AIV Comments on Proposed Amendments to Act 188 in S.103 Recommended by VNRC and VCV

April 21, 2017

AIV is concerned that the proposed changes to Act 188 discussed below would critically compromise the integrity and credibility of the statutes' scientific criteria and regulatory decision making processes, and we urge the Committee to reject or forego action on these proposals at this time.

To the extent that the Committee supports consideration of alternative language that still accomplishes the goals of existing statutes, such consideration would require additional testimony and discussion, and would be most responsibly addressed in the next legislative session when more time would be available and the additional work and recommendations called for in the underlying bill can help inform these considerations.

Weight of scientific evidence:

18 VSA §1776(b) includes the "weight" of credible scientific evidence to help ensure that the Commissioner does not simply selectively cherry-pick evidence that he or she claims to be credible to add chemicals to the scope of Act 188. Addition of chemicals should be firmly based in solid science, and citing the weight of credible scientific evidence is not an unusual or unduly difficult criteria to use.

No evidence has been provided to demonstrate the claims that "weight" is unworkable. Before deleting this important criteria, the Committee should investigate assertions that the standard is unworkable and, if it decides to change the language, should develop alternative proposed language to accomplish the purpose of the current language.

Exposure:

The question of whether children will be exposed to a chemical in a product is one of two essential questions in considering whether a product should be banned or otherwise restricted. It has been claimed that the criteria that children will exposed to a chemical in a product provided in 18 VSA §1776(d)(1)(A) requires an unreasonable degree of specific certainty:

(A) children will be exposed to a chemical of high concern to children in the children's product; and

However, this is not the case. In fact, what is required to determine exposure is explicitly outlined in 18 VSA §1776(d)(2):

(2) In determining whether children will be exposed to a chemical of high concern in a children's product, the Commissioner shall review available, credible information regarding:
(A) the market presence of the children's product in the State;
(B) the type or occurrence of exposures to the relevant chemical of high concern to children in the children's product;
(C) the household and workplace presence of the children's product; or
(D) the potential and frequency of exposure of children to the chemical of high concern to children in the children's product.

This is not the unobtainable or unreasonable standard claimed by critics.

Probability of adverse health impacts:

The second, and most important, question essential to whether a product should be banned or otherwise restricted is whether exposure to a chemical in the product actually poses a health risk. If the chemical is not present in levels that raise health concerns or exposure is so limited as to not trigger health concerns, there is not necessarily grounds to ban or restrict the product. This is currently addressed in 18 VSA §1776(d)(1)(B):

(B) there is a probability that, due to the degree of exposure or frequency of exposure of a child to a chemical of high concern to children in a children's product, exposure could cause or contribute to one or more of the adverse health impacts listed under subdivision (b)(1) of this section.

Critics of this provision recommend eliminating it completely and not having any criteria to establish whether exposure from a product is actually enough to raise health concerns. This would seem entirely unreasonable and inappropriate.

Existence of feasible safer alternatives:

Critics of the provision discussed above recommend replacing consideration of health risks with the existence of feasible safer alternative chemicals. We would not object to further discussion and consideration of whether existence of a feasible safer alternative should be added as a third required criteria in addition to exposure and health risk, but it is not a responsible substitute for either of the two existing criteria, which are both essential to responsible regulation.

Role of the Working Group:

The authority of the Working Group to initiate rule making is limited to banning or restricting products. Such decisions should be based on several considerations. Health risk is clearly a significant factor. However, considerations like economic impacts, customer needs, available feasible alternatives, and others are also important, especially if health concerns are not at critical levels.

These additional considerations are outside the scope of the Health Department. These regulatory decisions have traditionally been made by the Legislature, which can receive input and make decisions based on the full range of considerations. The Working Group was intended in part to serve as a substitute for the perspective and authority traditionally exercised by the Legislature. LCAR review is not analogous to or a meaningful alternative for the actual legislative process.

Authorizing the Health Commissioner to ban or restrict products on his or her own rulemaking authority and discretion as proposed by these amendments would be a fairly unprecedented. If the Committee is concerned about the role of the Working Group in this process, the Committee should investigate alternative proposed mechanisms to accomplish the purpose of the current language.

AIV appreciates consideration of these comments, concerns, and recommendations, and we look forward to continuing to work with the Committee on these and related issues.