SUSTAINABLE PFAS ACTION NETWORK

Office of Administrative Hearings (OAH)
c/o Rulemaking *eComments* website
https://minnesotaoah.granicusideas.com/
Minnesota Pollution Control Agency
Attention: Resource Management and Assistance Division

Regarding: Planned New Rules -- Currently Unavoidable Uses of PFAS

The Sustainable PFAS Action Network (SPAN) is submitting the following comments on the planned new rules that will govern how applicants may seek, and the Pollution Control Agency (MPCA) will consider and make, determinations that the presence of PFAS in a product represents a currently unavoidable use (CUU). Such determinations are of critical interest to SPAN Members because such determinations will establish which products will otherwise be banned from distribution in Minnesota commencing January 1, 2032.[1]

Background on SPAN

SPAN is a coalition of PFAS users and producers that are committed to sustainable, risk-based PFAS management. Our members advocate for responsible policies grounded in science that provide assurance of long-term human health and environmental protection while recognizing the critical need for certain PFAS materials as directly contributing to essential functions in our modern economy. In a recent study by INFORUM, a Washington-based economic consulting firm, critical PFAS-using industries, such as the automotive, aerospace, air conditioning and refrigeration, medical devices and pharmaceuticals, battery supplies, and semiconductor industries together account for more than six million jobs, annual wages over $600 billion, and more than $1 trillion to the nation's gross domestic product. SPAN was formed with these various and critical uses in mind, to ensure the health of the environment and consumers while maintaining America's global economic edge.

SPAN supports MPCA's efforts to establish a formal process that will ensure the approach taken by MPCA for considering and granting unavoidable use determination is timely, transparent, and has clearly established criteria which are applied fairly. In addition to responding to the specific questions upon which MPCA has requested comment, as set forth below in the numerical order as presented in MPCA's request for comment, SPAN is providing additional comments in its remarks to reiterate many of the topics addressed in its prior submittals to state government officials.

Specific Comments in Response to MPCA's Request

[1] As a coalition comprised of various member companies and entities, SPAN expects its member companies, when appropriate to do so, will submit proposals for CUU determinations that are pertinent to their individual products, chemistries, and needs. Nevertheless, SPAN encourages MPCA to take these comments into consideration and to eventually propose categorical CUU determinations which could encompass the uses identified in SPAN's comments below. Doing so will promote efficiencies and resource savings which could benefit MPCA and the regulated community by eliminating the need to issue product-by-product determinations.

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

Response: SPAN recommends MPCA provide criteria, definitions, examples, as well as narrative guidance to the regulated community that will further clarify how the Agency will interpret the statutory definition of "currently unavoidable use" (i.e., a use of PFAS determined to be “essential for health, safety, or the functioning of society and for which alternatives are not reasonably available”).

- SPAN recommends key terms in the Minnesota statute be further defined by MPCA. The rulemaking proposal should explain how MPCA interprets key terms in the CUU definition; specifically, “essential for health,” “essential for safety,” and “essential for the functioning of society.” SPAN suggests such definitions clarify that “essentiality” involves the concept that if the PFAS-containing product (or use of PFAS) were unavailable, there could be a significant increase in negative healthcare outcomes, or an inability to mitigate significant risks to human health or the environment, or significant interruptions to the daily functions on which US society relies.

- Further, SPAN recommends that PFAS-containing products and uses of PFAS that are considered to be essential for the functioning of society should be defined to include (but not be limited to) PFAS that are critical to climate mitigation efforts, components in critical infrastructures, the delivery of medications, personal protective and lifesaving equipment, public transport, agriculture, scientific research and construction.

- Another key term for which it would be helpful for MPCA to interpret publicly is “alternatives are not reasonably available.” Furthermore, it is unclear from the statute what MPCA will consider to be an “alternative” to a specific PFAS or its use in a particular product. For example, does MPCA interpret the term “alternative” to apply specifically and only to chemical alternatives that might be considered a “drop-in replacement” (e.g., a functional equivalent chemically for achieving the specific attribute provided by PFAS when present in a particular end use product), or to also include alternative manufacturing processes (e.g., that reduce or completely remove the use of PFAS in formulating a product), and/or to include *alternative end products* themselves which would negate the need to use a particular PFAS-containing product (e.g., these might include the substitution of the use of an umbrella made of sail cloth in lieu of the use of *outer wear*/*rain gear* with a PFAS-based water repellent coating).

    - To avoid inadvertently encouraging regrettable substitutions, SPAN recommends MPCA clarify it will consider a variety of important factors affecting whether an alternative is reasonably available. These should include (but not be limited to): (i) the performance capabilities of the alternative when compared to the PFAS-containing products (including the alternative’s ability to meet technical specifications such as those required to meet government-issued requirements); (ii) the comparative health and environmental effects of the alternative versus the PFAS material under consideration (based on known effects supported by scientific studies); and (iii) the comparative length of service life and end-of-life disposition of the material in question compared to the alternative under consideration.

- In addition to definitions to be provided by MPCA, SPAN recommends the agency also provide examples of “currently unavoidable uses,” and that these include (among others discussed below)

all uses that have previously undergone reviews and received federal authorizations for specific uses pursuant to programs such as (but not limited to) the significant new alternatives program (SNAP) under the Clean Air Act; the EPA's new chemicals and significant new uses program under Section 5 of the Toxic Substances Control Act; drugs, medical devices, biologics, and diagnostics and equipment authorized under the Food and Drug Act (FFDCA); pesticides and devices subject to regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and other federal programs whereby either the PFAS, or products containing them, have been deemed acceptable for their intended use by federal government agencies. This should include products which are subject to, or PFAS (or a PFAS-containing component) is necessary for meeting, federal specifications (e.g., Department of Defense requirements and military specifications, Federal Aviation Administration standards, NASA requirements).

- Rules to be established by MPCA also should recognize that while many of the product categories identified above may not fully satisfy the statutory provision in Section 8(a) of the law that refers to "a product for which federal law governs the presence of PFAS in a manner that preempts state authority," there are many additional categories of uses that, likewise, should be eligible for CUU determinations because there are, in fact, uses of PFAS which are critical to public health, safety, and/or the functioning of society and may not have reasonably available alternatives at this time. Such a more flexible approach that is not limited simply to a "federal preemption" criterion, will help MPCA concentrate its efforts on identifying non-essential consumer products for which the 2032 prohibition (or one to occur later) might be appropriate. SPAN recommends the following additional categories of products (and their raw materials, components, and replacement parts) be included in a categorical CUU determination to be identified in its eventual regulations:

    - Packaging for drugs, medical devices, biologics, diagnostics, and food contact articles and components subject to the oversight by the Federal Food and Drug Administration or the Department of Agriculture.
    - Items and products and substances required by state laws and regulations.
    - Used product offered for sale or resale, and products that are already owned but may be leased for use but for which ownership is retained by the lessor (e.g., office machinery, rental cars).
    - Transportation equipment including: automobiles, train engines and rail cars and components, packing containers and forklifts, ships and container vessels and services equipment, agricultural vehicles and equipment, motorcycles, construction equipment, wheel chairs and other forms of mobility assisting appliances.
    - Waste disposal equipment and equipment used in storage of waste and hazardous materials and products to ensure the safety and integrity of the containment and disposal systems.
    - Air conditioning, heating, ventilation, and refrigeration equipment and their components and parts including replacement parts and materials.
    - Heat transfer fluids for cooling of electronic components (e.g., data centers);
    - Appliances and equipment used in harnessing energy (e.g., windmills, solar panels).
    - Batteries and other components in electric vehicles.
    - Personal Protective Equipment and outwear for first responders and used in rescue, law

enforcement and defense application.

- Semiconductors, transistors, wiring, insulation, connections, housings and other electronics, and circuit boards which are not exposed (other than during repair or disassembly for disposal) as well as the final packaged semiconductor devices and articles containing them.

Examples of CUUs to be provided by MPCA, and the process established for seeking to add additional ones to the state's initial lists, should allow for latitude and flexibility to permit CUU determinations to be made for items not currently contemplated by MPCA during its impending rulemakings and to encourage, rather than discourage, innovation and economic development. The process established by MPCA should permit product manufacturers and PFAS-containing product users to request CUU determinations to be made even after the notification cycle is completed and continuing even after the 2032 product prohibitions take effect. This is needed to address as yet unknown innovations that might involve uses of PFAS in technologies and applications that could enhance energy efficiency or data processing or climate change mitigating methods, but which lawfully could not be brought to bear in Minnesota after the 2032 prohibitions take effect. MPCA should establish a CUU determination process that will encourage advances in the health care, engineering, transportation, energy storage and recovery, and other technologies that are yet unknowable.

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

Response: Yes. The standards for reasonably available alternatives should consider both the technical and economic feasibility of alternatives. MPCA should consider specifying that an alternative which is reasonably available must include technical and economic feasibility. This would require that an alternative be both readily available in sufficient quantities and will be available at comparable costs to the PFAS it is intended to replace, and that the alternative perform as well as or better than PFAS in a specific application of PFAS in a product or product component under pertinent specifications and use conditions. Businesses seeking CUU determination should be requested to provide information concerning the availability of alternatives as well as the technical and economic feasibility of the alternative. Furthermore, the health and environmental impacts of the use of alternatives also should be considered. For example, it might be possible to replace PFAS-containing heat resistant PPE for use by fire fighters with asbestos-containing alternatives, however, that particular substitution (or alternative) may not provide net health and environmental benefits which would outweigh the potential concerns related to the use of PFAS.

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

Response: Yes. Economic feasibility should be a consideration in addition to technical feasibility (such as meeting performance characteristics). Special consideration for small businesses might include longer periods for prohibitions to take effect.

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

Response: The safety of PFAS alternatives should be determined on a comparative basis by taking into consideration the entire lifecycle of the current (PFAS-containing) product in contrast to the "alternative" under consideration. For example, consideration should be given to the methods or manufacture of the alternative, the energy and environmental benefits of the continued use of an existing PFAS-containing product to a potential alternative, the service life of the existing product when compared to the alterative, and the likely environmental and health impacts of end-of-life treatment of and recyclability or disposal of the current and alternative material under consideration. Furthermore, the "safety" determination might need to involve a "comparative-risk" determination including whether an alternative may be available and should be considered for use which may contain PFAS, but a variety of PFAS for which there are fewer health or environmental concerns; in which case, it's use as a phased-in alternative should be considered and encouraged over time. Importantly, a "safety" determination also should consider the potential consequences of a potential failure of an alternative chemistry or PFAS-containing product, for example, if the alternative cannot meet technical standards that can affect safety. Such considerations are critical for PFAS-containing materials that must perform under challenging physical and chemical conditions and under repeated stresses, such as in aerospace and defense applications where failures can have devastating consequences.

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?

Response: SPAN recommends MPCA have the authority to issue CUU determinations with appropriate conditions. For example, exemptions from a prohibition might be granted subject to an appropriate time limitation (e.g., a ten-year period with the ability to seek extensions if alternatives remain unavailable), and/or to be contingent on commitments from the product producer to minimize human exposures and environmental releases of PFAS to retain a currently unavoidable use designation. However, such an approach should take into consideration the availability of alternatives and the time required to obtain needed authorizations (e.g., government-issued approvals and customer qualification) before substitutions can occur. Extensions should be considered and granted if needed. Consideration also should be given to international requirements and treaties. Periodic reporting by the exemption recipient also could be a condition of the currently unavoidable use designation.

As noted above, SPAN reiterates that replacement parts for existing materials (including large and complex equipment and machinery) may need to continue to contain PFAS to meet technical and contract specifications and thus should not be prohibited even after the 2032 product prohibitions.

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?

Response: The process MPCA establishes by which businesses may seek CUU determinations should, at a minimum, enable members of the regulated community to request a "currently unavoidable use" classification for one or more products and to provide information sufficient to support a finding by MPCA that there was a basis for MPCA to conclude the product met the criteria to be established for a CUU. If such determinations are to be made through a public rulemaking process, SPAN advocates that the process be open to the proponents and opponents of an unavoidable use determination.

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.

Response: SPAN Member companies, rather than SPAN itself, will be submitting such product and company-specific requests.

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

Response: Yes. As previously discussed, SPAN advocates that there are certain basic categories of use that should be considered to be unavoidable, and for which exemptions need not be sought by individual company-specific applicants. This will streamline the process for entities to seek such determinations for unique products and allow MPCA to focus on PFAS of high concern in non-essential uses which we believe is MPCA's ultimate intent with this rulemaking.

Other Comments from SPAN

- Span encourages MPCA to establish an entire framework for implementing its CUU determination program**.** SPAN recommends the state's process should enable potentially affected entities to not only apply for, but also provide guidelines, online resources, and an application portal providing administrative support for essential use determinations. The systems established should provide:
    - Deadlines for when applications must be submitted (including potentially variable timelines for different categories of products);
    - The required contents of such applications;
    - Definitive points in the application consideration processes inclusive of an interactive process whereby reviewers at MPCA may contact applicants to pose questions or seek additional information as required to assist MPCA in reaching a determination; and
    - Timelines for the consideration of and response to the applications (e.g., no later than 90 days following receipt of the application).

Reporting Requirements Under Subdivision 2: Although not responsive to the CUU comment solicitation, SPAN continues to encourage MPCA to prepare (in addition to the proposed regulations for its CUU process) and establish clear and practical reporting obligations for PFAS-containing consumer products under Subdivisions 2 and 3 of the law, which will provide information of value to MPCA's stakeholders, while ensuring any product prohibitions that are eventually codified and the CUU processes that is implemented pursuant to Subdivision 5 and 8 of the law are reasonable and risk-based, and accommodate essential PFAS uses and products that provide important societal benefits. The information gathered under the reporting requirements should be considered, evaluated, and inform any risk-based product restrictions issued by MPCA under Subdivision 5 of the law.

- SPAN advises that MCPA permit entities filing PFAS containing product reports to assert claims of confidentiality for information that is a trade secret or protected for national security reasons. SPAN also emphasizes that confidential information should be kept secure and protected from

public disclosure or unintended disclosure, including through hacking efforts and commercial espionage.

- SPAN recommends that MCPA avoid duplicating EPA's PFAS information collection efforts and place greater emphasis on gathering information on PFAS-containing substances, formulations, and other chemical mixtures that are produced in the state and will undergo further processing and use in the state in a manner that will provide an opportunity for releases and exposures to occur within Minnesota.

- SPAN suggests that MCPA adopt a "reasonably ascertainable" due diligence standard for manufacturers who are attempting to fulfill their reporting obligations and that MPCA make clear that manufacturers may reasonably rely on information provided by the suppliers, if the reporting party can document that proper inquiries were made to suppliers and the efforts they made to obtain information regarding the use of PFAS.

- SPAN requests MPCA clarify certain definitions, including the definition of "Intentionally added" PFAS. Specifically, MPCA should clarify that the definition does <u>not</u> include the following: manufacturing byproducts and impurities that might be unintentionally present in a product in commerce, and PFAS degradants that might be formed during product manufacturing but also be considered unintended components or contaminants.

- SPAN asks MPCA to clarify that the definition in the statute of "product" is, as was intended by the legislature, limited to those products made available to <u>consumers</u> for their personal use. The inclusion in the definition of products that are also made available to consumers for "commercial, or industrial use" or "for use in making other products" unintentionally expands the scope of the products on which the focus should remain. MPCA should include language in the proposal to make clear that PFAS-containing products that are used in commercial settings (e.g., office equipment) and in industrial and manufacturing applications (e.g., industrial and commercial devices, such as mechanized systems and robotics) are *excluded* from the reporting and prohibitions requirements under the law.

- SPAN requests MPCA to align its regulatory definition of PFAS (which currently is the overly-inclusive "single fully-fluorinated carbon atom" definition) with the EPA's more targeted definition[2] in the TSCA 8(a)(7) reporting rule (a structural definition approach that relies on the presence of at least two fluorinated carbons) which covers significantly fewer substances than the "one fully fluorinated carbon" definition.

<u>Fees</u>: SPAN also recommends that reporting fees be modest and that reporting should be done using an online platform that has been tested and is efficient and "user friendly". SPAN recommends that fees be

[2] EPA's reporting rules at 40 CFR 705.3 define *Per- and polyfluoroalkyl substances* or *PFAS as* any chemical substance or mixture containing a chemical substance that structurally contains at least one of the following three sub-structures: (1) R-(CF2)-CF(R')R", where both the CF2 and CF moieties are saturated carbons; (2) R-CF2OCF2-R', where R and R 'can either be F, O, or saturated carbons; (3) CF3C(CF3)R'R", where R 'and R" can either be F or saturated carbons.

established on a “per report” basis, or on a per-company basis (as opposed to a “per product” basis) and in a manner that enables a single company filing reports for multiple products to avoid paying reporting fees on a per-product basis.

Prioritization

Although not the focus of the recent request from MCPA for input, SPAN has in its prior submissions supported MPCA using rulemakings as a means to ensure the regulated community and MCPA have a common understanding of the processes and criteria that MPCA will be using for purposes of prioritizing for potential prohibitions under Subdivision 5 of the statute. SPAN has advocated that MCPA should concentrate its resources on products and product categories that, as directed in Section 5(b) of the statute, “in the commissioner's judgment, are most likely to contaminate or harm the state's environment and natural resources if they contain intentionally added PFAS.” SPAN continues to recommend that a risk-based evaluation process be structured and applied when identifying products for potential prohibitions. Such a process should take into consideration the factors affecting risk; specifically, hazard (e.g., toxicity, bioaccumulation, persistence) and exposures (e.g., production volumes, conditions of manufacture and use, methods of disposal).

Conclusion

SPAN appreciates the opportunity to provide constructive comments to MPCA and remains available to meet and confer with appropriate MPCA personnel to discuss these comments and other matters pertaining to PFAS and PFAS-containing products.