Draft Proposed Chapter 881: Fees; Chemical Use in Children's Products

- Basis Statement—Response to Comments

BASIS STATEMENT

CHAPTER 881
FEES: CHEMICAL USE IN CHILDREN'S PRODUCTS

In April 2008, the Legislature adopted Public Law Chapter 643, *An Act to Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products* [38 MRSA §§1691 through 1699-B]. The goal of the law as set forth in the Legislature's Declaration of Policy under 38 MRSA §1692 is to reduce the exposure of children and other vulnerable populations to chemicals of high concern by substituting safer alternatives when feasible. To accomplish this goal, the law confers upon 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.

Chapter 880 establishes the process by which the Department will designate priority chemicals. The Legislature gave the Department the authority to assess fees payable by the manufacturer or distributor to cover the department's reasonable costs in managing the information collected pursuant to Chapter 880, and to cover the costs to prepare an independent report on the availability of safer alternatives by a contractor if such information is not timely submitted by manufacturers or distributors. Chapter 881 establishes the process by which the Department will establish and assess such fees, and establishes an appeals process for any person wishing to contest the amount of the fee imposed by the Department.

The Department presented this rule to the Board of Environmental Protection at its meeting of November 19, 2009. The board authorized department staff to begin rule adoption proceedings. Notice of the proposed rule was published in the *Bangor Daily News*, *Kennebec Journal*, *Lewiston Sun Journal*, *Portland Press Herald* and *(Waterville) Morning Sentinel* on November 25, 2009. Notice also was mailed to the members of the stakeholder group that had been convened to advise the department on the implementation of the statute and to each person on the department's rulemaking subscription list.

The board held a public hearing on the rule on December 17, 2009. During the hearing and the public comment period followed, the Department received comments from 119 interested parties. The comments are summarized below, followed by the department's response

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COMMENTS

GENERAL COMMENTS

General Support

1. Comment: The commenters support the regulation of chemicals in children's products and encourage the Board to adopt Chapter 881 as proposed. (5, 6, 8, 9, 11, 13, 15, 17, 19, 20, 22, 23, 25, 26, 28-86; 88, 89, 91-97, 99-102, 106-114, 117, 118)

Response: The Department acknowledges the commenters' support. No change to the rule.

Precedent

2. Comment: The commenter asserts that the concept of fees to offset program costs is one of the most important tools in the public health toolbox. The commenter claims that the use of fees (in the form of federal and state excise taxes) in the case of the tobacco industry has saved many lives and millions of dollars. (26)

3. Comment: The commenter contends that the practice of manufacturers sharing the costs for the government's time and resources allocated to preventing harm associated with the manufacturing and use of their product (known as Extended Producer Responsibility) is consistent with other Maine laws that establish producers as the responsible party for preventing and mitigating that harm. The commenter provides the following examples of similar laws: electronic waste; mercury thermostat and auto switch collection and recycling laws; as well as the fee assessed on all paint manufacturers to cover the costs necessary to run the state's lead poisoning prevention program. (31)

Response to comments # 2-3: The Department that requiring the regulated community to share the costs of administering programs intended to mitigate health and environmental effects of their products is not without precedent. No change to the rule.

Other Options

4. Comment: The commenter points out the many ways that manufacturers may avoid being assessed a fee, such as when the information is in the public domain, when the chemical use is minor in volume, and/or if the manufacturer chooses to substitute a priority chemical with an alternatives. (31)

Response: The Department agrees that the rule allows flexibility for manufacturers to reduce or eliminate the amount of fees they will need to pay. No change to the rule.

Section 3. Reporting Fee

5. The commenter objects to the assessment of a fee to cover all administrative costs incurred by the department to collect and manage the information it requests under Chapter 880, regardless of the propriety of the chosen priority chemical. The commenter contends that the rules ignore the costs and burdens imposed on manufacturers. (1)

Response: The Department does not seek to impose unfair and arbitrary fees on manufacturers. However, there is a cost associated with managing the information required under Chapter 880. The Legislature considered it appropriate that such "reasonable" costs be covered by the manufacturers who produce the products that contain a designated priority chemical. No change to the rule.

6. Comment: The commenter recommends that realistic and appropriate fees established under the rule be clearly stated rather than set arbitrarily by the Department. (1, 14)

Response to comments: The Department cannot accurately determine the amount of the reporting fee needed to cover its administrative costs without first knowing what volume of data will come in as a result of an information request, or the number of entities the fee will be distributed among. Further, the amount of information gathered will most likely vary from chemical to chemical. The Department believes that to set an exact amount at this time would be arbitrary. The proposed rule allows us to first determine the exact costs of managing the data and then divide it equitably among the reporting entities. No change to the rule.

7. Comment: The commenter contends that the proposed rule meets the standard, as laid out in statute, for assessing a "reasonable" fee. The commenter considers the distribution of costs among entities that submit information to be reasonable. However, the commenter suggests any effort to cap those fees would be unreasonable because the cap would be arbitrary and inconsistent with the reality of evaluating differing chemicals. (31)

Response: The proposed rule does not cap the amount that must be paid by an individual distributor or manufacturer. However it does cap the total amount of fees that can be collected. This amount cannot exceed the administrative costs incurred by the Department to collect and manage the information. No change to the rule.

8. Comment: The commenter points out that at the federal level companies pay fees to EPA to assist in the administrative costs associated with approving a new substance. However, Chapter 881 proposes assessing fees for a process that seems almost certain to lead to a ban of children's products containing the chemical. The commenter submits that it may be appropriate for a regulatory process that may lead to approval of a chemical substance and its use, however the commenter takes issue with fees being applied to a process that appears biased in its outcome. The commenter suggests that fees would be more appropriate if the Department's proposed Chapter 880 was based in sound science, reflecting both hazard and exposure and providing additional risk management options beyond banning children's products that intentionally contain a chemical substance at any concentration. (16)

Response: The Department's proposed Chapter 880 does not seek to ban children's products that contain a designated priority chemical; rather it offers the option for banning the use of a priority chemical in children's products when a safer alternative is available. The fees assessed through the implementation of the proposed Chapter 881 would cover the costs of data collection about the presence of an identified priority chemical in children's products as well as the analysis of alternatives. The Legislature has directed the Department to place both the burden of demonstrating the safety of a priority chemical and the costs of collecting and managing that information and finding alternatives on the industries that profit from the use of those chemicals. No change to the rule.

9. Comment: The commenter suggests that the goal of the statutory language behind the proposed rule, "The department may assess a fee payable by the manufacturer or distributor upon submission of the notification to cover the department's reasonable costs in managing the information collected," is to ensure that Department's costs for soliciting, collecting and managing information and data pursuant to the law are sufficiently covered by the users of the priority chemicals, not the public. (31)

Response: The Department concurs. No change to the rule.

10. Comment: The commenter contends that it is entirely appropriate for manufacturers to pay the costs of running the program. The commenter opines that for too long state and federal policy has forced the public to pay the human, medical and financial costs of pollution by allowing the externalization of those costs. (41)

Response: The Department acknowledges the commenter's support. No change to the rule.

Section 4. Fee for alternatives assessment

11. Comment: The commenter asserts that the requirement of completing the alternative analysis within six months is completely unreasonable, even for one priority chemical/product effort,

and impossible considering the infinite number that would result from the proposed Chapter 880. The commenter references examples from California's Green Ribbon Science Panel which indicated that alternatives evaluations could take more than three years, and that implementation could take up to seven years. (7)

12. Comment: The commenter contends that the six month timeline for evaluation and possible alternatives assessment would be impossible for manufacturers. The commenter points to examples of such an evaluation taking more than three years, and adds that even when a suitable alternative is identified, implementation could take two to seven years. The commenter recommends that the Department set up a system that considers these factors. (10)

13. Comment: The commenter contends that the proposed compliance timeline of 6 months to complete an alternatives assessment is not realistic and fails to recognize the quality life cycle analysis/alternatives assessment. The commenter encourages the Department to be open to tailoring deadlines on a case-by-case basis following a pre-consultation meeting with a manufacturer or consortia. The commenter suggests that flexible timelines will likely be needed to address circumstances and data needs unique to individual process. (119)

Response to comments # 11-13: While the supplemental information requirements of Chapter 880, Section 3(B) do allow the Department to request information related to known alternatives and a manufacturer's reasons for not selecting those, it is does not require the kind of original research into new alternatives that the commenter alludes to. However, the Department agrees that provision of the information required under Chapter 880 Section 3 in some cases could take longer than six months. Moreover, the six-month time-frame proposed under Chapter 881 is at odds with the flexible timeline proposed under Chapter 880. Chapter 880 requires the board, when designating a priority chemical by rule, to specify the information that manufacturers and distributors must supply and set a deadline for those submissions that is no sooner than 180 days (six months) after the effective date of the rule. Additionally, under Chapter 880, subsection 3(D), the Commissioner may request supplementary information upon review of the information submitted pursuant to the rule that lists the priority chemical. In response to comments received, the Department has amended Chapter 880, section 3(D) to clarify that the commissioner may set a deadline under this section that is no later than 30 days after the request is made. The commissioner has flexibility in setting this date as far out as deemed necessary and appropriate. Additionally, the proposed Chapter 880, in section 3(C), recognizes the commissioner's authority to extend submission deadlines if necessary. In order to eliminate this inadvertent conflict between the two rules, the Department has amended the first paragraph of Section 4 of the rule as follows:

> ***"4. Fee for alternatives assessment.*** *If, ~~within 6 months of being directed to so by board order or requested to do so by the commissioner,~~ a manufacturer or distributor fails to submit an acceptable alternatives assessment as defined in chapter 880, section 3(B)(3), of department rules [06-0~~6~~96 CMR 880] by the deadline specified by the board or commissioner, the commissioner may assess a fee on the manufacturer or distributor to cover the costs incurred to hire a contractor of the department's choice to prepare an independent report on the availability of safer alternatives. The manufacturer or distributor shall pay the fee within 30 days of receipt of the invoice from the department."*

14. Comment: The commenter suggests that companies using a priority chemical may have a disincentive to do a good alternatives assessment because they would not want to change processes. The commenter suggests the fee charged when an alternatives assessment is not effective can overcome this disincentive. (15)

Response: The Department acknowledges the commenter's support. No change to the rule.

Section 6. Appeal

15. Comment: The commenter points out that the substantive appeals process provided in the proposed rule will give the Board the final authority in determining whether an assessed fee is reasonable or not. (31)

Response: The Department concurs that the appeals process in Section 6 offers manufacturers an avenue for contesting fees imposed under the proposed rule. No change to the rule.