May 19, 2023 *via* electronic submission

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

Subject: HCPA Comments on Draft Regulation for Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mr. Margerum,

The Household & Commercial Products Association[1] (HCPA) appreciates the opportunity to provide comments to the Maine Department of Environmental Protection (DEP) on the draft regulation to implement Public Law c. 477, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (LD 1503, 130th Legislature).[2]

HCPA is a voluntary, non-profit U.S. trade association representing approximately 240 companies engaged in the manufacture, formulation, distribution, and sale of products for the household, institutional, commercial, and industrial use. HCPA member companies manufacture and/or market products that may be impacted by this program.

HCPA supports the responsible production, use, and management of fluorinated substances, including regulatory requirements that are protective of human health and the environment for those substances which are persistent, bioaccumulative, and toxic (PBT). HCPA recognizes that DEP is bound by the broad definition of PFAS found within the law but believe that it is critically important to take into consideration the diversity of chemicals which meet this injudicious definition and their distinctive applications. A singular policy approach toward PFAS in products is not reflective of the current marketplace. Further, we advise the agency to closely monitor related activity conducted by the U.S. Environmental Protection Agency (EPA) and other state regulators.

With respect to the PFAS in the Products Program as described by DEP in its draft regulation, HCPA would like to provide the following comments and requests for clarity.

[1] The Household & Commercial Products Association (HCPA) is the premier trade association representing companies that manufacture and sell $180 billion annually of trusted and familiar products used for cleaning, protecting, maintaining, and disinfecting homes and commercial environments. HCPA member companies employ 200,000 people in the U.S. whose work helps consumers and workers to create cleaner, healthier and more productive lives.
[2] 38 M.R.S. § 1614

a. HCPA Comments on the Definition of Alternative

HCPA appreciates the definition of "Alternative" within the draft regulation, though believes it needs to become more refined. Specifically, HCPA believes that any alternative to an existing use of a PFAS substance can only truly be a replacement if it is both technologically and commercially feasible. While there may be a replacement substance or substances for a particular application of PFAS that is functionally similar and reduce the potential for harm to human health or the environment, if it is not commercially viable then it cannot be considered an alternative.

Commercial viability means that the solution is scalable to meet the demands of the market with no significant increase in cost. If consumers or other end users can't afford the product due to the cost of the replacement or there is not enough material to meet the demand, then it is not an alternative.

b. HCPA Comments on the Definition of Commercially Available Analytical Method

As written within the draft regulation, the definition of "Commercially Available Analytical Method" could prevent companies and third-party laboratories from using the most accurate and up to date testing methods on their respective products due to the specification that the analytical method remains unchanged. Very few analytical test methods currently exist that are adequately robust enough to accurately test the numerous complex PFAS mixtures within scope of the regulation. HCPA recommends that companies and third-party laboratories have flexibility to modify existing methods or develop new validated methods.

Accordingly, HCPA emphasizes that Total Organic Fluorine (TOF) analysis measures all fluorine materials associated with organic fluorine and does not identify individual PFAS substances. Further, EPA has noted[3] that TOF testing can often contain inorganic fluorine. There are more specified methods currently under development, such as the EPA Draft Method 1621: Screening Method for the Determination of Adsorbable Organic Fluorine (AOF) in Aqueous Matrices by Combustion Ion Chromatography (CIC) released in April of this year and the Total Oxidizable Precursor (TOP) assay. Tests like these can predict the accelerated degradation and release of many polymeric PFAS but can still have limitations in their ability to reflect a product's life cycle and small changes in laboratory protocol may result in large differences in measured PFAS.

Lastly, HCPA encourages Maine DEP to work with industry and intergovernmental agencies to ensure that the analytical testing requirements allow for robust and accurate results.

[3] Shoemaker and Jones, 2021

c. HCPA Comments on the Definition of Currently Avoidable Use

HCPA thanks DEP for adding a definition for "Currently Unavoidable Use." HCPA supports DEP having a process by which the Department has the ability to determine by rulemaking that an application of PFAS is currently unavoidable. HCPA would appreciate more details on this process beyond the definition for "Currently Unavoidable Use" before finalizing rulemaking such that stakeholders can assist DEP on how this best could function.

d. HCPA Comments on the Definition of Essential for Health, Safety, or the Functioning of Society

HCPA also thanks DEP for adding a definition for "Essential for Health, Safety, or the Functioning of Society." However, HCPA would also appreciate more information on this definition, primarily how the Department would determine what is essential for things such as climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction. For example, many HCPA members manufacture pesticidal products that reduce, kill or mitigate public health pests – would these products be encompassed within this definition?

e. HCPA Comments on Fully Fluorinated Carbon Atom

HCPA is concerned that the definition of "Fully Fluorinated Carbon Atom" is vague and confusing. HCPA recommends that DEP revisit the definition to provide additional clarity and provide examples of the definition in practice.

f. HCPA Thanks DEP for Modification of Intentionally Added PFAS to Address Concerns Regarding Contaminants

HCPA would like to thank the Department for adding into the definition of "Intentionally Added PFAS" a sentence that this definition does not include PFAS that is present in the final product as a contaminant. This clarification helps narrow the potential products that some companies would have reported due to the potential of a product containing a PFAS substance through unintended means such as water contamination and does not discourage manufacturers, marketers, and importers from monitoring their raw material supply chains so that they would be unaware of such contamination that can otherwise be addressed.

g. HCPA Comments on the Modification of Significant Change

The term "Significant Change" is going to have a different meaning for various applications. HCPA does not believe that an approach in which all significant change means 10% is appropriate. HCPA also believes that there should not be a "one size fits all" approach when defining this term. Rather, HCPA believes that DEP should develop a process through which

responsible parties can provide information detailing what they believe a significant change would mean for their application. While the information stakeholders present to DEP will vary based on the application, if there were general topics DEP would wish to receive from stakeholders, guidance would be appreciated.

h. HCPA Requests Hierarchy for Determining the Responsible Party to Report to DEP

HCPA is concerned about the confusion that exists over exactly which companies are required to report applications of PFAS as defined by the law to DEP. HCPA's interpretation of the law is that the responsible party is the company which markets the product and whose name appears on the product label. In circumstances where a marketing company is not located within the United States, the importer is the responsible party. However, based on the current wording of the Notifications section of the draft regulation, there are questions as to whether or not there are reporting obligations for the rest of the supply chain. The term "Product" is defined in the draft 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." It is conceivable that a company might sell a component into Maine to a company that assembles the end-use product in Maine, who then sells the fully assembled product to consumers and other users in the state. In this instance, there is confusion as to whether the supplier of the component would be subject to reporting requirements. In other scenarios in which a component is sold to a company that assembles the final product outside the state of Maine, but then the end-use product is sold within the state, there are questions as to exactly who is responsible.

As such, HCPA recommends DEP draft a definition for the term "responsible party", which describes the reporting hierarchy so that companies can make appropriate determinations and utilize clear terminology within the Notification section of the draft regulation so there is clarity amongst stakeholders compelled to report.

i. HCPA Feedback on the Use of Theoretical Calculations

HCPA appreciates DEP for providing the pathway for responsible parties to use a theoretical calculation based on the inputs and outputs of the manufacturing process. This is critical as there are not yet "Commercially Available Analytical Methods" to accurately determine the content of various PFAS substances in complex product mixtures and articles. However, manufacturers may rely on this allowance for reporting PFAS only if they are reporting PFAS as falling within a Department-approved range found in the Department's online notification system. Unfortunately, the system, to the best of HCPA's knowledge, does not yet exist. DEP should not proceed without commercially available analytical methods for most products and the online notification system, complete with Department-approved ranges for PFAS reporting.

j. HCPA Recommends Exploring All Avenues for Shared Reporting Services with Other States and EPA

HCPA is concerned that the draft regulation requires reporting that may be duplicative. Subsection 3 of the law provides DEP the authority to waive all or part of the notification requirement under Subsection 2 if DEP determines that substantially equivalent information is already publicly available. HCPA implores DEP to explore existing agreements with other states to reduce duplicative actions that will likely result from numerous state actions around PFAS. EPA is in the midst of a rulemaking process under the Toxic Substances Control Act (TSCA) Section 8 that will require those that manufacture and import any identified PFAS to report information regarding uses, disposal, exposures, hazards, and production volumes. HCPA believes that EPA's work is an opportunity for Maine and other states to reduce their reporting requirements and utilize the information gathered by the nation's federal environmental regulator.

HCPA also believes that there may be opportunities for DEP to reduce reporting obligations for companies already reporting product information to other departments within the state of Maine. For instance, companies must register their pesticide products with the Maine Department of Agriculture, Conservation & Forestry before they are allowed to sell their products within the state, and Maine's Board of Pesticide Control recently adopted[4] a condition of registration which requires registrants to submit an affidavit whether the product contains PFAS. Pesticide product registrations must be renewed each year, so this is an opportunity for DEP to reduce their requirements so long as CBI can be protected.

It is also important for DEP to work with stakeholders when the requirements of LD 1503 conflict with other recent legislation in Maine that encourages the use of substances that are captured under the statutory definition to meet various state goals, such as combatting climate change.

a. HCPA Believes More Consideration Must be Given to Confidential Business Information

As previously noted, HCPA is concerned over how DEP will handle "trade secrets" or confidential business information. HCPA anticipates that there will be numerous claims for confidential business information by many companies across several reporting elements.

To highlight another example beyond sales data, the very presence of a specific byproduct and impurity within a formulation can be considered CBI if it might divulge proprietary processes or formulation related information. Suppliers should not be required to reveal commercial trade secret information to their downstream customers and the final rule should simplify electronic reporting in a manner that enables "joint submissions".

[4] https://www.maine.gov/dacf/php/pesticides/documents2/bd_mtgs/May22/2-Apr22min-draft.pdf

DEP should acknowledge in the draft regulation that companies are able to assert claims of CBI for any PFAS for which a claim has already been approved by EPA for inclusion on the TSCA Confidential Inventory or for which a claim of protection exists under the Uniform Trade Secrets Act. The final rule should also make clear what information elements can be claimed as confidential and allow for simplified substantiation procedures for confidential business information claims, so that each individual claim does not require the submitter to complete the Department's substantiation questions on a chemical-by-chemical basis.

Furthermore, HCPA has concerns with DEP's potential use of the Interstate Chemicals Clearinghouse (ICC) Platform, which is a third-party, non-governmental organization, for which there is no public accountability. It is entirely unclear to HCPA what steps, technologies, processes, or tools the ICC Platform uses to protect CBI. Moreover, if the CBI is accessed inappropriately, what penalties or remedies are available to the state and impacted companies.

b. HCPA Requests Clarification Regarding Certificate of Compliance

Section 8 of the draft regulation refers to a "Certificate of Compliance" in the event DEP believes a product contains intentionally added PFAS and is being sold, offered for sale, or distributed for sale in violation. However, HCPA is not clear on the threshold DEP would need to come to believe a violation has occurred or what the certificate requires companies to show and attest in the event that a violation has not occurred. Furthermore, HCPA requests guidance on what DEP expects to be submitted if a company claims that the PFAS found in a product comes from a contaminant. HCPA would greatly appreciate clarity for the Certificate of Compliance.

c. HCPA Comment Regarding Fees

Any administrative fee that is collected under this program should be used to administer the program and not diverted to serve other activities.

Conclusion

HCPA appreciates the opportunity to provide these comments and requests. HCPA looks forward to working with DEP and other stakeholders to ensure the residents of Maine continue to have access to the products that improve their daily lives. Please do not hesitate to contact HCPA if the Department would like to discuss our comments.

Respectfully submitted,

Michelle L. Kopa

Michelle Lopez Kopa
Director, State Government Relations & Public Policy - Eastern Region
Household & Commercial Products Association