

Chemicals of High Concern in Children's Products Public Workshop Minutes 1/22/18

Present: Samantha Hurt (VPIRG), Martin Wolf (Seventh Generation), Ira Bernstein (University of Vermont/UVMCC), Allison DeMag (American Chemistry Council), Matt Lenz (Toy Association), Andy Hackman (Serlin Haley/JPMA), Ruma Kohli (Global Foundries), Woody Little (Toxics Action Center), Kate Longfield (Toxics Action Center), Shaina Casper (Toxics Action Center), Marcia Gustafson (Citizen), Kay Geibhards (Seventh Generation), Johanna Degraffenfield (VPIRG) Paul Burns (VPIRG), Matt McMahon (MMR), Lauren Heirl (Vermont Conservation Voters), David Englander (Vermont Department of Health), Sarah Vose (Vermont Department of Health), Kerry Morlock (Vermont Department of Health)

By Phone: Elena Pidgeon and Ayyappan Kandasamy (Levis), Stephen Romeo (MSR Laboratories), Julia Lentini (Britax), Margaret Gorman (American Chemistry Council), Brent Cleaveland (The Fashion Jewelry & Accessories Trade Association), Jos Huxley (Hasbro, Inc.), Don Asleson (Target), Heather Louie (Gap Inc.), Tami Wustenberg (Vermont Dept. Environmental Conservation), Ann Trevorow (Komar Brands), Pratik Ichhaporia (Intertek), Elizabeth Cook (Fleischman), William Driscoll (Associated Industries of Vermont)

Introduction:

Email Kerry Morlock to indicate if you are participating by phone, and you may email her with any questions you may have during the workshop.

David Englander provided an overview that the purpose of this gathering is to discuss the proposed rule draft, which will go through rulemaking in the coming months. VDH invites comments for the next 2 weeks (until Feb. 2nd) on the rule. The rule will go into rulemaking in February or March, dependent on the amount of feedback received, and tentatively, the rule would go into effect by the summer.

David Englander walked through the agenda and notes that he will walk chronologically through the rule section by section. VDH has highlighted changes in the rule.

Discussion:

No comments were raised on Section 1 and Section 2, and the discussion was moved onto Section 5 regarding the proposed addition of chemicals.

Andy Hackman noted that VDH proposed to add chemicals on Washington's Chemicals of High Concern list, and asked if VDH had proposed any removals like the ones Washington had? Sarah Vose responded that VDH reviewed and evaluated all Washington considerations, both removals additions, and determined that all chemicals met criteria for listing. For example, VDH proposed to list lead, and in comparison, Washington decided not to list lead as the public comments they received did not provide references to authoritative resources or peer-reviewed literature for lead toxicity. VDH found numerous resources to support the addition of lead for Vermont listing.

David Englander asked if there were any questions regarding specific chemicals or if individuals would like to speak about all listings as a whole? Andy Hackman asked if there would be a statement released

on how each chemical meets the listing criteria when they go into rulemaking? David Englander confirmed this is the case.

The discussion was moved to Section 6.17 of the rule, regarding the requirement of the use of UPC code or brand name and product model when UPC is not assigned. David Englander noted that, for the past 2 years among the legislature, there is agreement that this may be useful to consumers and that manufacturers can, and are, willing to do this.

Paul Burns offered his appreciation for the work completed on this and the goal is that consumers can determine what specific chemicals are used in specific products, and so far, this has been a challenge. He notes that there is an inconsistent approach between manufacturers regarding how this is conveyed, even if they use UPC codes. He suggests that UPC is collected in its own separate column, so that it is clear for users to make the link between chemical and product, which he believes is the purpose of this disclosure law.

Andy Hackman requests clarification as to whether the section regarding brand name and product model has been substituted with UPC, and whether 6.1.7 was restructured. It was clarified that was restructured but revised to reflect brand name and product model *or* UPC code.

Paul Burns believes that both brand name and product model and UPC should be reported and that users should have the capacity to search a UPC code for every product reported.

Martin Wolfe noted that he agrees, in principle, that UPC should be required when assigned, but recognizes that is hard for small businesses. He believes that UPC should be required, if assigned, and that brand name and product model should be required in addition.

Andy Hackman asked if, from a technological standpoint, the Department would be able to add another column, in terms of input? He notes that there are 2 million reports that would need to be updated and retroactively this would be a problem to add a column to this system and existing data. Sarah Vose responded that VDH would need to change the architecture of the system. Andy Hackman stated that his concern would be that this would be arduous to edit already submitted reports. It was clarified that already submitted data would not need to be changed.

Clarification was provided that this meeting is being recorded as it is a publicly noticed meeting, both minutes and recording will be made public record.

David Englander moved the discussion past Section 7, which remains the same, and to Section 8, language has been added to clarify precisely when the reporting periods occur and take note that reporting has changed. Paul Burns noted that this is not a mere clarification, but a reversal of a previous position from the Health Department. He stated that under the current guidance, if a product enters the marketplace between reporting periods and contains a Chemical of High Concern that the information must be reported before it is offered for sale. He noted that previously, the Health Department's position was clear, and in defense of the existing guidance and standard and he believes it should continue. He stated that if the proposed change is made, a product could enter the market a day after the last reporting period and potentially not be reported for 2 years, and this would needlessly allow a product to be sold without having to disclose this information to the Health Department and to the public. He believes that this would be a step backwards in terms of transparency and the goal of the legislation, which is to provide citizens with the capacity for the public to discern what chemicals are

present in children's products, so he is strongly opposed to this change. David Englander responded that Paul's characterization of the position of the Health Department is accurate, and when the rule was adopted under the previous administration, it was the position of that administration. He noted that under this administration, for the purposes of economic development, there's been a determination that reporting can be retrospective in nature. Paul Burns asked if there any way a parent who is interested in learning what chemicals might be present in children's products would be aided by this change of rule? David Englander responded it wouldn't be aided. Paul Burns followed-up asking whether this would be hindered? David stated he could not say whether it could be hindered, and he is grateful for these comments.

Andy Hackman asked if the retrospective reporting is consistent with states between WA, Maine, etc. and it was confirmed that this is the case.

Shaina Casper stated that the intention of this law is to give parents to choose what chemicals their children are being exposed to. There is concern about this delay, knowing that products can be offered for sale for up to two years before having to report, and this does not live up to the intention of the law, so they strongly oppose this change.

David Englander asked as to what percentage of new products come onto the market in any give two-year period? Andy Hackman responded that he is unsure, and notes there is a term annually, based upon season. David asked he would be able to get a rough calculation (understanding it would be retroactive)? Andy Hackman responded NPD data exist, which is self-reported by industry, from which, UPC codes would be lined up and used to determine the amount of turnover in a year and anecdotally estimate based on manufacturers assessments. Andy Hackman confirmed that this could be accomplished but not easily done.

Sarah Vose added that VDH would accept reports from manufacturers who choose to report prospectively, as certain retailers will not accept manufacturers products without proof of disclosing.

Martin Wolf stated he would like to second the concern regarding changes in reporting periods under Section 8 as opposed.

A retailer called in noting that they widely support the change in reporting date as they sell seasonal items and do not have foresight into what is offered for sale a year in advance, so they would need to constantly report. Under the previous language reporting was report prior to sale, then the data becomes arbitrary, and they would need to report 365 days a year as products are introduced.

An email question from Don Aseleson asked if there a reason the reporting dates can't align with other states? It was discussed that the dates aligned at one point, but Washington changed their reporting date, so they no longer align and in Washington's most recent rule update they moved the deadline to January 1. Andy Hackman noted he is unsure since VDH moved the effective date because of changes to Act 188, as to whether this change would need to be made in statute or rule, but they would have no problem with changing August to January. David Englander responded that this change could be made by rule. [The Department has not determined whether to change the dates a second time due to possible confusion.]

It was reiterated that all will have the opportunity to comment on this proposed draft before going into rulemaking, but also after going into rulemaking there will be a public meeting and public comment period before going to LCAR (Legislative Committee on Administrative Rules).

It was also reiterated that next Fridays comments (due 10 days from today) pertain to the draft proposed rulemaking today.

Moving onto section 9, the evaluation of chemicals of concern, David Englander stated that the vast majority of the language is taken from statute.

No comments were announced on section 9-11.

General Comments or Questions:

Matt McMahon asked what information is needed to return the correct product and is the brand name and, or product model and UPC necessary or UPC suffice in itself? Sarah V responded that UPC is sufficient to call up brand name and product model. If the data is presented with brand name and product model and UPC, it may be clearer to the public, but UPC should be able to return brand name and product model. Matt McMahon argues that the 'OR' clause should be included in the clause instead of and if that is the case. It was discussed that there are several existing repositories for UPC but no existing single repository storing every single existing UPC code.

Paul Burns noted that, for this reason, they prefer to see both fields for brand name and UPC code populated. He thinks the use of UPC code to be more user-friendly, but brand name could serve as a back up to serve in addition.

Martin Wolf stated that the purpose of the database is to serve the consumer and to make the search of the information easier rather than more difficult. Consumers are unlikely to know a product by UPC code, even if they knew the number, having to go to a second database would be an inconvenience and an unnecessary exercise. Most manufacturers have both the UPC code and brand name and product model as well as other information readily available in their databases, so there is no reason they could not provide both. For example, if all chemical data was only listed by CAS and not by chemical name, it would be burdensome to determine what chemical is present, similarly having the UPC code only would be burdensome to the consumer.

Marsha Gustafason stated that the brand name and product model would be wonderful to have in addition.

Sarah Vose noted that the phrases brand name and product model have caused confusion, since not all manufacturers follow that specific format, so maybe description could be used—would brand name and product model and description be sufficient? Andy Hackman responded that his biggest concern is creating dissonance between the format that currently exists, and shifting formats. Sarah Vose responded that if the existing format is not working perfectly, it may be refined, and establish a path to get the most accurate data looking forward is the best outlook. If VDH decides to change description or UPC code VDH wouldn't ask manufacturers to go back and update already submitted data.

Matt McMahon asked how far has VDH gone into developing the consumer facing side of this program and is there a clear idea of how data is used after consumer? Sarah Vose responded that VDH is putting the data into 70-140 excel spreadsheets and hasn't fully investigated gathering requirements for a

backend system and ideas have not formally been put down on paper. Matt McMahon noted that he doesn't know what the timeframe is for developing this—and this change may double or triple the amount of data, he suggested that maybe VDH consider this when looking at expanding the data collection.

Shaina Casper indicated that this wouldn't triple the data, and currently, the codes aren't useful, and a search must be conducted from 70-140 spreadsheets, and codes interpreted. She agrees that being able to see what is in the product through this method is not actually accessible to the public in order to see what the products are.

Paul Burns notes he is concerned about using a description for brand name and product model could be vague, being that broad, it is not clear if there could be uniformity or consistency.

Lauren Heirl stated that manufacturers are marketing products to be sold, and manufacturers provide this information on the pages where they are sold, so this piece of information exists. She is unsure if there is a way to describe "what is the name the you put on your product", or if someone "Google's" it they should be able to find the exact specific product online. Sarah Vose confirmed that this is conveyed in VDH's guidance and notes is has been challenging for a lot of manufacturers. David Englander invited people to submit ideas of what this language may look like.

Sarah Vose provided clarification that a lot of manufacturers have noted that the brand name and product model concept is confusing, though VDH has described it as how to find the product, what the product is called, or what it is, it sometimes does not match what is in the manufacturers database.

Woody Little commented on Section 8 noting that this change is a change in position that runs contrary to the law, and notes there is a constant turnover of UPC, and brand and product model over the course of a two year reporting period, which may amount to a significant percentage. If interested in providing this information to consumers, he states it is good to have a framework set up, but he is unsure why these changes weakening and creating inconsistency in the rule would be made, especially, as models like this might spread to other states. He notes that the ability for a manufacturer to move their product release for several days and may not have to report a majority of their products. He is concerned about Section 8 changes which he believes runs contrary to the law. Kay Gebhardt agrees with Woody, and retroactively there is a gap that is not supportive of what we are trying to do.

Ira Bernstein asked if a product was introduced to the market, sold, but taken off the market during the reporting period would it still be reportable at then end of the two-years? Andy Hackman responded yes, the way the language is constructed, it notes product sold prior to, this has happened in ME and WA too.

Woody Little noted that as a child or parent, he is not interested in knowing how much lead my child has consumed retrospectively, so he is unsure how the standpoint in Section 8 would help.

Don Asleson from Target Corp stated that consistency is important across states and that manufacturers are currently engaged multiple times for each state so they would like to become more efficient in reporting. If considering banning anything, he suggests to first consider the risk. Related to 11.2, he asks David Englander to explain workplace children's products, and the criteria to remove chemicals from the list, for example, TSCA's new use rule (where EPA puts limits around such a chemical use)-- would that be enough to be considered as regulated and thus removed from the list?

David Englander stated that workplace is defined in Vermont law as a place of employment and he confirms that this includes daycares and schools and any places where there are employees, though a definition could be added in the rule to be more precise. Regarding the second question—David Englander noted that it depends on what EPA adopted, what TSCA looked like at that time, Congress, preemption question aside, if it met criteria under the law.

An email from Debra DeFranco stated that not all manufacturers use UPC codes, the codes need to be purchased in blocks of 100,000, and that there is no master database for the public to access all existing codes. She also noted that a manufacturer may have multiple UPCs for the same product, so this should be allowed, and if a UPC is assigned it should be required along with the model # but shouldn't be made a requirement since it will put a financial burden for small businesses.

Review of Times and Closing Remarks:

People will have opportunity to provide comments until next Friday, Feb 2nd. At that point, it is anticipated the rule will go to the Interagency of Committee on rulemaking. The public comment period would likely be from mid-to late April, and from late April to late May public comments would be accepted. The (Health) Department would, under the law, adopt comments, or not adopt them and explain why, in writing, to the Legislative committee for review.