Comments on S.55

February 14, 2019

Thank you for the opportunity to provide comments on S.55. We are concerned that S.55 would critically undermine the integrity and credibility of Vermont's regulation of chemicals in children's products (Act 188) by eliminating key scientific and health criteria, making it easier to arbitrarily require testing and reporting on additional chemicals and to ban or otherwise restrict products in Vermont without appropriate scientific or health-based justification.

Interagency Committee on Chemical Management

With regard to the provisions in S.55 addressing the interagency committee and stakeholder advisory group tasked with reviewing and considering a number of ways to improve and possibly expand Vermont's chemical laws and regulations, we would simply note that the Interagency Committee on Chemical Management and its Citizen Advisory Panel have already been established and done a significant amount of work. There would not appear to be any reason to pass legislation addressing this matter at this time.

Changes to Act 188

The provisions of particular concern in S.55 are those making harmful changes to Act 188:

Weight of scientific evidence:

When the Commissioner of Health proposes rules to add chemicals to the scope of Act 188, 18 VSA §1776(b) requires that the Commissioner determine that additions are supported by 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.

S.55 would remove this criterion. No credible evidence has been provided to back up claims that "weight of scientific evidence" is an unworkable standard -- indeed, the Department of Health has proposed adding 20 chemicals to the list of Chemicals of High Concern to Children and it does not appear that the statutory criteria for adding chemicals has presented any unwarranted obstacles or burdens for the Department. The inclusion of "peer reviewed" in S.55 is not a serious or meaningful substitute for weight and credibility. 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 criterion to use.

Role of the Working Group:

Under Act 188, a Working Group of agency, environmental, manufacturing, and other stakeholders is responsible for recommending consideration of banning or restricting products before the Commissioner of Health initiates such rulemaking. 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 core competency 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. Because Act 188 took the Legislature out of this role, the Working Group was intended to ensure that broader perspectives are responsible for initiating rulemaking.

S.55 would remove this role of the Working Group and authorize the Health Commissioner to ban or restrict products on his or her own rulemaking authority. Such broad regulatory discretion for a single agency, let alone with the lowered standards discussed below, would be largely unprecedented. Although the joint Legislative Committee on Administrative Rules reviews new regulations, it has little to no real input on substance or authority to block rules from taking effect, and its review of rules is not a meaningful substitute for the legislative process or the current role of the Working Group.

Exposure:

Act 188 establishes two key criteria for proposing rules to ban or restrict children's products containing chemicals of high concern to children: (1) whether children will be exposed to the chemical, and (2) whether that exposure is at a level that raises health concerns. It has been claimed by supporters of the provisions in S.55 that the criterion 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, and the changes to make this criterion weaker in S.55 are not warranted.

Probability of health risks:

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 are 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.

S.55 would strike this criterion entirely, so that there would not be any required consideration that a real health risk from a product exists. This seems unreasonable and inappropriate, and is a potentially dangerous precedent for any product regulation.

Let Act 188 Work

Act 188 was developed and enacted in 2014 following extensive discussion, debate, and deliberation in an attempt to craft an ambitious and unprecedented law in as balanced, fair, and credible a manner as possible. The law has been in place, companies have complied with the law, rules have been developed and further rulemaking is proceeding, and there has been no evidence that any problem claimed by advocates for the changes represented in S.55 has manifested.

AIV would recommend that the Committee not act on S.55. The provisions regarding the interagency committee are redundant to what is currently underway, and the provisions regarding Act 188 are harmful to the existing law and could interfere with rulemaking currently underway.