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May 19, 2023

Commissioner Melanie Loyzim
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

By Email

Re: Comments on Posting Draft for the Maine PFAS in Products Program

Dear Commissioner Loyzim,

On behalf of Maine Outdoor Brands (MOB) and the Outdoor Industry Association (OIA), we present these comments regarding the Posting Draft for Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances.

MOB unites and provides a voice for Maine's outdoor product, service, and retail companies. MOB boasts a membership of over 170 stakeholders, ranging from small local manufacturers to national brands. Each of MOB's members contributes to Maine's unique and thriving outdoor recreation economy. The state's outdoor recreation industry makes up 3.6 percent of the state's economy, nearly double the national average and the fifth highest of any state. OIA serves as the industry's national-level voice.

Outdoor gear and apparel are designed to protect the user in a variety of circumstances. In the outdoors, qualities like water repellency, oil and grease repellency, durability, breathability, and heat resistance can make an incredible difference for comfort and survival. In extreme conditions, water repellency can be a life-saving function. The outdoor industry has used water-repellant treatments to make moisture bead up and roll off outer fabric and membrane layers. Historically, these treatments have relied on per- or polyfluorinated substances (PFAS).

The outdoor industry is uniquely positioned to support Maine's vision of a thriving and environmentally responsible economy that offers good-paying jobs and an unmatched quality of life. Responsible chemical management is a critical piece of that puzzle. That's why outdoor brands have led the way in researching and deploying innovative technologies that will phase out PFAS entirely while maintaining protective qualities. Through that work, our brand leaders have developed unique expertise in the identification and phaseout of these chemicals. However, with that knowledge, we are concerned about the challenges that our members will face with the implementation of these regulations in their current form.

The Posting Draft does not account for several realities in our industry, including technological limitations of testing, timelines for product development, and realities of inventory management. Small and mid-size businesses will struggle to meet the proposed requirements. Outdoor brands will have to weigh the challenges and expense of unclear testing and reporting requirements with the risk of enforcement. The result may be exit from the Maine market for brands outside the state, and the threat of closure for smaller brands within Maine.

We understand that Maine Department of Environmental Protection (DEP) is constrained by the statutory text of Public Law c. 477. Nonetheless, the agency retains authority to interpret and implement the requirements set out. To support the critical outdoor industry in Maine, MOB and OIA ask that Maine DEP consider the following amendments to its proposed rule:

Clarify Key Requirements

SCOPE OF TESTING:

The Posting Draft requires manufacturers to report on the “amount of each PFAS” used in the product based on “commercially available analytical methods.” The proposal defines such methods as “any test methodology used by a laboratory that performs analyses or tests for third parties to determine the concentration of PFAS in a product.” This definition poses a significant challenge to many of our members who are left wondering—what testing methods should they select?

The Posting Draft refers to EPA approved test methods, but EPA has not approved test methods for consumer products. Private labs have filled the void with a range of test options. A test for total fluorine—an indicator of PFAS content—can cost approximately \$150 for a material or finished product. But that test doesn’t provide a measurement of each individual PFAS. The test packages for quantifying individual PFAS content offered by different labs vary in comprehensiveness and cost. Some labs offer testing for 30 PFAS, others offer testing for 60 PFAS, and still others offer testing for up to 100 PFAS. Those packages do not cover the thousands of potential PFAS. Our members have been quoted between \$300 and \$1600 to test for even a limited set of PFAS in a single material. An individual product may contain more than 60 materials. Is a manufacturer obligated to find the most comprehensive set of tests available on the market? As labs develop tests for more PFAS, will the list of required tests expand? And what should a manufacturer do if they detect fluorine in their product, but existing tests cannot identify the chemicals in their product?

We recommend that Maine DEP provide a clear definition for “commercially available analytical methods” that incorporates reasonable considerations of cost, technological development, and scope of chemicals tested. That definition may include a safe harbor that allows reporting based on supplier-provided disclosures, or does not require testing if the manufacturer has

identified total fluorine below a certain threshold (such as 100ppm). Such a threshold would also protect responsible manufacturers that may experience unintentional contamination from a variety of sources. Maine DEP could develop a guidance document that delineates a set of tests that manufacturers can use to show good faith compliance with the regulations. The cost of testing quickly adds up, particularly for low-margin products. Under the current level of uncertainty, testing presents too expensive a burden for many of our members. That uncertainty may force many brands to make the challenging decision to simply exit Maine rather than face the risk of enforcement.

USED GOODS AND GOODS MANUFACTURED WITH RECYCLED MATERIALS:

Our members are constantly striving to decrease their impact on the environment. The growing circular economy has helped many of our brand members decrease their carbon emissions and reliance on raw materials. We appreciate the clear exception for “used” products in the Posting Draft. This definition provides certainty for our brand leaders that buy back or take back outdoor gear and apparel, refurbish or fix them, and resell them. We ask that Maine DEP exempt contamination arising from the use of recycled or reclaimed materials. Such legacy materials may include unintentional PFAS contamination that would become incorporated into the new consumer good. A clear exception either embedded into the “used” term or the “intentionally added PFAS” term would provide greater certainty to brand leaders who seek to divert waste from landfills and decrease their environmental impact.

PRODUCT COMPONENT:

Outdoor gear and apparel are complicated, technical goods. A tent may appear simple, but its bill of materials can easily exceed 60 components. A piece of luggage can have more than 50 components. The Posting Draft has amended the notification provision of Public Law c. 477 to require reporting of not only PFAS in the product, but also reporting on “product components” that “must be registered individually by name.”¹ This change from the underlying statute appears to create an entirely new and separate reporting requirement for product components that dramatically increases the reporting burden for complex products. Rather than report a finished tent, for example, the rulemaking as currently drafted could be read to create a reporting requirement for each fabric, tentpole, zipper, Velcro, and metal stake. We ask that this alteration be removed, and that the rulemaking clearly state that reporting is only required at the finished product level, such as for primary materials—not at the component level.

MANUFACTURER:

Many of our members have raised confusion over the broad definition of manufacturer in the Reporting Draft. The definition assigns reporting responsibilities to multiple parties, and it does

¹ Compare the statute language (“The amount of each of the PFAS . . . in the product”) with the Posting Draft language (“The amount of each of the PFAS . . . in the product or any product component”).

not account for licensing relationships. We request that Maine DEP clarify primary responsibility for reporting, as well as how to treat licensed goods where the licensor does not produce, own, or sell the product branded with their name.

PACKAGING AND FOOD PACKAGING:

In the Posting Draft, Maine DEP provided clarity on exemptions from the reporting requirements for packaging regulated under Title 32, § 26-A, as well as food packaging regulated under Title 32, § 26-B. Our members are grateful for this clarification and support the continued inclusion of these exemptions in the final draft.

Accommodate Industry-Specific Needs

LEGACY INVENTORY:

The outdoor industry faces significant inventory challenges. The industry experienced high demand during the COVID-19 pandemic, but a relative slowdown has led to inventory challenges for the industry as warehouses fill with legacy products. Older products may sit on shelves for years—and those shelves may belong to a retailer several links away from the original manufacturer. Our brand members face the new challenge of tracking and testing legacy products that have long left their possession. Our retail members similarly face a new challenge of assessing inventory that may no longer comply with state law. Further, as brands update chemistry for existing product lines, products that once contained PFAS may no longer contain that chemistry. The need to differentiate new versions of products may require SKU changes, new marketing, and new inventory tracking strategies that take time to implement. Maine DEP’s regulations do not account for these realities. We ask that Maine DEP consider adopting a safe harbor for goods manufactured before a certain date or issue guidance on how the agency will utilize its enforcement discretion on legacy goods. Otherwise, disposal may become the only path forward for brands and retailers.

CURRENTLY UNAVOIDABLE USES:

Many outdoor industry products are designed to protect users from dangerous conditions. This reality has been reflected in exemptions adopted by other states that have regulated PFAS in textiles. For example, both California and New York have adopted PFAS prohibitions for apparel that contain delayed prohibitions for “outdoor apparel for severe wet conditions.” California has adopted exemptions for personal protective equipment. We ask that Maine DEP adopt these exemptions as components of those products essential for health, safety, or the functioning of society to align the regulations with the developing cross-state framework.

SMALL BUSINESSES:

Our small business members are particularly concerned with the burden that the reporting rules will have on their businesses. These small businesses do not have the personnel,

expertise, and funding to stand up entirely new testing programs. In order to support the growing outdoor economy in Maine, we ask that Maine DEP consider adopting exemptions for small businesses, or extended compliance deadlines specific to the small business sector.

Extend the Implementation Timeline

PROVIDE LONGER EXTENSIONS:

The reporting obligation under Public Law c. 477 began on January 1, 2023. Nonetheless, the regulations remain under development. Maine DEP provided extensions to many businesses that await finalization of the reporting framework. These extensions are set to expire 6 months after the conclusion of rulemaking. That timeline does not account for the lead time that the outdoor industry uses to design, manufacture, and sell products. The product development cycle can take years. Several of our members described a 24-month development cycle from beginning to end—and that doesn't account for stock held in inventory by retailers for years after. Products sold today were designed well before the Maine PFAS law was proposed.

We ask that Maine DEP extend its extensions to at least 12 months after the conclusion of rulemaking to allow brands the time needed to set up testing and reporting protocols that meet the final regulations. In the alternative, we ask that Maine DEP consider sector-specific expirations for industries facing regulation elsewhere. For example, the textile industry faces a PFAS phaseout deadline of January 1, 2025 in California. Aligning reporting would allow our members to focus on PFAS phaseout rather than weigh complicated reporting requirements.

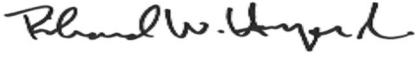
Conclusion

Maine has long been a leader in valuing the outdoor economy. MOB and OIA appreciate that the state has taken a leadership role in understanding and regulating PFAS—it is a critical step necessary to protect our beautiful lands and waters. We want to ensure that these regulations account for the realities of our sector, and that they support the outdoor industry economy.

We appreciate the opportunity to comment and welcome continued engagement. Please contact Jenny Kordick at jenny@maineoutdoorbrands.com if you have any questions or would like additional information.

Thank you,


Jenny Kordick
Executive Director
Maine Outdoor Brands


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