

MAINE STATE LEGISLATURE

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**SUMMARY OF PUBLIC COMMENTS AND RESPONSES
TO
REDUCTION OF TOXICS IN PACKAGING
Chapter 103**

BASIS STATEMENT

I. Purpose

In April 1992, the Maine Waste Management Agency proposed a rule to implement the provisions of Title 32, chapter 25-A, §§1731-1739, of the Maine Revised Statutes. The purpose of the rule is to reduce toxicity of packaging waste by prohibiting the unnecessary addition of heavy metals, such as lead, mercury, cadmium and hexavalent chromium, in packaging and packaging components.

II. Background

The Model Toxics in Packaging Legislation was developed by the CONEG Source Reduction Council, an organization of nine Northeastern Governors and representatives of industry and public interest groups. The purpose of the model toxic legislation is to eliminate heavy metal in packaging and packaging materials sold in the state. To date this legislation has been adopted in seven of the CONEG states (CT, ME, NH, NJ, NY, RI & VT), and four states outside of the northeast region (IA, MN, WA & WI). In addition, the model legislation has been introduced in the U.S. Senate by Senator Lautenberg (S-730), and in the House by Representative Wolpe (R-3509). Maine enacted the Reduction of Toxics in Packaging Law, Public Law 1990 Chapter 849, in 1990.

The model toxics legislation prohibits the sale of any package or packaging material to which lead, cadmium, mercury, or hexavalent chromium has been intentionally introduced. Further, manufacturers and distributors of packaging and packaging materials are required to limit the total amount of incidentally present heavy metals to 600 parts per million by April 1, 1992; 250 parts per million by April 1, 1993; and 100 parts per million by April 1, 1994.

When developing the model legislation, exemptions were provided for packaging made from post-consumer recycled materials, packaging containing one or more of the regulated metals that is essential to the protection of the packaging components (e.g. photographic or x-ray film), and packaging to protect the health and safety of the handlers of the package from its contents (e.g. use of lead shielding to contain radioactive materials). In addition, the Maine legislature has exempted packages or packaging components that contain an alcoholic beverage bottled prior to April 1, 1992.

A Certificate of Compliance stating that a package or packaging component is in compliance with the requirements of the law must be submitted by the manufacturer or supplier to the purchaser. A copy of the signed certificate of compliance is to be kept on file by the purchaser, manufacturer, and supplier for as long as that package or packaging component is in use. The certificate of compliance is subject to state and public review upon request.

Under Chapter 103, a Certificate of Compliance is not required to be submitted to the Agency

until April 1, 1993.

CONEG's Source Reduction Task Force has developed a series of questions and answers designed to aid companies with implementation of and compliance with the model law. This guidance document will be distributed with Maine's adopted rule.

III. Opportunities for Public Involvement

A public hearing was held in Augusta on April 27, 1992 to receive comments on the proposed rule. The public hearing was advertised on April 8, 1992 in the following Maine newspapers:

- Bangor Daily News
- Kennebec Journal
- Portland Press Herald
- Lewiston Daily Sun
- Waterville Morning Sentinel

The following groups were notified by mail:

- Department of Agriculture, Food & Rural Resources
- Maine Chamber of Commerce and Industry
- Waste Management Advisory Council
- Maine Municipal Association
- Interested Persons Requesting Notice
- Major manufacturers, trade and industry groups

Public comments were accepted through May 7, 1992.

The following is a summary of written and verbal comments received during the public hearing and the comment period. The Agency's response follows each comment.

PUBLIC COMMENTS

A. General

1. Comment: We believe that the CONEG model legislation was intended to affect consumer packaging and packaging components designed for the purpose of attracting attention of a retail consumer. Our company, like many other manufacturers produce industrial packaging components designed and engineered to protect, secure, close, unitize and provide pilferage protection for products destined for commercial use. The application of the Toxics Use Reduction in Packaging Law to industrial components will, in effect, ban critical systems intended for the latter purpose. We suggest that the proposed rule distinguish between these two classes of packaging/components.

Response: Section 6(B), which allows for companies to petition the agency for an exemption, was designed to address this type of concern.

2. Comment: The proposed rule fails to recognize that heavy metals exist in both the toxic and non-toxic forms. It should be modified so that it is in concert with its intent... to control those heavy metals that are toxicants.

Generally speaking, inorganic or the heavy metal based pigments are: inert, non-toxic, non-extractable, non-leachable, and historically safe to use. Incineration of cadmium pigments creates cadmium oxide which is insoluble in water.

Ironically, the Toxics Use Reduction in Packaging Law will place the environment at greater risk. Organic pigments which will be used as replacements to the inorganic can be leached from plastics and discolor water tables due to their varying degrees of solubility. Incineration of organic pigments will create a chemical zoo of hazardous by-products including many products which are carcinogens.

Response: The law applies to both soluble and insoluble forms of the four heavy metals and there is no distinction between the two. The uptake of lead in the human body from exposure of ingesting paint chips, ink, etc, is essentially the same for soluble and insoluble forms of lead. The toxicological information on chromium compounds clearly indicates that the hexavalent form is more toxic.

With regard to incineration, it is well documented that maximizing the removal of heavy metals in waste prior to incineration is necessary to reduce air emissions and leachate problems from ash (bottom ash and fly ash). The high temperature combustion process converts the heavy metal compounds (whether soluble or insoluble) in the waste to be burned to primarily oxide, hydroxide and salt compounds. Thus, package component would not be a factor in the final form of the heavy metal compounds in the air emission or the ash generated by incineration. Based on this information, no change has been made to the rule.

B. Substitute Materials

1. Comment: Section 4(D) of the proposed rule is so vague that it could easily be applied to find unlawful virtually any and all packaging components which are disposed in the waste stream. No company can conduct business with any reasonable degree of certainty that its packaging complies with this open-ended vague proposal. Nevertheless, violation of this provision can result in the imposition of substantial fines -- a hundred dollars for each package

or packaging component found in violation of this provision. This provision, which is not found in the CONEG proposal or any other state enacting similar legislation, thus jeopardizes every product manufacturer/packaging user in that such purchaser of a package and/or packaging component runs the risk of purchasing "noncomplying" packaging materials. Under Maine's proposed rule, the required certificate of compliance from the packaging manufacturer does not require that entity to warrant that its packaging conforms to the requirement of proposed Section 4(D). A product manufacturer/packaging user relying in good faith on that certificate of compliance thus should not be put at risk for circumstances outside its control; therefore, the assurance requested above should be incorporated into Maine's regulations. Such assurances could be crafted into Maine's regulations as follows:

- (1) No product manufacturer or distributor/packaging user shall be held in violation or otherwise penalized for a violation of the Maine statute if reliance in good faith on the certificate of compliance is shown.
- (2) Such good faith reliance does not require further testing or investigation by the product manufacturer or distributor/packaging user; the content and accuracy of the information in the certificate is the sole responsibility of the manufacturer of the packaging material.
- (3) A product manufacturer or distributor/packaging user who relies in good faith on a certificate of compliance shall not be subject to any penalty, including being requested or required to return any package or packaging component after such materials have left the packaging manufacturer/supplier.
- (4) A good faith defense extends to the use of those packages and packaging components which clearly would not appear to include any heavy metals -- *viz.*, cardboard boxes, wooden crates, masking tape, etc.

Response: The certificate of compliance form has been revised, in part, to accommodate this concern.

C. Certificate of Compliance

1. Comment: Several comments were received concerning the certification requirements under the proposed rule.

The CONEG model legislation required manufacturers and suppliers of packaging and packaging materials to furnish a certificate of compliance to the purchasers of packaging. In this instance, purchaser applies to companies who actually use the package for their product. The intent was to reduce the burden on the state to maintain the files, however, still providing the states and general public the authority to review the certificates.

Under Maine's proposed rule, a package manufacturer would have to furnish the Agency with a certificate for every package it makes. Considering the thousands of variations of materials, protective coatings, inks, adhesives, etc., this would be an significant cost burden on the State and on the package manufacturers.

None of the twelve other states that have this law in place require the certificate of

compliance be furnished by the manufacturer to the state. We strongly urge the Agency to modify the procedures or urge legislative adjustment to the law to coincide with the language used in the other CONEG states relating to the Certificate of Compliance.

Response: The Agency is aware that Maine's law differs from the other CONEG states and has delayed the date of receipt for the Certificates of Compliance to address this concern. During this time, the Agency will work with the legislature to amend this section of the law.

2. Comment: The proposed rule should be changed to allow packaging manufacturers to issue broad certificates that would cover entire categories of packaging. Separate identification of each packaging format would unduly burden manufacturers and the Agency without any commensurate benefit to the public or the Agency.

Response: In order to minimize paperwork, Section 5 of the proposed rule specifies that a certificate of compliance may cover more than one type of package or packaging component as long as each type is identified separately.

3. Comment: The proposed rule should clarify what types of information is available to the public. In Section 5 ¶ 1, language is needed to clarify that the test results submitted would be given confidential status by the Agency. We believe that testing methods and results should be available to the regulators only upon request.

Response: When receiving a certificate of compliance, the Agency assumes that the company has done what it deems necessary to stand behind the certification. Test results will only be given confidential status to the extent warranted by Maine law (Title 1, Section 402, subsection 3).

4. Comment: The proposed rule should require that a packaging manufacturer provide to a product manufacturer/packaging user a certificate of compliance, signed by an authorized corporate officer, certifying that the package and/or packaging component meet the requirements and standards of Section 4. Reliance upon that certificate should discharge fully a product manufacturer/packaging user's responsibilities under the law.

Response: Although Maine law prohibits the sale of packaging that violates the provisions of the law, compliance with the regulations is the responsibility of the packaging manufacturer, or supplier. Sections 6 - 7 describe their responsibilities to certify compliance and the enforcement methods and penalties if they do not comply.

5. Comment: Clarification is needed concerning Section 5(A) of the proposed rule which requires the submission of an amended or new certificate of compliance if the packaging is reformulated or if new packaging is created. No definitions or guidance are provided regarding reformulated or new packaging. We request that the requirement in the rule clearly define what falls into these categories. The requirement for a new amended certificate should not be triggered by the simple use of a new color or design or wording on the label, bottle or package, or a different kind of cardboard box or wooden crate. We recommend that a new amended certificate be required only when there is change in the heavy metal content of the package or packaging component.

Response: The Agency considers new packaging to mean a package that has not been previously used before. If the type of material or sources of material used in a

previously certified package change, then the Agency would consider this to be a reformulated package requiring a new or amended certificate.

6. Comment: We suggest that certificates of compliance submitted under Sections 5 or 6 of the proposed rule not be required to identify the State of Maine or the Maine statute. We believe that Maine should allow the use of a generic certificate which can be used in all states that have identical or substantially similar heavy metal packaging restrictions.

Response: For the certificate of compliance, it is not essential that the State of Maine be identified on the certificate; thus, a generic certificate would be acceptable. However, since exemptions granted under Maine's law differ from the other CONEG states, we believe it is necessary to identify the State of Maine when applying for an exemption status.

D. Testing Procedures

1. Comment: The proposed rule does not specify a standard testing procedure for measuring heavy metals. By not specifying a specific test method and leaving test methods to only very general standard methods and/or being left up to the individual company to implement, places the more conservative and conscientious companies at a business disadvantage to those who would use a less aggressive test procedure. We recommend that either the European standard for toxic metals in product and packaging method EN 71 be used or as we commented in the CONEG Legislation that the Toxic Containment Leachate Procedure (TCLP) be used as a standard test method. A uniformity of test procedure is necessary in order to compare packaging and products in various companies and to compare the results against the proposed standard.

Response: When the model legislation was developed in the fall of 1989 by CONEG's toxic committee, several different testing methods were discussed and there was general agreement that all available testing methods are accurate enough to the 100 ppm level. The committee agreed that 100 ppm was essentially at trace levels and therefore any differences in testing below that threshold level of 100 ppm would be inconsequential. The Agency recommends that companies should refer to the American Society for Testing and Materials (ASTM) 1916 Race Street, Philadelphia, PA, 19103-1187, 1990 Edition, Compiled by ASTM and/or U.S. EPA Office of Solid Waste and Emergency Response publication "Test Methods for Evaluating Solid Waste" SW-846, 3rd edition, November 1986.

2. Comment: We believe that the U.S. EPA testing method SW-846 or ASTM methods referred to by the Coalition of Northeastern Governors (CONEG) guidance document are inappropriate for measuring heavy metals in packaging. These test methods are used regularly to ascertain whether materials or chemicals contain Appendix VII hazardous substances listed under Subtitle C of the Resource Conservation and Recovery Act and are ill suited for determining heavy metal content in metal cans. Aluminum and steel metal material manufacturers routinely use other methods to determine heavy metals.

Response: As stated in the response to C.1 above, several different testing methods were discussed by CONEG's toxic committee and there was general agreement that all available testing methods are accurate enough to the 100 ppm level. Thus, companies are free to use test methods that they deem to be most appropriate.

E. Exemptions

1. Comment: Section 6(C) of the proposed rule should be revised to require the submission of "certificate of exemption" from only the package manufacturer. This requirement would mirror the requirement in Section 5 which requires only the manufacturer to furnish the Agency with the certificate of compliance. As currently drafted, Section 6(C) would require all entities claiming an exemption to file a certificate which will result in multiple filing with the Agency and serve no statutory purpose. Only the entity responsible for obtaining an exemption should be required to file a certificate with the Agency.

Response: In Section 6(C), the term all entities has been changed to manufacturers.

2. Comment: Section 6(D) is unclear in outlining whether exemptions granted under B(1) and B(2) will be limited to only 2 years. We would suggest language that would allow for exemptions granted under Section 6 - Subsections B(1) and B(2) be done for periods of 2 years. This way, the manufacturer would still be required to prove the need for the exemption every 2 years.

Response: We agree. The Agency's intent in Section 6(D) is to grant exemptions for periods of two years. In order to receive another exemption, the manufacturer would have to prove the need for exemption status every 2 years. The rule has been revised to enable additional two year periods of exemption.

3. Comment: None of the subsections in Section 6. Exemptions allows for the marketing of alcohol beverages marketed in high value, collectible containers which contain lead at higher levels that are allowed in the proposed rule. The agency should make provision in the proposed regulation for the continued marketing of these products because their small numbers and tendency to remain permanently with the purchaser as a decorative fixture make them a de minimis threat to the environment.

Response: Special collectible packages such as ceramic containers or crystal decanters are subject to Maine's law and therefore the rule. This comment is addressed in an identical manner in the CONEG guidance document.

F. Enforcement and Penalties

1. Comment: The language in Section 7 of the proposed rule could result in extremely unfair application of the penalty provision to packaging manufacturers. Under this provision, the Agency arguably could fine a manufacturer \$100.00 for each non-complying package offered for sale or promotion in Maine, and following the imposition of the fine, continue to assess fines for non-complying packages already in Maine's stream of commerce. The regulation does not recognize that a packaging manufacturer cannot recall a customer's packaging from a particular state's stream of commerce. Therefore, we propose that Section 7 (B) be revised to impose a fixed fine for an initial violation and a per-package fine only on those violators found to continue manufacturing/supplying after the date of violation. We propose that Section 7(B) be revised to read as follows:

"Violation. Any manufacturer or supplier that violates this Chapter commits a civil violation for which a forfeiture of not more than \$500.00 may be adjudged. The totality of non-complying packages and packaging components manufactured as of the date of the initial violation constitutes the basis of the offense. Any manufacturer or supplier that continues to violate this Chapter after the date of

the initial violation commits a civil violation for which a forfeiture of not more than \$100.00 may be adjudged. For such continuing violations, each package or packaging component in violation constitutes the basis of a separate offense."

Response: The language in Section 7(B) of the rule has been taken directly from 32 M.R.S.A. §1736. Since this section of the statute does not provide for a \$500 cap on penalties, we believe it would be inappropriate for the Agency to do so. The statutory language contemplates a per package penalty, not a continuing per day penalty. We do recognize that a packaging manufacturer may not be able to recall a particular package from Maine's stream of commerce. However, we believe the enforcement section of the statute is intended to deter manufacturers from ever allowing non-complying packages from entering the stream of commerce in the first place. Thus, no change has been made to this section.