AmericanCoatings ASSOCIATION℠

July 18, 2022

Kerri Malinowski
Safer Chemicals, Office of the Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: 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

Dear Mrs. Malinowski:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on the Concept Draft regarding regulations implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances 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, as well as chemical manufacturers. Our membership includes companies that manufacture a variety of formulated products including paints, coatings, sealants and adhesives and their raw materials that may be affected by DEP reporting requirements, due to the broad set of chemicals covered by the requirement, regardless of associated hazards.

[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 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.

ACA and its members respectfully submit the following comment:

I. Introduction

PFAS, or fluorinated chemicals, are a diverse group of chemistries characterized by the strong bond between fluorine and carbon. Because of this strong bond, PFAS provides 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 smart phones, tablets, and telecommunications systems; aircraft; solar panels and turbines critical to alternative energy development; medical devices and technology such as MRI imaging devices and pacemakers; lithium batteries, including those for electric vehicles, and engine wirings and gauges.

Additionally, it is important to note that all PFAS chemistries are not the same. Individual chemistries have their own unique properties and uses, as well as environmental and health hazard profiles. According to the USEPA, "approximately 600 PFAS are manufactured (including imported) and/or used in the United States."[2] Among these 600 are substances in the solid (e.g., fluoropolymers), liquid (e.g., fluorotelomer alcohols) and gaseous (e.g., hydrofluorocarbon refrigerants) forms. The fundamental physical, chemical, and biological properties of solids, liquids and gases are clearly different from one another, as well as their hazard profiles. For example, some HFC's contribute to global warming, but several fluoropolymer's have extremely low global warming potential and are non-flammable and environmentally favorable. Safe and environmentally favorable compounds should not be lumped into the broad "PFAS" definition and should be exempted. Due to this diversity, ACA will use the phrase "fluorinated chemicals" to generally refer to the set of "PFAS" chemicals subject to reporting.

The very distinct physical and chemical properties of the three types of commercial PFAS described demonstrate how varied they are. The use of such 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 deadline of January 1, 2023. Maine's Concept Draft does not clearly address how reporting entities should identify, quantify, report and update information related to fluorinated chemicals. Maine's Concept Draft also does not address how

[2] https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-26034.pdf

trade secret/proprietary information would be managed and protected, or how potential disputes might be resolved.

Other issues we have identified with this rulemaking include:

- More time is required to report information.
- DEP must develop a process and criteria so reporting entities can demonstrate essentiality for health, safety purposes as well as the functioning of our society.
- After the initial notification period, a regularly scheduled reporting requirement instead of reporting for cases of significant change, would more easily assure an updated database, while easing the burden on companies when tracking updates.
- DEP must provide options for specifying chemical identity, methods of quantitation, *de minimis* amounts for reporting and related exemptions.

Additional details follow.

1. **ACA urges the Department to Extend the Deadline for Submission until January 1, 2024**

Under 38 MRSA Section 1612(3), "the department may extend the deadline for submission by a manufacturer of the information required under subsection 2 if the department determine that more time is needed by the manufacturer to comply . . . ". There is no question that more time is needed for manufacturers to comply with the notification requirements. With less than six months until the statutory deadline, manufacturers do not have clear guidance regarding the format and content of the required submission. Without this guidance, manufacturers cannot even begin to prepare for the notification process and the necessary steps for compliance.

The statute does not provide sufficient guidance or clarity as to the requirements for notification. Manufacturers will be required to work extensively with their suppliers to determine the PFAS concentrations in specific raw materials for multitudes of formulas. Given the current state of the supply chain issues facing the coatings and chemical industries, the number of suppliers providing raw materials to any specific manufacturer has grown exponentially and this means that data points will have to be gleaned from multiple sources. There simply is not enough time for manufacturers to determine what data is needed; communicate with several suppliers to develop the data points; compile all of this information; and submit by January 1, 2023. ACA urges the Department to issue a blanket extension of the time until January 1, 2024, to submit the required information due to the manufacturers' need for additional time.

2. **Extension of the Deadline to Submit Notification is Triggered by a Manufacturer's Need for Additional Time**

The statute specifically allows for an extension of time to submit "if the Department determines that more time is needed by the manufacturer to comply . . .". There are no other criteria enumerated in the statutory language to trigger the extension. Under this language, the

Department has the discretion to allow for an extension upon a showing that a covered manufacturer requires additional time to respond.

Additional time could be necessary to identify the formulas that contain intentionally added PFAS; to identify the supplier that is providing the raw materials that may contain intentionally added PFAS; to identify the amount or range of volume of intentionally added PFAS in specific formulas; to perform quality assurance steps; and to compile this information in a format that is reasonable and acceptable. All of these steps will require time to complete. None of this information is readily available to our manufacturers and will require extensive collaboration with supplier partners.

3. **Essential Uses of PFAS compounds meet the criteria for "Currently Unavoidable use"**

There is express recognition in the statute that uses of PFAS compounds may be essential to a finished product's performance. In 38 MRSA 1612(5), the Department is given authority to allow the continued sale of products that contain PFAS compounds where it is a "currently unavoidable use". A "currently unavoidable use" is defined as a "essential for health, safety or the functioning of society and for which alternatives are not reasonably available."

Many products require the use of specific compounds, such as PFAS, in order to provide specific and unique performance characteristics. However, paint and coatings are rarely the "finished product" – they are an essential component of a finished product. Every manufactured product has a coating which not only protects the finished product but also provides other performance characteristics, like durability, appearance, corrosion resistance, etc. There is no question that many of these products, like medical devices and automobiles, are essential for health and safety purposes as well as the overall functioning of our society. ACA urges the Department to develop regulations that allow manufacturers to demonstrate essentiality for health, safety purposes as well as the functioning of our society.

4. **Reporting Should be Required on an Annual Basis or Upon Request from the Department**

ACA urges the Department to consider requiring notification under this statute on a schedule that could be easily incorporated into a regulatory calendar. Requiring updated reports or revised reports upon changes in the formula, supplier, or contact information is extremely difficult to monitor and track. Changes in the formula could occur every time a new shipment of raw materials is delivered to a manufacturing facility and could result in numerous reports required over the course of a year. Tracking and monitoring these changes as well as the required reporting data points will be very complex for the manufacturer and confusing for the Department. A reporting schedule is more likely to serve the Department's need as well as provide some efficiency for manufacturers.

5. DEP must clearly specify methods of identifying chemicals and amounts, while exempting non-identifiable chemicals.

Notification requires clear knowledge of a chemical's identity and amount in a product. ACA is concerned that the concept draft does not propose a viable method of chemical identification and methods to discern amounts of reportable chemicals in products.

The notification requirements is described in Section 3(A)(2)(c) of the Concept Draft:

> "(c) The amount of each of the PFAS as a concentration, identified by name and its chemical abstracts service (CAS) registry number, of each PFAS in the product or any product component. reported as an exact quantity determined using commercially available analytical methods, or as falling within a range approved by the Department;"

a. Notification should allow for situations where specific chemical identity is confidential.

DEP proposes companies identify reportable chemicals by CAS number. ACA suggests that DEP:

1. Exclude any chemical not identified by CAS number on a Safety Data Sheet from reporting; or

2. Expand acceptable chemical identification to include TSCA accession number and generic name, so chemicals can be identified be any one of these identifiers - CAS number, TSCA accession number or generic name.

The second option is not as desirable as it may compromise confidentiality of chemical identity. Manufacturers of formulated products such as paints, adhesives, sealants, etc., rely on information provided by upstream chemical manufacturers. Often, chemicals in raw materials are not identified by CAS number to protect confidentiality of a formulation. Instead, chemicals may be identified by the TSCA accession number and/or generic name used for registration on the confidential portion of the TSCA Inventory. Typically, when a company proceeds with commercialization of a new chemical with a confidential identity, EPA assigns it a TSCA Accession Number for listing on the confidential inventory, with a generic name conforming to EPA requirements, such that the name conceals at least one structural element of the chemical.

To protect confidentiality, chemical manufacturers usually will not provide CAS numbers to downstream formulators. Even the act of disclosing those CAS numbers can break confidentiality of the chemical, requiring disclosure of the complete chemical identity on the TSCA Inventory and in the market generally. Chemical manufactures spend millions of dollars to bring new chemicals to market. Maintaining confidentiality of specific chemical identity, including a CAS number or several CAS numbers in a mixture, provides an important incentive supporting innovation of new products, including safer, "green" chemistries.

Considering confidentiality of specific identities, manufacturers of formulated products cannot consistently identify fluorinated chemicals by CAS number but may be able to provide TSCA

accession numbers or generic names for any chemicals in mixtures in amounts above OSHA disclosure thresholds. These thresholds, set at 0.1% and 1%, depending on hazard classification, compel an upstream manufacturer to list the chemical on a Safety Data Sheet, provided to the downstream formulator.

ACA recommends that DEP exclude any chemicals not identified by CAS number from reporting. In the alternative, ACA recommends allowing notification by TSCA accession number, CAS number or generic name. This latter option may compromise confidentiality. Under TSCA, to establish confidentiality of chemical identity, a company must describe measures it has taken to protect chemical identity from the public, among other criteria. By notifying DEP of a TSCA accession number or generic name, a company may break confidentiality by disclosing one element of chemical identity, presence of at least one carbon-fluorine bond. It's unclear how EPA would interpret application of confidentiality requirements for this one structural element. To avoid any ambiguity in confidentiality requirements and to ensure protection of confidentiality, ACA recommends excluding any chemicals where CAS number is not list on a Safety Data Sheet from the reporting requirement.

b. DEP should specify a method of detection for PFAS in products.

ACA is concerned that DEP has not identified a viable test method for detection and reporting of fluorinated chemicals in products, leading to disparity in reporting methods and inaccurate reports. In the Concept Draft, DEP explains that third-party testing is not necessary, when a reporting entity uses a commercially available analytical method, including those methods identified by EPA for PFAS identification.[3] Currently, manufacturers are not aware of standardized analytical methods for PFAS identification in articles and chemically formulated products. EPA's test methods are not designed for products. DEP's reporting requirement would inevitably require third-party testing and development of analytical techniques by a third-party.

On its PFAS webpage, EPA identifies analytical methods identifying PFAS in water and air. EPA explains that it is currently developing test methods for PFAS to understand PFAS contamination across other environmental media. Notably, EPA has not developed analytical methods for PFAS in products, and it has not identified existing analytical methods for products. As explained on EPA's PFAS webpage:

[3] DEP provides an explanation of acceptable "commercially available analytical method" in Section 2(D) of the Concept Draft:

> "Commercially available analytical method" means any test methodology used by a laboratory that performs analyses or tests for third parties to determine the concentration of PFAS in a product. Commercially available analytical methods do not need to be performed at a third-party laboratory; however, they must remain unmodified. Commercially available analytical methods include methods approved by the U.S. Environmental Protection Agency (EPA) when used in accordance with that approval.

EPA scientists are developing validated analytical methods for drinking water; groundwater; surface water; wastewater; and solids, including soils, sediments, biota, and biosolids, which may eventually become standard methods or research methods.[4]

ACA requests DEP to clearly identify analytical methods for reporting of PFAS in chemicals, formulated products, articles and other types of products.

c. A *de minimis* threshold of 1% in mixture would provide DEP with information without imposing an unrealistic reporting requirement on manufacturers of formulated products.

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. 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.

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.

DEPs concept draft has no exemptions for *de minimis* amounts. *De minimis* thresholds are common for federal chemical reporting rules. EPA's Chemical Data Reporting Rule (CDR), for example includes a *de minimis* threshold of 25,000 pounds per year or 2,500 pounds per year for certain regulated chemicals.

Exemptions based on concentration thresholds are common under international systems. For example, under EU REACH,[5] the European chemicals management law, companies manufacturing or importing an amount below 0.1% are exempt from reporting requirements.

[4] See additional information here: PFAS Analytical Methods Development and Sampling Research | US EPA

[5] European Commission regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), EC 1907/2006.

The International Material Data System[6] used by the automotive industry also has a minimum 0.1% concentration tracking requirement.

ACA suggests that a percentage threshold based on the OSHA SDS (Safety Data Sheet) disclosure threshold would allow for expeditious gathering of reportable information. OSHA requires disclosure of chemicals based on a chemical's hazard classification, at 1% for chemicals classified with physical hazards and some health hazards and 0.1% for chemicals associated with certain other health hazards (e.g. carcinogenicity and reproductive toxicity). Because fluorinated chemicals are such a diverse group of chemicals, fluorinated chemicals vary in hazard classification. As such, some may be disclosed at the 0.1% threshold while others will be disclosed at the 1% threshold.

With a 1% threshold, a reporting entity can rely on the Safety Data Sheet to identify all hazardous fluorinated chemicals in concentrations above that amount. With a lower reporting threshold, at 0.1% for example, a formulator may not have knowledge of fluorinated chemicals in mixtures at the 0.1%-1% range. The Safety Data Sheet would only disclose those fluorinated chemicals identified with health hazards requiring disclosure at 0.1%, for example carcinogens or reproductive toxicants. Fluorinated chemicals at 0.1%-1% range that are not carcinogens may not be disclosed on the Safety Data Sheet. In effect, a downstream formulator would not know of presence of the fluorinated chemical.

Alternatively, DEP could stipulate that a downstream formulator is only required to report those PFAS chemicals disclosed on an OSHA mandated Safety Data Sheet, regardless of whether the chemical is disclosed at the 0.1% or 1% threshold. This approach would capture those chemicals disclosed at the 0.1%, without being unduly burdensome.

6. Conclusion

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

- ACA urges the Department to issue a blanket extension of the time until January 1, 2024, to submit the required information due to the manufacturers' need for additional time.
- ACA urges the Department to develop regulations that allow manufacturers to demonstrate essentiality for health, safety purposes as well as the functioning of our society.
- ACA urges the Department to consider requiring notification under this statute on a schedule that could be easily incorporated into a regulatory calendar.

[6] 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.

- ACA recommends excluding any chemicals where CAS number is not list on a Safety Data Sheet from the reporting requirement.
- ACA suggests that DEP expand acceptable chemical identification to include TSCA accession number and generic name, so chemicals can be identified be any one of these identifiers - CAS number, TSCA accession number or generic name.
- ACA requests DEP to clearly identify analytical methods for reporting of PFAS in chemicals, formulated products, articles and other types of products.
- ACA suggests that DEP adopt a *de minimis* threshold for reporting of 1% in mixture, harmonizing with federal OSHA Safety Data Sheet disclosure requirements. ACA further suggests that DEP clarify that downstream manufacturers can rely on disclosures made on an OSHA mandated Safety Data Sheet.
- Alternatively, DEP should mandate that companies only need to report those PFAS chemicals identified on an OSHA mandated Safety Data Sheet, as disclosed at the 1% or 0.1% thresholds, according to OSHA requirements.

Please contact us if we can provide any additional information.

Respectfully submitted,

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