May 19, 2023

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

Re: Proposed regulations implementing the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*, 38 M.R.S. §1614

Submitted via e-mail: rulecomments.dep@maine.gov

Dear Mrs. Malinowski:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on DEP's draft implementing rules, draft *Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances* 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 consider perspective of stakeholders to modify reporting procedures where possible. Since publication of the July 2022 concept draft, DEP has made significant changes in implementing rules with its February 2023 proposed draft rules. ACA appreciates the following modifications and supports finalizing these elements of the proposal, while suggesting some improvements:

- Entities do not need to report chemicals without CAS numbers.
- Third party testing is not required.
- When reporting within an approved range, a company can rely on calculations based on volumes in a manufacturing process.
- DEP allows for additional flexibility in grouping and identifying products by GPC (Global Product Classification)[2], HTS (International Trade Commission's Harmonized Tariff System)[3] or an approved alternative grouping.
- DEP expands on the definition of "essential for health safety or the functioning of society" to include "products and product components affecting climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction."

Although the draft rules demonstrate DEP's understanding of challenges faced by reporting entities, ACA notes additional areas for improvement. Notably, DEP has not specified the scope of due diligence required to comply, leaving open the possibility of companies being out of compliance even with a good-faith effort to identify reportable information. As written, the proposal would inevitably require product testing of end-use formulated products. Commercially available test methods are not available for formulated products and would inevitably have limits on detection, leaving open the possibility of non-compliance, without further specification of a due diligence standard and/or a specific test method required for compliance. In prior comment, ACA has suggested a *de minimis* threshold for reporting to allow reliance on supplier disclosures, typically disclosing PFAS above thresholds mandated by OSHA. DEP interprets the statute as not authorizing a *de minimis* threshold.

ACA also sees the need for a blanket reporting extension to January 1, 2025, assuming DEP will finalize rules and have an operating on-line reporting system by this Fall. ACA also suggests changes to updating reports after the initial reporting period. ACA requests a scheduled update of submitted information, after the initial notification period, to provide a clear, regularly scheduled timeframe to track updates. ACA further suggests modifications to the definition of "significant change."

ACA and its members provide additional information about these issues below:

[2] For additional information regarding GPC codes see: Global Product Classification (GPC) | GS1

[3] For additional information regarding HTS classification see: Harmonized Tariff Schedule of the United States (HTS) | United States International Trade Commission (usitc.gov)

1. **Excluding fluorinated chemicals without CAS numbers from reporting is required by the act and reduces barriers to reporting.**

As DEP has correctly recognized, Section 2 of the *Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution* (LD 1503, 2021), requires reporting of PFAS chemicals is required by CAS number while excluding those fluorinated chemicals without a CAS number. By requiring reporting by CAS number, the legislature did not provide alternative methods of chemical identification. ACA supports DEP's proposed exclusion of fluorinated chemical without CAS numbers from the reporting requirement, as DEP explains in the definition of PFAS in Section 2 of the Posting Draft of implementing rules.

Excluding chemicals without CAS numbers is also necessary to protect confidentiality of chemical structure. In some situations, companies do not register a chemical so as not to disclose structural elements associated by CAS number. By reporting under the Maine PFAS reporting program, companies are inevitably disclosing one structural element of a chemical, being at least one carbon-fluorine bond. This disclosure may be enough to break confidentiality at the federal level under TSCA, of a chemical that EPA otherwise has placed on the confidential portion of the TSCA inventory. 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. It's unclear how EPA would interpret application of confidentiality requirements considering disclosure of this one structural element.

2. **DEP should clarify the degree of due diligence for downstream industry using potentially reportable chemicals.**

ACA requests that DEP specify the degree of due diligence required in attempting to identify fluorinated chemistries in raw materials used by downstream product formulators and manufacturers. Due diligence parameters are necessary due to the broad scope of this reporting requirement, encompassing any chemical with one or more carbon-fluorine bond at any amount in a chemical mixture. In prior comment, ACA encouraged DEP to adopt a reporting threshold aligned with OSHA (Occupational Safety and Health Administration) Safety Data Sheet disclosure requirements of 0.1% or 1%, depending on chemical hazard, with carcinogens and reproductive toxins disclosure at the lower threshold. DEP has declined to do so, noting that the act requires disclosure at any amount.

The act, however, does not place limitations on DEP's ability to provide guidance about the scope of due diligence required to comply with the rule. In addition to the broad scope of reportable chemicals requiring reporting at *any* amount, including trace levels, downstream companies must identify fluorinated chemicals with CAS numbers in raw materials even when a manufacturer has withheld CAS number disclosure to protect a trade secret mixture. DEP explains, in its proposed implementing rules, "However, chemicals that do have CAS number assigned but are withheld by other persons or are otherwise unavailable are subject to this

Chapter." (See Proposed implementing rule, *Draft Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances*, Section 2(P)).

The reporting requirement inevitably requires downstream companies test raw materials to identify reportable chemicals. ACA appreciates DEP's proposal to allow in-house testing via any commercially available analytical method. This section of DEP's proposed rules allows for some flexibility and ease of compliance, but significant compliance barriers remain. Companies that conduct testing can still violate the rule due to the inadequacy of commercially available analytical test methods and limits of detection of any available methods. DEP should take note that most commercially available analytical methods are designed to test air or water for contamination. These are not designed for products or chemical formulations.

DEP must adopt a standard of due diligence to provide a pathway towards compliance and minimize unintentional non-compliance. ACA recommends adoption of EPA's due diligence standard. For chemical reporting rules under TSCA, including EPA's proposed PFAS reporting rule, EPA typically requires companies report all information "known to or reasonably ascertainable by" the reporting entity, as further described in the 2011 revisions to the Chemical Data Reporting Rule.[4] The standard requires:

- A reporting entity must conduct a thorough review of internal records for relevant information.
- A reporting entity must identify relevant records held by subcontractors and subsidiaries.
- A reporting entity does not need to conduct broad external surveys.
- A reporting entity does not need to make targeted inquiries outside of the company, if internal documents suggest an external information source.
- A reporting entity must provide records or reasonable estimates of any information a similarly situated company would be expected to have.

**3. 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 its proposed rules, 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. 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.

[4] 76 Fed. Reg. 50816,50829 (August 16, 2011), available online at: Federal Register, Volume 76 Issue 158 (Tuesday, August 16, 2011) (govinfo.gov).

DEP's reporting requirement would inevitably require third-party testing and development of analytical techniques by a third-party. This is cost prohibitive for many downstream formulators, especially considering that a company would need to identify the specific fluorinated chemical at issue. Any analytical methods for products will be developed by a laboratory and will be specific to the product at issue. These will not be commercially available methods.

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:

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

Considering that "commercially available analytical methods" are not available for formulated products, product formulators can rely on calculations based using data from upstream suppliers, but this information can be too inadequate to meet Maine's PFAS reporting requirement. Hence, product formulators need additional guidance about due diligence steps required to comply with the law when available information is inadequate.

**4. Essential Uses of PFAS compounds meet the criteria for "Currently Unavoidable Use"**

The statute expressly recognizes 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."

ACA appreciates DEP's proposal to further explain what is "essential for health, safety or the functioning of society," including products and components that affect climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction. ACA supports finalizing similar language, while making some editorial changes for clarity. Currently, the last sentence of the definition is not clearly referencing products and product components identified in the prior sentence, although that appears to be DEP's intent.

Many products require the use of specific compounds, such as PFAS, 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.

5. **The definition of "significant change" is vague by referencing "commercially available analytical methods," and it does not clearly state that it applies to intentional addition of PFAS**

ACA recommends modifying the definition of "significant change" to clarify that companies must report any intentional increases in PFAS amounts, but not inadvertent changes less than the 10% threshold. DEP must also consider the lack of "commercially available analytical methods" for formulated products and most products generally. Any analytical methods for products will be developed by a laboratory and will be specific to the product at issue. These will not be commercially available methods. In any case, developing test methods, even if not commercially available, is generally cost prohibitive.

ACA suggests the following change to the definition of "significant change" regarding the intentional addition of PFAS, as noted in brackets:

> "Significant change" means a change in the composition of a product which results in the [intentional] addition of a specific PFAS; a change in the amount of PFAS of more than a 10% increase, above the method variability allowed by the commercially available analytical method used [or excluding any inadvertent variances occurring during the product's usual manufacturing process] of the concentration that has been reported when compared to the existing notification; or a change in responsible official or contact information.

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

ACA urges that the Department require notification 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.

7. **ACA urges the Department to Extend the Deadline for Submission until January 1, 2025**

ACA requests that DEP provide a blanket extension for reporting to January 1, 2025, assuming DEP will finalize rules and have an operating on-line reporting system by this Fall. When complete, companies that reported by January 1, 2023 would need to supplement their notification in the online system. Several companies also received extensions of the reporting deadline. DEP provided reporting extensions for about 2,500 companies. These companies would be required to submit reports within six months after DEP finalizes its implementing rules. By providing a blanket extension, the agency would be able to manage submissions within one uniform timeframe while companies also can rely on one submission date, assuming DEP is able to finalize rules sufficiently in advance of a compliance date.

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 determines that more time is needed by the manufacturer to comply . . .

There is no question will need additional time to comply once reporting procedures and requirements are finalized. Without guidance offered by rules, 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 data in a timely manner under current deadlines. ACA urges the Department to issue a blanket extension of the time until January 1, 2025, to submit the required information due to the manufacturers' need for additional time.

**6. Conclusion**

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

- ACA supports excluding chemicals without CAS numbers from reporting as required by statutory language and to maintain trade secret formulations of some chemicals.
- DEP should adopt the "known to or reasonably ascertainable by" standard of due diligence used by federal EPA as the due diligence standard for TSCA reporting requirements, in lieu of identifying viable test methods for formulated products.

- ACA supports DEP's proposed definition of "essential for health, safety or the functioning of society," as including products and components that affect climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction.
- ACA urges DEP to modify the definition of "significant addition" to clarify that reporting of "intentional addition" of PFAS is required while excluding any inadvertent changes to PFAS concentration from the 10% reporting threshold.
- ACA urges the Department to require notification on a schedule that could be easily incorporated into a regulatory calendar, rather than updates based on a change in the formula, supplier, or contact information.
- ACA urges the Department to extend the deadline for submission until January 1, 2025.

Please contact us if we can provide any additional information.

Respectfully submitted,

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