

Before the Maine Department of Environmental Protection
Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substance

Comments of the Chemical Users Coalition

Introduction

Chemical Users Coalition (“CUC”)¹ appreciates the opportunity to provide these comments in response to Maine’s Department of Environmental Protection’s (“DEP” or “Department”) proposed amendments to Chapter 90 reflecting approved currently unavoidable use (“CUU”) determinations for specific products containing intentionally added PFAS under Maine’s Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances [PFAS] Pollution (the “Proposed Rule”).

CUC is an association of companies from diverse industries that typically acquire and use, rather than manufacture, chemical substances. 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 semiconductor devices 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 transportation sectors consistently rely. Consequently, our members encourage the Department when implementing PFAS-related restrictions or requirements to develop regulatory approaches that responsibly consider existing (and developing) products and technologies on which the US economy and the departments of the US government depend.

General Comments

CUC welcomes this opportunity to provide comments on the proposed amendments that will incorporate approved CUU determinations.² CUC’s comments do not pertain to the specific CUU determinations that were approved or denied. Rather, when reviewing this first round of

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, RTX Corporation, Sony Electronics, Inc., and TDK U.S.A. Corporation.

² CUC has previously submitted comments to the Department on Chapter 90, and those comments are incorporated by reference.

determinations, CUC has identified concerns with the determination process that Maine should address before acting on additional CUU applications.

Maine’s law on products containing PFAS provides that where the use of PFAS is critical to a product that is determined to be “essential for health, safety or the functioning of society, and for which alternatives are not reasonably available,” the Department may determine by rule that such use is a CUU and should be exempt from the otherwise applicable restrictions.

“Essential for health, safety or the functioning of society” is defined at 38 MRS 1614 (1)B-1 as “a use of a PFAS in a product when the function provided by the PFAS is necessary for the product to perform as intended, such that the unavailability of the PFAS for use in the product would cause the product to be unavailable, which would result in:

- (1) A significant increase in negative health outcomes;
- (2) An inability to mitigate significant risks to human health or the environment; or
- (3) A significant disruption of the daily functions on which society relies.

The Department received 11 CUU proposals for consideration in the following product categories: cookware product (5 proposals), cleaning product (4 proposals), cosmetic product container (1 proposal), and upholstered furniture (1 proposal). The Department stated that it considered whether the use of PFAS in the product is necessary for the product to perform as intended, with particular attention to whether the absence of the PFAS used has the potential to result in the product becoming unavailable and creating any of the negative outcomes detailed in the definition of “Essential for health, safety and the functioning of society.” Similarly, within the category of containers, the Department also weighed the necessity of PFAS use in the container with the ability of the container to function properly without the use of PFAS.

At the conclusion of the analysis, the Department determined that only 2 of the proposals qualified as CUUs. In its Staff Memo detailing its determinations, when declining to grant CUU determinations, the Department generally stated that its finding was either “based on the lack of evidence that this product meets the statutory definition of essential for health, safety and the functioning of society, and that reasonably available alternatives are available” or that the application “lacks evidence that the unavailability of PFAS for use in this product category would result in any of the negative outcomes set forth in the criteria of essential for health, safety or the functioning of society.” There is little to no explanation of how these determinations were made, what information was presented and reviewed, or what evidence would be deemed sufficient to support a CUU determination. Given that the vast majority of proposals were denied, CUC believes that the Department must provide substantive guidance to the regulated community and public generally concerning how CUU determinations were made and will be made.

CUC recommends that the Department issue guidance to add greater specificity and clarity to the criteria the Department is using in its analysis. The guidance should identify what will be considered “sufficient evidence” to support a finding that a use is “currently unavoidable.” CUC believes that all stakeholders, including manufacturers, importers, retailers, and consumers, need to understand the criteria the state applies. Companies deciding whether to invest in reformulation, substitution, or petitioning for CUU must know what evidence will be dispositive. Having clear standards will help these businesses prepare more thorough applications for submission, thereby facilitating the Department’s efforts to review and assess applications.

Moreover, knowing the criteria to be used will allow product makers to allocate resources they may need to devote to identifying and critically assessing alternatives more efficiently, rather than engaging in trial-and-error submissions. Furthermore, if those companies that will be submitting petitions understand what scientific, technical, and economic information is needed, they can submit better substantiated and more robust applications. This improves the quality of the state’s decision record and reduces inefficiencies due to back-and-forth interactions between applicants and Department personnel. Additionally, knowing what factors matter to the Department (e.g., availability of alternatives, performance needs, health/environmental trade-offs, economic feasibility) and how these will be assessed helps innovators focus on the appropriate areas of product development.

Specific Comments on Factors to be Considered in CUU Decision Making

CUC suggests that the Department consider at least the following factors when making determinations, and elaborate on the application of these factors in written guidance:

- Whether the presence or use of PFAS arises out of an underlying federal or state requirement, specification, or other obligation and the product is used for the purposes of national security, defense, aviation, or space exploration.
- Whether products or product components are “essential for the functioning of society” including but not limited to those that are used in or to address climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, electronic equipment, public transport, aerospace, aeronautics, public safety and defense, and construction.
- The likely exposure potential and levels for consumers or the environment during the product's lifecycle, considering usage patterns, frequency of use, and duration of use.
- The cost of acquiring and processing alternative substances or designs compared to the existing ones.
- Changes in manufacturing processes may affect overall production costs.
- Whether any existing or potential alternative materials can meet the required specifications, performance standards, and quality benchmarks for the product.

- The impact of an alternative on the longevity, safety and reliability of the final product, (which may impact durability and waste generation).
- The availability of a consistent and reliable supply of alternative materials at a reasonable cost.
- The reliability and stability of the suppliers providing the alternative materials.
- Safety standards and regulations applicable to the use of the alternative materials.
- Whether an alternative material will be compatible with existing product designs, manufacturing equipment, and processes.
- The potential human health and environmental impact of the alternative substance(s) in manufacturing processes for products throughout their lifecycle, from production to disposal.
- Needed testing, prototyping, and (re)qualification for any alternative substance to identify any issues or improvements needed.
- Whether and how issues of technological and economic feasibility of the use of alternative chemistries and/or manufacturing methods will be considered by the Department.

Conclusion

CUC appreciates the opportunity to submit the foregoing comments. CUC believes that Maine may be setting procedural precedents for other jurisdictions following similar approaches. Providing guidance and detail will benefit the CUU process beyond Maine. If Maine works with these other jurisdictions in developing common CUU criteria, predictability and harmonization across those jurisdictions would result, which would be beneficial to all stakeholders. We would welcome the opportunity to meet with DEP staff to address our comments and to assist in developing a guidance document that provides transparency, fairness, and predictability, strengthens compliance, and builds public trust and confidence in the decision-making process.