VERMONT
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Act 131 of 2024 required the Agency of Natural Resources ("Agency"), 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 report and draft legislation in consultation with those offices.

The draft report and legislation were provided to the public for comment and the Agency received approximately 30comments and made some adjustments to the report and legislation. This final report and draft legislation are being submitted to the House Committee on Human Services and Senate Committee on Health and Welfare.

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 they are among those that either represent a significant source of PFAS or present a direct 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 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 or 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. This includes replacement parts for complex durable goods not subject to a phase out under this chapter.

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 or commercially. This would include floor coverings and carpet, appliances, paints, kitchen equipment, and furniture. It would include them even if they were targeted for businesses. A further example is that a commercial driveway sealant that is also sold at retail would be considered a consumer product and subject to the phase out. The phase out on consumer products would not affect products that are not sold at retail to consumers. This would include products like medical imaging devices hospitals or doctors offices, prescription pharmaceuticals, prescription veterinary medicines or veterinary diagnostic devices, machinery used to make consumer products, and a host of other non-consumer products.

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 lower compared to other products. This exception includes things like aircraft, cars, many electronic devices, appliances, and other complex products that fit the definition. The draft legislation requires ANR to provide a recommendation by January 15, 2032, 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 can reasonably ascertain 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 can ascertain 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. It also includes a knowledge requirement on manufacturers that does not hold them in noncompliance for things a manufacturer does not know or cannot reasonably ascertain, provided good faith efforts to comply with these requirements are taken.

The definition of PFAS used in this proposal was aligned with the federal TSCA 8(a) reporting definition of PFAS, which gives manufacturers access to the reporting information that will be available on inputs into manufacturing processes. In addition, the proposed legislation gives a manufacturer the ability to require a supplier to certify whether PFAS is present in a component and then rely on that certification for their compliance with this phase out.

Perfluoroalkyl and polyfluoroalkyl substances

"Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means 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 2032 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 households or 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. The proposal also authorizes the Secretary to adopt alternate minimum recycled content exemptions by rule.

(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.

Personal Protective Equipment

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.

"Personal protective equipment" encompasses a plethora of equipment to protect 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; 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 household. Any contemplated PFAS legislation would need to consult the FDA's and CDC's regulations and/or guidelines regarding the particular PPE at issue.

Regarding OSHA, it does not appear to prohibit Vermont from regulating PFAS in PPE. 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.

Drugs, Medical Devices, Dietary Supplements

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 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 generally prevent brightline rules. The FDCA has an express preemption provision. 21 U.S.C. § 360k; 21 C.F.R. § 808.1. Whether a product falls under the express preemption provision depends on various factors including: (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, 476-480, 484-502 (1996); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); FindLaw, Regulatory Preemption of Medical Devices (2016) (explaining that important factors are whether a device has undergone pre-market approval (certain Class III devices) and whether the FDA has a specific requirement on the issue).[1]

The Dietary Supplement Health and Education Act (part of the FDCA) does not have an express preemption provision regarding the safety of dietary supplements. *See* 21 U.S.C. § 343-1 (express preemption provision regarding certain labeling). Unlike drugs, dietary supplements are not subject to pre-market approval. *See* Congressional Research Service, *Regulation of Dietary Supplements: Background and Issues for Congress* 14-15 (Sept. 2021).[2] Dietary supplements are treated as "food" under the FDCA. 21 U.S.C. § 321(f)(f). In matters of health and safety, there is a presumption against preemption. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 495 (1996). Absent a specific, conflicting federal law regarding the presence of PFAS in dietary supplements, Vermont appears to have the authority to phase out PFAS in dietary supplements.

[1] https://corporate.findlaw.com/litigation-disputes/regulatory-preemption-of-medical-devices.html#:~:text=Based%20upon%20a%20survey%20of,be%20preempted%20from%20state%20regulations.

[2] https://crsreports.congress.gov/product/pdf/R/R43062/7