VERMONT
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Act 131 of 2024 required the Agency of Natural Resources, in consultation with the Agency of Agriculture, Food and Markets, Department of Health, and Attorney General's Office to develop an implementation plan for revising the PFAS phase outs adopted in Vermont. The Agency of Natural Resources has developed this draft report and legislation in consultation with those offices.

This draft report and legislation are being provided to the public for comment. Public comments are due to the Agency before 4:45 pm on October 21, 2024. Comments should be sent via e-mail to the attention of Matt Chapman at the Department of Environmental Conservation (matt.chapman@vermont.gov). Please do not send paper copies of comments. The final report and draft legislation will be submitted to the House Committee on Human Services and Senate Committee on Health and Welfare around November 1, 2024.

The following are the questions posed in Act 131, taken out of order to facilitate an understanding of the Agency's recommendations.

(1) identify categories of consumer products that could have an impact on public health and environmental contamination;

The proposed legislation recommends new, near-term PFAS phase outs for the following product categories: (a) cleaning products; (b) dental floss; (c) fluorine treated containers; and (d) upholstered furniture. These products were selected because these product categories either represented a significant source of PFAS or presented a potential human exposure pathway. These phase outs are in addition to existing PFAS prohibitions for other consumer products including cosmetic and menstrual products, cookware, rugs and carpets, textiles, and food packaging. *See generally* 9 V.S.A. chapter 9, subchapter 12.

(6) propose definitions of "intentionally added," "consumer product," and "perfluoroalkyl and polyfluoroalkyl substances";

Consumer Product

> *"Consumer product" means any tangible personal property that is distributed in commerce, and which is normally used for personal, family, or household purposes. "Consumer product" includes product categories that are normally used by households but designed for or sold to businesses (e.g. commercial carpets or commercial floor waxes). "Consumer product" does not include complex durable goods and food.*

"Complex durable goods" means a consumer product that is a manufactured good composed of 100 or more manufactured components, with an intended useful life of 5 or more years, where the product is typically not consumed, destroyed, or discarded after a single use.

The definition of consumer products is intended to broadly include PFAS-added products that may be sold for personal, family, or household use. It is also intended to capture products that are normally used by households but sold to businesses. This would include floor coverings and carpet, appliances, paints, kitchen equipment, and furniture. It would include them even if they were targeted for businesses.

Based on the experience of other states, complex durable goods have been excluded from the definition of consumer products. Maine has had significant challenges in requiring persons subject to its phase out to certify that all constituent components are PFAS free. This definition proposes to exclude, for the time being, complex durable goods that are built for a longer product life and have a significant number of constituent components, given the difficulty of implementation and that many of these component parts would not be accessible and therefore direct human exposure risk is low. This exception includes things like aircraft, cars, and many electronic devices. The draft legislation requires ANR to provide a recommendation by January 15, 2030, which may be after other jurisdictions have more experience in managing complex durable goods.

Intentionally Added

"Intentionally added" means either of the following:

(A) when a person manufacturing a product or product component knows or reasonably should know the final product or product component could contain PFAS, including because:

(i) PFAS or PFAS precursors are added to the product or product component;

(ii) PFAS or PFAS precursors are used in the manufacturing process of the product or product component; or

(iii) PFAS are present in the final product as a byproduct or impurity; or

(B) the product or a product component contains PFAS above thresholds established by the Secretary.

The proposed definition of "intentionally added" is meant to reflect the Legislature's intent to protect public health and the environment from PFAS. In furtherance of this goal, a product contains "intentionally added" PFAS under two scenarios.

First, a product contains "intentionally added" PFAS if the manufacturer of the product or product component knows or reasonably should know the final product or product component could contain PFAS. The definition provides examples of scenarios where this standard would be satisfied. Alternatively, a product contains "intentionally added" PFAS if the product or product component contains PFAS above certain levels established by the Secretary.

Each of these categories puts the responsibility on manufacturers—those with the most knowledge about their products, suppliers, and processes—to understand the chemical composition of their products and, ultimately, whether PFAS is present in them.

> *Perfluoroalkyl and polyfluoroalkyl substances*
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> *"Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means one fully fluorinated carbon compound that is identified as "PFAS" as defined in 40 C.F.R. § 705.3. The Commissioner may adopt exemptions to the definition of PFAS if that chemical is federally regulated and not toxicologically similar to chemicals defined as PFAS. The Commissioner may add chemicals to the definition of PFAS if that chemical contains at least one fully fluorinated carbon atom and is toxicologically similar to chemicals defined as PFAS.*

The draft legislation proposes a definition of PFAS that is based on the definition in the reporting requirements for PFAS-containing products under the federal Toxic Substances Control Act. The definition used in prior legislation is overbroad from a technical perspective and includes many chemistries that do not have the functional qualities of PFAS (persistence, toxicity, mobility) and have benefit in society. While the proposed definition is somewhat narrower, it allows the Secretary to list or delist chemistries that are similar to or dissimilar to PFAS. Utilizing this definition also creates a significant regulatory benefit of being able to use the reporting that is required under federal law. This will give Vermont access to significant information regarding the addition of PFAS to products.

(2) propose a process by which manufacturers determine whether a consumer product contains PFAS and how that information is communicated to the State;

(3) address how information about the presence or lack of PFAS in a consumer product is conveyed to the public;

(7) propose a related public service announcement program and website content to inform the public and health care providers about the potential public health impacts of exposure to PFAS and actions that can be taken to reduce risk;

The proposed legislation is silent on how to address outreach to consumers and businesses as a part of the set of PFAS phase outs that are proposed. Assuming adequate staff resources are provided as a part of this proposal, there are two core steps of an outreach program:

- Create a consumer and business outreach web page that provides information and links to reported PFAS in consumer products that is required by the Toxics Substances Control Act and provide resources to reputable programs that certify that products are PFAS free.
- Create a pollution prevention program that can assist businesses to identify emerging contaminants, including PFAS, in products that they develop and identify less harmful substitutions for PFAS in those products.

The working group looked at, and ultimately chose not to recommend, a PFAS labeling requirement at this time because it is uncertain whether any labeling requirement could be in place by 2027 or 2028, when a large number of PFAS-added products will be phased out under this proposal or existing law. Depending on the recommendations of ANR's 2030 report on complex durable goods, it may make sense to revisit the possibility of labeling at that time.

(4) describe which agency or department is responsible for administration of the proposed program, including what additional staff, information technology changes, and other resources, if any, are necessary to implement the program;

This proposal recommends that the PFAS phase out programs be attached to the Agency of Natural Resources. It is estimated that, initially, two staff will be required to administer the phase out program, develop public outreach, and begin a more robust pollution prevention program in the state. These positions have been identified from within ANR and will be funded out of ANR's existing operating budget. Longer range staffing and operational budgets for implementation of the broader consumer products phase out and essential use waiver program have not been completed, but it will require additional staff and operating budget to administer that program. The legislation is designed to take advantage of a regional approach to resolution of these issues working with the New

England Waste Management Officials Association (NEWMOA) or other groups as a clearinghouse.

(5) determine whether and how other states have structured and implemented similar programs and identify the best practices used in these efforts;

Two states, Maine and Minnesota, have adopted broad-based phase outs on PFAS in consumer products. Both of these phase outs are in the early stages of implementation with effective dates of 2030 for the actual phase out. Initial implementation in Maine led to a number of changes in the law during the last session of Maine's legislative session. In light of these laws being in the early stages of implementation, it would be advisable to wait until the laws are effective before drawing lessons from these two states.

(8) provide recommendations for the regulation of PFAS within consumer products that use recycled materials, including food packaging, cosmetic product packaging, and textiles; and

Recycling consumer products is a significant policy goal of the State. It reduces the burden on natural systems by reusing products that were already created. Recycling also can significantly reduce the carbon emissions associated with the creation of new products. However, even if we are successful in removing PFAS from all new paper, plastic, and other products, the products currently in the marketplace will contain PFAS and it is likely that PFAS will be passed on in recycled consumer products.

The proposed legislation recommends an exemption for products made with at least 50 percent recycled content. In a short review of how much recycled content is in products, there are widely varying amounts. Recently, the State of California passed a minimum recycled content requirement for beverage containers that requires a 50 percent recycled content. This standard represents an aggressive but achievable level of recycled materials in a product. It also will prevent entities from adding only minimal recycled content to products to avoid being subject to the phase out.

(9) determine whether "personal protective equipment" regulated by the U.S. Occupational Safety and Health Administration under the Occupational Safety and Health Act, the U.S. Food and Drug Administration, or the U.S. Centers for Disease Control and Prevention, or a product that is regulated as a drug, medical device, or dietary supplement by the U.S. Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act or the Dietary Supplement Health and Education Act, is appropriately regulated under 9 V.S.A. chapter 63, subchapters 12–12c.

The question of whether Vermont may appropriately regulate PFAS in "personal protective equipment" (PPE), given that the federal Occupational Safety and Health Act (OSHA), the U.S. Food and Drug Administration (FDA), and the U.S. Centers for Disease Control (CDC)

and Prevention also regulate PPE, depends on various factors and does not lend itself to a uniform answer.

"Personal protective equipment" encompasses a plethora of equipment that protects varying body parts against wide ranging potential harms in settings ranging from hospitals to construction sites, including:

- Eyes (e.g., safety glasses, goggles, laser protective eyewear);
- Ears (e.g., ear plugs or muffs);
- Face (e.g., face shield);
- Hands (e.g., exam gloves, chemotherapy gloves);
- Feet (e.g., shoe coverings);
- Torso/body (e.g., fluid resistant gowns, impervious splash suit, laser protective clothing);
- Lungs/respiratory tract (e.g., N95 filtering facepiece respirator, elastomeric half-mask respirator, powered air-purifying respirator, surgical mask, and protective shields and barriers);
- Electrical protective equipment; and
- Personal fall protection systems.

See generally https://www.cdc.gov/niosh/learning/safetyculturehc/module-3/7.html.

Whether federal authority preempts state law depends on many factors, including the language of the specific state law in effect; the specific PPE involved and any accompanying federal laws and regulations specific to the PPE; and where the personal protective equipment is being used, such as in a medical setting, workplace, or because of an individual's personal choices. Any contemplated PFAS legislation would need to consult the FDA's and CDC's regulations and/or guidelines regarding the particular PPE at issue.

What can be said is that OSHA does not appear to prohibit Vermont from regulating PFAS. Under OSHA Section 18(b), a state may submit to federal authorities a proposed state plan, which if approved, authorizes a state to assume responsibility for development and enforcement of occupational safety and health standards. Vermont has a state-approved plan that "in effect removes the barrier of Federal preemption." 29 C.F.R. 1953.3(a); https://www.osha.gov/stateplans (listing Vermont as state with approved plan). Therefore, any contemplated PFAS legislation regarding PPE should consult the Vermont Occupational Safety and Health Act.

The resolution of the second question—whether Vermont can regulate PFAS in a drug, medical device, or dietary supplement notwithstanding the Federal Food, Drug, and Cosmetic Act (FDCA) or the Dietary Supplement Health and Education Act—also depends on many factors. Like PPE, it is difficult to affirmatively state brightline rules.

As it relates to drugs, federal authority expressly preempts state law for vaccines, there is an express non-preemption provision governing over-the-counter medicine, and there is neither an express preemption provision nor a non-preemption provision governing prescription drugs. *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 492-93 (2013). With respect to the latter, the United States Supreme Court acknowledged that the issue of federal preemption of prescription drugs has "repeatedly vexed the Court—and produced widely divergent views—in recent years." *Id*.

Similarly, medical devices present preemption issues that prevent brightline rules. The scope of the express preemption provision for medical devices in the FDCA has received considerable attention for decades. 21 U.S.C. § 360k; 21 C.F.R. § 808.1. Factors affecting this inquiry include: (i) whether the device in question is classified as a class 1, class 2, or class 3 medical device (21 U.S.C. § 360c); (ii) whether there are "specific [federal] requirements" applicable to the "particular device" in question (21 C.F.R. § 808.1(d)); and (iii) whether the proposed state requirement is related to the safety or effectiveness of a device in question. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

A more detailed review of the preemption framework around dietary supplements is ongoing, but initial research leads to the conclusion that Vermont has the authority to phase out PFAS in dietary supplements.