

July 18, 2022

VIA EMAIL KERRI.MALINOWSKI@MAINE.GOV

Kerri Malinowski
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333

Re: Reporting Concept Draft Feedback

Dear Ms. Malinowski:

The Chemical Users Coalition (CUC) is providing comments in response to the recently-released “Concept Draft” issued in advance of Maine’s proposed rule implementing certain notification requirements and sales prohibitions for products containing Intentionally Added PFAS.¹ CUC considers these comments to be very preliminary remarks prepared and hastily submitted to meet the short deadline. CUC reserves the right to comment further, to address additional issues to be covered, and to expand on these initial comments, at later dates.

CUC is an association of companies from diverse industries interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances.² CUC encourages the development of chemical-regulatory policies that protect human health and the environment while simultaneously fostering the pursuit of technological innovation in the context of international markets and the global economy.

The CUC appreciates your consideration of these comments. If you have any questions relating to this submission, please feel free to contact me.

Sincerely,



Lawrence E. Culleen

Enclosure

¹ The Concept Draft and eventual regulations will implement Maine’s *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution*. MRS Title 38, Section 1614.

² The members of CUC are Airbus S.A.S., The Boeing Company, Carrier Corporation, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, the National Electrical Manufacturers Association, Raytheon Technologies Corporation, Sony Electronics, Inc., and TDK U.S.A. Corporation.

Before the Maine Department of Environmental Protection
Maine's Concept Draft in Advance of Proposed Rules for 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

Comments of the Chemical Users Coalition

Introduction

Chemical Users Coalition ("CUC") appreciates the opportunity to provide these comments in response to Maine's Department of Environmental Protection's ("DEP" or "Department") recent notice announcing its proposed rule for notification requirements and sales prohibitions for products containing Intentionally Added PFAS under Maine's *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances [PFAS] Pollution*. CUC's members will likely be affected by the proposed changes being considered.

CUC is an association of companies from diverse industries that typically acquire and use, rather than manufacture or import, chemical substances.¹ CUC has consistently supported measures that protect health and the environment in a manner that enables the regulated community to pursue technological innovation simultaneously with economic development in the United States. CUC Members produce and distribute highly complex materials and products, including critical microscopic circuits to major devices, appliances and intricate equipment. To thrive in a competitive global economy, our members depend on the availability of certain existing substances as well as products that incorporate such substances, which are necessary components of a reliable pipeline for our members production of innovative new products upon which the consumer, commercial, industrial, health care, defense, space, and consistently transportation sectors rely. Consequently, our members encourage the Department when implementing PFAS related restrictions or requirements to develop regulatory approaches that responsibly take into account existing (and developing) products and technologies on which the US economy and the departments of the US government depend. The availability of such products and the development of new technologies will be unintentionally and adversely restricted if DEP does not develop certain implementation strategies that provide exceptions and varying compliance schedules to enable the continued distribution and use of such materials and products.

Comments

CUC is providing these preliminary comments addressing several specific provisions in the Concept Draft:

Reporting Should be Phased In And No Less Than 1-Year Following Rule's Effective Date

The Concept Draft implies DEP intends to impose a reporting deadline of January 1, 2023 for all affected products containing PFAS. The deadline is overly ambitious and is not required

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under the law. The statute requires only that the reporting process begin on January 1, 2023. Imposing a deadline for the submission of reports on that date will unnecessarily burden DEP personnel and administrative resources, and impose enormous reporting obligations on countless US and international suppliers of products and product components and lead to widespread non-compliance and submissions that are poorly or improperly prepared.

CUC suggests final regulations should be “effective” not later than January 1, 2023, and that the timeline for submission of reports be staggered, with reporting deadlines phased in depending on the nature and complexity of the products and product categories affected. In no case should reporting on any product category precede one year following the effective date of the final rules, or January 1, 2024.

CUC also recommends DEP consider a “phased in” approach whereby different product categories be considered for initial reporting during intervals between January 1, 2024 and the 2030 prohibition date. Section 5 of the underlying statute (MRS Title 38 Section 1614) encourages DEP to consider products by category on the basis of the category’s likelihood to cause contamination of the environment in Maine. Reporting requirements should be phased in and sequenced on such a basis. Moreover, this “staggard reporting” approach will reduce reporting and administrative burdens on both the entities subject to the final regulations and DEP personnel; this also will encourage more orderly and complete reporting.

DEP also must provide guidance on the level of diligence that is required when product manufacturers and assemblers are seeking information from suppliers (both in the US and abroad) with respect to the PFAS content of components and parts. Entities that are required to report should be allowed to reasonably rely on information provided by their suppliers.

Similarly, clarification should be given concerning when reports of “significant” changes must be filed or when new information must be filed after a manufacturer becomes aware of such significant changes or new information is provided by a supplier. A reasonable time (e.g., 90 days) should be provided for such reports to be filed following receipt of information triggering the requirement to report.

PFAS Definition And Other Key Terms Can Be Limited for Initial Reporting Cycles

The definition of PFAS used in the concept draft as “containing at least one fully fluorinated carbon atom” is overly comprehensive, is not at all well understood in the regulated community, and will create reporting requirements that are unnecessarily burdensome.

CUC recommends that a more limited definition of PFAS be implemented for reports during the first cycle of reporting for all categories of products, and that the scope of the definition be revisited thereafter. By limiting the scope and breadth of PFAS for which reporting requirements are initially imposed, DEP can provide a more reasonable and practical opportunity for suppliers of products and components that are incorporated into complex articles to determine the presence of PFAS in the supply chain and to seek opportunities to phase out certain uses of PFAS where possible. This also will permit for the development and submission of more accurate reporting. **To this end, CUC recommends exempting fluoropolymers.** These are substances of

low hazard and low risk to human health and can readily be excluded from the PFAS definition without creating a risk to product purchasers and users.

In addition, CUC recommends **DEP create a list of specific PFAS that are of concern for health or environmental effects and require reporting only on products containing listed PFAS. Such a list should include the Chemical Abstract Services Registry Number and the specific chemical identity** using CAS nomenclature for each substance for which reporting is required. The use of CAS numbers enables businesses throughout the value chain and across global marketplaces to understand which substances must be entities for reporting purposes.

Similarly, CUC suggests DEP narrow its definition of Intentionally Added PFAS to avoid unnecessary and burdensome reporting and to seek information of greatest importance to the policy objections. Accordingly, **CUC recommends the definition of Intentionally Added PFAS specifically exclude manufacturing byproducts and impurities that might remain unintentionally present in a product in commerce, as well as PFAS degradants that might be formed during product manufacturing but also be considered unintended components.**

CUC also strongly recommends DEP narrow the scope of the term “product” to include solely consumer products, as this is more consistent with the legislative intent of the statute.

Clarify The Party Responsible For Reporting And Eliminate Duplication

Given the scope of products and entities potentially responsible for reporting, and the lack of clarity in the Concept Draft and during discussion in DEP’s public meeting, CUC recommends DEP make clear which entities in the commercial value chain for affected products is responsible for reporting. Complex articles may be comprised of countless components which might be distributed within Maine as a component, and at a facility within Maine, then included into another article, and then distributed further within the state, potentially at retail. Clarification on this issue, and others, is needed. For example, clarification is needed to specify which entity is required to report when the entity that distributes a component or a finished product in Maine acts solely as a “distributor”, and is not the entity that manufactured the component or product, nor the company with its “brand name” on the component or product. Further clarification also is needed concerning products DEP considers to be exempt on the basis of federal regulations that might govern such content and the state’s own food packaging content laws. **CUC recommends such clarifications be offered and discussed with stakeholders in advance of issuing the proposed regulations.**

Fees To Be Assessed Should Be Clarified In The Proposal And Should Be Reasonable

The Concept Paper fails to identify the fees being considered making meaningful public engagement on this topic impossible. CUC requests that fees being considered are identified with specificity in the proposal. **CUC recommends fees should be assessed on a “per report” or “report per category” basis; not on a “per product” basis.** Reporting on a “per product” basis will encourage manufacturers and retailers to limit the number of products that are offered for distribution or sale in Maine and this will unfairly penalize consumers who reside in Maine.

CUC recommends repair and replacement parts for products manufactured prior to the effective date of the reporting rules should be exempt from reporting indefinitely.

Establish Threshold Levels, Reporting Ranges and Grouping, And Significant Changes

CUC Members recommend DEP look for opportunities to streamline and reduce administrative burdens on the Department personnel and administrative resources, and reporting burdens soon to be imposed on the manufacturers and distributors of complex (multi-component) articles/products, including imported products.

CUC requests DEP establish a threshold (e.g., *de minimis*) level for PFAS content in manufactured articles, beneath which level no reporting would be required (such as PFAS present at 0.1% by product weight or greater). The *de minimis* level of 0.1% is practical and is generally understood by the manufacturers and distributors of manufactured articles that move among various international markets because the level aligns with the level imposed in European Union for substances of very high concern when present in articles. However, CUC Members request that DEP schedule further opportunities and discussions concerning the establishment and selection of a specific *de minimis* value that is something which manufacturers can reasonably be expected to report.

CUC also recommends DEP permit entities that report be allowed to report on product categories and to report based on ranges of PFAS present within such products.

CUC is concerned that the Concept Draft suggests that changes in personnel at a particular reporting entity should trigger a report of a “significant change”. In addition, our Members have concerns that the Concept Draft would consider the omission of a PFAS as a trigger for “significant change” reporting. These changes are not pertinent to what CUC understands to be the underlying policy objectives of the reporting requirements (i.e., to identify products that contain PFAS and to identify which PFAS are contained). CUC suggests DEP should minimize unnecessary reporting such as these changes. Thus, **CUC recommends a significant change should be defined as the addition of one or more PFAS not previously reported or the material increase (i.e., 10% by weight or greater) in the concentration of a previously reported PFAS that is present in a product.** Reporting of the removal of PFAS content or an immaterial increase or decrease should not trigger reporting, although reporting of such minor changes should be voluntarily permitted.

Confidential Business Information Must Be Protected; Administrative Efficiencies Achieved

CUC Members produce and distribute highly complex products. The content of such products and the many individual components therein is regarded by CUC Members as commercially sensitive. For this reason, **CUC Members consider it to be imperative that DEP establish a process (and the necessary accompanying data security and protection capabilities within DEP, by which claims to protect Confidential Business Information (CBI) can be asserted for reports that are submitted.** Such claims for confidentiality can be accommodated by requiring reporting entities asserting such claims to provide a “non-confidential” (redacted) copy of each confidential report for purposes of any “public records” or a confidential submission that is required under the law.

DEP should seek and achieve administrative efficiencies. For example, CUC recommends that to the extent existing reporting systems and databases used in Maine can be expanded for purposes of this new program, that this should be considered. Similarly, when other states in the US are implementing similar reporting requirements, there are likely to be efficiencies that can be gained by using the same databases and to sequencing and harmonizing reporting deadlines and the information being gathered whenever possible.

To ensure such opportunities for efficiencies are optimized, CUC highly recommends DEP not establish the details of its reporting format and the technologies that will be used for reporting until the US Environmental Protection Agency has issued its reporting regulations being promulgated pursuant to Section 8(a) of the Toxic Substances Control Act (TSCA). The TSCA reporting rule will be issued in final form before the end of calendar year 2022.

Conclusion

As explained above and in our transmittal letter, CUC Members appreciate the opportunity to provide these comments to DEP and CUC reserves its right to submit additional or modified comments at a later date. CUC Members would be pleased to meet with Maine's Department of Environmental Protection personnel to discuss these comments and related issues.