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Via <https://minnesotaoah.granicusideas.com/>

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Re: Request for Comments: Planned New Rules Governing Currently Unavoidable Use Determinations about Products Containing Per-and polyfluoroalkyl substances (PFAS), Revisor's ID Number R-4837

We respectfully submit our comments on the following questions posed by MPCA:

1. Should criteria be defined for “essential for health, safety, or the functioning of society”? If so, what should those criteria be?

MN law [states](#) “(j) *“Currently unavoidable use” means a use of PFAS that the commissioner 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,*” with no further description of “essential for the health, safety, or functioning of society” or “alternatives”. “Essential for the health, safety, or functioning of society” is encompassed within “currently unavoidable use,” and we suggest that it is more productive to focus on the broader term and delineate what constitutes a “currently unavoidable use” instead of trying to categorize them under the two prongs of the definition.

We recommend that MPCA find that the use of PFAS in a product category is currently unavoidable only if all the following criteria are met:

- (1) There are no safer alternatives to PFAS that are reasonably available.
- (2) The function provided by PFAS in the product is necessary for the product to work.
- (3) The use of PFAS in the product is critical for health, safety, or the functioning of society.

The second proposed criteria could easily fit under both prongs of the definition of “unavoidable use.” If PFAS is not necessary for the product to work, that is a safer alternative to the use of the PFAS. It also means that the use of PFAS in the product is not necessary for the health, safety, or functioning of society. It is not important to delineate which prong the criteria falls under.

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However, it is important to specifically articulate the criteria so that it is considered in every analysis and is not overlooked.

In order to implement these three criteria, additional terms are critical to define. Specifically, we recommend including the following definitions:

- “Safer alternative” means an alternative that, in comparison with another product or product manufacturing process, has reduced potential adverse impacts and/or potential exposures associated with PFAS. Alternatives include materials, processes, designs, products, or chemicals that achieve the desired result. For example, a safer alternative to stain resistant sprays for avoiding stains could be the use of detergents or the use of fibers that are inherently stain resistant.
- “Necessary of the product to work” means required for the product to perform its core function, as determined by the department. For example, the core function of a couch is for people to sit on.
- “Product” means an item manufactured, assembled, packaged, or otherwise prepared for sale in Minnesota, including but not limited to, its components, sold or distributed for personal, residential, commercial, or industrial use, including for use in making other products.

The proposed criteria above add critical detail to inform considerations of safer alternatives and necessity. Additional considerations of necessity beyond these criteria will rely on the discretion of the agency to account for information that comes before the MPCA.

2. Should costs of PFAS alternatives be considered in the definition of “reasonably available”? What is a “reasonable” cost threshold?

Firstly, if alternatives are already being used or if PFAS in an application has already been banned in another jurisdiction and that ban is in effect, then the alternative should be determined to be reasonably available. In addition, if the findings of an available study or evaluation of alternatives by an authoritative body shows the viability of safer alternatives to PFAS in the product category under review, then those alternatives should also be considered reasonably available.

Secondly, a cost threshold is not appropriate in this context, because the cost implications can vary dramatically from product to product. Rather the focus should be on assessing what is “reasonably available.” We believe that inquiry could involve considerations of adequate supply of the alternatives and potentially the cost to the public. Costs to manufacturers are variable and subject to market pressures, including MPCA action. An alternative may initially start out significantly more expensive than the PFAS it is intended to replace, but as demand increases, the cost can fall rapidly, and a mandated switch away from PFAS could be the catalyst for demand for the alternative to increase. This is why it is important for cost considerations to not be determinative (and to have determinations of “currently unavoidable use” be time bound, as the availability of alternatives can change over time).

The need for any consideration of costs to be more focused on the impact to the public rather than the manufacturer is reinforced by the nature of alternatives that should be covered. As we

propose above, MPCA should adopt definitions that make clear that alternatives can include materials, processes, designs, products, or chemicals that achieve the desired result. For example, a safer alternative to stain resistant sprays for avoiding stains on upholstery could be the use of detergents or the use of fibers that are inherently stain resistant. In the example where detergents are a viable alternative to PFAS treated upholstery, there would be little to no direct costs to the public, but there might be economic impacts for the manufacturer of the PFAS treated upholstery. Thus, the cost to the manufacturer should not be the relevant cost for MPCA's analysis.

There should also be some consideration of the significance of additional cost to the public. However, minor costs should not influence the analysis. Even when considering costs to the public, a set threshold in absolute dollars should not be used as product categories may vary significantly in scale of cost. Nor is a percentage-based threshold appropriate because the significance of a certain percentage cost difference depends on the context—a high percentage could still amount to mere cents. In addition, any cost should be considered alongside societal costs of PFAS exposure and clean up.

3. Should unique considerations be made for small businesses with regards to economic feasibility?

For reporting requirements, it makes sense to consider economic feasibility for small businesses based on a combination of the number of employees and revenue. For example, Maine has exempted from reporting manufacturers that have 100 or fewer employees. However, there may be cases where a business has fewer than 100 employees, but makes substantial revenue to which reporting would not be a financial hardship. Furthermore in the case of franchises or businesses with contractors, the franchisor or the number of contractors (so that we are not creating perverse incentives to hire contractors instead of employees) should be considered in the analysis of economic feasibility of reporting.

However, these considerations should not be made when restricting the avoidable use of PFAS. Regardless of size, businesses should not be permitted to use PFAS unnecessarily because of the significant harms that may follow for human health and the environment.

4. What criteria should be used to determine the safety of potential PFAS alternatives?

As mentioned above, safer alternatives should include materials, processes, designs, products, or chemicals that achieve the desired result. For example, a safer alternative to stain resistant sprays for avoiding stains could be the use of detergents or the use of fibers that are inherently stain resistant.

A safer alternative should be an alternative that, in comparison with another product or product manufacturing process, has reduced potential adverse impacts and/or potential exposures associated with PFAS. There are tools such as Greenscreen or Chemforward to compare potential adverse impacts of alternatives, but as the proposed definition above suggests, non-chemical alternatives that achieve the desired end result should be considered.

The Washington Safer Products program has developed detailed criteria for “safer alternatives,” which are available in [Phase 3 Working Draft Criteria for Safer](#). If you have questions about these criteria or about the Safer Products for Washington program, we recommend contacting SaferProductsWA@ecy.wa.gov. The WA Department of Ecology has already shown great success in applying these criteria for identifying safer alternatives to PFAS in a number of product categories.

5. How long should PFAS currently unavoidable use determinations be good for? How should the length of the currently unavoidable use determination be decided. Should significant changes in available information about alternatives trigger a re-evaluation?

A currently unavoidable use determination should be reevaluated at least every five years. This length of time provides a degree of certainty for businesses while taking into account often quickly changing market conditions. Furthermore, when a manufacturer applies for a renewal of a currently avoidable use determination, they should not only have to show that their use still meets the criteria outlined in question 1, but they should also provide evidence of significant efforts to develop a safer alternative to the continued use of PFAS in the product or product category, including, but not limited to, published peer-reviewed papers and funding of third-party research with no financial conflict of interest. Without such a requirement, there is little incentive for businesses to make efforts to find alternatives to PFAS.

If significant changes in available information about alternatives becomes available the MPCA should review any relevant currently unavoidable use determinations and revoke any determinations where the use no longer meets the criteria for a currently unavoidable use. Furthermore, a public petition process should be put in place to allow for petitions to review a determination based on a significant change of information.

6. How should stakeholders request to have a PFAS use be considered for currently unavoidable use determination by the MPCA? Conversely, could stakeholders request a PFAS use not be determined to be currently unavoidable? What information should be submitted in support of such requests?

A petition process should be put in place for requests for a currently unavoidable use determination. In submitting a petition, a manufacturer should be required to provide evidence that their use of PFAS meets *all* of the following criteria:

- (1) There are no safer alternatives to PFAS that are reasonably available.
- (2) The function provided by PFAS in the product is necessary for the product to work.
- (3) The use of PFAS in the product is critical for health, safety, or the functioning of society.

When evaluating the above suggested criteria for an unavoidable use, MPCA does not need to evaluate all the criteria if the determination can be made on fewer criteria since all criteria must be met for an exemption. In other words, if a use is found not to meet one of the three criteria, the use is avoidable.

When reviewing this evidence MPCA should also consider the relevance and significance of the information provided for the product category, other available reliable information, and bans on the sale or use of PFAS in the product or product category in another state or other countries. If the sale or use of PFAS in the product or product category has already been banned in another state or other countries, and if the ban is in effect, then that should demonstrate that the use of PFAS is not a currently unavoidable use. Finally, MPCA should provide an opportunity for public comment, where other stakeholders could provide relevant information.

In the case that a currently unavoidable use determination has already been granted for a product or product category, there should also be a petition process in which the public or other stakeholders can provide information showing that the use is now no longer currently unavoidable. (See our response to question 5.)

7. In order to get a sense of what type of and how many products may seek a currently unavoidable uses determination, please share what uses and products you may submit a request for in the future and briefly why. There will be a future opportunity to present your full argument and supporting information for a possible currently unavoidable uses determination.

8. Should MPCA make some initial currently unavoidable use determinations as part of this rulemaking using the proposed criteria?

MPCA should not *a priori* determine that any PFAS use is currently unavoidable. This would bypass a petition process where manufacturers must provide evidence to MPCA that a use is currently unavoidable. It also removes any incentives to develop or implement safer alternatives for these uses.

Rather, MPCA should make additional determinations that the following are avoidable uses before the 2032 phase out:

- 1) Expanded textiles category: California has passed a law that bans the sale of PFAS containing textile articles starting January 1, 2025 (with a limited set of products provided an extension until 2028) and has defined “textile articles” broadly as “textile goods of a type customarily and ordinarily used in households and businesses, and include, but are not limited to, apparel, accessories, handbags, backpacks, draperies, shower curtains, furnishings, upholstery, beddings, towels, napkins, and tablecloths.” Therefore textile articles beyond upholstered furniture and textile furnishings (already listed to be avoidable uses in Minnesota law) should also be determined to be avoidable, including apparel, accessories, handbags, backpacks, footwear, and other products. MPCA should expand the restrictions on PFAS in textiles to be consistent with the scope of California’s law ([AB 1817](#)).

Similarly, Washington Department of Ecology, under the [Safer Products for Washington law](#), has taken action on the use of PFAS in apparel and gear, including: athletic wear, rain wear, reusable diapers, menstrual underwear, school uniforms, dresses, hats, scarves,

gloves, shoes, extended use products, backpacks, sleeping bags, umbrellas, camping furniture, and climbing rope. In this case, Ecology made the draft regulatory determinations that PFAS uses must be reported for: apparel intended for extended use by experts or professionals that are not marketed to the general public, shoes, and gear. Ecology further made a draft regulatory determination to restrict the use of PFAS in all other types of apparel.

- 2) Pesticides: Maine passed a law ([H.P. 1501 - L.D. 2019](#)) prohibiting the distribution of pesticides that are contaminated by perfluoroalkyl and polyfluoroalkyl substances; or that contain intentionally added PFAS beginning in 2030. “Pesticides” include any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pests; any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant; and any substance or mixture of substances intended to be used as a spray adjuvant. "Pesticide" includes a highly toxic pesticide.
- 3) Oil and gas products: Colorado passed a law ([HB22-1345](#)) that bans the sale or distribution of multiple product categories with PFAS, including oil and gas products, starting January 1, 2024. "Oil and gas products” include hydraulic fracturing fluids, drilling fluids and proppants.
- 4) Coatings, paints and varnishes: The Organisation for Economic Co-operation and Development (OECD), an intergovernmental organization with representatives from 38 industrialized countries, as well as the European Commission, produced a [report](#) on coatings, paints and varnishes (CPVs). They conclude that “for the most closely examined uses in CPVs, non-fluorinated alternatives account for a large majority of market share. It is more cost-effective to use the nonfluorinated alternatives and therefore FPs [fluoropolymers] and SC [short-chain] PFASs are typically used only where specific high- performance attributes are sought.” The information in this report and in the European Union’s Universal PFAS Restriction Proposal (see below) show that most if not all PFAS uses in coatings, paints and varnishes are avoidable.

The European Union has proposed an economy wide ban on PFAS, known as the Universal PFAS Restriction Proposal. In [Table 9 of Annex XV](#) many product/use categories have received no derogations to the proposed ban, meaning that alternatives have already been identified and the use of PFAS in those products is avoidable. Here we have listed a few examples that are not already included in MN law: metal plating, sterilization gases, PTFE thread sealing tape, window frames, various types of coatings, paints and sealants, and various packaging applications.

9. Other questions or comments relating to defining currently unavoidable use criteria and the process MPCA uses to make currently unavoidable use determination?

In order to reduce administrative burdens and delay tactics, MPCA should use the broadest reasonable product category in making currently unavoidable use determinations and rely on the determination for the category for any product in the product category. This requires a definition of a “product category”, and we propose the following:

“Product category” means a group of similar products that are used for a similar purpose and that could functionally replace each other for that purpose, as determined by the department, and does not mean a specific variation within a product. For example, pants, insulation, and cookware are each a product category whereas stain resistant pants, spray insulation, and nonstick cookware are specific variations of products within those product categories.

In using the broadest reasonable product category in making its determination, the department need not be overly limited by exceptions. Instead, the department could identify exclusions from a product category, if appropriate.

We would be happy to discuss any of the information provided in our comments. For further details, please contact:

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