DEFEND OUR HEALTH
Solutions for a Toxic-Free Tomorrow

May 19, 2023

Maine Department of Environmental Protection
Maine Board of Environmental Protection
17 State House Station
28 Tyson Drive
Augusta, Maine 04333-0017

Re: Proposed rules Chapter 90: Control of Petroleum Storage Facilities

To Members of the Board of Environmental Protection. Please accept these comments on behalf of Defend Our Health on proposed rules under Chapter 90: Chapter 90, Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS). Defend Our Health is a non-profit, located in Maine, that works to make sure that everyone has equal access to safe food, safe drinking water, healthy homes, and toxic-free, climate-friendly products.

These rules have been drafted in response to legislation passed last session, LD 1533 “An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution" that was put forth by Representative Gramlich to help protect the health and environment of all Mainers by reducing sources of PFAS coming into the state. While Defend Our Health is generally supportive of the draft rules, we do believe that there are areas that need to be strengthened.

The Maine Board of Environmental Protection should revise the proposed Chapter 90 rule to correct the following eight deficiencies before its final adoption:

1. DEP Improperly Interprets the Law to Narrow the Universe of PFAS to be Reported

The DEP is interpreting the statute to conclude that if a chemical compound that was a member of the class of PFAS did not have an assigned Chemical Abstract Services Registry Number (CASRN or CAS number), then no reporting of known use of that PFAS compound is required. A note in Subsection 2(P) of the proposed rule states that “38 M.R.S. § 1614 requires notification of intentionally added PFAS by CAS number*, therefore chemicals which do not have CAS numbers assigned are not subject to this Chapter*.” (Emphasis added)

This erroneous reading of the statute is echoed on the DEP's Safer Chemicals PFAS FAQ website (https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/index.html), the agency states:

> Will the Department publish a list of chemicals that meet the definition of PFAS?
>
> … The statute requires manufacturers to report the amount of intentionally added PFAS in their products by CAS number. *Therefore, the Department interprets that PFAS*

subject to the reporting requirement of the law is limited to those that have a CAS number. (emphasis added)

In subsection 2(A), the statute addresses disclosure requirements:

> A. 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 written notification that *includes*: (emphasis added)
>
> (1) A brief description of the product;
>
> (2) The purpose for which PFAS are used in the product, including in any product components;
>
> (3) The amount of each of the PFAS, identified by its chemical abstracts service registry number, in the product, reported as an exact quantity determined using commercially available analytical methods or as falling within a range approved for reporting purposes by the department;
>
> (4) The name and address of the manufacturer, and the name, address, and phone number of a contact person for the manufacturer; and
>
> (5) Any additional information established by the department by rule as necessary to implement the requirements of this section

The CAS number is *included* as one of five items that manufacturers must include in their disclosure. There is nothing in the statutory language to suggest that the unavailability of one piece of information excludes the chemical from the rest of the disclosure requirements.

Recommendation: The legislature is working on legislation that will clarify how PFAS can be reported. The rule should be amended to align with the language in LD 217 "An Act to Support Manufacturers Whose Products Contain Perfluoroalkyl and Polyfluoroalkyl Substances", which is expected to pass. The language states:

> The amount of each of the PFAS, identified by its chemical abstracts service registry number or in the absence of this number a description approved by the department, in the product, reported as an exact quantity, or as the amount of total organic fluorine if the amount of each PFAS compound is not known, determined using commercially available analytical methods or based on information provided by a supplier as falling within a range approved for reporting purposes by the department;

2. The Proposed Rule Excludes Critical Information from Reporting on PFAS Use

The proposed rule deleted a requirement contained in the first two concept-draft rules to require manufacturers to report the “state or national sales of a product” containing PFAS.

Both versions of the “Concept Draft for the Maine PFAS in Products Program” that were circulated last year for public review and comment required that the following information be reported on PFAS use in Section 3:

> A. Beginning January 1, 2023, and prior to sale or distribution for sale in Maine of a product that contains intentionally added PFAS.
>
> (1) A manufacturer of such a product must submit to the Department a notification that includes.
>
> (a) A brief description of the product, including at minimum;
>
> (i) Global Product Classification brick category and code;
>
> (ii) *Estimated sales volume in the State or nationally for the full calendar year following the year in which the product is being reported*; (emphasis added)
>
> (iii) The general type of the product, and
>
> (iv) Its intended use.

However, the proposed Chapter 90 rule has deleted provision ii) above and therefore no longer requires information to be reported on estimated sales volume in the State or nationally. DEP amended this draft rule provision without providing any explanation or rationale.

Recommendation: The legislature is working on legislation that will reinstate the original draft rule language regarding reporting estimated sales volume. The rule should be amended to align with the language in LD 217 "An Act to Support Manufacturers Whose Products Contain Perfluoroalkyl and Polyfluoroalkyl Substances", which is expected to pass.
The language states:

> Sec. 1. 38 MRSA §1614, sub-§2, ¶A is amended to read:
> A. Beginning Except as provided in subsection 3, by January 1, 2025, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the department a written notification that includes:
> (1) A brief description of the product, including estimated annual sales volume in the State or nationally;

3. The Proposed Rule Improperly Weakens the Definition “Currently Unavoidable Use”

Under the statutes, all uses of PFAS must be phased out by January 1, 2030 “unless the department has determined by rule that the use of PFAS in the product is a currently unavoidable use.” 30 MRSA §1614.5(D). The proposal faithfully restates the exact statutory definition of “currently avoidable use” in section 2 of the proposed Chapter 90 rule:

> F. Currently unavoidable use. "Currently unavoidable use" means 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.

However, in the proposed rule, the Department adds a new definition of “Essential for Health, Safety, of the Functioning of Society” that is not in the statute and which contradicts legislative

intent in important ways. (Note that this phrase is embedded as a key element of the definition of “currently unavoidable use.”)

The result, if this definition stands unchanged, would be to so weaken the intent to phase out non-essential uses of PFAS so that the Department could easily exempt most uses of PFAS from the presumptive statutory ban, but which contradicts legislative intent even if it satisfies industry.

The proposed Chapter 90 definition in question, in Section 2 of the proposed rule, is restated below along with proposed amendments (indicated by underlined and strike-out formatting) that would correct the critical deficiencies in the proposed definition. An analysis follows.

I. Essential for Health, Safety, or the Functioning of Society. “Essential for Health, Safety or the Functioning of Society” means for the use of PFAS in products or product components there are no safer alternatives to the use of the chemical, that the function of the chemical is integral to the function of the product, and that the unavailability of the product ~~or if unavailable~~ would result in a significant increase in negative healthcare outcomes, an ability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Uses of PFAS ~~Products or components~~ that are Essential for Health, Safety or the Functioning of Society include those that are required by federal or state laws and regulations. Products essential for the Functioning of Society include but are not limited to products integral to addressing climate mitigation, providing critical infrastructure, or the delivery of health care ~~medicine,~~ or lifesaving equipment~~, public transport, and construction~~.

Analysis: The proposed Chapter 90 rule makes several policy errors that would be corrected by the amendment suggested above

First, the law regulates specific ***uses*** of PFAS in products, not products themselves. In a given product category, such as textiles, there may be a dozen or more specific uses of PFAS. Some uses will be clearly non-essential; other textile uses may be essential for health, safety, or the functioning of society. A product may indeed be essential, but the use of PFAS in that product may not be. The definition must refer to a specific use.

Second, there are three separate components to an essentiality test that the rule must recognize:

(1) Are there safer alternatives that provide the same function? (That is, is the use of PFAS even necessary in that product?) For example, PFAS are not needed to provide grease-resistant food wrapping or dental floss; many PFAS-free alternatives are already on the market.
(2) Is the function that PFAS fulfills necessary? For example, stain resistance is not a needed function on men’s pants
(3) Is the product itself necessary? For example, ski wax marketed for high-performance racing that contains PFAS is arguably an unnecessary product.

Recommendation: The proposed Chapter 90 rule only addresses the last question. It must be amended as suggested above to include the other two measures of essentiality as well.

4. The Proposed Rule Improperly Narrows the Ban on PFAS in Fabric Treatment

Rule: The statute includes a ban on the sale of fabric treatments containing PFAS effective January 2023. 38 MRSA §1612 Subsection 1(C) states: "Fabric treatment" means a substance applied to the fabric to give the fabric one or more characteristics, including but not limited to stain resistance or water resistance. The proposed rule veers from the statutory definition of fabric treatments to limit the ban to fabric treatments that are *consumer products.* In Chapter 90 section 2(K) states: "Fabric treatment" means *a consumer product* intended to be applied to fabric to give or enhance one or more characteristics, including but not limited to stain resistance or water resistance. Fabric treatments do not include fabric dyes

Analysis: This significantly narrowed definition needlessly excludes commercially purchased fabric treatments that would be applied to fabric products before their ultimate sale to consumers. This would fail to protect employees of furniture stores and textile mills who face daily occupational exposure to fabric treatments and also the end-use consumers who bring those treated fabric products into their homes and face a concerning exposure pathway by way of fabric particles in household dust. The intent of LD 1503 was to protect Maine residents from exposure to PFAS stemming from the use of PFAS-containing products. It would be inequitable to shield from protection workers who face the cumulative risk of daily exposure to commercially purchased fabric treatments.

Recommendation: Restore the statutory definition of fabric treatments. If the Department can make the case that PFAS-containing dyes present a significantly lower exposure risk, the last sentence in subsection 1(K) of the proposed Chapter 90 rule could be retained.

5. The Proposed Rule Invites Abuse of Confidential Business Information Claims

Rule: A note included in Section 3(d) of the Chapter 90 proposed rule states: “Claims of confidential business information may be made at the time of notification. The Department will handle such claims in accordance with Maine’s Freedom of Access Act 1 M.R.S. §§ 400 – 521 and related policies and procedures; in particular 1 M.R.S. § 421(3)(B) excludes information from public disclosure that the courts would find to be privileged.”

Analysis: Section 3 of the rule governs the disclosure of levels of PFAS in products to Maine DEP’s Safer Chemicals Division. While 3(d) otherwise relates to reporting the contact information for manufacturers, the language in the note fails to limit claims of confidential business information (CBI) to the contact information of the reporting manufacturer. The language invites any claim of confidential business information, potentially including the presence, quantity, and purpose of any PFAS in the reported product and any related sales information gathered for that product.

Inviting claims of CBI will impede the Safe Chemicals program staff’s ability to evaluate the risk presented by each PFAS use and prevent the program staff from effectively determining which uses of PFAS would be exempted from a ban. Any widespread invitation to shield from disclosure information about PFAS in products such as CBI would be a gross disservice to the

many highly PFAS-impacted communities in Maine who are trying to avoid ongoing exposure to the chemicals. The failure to offer guidance as to what DEP would consider CBI and the inclusion of this key topic is a negligent practice that could fundamentally undermine the statute's aims of transparency and harm reduction.

Recommendation: DEP should remove the note inviting submission of CBI claims from Section 3. Any rules around CBI claims should state clearly that the Department's and the public's right to know in which products toxic chemicals are present and the Departments supersedes any claims of CBI, and that the Department will prioritize public health and the Safer Chemicals staff's ability to achieve the goals of this law in the consideration of any such claim.

6. The Proposed Rule Generates Insufficient Fees to Support the PFAS Products Program

Rule: According to subsection 6(a) of the Chapter 90 rule, DEP would mandate a $250 fee for the first three notifications by a manufacturer, and a $50 fee for each additional notification.

The statute states in subsection 6 that "the department may establish by rule and *assess a fee* payable by a manufacturer upon submission of the notification required under subsection 2 *to cover the department's reasonable costs in developing rules* under subsection 5, paragraphs C and D *and administering the requirements of subsections 2 and 9*." (Emphasis added) Subsection 5 deals with the sales prohibition; subsections 2 and 9 respectively cover the PFAS disclosure program and DEP's mandated PFAS point-source reduction efforts.

Analysis: The statute makes clear that the intention of any proposed disclosure fee is to cover the department's reasonable costs of (1) developing rules governing the phased-in prohibition on the sales of PFAS-laden products, (2) administering the PFAS-disclosure program and (3) administering efforts to identify and reduce point-source PFAS pollution. The development and implementation of these efforts is going to be a significant and costly undertaking. According to the DEP, the Safer Chemicals program staff's work on 38 MRSA §1614 has thus far been largely dominated by responding to manufacturers' requests for deadline extensions. This makes it abundantly clear that the Safer Chemicals program is understaffed and underfunded. The program needs additional resources to complete the critical work of implementing this law. The $50 - $250 disclosure fee will not generate nearly enough funding to cover the costs of administering the Safer Chemicals PFAS disclosure, source reduction and point source pollution reduction activities.

Recommendation: The Department should make a realistic budget projection for the full implementation of 38 MRSA §1614 and adjust the proposed fees accordingly. The statute makes clear that the costs of protecting Mainers from ongoing PFAS exposure should rightly be borne by corporations whose products contribute to the PFAS contamination of Maine's waste stream. The vast majority of Maine businesses are already exempted from disclosure and associated fees based on the small business exemption, their status as non-manufacturers, and/or the absence of intentionally added PFAS in their products. Larger businesses that generate income through the sale of PFAS-laden products in Maine can easily afford to pay more than $50 per product type.

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7. The Proposed Rule Invites Continued Abuse of Authority to Waive Reporting

Rule: Subsection 3(A) 2 of the Chapter 90 rule 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"

While disclosure waivers are allowed by the statute, the statute only offers that the Department *may* choose to issue them if the information is available. The issuance of waivers is not encouraged or mandated.

Analysis: While duplicative data on PFAS in products available elsewhere might in theory satisfy the spirit of the disclosure provision in this law, it would be onerous for the Safer Chemicals program's already overworked staff to track down and compile this information. Having a single, well-organized database of PFAS uses in products for sale in Maine will be critical for the Safer Chemicals program as it seeks to implement the portions of the program after the disclosure mandate including the prohibition on sales and any exemptions for products with currently unavoidable PFAS uses. It is not a good policy to let corporations selling products containing toxic chemicals sidestep regulations. Manufacturers selling products within Maine should already know the nature of any toxic chemicals in their products out of concern for their customers and out of concern for their own liability. Requiring these large companies to submit existing information through a web form is not a burdensome regulation.

Recommendation: Disclosure waivers should not be broadly considered beyond the small business exception. The Chapter 90 rules should be amended to clarify that it is the responsibility of manufacturers to compile and also submit the required information to DEP's Safer Chemicals program.

Thank you in advance for your consideration of our recommendations.

Best,

Christopher D. Chavis
Vice President of Programs and Policy
Defend Our Health