Maine Forest Products Council

The voice of Maine's forest economy

December 5, 2019

PFAS Task Force
c/o Maine DEP
17 State House Station, 28 Tyson Drive
Augusta, Maine 04330

RE: Comments on the draft PFAS Task Force Report

Dear PFAS Task Force members;

Please find attached comments submitted by PFAS Task Force member Dr. Charles Kraske. Dr. Kraske has been serving on the Governor's task force as a representative of the pulp and paper sector. The MFPC Pulp & Paper Environmental Committee represents the mills operating in Maine, and all have worked with Dr. Kraske in reviewing and preparing these comments.

We appreciate all of the work done by the committee and the opportunity to add our collective comments and perspectives to the final draft document.

Sincerely,

Patrick J. Strauch
Executive Director

Charles Kraske, Ph.D.
Senior Environmental Engineer
Verso Corporation, Androscoggin Mill

COMMENTS ON MAINE PFAS TASK FORCE DRAFT RECOMMENDATIONS

These comments were prepared in consultation with the Maine Forest Products Council (MFPC) for submission to the Maine PFAS Task Force created by Governor Mills' Executive Order. These comments were developed after review of the Task Force's draft recommendations.[1]

Our view: A Measured, Scientifically Sound Response to PFAS Contamination is Needed -- and Required -- If It Is to Support Rational Decision Making and Regulation.

Members of the MFPC use certain FDA-approved PFAS in applications in some paper making. MFPC supports several recent and planned action on PFAS. Those include adopting MCLs for drinking water, testing residuals that are land spread that may have exposures that lead to potential health impacts, development of appropriate analytical methods that are commercially available, analytical testing of environmental and drinking water where there are reasons to test, and support for additional PFAS toxicological testing. The highest priority should be to identify and address current exposures that meet or exceed adopted threshold levels.

However, MFPC has concerns for a number of the recommendations that do not reflect the science and fundamental principles of our regulatory and legal framework.

At the outset, MPFC points out that it is the only trade organization and industry represented on the task force. Many of the recommendations of the task force come from those who do not have manufacturing or commercial experience, nor experience with other industries or commercial users. The task force must recognize and acknowledge that its recommendations are unable to reflect that important broad and deep experience, which will be necessary for informed decision making by legislators and regulators. *We urge the task force to incorporate a recommendation to encourage early involvement and advance drafts to the public so that all stakeholders may provide information and comment*. The Maine Department of Environmental Protection's (DEP's) recent advance draft of its proposal to identify PFAS as a "hazardous matter" under its Chapter 800 regulations and the state's hazardous matter law was a good example of that practice. That strategy resulted in the Department obtaining valuable insight on how the DEP's objectives might be achieved, and ultimately changing the course of the DEP's decision making.

I. Fundamental Principles for PFAS Regulation, given the State of PFAS Science Exposure and Risk

1. Decisions must be based on science, not on fear or ease of implementation, and stakeholders should work collaboratively. Legislators, regulators, the public, wastewater and waste management industries, drinking water utilities, and commercial users of PFAS Stakeholders should work collaboratively to decide how to manage PFAS holistically, with science, facts, and all relevant information driving each

[1] These comments cover both (1) the Draft Summary of Recommendations, with recommendations numbered 1-31, dated on or about Nov. 4, 2019, and (2) the Draft Final Report "Managing PFAS in Maine," released by Kerri Malinowski, DEP dated on or about Nov. 19, 2019.

decision. The public doesn't like the idea of being exposed to chemicals that they don't understand, and that has led to fear and even outrage. But fear and outrage cannot be the basis for decision making. Neither is the discredited "Precautionary Principle."[2] Finally, although it is easy to define the category of "all PFAS," we must not confuse that ease with a *basis* to regulate "all PFAS."

2. Science does not yet support regulation of all PFAS as a group. Science is still evolving to understand the fate, exposure, and toxicity of PFAS in various environmental media. To regulate to protect risks requires that those risks be identified with adequate confidence to support rational decision making and regulation that has a rational basis. PFOA, PFOS, and PFBS arguably meet that threshold. But except for a limited number of PFAS chemicals there is not enough information on risks to support regulation with a rational basis. No credible scientific risk assessment body has concluded that all PFAS are similar. As recently as November 25, 2019 in discussing proposed regulation of PFAS under Emergency Planning and Community Right-to-Know Act rules, U.S. EPA has described the state of the science, and is collecting and reviewing data to determine if exposures to similar PFAS result in similar effects, but has been unable to identify categories for regulation, with the possible exception of PFOS and its salts.[3] Currently, the NTP Responsive Evaluation and Assessment of Chemical Toxicity, or REACT, Program is broadening our understanding of PFAS by studying over a hundred compounds that fall into different subclasses based on similarities in chemical properties. Others have suggested groups for priority testing and development of analytical methods based on screening information,[4] but those are not a basis for regulation; only for development of scientific data that may support regulation once groups or subgroups are identified. It may be scientists are able to identify subclasses but no such classes have been identified yet.

3. Risk-based thresholds must be developed for chemicals before risks can identified, communicated to the public, or regulated. These thresholds must be developed based on toxicological data and risk assessment tools. PFOA, PFOS, and PFBS arguably meet that threshold. Additional data and risk assessments are being developed monthly. See, e.g., the EPA Notice dated November 8, 2019 Federal

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[2] The precautionary principle applies when there is uncertainty, but there is always uncertainty and the principle begs the question of what is an adequate level of certainty/uncertainty for what action (and action is usually presented as a binary choice, when there are typically multiple choices). In fact, environmental regulatory decisions and risk levels incorporate safety factors to account for uncertainty, with additional safety factors to account for additional degrees of uncertainty. Cass Sunstein, who was Administrator of the White House Office of Information and Regulatory Affairs in the Obama administration from 2009 to 2012, has issued more damning criticisms of the Precautionary Principle. *Sunstein, Cass (2005). "The Precautionary Principle as a Basis for Decision Making" (PDF). The Economists' Voice. 2(2):8 (2). doi:10.2202/1553-3832.1079.*

[3] EPA Advance Notice of Proposed Rulemaking, Addition of Certain PFAS; Community Right-to-Know Toxic Chemical Release Reporting, 40 CFR Part 372, signed November 25, 2019, to be published in the Federal Register in December 2019, at pp. 9-10.

[4] Environ Health Perspect. 2019 Jan;127(1):14501. doi: 10.1289/EHP4555. A Chemical Category-Based Prioritization Approach for Selecting 75 Per- and Polyfluoroalkyl Substances (PFAS) for Tiered Toxicity and Toxicokinetic Testing. Patlewicz G, Richard AM, Williams AJ, Grulke CM, Sams R, Lambert J, Noyes PD, DeVito MJ, Hines RN, Strynar M, Guiseppi-Elie A, Thomas RS.

Register at 60393 publicly noticing the Availability of the Systematic Review Protocol for the PFDA, PFNA, PFHxA, PFHxS and PFBA IRIS Assessments; CDC/ATSDR announced on September 23 that they established cooperative agreements with seven partners to study the human health effects of exposures to per- and polyfluoroalkyl substances (PFAS) through drinking water at 11 locations across the nation; and many hundreds of other toxicity assessments are currently underway.

4. Analytical Methods capable of measuring to those risk-based thresholds are required before setting limits or regulation. Before an enforceable regulations with limits can be adopted, there must be appropriate analytical methods to allow regulators to make decisions on impacts, to allow the public to determine whether water or other media is safe or a threat, and to allow those who are regulated to determine how to comply. Testing is only appropriate where there are reliable analytical methods for the environmental media or waste to be sampled and where results can be measured against scientifically-based health or environmental standards. The analytical methods needed to study and accurately monitor these chemicals at such trace concentrations are still in development, except for a limited number of methods in drinking water and perhaps soils.

5. Recommendations that the state cannot afford are not helpful or realistic; nor are recommendations that can't be implemented. Maine is a small state with limited resources, and the Maine DEP, the Maine CDC, and the Maine Drinking Water Program do not have the resources to support many of the PFAS recommendations and requests of the public or the Task Force. Leveraging and relying on national expertise in toxicology and analytical methods is an absolutely necessity. It is unrealistic to imagine that Maine DEP and DHHS will have or develop the capabilities to do the jobs of the U.S. Food and Drug Administration scientists and regulators better, especially with a fraction of the funding and experience. Any limited funds that might be made available from the Maine Legislature should focus on high priority state-level tasks that will manage and regulate PFAS holistically, starting with existing PFAS legal mandates (unless those are legislatively reordered).

6. Prioritize identifying and addressing unreasonable exposures. The tasks to be undertaken, and all PFAS policy or regulation, should focus on the most effective steps needed to reduce human exposure that present unreasonable risks based on accepted approaches to risk assessment, and implement them within the broad context of protecting human health. This requires differentiating high concentration sites from background concentrations and taking action to mitigate concentrations at sites where humans the environment are at material risk.

7. Developing science will require changes in regulation over time. Fortunately, there is no reason to take an all-or-nothing, now-or-never, approach to PFAS regulation. Because scientific data and analytical methods for PFAS are developing rapidly, there is no justifiable need to attempt to accomplish all possible regulatory goals immediately, or to give up examining PFAS simply because the real world is complicated and changing. The other reason not to regulate all PFAS compounds now is that such policy will prevent or delay focusing on those PFAS of highest concern with real exposures, because resources will be spread and squandered, rather than focused and effective. Prioritizing decision-making and regulation based on available data is not only defensible and rational, but developing science requires regular reconsideration and adjustment of regulations and strategies as PFAS toxicology data and studies become available and as analytical methods are developed.

8. Maine paper companies want to continue to use and innovate with short-chain PFAS compounds that do not pose risks and that are FDA approved. Put bluntly, if Maine bans or discourages use of all PFAS, it will put Maine paper companies at a competitive disadvantage as compared to companies that do not face such regulation, and will be doing so without a scientific or rational basis. Banning or discouraging all PFAS use also runs a risk of driving use of less studied compounds with potential risks that may be greater. Finally, broad bans do not consider "essentiality" of *any* of the compounds in the class. Furthermore, Maine's paper companies rely on the EPA and FDA chemical approval process for all food contact materials. Indeed, industry must respect and rely on FDA (and EPA, in some cases) for approval of *any* chemical used in food contact materials. The paper industry (and others) must work within that context, regardless of whether the chemicals used are PFAS or some alternative chemical used to achieve paper properties that are necessary in food packaging-related products.

9. Several important aspects of Task Force recommendations for federal government agency action are well-founded and supported by MFPC. However, those federal recommendations differ markedly from the task force recommendations for Maine regulation, and the related recommendations for Maine are not well-founded.

One example of federal recommendation: ATSDR should finalize toxicity values for PFAS *commonly found* in environmental samples (emphasis added*)*. The U.S. EPA should then update Regional Screening Levels to include additional screening level guidelines. The U.S. EPA should also certify additional laboratory methods to measure PFAS in various media (groundwater, wastewater, soils and other solids, ambient air).

By contrast, the task force recommendation for Maine calls for multiple regulatory or other actions against all PFAS, without regard to whether toxicity values available or analytical methods for measuring PFAS in various media. We believe that a more targeted approach should be taken, using appropriate analytical methods, for PFAS compounds with known toxicological impacts, in the areas of primary risk.

II. General Comments on the Task Force Recommendations and Priorities

There are numerous recommendations – many of which are given to the three Maine agencies who are already struggling to keep up with current demands, including those related to PFAS. There are no designated priorities among the recommendations, and no guidance to these agencies as to how PFAS issues should be prioritized among its current priorities. These recommendations must be prioritized in conjunction with other critical, known environmental issues, such that limited state resources are targeted on the most pressing of needs. State funding and resources should then be directed to those recommendations that are most important or which steps should logically be implemented first.

Overall, we think that the highest priority should be to identify and address current exposures that meet or exceed adopted threshold levels.

III. Specific Comments corresponding to Specific Task Force Recommendations

The following specific comments include references to recommendations in both (1) the Draft Summary of Recommendations, with recommendations numbered 1-31, dated on or about Nov. 4, 2019 and (2) the Draft Final Report "Managing PFAS in Maine," released by Kerri Malinowski, DEP dated on or about Nov. 19, 2019. The recommendation numbering below reflects the numbering of the Nov. 19th draft.

Recommendation 1. Identifying and Reducing sources of PFAS. A new law requiring manufacturers to report on intentional use of all PFAS and in consumer products is not well based, regardless of the ultimate intent. There is no scientific basis for regulating all PFAS as a class under the Toxics Use Reduction Program, the Toxics Release Inventory, or food packaging law, since there are significant differences in toxicity, fate, and persistence. Some of the more detailed recommendations ("all PFAS that meet the statutory criteria") and ("the regulated PFAS under Chapter 420") appear to recognize that regulation must be limited to PFAS of concern, rather than all PFAS.

Discouraging purchase of all PFAS containing products without regard to alternatives or the essentiality or need for the product simply does not consider all relevant factors. The concept of "safer alternatives" is an attractive, simple phrase which masks a number of basic issues that we believe regulators are ill-equipped to address in finite timeframes, often because there are no criteria for decision making and because manufacturing chemistry, product development, and product efficacy and testing are not expertise government regulators possess across the range of potential products affected.

MFPC has serious doubts about the possibility and usefulness of enacting new legislative provisions to require reporting under the Maine Toxics Use Reduction Act. Although it is hard to comment on proposals without specific legislative language, the hurdles of adopting a rational scheme include:

- The fact that the rule would have to focus on specific PFAS, and a law or rule couldn't and shouldn't cover all PFAS
- Many PFAS are proprietary, and it is often impossible to obtain verification of which PFAS may be in a mixture, and even whether PFAS are included, thus preventing effective reporting
- Forcing a reduction in PFAS that don't pose identifiable risks doesn't advance protection of health or the environment.

We strongly oppose adding all PFAS under Maine Toxic Chemical Release Reports (37-B M.R.S. § 799), which is the reporting requirement under the federal Emergency Planning and Community Right to Know Act. First, there is no "Maine" report – it is a federal law that requires such reports, that provides a detailed regulation on when reporting is required, supplemented by multiple guidance documents, and that supplies a detailed federal form that must be completed. The Maine law also requires that same federal reporting – in one sentence – simply by referencing the federal law and rules. All reporting is now electronic to the federal government, with a copy to the state and local entities. There is no authority for any Maine agency to change reporting, modify the forms, or to set up electronic forms. Second, the questions of class regulation and ability to identify PFAS for possible reporting noted above are practical and real problems for changing Maine Toxic Chemical Release Reporting.

Third, under Toxic Chemical Release Reporting, the following additional decision-making challenges arise:

- What PFAS should be included, and why?
- What volume thresholds for use should apply to trigger reporting?
- If those include PFOA and PFOS, how could reporting address background levels? EPA provides detailed guidance on calculating possible releases from uses. No such guidance would exist for PFAS; how would reporting companies make rational descriptions of releases?
- How could releases be confirmed or levels determined if there are no validated analytical methods?
- If there aren't specific risk levels adopted by government levels for judging risks, how can the public make sense of any reported releases?

On November 25, 2019, EPA signed an advance notice of proposed rulemaking (ANPRM), soliciting information from the public as EPA considers proposing a future rule on adding certain PFAS to the list of toxic chemicals subject to reporting under § 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and § 6607 of the Pollution Prevention Act. EPA raised the above listed issues and many others that remain to be decided based on toxicity reviews, ability to adopt meaningful classes or subclasses, and application of the legal requirements of EPCRA. We question whether DEP or MEMA has the experience or expertise to make federal EPCRA policy decisions. We note that Maine waited until EPCRA rules were adopted and implemented before it adopted the parallel Maine law, and then simply incorporated the existing federal reporting requirement into Maine laws. We think the same approach is appropriate here for PFAS.

Recommendation 2. Providing Safe Drinking Water. Consistent with above principles, testing for PFAS can proceed only when there is a valid scientific basis for toxicity, when thresholds or limits of concern can be established, and after there are appropriate analytical methods to allow detection. Requiring notification of any level of any PFAS serves no useful purpose if there are not standards by which to judge the risks of exposure to those standards. Notification is useful to warn or avoid risks of concern, but neither individuals nor the public can make sense of PFAS levels without a hazard reference. Testing for specific PFAS compounds that are of concern in wells or drinking water if those sources may contain PFAS based on location-specific relevant information is a reasonable approach, and one that we understand was followed in the recent voluntary state-funded testing .

Recommendation 3. Protecting our Food Supply. We are mindful that the just-adopted L.D. 1433, the Food Packaging Law amendments, already provides regulatory authority for addressing PFAS in food packaging. MFPC questions whether any further recommendation should be included on that topic, since the DEP is already tasked with (and has already begun) developing a strategy under that law.

We noted a detailed recommendation from the November 4th, 2019 Draft Summary Recommendations, calling on the legislature to set a Maine-specific health risk value for PFAS Standards and treatment decisions across the state. It is unclear how the legislature could set a Maine-specific health risk value. First, the legislature is not well suited to examine toxicological studies, develop exposure scenarios and identify risk based values, even if all data were available. Second, Mainers are no more or less susceptible to PFAS risks than citizens in any other state, and may in fact be far less exposed as a state-wide population that most other states. As a result, we do not understand how a risk level could be

"Maine-specific." We believe that the U.S.EPA and in conjunction with the federal Centers for Disease Control have the expertise and resources to take the lead on this activity, with the Maine CDC acting upon guidance from those agencies. Finally, as noted below, the duties of the Task Force as set forth in the Governor's Executive Order do not include making recommendations for additional legislation.

Recommendation 4. Responsible Waste Management. Adding the term "pollutants and contaminants" to the Uncontrolled Hazardous Substances Sites law would dramatically expand the scope of this law, which now already includes all federal Hazardous Substances, all Maine Hazardous Matter, and all Maine Hazardous Waste. This would make Maine's law broader than CERCLA[5] and most all similar laws in other states, and is even much broader than "all PFAS" which is also overbroad. For example, dirt is a pollutant under the waste discharge laws, and so is temperature. Besides increasing the DEP's burdens in looking at new sites, DEP could arguably reopen every site that is already been remedied, imposing additional costs on PRPs, which include towns, school districts, the state national guard, and the state itself (as a PRP generating waste). If the proposal is to add specific PFAS substances to the cleanup program established under this law based on adequate toxicity data, then that is more typically a regulatory determination, and not a determination the legislature has expertise or experience in making. If any PFAS is to be added to law, then DEP will have to be ready with reliable analytical methods and reasonable cleanup standards to judge whether cleanup is necessary and to what extent in which media. The recommendation as formulated is at worst overly broad, and at best it is unclear to the point that it couldn't be effectively implemented. Again, the Executive Order does not include any directive to the Task Force to recommend legislation.

We note the provision on requiring fire departments to report any discharge of Class B AFFF. We believe DEP must focus on those Class B AFFF foams that pose risks. As a general matter, MFPC supports reporting of hazardous substances released to the environment in quantities that pose risks, and does not support reporting of "any discharges."

Recommendation 5. Improving Public Education about PFAS. MFPC supports public education, but that education will have to be completely transparent and science-based. Public education on the extent of PFAS or PFAS contamination -- without giving the public (1) information on the significance of the risks and (2) a comparison with other risks (both "involuntary" and "voluntary") -- invites additional public confusion, environmental illiteracy, and unnecessary concern. Of course, without a scientific basis, there can be no useful description of or education on PFAS risks. Therefore, because there is no accepted basis for class regulation, useful public education cannot simply refer to PFAS. We have great concerns that supplying only general information will be misleading, raise concerns that are unfounded, or leave the public justifiably confused and frustrated.

Finally, in public comment period at the November 26, 2019 PFAS Task Force Meeting, a public commenter sought Task Force support for a legislative proposal that might affect the ability to bring potential PFAS legal claims in court. We note that the Governor's Executive Order identified eight broad

[5] CERCLA includes "pollutants and contaminants" in the authorities of the United States to spend its own funds. 42 U.S.C. § 9604(a) and (b). The United States does not have authority to compel cleanup of (or recover cleanup costs for) "pollutants and contaminants" by potentially responsible parties, reserving that authority for hazardous substances. 42 U.S.C. § 9607(a).

duties of the Task Force, but none of those duties included recommending legislation. The Task Force has labored for months, but the issue of promoting private legal claims for PFAS was not raised by any Task Force member nor in any of the draft recommendations. While we acknowledge that this proposal did not come from the Task Force, we believe such topics are well beyond the scope of the Task Force's authority and beyond members' expertise, and we do not believe that favoring potential litigants on one side of future lawsuits is an appropriate subject for Task Force recommendations in any event. Therefore, we do not believe a recommendation on this topic can be or should be included.