



ENVIRONMENTAL HEALTH STRATEGY CENTER

Robert Foley, Chairman
Maine Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

28 September 2012

Board of Directors

Re: For the Record – Proposed Amendment to Chapter 882 on BPA

Jessa Barnard, JD

Dear Chairman Foley and Members of the Board of Environmental Protection,

Gail Carlson, PhD

This letter aims to correct several misrepresentations of fact and misleading allegations offered in testimony by Ben Gilman from the Maine State Chamber of Commerce on behalf of five national industrial trade associations (the “chemical industry coalition”)¹ at the September 6th public hearing on the proposed amendment to Chapter 882 regarding the regulation of bisphenol A (BPA).

Priscilla Carothers

Ken Geiser, PhD

Ginger Jordan_Hillier

The chemical industry coalition argued that the proposed rule violates the legislative agreement that led to the unanimous passage of LD 1129, as amended, in 2011. That bill amended Chapter 16-D, Toxic Chemicals in Children’s Products (commonly referred to as the Kid Safe Products Act), the governing statutory authority for Chapter 882.

Jeannie Mattson

Hon. Hannah Pingree

The industry claim is false and misleading.

Sharon Rosen, PhD

Background on the Legislative Agreement

Michael Belliveau
Executive Director

The originally proposed version of LD 1129, which was introduced in 2011 on behalf of the chemical industry coalition, would have made 28 substantive changes to the Kid Safe Products Act. Together, these changes, if they had been enacted, would have gutted the existing law, leaving a tattered shell in statute that would have effectively prevented regulation of bisphenol A or other priority chemicals of high concern in consumer products. For background, I have attached a detailed analysis of the original bill that I prepared at the time. (A copy of the original bill was submitted for the record as Exhibit 5 to the petition for proposed rulemaking).

P.O. Box 2217
Bangor, ME 04402

565 Congress Street, Suite 204
Portland, ME 04101

(207) 699-5795

www.preventharm.org

¹ The five industry trade groups represent manufacturers of chemicals (including BPA), cans, metal packaging, food products and toys. Notably absent from the hearing was any opposition from infant formula or baby food manufacturers or their trade groups. Nor did any Maine business or member company of the Maine State Chamber of Commerce oppose the proposed rule. In fact, several small Maine businesses supported the rule change.



At the public hearing on the bill, our public health coalition strongly opposed LD 1129, while the chemical industry coalition strongly supported it.

After the hearing, Mr. Gilman and I set aside the original bill and negotiated in good faith to reach agreement on a set of changes to the Kid Safe Products Act that clarified its scope and the process for selecting new priority chemicals of high concern. He represented the chemical industry coalition and I represented the public health coalition, the Alliance for a Clean and Healthy Maine.

Our negotiated agreement was sanctioned by legislative leaders on the Environment and Natural Resources Committee, which voted unanimously to approve a substitute amendment to the original legislation that embodied the agreement we reached, in its entirety. The amended bill was unanimously approved by the Legislature and signed into law by the Governor as P.L. 2011, Chapter 319, a copy of which we submitted for the record as Exhibit 3 to the petition for proposed rulemaking.

1. The process for bringing the proposed BPA rule amendment before the Board is fully consistent with the legislative agreement on LD 1129

The original LD 1129 legislation would have explicitly prohibited Maine citizens from expressing their right under the Maine Administrative Procedures Act to petition the Department of Environmental Protection to initiate rulemaking under the Kid Safe Products Act. *See* LD 1129 (Hamper), §1 (BPA Petition, Ex. 5); and page 8 of my attached bill analysis.

The chemical industry coalition agreed in negotiations to drop this prohibition from the proposed legislation. In approving the substitute amendment to LD 1129, the Legislature expressly rejected the proposed restriction on citizen-initiated rulemaking under this law. *See* Committee Amendment to LD 1129, §1 (BPA Petition, Ex. 6).

In fact the final legislation signed into law explicitly retained the citizen right to petition for rulemaking under the Kid Safe Products Act:

this subsection may not be construed to prohibit an agency from initiating appropriate rule-making proceedings in response to any person who petitions for adoption or modification of rules pursuant to section 8055.
See P.L. 2011, ch. 319 (BPA Petition, Ex. 3).

In considering and rejecting industry's proposed ban on citizen-initiated rulemaking, the Legislature affirmed the validity of the process that has led to the proposed amendment to Chapter 882 that is before you today.



2. Petitioners have simply called the question embodied in Chapter 882 as adopted by the Board: should additional sources of BPA be regulated?

When Chapter 882 became effective in 2011, manufacturers of infant formula and baby food were required to report their use of BPA by October 3, 2011 and to submit an evaluation of the availability of safer alternatives by January 1, 2012. Additionally, the Board required in the rule that the Department report back by January 1, 2013 with an analysis of those data and recommendations on whether additional actions should be taken, such as a sales prohibition on infant formula and baby food that contain BPA in its packaging. Chapter 882, §4. *See* BPA Petition at pp. 20-22.

Industry, however, has refused to timely comply with these reporting requirements. As noted by Department staff during the public hearing, not one company has fully complied with the Chapter 882 reporting requirements, and DEP has issued formal letters of warning and notices of violation to four of these manufacturers. *See* BPA Petition at Table A, p. 22.

Since the regulated companies failed to timely report on alternatives, the Department has not been able to prepare the assessment and recommendations required by the Chapter 882 directive from the Board. Therefore, Petitioners prepared their own assessment of alternatives and petitioned the Board to amend the rule to reduce exposure to children under age three from these sources of BPA.

In short, the industry has acted in bad faith, not the petitioners. The citizens' petition and proposed rule amendment represent the natural and logical next action in the step-by-step process detailed by the Board of Environmental Protection in Chapter 882.

3. The legislative agreement on LD 1129 has been fully implemented; to argue delay to “let the process work” is simply that, a delaying tactic

The compromise version of LD 1129, as amended, established only three mandates. We commend the Department of Environmental Protection for successfully and timely completing the full implementation of the LD 1129 requirements:

- By January 1, 2012, the Department was required to clean up the list of chemicals of concern by removing substances that were not used in a consumer product subject to regulation under the law. *See* P.L. 2011, ch. 319, §3 “Revisions” (BPA Petition, Ex. 3). That task was successfully and timely completed. (The revised list is linked from “Chemicals of Concern” at <http://www.maine.gov/dep/safechem/concern/index.html>);
- By July 1, 2012, the Department was required to adopt a new list of chemicals of high concern, which then are the candidates from which the agency may designate new



www.preventharm.org

priority chemicals in the future. *See* P.L. 2011, ch. 319, §4 “List” (BPA Petition, Ex. 3). The Department published this list on June 30, 2012. It names 49 chemicals of high concern. (The new list is linked from “Chemicals of High Concern” at <http://www.maine.gov/dep/safechem/concern/index.html>). Bisphenol A was not affected by this action because it was already named a priority chemical in 2010; and

- The Department was also required to update its general rules under the Kid Safe Products Act (Chapter 880) to reflect the changes in the law. *See* P.L. 2011, ch. 319, §4 “Rules” (BPA Petition, Ex. 3). The Department held a public hearing on the proposed Chapter 880 amendments on November 15, 2011, and finally adopted those regulations with an effective date of July 21, 2012. *See* final Chapter 880 rule at <http://www.maine.gov/dep/safechem/rules.html>.

There are no more mandates in the law. We have the “let the process work” to its fullest extent. No further process was agreed to in the 2011 amendments regarding future sales prohibitions on existing priority chemicals, such as BPA, or for new priority chemicals.

4. The Board previously found that BPA was intentionally added to epoxy resin in food packaging; to claim it a “contaminant” is to seek a loophole

I have to applaud the honesty of Margaret Gorman from the chemical manufacturers trade group, American Chemistry Council, for clearly asserting the industry’s agenda in testimony before the Board on September 6th.

The chemical industry coalition wishes that chemicals that are intentionally used to make plastics be exempt from regulation, even though Maine children are exposed to those chemicals when product components made with those plastics are used in consumer products and packaging. The law does not provide for such exemptions.

Ms. Gorman cited three examples where the chemical industry wants to carve out an exemption from regulation of toxic chemicals in consumer products:

- BPA, when it’s used to make polycarbonate plastic and epoxy resin;
- Vinyl chloride, when it’s used to make polyvinyl chloride (PVC) plastic; and
- Styrene, when it’s used to make polystyrene plastic or polyester resin.

While only the first example is at issue before the Board today, the message is clear. The chemical industry wants to exempt its products by any argument available, even when it flies in the face of the facts and contradicts the law and existing rules.



www.preventharm.org

The Board of Environmental Protection has already previously determined that BPA is intentionally added to polycarbonate plastic and epoxy resin used as a product component in food packaging. *See* Supplemental Basis Statement, Response to Comment 1 at p. 5 (BPA Petition, Ex. 11).

In 2011, the chemical industry coalition lobbied the Department to support its proposed definition of “contaminant” so that the industry could advance its loophole strategy. Unfortunately, the Department included such a proposal, along with other policy concepts previously rejected by the Legislature, in its initially proposed revisions to Chapter 880, which were suppose to be limited to implementing the recent changes in statute.

In January 2012, we requested that the Commissioner issue regulatory guidance to manufacturers because of the uncertainty created the chemical industry coalition as to whether BPA was a contaminant, and because of the poor and confused compliance record with the BPA reporting requirements. (See our attached letter request to the Commissioner dated January 12, 2012, which is attached for inclusion in the record for the Chapter 882 rulemaking).

Although the Commissioner chose not to issue such guidance, the Department wisely dropped the industry “contaminant” definition from the final Chapter 880 rule, after it was pointed out that such a change contradicted its own staff analysis and ran contrary to legislative intent and past rulemaking. (See also my detailed comments on the originally proposed Chapter 880 revisions dated November 28, 2011, which are attached to this letter for inclusion in this record).

The industry carried this continued ambiguity and confusion into the Chapter 882 hearing on September 6th. (See testimony of Andy Hackman, Toy Industry Association). Yet, all of parties agreed once again that BPA was used to make epoxy resin because of the resulting performance attributes, including durability, adhesion and corrosion protection that BPA imparted to the final product component. This means that BPA meets the statutory definition of a priority chemical that’s been intentionally added to the product component.

The Board would have to ignore these facts, the definition of “intentionally-added” in statute, and a consistent regulatory history, in order to grant the chemical coalition its wish by declaring BPA to be instead a “contaminant.”

If the Board reversed course and found that BPA was a “contaminant,” then BPA used in epoxy resin for food packaging would suddenly be exempt from reporting (thus nullifying the four notices of violation issued by the Department). More importantly for this proceeding, such a reversal would prevent the Board from prohibiting the sale for BPA-containing infant formula, baby food and toddler food, as requested by Petitioners.

The “contaminant” loophole would exempt BPA from regulation because, even though BPA is present as 67% of epoxy resin and nearly 100% of polycarbonate plastic, the BPA is slowly and



www.preventharm.org

continuously released from these materials such that the concentration of BPA in the plastic at any given moment falls typically below 100 parts per million. (See testimony of chemist Ken Soltys, Pure Strategies, Inc.).

Under the Kid Safe Products Act, a priority chemical that is present as a “contaminant” below a *de minimis* level of 100 parts per million in a product or product component is exempt from reporting and cannot be subject to sales prohibition.² See BPA Petition, Ex. 4 at §1693(8-A) at Exhibit 4.

I have summarized the relentless effort of the chemical industry coalition to oppose regulation of BPA and other priority chemicals, and to seek exemptions based on the spurious “contaminant” argument, in the attached chronology.

Conclusion

The Deputy Attorney General correctly advised you at the hearing that you are not bound by any stakeholder process or legislative agreement, but instead must follow statutory authority and criteria. Nonetheless, I hope that you now understand that no legislative stakeholder process has in fact been violated.

I urge the Board and Commissioner to strictly consider the evidence before you and to interpret the statute and regulation consistent with legislative intent and the bases for past rulemaking.

Thank you for your consideration.

Respectfully submitted,

Michael Belliveau
Executive Director

cc: Patricia Aho, Commissioner,
Department of Environmental Protection

Attachment

² The legislative intent behind treating a true “contaminant” differently under the law is sound and was agreed to by all the parties in negotiation. For example, if lead dust settles out from the air to contaminate a manufactured product, or if the potable make-up water for a formulated product contains arsenic, then the manufacturers of these products cannot readily alter their choice of materials or manufacturing process to avoid these chemical “contaminants.” On the other hand, when manufacturers specify use of epoxy resin coatings or polycarbonate plastic, they know that BPA has been intentionally added. They can choose instead a safer alternative that would eliminate the need for and all exposure to BPA.



A CHRONOLOGY

The Chemical Industry's Relentless Effort to Avoid Regulation of Priority Chemicals such as Bisphenol A under the Kid Safe Products Act

- 2000 - 2008 The Maine Legislature debates the science, policy and politics of proposed bans on specific chemicals in consumer products, considering nearly 20 bills to phase out mercury, arsenic, lead, PBDEs, phthalates and BPA; most of these become law despite consistent opposition from chemical manufacturers
- Dec. 2007 After an 18-month deliberation by a multi-stakeholder group, the Governor's Task Force to Promote Safer Chemicals in Consumer Products issues its final report recommending that the Legislature adopt of comprehensive chemical policy to identify priority chemicals, collect information on chemical use, and to phase out priority chemicals in specific products whenever safer alternatives are available, effective and affordable in order to protect children's health
- Jan. 2008 Legislation is proposed to implement the report recommendations
- April 2008 The Kid Safe Products Act passes with widespread bipartisan support by a vote of 129-9 in the House of Representatives and 35-0 in the Senate, despite opposition from the chemical industry coalition; The law empowers the Department and Board of Environmental Protection, with assistance from the Maine Center for Disease Control and Prevention, to prioritize chemicals, collect data, sort through the scientific evidence on chemical hazards, and provisionally decide when to phase-out priority chemicals in consumer products, subject to final approval by the Legislature
- March 2010 The Board of Environmental Protection adopts the Chapter 880 rule to implement the Kid Safe Products Act, rejecting chemical industry proposals to create exemptions and hurdles not authorized by the law
- Aug. 2010 The chemical industry coalition opposes the designation of bisphenol A as a priority chemical, arguing that it's an impurity that's not intentionally added
- Dec. 2010 The Board of Environmental Protection designates BPA a priority chemical and provisionally prohibits the sale of reusable food and beverage containers with BPA, finding that BPA is intentionally added to polycarbonate plastic and epoxy resin



- March 2011 The Legislature authorizes final adoption of the BPA sales prohibition on plastic baby bottles and sippy cups, by a bipartisan vote margin of 145-3 in the House of Representatives and 35-0 in the Senate
- March 2011 The chemical industry coalition advocates passage of LD 1129 to severely weaken the Kid Safe Products Act, effectively preventing the regulation of BPA and other priority chemicals in consumer products
- June 2011 LD 1129, as amended, was unanimously passed by the Legislature after a negotiated agreement was reached between the public health coalition and the chemical industry coalition. The new law creates a *de minimis* level of a priority chemical in a consumer product, below which chemical use reporting and alternatives assessments cannot be required and a sales prohibition cannot be enacted. The *de minimis* level for an “intentionally-added” chemical is the lowest level that can be reliably measured (known as the practical quantification limit). The *de minimis* level for a “contaminant” is 100 parts per million.
- Oct. 2011 Under Chapter 882, manufacturers must report their use of BPA. Several toy companies report BPA below 100 parts per million, but also claim that it was a contaminant or not intentionally-added. One toy company withdrew its BPA report claiming that they did not have to report because BPA was a contaminant. Most manufacturers of infant formula and baby food fail to report their BPA use as required. At least one claims they did not have to report because BPA was not intentionally added. (Four notices of violation are eventually issued).
- Nov. 2011 The public health coalition opposes the proposed revisions to Chapter 880, intended to implement the LD 1129 changes to the Kid Safe Product Act, because they include several policy concepts advocated by the chemical industry coalition that are not authorized by the statute and which contradict past Board rulemaking; These include a proposed definition of “contaminant” that would allow the chemical industry to argue that BPA should be exempt from all regulation
- Jan. 2012 The sales prohibition on reusable food and beverage containers made of polycarbonate plastic containing BPA becomes effective
- Jan. 2012 None of the manufacturers of infant formula or baby food comply with the Chapter 882 requirement to submit an evaluation of safer alternatives to the continued use of BPA in metal packaging. (Four notices of violation are eventually issued)
- Feb. 2012 In a revised proposed Chapter 880 amendment to implement LD 1129, the Department drops the chemical industry-backed definition of “contaminant” and other policy concepts not supported by the law



- June 2012 The Department of Environmental Protection successfully and timely completes the full implementation of all of the LD 1129 requirements
- June 2012 The public health coalition petitions the Board of Environmental Protection to extend the existing sales prohibition on BPA-containing products to infant formula, baby food and toddler food in epoxy coated metal packaging
- July 2012 The final revisions to Chapter 880 become effective. They do not include the chemical-industry backed definition of “contaminant”
- Sept. 2012 The chemical industry coalition opposes the proposed amendment to Chapter 882 to prohibit the sale of infant formula, baby food and toddler food in packaging containing BPA, arguing that BPA should be exempt as a “contaminant”