



ENVIRONMENTAL
HEALTH
STRATEGY CENTER

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Honorable Jim Hamper, House Chair
Honorable Bob Duchesne, Ranking Member
Joint Standing Committee on Environment and Natural Resources
Cross State Office Building, Room 216
Augusta, Maine 04333

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Re: **LD 1738 - Opposition to proposed Toy Industry amendment**

Dear Sen. Saviello, Reps. Hamper and Duchesne & Members of the Committee,

Yesterday, the Toy Industry Association proposed substantive policy changes to the Toxic Chemicals in Children's Products law (i.e. the Kid-Safe Products Act) in the form of a proposed amendment to LD 1738, the omnibus bill that the Maine Department of Environmental Protection (DEP) uses every year to advance routine technical changes to Maine's environmental laws.

We strongly and respectfully oppose the proposed toy industry amendment.

The proposed amendment is neither routine nor technical, but rather a substantive policy change. If enacted, it would conflict with existing statute and contradict legislative intent. The proposed amendment prematurely attempts to resolve a strongly contested DEP rule change that the agency has not yet decided on. For all these reasons, the proposed amendment should not be considered as an amendment to LD 1738. If the proponents wish to seek introduction of new legislation, then a full public hearing would allow a proper airing of these issues.

The toy industry wants a backdoor exemption from reporting BPA

The toy industry amendment would allow the priority chemical bisphenol A (or BPA) to be improperly declared a "contaminant," rather than as a chemical that was intentionally added to a component of a toy. As a "contaminant," BPA would be subject to a much higher *de minimis* level than an intentionally added chemical, allowing manufacturers to escape reporting of their use of BPA in toys.

That's the singular policy implication of this amendment. Consider the evidence.

Eight toy manufacturers reported BPA use by the October 3, 2011 deadline for identical reasons. All the toys reported contain components made of



polycarbonate plastic. BPA was intentionally added to these toy components during the manufacture of polycarbonate plastic to impart the desired properties of strength and durability.

Yet four of the eight toy manufacturers improperly asserted in their reports that the BPA was either a “contaminant” or “not intentionally added.” One of the four manufacturers went so far as to improperly withdraw its BPA use report, claiming that they were exempt from reporting since BPA was a “contaminant” and was present at levels below the *de minimis* level for reporting of contaminants of 100 parts per million.

By defining “contaminant” so broadly, the proposed toy industry amendment would memorialize this improper practice and encourage non-reporting of BPA use in toys.

Redefining “contaminant” contradicts the statute and legislative intent

The current statute is clear. A priority chemical, such as BPA, is either a “contaminant” or “intentionally added” but cannot be both because a different *de minimis* level applies in each instance. This legislative intent reflects the changes enacted with LD 1129, which was unanimously approved by the Committee and Legislature following a negotiated agreement by all the parties, including the Toy Industry Association and Environmental Health Strategy Center.

Now, with its proposed amendment to LD 1738, the toy industry would unravel the LD 1129 compromise, and contradict the statute and legislative intent. By defining “contaminant” so broadly, the toy industry amendment would allow a priority chemical like BPA to be declared a “contaminant” *even though it was intentionally added* during the manufacturer of the product component.

How can a chemical be both a “contaminant” and “intentionally added”? Which of the two *de minimis* levels would then apply? Would it be up to the toy manufacturer? If so, wouldn't they naturally choose the high *de minimis* level for contaminants and avoid reporting its BPA use if they could?

These contradictions are detailed in the attached comments that we submitted to proposed changes in the Chapter 880 regulations intended to implement LD 1129. Please review these comments for reference to specific sections of statute and for a deeper analysis.

Let DEP finish its pending rulemaking to implement LD 1129

Last year, the toy and chemical industries successfully lobbied DEP staff to include their proposed definition of “contaminant” in the proposed regulation to implement the changes in law enacted by LD 1129. We opposed this proposed rule change in testimony delivered on



November 15th and in written comments (attached) submitted on November 28th. Final action on the DEP rule is still pending.

We pointed out that the proposed definition of “contaminant” in the proposed regulation (which is virtually identical to the proposed LD 1738 amendment) contradicted DEP’s early staff recommendation and written analysis, was not authorized by the statute, and violated legislative intent.

Apparently the industry now concedes the lack of statutory authority for its desired regulatory definition of “contaminant,” which is why they have proposed this amendment to LD 1738. However, as discussed above, they have not solved the contradiction with current statute.

More importantly, from a process perspective, the Committee should allow the DEP to render its final decision on the proposed regulation and let due process unfold until the rulemaking takes effect. If policy issues remain after the regulation is settled, they can be taken up by the next Legislature.

Conclusion

Clearly, the proposed toy industry amendment raises major policy questions that are not properly sorted out in an omnibus bill dedicated to routine technical changes, such as LD 1738.

If the proponents feel so strongly that this matter must be debated in 2012, let them persuade the Legislative Council or the Administration to introduce new legislation that would allow the public to fully comment on the matter during a properly noticed public hearing.

We strongly recommend that you reject further consideration of the toy industry amendment to the Kid Safe Products Act. We would be happy to answer any questions or provide more information at the Work Session on LD 1738 next week.

Thank you for your thoughtful deliberations on this matter.

Respectfully submitted,

Michael Belliveau
Executive Director