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Mark Margerum
Maine Department of Environmental Protection
Regulatory and Rulemaking Policy and Development
17 State House Station
Augusta ME, 04333-0017

Re: Proposed 06-096 C.M.R. ch. 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mr. Margerum,

Our Firm represents a number of clients who have a significant interest in the proposed regulations (Proposed 06-096 C.M.R. ch. 90), that would implement Maine's statute entitled, "An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances PFAS Pollution" (38 M.R.S. 1614.; PL c 477). Although the rule is intended to provide guidance on the notification requirements and sales prohibitions for products and product components containing intentionally added PFAS, these clients believe that clarification on certain features of the proposal is needed to ensure compliance therewith. Below are questions that we ask be considered and addressed prior to finalization of the rule.

1. Proposed 06-096 C.M.R. ch. 90, § 3 states that "*Beginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the Department a notification.*"

   § 2 (N) states that "Manufacturer" *means the person that manufactures a product or whose brand name is legally affixed to the product. In the case of a product that is imported into the United States where the person that manufactured or assembled the product or whose brand name is affixed to the product does not have a presence in the United States, manufacturer includes either the importer or the first domestic distributor of the product, whichever is first to sell, offer for sale, or distribute for sale the product in the State of Maine." "Product" is defined in §2(R) as "an item manufactured, assembled, packaged, or otherwise prepared for sale to consumers, including its product components, that is sold or distributed for personal, residential, commercial, or industrial use, including for use in making other products. Product includes packages, packaging components, and food packaging as defined in 32 M.R.S. § 1732, when sold individually or in bulk and not used in marketing, handling, or protecting a product.*"

We are requesting clarification concerning how the Department interprets the reporting requirements to apply to multiple businesses in the supply chain for finished products with multiple PFAS- containing components. The proposed regulations do not make sufficiently clear whether the responsibility falls upon the maker of the PFAS-containing components, the brand owner, a brand licensee, an importer, or the company that is distributing the finished product.

a. With regards to a finished product containing PFAS as one [or more] of the components, who is subject to the reporting requirement, the company actually selling the finished product or the company whose PFAS component is used in the finished product? As product is defined to include "product components," it is not clear if the Department intends for the burden of reporting to be on the manufacturer of the complete finished product, or on the manufacturer of the component of a finished product.

   Scenario: Company A makes a PFAS product outside the state of Maine in the US and is selling it to company B outside the state of Maine. Company B manufactures its own product outside Maine using company A's product as a component. Company B has downstream supply chain arrangements including distribution via third party distributor or sellers in Maine over which Company A has no visibility or authority. What is company A's obligation for reporting to the state of Maine?

b. Complex finished products may contain a multitude of complex components. For example, a passenger automobile/vehicle could have an air conditioning system that is charged with a PFAS refrigerant or refrigerant blend. In such a case, which party is subject to the reporting requirement: the automotive company whose name appears on the vehicle or the entity that manufactured the refrigerant/refrigerant blend itself?

   Scenario: Assume Company A produces a PFAS component that is labeled with Company A's name on it and the component is distributed to Company B for B's use at its facility located in Maine. Also assume Company B places the component provided by Company A into a consumer-use appliance (e.g., a washing machine) assembled at Company B's facility in Maine. Assume further that Company B also places onto the same appliance additional PFAS-containing components supplied by Companies C and D and each component bears a permanent label with the suppliers' company name it,

however, the finished appliance bears only Company B's brand name on the exterior, although each of the individual components are readily visible to someone servicing or installing the appliance, and are noted and clearly depicted in the detailed instructions manual and operating instructions provided to purchasers of the appliance. In these facts, please identify which business should provide a notification to Maine DEP.

c. There are times when a company will not actually manufacture products labeled with its brand name. Rather, one entity will manufacture the product and it will be labelled with the brand name of a different company (e.g., a "private labeler"). With regards to a finished product containing PFAS for which the actual product manufacturer is an entity other than the company whose brand-name is on the product, which entity will DEP consider to be subject to the PFAS-containing products reporting requirement? Is it the company that actually manufactures the underlying product or the company whose brand-name appears on the product? Does it matter if one or both of the companies has a presence in Maine? Would the answer differ if the companies' facilities in Maine are not involved in the assembly or distribution of the product in question?

d. If Company X manufactures and imports [into Maine] a shipping container of a PFAS compound, and the container is then sold to Company Y, located in Maine, for processing into smaller containers (i.e., cylinders) that are then sold into retail commerce, which entity is subject to the reporting requirement, Company X or Company Y?

2. US EPA's Significant New Alternatives Policy (SNAP) program operates under Section 612 of the Clean Air Act (CAA). The program is designed to identify and evaluate substitutes for ozone depleting substances (ODS). EPA may deem certain substitutes for evaluated ODS to be acceptable substitutes via a notice of acceptability or rule published in the Federal Register.

   Proposed §3(A)(2) of Chapter 90 states that "*the Department may waive all or part of the notification requirement under Subsection 1 if the Department determines that substantially equivalent information is publicly available, except that the Department will not issue a waiver for the information required in Subsection 1(d) above."*

   If a refrigerant or refrigerant blend that contains intentionally added PFAS is "SNAP-approved" by EPA, would DEP waive the notification requirements

contained in §3, given the information about the substance already was made publicly available when published in the Federal Register? Would that constitute "substantially equivalent information that is publicly available?"

3. 38 MRS 1614 (5)(D) states that "*Effective January 1, 2030, a person may not sell, offer for sale or distribute for sale in this State any product that contains intentionally added PFAS, unless the department has determined by rule that the use of PFAS in the product is a currently unavoidable use. The department may specify specific products or product categories in which it has determined the use of PFAS is a currently unavoidable use. This prohibition does not apply to the sale or resale of used products.*"

   Proposed 06-096 C.M.R. ch. 90, § 7(A)(2) states that "*The Department may exempt a product from the prohibition under this subsection if the Department has determined that the use of PFAS in the product is a currently unavoidable use." §2(F) defines "current unavoidable use" as "a use of PFAS that the Department has determined by rulemaking to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available.*"

   §2(I) defines "Essential for Health, Safety or the Functioning of Society" as "*products or product components that if unavailable would result in a significant increase in negative healthcare outcomes, an inability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Products or product components that are Essential for Health, Safety or the Functioning of Society include those that are required by federal or state laws and regulations. Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction.*"

   a. While the MRS provision states that the Department may exempt products from the general prohibition on sale, the proposed CMR provision seems to indicate that the exemption will only be on the prohibition on sale of products for which notification was not received, as that provision is in the subsection that discusses that specific prohibition. Was that the Department's intent, or did the Department intend to restate the general exemption provision found in the above cited MRS provision?

   b. What process will DEP use, and what criteria will DEP establish, when making a determination that specific products that contains intentionally added PFAS is an unavoidable use?

c. More specifically, the Department, in the FAQs posted at https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/, states that "The Department is aware that many existing refrigerants either meet or contain a chemical that meets the definition of a PFAS under this program and that future refrigerants may similarly meet the definition.

Currently, under the statute refrigerants would not be subject to a sales prohibition until January 1, 2030. Closer to 2030 the Department may undertake an investigation to determine if refrigerants are, at that time, a currently unavoidable use."

What criteria will DEP use to determine if the use of refrigerants/refrigerant blends that contains intentionally added PFAS is an "*unavoidable use*"?

4. In the FAQs DEP has posted at https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/, DEP states that "The Department is currently working with the Interstate Chemical Clearinghouse IC2) to develop an online reporting system for all products subject to 38 M.R.S. §1614. The system in development will allow reporting by Global Product Classification brick category and code, and Chemical Abstracts Service Registry Number."

   Will DEP provide for a demonstration period and/or make training available for the online reporting system when it becomes available? If yes, when would that demonstration or training period be expected to occur?

We appreciate DEP's consideration of these questions. Please feel free to contact me should you need any additional information or have questions concerning this submission.

Sincerely,

Judah Prero