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**Report to the Joint Standing Committee on Environment  
and Natural Resources  
126<sup>th</sup> Legislature, First Session**

# **Fees: Chemical Use in Children's Products**

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## Executive Summary

Resolve 2009, ch.194 § 2, directed the Department of Environmental Protection (Department) to report to the Joint Standing Committee on Environment and Natural Resources (Committee) on its experiences, and provide any recommendations, regarding fees charged in accordance with Department rule, *Fees; Chemical Use in Children's Products*, 06-096 CMR ch. 881.

From its experiences with invoicing and collecting fees under this program, the Department would like to amend Chapter 881 and 38 MRSA § 1695(4) to accomplish the following:

- Allow the fee established in Chapter 881, § 3 to be distributed equitably versus equally among regulated entities;
- Allow those contesting a fee to do so without having to first pay the invoiced fee amount; and
- Allow rules concerning these fees to be promulgated through routine technical rulemaking.

The law at 38 MRSA § 1695(3) gives the Department the authority to assess a fee to those entities that are required to report on their use of a priority chemical in children's products in accordance with 38 MRSA § 1695(1). Additionally, 38 MRSA § 1695(2)(C) gives the Department the authority to assess a fee on manufacturers or distributors to cover the costs to prepare an independent report on the availability of safer alternatives by an independent contractor.

In Chapter 881, § 3, a one-time fee is established to cover the administrative costs associated with the collection and management of information from regulated manufacturers or distributors. The language within the rule establishes that the cost incurred by the Department is to be distributed equally among reporting entities. The Department has invoiced 32 regulated entities \$2000/each for their use of bisphenol A and nonylphenol/nonylphenol ethoxylates.

The rule at Chapter 881, § 4, allows the Department to hire a contractor to prepare an alternatives assessment if regulated manufacturers or distributor fail to produce an alternatives assessment in compliance with Chapter 880, § 5(B)(3). The cost incurred to hire a contractor to prepare an alternatives assessment is to be distributed equitably among regulated entities. The Department contracted with TechLaw, Inc. to prepare an alternatives assessment that met the requirements found in rule. The cost of the contract was \$38,650, which was distributed among the regulated entities resulting in an invoice amount of \$5,176.34 for seven of the eight entities. The eighth entity was charged a reduced fee of \$2,415.63 because that entity did provide a more robust assessment of alternatives, in comparison to the other regulated manufacturers.

## I. Introduction

In Resolve 2009, ch.194 § 2 (Appendix A), the Department was directed to report to the Committee on its experiences and provide any recommendations regarding fees charged in accordance with Department rule, *Fees; Chemical Use in Children's Products*, 06-096 CMR ch. 881.

The law at 38 MRSA § 1695(1) requires a manufacturer or distributor of children's products containing a priority chemical in an amount greater than the de minimis level to report to the Department on the children's product, the number of units sold or distributed for sale in the State or nationally, the priority chemical contained in the product, the amount of chemicals in each unit of the product, and the purpose the priority chemical serves in the product. In order to manage this information collected, 38 MRSA § 1695(3) gives the Department the authority to assess a fee payable by reporting manufacturers or distributors in order to cover the Department's reasonable costs.

In addition to the fee allowance in Section 1695(3), 38 MRSA § 1695(2)(C) gives the Department the authority to assess a fee on manufacturers or distributors to cover the costs to prepare an independent report on the availability of safer alternatives by an independent contractor. The law provides that the choice of contractor is the responsibility of the Department.

If the Department pursues the assessment of fees pursuant to 38 MRSA §§ 1695(2)(C) & 1695(3), it must engage in rulemaking to determine the appropriate fee structure. 38 MRSA § 1695(4) requires that rules regarding fees are to be promulgated through major substantive rulemaking. Effective June 15, 2010 Chapter 881 was adopted by the Department to establish the framework for the assessment of reporting fees and alternative assessment fees.

## II. Reporting Fee

Chapter 881, § 3, establishes that manufacturers or distributors that are required to provide information on their use of a priority chemical, are subject to a one-time fee to cover the administrative cost of collecting and managing the information provided in the reports. The cost incurred by the Department to collect, evaluate or otherwise manage the information collected is to be distributed equally among reporting entities.

### a. Assessed Fee

The Department currently employs one full-time employee who manages this program. The cost of employing this individual for one-year was utilized to establish the fee. An additional twenty percent was added to this figure to reflect unaccounted costs, such as assistance from other staff.

**Table 1**

<b>Figures Establishing Reporting Fee</b>	
Annual Cost to Fund Staff	\$57,320
Twenty Percent for Unaccounted Costs	\$11,464
Total Basis for Fee Assessed	\$68,784
Number of Reporting Entities	33
Fee Assessed Per Entity	\$2,000*
68,784 ÷ 33 = 2,084.36 – Fee was rounded to an even \$2,000	

This fee of two thousand dollars (\$2000) was assessed to the thirty-two (32)<sup>1</sup> reporting distributors and manufacturers of the priority chemicals, bisphenol A (BPA), and nonylphenol and nonylphenol ethoxylates (NP/NPE).

#### **b. Actual Estimated Cost**

The costs used as the basis for the actual assessed reporting fee does not take into account numerous other factors, including, agency consultation fees, other staff time, management review and duration for which the fee was calculated.

During this process, program staff consulted with other Department staff including management, the Attorney General's Office, and staff from Maine Center for Disease Control and Prevention. In consultation with accounting staff at the Department, a fee was calculated capturing the broader universe of actual costs incurred. This still does not capture the true cost associated with this reporting process because it does not account for technological resources utilized, such as the creation of reporting forms, and the electronic storage of the information provided. If these factors were utilized to calculate the fee, the actual amount would be more in the range of \$5000 per reporting entity. This assumes the program took one calendar year to complete, but in actuality managing the information provided, engaging in enforcement and follow-up activities took two years, which would make the fee more in the range of \$10,000 per reporting entity. This estimate is considered to be conservative because it assumes there are no on-going costs related to the reporting process.

### **III. Alternatives Assessment Fee**

When a regulated manufacturer fails to provide an acceptable alternatives assessment, as defined in Chapter 880, § 5(B)(3), the Department may hire an independent contractor to prepare a report on the availability of safer alternatives. The cost incurred by the Department to arrange for the preparation of this report may be recuperated by assessing a fee on those distributors and manufacturers that fail to submit an acceptable alternatives assessment in a timely manner. The total cost for this preparation is to be divided equitably among those manufacturers and distributor of children's products containing BPA, as defined in Chapter 881, § 4.

<sup>1</sup> The original fee was calculated based on the number of entities that submitted reports to the Department. It was later discovered that one of the reporting entities was not regulated by the Department. The fee was not recalculated and the \$2000 not collected was not redistributed to the other 32 entities.

Of the eighteen entities reporting the use of BPA to the Department, eight were required to submit an alternatives assessment because they manufactured infant formula and baby food sold in plastic containers and/or jars that contained intentionally added BPA. To date, none of the eight entities required to submit an alternatives assessment have submitted an acceptable assessment that met the requirements in rule. However, one manufacturer (Initiative Foods) did hire a consulting firm to assist in the preparation of a compliant report; however, that report also did not meet all the criteria set forth in rule. Due to the fact that no regulated manufacturer produced an alternatives assessment that met the required criteria, the Department sought to hire an independent contractor to prepare a suitable report on the availability of safer alternatives.

In order to hire an independent contractor, the Department published a Request for Proposal (RFP) for an alternatives assessment on April 24, 2012. Thirteen entities downloaded the RFP, but the Department did not receive any proposals. The Department reviewed the list of consulting firms with the potential to perform the required task, and contacted these entities directly to inquire why a proposal had not been submitted. Multiple firms stated that they did not submit a proposal because of the uncertainty in receiving a return on their investment. The RFP stated four firms would be retained, yet only one would be utilized and paid to produce an alternatives assessment. The other entities did not feel they had the expertise needed to complete the project in accordance with the specifications detailed in the RFP. Two expressed interest once they had personal communications from the Department.

During the first week of June, Department staff contacted TechLaw, Inc. and Pure Strategies, Inc. to restate the Department's need for a qualified consultant to perform an alternatives assessment. On June 7, 2012, TechLaw, Inc. provided the Department with a proposal to accomplish the scope of work required by rule for an alternatives assessment. Pure Strategies, Inc. submitted to the Department on July 11, 2012 a proposal that went beyond the scope of work needed to perform an alternatives assessment in accordance with rule, and at a cost of \$155,900. At the time the Department received the proposal from Pure Strategies, Inc. it had already entered into an agreement with TechLaw, Inc. (July 5, 2012).

As this fee is to be distributed equitably among reporting entities, the Department only charged Initiative Foods half of the fee due to their effort in producing an alternatives assessment, that while not compliant, contained useful information. The total contract cost for TechLaw's preparation of the alternatives assessment was \$38,650. Therefore, each of the other seven entities have been invoiced a fee of \$5176.34, while Initiative Foods was invoiced a fee of \$2415.63. The fees charged were calculated by dividing the total contract amount by the number of entities required to submit an alternatives assessment. That number was divided by fifty percent to calculate the amount owed by Initiative Foods. The credit given to Initiative Foods was then divided among the seven remaining entities and that number was added to original split of the contract into eight.

**Table 2**

<b>Figures Establishing Alternatives Assessment Fee</b>	
<b>Total Contract Amount</b>	\$38,650
<b>Initial Fee Calculation</b>	$38,650/8 = \$4831.25$
<b>Initiative Credit (Final Cost)</b>	$\$4831.26 \times .50 = \mathbf{\$2415.63}$
<b>Final Cost for all Other Entities</b>	$\$2415.63/7 = \$345 (\$345 + \$4831.25)$ <b>= \$5176.34</b>

## IV. Recommendations

In assessing and collecting the reporting fees, a number of issues became evident. First, the Department rule establishes that the cost of collecting and managing the information provided by reporting entities should be distributed equally among distributors or manufacturers of children's products containing a priority chemical. The Department was contacted by numerous entities that felt the distribution of the fee equally was unfair because they represented such a small share of the market in Maine as compared with other entities. Additionally, some felt that not all distributors or manufactures that were required to report, reported; therefore, the number of entities used to calculate the fee was lower than it should be, thus resulting in a higher fee. In administering this program, Department staff is in agreement that the reporting fee should not be distributed equally, but rather equitably. This would allow for greater flexibility and fairness. Unfortunately, the issue concerning capturing all entities required to report is difficult to fully address. The Department encourages those who have knowledge of an entity utilizing a regulated priority chemical in a children's product, who has not reported, to bring that information to the attention of the Department. Since the universe for manufacturers and distributors is global, it is often difficult to truly assess if all those required to report have.

An additional issue with the language in Chapter 881 is the Appeal provision found at Section 6. The current language requires that those wishing to contest any fee imposed under Chapter 881, must pay the fee by the due date specified on the Department invoice, and concurrently petition the Commissioner to have all or a portion of the fee waived. This language also does not require that the petitioner of a fee submit any information to verify why the fee is not appropriate. The language simply requires that the petitioner state the date and the amount paid, the amount of the fee that is contested, and any reason why the Commissioner may not impose the fee. The sequence established in rule to file an appeal is flawed for numerous reasons. First, it requires an entity who may be contesting the fee, because it is difficult to pay, to do so upfront before they can appeal. Second, it is creating more process for both the Department and the entity. Paying the fee upfront requires extra processing of the fee, and if a waiver of all or a portion of the fee is granted, then a refund must be processed, thus involving additional accounting resources. The Department would prefer if the rule allowed for an appeal of the fee without payment.

As this program is both relatively new, especially when compared with other Department programs, and unique in that it regulates on a global level, experience will help refine the process of administering and enforcing the necessary requirements. For this reason, the Department is also recommending that 38 MRSA § 1695(4) be amended to allow rules under this chapter to be enacted through routine technical rulemaking. By allowing these rules to be amended through routine technical rulemaking the Department can respond more quickly to unforeseen issues and make appropriate changes to enhance fairness and efficiency. This will be especially crucial when other chemicals are required to go through the reporting and alternatives assessment processes.

Suggested language changes to Chapter 881, Sections 3 & 6, and 38 MRSA § 1695(4) can be found at Appendix B.

## Appendix A

### Language from Resolve 2009, ch.194 § 2

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

**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.



## Appendix B

### Suggested Amendments to 38 MRSA § 1695(4) and Chapter 881, §§ 3 & 6

#### 38 MRSA § 1695(4) Amendments

**4. Rulemaking to determine fees.** If the department assesses a fee pursuant to subsection 2, paragraph C or subsection 3, the department shall determine the appropriate fee through ~~major substantive rulemaking~~ routine technical rulemaking, as defined in Title 5, chapter 375, subchapter 2-A.

#### Chapter 881 Amendments

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

SUMMARY: This rule establishes the fees that may be assessed by the Department of Environmental 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~~ equitably 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 MRSA §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~~ within forty-five (45) days of the confirmation date of receipt of the Department invoice. The petition must state the name of the petitioner; ~~the date and the amount paid;~~ the amount of the fee that is contested; any reasons why the commissioner may not impose the fee; and any supporting materials to substantiate the claims of the petitioner. 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). If an appeal is denied, the assessed fee must be paid within thirty (30) days of the final decision on appeal.

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**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.

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STATUTORY AUTHORITY: 38 MRSA §341-D(1-B); and 38 MRSA §1695(4)

EFFECTIVE DATE: June 15, 2010 – filing 2010-231 (final adoption, major