SUSTAINABLE PFAS ACTION NETWORK

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Comments Submitted Via NMED Public Comment Portal

Sustainable PFAS Action Network (SPAN) Comments on Proposed Rules for Implementation of HB212, *The PFAS Protection Act*

Background on SPAN

SPAN is a coalition of PFAS users and producers 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 for U.S. economic growth and global competitiveness. SPAN was formed with the objectives of ensuring legislators and regulatory agencies are aware of the essentiality of products generated by our members while simultaneously supporting practical regulatory programs focused on protecting human health and the environment and maintaining America's global economic edge.

Comments Regarding Draft PFAS Rules

SPAN appreciates the productive and collaborative dialogue we have had with legislators and policymakers in New Mexico on developing an effective and practicable PFAS program. SPAN has been supportive of many aspects of both HB212 and the proposed rule, such as its consideration of certain essential PFAS uses. SPAN appreciates policymakers' willingness to consider a more targeted approach to PFAS product use controls. However, certain provisions of the Proposed Rule, particularly with the labeling provisions, should be improved to make New Mexico's PFAS in Products program more effective and aligned with the statute. Below are some suggestions SPAN encourages the Department to consider before formally adopting the Proposed Rule.

20.13.2.10 Exemptions

This section establishes exemptions for certain product categories from the general PFAS sales prohibitions, testing, and reporting requirements. However, as currently drafted, the exemptions would not apply to the proposed labeling requirements. As discussed in greater detail below, SPAN believes that when the legislature established certain exemptions, it was the intent of the statute that these categories would be exempt from the entire regulatory structure, labeling included. SPAN

believes that the regulations are not within the intention of the statute and products exempt from the statute should not be within scope of the regulation and exempt from the labeling requirements. In addition, SPAN believes that the requirements of the Proposed Rule should not apply to PFAS substances solely used for research and development purposes, or products when PFAS is only present in trace (i.e., *de minimis*) concentrations.

Consequently, SPAN suggests that this proposed provision be amended to read: (**bold** – new language; ~~strikethrough~~ – deletions).

"20.13.2.10 EXEMPTIONS: The following are exempt from the requirements in Sections 20.13.2.11, 20.13.2.12, ***20.13.2.13*** *and 20.13.2.14 4* ~~(limited to medical devices outlined in 20.13.2.10.C)~~ of this rule: …

Q. a product that contains intentionally added per- or poly-fluoroalkyl substances at a concentration at or below 1%; or

R. a product that contains intentionally added per- or poly-fluoroalkyl substances that is used exclusively for research and development purposes.

SPAN would also like to note there are PFAS used in laboratories and manufacturing sites that are handled by carefully trained professionals with very minimal risk of exposure. These chemicals have undergone extensive testing, and are handled only at facilities where exposure and risk of emission are minimized. SPAN would encourage NMED to consider the below additional language in consideration of products that contain these chemicals.

S. a product that contains intentionally added per- or poly-fluoroalkyl substances that is handled in laboratories or manufacturing sites or is managed exclusively by trained professionals in facilities that adhere to strict occupational and environmental safety standards that minimize exposure risk.

20.13.2.11 Currently Unavoidable Use

The Proposed Rule requires CUU submissions to include extensive data on alternatives and detailed human and environmental impact assessments for PFAS in products. While these objectives are understandable, the process as drafted is impractical for manufacturers—particularly makers of complex goods—because much of this information is not available at the product level.

Manufacturers typically rely on upstream suppliers for chemical composition data, and even under existing federal frameworks like TSCA, such disclosures are limited to what is "known or reasonably ascertainable." Imposing a higher standard would create a barrier that effectively prevents companies from applying for CUU determinations.

Further, the rule's treatment of confidential business information compounds the problem: if proposals containing trade-secret data can be deemed insufficient, manufacturers will have no viable path forward. Confidentiality agreements are often the only mechanism for obtaining component-level PFAS data, and excluding this information undermines the practicality of the CUU process. SPAN recommends revising the rule to align with established federal practices by requiring information only to the extent it is known or reasonably ascertainable and allowing confidential data to support CUU applications.

At a minimum, SPAN suggests the following amendments:

A. *. . . A proposal must, at a minimum, contain,* ***to the extent that such information is known or reasonably ascertainable: . . .***

~~C. *Should a proposal for a currently unavoidable use determination contain claims of confidentiality, the department may determine that there is insufficient publicly available information to evaluate the proposal. The department strongly recommends that all proposals for currently unavoidable use determinations do not contain claims of confidentiality.*~~

In addition to the language changes above, SPAN would strongly recommend that New Mexico adopt the definition of "known or reasonably ascertainable" used by EPA for the TSCA Section 8(a)7 PFAS Reporting Rules, as promulgated in 2023. This will allow New Mexico's PFAS statute to align with the federal government to the greatest extent possible, and assure manufacturers do not have to comply with different definitions. The definition of "known or reasonably ascertainable," as used in 40 CFR 705.3, is below:

> Known or reasonably ascertainable by *means all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.*

20.13.2.13 Labeling

Overall Suggestions for Labeling in New Mexico

1. **Labeling Requirements Should Not Apply to Exempted Products**
   SPAN recommends that labeling requirements, if any, should not apply to those products which are specifically exempt from restriction and/or reporting by Subsection A of Section 3 of the PFAS Protection Act. If the legislature recognized that PFAS in certain applications are critical and not currently replaceable, or that they do not pose a potential risk in certain applications, or that they are adequately regulated under other laws, labeling is not needed for such products, and labels would only serve to confuse the public.

Additionally, labeling requirements should not extend to products that are intended for industrial or professional uses or applied by a skilled technician or medical applications. The purpose of labeling is, presumably, to inform consumers. In these industrial and professional use settings, potential exposures are already controlled through workplace safety measures—such as the use of personal protective equipment and other occupational safeguards—making labeling unnecessary and duplicative. For medical applications, labeling could mislead patients by suggesting a health risk for products prescribed by their doctor.

2. Compelled Speech Concerns

If the agency chooses to require labeling as proposed, the proposed labeling requirement will require product manufacturers to make statements about their product's PFAS content which may not be factual or accurate. Before moving ahead with this proposal, NMED must recognize that under the First Amendment, compelled commercial speech must be "purely factual and uncontroversial," as reaffirmed in National Association of Wheat Growers v. Bonta.[1] Federal courts have struck down labeling mandates that convey disputed or misleading messages about chemical risks. The indiscriminate PFAS labeling language under consideration risks exceeding these constitutional limits, making the rule vulnerable to First Amendment challenges that could likely result in delayed implementation and unnecessary additional costs. This has recently been the case with Proposition 65 in California, where courts have ruled that labeling in certain applications is a violation of the First Amendment. Continuing with such a broad rule threatens to delay the successful implementation of the law's initial intent.

3. Delay Development of Rule

If NMED moves forward with labeling requirements, SPAN strongly urges the Department to postpone this provision and first prioritize implementing the regulations mandated by statute, as several other elements of the Proposed Rule require attention before labeling is considered. HB 212 does not require NMED to mandate product labeling, nor does it authorize labeling for products exempted by statute. The law simply grants discretionary authority without imposing a timeline. Given this statutory framework, SPAN believes labeling should not proceed at this time. Numerous other provisions in the Proposed Rule warrant implementation before labeling is contemplated.

Moreover, the proposed enforcement date of January 1, 2027, is not feasible. Industry cannot meet this timeline because internal systems for product tracking and labeling workflows require approximately six months to develop and can only begin after the final rule is published to ensure alignment. With the rule expected to be finalized no earlier than July 2026, compliance by January 2027 is unrealistic, particularly for complex products. Should NMED proceed with labeling, SPAN recommends setting the compliance date at least one year after publication of the final rule to ensure compliance is reasonably achievable.

[1] National Ass'n of Wheat Growers v. Bonta, 85 F.4th 1263 (9th Cir. 2023).

As mentioned above, SPAN recommends that labeling requirements, if any, should not apply to those products which are specifically exempt from restriction and/or reporting by Subsection A of Section 3 of the PFAS Protection Act. If the legislature determined that certain PFAS applications are critical, irreplaceable, pose minimal risk, or are already regulated under other laws, labeling these products is unnecessary and could confuse the public.

Suggestions for Improvements to Proposed Rules

As SPAN stated previously, we strongly urge the EIB to reconsider the timing of this labeling requirement, and reconsider the need to institute a labeling requirement at all for the success of New Mexico's PFAS in Product program. However, if the rules go forward, SPAN has several suggestions on needed improvements.

1. **De Minimis Threshold / List of PFAS**
   SPAN recommends that a minimum concentration (*de minimis*) threshold level should be established to determine when labeling for PFAS content would be required. Without such a threshold, the program would treat all PFAS identically, regardless of concentration, misrepresenting relative potential risk.

   As mentioned, for complex manufactured products, it can often be difficult for manufacturers to ascertain if specific components were manufactured with, or otherwise include, PFAS. The labeling requirements for such components should only be triggered if the presence of PFAS is known or reasonably ascertainable, and such requirements should not differ from those for any other product. SPAN would also like to acknowledge that the definition of PFAS passed into law in HB212 uses a definition of PFAS that is estimated to contain over 10,000 compounds, of which only a fraction are expected to currently be used in commerce. To aid in implementation, SPAN strongly urges NMED release a list of the compounds, identified by their CASRN, that meet the NMED's interpretation of PFAS to facilitate the supply chain surveys undertaken by manufacturers.

2. **Choice of Labeling Placement**
   When a physical label is required, SPAN recommends that manufacturers have the option to place the label on the product itself, or the packaging. The placement must ensure that the label is visible and readable to the purchaser before initial use. It is important that manufacturers have this choice as packaging provides a practical location for such disclosures. Affixing labels directly to many products, including especially small products, is often technically infeasible making it difficult for the label to be readable.

3. **Clarity needed on Labeling for Bulk or Small packaging**
   Although the Proposed Rule briefly addresses retailer repackaging, it does not address labeling requirements for bulk packaging or very small products with small packaging. SPAN suggests that

these scenarios be specifically addressed and allow for the greatest flexibility possible for manufacturers to meet the labeling requirements.

4. **Clarity needed on the process for Labels from Other States**
   The Proposed Rule theoretically allows the labeling used for another jurisdiction to satisfy the NMED labeling requirement. However, the Proposed Rule contains provisions that require New Mexico-specific changes, such as specific website references, which diminishes the utility and practicability of this provision. Manufacturers should not need to place multiple labels on a product to satisfy similar requirements. The Department should carefully consider the costs and benefits of provisions in the Proposal that, as a practical matter, may require that multiple labels appear on a product that provide no significant new information to a consumer and only serve to impose a costly compliance mandate.

5. **Recommended to outline a clear process for label waiver applications**
   Lastly, NMED should include a transparent and predictable process for requesting labeling waivers for those products exempt from statute. Such a process should include clear eligibility criteria, firm deadlines for agency review and decisions, and an appeals procedure. SPAN recommends using the same timeframe for the labeling waiver as outlined in the section regarding labeling requirements in other states. This timing allows for consistency across the regulation.

6. **Clarity on Definitions**
   The proposed rules contain several definitions for which different interpretations could mean unintentional noncompliance if the proposed rules go forward, despite manufacturers making a good-faith attempt to provide the necessary information according to NMED's standards. SPAN recommends that NMED provide additional clarification on:

   - **Useful Life**: Flexibility will be needed when assessing the "useful life" of a product, which the rules mention but do not elaborate on. A product's "useful life" could be determined by several factors that are not necessarily considered during the manufacturing process, when a product is being labeled.
   - **HVAC**: The proposed rule should clarify the definition of HVAC by specifying that "cooling, heating, ventilation, air conditioning, water heating or refrigeration equipment" includes all components of an HVAC system. This definition should explicitly cover parts such as filters, even when they are sold separately, to ensure consistent interpretation.
   - **Textile Articles**: The proposed rule should provide a clear definition for "textile articles". SPAN recommends that NMED adopt language similar to California AB-1817 (California HSC, Division 104, Part 3, Chapter 13.5), which specifies that "textile articles" means 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. Including such examples will eliminate ambiguity and ensure consistent interpretation and compliance across states.

SPAN suggests that this section be amended to read:

A. *Labeling required. Unless exempted under Section 20.13.2.13.B of this rule, after January 1,* ***2032*** ~~*2027*~~*, a manufacturer may not sell, offer for sale, distribute, or distribute for sale a product containing intentionally added per- or poly-fluoroalkyl substances* ***at a concentration greater than 1% whose presence is known or reasonably ascertainable*** *unless the manufacturer does one of the following: …*

B. *Labeling exemptions. The labeling requirements of this rule do not apply to* ***products listed in 20.13.2.10 A through P, products sold exclusively for industrial or professional use, or*** *used products offered for sale or resale.*

C. *Labeling standards. Prior to sale of a product that contains intentionally added per- or poly-fluoroalkyl substances, the manufacturer of the product shall affix or cause to be affixed* ***to either the product or the product packaging****, a label that conforms to the requirements of this section. Complex durable goods and components of complex durable goods are exempt from the requirements of this section and are addressed in Section 20.13.2.13.D of this rule.*

(1) *The label must clearly inform the consumer, using words and symbols approved by the department, that the product contains intentionally added per- and poly-fluoroalkyl substances in both English and Spanish. The label must be affixed to* ***either the packaging or*** *the product such that the label is clearly visible and legible prior to sale. The label must be displayed with such conspicuousness as compared with other words, statements, design or devices on the* ***packaging or*** *product as to render the label likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use. Text shall be no smaller than the largest font used for other consumer information on the* ***packaging or*** *product.*

~~*D. Labeling of complex durable goods with intentionally added per- or poly-fluoroalkyl substances. Prior to sale of a complex durable good that contains intentionally added per- or poly-fluoroalkyl substances or components that contain intentionally added per- or poly-fluoroalkyl substances, the manufacturer shall conform to the information requirements of this section.*~~

~~*(1) A symbol approved by the department accompanied by a statement indicating the presence of intentionally added per- or poly-fluoroalkyl substances and/or component parts with intentionally added per- or poly-fluoroalkyl substances shall be included in the specification sheet and other product labeling information available to potential consumers prior to purchase. The following wording is acceptable: This product is made with PFAS or contains component parts made with PFAS. PFAS are a family of chemicals, exposure to which are associated with negative health and environmental effects. For more information on the location of components made with PFAS, review the product's operation and maintenance manual.*~~

~~*(2) The statement shall also be included in Spanish and shall include an internet website address for a web page hosted by the department [https://www.env.nm.gov/pfas/] that provides information about per- and poly-fluoroalkyl substances in products or a quick response (QR) code or other machine-readable code, consisting of an array of squares, used for storing an internet website [https://www.env.nm.gov/pfas/] for a web page hosted by the department that provides information about per- and poly-fluoroalkyl substances in products.*~~

~~*(3) The statement must be easily identified and legible on the specification sheet and other information available to potential consumers prior to purchase. A 10-point font or larger is presumed to be legible.*~~

~~*(4) The operation and maintenance manual associated with the complex durable good shall include a statement indicating the presence of intentionally added per- or poly-fluoroalkyl substances and/or component parts with intentionally added per- or poly-fluoroalkyl substances, using words and symbols approved by the department, followed by a complete list of components with intentionally added per- and poly-fluoroalkyl substances, including sufficient detail about the components' locations within the complex durable good such that they can be readily located. The statement must also include an internet website address for a web page hosted by the department [https://www.env.nm.gov/pfas/] that provides information about per- and poly-fluoroalkyl substances in products or a quick response (QR) code or other machine-readable code, consisting of an array of squares, used for storing an internet website for a web page hosted by the department [https://www.env.nm.gov/pfas/] that provides information about per- and poly-fluoroalkyl substances in products.*~~

~~*(5) Where product information and labeling include consumer information about a product in a language other than English or Spanish, the requirements of Section 20.13.2.13.D.1 through 20.13.2.13.D.4 of this rule shall also be provided in that language in addition to English and Spanish.*~~

~~*(6) Nothing in this section shall be construed to require or replace such disclosure, notice or labeling that is otherwise prohibited or prescribed by federal law.*~~ *. . .*

~~*F.*~~ ***E. Upon application by a product manufacturer,*** ~~*T*~~*the department may waive the obligation of a manufacturer to label a product as required by this 5 section* ~~*if the product is exempt pursuant to Section 20.13.2.8 of this part,*~~ *and* ***if*** *none of the product's material containing intentionally added per- or poly-fluoroalkyl substances will ever come into direct contact with a consumer while the product is being used as intended during the useful life of the product.* ***Waiver requests must be submitted to the Department at least one year before the effective date for the labeling requirement, and for products introduced into commerce after that time, at least six months prior to sale in the state.*** *The waiver request must contain the following information:*

(1) ~~*Information contained in Section 20.13.2.12.B.4 of this Part;*~~ ***The name and address of the manufacturer and the name, address and phone number of a contact person for the manufacturer;***

(2) A description of the product for which a waiver is requested; ***and***

~~*(3) I*~~*(3)* ~~*dentification of the specific per- or poly-fluoroalkyl substance(s) intentionally added to the product or its components by the chemical name and the Chemical Abstracts Service Registry number (CASRN), or if no CASRN exists, another chemical identifying number; and*~~

*(4****3****) An explanation of why the product should not require a label pursuant to this section.*

~~*and 15 (5) any other information the department deems necessary for the evaluation of the waiver 16 request*~~

The Department shall either approve or deny waiver requests within three months of receipt of the request. Failure to either approve or deny after that time shall be deemed an approval. Should the

Department deny the request, the manufacturer may appeal the determination to the Secretary of the Department.

Conclusion

As stated previously, SPAN appreciates the dialogue that we have established with policymakers in New Mexico. SPAN members are supportive of certain provisions of HB 212 and the Proposed Rule, and believe they set important precedents in practical, risk-based PFAS regulatory policy. However, SPAN strongly encourages the Department to consider the above comments and recommendations when considering modifications to the Proposed Rule. We look forward to working with the Department on further adjustments to the Proposed Rules throughout the comment period.