



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

MEMORANDUM

TO: Board of Environmental Protection
FROM: Andrea Lani, Bureau of Remediation and Waste Management
DATE: May 20, 2010
RE: Final adoption of 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 provisionally-adopted 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 February 18, 2010 the Board provisionally adopted Chapter 881, a major substantive rule. On March 26, 2010 the Legislature passed a resolve (Resolves 2009, chapter 194) authorizing final adoption of the rule until February 1, 2013 and requiring the department examine the first two years of experience regarding fees assessed under Chapter 881 and report its finding to the Legislature. The department has added this sunset provision and reporting requirement as a note at the end of Chapter 881.

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 287-7688 FAX: (207) 287-7826
RAY BLDG., HOSPITAL ST.

BANGOR
106 HOGAN ROAD, SUITE 6
BANGOR, MAINE 04401
(207) 941-4570 FAX: (207) 941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04679-2094
(207) 764-0477 FAX: (207) 760-3143

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 finally adopt the proposed rule as submitted.

Estimated Time of Presentation:

15 minutes.

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Resolve, Regarding Legislative Review of Chapter 881: Fees; Chemical Use in Children's Products, a Major Substantive Rule of the Department of Environmental Protection

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Maine Revised Statutes, Title 5, chapter 375, subchapter 2A requires legislative authorization before major substantive agency rules may be finally adopted by the agency; and

Whereas, the above-named major substantive rule has been submitted to the Legislature for review; and

Whereas, immediate enactment of this resolve is necessary to record the Legislature's position on final adoption of the rule; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1 Adoption. Resolved: That final adoption of Chapter 881: Fees; Chemical Use in Children's Products, a provisionally adopted major substantive rule of the Department of Environmental Protection that has been submitted to the Legislature for review pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2A, is authorized until February 1, 2013; and be it further

Sec. 2 Review; authority for legislation. Resolved: That the Department of Environmental Protection shall examine the first 2 years of experience regarding fees assessed under the department's rule, Chapter 881: Fees; Chemical Use in Children's Products, as adopted pursuant to section 1. No later than February 1, 2013, the department shall submit a report of its findings and recommendations to the joint standing committee of the Legislature having jurisdiction over natural resources matters. The report must identify the reporting fees and alternatives assessment fees actually assessed by the department, the actual costs to the department and the related priority chemicals that were the basis for the fees. The report must also include a description of the process used by the department to contract with contractors to prepare independent reports, including, but not limited to, the use of a competitive bidding process. Following its review of the report, the committee may submit a bill to the First Regular Session of the 126th Legislature regarding fees related to chemical use in children's products.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

Chapter 881: FEES; CHEMICAL USE IN CHILDREN'S PRODUCTS

SUMMARY: This rule establishes the fees that may be assessed by the Department of Environment Protection to cover costs incurred in administering the provisions of Title 38, chapter 16-D, §§1691-1699-B of the Maine Revised Statutes Annotated.

1. **Definitions.** The following terms, as used in this rule, have the following meanings:
 - A. **Board.** "Board" means the Board of Environmental Protection.
 - B. **Children's product.** "Children's product" means a consumer product intended for use by children, such as baby products, toys, car seats, personal care products and clothing, and any consumer product containing a chemical of high concern that when used or disposed of will likely result in a child's or a fetus's being exposed to that chemical.
 - C. **CMR.** "CMR" means the Code of Maine Rules.
 - D. **Consumer product.** "Consumer product" means any item sold for residential or commercial use, including any component parts and packaging. "Consumer product" does not include a food or beverage or an additive to a food or beverage, a tobacco product or paper or forest products or a pesticide regulated by the federal Environmental Protection Agency. "Consumer product" also does not include a drug or biologic regulated by the federal Food and Drug Administration or the packaging of a drug or biologic regulated by the federal Food and Drug Administration if the packaging is regulated by the federal Food and Drug Administration.
 - E. **Department.** "Department" means the Department of Environmental Protection, which includes both the Board and the Commissioner.
 - F. **Distributor.** "Distributor" means a person who sells consumer products to retail establishments on a wholesale basis.
 - G. **Manufacturer.** "Manufacturer" means any person who manufactured a final consumer product or whose brand name is affixed to the consumer product. In the case of a consumer product that was imported into the United States, "manufacturer" includes the importer or first domestic distributor of the consumer product if the person who manufactured or assembled the consumer product or whose brand name is affixed to the consumer product does not have a presence in the United States.
 - H. **MRSA.** "MRSA" means the Maine Revised Statutes Annotated.
 - I. **Priority chemical.** "Priority chemical" means a chemical identified as such by the board under chapter 880, section 2, of department rules, 06-096 CMR 880.
2. **Applicability.** The requirements of this chapter apply to manufacturers and distributors of children's products that contain a priority chemical.
3. **Reporting fee.** A manufacturer or distributor required under 06-096 CMR 880 to provide information on its use of a priority chemical shall, within 30 days of receipt of an invoice from the department, pay a fee to cover the administrative costs incurred by the department to collect and manage the information. The department shall set the total amount of the fees to recover costs incurred by the department to collect, evaluate for completeness and sufficiency and otherwise

manage the information. The total fees as determined by the department will be divided equally among the entities that submitted information.

- 4. Fee for alternatives assessment.** If a manufacturer or distributor fails to submit an acceptable alternatives assessment as defined in chapter 880, section 3(B)(3), of department rules [06-096 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.

The total fees assessed for failure to submit an acceptable alternatives assessment will be calculated to recover the contracting and other costs incurred by the department to arrange for preparation of an independent report on the availability of safer alternatives. The total fees will be divided equitably among manufacturers and distributors of children's product that contain the priority chemical. Manufacturers and distributors who have submitted an acceptable alternatives assessment are exempt from the fee.

- 5. Remittance; deposit.** Fees assessed under this chapter must be paid by check payable to "Treasurer, State of Maine." The department shall deposit the check in the Maine Environmental Protection Fund as established under 38 MRS §351.
- 6. Appeal.** Any person wishing to contest the amount of a fee imposed under this section must pay the fee by the due date specified in the department invoice and file a petition in writing with the commissioner requesting a refund. The petition must state the name of the petitioner; the date and the amount paid; the amount of the fee that is contested; and any reasons why the commissioner may not impose the fee. The commissioner may grant or deny the petition. If denied in whole or part, the commissioner shall provide the petitioner with a written decision explaining the basis for denial. The decision may be appealed to the board as provided in the department *Rules Concerning the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2 (effective April 1, 2003).

NOTE: The Legislature authorized final adoption of this chapter until February 1, 2013. See Resolves 2009, chapter 194, section 1. Section 2 of the Resolve requires the department to examine the first 2 years of experience regarding any fees assessed under this chapter and to report its findings to the joint standing committee of the Legislature having jurisdiction over natural resources matters no later than February 1, 2013. The report must identify the reporting fees and alternatives assessment fees actually assessed, the actual costs to the department and the priority chemicals that were the basis for the fees. The report must also include a description of the process used by the department to contract for preparation of independent reports on the availability of safer alternatives. Following its review of the report, the committee may submit a bill to the First Regular Session of the 126th Legislature regarding fees related to chemical use in children's products.

AUTHORITY: 38 MRS §341-D(1-B); and

38 MRS §1695(4)

EFFECTIVE DATE: