

Basis Statement
Citizen Initiated Petition to Amend Rule Chapter 882
Designation of Bisphenol A as a Priority Chemical and
Regulation of Bisphenol A in Children's Products

Basis Statement

On June 21, 2012, a Citizen Petition to Initiate Rulemaking concerning 06-096 C.M.R. ch. 882, *Designation of Bisphenol A as a Priority Chemical and Regulation of Bisphenol A in Children's Products*, was submitted to the Board of Environmental Protection (Board). The petition sought to extend the existing prohibition on the sale of reusable food and beverage containers containing bisphenol-A (BPA) to packaging used for infant formula, baby food, and toddler food. In addition the petition sought the adoption of a modified definition for "intentionally added," and adoption of a definition for the term "toddler food."

Under 38 M.R.S.A. § 1696, the Board has the authority to adopt rules prohibiting the manufacture, sale or distribution in the State of a children's product containing BPA, and such a prohibition would be a major substantive rule. Therefore, the petition's proposed ban on packaging used for infant formula, baby food and toddler food falls within the Board's jurisdiction. The remaining language changes proposed in the petition call for routine technical rulemaking, which is the responsibility of the Commissioner of the Department of Environmental Protection (Commissioner).

A joint public hearing before the Board and Commissioner on this petition was held on September 6, 2012. Notice of this hearing was posted on August 15, 2012. The public comment period closed on September 28, 2012. Four deliberative sessions were held prior to action by the Board and Commissioner.

On January 24, 2013, the Board voted to provisionally adopt a sales prohibition on infant formula and baby food packaging containing intentionally added bisphenol A in an amount greater than a de minimis level, because evidence in the record showed that children under three years of age who consume infant formula and baby food from packaging containing bisphenol A are exposed to the priority chemical, and that there are safer alternatives available at comparable costs.

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The Board voted not to adopt a rule prohibiting the sale of toddler food packaging containing intentionally added bisphenol A because the record remained unclear what products would be considered intentionally marketed to, or intended for the use of children under three years of age.

The Commissioner did not adopt the proposed definition for toddler food because at this time it is unnecessary, and the definition as proposed was not clear enough to be able to regulate toddler food. The Commissioner also did not adopt the proposed modification to the definition for "intentionally added" because the definition for this term in the current rule is consistent with the definition in statute and is sufficient for the administration of the program.

The Board modified the language proposed by the petitioners for the prohibition of infant formula and baby food packaging set forth in 06-096 C.M.R. ch. 882 § 5(A) in order to align with statutory and regulatory requirements. As set forth in more detail below, the amendments clarify that the sales prohibition is on the packaging and not the food and beverage items; the prohibition only applies to items that contain BPA in an amount greater than the de minimis level; and establishes the effective date of the sales prohibition as March 1, 2014.

The petition proposed a ban on "infant formula and baby food that is sold in a plastic container, jar or can that contains intentionally-added bisphenol A." Pursuant to 38 M.R.S.A. § 1696(1), the Board's authority to prohibit the manufacture, sale or distribution of a product containing a priority chemical extends only to a "children's product." Section 1691(7) defines "children's product" in part as a "consumer product," and Section 1691(8) excludes from the definition of "consumer product" a food or beverage. In addition, 38 M.R.S.A. § 1697(8) excludes food and beverage packaging from the regulations, except when the product is intentionally marketed or intended for the use of children under three years of age. As established in the Department's Rule, Chapter 882, §§ 1(B)(2) and 2(E), infant formula and baby food are intended for the use

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of children under three years of age; therefore the Board has the authority to regulate infant formula and baby food packaging, but does not have the authority to ban a food or beverage containing BPA. In order to regulate within its given authority, the Board amended the proposed rule to clarify that the ban applies to infant formula and baby food packaging. The Board replaced the words "plastic container, jar or can" as proposed by the petitioners, with the more general word "packaging" in order to be consistent with statute and rule (38 M.R.S.A. §§ 1691(8) and 1697(8); Chapter 882, §§ 1(B)(2) and 2(E); and Chapter 880, § 1(J)). By using the term packaging, the Board intends to include all types of packaging that are used to contain infant formula and baby food including plastic containers, jars and cans as proposed in the petition.

The Board added to the petition's proposed rule the phrase, "in an amount greater than a de minimis level," because the Board's authority under 38 M.R.S. § 1696(1) is limited to imposing a ban on a children's product containing BPA "in an amount greater than a de minimis level."

The Board changed the effective date for the ban on infant formula and baby food packaging from January 1, 2013 proposed in the petition to March 1, 2014. Pursuant to 38 M.R.S. § 1696(1), the effective date of a prohibition may not be sooner than 12 months after notice of the proposed rule is published. The petition language was posted for public comment on August 15, 2012, and so the earliest effective date for the prohibition would be August 15, 2013. The Board decided on a later date, March, 2014, for several reasons. First, Section 5(B) of Chapter 882 requires that manufacturers of products subject to the sales prohibitions in Section 5(A) must file, or cause their distributors to file, a compliance plan with DEP no later than 180 days prior to the effective date of the sales prohibition. Manufacturers and distributors will need time to develop compliance plans which will be due 180 days before the effective date of the prohibition. Second, the Board's rulemaking is major substantive and the provisionally adopted rule will require legislative review. Therefore, it is likely that any final rule will not be adopted by the Board for several months.

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The Commissioner changed the proposed language in 06-096 C.M.R. ch. 882 § 5(B) of the petition to not specifically list the individual children's product categories for which compliance plans must be submitted. The provision in Chapter 882, § 5(B) is routine technical and any changes would become effective before the major substantive portion in Chapter 882, § 5(A), which must be approved by the Legislature and finally adopted by the Board before becoming effective. To avoid a possible conflict, the Commissioner replaced the individual categories listed in Chapter 882, § 5(B) (including the reusable food or beverage containers banned in the current rule) with the term "children's product" so that whichever children's products are subject to the sales prohibition of Chapter 882, § 5(A), those children's products will be subject to the compliance requirement.

Comments on the rulemaking proposed in the petition are summarized below, are grouped according to subject matter, and may be consolidated. Responses follow the comments.