AmericanCoatings
ASSOCIATION℠

Oct. 25, 2024

Matt Chapman
Director, Waste Management and Prevention Division
Vermont Department of Environmental Conservation
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

Re: Act 131, Phase Out of PFAS Added Products
Submitted via e-mail: matt.chapman@vermont.gov

Dear Mr. Chapman:

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on DEC's (Department of Environmental Conservation's) draft report and legislation, *Phase Out of PFAS Added Products*. We are committed to working with Vermont DEC to help ensure an accurate understanding of PFAS in products and any associated risks to the public and environment.

The Association's membership represents 90% of the paint and coatings industry, including downstream users of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture a variety of formulated products including paints, coatings, sealants and adhesives and their raw materials that may be affected by requirements, due to the broad set of covered chemicals, regardless of associated hazards.

ACA appreciates DEC's willingness to consider stakeholder perspectives. ACA appreciates that implementing a PFAS reporting requirement and ban presents many challenges. ACA also appreciates the legislature and the agency's willingness to consider industry perspectives while considering the public's interest in limiting use of PFAS in products.

[1] ACA is a voluntary, non-profit 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. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

Recognizing the agency's goals, ACA suggests changes to the definition of PFAS, "currently unavoidable use," "intentionally added," and "consumer product." ACA also suggests greater flexibility for the agency when establishing a duration of currently unavoidable use designations. ACA suggests aligning the due diligence standard with EPA's standard, while allowing downstream actors to rely on representations of suppliers.

ACA and its members respectfully submit the following for your consideration:

I. Modifying the definition of "PFAS" to enhance clarity.

ACA generally supports the agency's proposal to reference EPA's definition of PFAS, although the phrasing of the agency's proposed definition in Act 131 could cause confusion. The phrase "one-fully fluorinated carbon atom" is commonly used when discussing PFAS types. Here, the definition references "one fully fluorinated carbon *compound* that is identified as PFAS as defined in 40 C.F.R. §705.3." Clearly the agency is referring to fluorinated carbon compounds meeting the referenced definition in EPA regulations. To avoid potentially confusing phrasing of "one fully fluorinated carbon compound," ACA recommends changing that text to "*a* fully fluorination carbon compound . . . " replacing the "one" with "a."

ACA further recommends limiting the PFAS definition to PFAS identified by CAS number of PFAS currently in commerce. EPA provides a convenient list of such PFAS referenced in their PFAS reporting rule and related guidance. The list is available through EPA's CompTox Dashboard and EPA's PFAS TSCA Section 8(a)(7) website.[2] A key advantage of this approach is that downstream chemical users can more easily identify and notify the agency of PFAS in their products, since the chemicals at issue are clearly listed with a CAS number. Requiring reporting of PFAS that meets a structural definition establishes open ended criteria, where downstream users must exercise additional due diligence to identify chemistries from upstream suppliers, including those in negligible amounts and those that are not disclosed by CAS number. Tests for such amounts are highly variable in accuracy and expensive. Tests also may not be available for several types of products.

[2] A list of chemicals meeting EPA's PFAS definition is available on EPA's CompTox Dashboard. The CompTox list includes all chemicals with known structures that meet the definition of PFAS for section 8(a)(7) reporting. The CompTox list includes all known chemicals, regardless of their TSCA Inventory status, and is updated as new chemicals are added to the database. The CompTox list does not include all polymers or chemicals with undefined (unknown or variable) structures, which may be covered by this rule. This list is also available via EPA's Substance Registry Service. An Excel® file of chemicals on the TSCA Inventory that meet the definition of PFAS is provided in the Additional Resources section of the PFAS 8(a)(7) website: https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tscasection-8a7-reporting-and-recordkeeping#additional-resources. The Excel® file includes both chemicals with known structures as well as polymers and other chemicals with unknown or variable composition.

II. Defining "Currently Unavoidable Use" so it is aligned with other states.

ACA encourages the agency to modify criteria for "currently unavoidable use" in Section 6(b) of the proposed Act 131 so it is aligned with the approach taken by Maine. Maine includes consideration of whether a product is essential to the "functioning of society" in addition to health and environmental benefits and availability of alternatives. Because of this additional consideration, some products deemed critical to infrastructure, transportation and other socially important sectors, could meet the CUU criteria in Maine, but not in Vermont, although products are non-toxic and not a source of PFAS contamination.

Maine's *Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution* (38 MRSA §1612) defines Currently Unavoidable Use at Section 1:

> "Currently unavoidable use" means a use of PFAS that the department has determined by rule under this section to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available.

Non-allignment, especially in neighboring states, creates a situation where citizens of one state may need to cross state lines to purchase certain products. It also present significant challenges to industry since distribution networks do not track products by state-level distribution, especially within neighboring states, within one region. Distribution is regional, but not tracked at the state level.

III. Providing the agency with flexibility in determining the duration of CUU designations.

ACA recommends that Act 131 provide the agency with flexibility in determining expiration of CUU designations on a case-by-case basis considering potential for alternatives, functionality of the fluorinated chemistry in a product and degree of potential risk to environment and human health. The current proposal in Section 6(b) establishes a maximum duration of 5 years for CUU designations of a product and a maximum of 10 years for categories of products. Due to the broad range of PFAS chemistries, their varying functions and potential risks, a 5 or 10 year CUU duration is unnecessarily short for certain critical uses that cannot be phased out within that time. The agency should also provide an option for CUU renewals.

The agency should have flexibility to set duration as needed, while leaving open the possibility of designations that remain in effect longer than five years, including designations with no expiration date, when the chemistry is non-toxic and deemed critical. For example, ACA urges the agency to consider fluoropolymers that are typically non-toxic. These are required to meet certain product performance standards. Substitutes are not as effective, resulting in more frequent coating application and less effective protection, requiring greater resource use. ACA would welcome the opportunity to provide additional information about this topic as needed.

IV. Defining "intentionally added" PFAS.

The proposed definition of "intentionally added" is problematic because it references byproducts and impurities in products, where typically byproducts and impurities would be trace amounts, sometimes so low as to be below Safety Data Sheet disclosure thresholds. OSHA requires disclosure of hazardous chemicals in mixtures when above 0.1% or 1% in mixture, depending on the type of hazard. Mixtures can be raw materials or the final end-use product, for commercial or workplace use.

Although the proposed definition authorizes the Secretary to establish *de minimis* thresholds, a company would still need to test and/or seek additional information to identify byproducts and impurities in its raw materials or end-use products. Under the current proposal, the *de minimis* thresholds are another reporting data point in addition to reporting by products and impurities. This is problematic because test methods for by products and impurities for such a broad definition of PFAS do not exist in many instances. When test methods are available, they can be prohibitively expensive, especially for small and medium-sized enterprises.

ACA recommends removing "byproducts and impurities" from the definition of intentionally added. Intentionally added chemicals are typically chemicals added by a manufacturer to serve a functional purpose in the product. These are not byproducts and impurities. Removal of "by products and impurities" would also more clearly align with other states' definitions of "intentionally added." Maine's *Act to Stop PFAS Pollution* defines "intentionally added" as:

> "Intentionally added PFAS" means PFAS added to a product or one of its product components to provide a specific characteristic, appearance or quality or to perform a specific function.

Providing a clear standard of due diligence to identify PFAS would also assist downstream companies with compliance. Currently, the definition of "intentionally added" triggers requirements when a manufacturer "knows or reasonably should know the final product or product component could contain PFAS . . . " This is a vague standard of due diligence. ACA recommends referencing EPA's standard of due diligence for reporting, in addition to removing reference to impurities and byproducts.

EPA established its standard of due diligence for TSCA reporting rules under the TSCA Chemical Data Reporting rule, as information "known to or reasonably ascertainable by" the reporting entity. Although this standard is not without some ambiguity, it does provide a common reference for companies subject to Vermont's requirement. The EPA due diligence standard requires companies to conduct a thorough internal review of documentation and conduct targeted external inquiries, if internal review indicates another information source.

ACA also requests that the agency allow product manufacturers to rely on information provided by the supplier. Maine, in its implementing regulations, is now proposing that product manufacturers rely on information provided by the supplier. This provides ease and accuracy in compliance, while avoiding testing obligations to identify PFAS in products. Tests for PFAS in

products have a high degree of variability in results and are expensive to conduct. It also assures that the agency will receive a broad set of relevant information.

V. Clarifying the definition of consumer products

ACA members manufacture a variety of formulated paints, coatings, sealants, adhesives, etc. Some are purely consumer grade products, while others are commercial grade, but available in retail centers where they are typically sold to commercial users. The intent of the proposed definition of "consumer product" in proposed Act 131 seems to exclude certain commercial grade formulated products, while including some commercial-grade products that are "normally used by households but designed for or sold to businesses (e.g. commercial carpets or commercial floor waxes)." This distinction is not clear. For example, the definition does not clearly include or exclude a commercial-grade pavement sealer, typically applied professionally, but available in retail stores.

ACA suggests limiting the definition of "consumer products" to products manufactured for consumer use, while clearly excluding products manufactured for commercial use. The agency may also consider limiting commercial use of specific consumer products listed in Section 6(a), since this seems to be the focus of proposed prohibitions. This approach would require modifying the definition of "consumer product," where the agency proposes, "Consumer products includes product categories that are normally used by households but designed for or sold to businesses (e.g. commercial carpets or commercial floor waxes)." Clear specification of "product categories" by referencing the list in Section 6(a) would be helpful.

VI. Updating compliance deadlines of Maine and Minnesota referenced in proposed Act 131.

At page 5 of DEC's draft report, the author incorrectly identifies "effective dates of 2030 for the actual phase out" of products containing PFAS in Maine and Minnesota. This date should be updated to Jan. 1, 2032 to reflect current implementation deadlines in Maine and Minnesota based on an amendment in Maine[3] and the original legislation in Minnesota.

VII. Conclusion

ACA and its members suggest the following changes to the proposed rule and draft report to the legislature:

- Change the definition of PFAS to clarify that Act 131 adopts EPA's definition of PFAS.
- Further specify covered PFAS by limiting the definition of PFAS to the list of PFAS in commerce provided by EPA.

[3] *An Act to Support Manufacturers Whose Products Contain Perfluoroalkyl and Polyfluoroalkyl Substances* (LD 1537, 131st Legislature, effective August 9, 2024). For additional information and a table of implementation dates see: https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/.

- Modify the definition of “currently unavoidable use” to include products that have an essential function in society.
- Authorize the agency to determine duration of currently unavoidable use designations on a case-by-case basis, with an option to renew.
- Remove reference to “byproducts and impurities” in the definition of “intentionally added” PFAS.
- Align the standard of due diligence for reporting to EPA’s due diligence standard.
- Allow downstream actors to rely on information provided by the supplier.
- Modify the definition of “consumer product” to exclude products manufactured for commercial use, except certain products identified in Section 6(a) and defined in the proposed act.
- Update Maine and Minnesota compliance dates to Jan. 1, 2032 as referenced in draft report to the legislature at page 5.

ACA appreciates the agency’s willingness to consider stakeholder perspectives at this early stage of rulemaking. Please feel free to contact me if I can provide any additional information.

Respectfully submitted,

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