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VIA EMAIL (RULECOMMENTS.DEP@MAINE.GOV)

Mark Margerum
Maine Department of Environmental Protection
17 State House Station
Augusta ME, 04333-0017

Re: 3M's Public Comments on Proposed Rule, Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mr. Margerum:

I write on behalf of 3M Company ("3M") to comment on the Maine Department of Environmental Protection's (the "Department") proposed rule, Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances, dated February 14, 2023 (the "Proposed Rules"). 3M appreciates the opportunity to comment on the Proposed Rules. 3M is committed to compliance with all environmental laws and regulations, including the Proposed Rules and 38 M.R.S. § 1614 (the "Act").[1]

3M has previously highlighted substantial ambiguities with the Act and the Department's previous two "Concept Draft" regulations.[2] The Department has recognized these ambiguities and other infirmities associated with the current version of the Act, particularly those that create significant obstacles to compliance for manufacturers of complex products with complicated supply chains.[3] 3M appreciates the Department's efforts to clarify some of these issues via the Proposed Rules. 3M further understands that the Legislature is expected to soon pass a new version of the Act and that the Department may further refine the Proposed Rules in response. In the meantime, however, and as discussed below, 3M is concerned that several aspects of the Proposed Rules remain unclear and requests that the Department further consider and clarify those provisions.

[1] On December 27, 2022, and in compliance with the Act, 3M submitted a spreadsheet containing a list of 3M products that contain intentionally added PFAS and are sold in the United States as of that date.
[2] 3M discussed these ambiguities in the following documents: 3M's comments to DEP's First "Concept Draft" (July 18, 2022); 3M's comments to DEP's Second "Concept Draft" regulations (November 10, 2022); 3M's extension request letters dated September 21, 2022 and November 10, 2022 and the cover letter to 3M's December 27, 2022 submission.
[3] *See, e.g.*, Letter from Nessa Coppinger, Counsel for 3M, to Melanie Loyzim (Sept. 21, 2022); Letter from Blazka Zgec, Department of Environmental Protection, to Industry Coalition (Aug. 26, 2022).

1. **The Definition of "Offer for Sale" is Overly Broad and Ambiguous.**

The Proposed Rules require reporting prior to "offer[ing] for sale" a product containing "intentionally added PFAS" into Maine. The Department defines "offer for sale" – which is not defined in the Act – as "to make a product available for purchase, including through online sales platforms that deliver into the State of Maine." This definition is overly broad and ambiguous and is almost certain to result in reporting of products that are not sold in Maine. For example, manufacturers often sell products to intermediate distributors and channel partners and, therefore, lack visibility into where those products are ultimately sold. As a result, under a broad reading of the current definition, manufacturers could feel the need to report products for which the manufacturer has no knowledge or intent that they be sold into Maine just in case they are eventually sold into Maine by a third party. 3M respectfully submits that the Department could resolve this issue by clarifying the definition of "offer for sale" as follows: "Offer for sale" means to make a product available for purchase with the specific understanding or intent that it will be sold or distributed to customers in Maine.

2. **3M Recommends that the Department Further Clarify Which Manufacturer is Responsible for Reporting and Paying Fees for Products that Contain Multiple Product Components.**

The Proposed Rules remain unclear as to which "manufacturer" is responsible for reporting and paying fees for complex products. 3M recommends that the Department clarify that any fee should be paid only at the final product or product component manufacturer level, and only if the final manufacturer has made its product available for sale to a customer in Maine (using the proposed revised definition of "offer for sale" discussed above). In other words, under the current language of the Proposed Rules, including the overly broad definition of "offer for sale," if manufacturer A incorporates a PFAS-containing product component from manufacturer B into its product, and sells or makes that product available to a customer in Maine, manufacturer A – as the manufacturer of the final product, with visibility into where that product is made available for sale or sold – should be the only manufacturer required to report and pay a fee for that product.

It appears that the Department agrees, in concept, with the suggestion that only one manufacturer should be required to notify and pay a fee for complex products. For example, the Department states on page 5 that "[f]or product components for which the Department has previously received notifications, which are used in more complex products containing the reported components, the manufacturer of the more complex product shall either report PFAS in the product including its components, ***or*** refer to the notifications for product components and any PFAS in the remainder of the product." (emphasis added).

In addition, the Department has included a Note on page 8 that provides: "Notifications

are required only for products or product components offered for sale or distributed for sale in the State [of] Maine. Product components that are incorporated into a complex product which are offered or distributed for sale in Maine are not subject to the notification requirement, even when information regarding the product components is provided as part of that product's notification submission."

3M appreciates these attempts at clarification. However, as stated above, manufacturers do not always know the form in which a product is sold in a given state—whether the product is sold directly into Maine in its present form or whether it is incorporated into a more complex product by a downstream entity prior to being sold into Maine. As a result, the original product component manufacturer may well not be in a position to know whether it is obligated to notify the Department of such a product and pay the fee. Further, manufacturers of products that contain multiple components may not always have a way to determine whether each of their product components has been previously reported. These issues will either lead to an over- or under-reporting of products by manufacturers, which would be neither helpful to the Department nor the public. To remedy this, 3M recommends that the Department clarify that a final manufacturer of a complex product has the reporting and payment obligation, and only if that final manufacturer has sold the product or offered it for sale (under the revised definition of "offer for sale" proposed by 3M above) with the intent or understanding that it be sold to customers in the State of Maine.

3. **3M Recommends that the Department Further Streamline the Information Required to be Reported.**

HTS Number. Section 3A(1)(a) of the Proposed Rules states that the brief description of a reported product must include the United States International Trade Commission's Harmonized Tariff System ("HTS") number, if a Global Product Classification ("GPC") brick category and code is not applicable. However, the Proposed Rule does not provide detail as to the level of HTS code required for reporting. HTS codes range from the 1-2 digit "Chapter" code to the 4-8 digit "heading/subheading" code to the 10-digit "statutory suffix" code. 3M submits that a reasonable approach to compliance with this requirement would be for manufacturers to include the four-digit HTS code comprised of the HTS chapter and heading under which a particular product is categorized. Coupled with the other notification content requirements, this approach would sufficiently identify covered products and provide manufacturers with the flexibility to utilize the HTS for covered products that may not yet be classified under the HTS.

General Type and Intended Use. Section 3A(1)(a)(ii) and (iii) of the Proposed Rules would require the product description to include the "general type of the product" and "its intended use." Neither of these phrases has been defined by the Department, and the distinction between the two is unclear. Furthermore, both of these requirements appear to be inherently

addressed by the requirement to notify the Department of a product's GPC brick category and code or HTS number because that requirement already serves to classify products into different categories by type and intended use. Thus, 3M recommends that the Department revise Section 3A(1)(a) to delete 3A(1)(a)(ii) and (iii) and require that a "brief description of the product" include only the requirements of Section 3A(1)(a)(i) (i.e., reporting of the GPC brick category and code or HTS number, stock keeping unit, or approved alternative category).

Amount of PFAS. Section 3A(1)(c) of the Proposed Rules provides that the notification would need to include "the amount of each of the PFAS as a concentration, identified by name and its [CAS] registry number, of each PFAS in the product or any product component reported" as either (1) "an exact quantity determined using commercially available analytical methods," or (2) "falling within a range approved by the Department."

The Department's proposal to require reporting of PFAS amounts as an "exact quantity" is not technically feasible for many products because commercially available analytical methods for PFAS do not support the reporting of many PFAS in exact quantities. Therefore, lower levels of PFAS concentrations cannot be reliably measured with any degree of reasonable analytical certainty to satisfy the Proposed Rules' requirement to report "exact quantities." To 3M's knowledge, there is currently no commercially available analytical method for determining the "exact quantity" of many individual PFAS species present in a variety of products. Test methods need to be validated to verify their effectiveness for testing products of a particular form, for example solid vs. liquid product. In addition, there are not commercially available, validated analytical measurement methods to detect and reliably quantify many individual PFAS compounds present in commercial products. Accordingly, 3M recommends that manufacturers be permitted to report the quantity of intentionally-added PFAS in their products based on information provided by suppliers. 3M also reiterates its request that the Department approve and include accepted concentration ranges to provide the Department with information about the amount of PFAS a product contains while maximizing manufacturers' abilities to leverage information that may be provided by raw material and product component suppliers.

Reporting Multiple Products Together. 3M appreciates and supports the Department's proposal in Section 3C to allow the reporting of multiple products or product components together under a single GPC code or HTS code. As to Section 3C(1), 3M submits that the Department should allow products to be reported together within the same four-digit HTS number for the same reasons set forth above. As to Section 3C(3), the Proposed Rules would require group reporting so long as each PFAS is present in every product either (a) "[i]n a substantially similar amount as determined by a commercially available analytical method, or (b) [i]f reporting by range of concentration is available, within the same concentration range." The phrase "substantially similar amount" has not been defined, and it is unclear what amounts would be considered to be "substantially similar" under Section 3C(3). 3M recommends the Department allow manufacturers to use the same ranges for purposes of reporting products

together as the Department approves under Section 3(C)(3).

4. **3M Recommends that the Definition of "Publicly Available" Be Revised.**

3M appreciates and supports the Department's proposal to waive all or part of the notification requirement if the Department "determines that substantially equivalent information is publicly available." However, 3M submits that the current definition of "publicly available" is too narrow as proposed and should be revised to afford more flexibility to manufacturers, including by allowing publicly available information to include the product information made available to the general public on a manufacturer's website. To that end, 3M proposes that the definition be revised as follows (with suggested revisions in bold text): "information that is lawfully made available to the general public from federal, state, or local government records, widely distributed media, or disclosures made to the general public**, including those made on a manufacturer's website or pursuant to** ~~**that are required by**~~ federal, state, or local law."

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On behalf of 3M, thank you for the opportunity to submit comments on the Proposed Rules.

Sincerely,

/s/ Daniel J. Deeb

Daniel J. Deeb