



ENVIRONMENTAL HEALTH STRATEGY CENTER

PREVENTING HARM WHERE WE LIVE, WORK & PLAY

30 April 2009

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Testimony of Michael Belliveau, Executive Director
Environmental Health Strategy Center
in Support of LD 1423, An Act to Improve Toxics Use Reduction and Reduce
Energy Costs by Maine Businesses
before the Joint Standing Committee on Natural Resources

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Good afternoon Senator Goodall, Representative Duchesne and Members of the Natural Resources Committee. I represent a statewide nonprofit environmental public health organization that works to promote human health, safer chemicals and a sustainable economy. I have become quite familiar with Maine's toxics use reduction program over the last ten years.

LD 1423 will promote greenhouse gas reductions by Maine businesses as part of the State's pollution prevention programs, while updating the existing Toxics Use Reduction Act (TURA).

We support LD 1423 because of its intent to promote pollution prevention through energy conservation, which in turn will reduce toxic emissions from fossil fuel-fired power plants.

However, we have some serious reservations about parts of the bill that need to be addressed. Amendments are needed to mitigate several problems created by the bill, including: (1) problems with "fitting" a new greenhouse gas reduction assistance effort into an old toxics use reduction program, (2) changes in toxics use reduction policy that directly conflict with modern chemical policy and chemical management principles, (3) a vague, unworkable process for ensuring progress in toxics use reduction, and (4) a change in metrics that will distort actual progress in reducing toxics use and release.

The primary intent of LD 1423 is to free up limited state pollution prevention staff time by cutting back some of the existing requirements under the toxics use reduction program, and then applying that newly available staff time to increase assistance to businesses to help them conserve energy to reduce



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greenhouse gases. The bill also replaces outdated short-term toxics use reductions goals with a long term aspirational goal.

1. GREENHOUSE GAS REDUCTION IS NOT THE SAME AS CROSS-MEDIA POLLUTION PREVENTION

a. Definition of Cross-Media Pollution. (See Sec. 3 of the bill). The new definition is technically inaccurate, and fundamentally dilutes the original intent of the law, which was to incentivize efforts to prevent toxic chemical pollution of the air, water, or land from crossing over to impact any other environmental media. For example, the reason to eliminate mercury use is because air emissions cause water pollution which exposes wildlife and humans to mercury contaminated fish; similarly mercury products in waste can lead to ground water pollution and air pollution which affects surface water, fish and exposure. This is cross-media pollution - pollutants that from one medium to another, from waste to air to water to ground water.

LD 1423 changes the definition in two ways. It says that cross-media pollution includes pollution that affects "any" environmental resource, rather than the existing language of "more than one environmental resource." With that change, it's actually no longer cross-media pollution, it's just pollution. Second, LD 1423 adds greenhouse gases to the definition of cross-media pollution. That's technically a stretch. Carbon dioxide may be a cross-media pollutant if CO₂ air emissions are absorbed by the ocean and change its acidity. However the other five classes of greenhouse gas pollutants (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) may or may not be cross-media pollutants. At least some of them may only be of concern as atmospheric pollutants.

RECOMMENDATION: Retain original definition of "Cross-media pollution."

b. Inclusion of greenhouse gas reduction in cross-media pollution prevention programs. (See Sec. 5 of the bill). The above would be no more than a technical concern except for the addition of policy language to Section 2302, TOXICS USE REDUCTION AND HAZARDOUS WASTE MANAGEMENT POLICY. LD 1423 asserts that greenhouse gas reductions should be incorporated into "cross media pollution prevention programs" established to reduce toxic chemical use and hazardous waste generation because they are known to cause cross-media pollution.

The tough fit of shoe-horning greenhouse gases into cross media pollution prevention programs is further illustrated from afar by the Environmental Council of the States. Commissioner Littels chairs the Cross-Media Committee of ECOS which deals with

mercury, emerging toxic chemical contaminants and other classic cross media pollutants. ECOS, however, has a totally separate process and body for addressing greenhouse gases, which is addressed by their Air Committee. (See www.ecos.org).

RECOMMENDATION: Delete "cross-media" from language and establish a separate policy basis for incorporating greenhouse gas reduction opportunities into pollution prevention assistance program.

2. RISK-BASED STANDARDS HAVE NO PLACE IN TOXICS USE REDUCTION POLICY

We are seriously opposed to the proposed weak risk-based standards that would be established by LD 1423 to govern which existing chemicals could be exempt from progress reporting, and which new facilities and new chemicals could be added to those subject to pollution prevention planning and reporting. These standards mirror those established by the Toxic Substances Control Act of 1976, which is universally recognized as outdated, obsolete and ineffective. They also directly conflict with the standard of proof and burden of proof established under LD 2048 in 2008, the so-called Kid Safe Products Act that established a comprehensive modern chemical policy framework for the State of Maine.

a. Weak, Obsolete Risk-Based Standards for Exemptions of Chemicals from Progress Reporting. (See Sec 8 of the bill; proposed subsection 4. Petition, on page 3)

LD 1423 allows a toxics releaser to petition the DEP Commissioner to exempt a chemical from reporting on progress in achieving voluntary reduction goals if they demonstrate that the release does not pose an unreasonable threat to occupational health, public health or the environment. Without a definition in the bill, "unreasonable threat" will interpreted as "unreasonable risk," a term straight out of the obsolete and ineffective Toxic Substances Control Act of 1976 (TSCA), which Congress has finally begun to overhaul. Except that the LD 1423 standard is even weaker than TSCA in how it's applied. TSCA establishes the unworkable "unreasonable risk" standard as part of the basis for restricting the use or production of a chemical. For a much lighter regulatory requirement in Maine law, i.e. planning for a voluntary toxics reduction goal, LD 1423 proposes essentially the same standard.

Any risk-based (threat-based) standard invites undue reliance on quantitative risk assessment, a process that is rife with uncertainty and opaque assumptions that are easily manipulated. Risk assessment is so flawed that the Nixon-appointed first EPA

Administrator William Ruckelshaus said that "Risk assessment is like a captured spy; if you torture it long enough you can make it say anything." Today's risk assessment process has been so gamed by industry and bogged down in its use in regulatory decision making, which the National Research Council recently issued a report prepared by eminent U.S. scientists calling for a complete overhaul of the risk assessment process.¹

In contrast to the "unreasonable risk/threat" standard proposed in LD 1423, the Kid Safe Products Act, the Maine law passed as LD 2048 in 2008 that establishes a modern comprehensive chemical policy framework, excludes risk-based considerations completely. Instead it authorizes DEP to restrict use of a priority chemical in products on the basis of a hazard-based and exposure-related standard. No risk assessment is required. Again, the LD 2048 standard applies to a much more rigorous regulatory mandate - a restriction on the use of toxic chemical, with a much tougher, more protective standard.

Under LD 2048, DEP merely needs to demonstrate that the substance is a priority chemical of high concern, that direct or indirect exposure occurs, and that a safer alternative is available at comparable cost. Under proposed LD 1423, a petitioner can be exempted from planning voluntary reductions by simply asserting no unreasonable threat (risk).

Further, "unreasonable threat" is not defined in LD 1423. What's unreasonable? To whom? By what measure is something a threat?

RECOMMENDATION: Delete subsection 4 of proposed 2303-A. An exemption process is not needed, and certainly should not be risk-based.

b. Undue reliance on undefined risk-based standards for adding new facilities or new chemicals to the pollution prevention planning process. (See Sec. 9 of the bill; proposed Section 2304, subsection 1, paragraphs C. and D.)

DEP should be able to add facilities and chemicals to the toxics use reduction program. However, LD 1423 requires the Commissioner to demonstrate in a rule-making process that the facilities or chemicals "pose a threat to the public health and safety and employees and a risk to the environment."

¹ National Research Council of the National Academies. Science and Decisions: Advancing Risk Assessment. Washington DC: The National Academies Press. 2009.

This is a risk-based hurdle that imposes an undue burden of proof and a vague standard of proof on the Commissioner. Risk assessment is a controversial, problematic methodology for the reasons stated above and by the National Research Council. Demonstrable proof of harm is often hard to come by due to serious lack of data on toxicology, environmental fate, susceptibility of vulnerable populations and exposure. What degree of threat/risk must be proved? As drafted, the Commissioner would have to show harm to all three receptors: public health AND employees AND environment. Taken together, this is nearly an impossible burden of proof for DEP that could easily be challenged in court by an uncooperative facility owner.

RECOMMENDATION: Delete the risk-based standard and replace it with language that requires a demonstration that the chemicals involved are chemicals of high concern as established under existing Maine law (based on their inherently hazardous properties) and that their use or release may result in direct or indirect exposure to the general public, workers or the environment.

3. THE PROCESS FOR ENSURING TOXICS USE REDUCTION PROGRESS IS VAGUE AND UNWORKABLE

We understand and support the need to modernize the existing Toxics Use Reduction Act given that the current reduction goals have expired. We question, however, the effectiveness of the aspirational goal and process established by LD 1423. The bill establishes an aspirational goal to attain "zero discharge of harmful and toxic materials to the environment" ... "toward achievement of a zero discharge goal by businesses in this State by 2050." Then the bill mandates that a DEP advisory committee that has no regulatory authority (known as the Pollution Prevention Advisory Committee) "shall establish a schedule and process for continual progress toward achievement of a zero discharge goal by business in this State by 2050."

a. Zero discharge by 2050 is a laudable aspiration, but can not be assured with out interim milestones or explicit toxics use reduction requirements. (See Sec. 8 of the bill; proposed Section 2303-A; first paragraph)

The term "zero discharge" arose in the 1970's as bi-national goal to eliminate water pollution by persistent, bioaccumulative and toxic chemicals in the Great Lakes. It generally refers to waste water discharge as opposed to "releases" which refer to the combination of air emissions, water discharges and land disposal of waste. Reliance on "zero discharge" alone ignores a primary intent of the statute - to reduce or eliminate the use of toxic chemicals (not just their release into the environment).

To achieve a voluntary goal more than 40 years from now can not be assured with out interim reduction goals and a more serious toxics use reduction program. In contrast, the Nordic countries have established a "generational goal" to eliminate use and exposure to toxic substances by the year 2020 and have backed that up with substantive policy to move hazardous chemicals and technologies out of commerce in favor of safer alternatives.

RECOMMENDATION: Change the terminology to reset the aspirational goal to "eliminate the use and release of hazardous chemicals of high concern within the State. Change the attainment date to 2020 or establish an interim reduction goal to be achieved by 2020. Establish mandatory reduction goals if interim milestones are not met voluntarily.

b. As drafted, LD 1423 would violate the Maine Administrative Procedure Act by authorizing an advisory committee to implement the law. (See Sec. 8 of the bill; proposed Section 2303-A; first paragraph)

The mandate to "establish a schedule and process for continual progress toward achievement of a zero discharge goal by businesses in this State" is subject to the requirements of the Maine Administrative Procedure Act (MAPA), which triggers a rule-making requirement (5 MRSA Section 8002 et seq.). The Pollution Prevention Advisory Committee can not legally fulfill this mandate. A "rule" under MAPA includes every "statement of policy, or other agency statement of general applicability" that "implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency." (5 MRSA Section 8002, subsection 9). This mandate in LD 1423 meets the definition of a "rule."

RECOMMENDATION: Change the language to require DEP to adopt rules pursuant to Title 5 to establish the schedule and process for businesses to achieve zero discharge.

4. THE CHANGE IN METRICS WILL DISTORT TRACKING OF REAL PROGRESS IN TOXICS USE REDUCTION

LD 1423 repeals the method of reporting that gives the most accurate portrayal of whether facilities are actually reducing the use and release of toxic chemicals. The existing Toxics Use Reduction Act requires that the pollution prevention plans include numeric goals expressed as the amount of toxic chemicals reduced "per unit of product to account for changes in the level of production activity" (38 MRSA 2305, subsection 2-A). Similarly, the progress reports required in TURA must include a quantitative

statement of progress achieved in achieving its reduction goals reported both "in absolute amounts and per unit of production" (38 MRSA 2305-A, subsection 2).

The purpose of per unit production metric is to measure actual efficiency in reducing toxics. Without this metric, the toxics reductions reported could result from reduced production during a recession or increased toxic releases that are actually the result of an increase in production rather than a worsening of pollution conditions at a facility. By normalizing toxic reductions to the unit of product, TURA guards against misinterpreting apparent trends in toxic pollution that are more related to the state of the economy than when the facility is actually making progress in reducing pollution over time. This metric measures real progress.

LD 1423 repeals the per unit of product method of reporting goals (Sec. 10 of the bill; amendment to Section 2305, subsection 2-A; on page 4 of the bill) and also repeals it for the reporting of progress achieved (Sec. 11 of the bill; amendment to Section 2305-A, subsection 2; on page 5 of the bill).

DEP argues that too much staff time is spent helping companies prepare these reports. By repealing this method, goals and progress will only be reported in absolute values which may swing wildly with the ups and downs of the economy. DEP argues that the staff time freed up by not having them help companies more accurately report will be used instead to provide technical assistance to businesses to help them conserve energy to reduce greenhouse gases. This is the primary intent of the legislation from DEP's perspective.

However, accurate toxics reduction reporting need not be sacrificed to increase resources for greenhouse gas reductions. Instead, DEP should look to lift the arbitrary cap on program fees. Currently facilities pay a maximum of \$1,000 regardless of whether they are very large mills or much smaller facilities. Fees should be calibrated to volume and degree of hazard to add market incentive to achieve greater voluntary reductions of toxics.

RECOMMENDATION: Do not repeal "per unit product" reporting. Lift the arbitrary cap on facility fees. Base the fees on the volume and degree of hazard of the chemicals.

Conclusion

Please work LD 1423 carefully to correct these deficiencies so that you can vote Ought to Pass as Amended. Thank you.