

MEMORANDUM

TO: Board of Environmental Protection
FROM: Andrea Lani, Bureau of Remediation and Waste Management
DATE: February 18, 2010
RE: Adoption of Chapter 880, Regulation of Chemical Use in Children's Products and Chapter 881, Fees; Chemical Use in Children's Products

Statutory and Regulatory Reference:

A. Statutory authority.

In enacting 38 MRSA §§1691 through 1699-B [PL 2007, c. 643] the Legislature conferred on the Department the regulatory power to collect information on chemical use and prohibit the sale of children's products containing priority chemicals when safer alternatives are available.

B. Specific legal mandates requiring adoption.

38 MRSA §1695(4) requires the Department to determine the appropriate fee assessed pursuant to 38 MRSA §1695 sub-§2, paragraph C or subparagraph 3 through major substantive rulemaking. Chapter 881 establishes the fees.

Location/Applicability:

The proposed regulation will apply statewide.

Description:

The proposed Chapter 880, *Regulation of Chemical Use in Children's Products* establishes the process by which the Department will designate priority chemicals. The purpose of designation is to: facilitate the gathering of information on the use of priority chemicals in children's products and the extent to which children may be exposed to the chemical; facilitate gathering information on the availability of safer alternatives; and facilitate consideration of a ban on the sale of those products when a safer alternative is available. The rule establishes that the designation of one or more priority chemicals will take place through a rulemaking process. This will ensure that the regulated community and interested parties will have sufficient notice and opportunity to comment on a proposed designation. Finally, the proposed rule details what considerations the Department will take into account when reviewing an alternatives assessment and determining whether a safer alternative is indeed available, as a prerequisite to a sales prohibition.

The proposed Chapter 881, Fees; *Chemical Use in Children's Products* regulation establishes the method by which the Department will assess fees for those reporting information required under Chapter 880 and for the Department to hire a contractor to perform an alternatives assessment when a manufacturer or distributor fails to provide an acceptable assessment.

On December 17, 2009, the Board of Environmental Protection held a public hearing on the Department's proposed Chapters 880 and 881. During the hearing and the public comment period, the Department received comments on both rules from 119 interested parties. The Basis Statement for each rule includes all of the comments received in a summarized form and the Department's responses, including our reasons for either accepting or failing to accept the recommended changes to the rule.

The comments on Chapter 880 covered a wide range of issues relating to the proposed rules, from general support to a proposed rewrite of Chapter 880 in its entirety. Many of the comments derived from a general objection to the policy basis of the statute and the proposed rules, which is a chemicals policy that is hazard-based, rather than risk-based. Other areas of Chapter 880 that commenters in opposition to the rule had concerns with included: the development of the Chemicals of High Concern list; conflict and/or consistency with existing regulations at the Federal level or in other jurisdictions; a desire to rank chemicals and chemical uses based on risk; the burdens to business of reporting the information required when a priority chemical is designated; effects of the rule on small businesses, manufacturers and retailers in Maine; the scope and timeframe of alternatives assessments; and protection of confidential business information.

The Department made a number of revisions to Chapter 880 in response to comments received, as follows:

- We included the definition of "child or children" from the Maine rules of statutory construction, 1 MRSA §72, sub-§2-A.
- We restored the phrase "being known as" to the note in section 2(B), from which it had been inadvertently left out.
- We added a phrase to section 3(B)(3) to clarify that an alternatives assessment will only be called for if first it has been demonstrated that children are exposed to the priority chemical.
- We added a sentence to section 3(D) clarifying that the commissioner will set a deadline for any additional information requested pursuant to that section.

The main concern regarding Chapter 881 was an objection to the six-month timeframe for submitting an alternatives assessment. We revised section 4 of the proposed rule to correct this apparent conflict with Chapter 880, which allows the Board or the Commissioner to set a deadline for submission of requested information.

The Department also corrected a few minor typographical errors/oversights in both rules.

Environmental Issues:

Toxic chemicals in consumer products present significant risk of adverse health consequences ranging from subtle cognitive development to chronic disease and premature death. The Governor's Task Force to Promote Safer Chemicals in Consumer Products concluded that substantial human and societal costs of disability, birth defects and disease, including health care, educational and employment-related costs, may be attributable to increasing exposures to toxic chemicals. Reducing or eliminating exposures to these chemicals by shifting to use of safer alternatives may significantly reduce these costs.

In the Executive Summary of its final report, the Task Force agreed with the U.S. Government Accountability Office (GAO) and others that the federal Toxic Substances Control Act (ToSCA) does not provide sufficient chemical safety data for public use by consumers, businesses and workers; is inadequate to ensure the safety of chemicals in commerce in the United States; and fails to create incentives to develop safer alternatives. The Task Force concluded that even when considering ToSCA combined with the federal Occupational Safety and Health Act (OSHA), federal regulation fails to provide health and ecotoxicity information regarding the safety of chemicals that have the potential to harm workers and the public at large.

The Declaration of Policy at 38 MRSA §1692 states, “It is the policy of the State, consistent with its duty to protect the health, safety and welfare of its citizens, to reduce exposure of children and other vulnerable populations to chemicals of high concern by substituting safer alternatives when feasible.”

Departmental Recommendation:

The Department recommends that the Board adopt the proposed regulations as submitted.

Estimated Time of Presentation:

30 minutes.