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VIA E-MAIL AND USPS

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

Re: Comment on Maine DEP Second Concept Draft of PFAS Reporting Rules

Dear Commissioner Loyzim:

We appreciate this opportunity to submit comments on the Maine Department of Environmental Protection's (DEP) "Second Concept Draft for the Maine PFAS in Products Program," (Second Concept Draft), which Maine DEP provided to stakeholders on October 13, 2022, and which may serve as the basis for a proposed regulation for Maine's Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances [PFAS] Pollution, 38 M.R.S. §1614 (the Act). Our submission is on behalf of a multinational technology company that develops a variety of complex electronic products that are distributed and sold in Maine. This company may be subject to the Act.

Our client is very concerned, as it was with Maine DEP's First Concept Draft, that the proposed rulemaking will leave stakeholders scrambling to provide information that despite best efforts would run a high risk of being incomplete, inaccurate, and susceptible to confidentiality breaches. The Second Concept Draft gives companies no confidence that notification requirements are feasible or realistic. While our client is pleased that many potentially affected companies have been given compliance extensions, for many of the reasons described below, the length of the extensions are insufficient and DEP will need to consider further extensions at the appropriate time.

We incorporate by reference the comments we submitted on behalf of the same client for the First Concept Draft dated July 18, 2022. We focus these comments on some of the topics of highest concern to our client.

A. The Second Concept Draft Does Not Provide Adequate Assurance that Confidential Business Information Will Be Protected

The Second Concept Draft amends the original concept draft with a note that "Claims of Confidential Business Information [CBI] may be made at the time of reporting and will be managed under the Uniform Trade Secrets Act 10 M.R.S. §1542(4)(A)&(B)." At the outset, our client emphasizes that the Act does not require disclosure to the public of any information notified to DEP. Neither does the Act's legislative history suggest that the general public should be privy to such information. If the Second Concept Draft's notification requirements do not adequately protect the detailed information stakeholders will be required to provide, stakeholders' trade secrets could be compromised and significant commercial advantages lost.

Protection of information notified to DEP is required by Maine's Freedom of Access Act (FOAA). Under the FOAA, the public has the right to inspect and copy any agency records only if a statutory exemption does not apply. 1 M.R.S. § 408-A. There is a statutory exemption for "[r]ecords that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding." 1 M.R.S. § 402(3)(B). Under Maine Rule of Evidence 507(a), in turn, "[a] person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns." Thus, trade secrets within agency records – which will include notifications provided to DEP – may not be disclosed to the public.

The Maine Supreme Court has held that the following factors should be taken into account when considering whether information is eligible for protection under the FOAA:

> "(1) the value of the information to the plaintiff and to its competitors;
> (2) the amount of effort or money the plaintiff expended in developing the information;
> (3) the extent of measures the plaintiff took to guard the secrecy of the information;
> (4) the ease or difficulty with which others could properly acquire or duplicate the information; and
> (5) the degree to which third parties have placed the information in the public domain or rendered the information 'readily ascertainable' through patent applications or unrestricted product marketing."

Blue Sky W., LLC v. Me. Revenue Servs., 215 A.3d 812, 824 (Me. 2019). Our client, like many product manufacturers, considers product composition and distribution information to be highly valuable. This information is closely protected by our client. Thus, Maine DEP should protect from disclosure under the FOAA information such as the identity of any PFAS present in a product, the amount, and any volume data notified to the Department.

DEP should confirm this same interpretation of the FOAA through its webpage or the rulemaking process. We also suggest that the rulemaking include robust provisions that will allow protection of CBI and trade secrets, e.g., through the use of generic chemical names and broad chemical ranges in information that is released to the public. The U.S. Environmental Protection Agency's (EPA's) proposed rule to centralize CBI claims under the Toxic Substances Control Act (TSCA), 87 Fed. Reg. 29078 (May 12, 2022), may serve as a model in that regard. In order to provide certainty to the regulated community, the EPA proposed rule identifies specific information that submissions must include and the type of information that could qualify as confidential. EPA also provides an electronic platform for submission.

B. DEP Should Rethink the Applicability of "Intentionally Added" to Complex Articles

For complex articles – like electronics – DEP should rethink applicability of the "intentionally added" standard to make compliance more realistic. EPA has done so in chemical reporting rules by requiring reporting only information that is "known or reasonably ascertainable" by a company. This is the standard EPA uses for its quadrennial Chemical Data Reporting rule requirements. 40 C.F.R. § 704.3. Importantly, this is also the standard that EPA has proposed for its PFAS reporting rule. 86 Fed. Reg. 33926, 33927 (June 28, 2021) ("The Agency is proposing this action pursuant to TSCA section 8(a)(7) to obtain certain information known to or reasonably ascertainable by manufacturers of PFAS."); proposed 40 C.F.R. § 705.15 (requiring manufacturers to report "the following information to the extent known to or reasonably ascertainable by them"). Under this standard, as long as the company exercises an appropriate level of due diligence (e.g., in the form of supplier inquiries) and accurately reports what it knows or learns, it has complied with the reporting requirement. 86 Fed. Reg. at 33928.

In tandem, a *de minimis* standard for PFAS content should be incorporated. Our client suggests 0.1% by weight, which is generally understood in the industry and applicable law as an appropriate threshold of significance. *See, e.g.*, EU Regulation No. 1907/2006 Concerning the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) Articles 7 and 33; OSHA Hazard Communication Standards, 29 C.F.R. Part 1910.

A product 1) for which the manufacturer has done appropriate due diligence with suppliers and not discovered any PFAS present; and 2) which in fact contains less than 0.1% PFAS by weight can be regarded as not containing "intentionally added" PFAS. DEP should incorporate a *de minimis* threshold into its regulations to reflect that. This is a reasonable interpretation of the statute and would be an equitable solution for manufacturers that are being asked to perform a burdensome due diligence exercise on an extremely tight timeline. Testing all products to confirm presence or absence of PFAS – whether in advance of January 1, 2023 or on any timeline – is not feasible.

C. The Second Concept Draft Maintains and Introduces Unclear and Unrealistic Criteria for Reporting

a. DEP Must Approve Reporting Concentration Ranges Well in Advance of Any Reporting Deadlines

The statute allows DEP to approve a range of reporting, but under the Second Concept Draft, it appears DEP may not propose or approve reporting ranges for several more months. It is critical for business planning that regulated entities understand well in advance what ranges will be permissible and for which chemicals and products those ranges apply. As part of the rulemaking, DEP should specify acceptable ranges now. Failure to do so would leave insufficient time before the reporting deadline for DEP to act and for the regulated community to prepare for compliance. PFAS are a chemical class comprising thousands of different substances, and are typically present in products in very low concentrations. This makes identifying and quantifying specific PFAS present in a given article extremely challenging and costly. For complex products containing many parts, manufacturers commonly have multiple suppliers for each part to ensure supply chain resilience.

A provision on reporting specific concentrations could be read as a requirement, in effect, to establish those concentrations through product testing. If testing of each component for exact amounts were required, this would make the manufacturers' burden even less reasonable, especially in cases where each supplier of a given part may utilize different PFAS chemicals within the same functional group in order to meet required performance specifications.

In order to avoid the unrealistic prospect of testing every product, DEP must timely approve reporting of intentionally added PFAS within concentration ranges, as part of the current rulemaking process. We recommend that DEP approve broad concentration ranges, which should provide ample information to DEP. For example, ranges on the order of "between 0.1 and 1 percent" and "above 1 percent" would appear to address the statutory intent while avoiding the information-collection challenges and CBI protection concerns associated with more granular reporting. Our client anticipates that obtaining concentration range data from suppliers would be far more realistic than exact amounts.

b. Maine DEP Must Provide a Realistic Process for Categorical Reporting

We appreciate Maine DEP's effort to describe situations in which reporting by category would be permissible. Section 3.C. However, our client is particularly concerned with the requirement that reporting by category would only be appropriate if the "same PFAS are present in every product." For example, in many cases, a manufacturer will dictate performance specifications but not specific chemical composition, so suppliers may use different chemicals to meet the specifications. Under these circumstances, even one product stock keeping unit (SKU)

may be considered as falling under multiple reporting categories in Maine. This feasibility issue would be addressed if Section 3.C(2) were amended to read "PFAS are present in every product and are used for the same or similar purposes." This change would still allow DEP to gather information that would be relevant to a later determination about whether a use was currently unavoidable. Finally, our client supports other commenters in suggesting that Maine should use Harmonized Tariff Codes in Section 3.C(1).

D. Maine's Reporting Requirements are Duplicative of Pending Federal Requirements and Ongoing Industry Efforts

Organizations like ChemSec have already been gathering, for public consumption, information about the multiple applications of PFAS in potentially dozens of categories of electronics and components of electronics. This will result in the type of information the legislature mandated that DEP collect under the Act. Likewise, as DEP is aware, EPA has proposed a reporting rule under the Toxic Substances Control Act that would require reporting for all PFAS in all imported articles, including electrical and electronic products. By statute, EPA is required to finalize this rule by January 1, 2023. Once final, this EPA rule will largely duplicate the reporting requirement the Maine legislature envisioned. In fact, the Governor of California recently vetoed PFAS legislation similar to Maine's citing the bill with its multi-million-dollar implementation price tag as being premature given the EPA's pending rulemaking.[1]

In closing, Maine DEP has been directed to tackle an essentially unworkable feat. The Act directs the Department to promulgate rules requiring those broadly defined as "manufacturers" to report and eventually eliminate hundreds of chemicals from products in Maine commerce, within an infeasible timeframe and without realistic criteria or thresholds. Our client supports commonsense amendments to the Act and hopes they will be promulgated. Until then, Maine DEP should adopt more flexible interpretations of its obligations of the existing Act such as those recommended above to make compliance feasible. If DEP has any questions about these comments, please do not hesitate to contact me.

[1] https://www.gov.ca.gov/wp-content/uploads/2022/09/AB-2247-VETO.pdf?emrc=cc359d

Sincerely yours,

Ryan J. Carra

cc: Blazka Zgec, Environmental Specialist, Maine DEP
Kerri Malinowski, Safer Chemicals, Office of the Commissioner, Maine DEP