July 18, 2022

Maine Department of Environmental Protection
Office of the Commissioner
Attn: Kerri Malinowski Farris
17 State House Station
Augusta, ME 04333

Dear Kerri,

Thank you for allowing us to provide comments on the Concept Draft of a proposed rule that would detail the notification requirements and sales prohibitions for products containing Intentionally Added PFAS under Maine's Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, 38 M.R.S. §1614 (the "Act"). Below you will find Defend Our Health's detailed comments on the proposed rule. We are also attaching a letter we previously send to the Department in partnership with NRDC that lays out some of our suggestions for implementation. Please don't hesitate to contact us if you have any follow up questions or clarifications on the comments we provided.

General Comments

One of the topics raised during the stakeholder discussion hosted by the Department was how it intended to handle what industry referred to as "confidential business information (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 reports.

However, neither the Act nor Maine's Freedom of Access statute define or provide for any exemption from public disclosure of so-called "CBI." In debating the Act, the Legislature's Environment and Natural Resources Committee specifically rejected language to include restrictions on the public dissemination of the resulting information.

The Department is obligated under Maine law to ensure that the information collected under the Act is publicly available and making an accessible system should be a priority for it. If the Department is crafting an interpretation of what can be withheld from public distribution and integrating this into its data system

that is currently under development, it must issue specific descriptions of what it intends to withhold and the legal justification under Maine law for such an exemption to 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 setting up the Department for costly and distracting legal battles. We are also concerned the Department will be setting itself up for substantial administrative burdens to review claims of CBI made by submitters when challenged by public interest advocates seeking access.

While we do not see a justification for withholding any elements of the reports from public view, we would also note that the law allows for reporting the amount of PFAS in a product in ranges approved by the department. Utilizing these ranges, rather than an exact amount, seems like a more than generous compromise for industry to avoid disclosing their exact "recipes." We would have no objection to the reporting system only capturing data within a reasonable set of ranges, and note that it would be trivial to program the system to automatically convert an exact quantity to a corresponding range value and make that range value available for public consumption. 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. product name, description, UPC, etc.)

We would also note that the proposed rules are silent on providing additional 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. The Department suggested these would be made clear in the reporting system. However, these are not minor details. Understanding the department's approach to how it is going to classify these elements is critical to the public being able to comment on the utility and completeness of the proposed data collection. 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, and we reiterate our suggestions in the May 4 letter.

Specific Comments on Draft Rule by Section

2 Definitions. We have concerns with several of the definitions that were included in the draft material.

C. Carpet or rug. The definition in the draft includes the sentence "Carpet or rug does not include products that are placed on the floor that do not have a primary purpose of covering or protecting the floor." This was not in the original statute and confuses rather than elucidates the issue. It seems to add an element of intent of use that would be hard to determine and could lead to bad actors claiming a "for decorative use only" sticker slapped on a rug exempts it from regulation. One

could argue that many rugs aren't necessarily used to "protect the floor" but would still meet the statutory definition of a rug or carpet and should be regulated as such.

J. Fabric Treatment. The Department 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.

L. Manufacturer. The note under 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." We are not exactly clear who the Department is suggesting has responsibility, but it is clear that that the intent and structure of the law is NOT to place obligations on individual consumers, and we suggest clarifying the intent here it NOT to put an obligation on an individual for a product being purchased at retail for their own use.

N. Perfluoroalkyl and polyfluoroalkyl substances (PFAS). The note under section N provides a URL to a list on the U.S. EPA website and states that this URL "provides clarity on what is considered a PFAS." This isn't the case. The information provided by the US EPA at that website is a list 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 in anyway expand upon the meaning of the definition. While the link may be helpful as an example of chemicals included, it shouldn't be cited as clarifying the already clear definition in Maine.

R. Publicly available. It needs to be made clear that "publicly available" means that it is easily and readily accessible to Mainers and the Department. If information is in a freely accessible government online database, such as the database for pharmaceutical ingredients, that is appropriately publicly available. It cannot mean something that is available only in hard copy in a different state or is information that the general public would have to FOIA to be able to access. Requiring the reporter to identify where the information is available to qualify for an exemption should also be considered.

S. Significant Change. The proposed definition lays out that the significant change would include a specific percentage change in the amount of PFAS included in the product. A percentage raises challenges since 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.)

3 Notifications.

Section 3(A)(1). Extensions should not be granted on a blanket basis. The entity requesting an extension should have to justify that the information being requested isn't readily available. Additionally, they should still have to submit a partial report with the extension request that identifies specific products, include any information on PFAS they have information for and also identify parts or products for which they have not yet determined if PFAS are present.

Section 3(A)(2)(a)(ii) should say "UPC number" to be clear the number is the part needed, not the graphic itself.

Section 3(A)(2)(b)/3(A)(2)(c). When it comes to reporting PFAS in both a product and a component of a product, the Department needs to set clear guidelines on how a manufacturer should report this information. In order to have a complete picture regarding the amount and type of PFAS in each product, a manufacturer should have to report the PFAS in the product and in each component part. Information on each component and total PFAS in the product can be included in a single report for the product, with sections for each component. However, the manufacturer should also have to report the components separately if they are sold separately. For instance, parts that are used in a car are sold as part of the car and separately for repair. There can be one report for the car and its components and then a separate report for any components that are also being sold separately.

Section 3(A)(2)(c). There may be PFAS reportable for which there is not an assigned CASRN, and the rules should require PMN, EPA accession number, or a full chemical name and formula if a CASRN is not assigned.

Section 3(A)(2)(c)(ii) appears to not be related to (c) and should probably be relabeled 3A(2)(d).

Section 3(B). The Department should not allow submittal by any method other than that which results in the immediate and automatic population of the information in its database, be it the direct input via a web interface or uploading of a datafile that can be automatically processed into the database. Given the volume of information it will be receiving, it is not reasonable for the Department to accept paper reports, email submissions, or other formats that would require staff resources to enter into the database.

Section 3(E). This section needs to be clarified to make clear that this section does not apply to the consumer. The way it is drafted implies if a person purchases a product while on vacation away, the consumer would be the one responsible to report any PFAS to the Department. This is obviously not the intent of the law and needs to be clarified.

4 Exemptions

Section 4A(1). The Department should better identify specific categories that qualify for this exemption. For example, on the webinar, the Department was asked about pharmaceuticals. We believe that any drugs approved by the FDA likely meet the criteria for exemption as the FDA controls the presence of PFAS in drugs, additionally, the composition of FDA regulated drugs is already publicly available.

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

Section 5(C). This section should be modified to include the language from the statute exempting uses of PFAS that are currently unavoidable. That exemption is a critical to the framework of the prohibition, and even if the Department has not yet defined unavoidable, it is important that it be clear that some exceptions will be made.

6. Fees

Section 6(A). The language in this draft limits the fees to covering administrative costs for managing the program. However, the law authorizes a much broader purpose of fees in recognition of the fact that the costs associated with the use of PFAS should fall on the manufacturers. The Department should be generating fees for further rule making on currently unavoidable uses, as well as for education, technical assistance, and even funding installation of pre-treatment systems.

Section 6(A)(2) states that there will be no fees for product updates or status changes. Nothing in the law prohibits gathering fees for these purposes. As previously stated, the onus for any costs should be on the manufactures, not the state, and charging an additional, even if lesser fee, for changes is reasonable and associated with actual costs to maintaining the system.

7. Failure to Provide Notice

Sect 7(A)(1) – Retailers who are also manufacturers (e.g. those with store brands) should not be exempted. We would suggest: “The prohibition in this Section does not apply to a retailer in the State of Maine unless the retailer sells, offers for sale, or distributes for sale in the State a product for which the retailer has received a notification pursuant to Section 8(A)(2) that the sale of the product is prohibited unless the retailer is also the manufacturer.”

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Thank you once again for the opportunity to provide these comments and we look forward to continued 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

Implementation of Maine PFAS Notification Requirement

As an introductory matter, we note certain terms are defined in Maine law, thus the notification requirements must be applied consistent with these definitions. These terms include the definitions of PFAS, manufacturer, product, product component, and intentionally added.

We are also mindful of the varied purposes for using the data to be generated through the notification process. While DEP will clearly be a principal user of the data for phase out program implementation purposes, there will be other important consumers of the information as well. State and federal agencies will be relying upon these data to complement other existing sources of information to develop a more complete understanding of USA PFAS production and uses. And the public will access the data to better understand the situation in Maine and nationally, and to inform their purchasing choices as they seek products with little or no potential for PFAS exposure.

Accordingly, when developing the notification regulations and the associated data base, DEP must bear in mind all the potential users of the data, and visualize a data base that is publicly accessible, comprehensive, user friendly, and searchable for a variety of different purposes.[1] We are pleased to hear that DEP will be working with NEWMOA in this regard, given NEWMOA's experience with mercury product reporting and the IC2 clearinghouse.

Element 1 – "A brief description of the product"

- Virtually identical wording appears in the Maine mercury product notification requirement, at 38 MRSA 1661-A.1.A. DEP guidance on the mercury product notification links to the IMERC reporting form. See https://www.maine.gov/dep/mercury/hgrequire.html. Under the mercury notification requirements, information on each individual product must be provided, unless the products meet "category" reporting eligibility (all of the products in the category are similar and have the same use, the mercury serves the same purpose and is in similar components, and all of the products fall within

[1] Further support for these attributes can be found in the Principles for Chemical Ingredient Disclosure endorsed by a wide array of businesses, government agencies, and civil society. See https://www.biznGO.org/public-policies/principles-for-chemical-ingredient-disclosure.

the designated mercury ranges allowed by Maine DEP/IMERC).[2] For each product, the manufacturer must provide what the product is (i.e., truck), which component parts of the product contain the mercury (i.e., headlights), and the number of these components in a typical unit of the product.[3]

- The State of Washington's Children's Safe Products Reporting Rule requires that the manufacturer provide information on the "product category or categories in which it occurs".[4] Thus, the Washington reporting requirement applies to the product category, not to the product, and thus differs from Maine law in that important respect. Based upon the statutory definition of children's products, the Department of Ecology identified 15 children's product types (i.e., arts/crafts/needlework, beauty/personal care/hygiene), and within each of these product types, utilizes the GS1 Global Product Classification System (GPC) to provide the product description. Manufacturers are provided a drop-down menu for each of the product types, and they must select the applicable GPC Brick Code within the product type.[5] The manufacturer must also identify the product component in which it occurs. The Department of Ecology has identified eight component choices for children's products (bio-based materials, synthetic polymers), and the manufacturer must select all of the relevant component parts (there may be more than one).[6]
- Under EPA's proposed PFAS reporting rule, the reporting obligation falls upon the PFAS manufacturers, not the manufacturers of products using PFAS. This is a critical difference with the Maine reporting requirement. However, PFAS manufacturers are required to provide information on the categories of use for the PFAS manufactured.[7] This information includes how the PFAS are used in product manufacturing (choose one of five processing types, such as "processing – incorporated into article"), and the industrial sector codes applicable to the type of processing (i.e., IS 22 – plastics material and resins manufacturing). And most importantly for the Maine requirement, PFAS manufacturers must provide the

[2] The Maine PFAS law defines "product" as "an item", meaning each product should be considered separately unless it meets Maine DEP's approval for a category or type of product grouping under 38 MRSA 1612.2.B.

[3] Note that for lamps, due to the uniformity of lamp descriptions and applications, a lamp-specific form was created with a uniform set of descriptions and applications provided, from which the manufacturer chooses the relevant identifiers. This is something the Department may wish to consider for certain product types after the initial round of PFAS notifications are submitted, when more is known about specific product components and functions within product types.

[4] See https://app.leg.wa.gov/WAC/default.aspx?cite=173-334-080&pdf=true.

[5] See the Manufacturer Reporting Guidance, available at https://apps.ecology.wa.gov/publications/documents/1704040.pdf, pp. 6-16.

[6] Id. at 17.

[7] See proposed 40 CFR 705.15(c), at 86 Fed. Reg. 33958 (June 28, 2021).

relevant consumer/commercial category codes for the products ultimately produced (i.e., CC111 – All-purpose waxes and finishes).

Recommendation: The Maine mercury product notification is the most relevant and instructive model for the PFAS notification requirement. To facilitate data comparisons and exchange with EPA, DEP should also require submission of the industrial sector and consumer/commercial codes to be used by EPA.

Element 2 – The purpose for which PFAS are used, including in product components

- Virtually identical wording appears in Maine's mercury product notification requirement. See 38 MRSA 1661-A.1.B. This wording is repeated in the notification requirement itself.
- Under the State of Washington reporting requirement, a "brief description of the toxic chemical function in each product component is required." The Department of Ecology provides a list of functions for the reporter to choose from.[8]
- EPA's proposed PFAS reporting rule uses a similar approach to Washington, but a larger set of function codes (see Table 4 at 86 Fed. Reg. 33959-60 (June 28, 2021).

Recommendation: Use the EPA function codes to facilitate data comparisons and make it easier to report (manufacturer would choose the code(s) from a dropdown menu).

Element 3 – The amount of PFAS in the product, reported as an exact quantity, or with a department approved range

- The Maine mercury product notification requirement contains virtually identical language. See 38 MRSA 1661-A.1.C. As implemented, product manufacturers report either the exact amount, or within ranges established for formulated or fabricated products.[9] For fabricated products, the authorized ranges per component are 0-5 mg, 5-10 mg, 10-50 mg, 50-100 mg, 100-1,000 mg, and greater than 1000 mg. For formulated products, the

[8] See the Manufacturer Reporting Guidance, available at https://apps.ecology.wa.gov/publications/documents/1704040.pdf, p. 30.

[9] A fabricated mercury-added product is a combination of individual components, one or more of which has mercury added, that combine to make a single unit. A formulated mercury-added product is a chemical product, including but not limited to laboratory chemicals, cleaning products, cosmetics, pharmaceuticals, and coating materials that are sold as a consistent mixture of chemicals.

authorized ranges per component are 0-10 ppm, 10-50 ppm, 50-250 ppm, and greater than 250 ppm.

- The State of Washington requires reporting of the exact amount, or within one of 6 ranges: less than 100 ppm, 100-499 ppm, 500-999 ppm, 1,000-4,999 ppm, 5,000-9,999 ppm, 10,000 ppm or greater.[10] Note the Washington reporting regulations only require reporting above 100 ppm, and thus differs significantly from Maine law.
- EPA's proposed PFAS reporting rule requests data on "the typical maximum concentration", reported in one of five ranges (by weight): less than 1%, 1-30%, 30-60%, 60-90%, and at least 90%.[11] One reason these ranges are so large is the reporting requirement applies to the PFAS manufacturers, not the product manufacturers, so precise information on the PFAS concentrations in products may be unavailable to the entities reporting. In contrast, Maine's reporting obligation applies to companies in the best position to know more precise concentrations.

Recommendation: PFAS are toxic at very low concentrations. Greater precision at lower concentrations will complement other PFAS reporting programs with ranges targeting higher concentrations, and will enable DEP to provide a stronger assessment of potential contamination of Maine's land and water resources, as contemplated by Maine law..

In the case of both fabricated and formulated products, consistent with the mercury notification program, the recommended ranges apply to the PFAS-added component of the product, not the entire product.[12] For formulated products, we additionally recommend that companies provide either the PFAS concentration in the entire product or the proportion of the PFAS-added component to the entire product. These additional data on PFAS concentrations in formulated products as a whole will facilitate DEP's understanding of potential wastewater discharges to Maine's waterbodies and/or POTWs.

The ranges are a simplified numeric sequence, recognizing the widely varying product categories covered by the reporting requirement. The proposed ranges are as follows:

Less than 1 ppb

1 ppb to less than 10 ppb

[10] See the Manufacturer Reporting Guidance, available at https://apps.ecology.wa.gov/publications/documents/1704040.pdf, p. 21.
[11] See Table 6 at 86 Fed. Reg. 33963 (June 28, 2021).
[12] For example, the ranges apply to the fabric treatment on a car seat, not the car seat or the car.

10 ppb to less than 100 ppb

100 ppb to less than 1 ppm

1 ppm to less than 10 ppm

10 ppm to less than 100 ppm

100 ppm to less than 1,000 ppm

Equal to or more than 1000 ppm

Element 4 – The name and address of the manufacturer, and information on the applicable contact person

- See http://www.newmoa.org/prevention/mercury/imerc/FormSingle.pdf for the applicable mercury product notification requirements.
- See WAC 173-334-080(f) for the applicable State of Washington reporting requirements.
- See proposed 40 CFR 705.15(a) at 86 Fed. Reg. 33957 (June 28, 2021) for the applicable information required under the PFAS reporting rule.

Recommendation: This is very straightforward, so no specific recommendation is needed.

Element 5 – "any additional information established by the Department by rule as necessary to implement the requirements of this section"

Recommendations:

- Under the Maine mercury product notification requirement, the manufacturers must provide "the total amount of mercury in all units of the product or product components sold in the United States during the most recent calendar year for which sales figures are available, reported either for the units or components sold by the manufacturer or as aggregated by a manufacturer trade association for all units of the product or components made by the industry". See 38 MRSA 1661-A.1.D. Similarly, quantity data is sought by EPA for each of the PFAS production and processing activities. Total quantity data is critical to know for priority setting purposes under the Maine law, since it provides an indication of the potential for products to contaminate Maine's land and water resources,

through use and/or waste management. National data must be requested since state-specific data will not be available.

- When determining a product category's potential to contaminate Maine's land water, DEP must also consider Maine-specific data where available. Accordingly, if the product manufacturer is located in Maine, DEP should request data on the presence and concentration of PFAS in wastewaters and other wastes, as well as basic information on how the wastes are managed. Wastes destined for management in Maine originating from another state must similarly be reported.
- DEP should request available PFAS environmental monitoring data related to the product manufacturing activities reported. If the data apply to a Maine location, they are certainly relevant to the prioritization activities Maine DEP must perform. However, even data from outside Maine may be relevant as well, because the information will inform DEP about the potential land and water resources contamination scenarios associated with a particular product category. Where the data are already in the public domain, companies can simply provide a link to where the data can be found.
- Lastly, DEP should request that UPC codes be provided for the products reported. Inclusion of UPC codes would provide a simple way for consumers to know which products to favor and which to avoid, based upon the PFAS data provided. It would also facilitate product comparisons.