

Comments on the proposing new rule, Chapter 90 : Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

January 2025

We welcome the opportunity to submit public comments on the Maine Department of Environmental Protection's (MDEP) proposed new regulations to implement the Maine law restricting PFAS in products (38 M.R.S. section 1614, as amended by LD 1537). We have prepared and organized our comments as follows.

The "A. Proposal for Currently Unavoidable Use Determinations." under "9. Currently Unavoidable Use." in this proposed concept draft describes the information required to make a proposal for Currently Unavoidable Use (CUU) determinations. As explained below, the information requirements imposed on CUU applicants are excessive and difficult to obtain by the applicant alone, and imposing such excessive information requirements will excessively raise the hurdle for CUU applications and lead to the loss of benefits originally derived from products and uses that should be determined as CUU. This in turn leads to a loss of opportunity to protect what is essential for health, safety or functioning of society for Maine, which is the original purpose of CUU. We believe that Maine would be better served by setting the realistic requirements for CUU applications and by opening the door for applications more widely.

1. Potential violation of antitrust law.

The "A. Proposal for Currently Unavoidable Use Determinations." under "9. Currently Unavoidable Use." in this proposed concept draft indicates the following that must be included in the proposal.

(4) A description of whether there are alternatives for this specific use of PFAS which are reasonably available including:

(a) Identification of specific compounds, classes of materials, or combinations of materials identified as potential alternatives including the removal of PFAS without substitution;

(b) An assessment of how the materials in Subsection a, above, meet or fail to meet the criteria identified in Subsection 3(b) above;

(c) An assessment if materials identified in Subsection a, above, are available in sufficient quantities to meet production needs without regard to cost;

(d) An assessment of the cost difference between obtaining PFAS for use in a product and obtaining the material identified in Subsection a, above, for the same purpose;

(e) A comparison of the known risks to human health and the environment between PFAS and the materials identified in Subsection a; and

(f) An assessment of whether there are feasible changes to the manufacturing process of the product that would eliminate the need for PFAS.

(8) A justification explaining how products available in compliance with other similar sales prohibitions are not reasonably available alternatives in the State of Maine. This may include demonstrating that additional sales in the State of Maine would result in such an increased demand for the PFAS alternative that it would no longer be available in sufficient quantities, such a demonstration must include an assessment that an increase in production of the PFAS alternative is not possible.

Proposals may be submitted by manufacturers individually or collectively, according to the proposal. For example, if a PFAS manufacturer prepares a proposal, the potential substitute could be manufactured by a competitor. (4) (c), (d) and (8) are information on production volume and cost, which is very difficult to obtain and the exchange of information with competitors may be taken as an agreement and judged to be in violation of antitrust laws. Therefore, it is practically impossible for a manufacturer of PFAS to provide this information, and it is not a requirement that should be imposed on the proposer.

2. Possibility of omission of information due to heavy burden on the proposer.

The "A. Proposal for Currently Unavoidable Use Determinations." under "9. Currently Unavoidable Use." in this proposed concept draft indicates the following that must be included in the proposal.

(5) A list of federal regulations, other State of Maine regulations, and regulations of other states which the product described in Subsection 1 is subject to by reason of containing PFAS, including;

(a) Details of any sales prohibition the product is subject to because of containing intentionally added PFAS including;

(i) Whether that sales prohibition is absolute or if there is a process similar to the State of Maine's currently unavoidable use determination.

(ii) If there is a similar process available, whether the requester has filed a proposal under the relevant state or federal program, and its status.

(6) If, in another jurisdiction, subject to an absolute prohibition or no currently unavoidable use determination or similar has been made, a list of comparable products that the proposer is aware of remaining available for sale, offered for sale, or distributed for sale within that jurisdiction;

(7) If a similar program's sales prohibition is identified as applicable in Subsection 5 and similar

products are available for sale, offered for sale, or distributed for sale;

Obtaining this information would require very extensive research, which is an overly high hurdle for the proposal. Imposing such excessive information request obligations will lead to an excessively high hurdle for CUU applications and the loss of benefits that would otherwise accrue from products and uses that should be determined as CUU. This would result in the loss of the opportunity to protect what is essential for health, safety or functioning of society for Maine, which is the original purpose of CUU. In addition, there is a risk of omission of information by some proposers. Therefore, these information collections should be conducted by the authorities themselves, for example by appointing neutral experts and consultants, so that the information can be used objectively.

Even when these information collections are conducted by a third party, we believe that the following points should be noted. (5)(a)(ii) should not be included in the mandatory requirement because the business status varies by product category and industry, and therefore, it does not necessarily mean that the applicant has applied to other states, and the intention to understand the status of submission to other states is not clear. (6) and (7) are not necessarily substitutable in Maine applications for products offered for sale in other states because of the wide range of product specifications. Simply the fact that the product is offered for sale in another state should not be the sole basis upon which a CUU should be determined. If the potential for substitutability is to be investigated, it should not be included in the mandatory requirement because it is duplicative of (4)(a) and (b).

3. Information should be allowed to be submitted at the CBI.

The "A. Proposal for Currently Unavoidable Use Determinations." under "9. Currently Unavoidable Use." in this proposed concept draft contains the following note.

NOTE: While 38 M.R.S. § 1614(12) and Section 10 provide a mechanism for the protection of proprietary information, currently unavoidable use determinations are subject to the Department's rulemaking process including approval by the Board of Environmental Protection in a public meeting and response to public comments. Should a proposal for a currently unavoidable use determination contain claims of confidentiality, the Department may determine that there is insufficient publicly available information to justify a rulemaking. The Department strongly recommends that all proposals for currently unavoidable use determinations do not contain claims of confidentiality.

It is inconsistent to require information equivalent to Confidential Business Information (CBI), such as information on distribution volumes and product characteristics, while not recommending

the application of CBI. In addition, by not recommending the application of CBI, it is questionable whether the correct information is available; we believe that allowing the application of CBI and obtaining the correct information is more necessary to CUU's decision to provide an opportunity to protect what is essential for health, safety or functioning of society for Maine's citizens. Therefore, the provision of information through CBI should be allowed.

4. Lastly.

We recognize that Maine is one of the states in the US that is about to adopt the most stringent regulations regarding PFAS. Extremely stricter regulations than other states would result in the loss of essential PFAS applications (especially those related to fluoropolymers) and lead to an exodus of industry to other states. For the further development of your state, we believe it is necessary to align with the efforts of other states and the U.S. federal government and introduce an appropriate form of regulation that is not excessive.