

Submitted via Email as Requested to:

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Attention: Maine Department of Environmental Protection

PFAS Currently Unavoidable Uses Pursuant to 38 M.R.S. §1614

Subject: Identification of Currently Unavoidable Uses of PFAS

The Chemical Users Coalition (CUC) submits the following for consideration by the Department of Environmental Protection (DEP) in its efforts to identify currently unavoidable uses (“CUUs”) of PFAS pursuant to Subsection 5.C. of Section 1614 of Title 38 (also known as the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances [PFAS] Pollution*). The determinations to be made by DEP are critically important to CUC Members because DEP’s rulemaking ultimately will govern which products can continue to be distributed in Maine and those which will be prohibited from sale and distribution in Maine commencing January 1, 2030.

Background on CUC

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.¹ 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.

CUC supports DEP’s efforts to solicit proposals for consideration in determining currently unavoidable uses of PFAS. We anticipate that every CUC member company will be affected by DEP’s CUU determinations. Thus, CUC also supports DEP’s stated intention to provide a “pre-rulemaking concept draft” of CUU’s in May of this year for consideration and comments by the regulated community and other interested parties. We understand that CUC Members will likely be submitting company- and product-specific proposals themselves; however, CUC is providing these suggestions for DEP’s consideration when developing its concept draft list of CUUs. CUC looks forward to having an opportunity to comment on DEP’s CUU concept draft list at that time.

CUC Recommends These Categories of PFAS Uses be Designated Currently Unavoidable

CUC recognizes the legal requirements that a currently unavoidable use be one determined by rule to be “essential for health, safety or the functioning of society and for which alternatives are not reasonably available.” With this in mind, the following are uses CUC recommends be included on DEP’s forthcoming draft list of CUUs:

- All uses of PFAS and PFAS-containing products that have undergone reviews and received authorizations in the context of federal programs such as (but not limited to) the US Environmental Protection Agency’s (EPA’s) new chemicals and significant new uses program under Section 5 of the Toxic Substances Control Act; EPA’s significant new

¹ 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.

alternatives program (SNAP) under the Clean Air Act; programs overseen by the US Food and Drug Administration (FDA) concerning drugs, medical devices, biologics, and diagnostics and equipment under the Food and Drug Act (FFDCA);² pesticides and devices subject to EPA regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and other federal programs whereby either the PFAS, or products containing PFAS, are determined to be acceptable for their intended use by these (and other) federal government agencies. This classification also should include products and materials having uses in programs overseen by other federal agencies such as the Department of Defense (e.g., products and materials meeting DoD requirements and military specifications), the Federal Aviation Administration (e.g., performance rules and regulatory controls governing the design, manufacture, installation, and maintenance of aircraft parts and replacement parts), and similar NASA-issued requirements.³

- All uses of PFAS and PFAS-containing products and related items (including chemical substances and mixtures) required by state laws and implementing regulations administered by state agencies responsible for maintaining public health, community safety, and the environment.
- PFAS containing materials and articles used as components of, and replacement parts for, transportation equipment including automobiles, train engines and rail cars, packing containers and forklifts, refrigerated containers, ships and container vessels and their services equipment, aircraft and their service equipment, agricultural vehicles and equipment, motorcycles, construction equipment, wheelchairs and other forms of mobility assisting appliances.
- Waste treatment and disposal equipment, including treatment and disposal equipment utilized at remediation sites, and equipment used in storage (and movement and treatment) of waste and other hazardous materials including products to ensure the safety and integrity of the containment and disposal systems.
- Air conditioning, heating, ventilation, refrigeration and electronics thermal control equipment and their components and parts including replacement parts and materials.
- Life Safety Systems and related devices for smoke, fire, and carbon monoxide detection and fire suppression, security, and access control systems
- Appliances and equipment and component parts used in harvesting energy (e.g., windmills,

² CUC advocates this proposed category should extend to packaging for drugs, drug delivery devices, medical devices, biologics, diagnostics, as well as food contact articles and their components.

³ CUC Members recognize that many of the product categories identified above may not satisfy the statutory provisions in Subdivision 4.A. of the Maine PFAS law that refers to “[a] product for which federal law governs the presence of PFAS in the product in a manner that preempts state authority.” However, the categories identified and many more federal programs such as these should be found by DEP to be critical to society and to health and the public safety.

solar panels) and conserving energy. These should include building materials intended to insulate and to sustain temperate conditions within.

- PFAS used in the manufacture of, and within, products intended to store energy such as batteries and other components critical to electric vehicles and stationary equipment.
- PFAS present in personal protective equipment and outwear for use by first responders and personnel engaged in search and rescue efforts, law enforcement equipment and apparel, and defense-related gear and applications.
- PFAS used in the manufacture of semiconductors and electronic equipment and devices including component parts such as transistors, wiring, insulation, connections, housings, circuit boards and component parts; this should include PFAS used in the manufacturing process and PFAS used by suppliers to the semiconductor manufacturing sector including PFAS used in construction and assembly of semiconductor manufacturing equipment, PFAS that may remain present in semiconductors as well as the final packaged semiconductor devices and in electronic equipment and products that contain such semiconductors.
- Other electrical equipment not included in those items enumerated above and that is critical to meeting our nation's goals relating to electrification, energy security, human health and safety, reliability, durability, and sustainability. These products include electronic components found in medical devices (e.g., imaging equipment, pacemakers), electronic sensors, industrial automation relays and soft starters, gas-insulated power grid equipment, insulated wiring, essential and emergency lighting equipment, and PFAS containing components that increase durability, reliability and safety of the electrical equipment.
- All uses of PFAS and PFAS-containing products and materials necessary to manufacture the products described above.

CUC Recommends Procedures for CUU Determinations Be Established

CUC Members also recommend DEP codify a process by which product manufacturers and PFAS-containing *product users* may continue to submit requests for CUU determinations on a going forward basis (even after initial CUU listings are established and beyond the 2030 effective date for product prohibitions) to permit flexibility in the event items, products, and PFAS uses (including those not currently contemplated) are identified for which reasonable CUU determinations should be granted. This will help make clear DEP's recognition that future innovations (including those that might involve PFAS uses in technologies that might be deployed in applications that enhance energy efficiency, data processing, climate change mitigating methods, or other beneficial uses) are not being discouraged or unduly impeded even after the 2030 prohibitions take effect in Maine. So as to not impede innovation, the CUU process established in Maine should include consideration of broad provisional approvals (with appropriate

conditions) until final determinations can be established. Further, although our members have been working diligently to determine the extent of their uses of PFAS (or the presence of PFAS in materials they acquire), this information is still considered to be incomplete. Thus, CUC strongly recommends DEP provide opportunities to notify DEP of uses even after statutory deadlines without fear of enforcement actions as well as a process to seek CUU determinations after applicable prohibition deadlines to limit unintentional impacts of the law.

CUC also recommends that DEP should coordinate its efforts with other jurisdictions that are engaged in similar exercises (e.g., Minnesota), to create an approach that allows manufacturers (and PFAS-containing product users) to submit currently unavoidable use requests that can apply in multiple jurisdictions.

DEP Should Be Flexible in Determining Availability of Alternatives in CUU Determinations

CUC recognizes that CUU determinations generally require a showing that acceptable alternatives for the specific use be shown to be unavailable. CUC Members also anticipate that submissions our members make seeking CUU determination on a product- or use-specific basis will be accompanied by statements and support with regard to the availability of alternatives. However, CUC recommends that when DEP is considering whether an alternative exists for a PFAS use or a PFAS-containing product, that DEP should exercise flexibility and alternatives should be determined on a “comparative” basis. This means that DEP should take into account the entire lifecycle of the current PFAS-containing product (or PFAS use) in contrast to the “alternative(s)” under consideration. In this context, consideration should be given to: the methods of manufacture of the PFAS-containing product and its alternative, their respective energy efficiency and environmental and product safety benefits; their respective estimated service lives; and the likely environmental and health impacts of end-of-life treatment and recyclability or disposal of the current material versus the alternative material under consideration.

Furthermore, DEP-sponsored alternative assessments must also consider “performance” attributes and other technical requirements such as supportability of alternative materials and parts (e.g., maintenance and repair) and availability in the supply chain. While replacement materials may be available, it is imperative that the alternative materials be tested and proven to conform with the product and/or application performance requirements. This includes but is not limited to thermal and atmospheric stability, chemical resistivity, electromagnetic interference, polarity concerns and overall long-term resistance to wear and tear. Substitution with alternatives that have a perceived favorable health and safety profile or toxicological endpoint but are unable to achieve required performance measures may compromise product functionality leading to product failure and eventually dangerous and unsafe situations that may compromise national security and public safety.

CUC recommends DEP should also consider instances that might permit establishing phase-down (toward phase-out) requirements for existing PFAS uses beyond the 2030 overall “ban” currently required under the statute. Minimally, DEP should allow a ‘sell through’ provision to avoid surplus disposal challenges or lack of national treatment/disposal capacity. DEP might consider, where appropriate, CUU determinations that include appropriate conditions. For example, exemptions from the 2030 prohibition might be granted subject to an appropriate time limitation

(perhaps accompanied by periodic reporting requirements and the ability to seek extensions upon a continued showing of unavailability of alternatives). Any timeline established must take into consideration the time required to meet product qualification standards (e.g., government requirements and technical and safety specifications).

Replacement Parts

CUC recommends that previously manufactured products (existing stocks produced or designed to conform to a specification before January 1, 2030), spare/replacement parts for existing products, and materials needed to maintain and repair existing products be exempted from the sales restriction and classified as CUUs. These parts often are not newly manufactured. Rather, when a new product is manufactured, spare and replacement parts are manufactured and may be stockpiled to meet future demand and maintained in accordance with either contractual or regulatory requirements so that the product can be continuously used and need not be replaced solely because a replacement part is unavailable. If these parts are not newly manufactured, it may be difficult for the entity selling the parts to ascertain PFAS content due to the lapse of time since manufacture. The availability of spare/replacement parts would also allow for the continued use and maintenance of existing products, thereby preventing the accumulation of unnecessary waste, including e-waste.

Confidentiality Remains an Important Concern for CUC Members

CUC reiterates a comment made previously in our submissions to DEP, that the Department must establish a mechanism allowing entities filing CUU determination requests to assert claims of confidential trade secrets and national security-related confidential material. Such claims of confidential trade secrets and national security-related confidential materials shall also be extended to the notification requirements under Section 2 of the statute and should restrict disclosures made by DEP to any publicly-facing product clearinghouse. CUC emphasizes that confidential information must be kept secure and be affirmatively protected from inadvertent public disclosure by DEP. This must include aggressive techniques to ensure protections against espionage and hackers as well as compliance with applicable State Department International Traffic in Arms Regulations (ITAR) requirements. DEP employees and data technicians may require training in international trade restrictions as well as cyber security measures in addition to their current curriculum.

Conclusion

CUC appreciates this opportunity to provide comments to DEP on CUU determinations. CUC Members would welcome the opportunity to confer with DEP personnel to discuss our comments.