Concept Draft requires onerous reporting that may be duplicative. Subsection 3 of the law provides DEP the authority to waive all or part of the notification requirement under Subsection 2 if DEP determines that substantially equivalent information is already publicly available. HCPA implores DEP to explore existing agreements with other states to reduce duplicative actions that will likely result from numerous state actions around PFAS. EPA is in the midst of a rulemaking process under the Toxic Substances Control Act (TSCA) Section 8 that will require those that manufacture and import any identified PFAS to report information regarding uses, disposal, exposures, hazards, and production volumes. HCPA believes that EPA's work is an opportunity for Maine and other states to reduce their reporting requirements and utilize the information gathered by the nation's federal environmental regulator.

HCPA also believes that there may be opportunities for DEP to reduce reporting obligations for companies already reporting product information to other departments within the state of Maine. For instance, companies must register their pesticide products with the Maine Department of Agriculture, Conservation & Forestry before they are allowed to sell their

products within the state, and Maine's Board of Pesticide Control recently adopted[4] a condition of registration which requires registrants to submit an affidavit whether the product contains PFAS. Pesticide product registrations must be renewed each year, so this is an opportunity for DEP to reduce their requirements so long as CBI can be protected.

It is also important for DEP to work with stakeholders when the requirements of LD 1503 conflict with other recent legislation in Maine that encourages the use of substances that are captured under the statutory definition to meet various state goals, such as combatting climate change. HCPA recommends that DEP conduct stakeholder outreach to discuss these occurrences; otherwise, the regulated community will be unsure of how to proceed forward within Maine.

III. HCPA Comments on the Definitions within the Concept Draft

a. HCPA Comments on the Definition of Alternative

HCPA appreciates the definition of "Alternative" within the Second Concept Draft, though believes it needs to be more refined. Specifically, HCPA believes that any alternative to an existing use of a PFAS substance can only truly be a replacement if it is both technologically and commercially feasible. While there may be a replacement substance or substances for a particular application of PFAS that is functionally similar and reduce the potential for harm to human health or the environment, if it is not commercially viable then it cannot be considered an alternative.

Commercial viability means that the solution is scalable to meet the demands of the market with no significant increase in cost. If consumers or other end users can't afford the product due to the cost of the replacement or there is not enough material to meet the demand, then it is not an alternative.

b. HCPA Comments on the Definition of Commercially Available Analytical Method

As written within the Second Concept Draft, the definition of "Commercially Available Analytical Method" could prevent companies and third-party laboratories from using the most accurate and up to date testing methods on their respective products due to the specification that the analytical method remains unchanged. Very few analytical test methods currently exist that are adequately robust enough to accurately test the numerous complex PFAS mixtures within scope of the regulation. HCPA recommends that companies and third-party laboratories have flexibility to modify existing methods or develop new validated methods.

Accordingly, HCPA emphasizes that Total Organic Fluorine (TOF) analysis measures all fluorine materials associated with organic fluorine and does not identify individual PFAS substances.

[4] https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/May22/2-Apr22min-draft.pdf

Further, EPA has noted[5] that TOF testing can often contain inorganic fluorine. There are more specified methods currently under development, such as the EPA Draft Method 1621: Screening Method for the Determination of Adsorbable Organic Fluorine (AOF) in Aqueous Matrices by Combustion Ion Chromatography (CIC) released in April of this year and the Total Oxidizable Precursor (TOP) assay. Tests like these can predict the accelerated degradation and release of many polymeric PFAS but can still have limitations in their ability to reflect a product's life cycle and small changes in laboratory protocol may result in large differences in measured PFAS.

Lastly, HCPA encourages Maine DEP to work with industry and intergovernmental agencies to ensure that the analytical testing requirements allow for robust and accurate results.

c. HCPA Comments on the Definition of Currently Avoidable Use

HCPA thanks DEP for adding a definition for "Currently Unavoidable Use." HCPA supports DEP having a process by which the Department has the ability to determine by rulemaking that an application of PFAS is currently unavoidable. HCPA would appreciate more details on this process beyond the definition in the Second Concept Draft for "Currently Unavoidable Use" before this rulemaking is complete such that stakeholders can assist DEP on how this could best function.

d. HCPA Comments on the Definition of Essential for Health, Safety, or the Functioning of Society

HCPA also thanks DEP for adding a definition for "Essential for Health, Safety, or the Functioning of Society." However, HCPA would also appreciate more information on this definition, primarily how the Department would determine what is essential for things such as climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction. For example, many HCPA members manufacture pesticidal products that reduce, kill or mitigate public health pests – would these products be encompassed within this definition?

e. HCPA Comments on Fully Fluorinated Carbon Atom

HCPA is concerned that the definition of "Fully Fluorinated Carbon Atom" is vague and confusing. HCPA recommends that DEP revisit the definition to provide additional clarity and provide examples of the definition in practice.

[5] Shoemaker and Jones, 2021

f. HCPA Thanks DEP for Modification of Intentionally Added PFAS to Address Concerns Regarding Contaminants

HCPA would like to thank the Department for adding into the definition of "Intentionally Added PFAS" a sentence that this definition does not include PFAS that is present in the final product as a contaminant. This clarification helps narrow the potential products that some companies would have reported due to the potential of a product containing a PFAS substance through unintended means such as water contamination and does not discourage manufacturers, marketers, and importers from monitoring their raw material supply chains so that they would be unaware of such contamination that can otherwise be addressed.

g. HCPA Comments on the Modification of Significant Change

The term "Significant Change" is going to have a different meaning for various applications. HCPA does not believe that an approach in which all significant change means 10% is appropriate. HCPA also believes that there should not be a "one size fits all" approach when defining this term. Rather, HCPA believes that DEP should develop a process through which responsible parties can provide information detailing what they believe a significant change would mean for their application. While the information stakeholders present to DEP will vary based on the application, if there were general topics DEP would wish to receive from stakeholders, guidance would be appreciated.

IV. HCPA Comment Regarding Fees

Any administrative fee that is collected under this program should be used to administer the program.

V. HCPA Requests Clarification Regarding Certificate of Compliance

Section 8 of the Concept Draft refers to a "Certificate of Compliance" in the event DEP believes a product contains intentionally added PFAS and is being sold, offered for sale, or distributed for sale in violation. However, HCPA is not clear on the threshold DEP would need to come to believe a violation has occurred or what the certificate requires companies to show and attest in the event that a violation has not occurred. Furthermore, HCPA requests guidance on what DEP expects to be submitted if a company claims that the PFAS found in a product comes from a contaminant. HCPA would greatly appreciate clarity for the Certificate of Compliance.

VI. Conclusion

HCPA appreciates the opportunity to provide these comments and requests. HCPA looks forward to working with DEP and other stakeholders to ensure the residents of Maine continue to have access to the products that improve their daily lives. Please do not hesitate to contact HCPA if the Department would like to discuss our comments.

Respectfully submitted,

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