March 18, 2024

The Honorable Nancy Skinner
Member of the Senate
1021 O Street, Suite 8630
Sacramento, CA 95814

RE: SB 903 (Skinner) - Environmental health: product safety: perfluoroalkyl and polyfluoroalkyl substances – OPPOSE

Dear Senator Skinner:

The undersigned organizations are writing to inform you of our opposition to your SB 903, legislation proposing to create a sweeping and complex new regulatory program at the Department of Toxic Substances Control (DTSC) to regulate all commercial and consumer products that may contain, as well as any industrial manufacturing processes that may use perfluoroalkyl and polyfluoroalkyl (PFAS) substances.

As outlined below, we have identified several concerns including the bill's generalized characterization of PFAS chemistries, the significant impact on the diverse array of products, applications, and industries on which California's economy relies, including industries in which both California and the federal government heavily invest and seek to expand, such as clean energy, a vague DTSC process that provides little regulatory certainty to the business community and that minimizes manufacturer engagement, and no recognition or utilization of existing DTSC chemical management authority and new PFAS reporting rules recently finalized at the United States Environmental Protection Agency (USEPA), both of which could be used to more fully inform regulation of PFAS in consumer and commercial products.

Under SB 903, manufacturers that use PFAS chemistries must petition DTSC and receive a determination that the use of PFAS in a product is a "currently unavoidable use." Otherwise, the product is prohibited beginning January 1, 2030. DTSC would evaluate petitions on a variety of criteria, including whether "the function provided by PFAS in the product is necessary for the product to work."

Thousands of companies and the hundreds of thousands of products and product components these companies manufacture, could only remain in the marketplace pending a determination by DTSC staff that may or may not have any expertise with the chemistry involved, the manufacturing process, the function of the product or the complicated (often global) supply chains that bring these products and product components to California.

PFAS are a diverse group of chemistries that provide strength, durability, stability, and resilience. These properties are critical to the reliable and safe function of a broad range of products that are important for industry and consumers. They impart a wide range of performance characteristics that are vital for the manufacture and performance of medical devices, smart phones and laptops, solar panels, electric vehicles, HVAC units, electric appliances, paints and coatings, components of agricultural equipment, telecommunications infrastructure and advanced transportation and aerospace applications to name just a few.

One key type of PFAS in use today is fluoropolymers, a type of specialty material. Fluoropolymer uses include:

- **Automotive:** Gaskets, rings, valves, and hoses in the fuel system; wiring and circuit boards; pull cables; shock absorbers and bushings.

- **Aerospace (military and civilian):** High performance navigation and communication antennae; lubricants for wing flap mechanisms and landing gear; fuel-oxygen separation systems.

- **Clean Energy**: Electric vehicle batteries, hydrogen fuel cells, solar panels, wind turbines, and sheathing for power cables and coatings for electrical wire.

- **Electronics and Electric Appliances:** Computers and other electronic equipment and related components and accessories.

- **Industrial Processes:** Linings for pipes, valves, and tanks to prevent corrosion; gaskets in high temperature, high pressure production processes to contain reactive substances.

- **Medical:** Surgically implanted medical devices (e.g. stents); COVID testing equipment and respirator tubing; catheters and guide wires; transfer and storage bags for biological fluids; personal protective equipment.

- **Semiconductors:** Ultra-low contamination semiconductor manufacturing; wafer etching; chemical piping and storage.

Attempts to implement this type of regulatory program have proven to be extremely challenging. The experiences of other jurisdictions serve as cautionary tales for California. For example, in the European Union, industries have submitted thousands of comments on the widespread consequences of a ban and the lack of suitable alternatives. As a result, EU authorities have had to delay consideration of their restriction proposal given the complexity of the issue, the number of industries and applications impacted, and the potential consequences for the EU's long-term sustainability, public health, and economic growth goals.

In 2021, Maine passed a similarly broad-brush ban on products using PFAS chemistries and the Maine Department of Environmental Protection (DEP) has since struggled to implement the mandate. The Maine DEP as issued more than 2400 extensions to companies for just its PFAS reporting requirement due to a variety of reasons including complicated supply chains for manufacturers to determine if PFAS is included, lack of an operational database for manufacturers to submit product information, limited lab capacity within the US to test products for PFAS and lack of protections for confidential business information. Rulemaking has been suspended, and eight pieces of legislation have been introduced to amend or reform the original law.

Foundational Concerns for Characterization of PFAS

SB 903 is built on a foundation that wrongly characterizes all PFAS substances as equal, regardless of any unique properties and uses, environmental and health profiles, potential exposure pathways, and any potential risk.

PFAS substances can be either a solid (e.g., fluoropolymers), liquid (e.g., fluorotelomer alcohols) or a gas (e.g., hydrofluorocarbon refrigerants). The fundamental physical, chemical, and biological properties of solids, liquids and gases are clearly different from one another. The very distinct physical and chemical properties of the three types demonstrate how varied they are and how imposing a "one-size fits all" approach as proposed would be inappropriate.

An illustration of this point can be found in a 2023 Department of Defense report that urged "Congress and the Federal regulatory agencies should avoid taking a broad, purely "structural" approach to restricting or banning PFAS. It is critical that future laws and regulations consider and balance the range of environmental and health risks associated with different individual PFAS, their essentiality to the U.S. economy and society, and the availability of viable alternatives."[1]

[1] https://www.acq.osd.mil/eie/eer/ecc/pfas/docs/reports/Report-on-Critical-PFAS-Substance-Uses.pdf

Implementation Concerns and Questions

SB 903 contains several provisions that result in greatly expanding the scope of potentially impacted industries and products beyond generally consumer-facing applications. The bill also includes vague terms and criteria that provide little to no regulatory certainty to manufacturers. For example,

- Section 2 includes an expanded definition of "intentionally added PFAS" that includes "any source of PFAS that is reasonably known to be present…" This language introduces a level of subjectivity into the determination of whether PFAS is intentionally added, which complicates implementation and enforcement. It also fails to consider unintentional contaminants that are beyond a manufacturer's control (e.g. cross-contamination, background levels, test method limitations, and variabilities, etc.). Arguably, one molecule of a PFAS substance would require a manufacturer to submit a petition for a "currently unavoidable use" determination to DTSC for review.

- Section 2 defines safer alternative as "an alternative that, in comparison with another product or product manufacturing process, has *reduced potentially adverse impacts* or potential exposures associated with PFAS." The bill provides no insight into what criteria DTSC would use to determine whether "reduced potentially adverse impact" has been achieved or what magnitude of reduction would be considered meaningful.

- The bill fails to adequately define key terms and improperly delegates to DTSC discretion to make a number of decisions relating to whether PFAS in a product or product category is a "currently unavoidable use." The bill fails to provide sufficient guidelines or criteria for DTSC to make determinations about whether a study or evaluation is "reliable information," whether safer alternatives to PFAS are "reasonably available," whether the function provided by PFAS in a product is "necessary for the product to work" or "required to perform its primary function," whether there have been "significant efforts to develop a safer alternative," and whether PFAS in a product is "critical for health, safety, or the functioning of society." This lack of guidance increases the risk of inconsistent, unsubstantiated, and scientifically unsupported determinations regarding whether PFAS in a product or product category is a "currently unavoidable use."

- The envisioned petition process would likely require manufacturers to submit complex, detailed, and perhaps proprietary information about their products, manufacturing processes, or suppliers, yet the bill provides no protection for confidential business information. In fact, the bill requires DTSC to "provide an opportunity for public comment" when making its "currently unavoidable use" determinations, further increasing the opportunity to expose trade secret or confidential business information.

- The bill authorizes DTSC, if it "has *reason to believe* that a product contains intentionally added PFAS" to direct a manufacturer to provide, within 30 days independent, third-party laboratory test results demonstrating that the product does not contain intentionally added PFAS." Testing labs are unlikely to have off-the-shelf test methods for the multitude of products that would allow for results within 30 days. Furthermore, the bill provides no testing guidance, insight into what data would be expected and assumes the presence of any PFAS is "intentionally added."

- Compliance timelines are not specified. For example, the bill authorizes DTSC to review a determination of "currently unavoidable use" before its expiration and revoke a determination if there is a significant change in information but provides no timeline for manufacturer notice or compliance with a DTSC decision to revoke a prior determination.

- The bill allows DTSC to impose an earlier effective date for the prohibition for any product or product category based only on whether it has already been banned by any other state or country. The bill also allows DTSC to rely on another jurisdiction's ban on PFAS in a product or product category as the basis for denying a petition for a "currently unavoidable use" determination.[2] Both of these determinations could therefore be made without regard to the evidence supporting that action or whether that evidence was actually considered by the subject jurisdiction. Additionally, we have questions and concerns about the implementation of these provisions if other jurisdictions enact wholesale PFAS-in-product bans that similarly fail to take into consideration the critical and essential uses of PFAS in commercial and consumer products.

- Given the volume of products in commerce in California that would likely be subject to the SB 903 process, the five-year expiration period for "currently unavoidable use" determinations would require an indefinite cycle of petitions, regulatory reviews, and agency determinations, necessitating an exceptionally large stand-alone program at DTSC to regulate a single group of substances. The fiscal and programmatic implications of this proposal are staggering.

- Manufacturers would be prohibited from submitting a petition for a "currently unavoidable use determination" before the January 1, 2030 effective date of the ban, effectively guaranteeing widespread non-compliance, enforcement actions, and penalties immediately after that date with no recourse for the manufacturer. SB 903 also does not consider new products that may be introduced into the California market after January 1, 2032, which stifles innovation and economic development.

- SB 903 fails to ensure due process for manufacturers. For example, SB 903 allows DTSC to review petitions for "currently unavoidable use" determinations but contains no requirement that DTSC issue its decision in writing (or a timeframe for that decision) and no process through which a manufacturer can appeal that decision. Written notice of DTSC's decision is critical when DTSC denies a petition because SB 903 allows DTSC to make a decision "without evaluating all the criteria … if the determination can be made based on fewer criteria." SB 903 allows DTSC to review, or any person to request that DTSC review, a "currently unavoidable use" determination based on a significant change in information but contains no procedures for notifying a manufacturer that an applicable "currently unavoidable use" determination is being reviewed, allowing a manufacturer to participate in the review process, notifying a manufacturer of DTSC's decision, or allowing a manufacturer to appeal DTSC's decision.

[2] This also raises the question of why the bill does not give similar weight to critical or essential use determinations, or other similar exemptions or exceptions, for PFAS in products or product categories granted by other jurisdictions.

- Relatedly, the bill fails to provide any mechanism for a stay of the January 1, 2030 effective date pending DTSC's review of a petition for a "currently unavoidable use" determination, which as addressed below, a manufacturer cannot submit until January 1, 2030, the date on which the ban goes into effect.

Failure to Leverage DTSC's Existing Regulatory Authority and Acknowledge Recent Federal Reporting Requirements

We also question the need to create an entirely new and separate regulatory program given DTSC's existing chemical management authority.

Under the Safer Consumer Products (SCP) statute, DTSC has broad authority to identify chemical/product combinations and, if warranted, impose use restrictions. Additionally, California Code of Regulations, title 22, section 69501.4(b) authorizes DTSC to request information from product or chemical manufacturers, importers, assemblers, or retailers that it determines necessary to implement the SCP's framework regulations, via an information call-in. DTSC may use the information obtained through call-ins for several purposes, including identifying product-chemical combinations to evaluate as potential priority products; identifying and analyzing alternatives to eliminate or reduce potential exposures and adverse impacts; and filling data gaps to improve understanding and reduce research time.

In 2022, the Legislature passed, and Governor Newsom signed into law SB 502[3] (Chapter 701, Statutes of 2022), legislation that expanded DTSC's authority to require manufacturers provide specific information including:

- information on ingredient chemical identity, concentration, and functional use;
- existing information, if any, related to the use of the products by children, pregnant women, or other sensitive populations; and
- data on state product sales, or national product sales in the absence of state product sales data.

DTSC has also expanded its staff in recent years to support the SCP program, accelerate the identification of priority products, expand chemical and data analysis, and enforce requirements, "including notifications and regulatory responses." Leveraging the existing SCP program to regulate PFAS in commercial and consumer products would not only address some of the more significant concerns we raise in this letter but is the more fiscally prudent approach given California's current budget constraints.

Finally, USEPA recently finalized regulations under Section 8(a)(7) of the Toxic Substances Control Act (TSCA) that impose extensive reporting obligations on any company that, at any time since 2011, manufactured or imported any PFAS chemical, including PFAS chemicals imported as part of manufactured articles.

Information companies must report include:

- The identities of the PFAS substances in the article;
- The categories of use of the PFAS substances in the article;

[3] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB502

- The specific functions of the PFAS substances in the article;
- The estimated maximum concentrations of the PFAS substances in the article; and
- The annual import volume of the article containing the PFAS substance(s).

The wealth of information that will be available to DTSC and others could help inform where these substances are being used and any potential exposure pathways. This data could result in a more focused effort to develop any state level regulatory action that may be necessary.

Potential Conflicts with Previously Enacted PFAS-in-Products Laws. SB 903 excludes from its scope a product or product category for which DTSC issues a "currently unavoidable use" determination, a product or product category for which federal law governs the presence of PFAS in a manner that preempts state authority, and used products, but does not exclude, or make any mention of, products regulated by existing California PFAS-in-products laws. This creates the potential for conflicts between SB 903 and existing PFAS-in-products laws that will cause uncertainty and confusion among regulated persons and frustrate implementation and enforcement, a concern highlighted by Governor Newsom in his messages vetoing several PFAS-in-product bans last year.[4]

For example, we have questions regarding the applicability of SB 903 to products regulated by other PFAS-in-products laws due to differing definitions of "regulated PFAS" and "intentionally added PFAS." While SB 903 broadly defines "intentionally added PFAS," with no reference to actual intent or quantitative thresholds, as also discussed below, other laws more narrowly define "Intentionally added PFAS" to include "PFAS chemicals that are intentional breakdown products of an added chemical" (AB 2771 (Chapter 804, Statutes of 2022) and "regulated PFAS" to include the presence of PFAS in a product or product component at or above 100 parts per million, as measured in total organic fluorine (AB 1200 (Chapter 503, Statutes of 2021), AB 1817 (Chapter 762, Statutes of 2022)). We also have questions regarding the applicability of SB 903 to products exempt from regulation pursuant to other PFAS-in-products laws such as textile articles excluded from regulation pursuant to AB 1817, juvenile products excluded from regulation pursuant to AB 652 (Chapter 652, Statutes of 2021), or any other product or application in which PFAS is used that is regulated by existing California law.

Collectively, we support the responsible production, use and management of fluorinated substances, including regulatory requirements that are protective of human health and the environment, taking into consideration the diversity of physical and chemical properties and the environmental and health profiles of these substances.

Though we are opposed to SB 903, we remained committed to an on-going dialogue on chemical policy in California that is grounded in strong scientific principles, protective of human health and the environment, leverages existing state and federal regulatory requirements, encourages innovation and economic development, and provides regulatory certainty to the business community.

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[4] See for example, Governor Newsom's veto message regarding SB 727, which proposed to ban PFAS in cleaning products: "While I strongly support the author's intent and have signed similar legislation in the past, I am concerned this bill falls short of providing enhanced protection to California consumers due to lack of regulatory oversight. Previously enacted single-product chemical bans, which also lack oversight, are proving challenging to implement, with inconsistent interpretations and confusion among manufacturers about how to comply with the restrictions." https://www.gov.ca.gov/wp-content/uploads/2023/10/AB-727-VETO.pdf

Thank you for the opportunity to share these concerns.

Sincerely,

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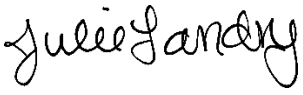

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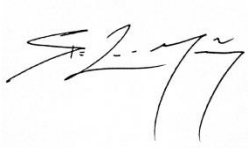

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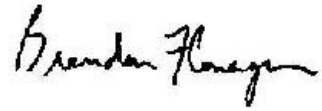

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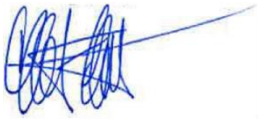

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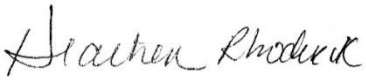

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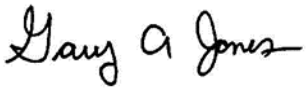

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