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An Act To Clarify Maine's Phaseout of Polybrominated Diphenyl Ethers

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §1310-B, sub-§2, as amended by PL 2009, c. 397, §1, is further amended to read:

2. Hazardous waste information and information on mercury-added products and electronic devices and mercury reduction plans; chemicals. Information relating to hazardous waste submitted to the department under this subchapter, information relating to mercury-added products submitted to the department under chapter 16B, information relating to electronic devices submitted to the department under section 1610, subsection 6A or, information relating to mercury reduction plans submitted to the department under section 585B, subsection 6 or information related to products that contain the "deca" mixture of polybrominated diphenyl ethers submitted to the department under section 1609 may be designated by the person submitting it as being only for the confidential use of the department, its agents and employees, the Department of Agriculture, Food and Rural Resources and the Department of Health and Human Services and their agents and employees, other agencies of State Government, as authorized by the Governor, employees of the United States Environmental Protection Agency and the Attorney General and, for waste information, employees of the municipality in which the waste is located. The designation must be clearly indicated on each page or other portion of information. The commissioner shall establish procedures to ensure that information so designated is segregated from public records of the department. The department's public records must include the indication that information so designated has been submitted to the department, giving the name of the person submitting the information and the general nature of the information. Upon a request for information, the scope of which includes information so designated, the commissioner shall notify the submitter. Within 15 days after receipt of the notice, the submitter shall demonstrate to the satisfaction of the department that the designated information should not be disclosed because the information is a trade secret or production, commercial or financial information, the disclosure of which would impair the competitive position of the submitter and would make available information not otherwise publicly available. Unless such a demonstration is made, the information must be disclosed and becomes a public record. The department may grant or deny disclosure for the whole or any part of the designated information requested and within 15 days shall give written notice of the decision to the submitter and the person requesting the designated information. A person aggrieved by a decision of the department may appeal only to the Superior Court in accordance with the provisions of section 346. All information provided by the department to the municipality under this subsection is confidential and not a public record under Title 1, chapter 13. In the event a request for such information is submitted to the municipality, the municipality shall submit that request to the commissioner to be processed by the department as provided in this subsection.

Sec. 2. 38 MRSA §1609, sub-§5-A is enacted to read:

5-A. "Deca" mixture of polybrominated diphenyl ethers in shipping pallets. This subsection governs the manufacture and sale of shipping pallets and products made from shipping pallets containing the "deca" mixture of polybrominated diphenyl ethers, referred to in this subsection as "the "deca" mixture."

A. A person may not manufacture, sell or offer for sale or distribute for sale or use in the State a product that is manufactured from recycled shipping pallets containing the "deca" mixture, except that this prohibition does not apply to the manufacturing, selling or distribution of shipping pallets that are manufactured from recycled shipping pallets containing the "deca" mixture.

B. Beginning January 1, 2012, a person may not manufacture, sell or offer for sale or distribute for sale or use in the State a shipping pallet containing the "deca" mixture, other than a shipping pallet made from recycled shipping pallets or described in subsection 11, paragraph A1.

C. By January 1, 2013, and annually thereafter, a manufacturer or owner of shipping pallets subject to the restrictions of this subsection shall submit a report to the department that certifies its compliance with the restrictions of this subsection. The report must include data on the bromine content of a representative number of shipping pallets and an interpretive analysis of the data sufficient to demonstrate compliance with this subsection. The board may adopt rules to implement the reporting requirements of this subsection. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2A.

Sec. 3. 38 MRSA §1609, sub-§5-B is enacted to read:

5-B. Exemptions. Notwithstanding subsection 5A, paragraph B, a person may sell or distribute a shipping pallet containing the "deca" mixture of polybrominated diphenyl ethers for which an exemption is obtained pursuant to this subsection. A manufacturer or owner of a shipping pallet may apply for an exemption by filing a written petition with the commissioner. The petition must include a proposed duration for the exemption. The commissioner shall grant an exemption upon finding that:

A. A safer alternative that meets the criteria of subsection 14 does not exist;

B. A shipping pallet containing a proposed safer alternative fails to meet applicable fire safety standards, approvals and tests or relevant performance standards;

C. Additional time is needed by the petitioner to complete testing or obtain approval to ensure that a shipping pallet containing a proposed safer alternative complies with applicable fire safety standards, approvals and tests; or

D. Additional time is needed by the petitioner to modify the manufacturing process in order to produce a shipping pallet containing the safer alternative.

The commissioner may not grant an exemption pursuant to this subsection that extends beyond January 1, 2013.

Sec. 4. 38 MRSA §1609, sub-§7, as enacted by PL 2007, c. 296, §1, is amended to read:

7. Manufacturer responsibility. Effective January 1, 2008, a manufacturer of a product containing polybrominated diphenyl ethers restricted under subsection 1, 4 or 5 must notify persons that sell the manufacturer's product of the requirements of this section. Beginning January 1, 2013, a manufacturer of a product containing polybrominated diphenyl ethers restricted under subsection 5A must notify persons that sell the manufacturer's product of the requirements of this section.

Sec. 5. 38 MRSA §1609, sub-§11, as amended by PL 2009, c. 121, §18, is further amended to read:

11. Application. This section does not apply to prohibit the sale, distribution or use of:

A. Used products;

A-1. Shipping pallets manufactured before January 1, 2012 that contain the "deca" mixture of polybrominated diphenyl ethers or shipping pallets for which an exemption has been granted under subsection 5B;

B. ~~Products~~Except as provided in subsection 5A, products if the presence of polybrominated diphenyl ether is due solely to the use of recycled material; or

C. Replacement parts that contain the "octa" or "penta" mixtures of polybrominated diphenyl ether if the parts are for use in a product manufactured before January 1, 2006.

Sec. 6. 38 MRSA §1609, sub-§13, as amended by PL 2007, c. 655, §18, is further amended to read:

13. Department rule-making authority; flame retardants. If the commissioner determines, in consultation with the Department of Health and Human Services, Maine Center for Disease Control and Prevention and the Department of Public Safety, Office of the State Fire Marshal, that a flame retardant is harmful to the public health and the environment or meets the criteria as a prohibited replacement pursuant to subsection 14, paragraph B and a safer alternative to the flame retardant that is safer to the public health and the environment is nationally available and the State Fire Marshal determines that a safer alternative meets applicable fire safety standards as set forth in subsection 14 is available, the commissioner may adopt rules to prohibit the manufacture, sale or distribution in the State of:

A. A mattress, a mattress pad or upholstered furniture intended for indoor use in a home or other residential occupancy that contains that flame retardant; ~~or~~

B. A television or computer that has a plastic housing containing that flame retardant; ~~or~~

C. A plastic shipping pallet that contains that flame retardant.

The commissioner's rulemaking under this subsection must be made in accordance with Title 5, chapter 375, subchapter 2A. The department shall report any rulemaking undertaken pursuant to this subsection to the joint standing committee of the Legislature having jurisdiction over natural resources matters. The joint standing committee of the Legislature having jurisdiction over natural resources matters may submit

legislation relating to the department's report. For purposes of this subsection, "flame retardant" means any chemical that is added to a plastic, foam or textile to inhibit flame formation. Rules adopted pursuant to this subsection are routine technical rules.

§1609. Electronic waste

(As enacted by PL 2003, c. 661, §2 is REALLOCATED TO TITLE 38, SECTION 1610)

Sec. 7. 38 MRSA §1609, sub-§14 is enacted to read:

14. Safer alternatives; policy. It is the policy of the State that the "deca" mixture of polybrominated diphenyl ethers be replaced with safer alternatives as soon as practicable.

A. For the purposes of this subsection, "safer alternative" means a substitute process, product, material, chemical, strategy or any combination of these that:

(1) When compared to the chemical to be replaced would reduce the potential for harm to human health or the environment or has not been shown to pose the same or greater potential for harm to human health or the environment as the chemical to be replaced;

(2) Serves a functionally equivalent purpose that enables applicable fire safety standards, approvals and tests and relevant performance standards to be met;

(3) Is commercially available on a national basis; and

(4) Is not cost-prohibitive.

B. Effective June 1, 2011, a person subject to the restrictions under this section may not replace the "deca" mixture of polybrominated diphenyl ethers with a chemical alternative that the commissioner, in consultation with the Department of Health and Human Services, Maine Center for Disease Control and Prevention, determines:

(1) Has been identified as or meets the criteria for identification as a persistent, bioaccumulative and toxic chemical by the United States Environmental Protection Agency;

(2) Is a brominated or chlorinated flame retardant; or

(3) Creates another chemical as a breakdown product through degradation or metabolism that meets the provisions of subparagraph (1).

A replacement to the "deca" mixture of polybrominated diphenyl ethers may contain an amount of the chemicals listed or described in subparagraphs (1), (2) and (3) equal to or less than 0.1%, except that a replacement may contain an amount of a halogenated organic chemical containing the element fluorine equal to or less than 0.2%.

Upon request by the commissioner, a person subject to the restrictions under this subsection shall provide the commissioner with all existing information about the hazard and exposure characteristics of the replacement chemical that is known to, in the possession or control of or reasonably ascertainable by the person.

Sec. 8. 38 MRS §1609, sub-§15 is enacted to read:

15. Confidentiality. Information submitted to the department pursuant to this section may be designated as confidential by the submitting party in accordance with the provisions set forth in section 1310B and, if the information is so designated, the provisions of section 1310B apply.

Sec. 9. Alternatives assessment study. The Department of Environmental Protection may supervise an alternatives assessment study to determine the availability of safer alternatives to the use of the "deca" mixture of polybrominated diphenyl ethers in shipping pallets. The study may be voluntarily funded by a manufacturer or owner of pallets that is subject to the restrictions in the Maine Revised Statutes, Title 38, section 1609, subsection 5A that chooses to participate in the study. Any funding received must be deposited in a dedicated account managed by the department. The study must be coordinated with any research, development and demonstration work funded by a manufacturer or owner of shipping pallets subject to the restrictions in Title 38, section 1609, subsection 5A that supports the planned transition away from the "deca" mixture of polybrominated diphenyl ethers to safer alternatives as soon as practicable. The department may contract with a 3rd party for a study undertaken pursuant to this section, and the study must be prepared consistent with current methodologies for alternatives assessment. Upon the department's request, a manufacturer or owner of shipping pallets subject to the restrictions of Title 38, section 1609, subsection 5A shall submit to the commissioner all existing information regarding safer alternatives to the "deca" mixture in shipping pallets that is known to, in the possession or control of or reasonably ascertainable by the manufacturer or owner. Information submitted to the department pursuant to this section may be designated as confidential by the submitting party in accordance with Title 38, section 1609, subsection 15.

By January 1, 2011, the department shall determine whether there is a reasonable basis to conclude that a study undertaken pursuant to this section or other information available to the department demonstrates that a safer alternative to the use of the "deca" mixture in shipping pallets that meets the criteria in Title 38, section 1609, subsection 14 exists. In making the determination, the department shall consider any study supervised by the department pursuant to this section and may consider the effect of the safer alternative on the recyclability of the shipping pallets.

Sec. 10. Standards and approvals. For purposes of the Maine Revised Statutes, Title 38, section 1609, subsection 5B and an alternatives assessment study undertaken pursuant to section 9 of this Act, the Commissioner of Environmental Protection shall consider the applicable fire safety standards, approvals and tests and relevant performance standards that are consistent with specifications of the

manufacturer and industry practices. If they are approved by the commissioner, the commissioner shall use the applicable fire safety standards, approvals and tests and relevant performance standards submitted by the manufacturer.

Sec. 11. Study issues. The Department of Environmental Protection shall, within existing resources, study the issues related to the implementation of the restrictions that a person may not replace the "deca" mixture of polybrominated diphenyl ethers with a chemical alternative that is a brominated or chlorinated flame retardant. By January 15, 2011, the Department of Environmental Protection shall report to the joint standing committee of the Legislature having jurisdiction over natural resources matters its findings and recommendations.

Effective 90 days following adjournment of the 124th
Legislature, Second Regular Session, unless otherwise indicated.