AmericanCoatings
ASSOCIATION℠

July 26, 2024

Roxann Nayar
Oregon Department of Environmental Quality
Materials Management
700 NE Multnomah Street, Suite 600
Portland, Oregon 97232-4100

Submitted via email to recycling.2024@deq.oregon.gov

RE: ACA's Comments on Oregon's Proposed Rulemaking for the Plastic Pollution and Recycling Modernization Act.

Dear Roxann Nayar,

The American Coatings Association (ACA)[1] submits the following comments to the State of Oregon Department of Environmental Quality (DEQ) regarding the proposed regulations for the Plastic Pollution and Recycling Modernization Act. The ACA represents approximately 96% of the paint and coatings products manufactured in the United States, including architectural, industrial and specialty coatings.

The $32 billion paint and coatings industry manufactures a wide variety of coatings products for consumers, businesses, and manufacturing establishments alike. With the exception of powder coatings, most paint and coatings products are in liquid form and utilize containers in a range of sizes. The sizes range from small containers of less than a liter or pint to large containers that hold several hundred gallons. These containers are typically either metal, plastic, or a hybrid of metal and plastic. With the increasing number of packaging laws across the country, ACA members will be required to evaluate the packaging being used for paint and coatings products to ensure compliance with these laws. Consequently, ACA has a significant interest in assisting our industry in compliance with any regulatory requirements.

Currently, Oregon is one of several states including Maine, Colorado and California that have passed extended producer responsibility (EPR) laws for packaging. However, individual states passing their own version of an EPR law results in significant differences within each of these states' EPR laws. This will be extremely problematic and burdensome for

[1] ACA is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory, and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

industry because developing compliance plans for manufacturers with a nationwide customer base will be extremely challenging. The coatings industry routinely conducts interstate transactions where their products are shipped across states lines, thereby requiring these companies to comply with various applicable federal and state laws.

ACA provides the following recommendations on this proposed rulemaking to provide clarification and consistency with other existing EPR state laws across the country, which would bolster implementation across Oregon.

1. **Clarify that architectural coatings are not covered products.**

In the Oregon statute (SB 582) that was passed in 2022, Section 2 (6)(b)(I) set forth the definition of what " '[c]overed products' does not include" and further states that "[p]ackaging related to containers for architectural paint, as defined in ORS as defined in ORS 459A.822,that has been collected by a producer responsibility organization under the program established under ORS 459A.820 to 459A.855." PaintCare began its operations as the paint stewardship program in Oregon in 2008 and serves as the producer responsibility organization (PRO) for architectural paints, which allows these products to be excluded from these EPR laws. Although architectural paints were identified in the statute as not being a covered product, the proposed regulations make no mention or reference to this exclusion. ACA requests that DEQ clarify in the proposed regulations that architectural paints collected under the state's paint stewardship program are excluded and are not covered products under these regulations.

2. **Amend the definition of long-term storage under what are considered "not covered products".**

In the proposed regulations, under OAR 340-090-0840 (2)(a), it states "the following are not covered products" which includes "[p]ackaging that is used for the long-term (five or more years) storage of a product with a lifespan of three or more years." While the packaging is intended to store the product and each (i.e., the packaging and the product) would have separate and independent lifespans, it does not seem feasible to place a shorter lifespan limit on the product being stored.

The lifespan of a coating depends greatly on the type of product. Many latex and oil-based paints are manufactured for an average lifespan of ten to fifteen years.[2] The lifespan of paint once the can is opened also depends on the type of paint as well as storage conditions. Paint is a product that can be used up entirely in a project, or it can be partially used and stored for use at a later time. The remaining paint can be reused for touchup jobs or for another project entirely. This requires that the paint packaging also be durable enough to withstand the lifespan of the paint. ACA recommends DEQ amend the definition of long-term

[2] Christin Perry and Samantha Allen, *How Long Does Paint Last?*, FORBES (July 25, 2022), https://www.forbes.com/home-improvement/painting/how-long-does-paint-last/.

storage to merely state that the "following are not covered products [including] packaging that is used for long-term (five or more years) storage of a product."

3. Include exemptions to align with other state extended producer responsibility laws.

ACA recommends DEQ include the following exemptions to align with other states' laws in order to streamline the regulatory burden and assist with implementation by reducing the confusion from varying state laws.

a. Exempt packaging materials classified for the transportation of dangerous goods or hazardous materials under Title 49 of the Code of Federal Regulations (CFR) Part 178.
b. Exempt packaging used to contain hazardous or flammable products regulated under the 2012 Federal Occupational Safety and Health Administration (OSHA) Hazard Communication Standards within 29 CFR Part 1910.1200.
c. Exempt packaging material that is exclusive to manufacturing or industrial processes.
d. Exempt packaging material intended solely for use in business-to-business transactions.

California currently provides exemptions for specific packaging under 49 CFR and 29 CFR, as listed in California's Act in § 42021 (e)(2)(C). Additionally, under 49 CFR §199.9, it states that "…this part preempts any State or local law, rule, regulation, or order to the extent that: (1) Compliance with both the State or local requirement…" Based on the preemption clause within 49 CFR, the federal regulation would prevail when compliance to both the state requirement and the federal requirements is not possible.

California and Minnesota both provide an exemption for packaging of products regulated by OSHA under 29 CFR. With respect to packaging exclusive to manufacturing or industrial processes, this was listed in the Oregon statute (SB 582) that was passed in 2022, Section 2 (6)(b)(E) for what a "covered product" does not include. However, the proposed regulations make no mention or reference to this exclusion. Furthermore, Colorado provides an exemption for this category as well and an exemption for packaging material that is solely for use in business-to-business transactions since these are not consumers.

To promote and streamline compliance requirements while encouraging commerce and the transport of goods, ACA recommends that DEQ consider including these exemptions into Oregon's regulations.

4. Clarify the procedure on how producers obtain an exemption.

While the proposed regulations set forth what are not covered products (under OAR 340-090-0840(2) and that an exemption is permitted for products collected and recycled

outside of the Opportunity to Recycle (under OAR 340-090-0840(3)), it is unclear what producers would need to provide to ensure their products are categorized correctly under this law. ACA recommends that DEQ provide further clarification on how to seek an exemption.

5. Reconsider the overly broad proposed per- and polyfluoroalkyl (PFAS) definition and amend the PFAS definition.

ACA is concerned that Oregon's proposed definition of PFAS is unnecessarily broad detracting focus from identifying potential PFAS contaminants in the state. The proposed definition is not aligned with U.S Environmental Protection Agency's (EPA) PFAS definition under its PFAS reporting rule or PFAS as defined by some other states. Due to the diversity of PFAS chemicals with varying hazard characteristics, ACA recommends that Oregon restrict any product lifecycle and reporting requirements to discreet chemical lists, based on demonstrable exposure potential to identify those products associated with significant risk to consumers. One such readily available list is EPA's listing of PFAS in commerce, available in its Toxic Substances Control Act (TSCA) PFAS Reporting Rule.

In the alternative to this narrowly tailored approach, Oregon should consider modifying its definition, currently inclusive of chemicals with one or more fluorinated carbons[3], to focus on PFAS chemistries with at least two or more fluorinated carbons. This would focus the standard on PFAS chemistries associated with toxicity and contamination. Compounds with single fluorinated carbon atoms are not persistent as typically associated with PFAS chemistries.[4]

ACA recommends using Delaware's PFAS definition as a reference:

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[3] OAR 340-090-0900, as proposed, at Section 29 – "PFAS means perfluoroalkyl and polyfluoroalkyl substances, a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."

[4] In the preamble to its PFAS TSCA Section 8(a)(7) reporting rule, EPA explains:

> "In the development of this proposed definition, EPA intended to include substances with a strong electron withdrawing nature as this greatly effects the chemistry of the substituted, adjacent and nearby atoms, meaning they would have a minimum of two fluorine atoms on at least one carbon (e.g., -CF2-). Additionally, EPA wanted the covered substances to be unlikely to degrade or metabolize, so an adjacent CF group was added to the requirement/ definition, with the stipulations that the substitutions could not be H and both carbons must be saturated (*e.g.,* -CF2- CFR-). EPA also thought that branching might make a chemical less susceptible to degradation and metabolism, so EPA also removed the option for -CF2-CF2- when developing the proposed definition."

(EPA Final TSCA Section 8(a)(7) PFAS Reporting Rule, 88 Fed. Reg. 195, 70516, 70533, Oct. 11, 2023, bold font added for emphasis.)

Here, EPA explained its proposed definition, although the explanation also holds true for the structural definitions that EPA adopts in its final rule, all being structural forms of compounds with two or more fluorinated carbons. As noted above, addition of at least one CF group to the single original CF group is necessary for persistence, being a lack of degradation and ability to metabolize.

> "PFAS" means non-polymeric perfluoroalkyl and polyfluoroalkyl substances that are a group of man-made chemicals that contain at least 2 fully fluorinated carbon atoms, excluding gases and volatile liquids. "PFAS" includes PFOA and PFOS.
> (29 Delaware Code § 8092)

An important feature of this definition is the exclusion of fluoropolymers from the definition of PFAS, as well as focusing on compounds with 2 or more fluorinated carbons. Fluoropolymers are chemically stable, non-toxic, non-bioavailable, non-water soluble and non-mobile.[5] As explained in Henry, et. al.[6]

> Fluoropolymers, high molecular weight polymers, have unique properties that constitute a distinct class within the PFAS group. Fluoropolymers have thermal, chemical, photochemical, hydrolytic, oxidative, and biological stability. They have negligible residual monomer and oligomer content and low to no leachables. Fluoropolymers are practically insoluble in water and not subject to long-range transport. With a molecular weight well over 100 000 Da, fluoropolymers cannot cross the cell membrane. Fluoropolymers are not bioavailable or bioaccumulative, as evidenced by toxicology studies on polytetrafluoroethylene (PTFE): acute and subchronic systemic toxicity, irritation, sensitization, local toxicity on implantation, cytotoxicity, in vitro and in vivo genotoxicity, hemolysis, complement activation, and thrombogenicity. Clinical studies of patients receiving permanently implanted PTFE cardiovascular medical devices demonstrate no chronic toxicity or carcinogenicity and no reproductive, developmental, or endocrine toxicity.

In order to maintain focus within the lifecycle assessment on potential hazardous contaminants, fluoropolymers should be excluded from Oregon's PFAS definition. Alternatively, ACA recommends adoption of EPA's structural definition adopted for the purpose of EPA's TSCA Section 8(a)(7) PFAS Reporting Rule, although this definition may be overly broad by including fluoropolymers and other fluorinated chemistries that would rank low on persistent, bio accumulative, and toxic (PBT) criteria, including having negligible persistence. Under 40 CFR § 705.3, EPA defines PFAS as any chemical substance or mixture containing a chemical substance that structurally contains at least one of the following three sub-structures:

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[5] Henry, Barbara, et. al., *A critical review of the application of polymer of low concern and regulatory criteria to fluoropolymers*, 9 Feb. 2018, Integrated Environmental Assessment and Management, available online at: https://setac.onlinelibrary.wiley.com/doi/10.1002/ieam.4035.

[6] See footnote 2 at the abstract.

(1) R-(CF2)-CF(R')R'', where both the CF2 and CF moieties are saturated carbons. (i.e., This structural definition addresses persistence.)
(2) R-CF2OCF2-R', where R and R' can either be F, O, or saturated carbons. (i.e., This structural definition addresses fluorinated ethers.)
(3) CF3C(CF3)R'R'', where R' and R"" can either be F or saturated carbons. (i.e., This structural definition includes formations with non-adjacent carbons.)

6. **Clarify the degree of due diligence for downstream industry using potentially reportable PFAS in its Life cycle Assessment Requirements.**

ACA requests that DEQ specify the degree of due diligence required in attempting to identify fluorinated chemistries in raw materials used by downstream product formulators and manufacturers. Due diligence parameters are necessary due to the broad scope of this reporting requirement, encompassing any chemical with one or more carbon-fluorine bond at any amount in a chemical mixture. ACA encourages Oregon to adopt a reporting threshold aligned with Occupational Safety and Health Administration (OSHA) Safety Data Sheet (SDS) disclosure requirements of 0.1% or 1%, depending on the chemical hazard, with carcinogens and reproductive toxins disclosure at the lower threshold. Another report is adopting EPA's "known to or reasonably ascertainable by" standard of due diligence under TSCA reporting rules, including EPA's PFAS Reporting Rule and its Chemical Data Reporting Rule. ACA would welcome the opportunity to discuss this further with the agency as needed.

7. **Clarify how the information collected and submitted to DEQ for life cycle evaluations will be handled by DEQ.**

In the proposed regulations, under OAR 340-090-0910(2), it requires that producers perform a life cycle evaluation as set forth and submit those evaluations to the department and to the PRO. However, the proposed regulations do not address how this information would be used or handled by either the department or the PRO and what safeguards would be in place for any potentially business-sensitive information that could be submitted. There is no indication that these submissions could be made publicly available at a later time but there is not a mechanism to ensure that they are not either. ACA recommends that DEQ provide further clarification into how these submissions would be used by the department and the PRO, and what safeguards will be in place regarding the information within these submissions.

8. **Reconsider relying on total organic fluorine content as an indicator of intentionally added PFAS**

At OAR 340-090-0900 Section 20(b), the proposed regulations state:

> The use of PFAS is presumed intentional if any total fluorine is present in the finished product. Producers may rebut this presumption by

providing credible evidence to demonstrate that PFAS were not intentionally added.

ACA cautions against adoption of a total organic fluorine test as an indicator of intentionally added PFAS. Total fluorine testing does not distinguish the variety of PFAS chemistries from overall fluorine content, resulting in inaccurate and over-inclusive reporting. Noting limitations of total fluorine measurements, a study concludes, "Measurement of total fluorine (TF) is inexpensive, but it is not as reliable of a proxy for PFAS because it includes inorganic fluoride in addition to organic fluorine."[7] Instead of testing for total organic fluorine, end-use product manufacturers can identify and report intentionally-added PFAS by relying on disclosed information from raw materials suppliers, above SDS thresholds with appropriate due diligence requirements, as noted above.

9. Provide transparency and amend the Producer Responsibility Organization (PRO) Fees (i.e., the Program Plan Review Fee and the Annual Administration Fee) to more accurately reflect DEQ's costs.

In the proposed regulations, under OAR 340-090-0690 (1), the "Program Plan Review Fee" requires each applicant PRO submitting a plan to pay DEQ $150,000 and the plan would not be reviewed until the fee is paid. Additionally, the "Annual Administrative Fee," under OAR 340-090-0690 (2), is set to the amount of $4 million for each calendar year in the first four years and $3 million for the subsequent years. It is unclear from the proposed regulations how these amounts were determined and how these amounts accurately cover the DEQ's resources assigned to address aspects pertaining to the implementation of the Plastic Pollution and Recycling Modernization Act.

While it is statutorily mandated for this extended producer responsibility program to be established and the statute does identify that the agency may set forth a one-time fixed fee for document review, these fees should not be excessively prohibitive.[8] Furthermore, the projected annual administration fees seem to be arbitrarily set since the program has not yet started and it would be highly speculative that the $4 million fee would need to be in place for four years or that the subsequent years would cost the agency $3 million.

The PRO will be assessing and setting its fees to producers and manufacturers in order to cover the costs to the PRO, which includes the fees the PRO must pay to DEQ. If the PRO is required to pay these high fees to DEQ, the PRO would have to charge its member producers fees that would be high enough to cover these costs. Generally, government fees are typically set to a reasonable amount that reflects the agency manpower necessary to review the documents submitted, either by an hourly rate or a per page rate. ACA

[7] Young, Anna, et. al., *Organic Fluorine as an Indicator of Per- and Polyfluoroalkyl Substances in Dust from Buildings with Healthier versus Conventional Materials*, Environ. Sci. Technol. 2022, 56, 23, 17090–17099, available online at: https://pubs.acs.org/doi/10.1021/acs.est.2c05198#

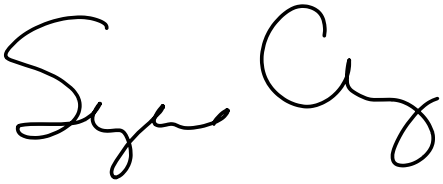
[8] See Oregon Senate Bill 582, Section 31.

recommends that DEQ provide transparency into how these fees were determined and amend these fees to more accurately reflect the costs to DEQ.

Conclusion

ACA appreciates the opportunity to provide comments to Oregon DEQ on the Proposed Rulemaking for the Plastic Pollution and Recycling Modernization Act, and we look forward to working cooperatively on this matter.

Sincerely,



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