

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

An Act To Restore the Authority of the Board of Environmental Protection

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

Sec. 1. 32 MRSA §4174, 2nd and 3rd ¶¶, as amended by PL 2017, c. 137, Pt. A, §2, are further amended to read:

The ~~commissioner~~Department of Environmental Protection shall establish the criteria and conditions for the classification of wastewater treatment plants or systems, using as a basis the standards established by the New England Water Pollution Control Association.

The ~~commissioner~~Department of Environmental Protection shall establish by rule the qualifications, conditions and licensing standards and procedures for the certification of individuals to act as operators.

Sec. 2. 32 MRSA §4179, as amended by PL 2017, c. 137, Pt. A, §3, is further amended to read:

§ 4179.Rules

The ~~commissioner~~Department of Environmental Protection shall adopt rules that include, but are not limited to, provisions establishing the basis for classification of treatment plants in accordance with section 4172 and provisions establishing requirements for certification and procedures for examination of candidates.

Sec. 3. 38 MRSA §341-B, as amended by PL 2011, c. 304, Pt. H, §1, is further amended to read:

§ 341-B.Rules

The purpose of the Board of Environmental Protection is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions. The board shall fulfill its purpose through ~~major substantive~~ rulemaking, decisions on selected permit applications, decisions on appeals of the commissioner's licensing ~~and actions~~, review of the commissioner's enforcement actions and recommending changes in the law to the Legislature.

Sec. 4. 38 MRSA §341-D, sub-§6, as repealed and replaced by PL 2011, c. 304, Pt. H, §11, is further amended to read:

6. Enforcement. The board shall ~~hear appeals of emergency orders pursuant to section 347-A, subsection 3;~~

E. Advise the commissioner on enforcement priorities and activities;

F. Advise the commissioner on the adequacy of penalties and enforcement activities;

G. Approve administrative consent agreements pursuant to section 347-A, subsection 1; and

H. Hear appeals of emergency orders pursuant to section 347-A, subsection 3.

Sec. 5. 38 MRSA §341-H, as amended by PL 2011, c. 538, §1, is further amended to read:

§ 341-H. Departmental rulemaking

~~The department may adopt, amend or repeal rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering as provided in this section.~~

Subject to Title 5, chapter 375, subchapter 2-A, the board may adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering as provided in this section. The board shall also adopt, amend and repeal rules as necessary for the conduct of the department's business, including the processing of applications, the conduct of hearings and other administrative matters.

1. Rule-making authority of the board. ~~Notwithstanding any other provision of this Title, and except as provided in this subsection, the board shall adopt, amend or repeal only those rules of the department designated as major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A. The board shall also adopt, amend and repeal routine technical rules as necessary for the conduct of the board's business, including the processing of applications, the conduct of hearings and other administrative matters.~~

2. Rule-making authority of the commissioner. ~~Notwithstanding any other provision of this Title, the commissioner shall adopt, amend or repeal only those rules of the department that are not designated as major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A.~~

3. Duties of department. The department shall:

A. Identify in its regulatory agenda under Title 5, section 8060, when feasible, a proposed rule or provision of a proposed rule that is anticipated to be more stringent than a federal standard, if an applicable federal standard exists; and

B. During the consideration of any proposed rule, when feasible, and using information available to it, identify provisions of the proposed rule that the department believes would impose a regulatory burden more stringent than the burden imposed by the federal standard, if such a federal standard exists, and shall explain in a separate section of the basis statement the justification for the difference between the agency rule and the federal standard; and

C. ~~Notwithstanding Title 5, chapter 375, subchapter 2 or 2-A, the department shall accept and consider additional public comment on a proposed rule following the close of the formal rule-making comment period at a meeting that is not a public hearing only if the additional public comment is directly related to comments received during the formal rule-making comment period or is in response to changes to the proposed rule. Public notice of the meeting must comply with Title 1, section 406 and must state that the department will accept additional public comment on the proposed rule at that meeting.~~

3-A. Additional public comment. Notwithstanding Title 5, chapter 375, subchapter 2 or 2-A, the board shall accept and consider additional public comment on a proposed rule following the close of the formal rule-making comment period at a meeting that is not a public hearing only if the additional public comment is directly related to comments received during the formal rule-making comment period or is in response to changes to the proposed rule. Public notice of the meeting must comply with Title 1, section 406 and must state that the board will accept additional public comment on the proposed rule at that meeting.

4. Legislative review of a rule. If a rule adopted by the ~~department~~board is the subject of a request for legislative review of a rule under Title 5, chapter 377-A, the Executive Director of the Legislative Council shall immediately notify the ~~department~~board of that request and of the legislative committee's decision under that chapter on whether or not to review the rule.

Sec. 6. 38 MRSA §342, sub-§9, as amended by PL 2011, c. 304, Pt. H, §15, is further amended to read:

9. Rules. The commissioner may ~~adopt, amend or repeal, in accordance with section 341-H, routine technical rules under Title 5, chapter 375, subchapter 2-A and shall submit to the board new or amended major substantive rules for its adoption.~~

Sec. 7. 38 MRSA §342, sub-§11-A, as amended by PL 2011, c. 304, Pt. H, §16, is further amended to read:

11-A. Recommendations and assistance to board. The commissioner shall make recommendations to the board regarding proposed ~~major substantive~~ rules; permit and license applications over which the board has jurisdiction; modification or corrective action on licenses; appeals of license and permit decisions; enforcement actions; and other matters considered by the board. The commissioner shall also provide the board with the technical services of the department.

Sec. 8. 38 MRSA §347-A, sub-§1, ¶A, as amended by PL 2011, c. 304, Pt. H, §19, is further amended to read:

A. Whenever it appears to the commissioner, after investigation, that there is or has been a violation of this Title, of rules adopted under this Title or of the terms or conditions of a license, permit or order issued by the board or the commissioner, the commissioner may initiate an enforcement action by taking one or more of the following steps:

- (1) Resolving the violation through an administrative consent agreement pursuant to subsection 4, signed by the violator and approved by the ~~commissioner~~board and the Attorney General;
- (2) Referring the violation to the Attorney General for civil or criminal prosecution;
- (3) Scheduling and holding an enforcement hearing on the alleged violation pursuant to subsection 2; or

(4) With the prior approval of the Attorney General, commencing a civil action pursuant to section 342, subsection 7 and the Maine Rules of Civil Procedure, Rule 3.

Sec. 9. 38 MRSA §347-A, sub-§4, ¶D, as amended by PL 2011, c. 304, Pt. H, §20, is further amended to read:

D. The public may make written comments to the ~~commissioner~~board at the ~~commissioner's~~board's discretion on an administrative consent agreement entered into by the ~~commissioner~~board.

Sec. 10. 38 MRSA §347-A, sub-§6, ¶A, as amended by PL 2011, c. 538, §6, is further amended to read:

A. In the case of an administrative consent agreement, notice of the proposed agreement and the proposed agreement must be posted on the department's publicly accessible website at least 30 days before the ~~commissioner~~board takes any action on the agreement. The Attorney General and the department shall receive and consider any written comments relating to the proposed agreement.

Sec. 11. 38 MRSA §568-A, sub-§3, as amended by PL 2017, c. 137, Pt. A, §13, is further amended to read:

3. Exemptions from deductible. The commissioner may waive the deductible requirement for an applicant's personal residence if the commissioner determines that the applicant does not have the financial resources to pay the deductible. The ~~commissioner~~department shall adopt rules to determine the standards to be used to assess an applicant's ability to pay this deductible.

Sec. 12. 38 MRSA §1319-O, as amended by PL 2015, c. 124, §9, is further amended to read:

§ 1319-O. Rule-making authority; hazardous waste, waste oil and biomedical waste

1. Hazardous waste. This subsection governs rulemaking for hazardous waste.

A. The ~~commissioner~~department may adopt and amend rules identifying hazardous waste. It is the intent of the Legislature that the ~~commissioner~~department shall identify as hazardous waste those substances that are identified by the United States Environmental Protection Agency in proposed or final regulations. The Legislature also intends that the ~~commissioner~~department may identify as hazardous waste, in accordance with subparagraph (2), other substances in addition to those identified by the United States Environmental Protection Agency. Further, the Legislature intends that a substance that has been identified as a hazardous waste by the ~~commissioner~~department may be removed from identification only by further rulemaking by the ~~commissioner~~department.

Hazardous waste may be identified as follows.

(1) The ~~commissioner~~department may identify any substance as a hazardous waste if that substance is identified as hazardous by particular substance, by characteristic, by chemical class or as a waste product of a specific industrial activity in proposed or final rules of the United States Environmental Protection Agency.

(2) The ~~commissioner~~department may identify any substance as a hazardous waste if the ~~commissioner~~department, after evaluation based on existing data or data reasonably extrapolated from previously conducted studies using similar classes of substances or compounds under similar circumstances, has determined that the substance is an acute or chronic toxin causing significant potential adverse public health or environmental effects. An acute or chronic toxin may include the characteristics of:

- (a) Carcinogenicity;
- (b) Mutagenicity;
- (c) Teratogenicity; or
- (d) Infectiousness.

Rules adopted under this subparagraph must be submitted to the joint standing committee of the Legislature having jurisdiction over natural resources for review.

(3) Whenever the ~~commissioner~~department proposes to adopt or amend rules identifying hazardous waste or removing hazardous waste from identification, the ~~commissioner~~department shall hold a public hearing.

(4) In addition to hazardous waste identified under subparagraphs (1) and (2), the Legislature identifies the following chemicals, materials, substances or waste as being hazardous waste:

- (a) Polychlorinated biphenyls and any substance containing polychlorinated biphenyls.

B. The ~~commissioner~~department may adopt rules relating to the handling of hazardous waste, including, but not limited to:

(1) Containerization and labeling of hazardous waste, consistent with applicable rules of other federal and state agencies;

(2) Reporting of handling of hazardous waste; and

(3) Waste that is not compatible.

C. The ~~commissioner~~department may adopt rules relating to transportation of hazardous waste, including, but not limited to:

(1) Licensing of transporters of hazardous waste, conveyances used for the transportation of hazardous waste and the operators of these conveyances; and licensing fees must be paid to the Maine Hazardous Waste Fund; and

(2) A manifest system for hazardous waste that takes into consideration the requirements of the United States Resources Conservation and Recovery Act of 1976, Public Law 94-580, as amended, and this subchapter.

D. The ~~commissioner~~department may adopt rules relating to the interim and final licensing and operation of waste facilities for hazardous waste, including, but not limited to:

(1) Standards for the safe operation and maintenance of the waste facilities, including, but not limited to, record keeping, monitoring before and during operation of the facility and after its termination of use or closure, inspections and contingency plans to minimize potential damage from hazardous waste;

(2) The training of personnel and the certification of supervisory personnel involved in the operation of the waste facilities;

(3) The termination, closing and potential future uses of the waste facilities;

(4) Rules equivalent to regulations of the United States Environmental Protection Agency that provide for licensing or permitting by rule; and

(5) Corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this subchapter, regardless of the time waste was placed in the unit. For purposes of this paragraph, "solid waste management unit" includes any waste pile, landfill, surface impoundment or land treatment facility from which hazardous constituents might migrate, regardless of whether the unit was intended for the management of solid or hazardous wastes.

E. The ~~commissioner~~department may adopt rules relating to evidence of financial capacity of hazardous waste facilities' owners or operators, and of those who transport hazardous waste, to protect public health, safety and welfare and the environment, including, but not limited to:

(1) Liability insurance;

(2) Bonding; and

(3) Financial ability to comply with statutory and regulatory requirements or conditions.

Evidence of financial capacity required by the ~~commissioner~~department may include one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit or qualification as a self-insurer. In establishing the required evidence of financial capacity to further the purposes of this subchapter, the ~~commissioner~~department may specify policy or other contractual terms, conditions or defenses that are necessary or that are unacceptable.

F. By January 1, 2000, the board shall adopt, at a minimum, the universal waste rules, excluding pesticides, promulgated by the United States Environmental Protection Agency as defined in 40 Code of Federal Regulations, Parts 9, 260, 261, 262, 264, 265, 266, 268, 270 and 273.

2. Waste oil. This subsection governs rulemaking for waste oil.

A. The ~~board~~department may adopt rules relating to the transportation, collection and storage of waste oil to protect public health, safety and welfare and the environment. The rules may include, without limitation, rules requiring licenses for waste oil dealers and the location of waste oil storage sites that are operated by waste oil dealers, evidence of financial capability and manifest systems for waste oil. A person licensed by the department to transport or handle hazardous waste is not required to obtain a waste oil dealer's license, but the hazardous waste license must include any terms or conditions determined necessary by the department relating to the transportation or handling of waste oil.

B. The ~~board~~department may adopt rules relating to the registration, design and operation of used oil collection centers for the purposes of section 1319-Y. Rules adopted pursuant to this paragraph are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

3. Handling and disposal of biomedical waste. The ~~commissioner~~department shall adopt rules relating to the packaging, labeling, handling, storage, collection, transportation, treatment and disposal of biomedical waste, including infectious and pathogenic waste, to protect public health, safety and welfare and the environment.

A. The rules must include, without limitation:

- (1) Registration of biomedical waste generators;
- (2) Handling of biomedical waste by generators;
- (3) Licensing of biomedical waste transporters and the conveyances used for the transportation of biomedical waste;
- (4) Implementation of a biomedical waste tracking or manifest system;
- (5) Establishment of treatment and disposal standards; and
- (6) Categories of biomedical waste subject to regulation under this subsection, consistent with the provisions of section 1303-C, subsection 1-A.

B. The ~~commissioner~~department shall adopt rules governing the siting, licensing, operational and record-keeping requirements for biomedical waste treatment, storage and disposal facilities.

C. The ~~commissioner~~department shall require evidence of financial capacity.

D. The ~~commissioner~~department may assess licensing and registration fees sufficient to pay for the department's administrative costs in regulating biomedical waste.

E. The rules must provide transportation and disposal options for persons who generate fewer than 50 pounds of sharps per month that allow:

- (1) The generator or an employee of the generator to transport properly packaged sharps to a licensed biomedical waste disposal facility or another medical facility that has volunteered to serve as a collection point for sharps if no more than 50 pounds of sharps are transported in one trip; and
- (2) The generator to mail properly packaged sharps to a licensed biomedical waste disposal facility in this State or a facility in another state if the carrier accepts those items and no more than 50 pounds are transported in any single package.

For purposes of this paragraph, "sharps" means items that may cause puncture wounds or cuts, including hypodermic needles, syringes, scalpel blades, capillary tubes and lancets, and "properly packaged" means packaged in accordance with department rules and rules or requirements imposed by the mail carrier.

Sec. 13.38 MRSA §1362, sub-§1, ¶A, as amended by PL 2017, c. 475, Pt. A, §67, is further amended to read:

A. Any substance identified by the ~~commissioner~~department under section 1319-O;

Sec. 14. 38 MRSA §1609, sub-§13, as amended by PL 2009, c. 610, §6, 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 as set forth in subsection 14 is available, the ~~commissioner~~department 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;
- 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~~department's rulemaking under this subsection must be made in accordance with Title 5, chapter 375, subchapter 2-A. 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.

Sec. 15. 38 MRSA §1691, sub-§11, as enacted by PL 2007, c. 643, §2, is further amended to read:

11. Priority chemical. "Priority chemical" means a chemical identified as such by the ~~commissioner~~department pursuant to section 1694, subsection 1.

Sec. 16. 38 MRSA §1694, sub-§§1 and 2, as amended by PL 2011, c. 319, §5, are further amended to read:

1. Criteria. The ~~commissioner~~department may designate a chemical of high concern as a priority chemical if the commissioner finds, in concurrence with the Department of Health and Human Services, Maine Center for Disease Control and Prevention:

- A. The chemical has been found through biomonitoring to be present in human blood, including umbilical cord blood, breast milk, urine or other bodily tissues or fluids;
- B. The chemical has been found through sampling and analysis to be present in household dust, indoor air or drinking water or elsewhere in the home environment; or

D. The chemical is present in a consumer product used or present in the home.

2. Designation. The commissioner shall designate at least 2 priority chemicals by January 1, 2011. The ~~commissioner~~department may designate additional priority chemicals if the commissioner finds that the chemicals meet one of the criteria listed in subsection 1.

Sec. 17. 38 MRSA §1694, last ¶, as enacted by PL 2007, c. 643, §2, is amended to read:

The ~~commissioner~~department shall adopt rules to implement the provisions of this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 18. 38 MRSA §1697, sub-§6, as enacted by PL 2007, c. 643, §2, is amended to read:

6. Mercury-added products. The ~~commissioner~~department may designate mercury or a mercury compound as a priority chemical for the purpose of adopting rules under section 1696 to prohibit the manufacture, sale or distribution of a mercury-added product that is not regulated under section 1661-C or 1667 prior to the effective date of this section. The disclosure requirements of section 1695 do not apply to the manufacturer or distributor of a children's product that contains the designated mercury or mercury compound if the manufacturer has complied with the notification requirement under section 1661-A.

Sec. 19. 38 MRSA §3106, sub-§8, ¶A, as enacted by PL 2015, c. 166, §14, is amended to read:

A. A distributor that initiates the deposit under section 3103, subsection 2 or 4 has the obligation to pick up any empty, unbroken and reasonably clean beverage containers of the particular kind, size and brand sold by the distributor from dealers to whom that distributor has sold those beverages and from licensed redemption centers designated to serve those dealers pursuant to an order entered under section 3109. A distributor that, within this State, sells beverages under a particular label exclusively to one dealer, which dealer offers those labeled beverages for sale at retail exclusively at the dealer's establishment, shall pick up any empty, unbroken and reasonably clean beverage containers of the kind, size and brand sold by the distributor to the dealer only from those licensed redemption centers that serve the various establishments of the dealer, under an order entered under section 3109. A dealer that manufactures its own beverages for exclusive sale by that dealer at retail has the obligation of a distributor under this section. The ~~commissioner~~department may establish by rule, in accordance with the Maine Administrative Procedure Act, criteria prescribing the manner in which distributors shall fulfill the obligations imposed by this paragraph. The rules may establish a minimum number or value of containers below which a distributor is not required to respond to a request to pick up empty containers. Any rules adopted under this paragraph must allocate the burdens associated with the handling, storage and transportation of empty containers to prevent unreasonable financial or other hardship.

Sec. 20. Transition provisions. The following transition provisions apply to changes in rulemaking and the impact on pending proceedings.

1. Effect on existing rules. All rules adopted by the Commissioner of Environmental Protection prior to the effective date of this Act continue in effect until amended or rescinded by the Board of Environmental Protection; and

2. Effect on pending proceedings. All regulatory proceedings pending before the Board of Environmental Protection or the Commissioner of Environmental Protection on the effective date of this Act are subject to the Maine Revised Statutes, Title 1, section 302.

SUMMARY

This bill amends the responsibilities and duties of the Board of Environmental Protection. The bill:

1. Moves all rulemaking authority of the Department of Environmental Protection to the board;
2. Adds to the board's enforcement responsibilities the duty to approve administrative consent agreements and to advise the commissioner on enforcement priorities and activities and on the adequacy of penalties and enforcement activities; and
3. Includes transition language to provide for the orderly transition of the rulemaking authority and for procedures pending before the department on the effective date of this legislation.