



May 15, 2023

Maine Department of Environmental Protection  
Office of the Commissioner  
Attn: [PFASProducts@maine.gov](mailto:PFASProducts@maine.gov)  
17 State House Station  
Augusta, ME 04333

Dear Sir/Madam:

We write on behalf of the Natural Resources Defense Council (NRDC). Thank you for the opportunity to provide comment on the proposed rule that would detail the notification requirements and sales prohibitions for products containing Intentionally Added PFAS under Maine's Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, 38 M.R.S. §1614 (the "Act").

Our comments consist of two parts. In Attachment A to these comments, we provide specific suggested text changes to the proposed rule, intended to improve the clarity of the proposed rule and/or consistency with statutory intent. In this portion of the comments, we explain the bases for the proposed changes and address related issues not directly raised in the proposed regulatory text, such as statements made by DEP in its FAQs.

We also support the comments from Defend Our Health (DOH). The Department should heed these recommendations to make the proposed rule as effective as possible.

### Definitions

I. Essential for Health, Safety, or the Functioning of Society. We proposed several changes to this crucial definition for consistency with the statute. The first set of changes would change the emphasis from the product to the use of PFAS in the product

because the statute defines "currently unavoidable use" to mean "*a use of PFAS that the department has determined by rule under this section to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available.*" A product may indeed be essential, but the use of PFAS in the product may not be.

Second, changes are proposed to make clear this essentiality test has three components: (1) the availability of alternatives to the use of PFAS (i.e., the necessity of PFAS use), (2) the necessity of the function provided by PFAS since in many cases the PFAS function is not necessary to make the product (e.g., stain resistance for pants); and (3) the necessity of the product itself. In DEP's proposed definition, only the third element is addressed, but the first two elements are also important factors in determining whether the PFAS use should continue.

Third, changes are proposed to address current text ambiguity suggesting that for some of the sectors listed (i.e., public transport, construction), the PFAS use need not be integral to the functioning of the product. For example, PFAS use to make stain resistant fabric covers for vehicle seat cushions is not essential for the functioning of society simply because it involves public transport.

N. Definition of Manufacturer. We suggested changes to the note addressing the roles and responsibilities of online platforms. Where the online platform acts as the distributor of a product in the United States for a foreign manufacturer, the online platform is clearly the importer of the product, in the same way any domestic wholesale distributor of foreign manufactured goods would be. The online platforms are in a much better position to know or obtain the information necessary to complete the notification requirements than the ultimate consumer would be. Courts are increasingly categorizing online platforms as wholesalers and retailers, rather than mere purveyors of information. See e.g.,

Loomis v. Amazon.com LLC, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2021).

P. Definition of PFAS. We suggested changes to the text to clarify that the EPA list of PFAS is only a partial list, and by itself, is not comprehensive enough to meet Maine's statutory definition.

In addition, we also take issue with the note in the proposed rule indicating that PFAS without a CAS number are not subject to notification requirements. The Department has not correctly interpreted the law. The statutory definition of PFAS contains no such limitation. It is clear the Legislature intended to apply a broad definition of PFAS as a class. And while it is true the statutory notification requirements specify providing a CAS number where one is available, there is nothing in the statute which suggests in the absence of a CAS number, no notification of the PFAS use is required. DEP reads an exclusion in the law where none exists, and in doing so, has undermined the intent of the law.

DEP has arbitrarily reduced the scope of PFAS coverage by nearly 10%, since there are at least 14,735 known PFAS listed in US EPA's CompTox Dashboard, but 1,365 listed without a CAS number.<sup>1</sup> The CAS registry number is but one way in which a chemical may be identified, therefore the absence of a CAS number presents no bar to either PFAS identification or implementation of the notification requirements. Indeed, under the proposed regulatory text, DEP requests both the name of the PFAS and the CAS number, thereby acknowledging the importance of the PFAS name as well. DEP offers no scientific or technical justification as to why the reporting program cannot include PFAS without a CAS number.

Rather than excluding from reporting PFAS with no CASRN, the Department should specify that in cases where no CAS number is

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<sup>1</sup> See <https://comptox.epa.gov/dashboard/chemical-lists/PFASSTRUCT>.

available, companies should provide the information that can be derived from the CAS number, such as the chemical name, molecular formula, and molecular weight. NRDC has provided in Attachment A the necessary text.

The best example of a comparable PFAS database is the information 3M made available on its website (downloadable from: [https://pfas.3m.com/pfas\\_uses](https://pfas.3m.com/pfas_uses)). The download contains 15,031 rows of products that contain one or more PFAS. Products are identified by product trade name, a standardized product code and 11-digit product ID. Each product row then lists one to seven PFAS that are present in that product (including the CASRN, the % PFAS range, and the function of the PFAS).

Significantly, a large portion of this database consists of entries labeled “Vendor Trade Secret” (n>2,600) and a few other odd identifiers that don’t fit CASRN naming convention. “Fluoropolymer (no CAS # available)” was also used 91 times in the sheet. Another frequently mentioned PFAS is listed as ACCN# 265599 (n=1,533). This isn’t a CASRN, but NRDC identified it through a google search of a MSDS data sheet indicating it is a fluorinated acrylic copolymer (mixture). Accordingly, unique identifiers were used, even in the absence of CASRN.

In total, somewhere between 3,000-5,500 PFAS entries are not identifiable by CASRN. If 3M, which has a very large PFAS product portfolio can supply these data, then others can as well (or use 3M’s data if 3M’s products are components of other more complex products). The company provided the % PFAS range and the function of the PFAS (even in the absence of a CASRN or when it was deemed trade secret).

NRDC’s approach is more consistent with the Interstate Chemicals Clearinghouse “Principles for Chemical Ingredient Disclosure” that chemical ingredient disclosure -

“comprises identity of the chemical ingredient, including name(s), CAS registry number, function, presence on specified lists of chemicals of concern, and other chemical hazard characteristics of the ingredient.”<sup>2</sup>

We find DEP’s inconsistency with these principles particularly troubling since DEP is a member of the Clearinghouse and will be relying upon the Clearinghouse to operationalize the Maine PFAS notification program. Nothing in these Principles suggests the obligation to disclose is contingent upon a chemical having a CAS number.

In looking ahead to the notification form itself, DEP can simply instruct companies to indicate “NA” where the CAS number is requested, and then instruct companies to provide the molecular formula and weight instead. This approach would be consistent with the implementation of California’s SB-258 Cleaning Products Right to Know Act of 2017.<sup>3</sup>

R. Definition of Product. The proposed definition of product is satisfactory, but in a separate FAQ, Maine DEP says the following:

Is notification required if PFAS is used in the manufacturing process, but it is not present in the final product?

No, providing notice to the Department is only required if either PFAS or its degradation products have been intentionally added to the product to impart a specific characteristic or function and are present in the product offered for sale.<sup>4</sup>

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<sup>2</sup> See [https://newmoa.org/ic2/Principles\\_of\\_Chemical\\_Ingredient\\_Disclosure5.pdf](https://newmoa.org/ic2/Principles_of_Chemical_Ingredient_Disclosure5.pdf).

<sup>3</sup> See <https://legiscan.com/CA/text/SB258/2017>, Section 108954.5(a)(3).

<sup>4</sup> See <https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/index.html>.

This DEP response is misleading and potentially inconsistent with the Maine statute, since it appears to address only the responsibility of the manufacturer, but not the responsibility of the entity which sold the PFAS to the manufacturer. The law expressly defines a “product” as inclusive of items sold for industrial use. The PFAS used in the manufacturing process described in the DEP FAQ did not just magically appear. Rather, the PFAS was sold to the manufacturer for industrial use and thus falls within the statutory definition of product, regardless of whether the PFAS appears in any downstream product. The entity which manufactured the PFAS product for the industrial application must comply with DEP notification requirements, if the industrial use occurred in the State of Maine.

Indeed, in an earlier FAQ, DEP correctly interprets the law –

Are products that are sold for industrial or commercial use treated differently than those meant for personal or residential use?

No, under the law all products, regardless of whether they are sold for personal, residential, commercial, or industrial use are treated the same.

Clearly, DEP needs to revisit the FAQs, both to ensure consistency with each other, and with Maine law.

U. Definition of Reasonably Available. This is a new definition, not previously published in the concept drafts. In this proposed definition, DEP would require that a PFAS alternative function “as well as or better” than PFAS in a specific application. However, there may be instances where a substitute may be perfectly adequate for performing the PFAS function in a product, even though the alternative might not achieve precisely the same performance specification (slightly slower reaction time, a small

decrease in duration of effectiveness or performance). Given the policy objective of eliminating toxic PFAS use, a small but immaterial change in functionality may be acceptable, particularly where improvements in performance can be expected over time.<sup>5</sup> Accordingly, we suggest a corresponding revision to the proposed rule in Attachment A.

V. Definition of Significant Change. This definition is important because it triggers a company requirement to revise the previous notification submitted, and thereby determines whether the notification database reflects the current circumstances. In the previous concept draft, DEP had proposed to define significant change as a change which results in the addition or removal of PFAS in the product. In the current proposal, only the addition of PFAS must be reported. The change is misguided, because the resulting database would not reflect PFAS removals. This lack of updated data on product improvements will prevent DEP from benchmarking sectors for phase out prioritization before 2030, prevent the public from comparing products for current PFAS concentrations, and prevent Maine's Legislature from adequately monitoring implementation of the law.

Notifications should be revised when the PFAS concentration increases or decreases by 10% or more, for the same reasons. PFAS concentration decreases are equally reportable updates because of the ongoing need for currently valid information.

We note DEP's proposed definition of "significant change" here is completely inconsistent with Maine's mercury notification requirements. Under the mercury program, a notification must be revised if there is a change in any of the information previously

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<sup>5</sup> See generally, Roy et al., Combined Application of the Essential-Use and Functional Substitution Concepts: Accelerating Safer Alternatives, *Environ. Sci. Technol.* 2022, 56, 9842-9846.

submitted (e.g., an increase or decrease in the amount of mercury in the product), such as -

- Mercury is no longer used in the product;
- The mercury-added product or product category is no longer manufactured;
- The mercury-added product or product category is no longer sold in the states requiring notification; and/or
- New mercury-added products are being manufactured and offered for sale.<sup>6</sup>

In the case of the PFAS notification requirements, the need for revised notifications to reflect current circumstances is even more paramount, since the PFAS notification requirement is a one-time obligation, while a new mercury product notification must be submitted every three years.

### Notifications

NRDC suggests three changes to the notification requirements. First and foremost, although the current text requires companies to identify the type of product, the current text does not require identification of the component in the product to which PFAS was intentionally added. This is a very important omission, since it is critical to know which components contain the PFAS, particularly in products consisting of many component parts. It is obvious that if the Legislature requested data on the purpose and concentration of the PFAS in the product component, identification of the component itself must accompany this information for the data to be useful and make sense. Neither DEP nor the public should have to guess where the PFAS can be found.

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<sup>6</sup> See <https://newmoa.com/prevention/mercury/imerc/faq.cfm#3>.



Second, DEP should request available PFAS environmental monitoring data related to the product manufacturing activities reported. If the data apply to a Maine location, they are certainly relevant to the prioritization activities Maine DEP must perform under the law. However, even data from outside Maine may be relevant as well, because the information will inform DEP about the potential land and water resources contamination scenarios associated with a particular product category. Where the data are already in the public domain, companies can simply provide a link to where the data can be found.

Third, we urge DEP to include national sales data on the product(s) being reported. This requirement was in the previous concept drafts but is not in the proposed rule. The failure to require national sales data in the proposed rule is inconsistent with Maine's other product notification requirements and EPA's proposed PFAS reporting rule; and will deprive DEP and the public of critical information.

Under the Maine mercury product notification requirement, the manufacturers must provide "the total amount of mercury in all units of the product or product components sold in the United States during the most recent calendar year for which sales figures are available, reported either for the units or components sold by the manufacturer or as aggregated by a manufacturer trade association for all units of the product or components made by the industry". See 38 MRSA 1661-A.1.D. Similarly, quantity data is sought by EPA for each of the PFAS production and processing activities.

Total quantity data is critical to know for priority setting purposes under the Maine law, since it provides an indication of the potential for products to contaminate Maine's land and water resources, through use and/or waste management. Indeed, Using the reporting data, IMERC periodically published national data on

mercury use in products,<sup>7</sup> which became the best source of data in the country until EPA recently adopted its own product-based reporting obligations.<sup>8</sup> National data must be requested since state-specific data will not be available.

Unrelated to the rule text itself, as part of form preparation, we suggest DEP utilize the same drop-down codes EPA has proposed to use for the identity of the type of product (Table 5), and PFAS functions in products or components (Table 4).<sup>9</sup> Using the same codes, where possible, can facilitate data comparisons and may contribute to greater consistency in data quality.

We also note the proposed rule does not address appropriate concentration ranges for reporting. PFAS are toxic at very low concentrations. Greater precision at lower concentrations will complement other PFAS reporting programs with ranges targeting higher concentrations, and this precision will enable DEP to provide a stronger assessment of potential contamination of Maine's land and water resources, as contemplated by Maine law.

In the case of both fabricated and formulated products, consistent with the mercury notification program, the recommended ranges apply to the PFAS-added component of the product, not the entire product.<sup>10</sup> For formulated products, we additionally recommend that companies provide either the PFAS concentration in the entire product or the proportion of the PFAS-added component to the entire product. These additional data on PFAS concentrations in formulated products as a whole will facilitate DEP's understanding of potential wastewater discharges to Maine's waterbodies and/or POTWs.

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<sup>7</sup> See [https://www.newmoa.org/wp-content/uploads/2023/01/2016\\_Mercury-added\\_Data\\_Analysis.pdf](https://www.newmoa.org/wp-content/uploads/2023/01/2016_Mercury-added_Data_Analysis.pdf).

<sup>8</sup> See <https://www.regulations.gov/document/EPA-HQ-OPPT-2017-0127-0002>, p. 6.

<sup>9</sup> See 86 Fed. Reg. 33959-62 (June 28, 2021).

<sup>10</sup> For example, the ranges apply to the fabric treatment on a car seat, not the car seat or the car.

The ranges are a simplified numeric sequence, recognizing the widely varying product categories covered by the reporting requirement. The proposed ranges are as follows:

Less than 1 ppb  
1 ppb to less than 10 ppb  
10 ppb to less than 100 ppb  
100 ppb to less than 1 ppm  
1 ppm to less than 10 ppm  
10 ppm to less than 100 ppm  
100 ppm to less than 1,000 ppm  
Equal to or more than 1000 ppm

### Fees

The note under Section 6A of the proposed rule seeks to clarify who is responsible for notifications when product components are incorporated into a complex product. We read the note as meaning the manufacturer of the complex product must submit the notification covering each of the product components, thus the product component manufacturer would only submit a notification covering components sold directly in Maine (without incorporation into the complex product).

However, the note is not clear, and could be construed as eliminating the notification for both the component and complex product manufacturer, thereby opening a huge gap in Maine's PFAS reporting requirements and database. Accordingly, in Attachment A, we suggest language to the note to avoid any misunderstandings and preserve the integrity of Maine's notification requirements.

Failure to Provide Notice

We provided clarifying text to Section 7(A)(2) of the proposed rule that currently unavoidable use exemption determinations are rulemakings under Maine law, consistent with the definition of “currently unavoidable use” in the proposed rule.

Please contact David Lennett at [dlennett@nrdc.org](mailto:dlennett@nrdc.org) if we can be of further assistance.

Sincerely,

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