

May 18, 2023

To: Susan Lessard, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Via: E-Mail, rulecomments.dep@maine.gov

Re: *General Dynamics Bath Iron Works Corporation Comments on Proposed Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances*

Dear Ms. Lessard and Members of the Board of Environmental Protection:

General Dynamics Bath Iron Works Corporation (“BIW”) appreciates the opportunity to comment on the proposed Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (“Proposed Rule”), which implements the notification requirements and sales prohibitions for products and product components containing intentionally added PFAS under Maine’s *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution* (the “Act”), codified at 38 M.R.S. § 1614 (the “statute”).

BIW was one of the hundreds of stakeholders who participated in the two public outreach sessions in June and October 2022 where Department Staff discussed concept drafts of the Proposed Rule. BIW also submitted comments on the second concept draft of the Proposed Rule to the Department in November 2022. Unfortunately, BIW’s concerns expressed in its comments, including the fundamental issue of applicability of the Proposed Rule to the “products” BIW manufactures, have not been addressed in the Proposed Rule that is before the Board.

BIW therefore submits these comments to assist the Board in developing a rule that will allow Maine manufacturers to comply with the Act, and attaches hereto its November 2022 comments that propose specific edits to the rule language.

I. Applicability of the Proposed Rule Must Be Clarified

BIW is a full-service naval shipyard headquartered in Bath, Maine that specializes in the design, building, and support of complex surface combatant ships for the U.S. Navy, which is an arm of the U.S. Department of Defense (“DOD”). As the Proposed Rule is presently drafted, it is unclear whether the ships BIW builds pursuant to federal contracts are “products” – and whether BIW’s customer, the U.S. Navy, is a “consumer” – subject to the Proposed Rule Sections 3 and 7 notification requirements and sales prohibitions.

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BIW builds the most advanced warships in the world right here in Maine, and must ensure uninterrupted supply from its vendors and an uninterrupted delivery of its ships to the U.S. Navy. These ships are built to specifications established in regulations and contracts with the U.S. Navy, and the number of suppliers able to manufacture critical components of the ships is small and further restricted by U.S. laws and regulations (including export control laws, such as ITAR/EAR; the Buy American Act; and the Federal Acquisition Regulations & Defense Federal Acquisition Regulations). Also of note, these ships are not marketed, offered for sale, or distributed for sale in this state nor is there any probability that they will be used by the military in the State of Maine. In brief, the ships are here temporarily during construction and repair before they are delivered to the Navy for use elsewhere. Nevertheless, the Proposed Rule appears to reach even the warships that BIW produces. Clarification of the applicability of the Proposed Rule to products such as ours is essential.

II. Broader Exemptions Should Be Set Forth in the Proposed Rule

Proposed Rule Section 4 recognizes the issue of federal preemption but unnecessarily limits it to scenarios in which “federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority.” However, the Section 3 notification and Section 7 prohibition provisions on their face conflict with federal authority. Accordingly, there is no need for “explicit statutory language or an applicable court finding” for the Department to find implied preemption exists, and its Section 4 Note should recognize this.

BIW’s development, design, production, and delivery of warships is heavily regulated and required by federal contracts. But it appears from the Proposed Rule, and particularly the DEP’s incomplete understanding of federal preemption as expressed in the Section 4 Note, that our products are nevertheless subject to the Proposed Rule and its Section 7 ban where notification is unattainable. While the DEP, in that Note, recognizes express preemption (“expressly written into the enabling statute”) it unnecessarily restricts the concept of implied preemption, finding implied preemption only “where an applicable opinion from a court having jurisdiction in Maine finds that preemption of parts of this program is implied.” The Department is limiting implied preemption to what is known as “obstacle preemption,” where courts seek to remove a barrier to the accomplishment of a federal objective. However, implied preemption is far broader. It also includes “field preemption,” where federal involvement in a particular field is so pervasive as to preclude state involvement of any kind, and “conflict preemption,” where a state regulation is void because it competes with a federal regulation:

Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Solid Waste Management Association*, 505 U.S. 88, 98 (1992).

The Proposed Rule, as presently drafted and interpreted by the Department, plainly is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because it directly conflicts with federal regulatory oversight of the ships BIW produces. In fact, there are many contractual obligations that flow directly from federal law or regulations, and our ships are built pursuant to federal contracts that incorporate federal acquisitions regulations and dictate what products and, at times what vendors, we may use. Switching out products because we are unable to obtain from our suppliers the PFAS information necessary to comply with the Proposed Rule is simply not possible.

While the federal laws and regulations, as well as long-term federal contracts, that control our production may not explicitly control the presence of PFAS in our product and the hundreds of thousands of components that make up a warship, the effect of the Proposed Rule is to ban those components over which we have no control (and, perhaps, our ships themselves). Because BIW is unable to comply simultaneously with both federal regulation of its shipbuilding and the Department's Section 7 ban, the Proposed Rule unjustifiably interferes with the production of products essential for our nation's safety. Exemption of products over which the manufacturer has little to no development or design control due to federal regulation and contracts is crucial. The Proposed Rule should make this explicit in Section 4.

III. Exemption of Essential Products Should Be Made Explicit and Immediate

BIW appreciates that the Department has acknowledged that essential products include those that are required by Federal or State Laws and Regulation. Products "Essential for Health, Safety, or the Functioning of Society" necessarily also include those produced pursuant to government contracts because, for example, BIW's ship production in compliance with its federal contract obligations is akin to production of products "that are required by Federal or State Laws and Regulations." The Proposed Rule should make this explicit.

BIW understands that, while illogical and contrary to the Act, 38 M.R.S. § 1614 would stymie the production and supply of essential products while awaiting a major substantive rulemaking on "currently unavailable use" determinations. The Legislature did not intend for the statutory notification requirements and sales prohibitions to interrupt the supply of products essential for

health, safety, or the functioning of society. To the contrary, in the preamble to the Act the Legislature made clear that the purpose of this legislation is to allow the Department to “collect information regarding the use of PFAS in and to phase out the sale of certain *nonessential* products containing PFAS.” On its face, the Act is applicable only to “nonessential products.” But the statute nevertheless puts the cart before the horse by banning under Section 7 essential products now that after a major substantive rulemaking will exempted because the use of PFAS in those products is currently unavoidable. If the use is “currently” unavoidable, those products should remain available to Mainers now.

A solution is available via this rulemaking, however. The Department’s rulemaking process for designating products as “currently unavoidable uses,” 38 M.R.S. § 1614(5)(C), concerns only the adoption of rules for exemptions to the January 1, 2030 prohibition. 38 M.R.S. § 1614(10). This major substantive rulemaking has no bearing on the Board’s ability via this routine technical rulemaking to adopt rules to implement any other provision, including the exemptions set forth in §§ 1614(4) and 1614(7). Consequently, the Board may clarify in Sections 4 and 7 those products that are exempted from the notification requirements and sales prohibitions.

IV. A Blanket Extension Is Necessary

The Board, should it decline to exempt federally regulated and essential products, should provide for a blanket extension of the notification deadline until such time as it has made its determination as to what products are exempt. Not only would such an extension recognize the breadth of the rule and the complexity of the products made in Maine, but such extension would allow the Department to put the horse back before the cart, and make its determination as to what uses of PFAS are currently unavoidable. The Proposed Rule expressly provides for such an extension in the Section 7(A) prohibition on the sale of products for which notification is not made “unless granted an extension in accordance with 38 M.R.S. § 1614(3).” Nowhere does the Act, the statute, or the Proposed Rule limit the number or duration of extensions that the Department may grant.

As of May 3, 2023, the Department had granted extensions of the notification deadline to approximately 2,500 entities. BIW proposes that the Board allow for an initial transition period until such time as its major substantive rulemaking pursuant to 38 M.R.S. § 1614(10) is complete. Thousands of manufacturers have already made clear that “more time is needed” to come into compliance. More time also is needed for the Department to finalize a rulemaking as to what uses of PFAS in essential products are currently unavoidable, to avoid the likely unintentional effect 38 M.R.S. § 1614 has in banning of thousands of essential products that will eventually be exempt from notification.

V. Conclusion

BIW is committed to compliance with all applicable Department rules and regulations, and shares the Department's goal of eliminating harmful contaminants from the environment. Thank you for considering these comments, and we look forward to continuing to work with the Board to develop a reasonable notification process that meets the mandate of the Act.

Sincerely,



Jason M. Gasper
Director, Environmental, Health & Safety

cc: Mark Margerum, Maine DEP
Laura M. O'Hanlon, Esq., Deputy General Counsel, BIW
Lisa Gilbreath, Esq., Pierce Atwood

NOVEMBER 10, 2022 COMMENTS

GENERAL DYNAMICS
Bath Iron Works

Deborah J. Nadeau

Director Occupational Safety & Environmental

November 10, 2022

VIA EMAIL - PFASproducts@maine.gov

Melanie Loyzim, Commissioner
State of Maine Department of Environmental Protection
17 State House Station
32 Blossom Lane
August, ME 04333-0017

Re: *Maine PFAS in Products Program*

Dear Commissioner Loyzim:

General Dynamics Bath Iron Works Corporation (“BIW”) appreciates the opportunity to comment on the Department of Environmental Protection (“Department”)’s second concept draft rule for the “Maine PFAS in Products Program” that will detail the notification requirements and sales prohibitions for products containing intentionally added PFAS under Maine’s *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution* (the “Act”), codified at 38 M.R.S. §1614. As you likely are aware, BIW is a full-service naval shipyard headquartered in Bath, Maine that specializes in the design, building, and support of complex surface combatants for the U.S. Navy, which (along with the Army, Marine Corps, Air Force, Space Force, Coast Guard, and National Guard) is an arm of the U.S. Department of Defense (“DOD”).

As one of the largest private sector employers in Maine, employing more than 6,800 shipbuilders from all 16 counties in Maine, BIW takes environmental compliance seriously. We aggressively strive for continuous improvement, not only in the ships our employees design and build for the U.S. Navy, but in the way in which we protect ourselves and the environment. Our commitment to being a good neighbor in our community and State is evidenced by our pledge to operate in a ‘Compliance-Plus’ manner by going above and beyond full compliance with federal, state, and local environmental laws when it makes good business sense. In fact, we currently utilize product substitution, technology improvements, and best management practices to continually improve processes and reduce our environmental footprint.

Accordingly, BIW seeks clarification in this rulemaking process as to whether the ships BIW builds pursuant to federal contracts are “products” – and whether BIW’s customer, the U.S. Navy, is a “consumer” – subject to the 38 M.R.S. §1614 notification requirements and sales prohibitions. BIW builds the most advanced warships in the world right here in Maine, and must ensure uninterrupted supply from its vendors and an uninterrupted delivery of its ships to the U.S. Navy. These ships are built to specifications established in regulations and contracts with the U.S. Navy, and the number of suppliers able

to manufacture critical components of the ships is small and is further restricted by U.S. laws and regulations (including export control laws, such as ITAR/EAR; the Buy American Act; and the Federal Acquisition Regulations & Defense Federal Acquisition Regulations). Also of note, these ships are not marketed, offered for sale, or distributed for sale in this state nor is there any probability that they will be used by the military in the State of Maine. Although there remains an open question about whether the Department may take action that would interfere with a federal government contract, such as regulating the sale of a warship to the U.S. Navy, clarification of the applicability of 38 M.R.S. §1614 is essential for manufacturers in general, and BIW provides the following specific comments on the second concept draft rule.

Section 2.I. Essential for Health, Safety, or the Functioning of Society.

BIW believes that the ships it provides to the federal government are “Essential for Health, Safety, or the Functioning of Society” (1) because they are required by federal contracts and (2) because the development, design, production, and delivery of warships to meet U.S. military specifications and requirements is part of our nation’s critical infrastructure.

First, BIW appreciates that the Department has acknowledged that essential products include those that are required by Federal or State Laws and Regulation, but believes this section should be clarified such that the production of products “in compliance with government contracts” also is essential. This makes sense, because BIW’s production of warships in compliance with its obligations under federal contract is akin to production of products “that are required by Federal or State Laws and Regulations.” In fact, there are many contractual obligations that flow directly from federal law or regulations.

Second, this definition should make clear what sectors are essential to the functioning of society. For example, there are 16 critical infrastructure sectors whose assets, systems, and networks are considered so vital to the United States that their incapacitation would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.¹ One such sector is the Defense Industrial Base (“DIB”), the designated sector-specific agency for which is the DOD. As a defense contractor, BIW is designated as an integral part of the DIB. The rule should make clear that BIW’s production of ships for military defense is “essential for the functioning of society.”

¹ See Presidential Policy Directive 21 (PPD-21): Critical Infrastructure Security and Resilience advances a national policy to strengthen and maintain secure, functioning, and resilient critical infrastructure, available at: <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>. See also Defense Critical Infrastructure Program (DCIP), available at: <https://policy.defense.gov/OUUSDPOffices/ASD-for-Homeland-Defense-and-Hemispheric-Affairs/Defense-Critical-Infrastructure-Program/>.

Because BIW provides its products to the DIB sector pursuant to contracts with the U.S Government and meeting military operational need, BIW proposes the following edits to section 2.I. of the second concept draft rule:

“Essential for Health, Safety or the Functioning of Society” means Products 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 that are Essential for Health, Safety or the Functioning of Society include those that are required by Federal or State Laws and Regulations **or by contracts with the Federal government or any arm thereof**. Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure (**including Products supplied to any Designated Critical Infrastructure Sector**), delivery of medicine, lifesaving equipment, public transport, and construction.

Section 2.Q. Person.

As described above, products supplied to the U.S. government pursuant to federal contracts should be excluded due to their legal nature. Additionally, DOD entities may purchase a product in Maine but also most often do not use that product in Maine. BIW proposes the following edit to section 2.Q of the second concept draft rule:

“Person” means any individual, partnership, corporation, firm, ~~federal~~, state, or local government entity, or public or private organization of any character.

Alternatively, the definition of “Consumer” in section 2.E could be revised to exclude federal governmental entities as follows:

“Consumer” means any person **other than federal governmental entities and defense contractors selling goods directly to a federal government entity** who purchases goods or services which are sold by manufacturers, wholesalers, or retailers.

Section 2.R. Product.

Similarly, BIW proposes that the definition of “products” subject to this rulemaking exclude those that are sold or distributed for use by the U.S. military outside of Maine. In addition to being essential, the production of a warship occurs over the course of many years, and therefore are subject to long-term supply contracts for components that may sit on the ship for years before it is ultimately provided to the U.S. Navy. It appears that the rule is intended to capture products less complex than a warship that is constructed in Maine but delivered to a governmental customer for use outside the state of Maine. Accordingly, BIW proposes the following revision:

“Product” means 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 does not include an item manufactured, assembled, packaged, or otherwise prepared for a federal governmental entity.**

Sections 3.A. & 3.E. Notification.

BIW notes that it is unclear if the “product” that it manufactures is the warship itself, which contains many thousands of component parts each of which may or may not have one or more of the thousands of recognized PFAS substances, and if so the extent to which BIW would be obligated to notify the Department of the intentionally added PFAS in each component. It appears that the Department expects that certain product component manufacturers will have a notification obligation, but what is unclear is to which product components that obligation attaches and how BIW as the ultimate product manufacturer would even be aware of notification by a product component manufacturer.

Additionally, when a product is imported directly into the State of Maine from outside the United States to be sold, offered for sale, or distributed for sale outside of the sales and distribution channels controlled by the manufacturer and the manufacturer has not submitted notification of the product to the Department, it is the responsibility of the person importing the product into the State of Maine to submit notification of the product to the Department. This requirement, especially when being introduced during the term of existing long-term contracts, creates an unreasonable burden shift to BIW.

BIW intends to address the complexities in its product and difficulties in obtaining unknown information from its supply chain in a request for an extension of time to comply with the notification requirements, should that requirement apply to BIW, but notes here that it is unlikely that its suppliers, including the 1,273 suppliers located outside of the state of Maine, are aware of the 38 M.R.S. §1614 notification requirements and sales prohibitions let alone aware of PFAS concentrations in their products.

Section 4.A. Exemptions.

BIW proposes that products defined as “Essential for Health, Safety, or the Functioning of Society” be included in the section 4(A) exemptions or in the section 7(A) prohibition exemptions. It is entirely illogical for the Department to stymie the production and supply of such essential products while awaiting a rulemaking on “currently unavailable use” determinations for the following reasons.

First, the Legislature did not intend for the 38 M.R.S. §1614 notification requirements and sales prohibitions to interrupt the supply of products essential for health, safety, or the functioning of society. To the contrary, in the preamble to the Act the Legislature made clear that the purpose of this legislation is to allow the Department to “collect information regarding the use of PFAS in and to phase out the sale of certain nonessential products containing PFAS.”² On its face, the Act is applicable only to “nonessential

² The Act is available at <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1113&item=5&snum=130> (emphasis added).

products.” The Department’s mandate, therefore, is to collect information regarding PFAS in products that are not essential, nothing more. Perhaps the Department recognizes this mandate, as it has already proposed in this rulemaking a definition of products that are “Essential for Health, Safety, or the Functioning of Society.” The next logical step is to exempt from these rules those essential products. In fact, inhibiting the supply of those products essential to our health and safety would undermine the Department’s legislative mandate to protect human health and the environment. 38 M.R.S. § 341-A(1).

Second, the Department’s rulemaking process for designating products as “currently unavoidable uses,” 38 M.R.S. § 1614(5)(C), concerns only the adoption of rules for exemptions to the January 1, 2030 prohibition. 38 M.R.S. § 1614(10). This major substantive rulemaking has no bearing on the Department’s ability via this routine technical rulemaking to adopt rules to implement any other provision, including the exemptions set forth in §§ 1614(4) and 1614(7). Consequently, the Department may expand in the second concept draft rule sections 4(A) and 7(A) those products that are exempted from the notification requirements and sales prohibitions.

Accordingly, in addition to amending Section 2.I (as noted above), BIW proposes that section 4(A) of the second concept draft rule be revised to include products that are “Essential for Health, Safety, or the Functioning of Society” as follows:

- A. The following are exempt from the requirements of this Chapter:
 - (1) A product for which federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority. For this purpose, the provisions of this Chapter are severable, and if any phrase, Section or Subsection is preempted by federal law or regulation, the validity of the remainder of this Chapter shall not be affected.
 - (2) **A product that is Essential for Health, Safety, or the Functioning of Society.**
 - (3) A product subject to Title 32, §26-A, Reduction of Toxics in Packaging, and
 - (4) A product subject to Title 32, §26-B, Toxic Chemicals in Food Packaging.

Alternatively, if those products are not exempt from the requirements of the proposed rule, BIW proposes that section 7(A) of the second concept draft rule be revised to include such products, as follows:

- A. Unless granted an extension in accordance with 38 M.R.S. § 1614(3) or a waiver in accordance with section 3(A)(2) above, a Person may not sell, offer for sale, or distribute for sale in the State of Maine a product containing intentionally added PFAS if the manufacturer has failed to provide the information required under Section 3.
 - (1) 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.

- (2) **The prohibition in this Section does not apply to a product that is Essential for Health, Safety, or the Functioning of Society.**
- (3) 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.

Such revisions allow Department to address “the imminent threat of further contamination of soil and water in the State” and “to collect information regarding the use of PFAS in and to phase out the sale of certain nonessential products containing PFAS” while ensuring that the Department does not “significantly interrupt the daily functions on which society relies” while awaiting a major substantive rulemaking – which has not even begun – for products whose use is “currently unavoidable.”

Enforcement.

As noted in the proposed rule, violations of Chapter 477 are subject to the Department’s enforcement authority under 38 M.R.S. §§347-A-349. Given that the statute does not provide sufficient detail to allow entities to understand if it is applicable to their companies and what type of information is to be included, the Department should include a suspension of enforcement provision within the rules. Specifically, the Department should formally suspend enforcement activities for one full year following the promulgation of implementation rules. During that one year period, the Department should engage in compliance and educational activities to assist companies in having a greater understanding of the statutory requirements and how they are being implemented in Maine.

BIW is committed to compliance with all applicable Department rules and regulations, and shares the Department’s goal of eliminating harmful contaminants from the environment. Thank you for considering these comments, and we look forward to continuing to work with the Department to develop a reasonable notification process that meets the mandate of the Act.

Sincerely,



Deborah J. Nadeau
Director Occupational Safety & Environmental

cc: Laura M. O’Hanlon, Esq., Deputy General Counsel, BIW
Lisa Gilbreath, Esq., Pierce Atwood