

STAFF DRAFT June 15, 2006

Comments submitted by mail to:
Attn: Docket ID Number EPA-HQ-OPPT-2006-0397
Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

and

Online via <http://www.regulations.gov>
Attention: Docket ID Number EPA-HQ-OPPT-2006-0397

RE: Sierra Club Petition for EPA to take four actions under TSCA to address risks of toy jewelry containing lead; Petition submitted under Section 21 of the Toxic Substances Control Act (TSCA) (70 FR 35667)
Docket Identification (ID) Number EPA-HQ-OPPT-2006-0397

The Minnesota Pollution Control Agency (MPCA) supports the Sierra Club petition. MPCA requests that EPA (and CPSC) accept the petition and initiate the requested actions that will provide the agencies with better knowledge and enforcement tools to protect children from lead in toy jewelry.

Since the Federal Register notice provides only 10 working days for response, this letter is brief and we would be happy to provide additional information upon request at any time and following EPA's decision about whether to accept or reject the petition.

With 10 working days available for a response, the detailed technical information requested in the Federal Register notice will be available only from a few commenters who focus their work on these issues. The MPCA cannot supply the requested technical information in the short time provided. However, we think there are more important issues that we can address in this comment letter.

We are not aware of a determination that there is a 'safe' level of lead exposure for children and therefore there has not been a "safe" level of lead established for products that children may be exposed to – which includes nearly any product sold for household or school use, including lead fishing tackle and toys and games made of or containing lead. The American Academy of Pediatrics Policy Statement¹ "Lead Exposure in Children: Prevention, Detection, and Management" includes in its Recommendations for Government:

"4. Minimize the further entry of lead into the environment. Regulations concerning airborne lead should be enforced, *use of lead in consumer products should be minimized*, and consideration should always be given to whether a child might come into contact with such a product." (emphasis added)

The most important issue is that we already have federal and state laws, rules, and policies that support or mandate NO INTENTIONALLY ADDED LEAD in consumer products, particularly products which pose

¹ PEDIATRICS Vol. 116 No. 4 October 2005, pp. 1036-1046 (doi:10.1542/peds.2005-1947)

a lead exposure risk to children. This is the only approach that will allow us to achieve the federal government's goal of eliminating childhood lead poisoning by 2010.

EPA and CPSC measures for dealing with lead in children's products appear to rely primarily on assessment of risk and then efforts to control for risk factors rather than on prevention or elimination of the substance that poses the risk. The primary or sole exception appears to be the Federal Hazardous Substances Act (FHSA): "A toy or other article intended for use by children which contains a hazardous amount of lead that is accessible for children to ingest is a banned hazardous substance. 15 U.S.C. 1261(q)(1)(B).²" FHSA should be used to the maximum extent possible by EPA, CPSC, and others to block the import, distribution, and sale of lead-containing products.

The mining, processing, manufacturing, use, and disposal of lead and lead in products also create wastes that cause pollution and therefore affect health. Similarly, risk assessment and after the fact control approaches are not sufficient to eliminate this pollution and associated exposure. The Federal Pollution Prevention Act of 1990 establishes a hierarchy for dealing with pollution and recognizes that existing regulatory structures that focus on control rather than prevention are not adequate to eliminate pollution. The findings and statement of policy for pollution prevention from the Pollution Prevention Act:

Pollution Prevention Act of 1990
UNITED STATES CODE TITLE 42
THE PUBLIC HEALTH AND WELFARE
CHAPTER 133
POLLUTION PREVENTION
§ 13101. Findings and policy

(a) Findings

The Congress finds that:

- (1) The United States of America annually produces millions of tons of pollution and spends tens of billions of dollars per year controlling this pollution.
- (2) There are significant opportunities for industry to reduce or prevent pollution at the source through cost-effective changes in production, operation, and raw materials use. Such changes offer industry substantial savings in reduced raw material, pollution control, and liability costs as well as help protect the environment and reduce risks to worker health and safety.
- (3) The opportunities for source reduction are often not realized because existing regulations, and the industrial resources they require for compliance, focus upon treatment and disposal, rather than source reduction; existing regulations do not emphasize multi-media management of pollution; and businesses need information and technical assistance to overcome institutional barriers to the adoption of source reduction practices.
- (4) Source reduction is fundamentally different and more desirable than waste management and pollution control. The Environmental Protection Agency needs to address the historical lack of attention to source reduction.
- (5) As a first step in preventing pollution through source reduction, the Environmental Protection Agency must establish a source reduction program which collects and disseminates information, provides financial assistance to States, and implements the other activities provided for in this chapter.

(b) Policy

² U.S. Consumer Products Safety Commission, "Codification of Guidance Policy on Lead in Consumer Products." December 22, 1998 *Federal Register*, Vol. 63, No. 245, p. 70649.

The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.³

It is important to apply the findings and policy of the Pollution Prevention Act to the issue of lead in toy jewelry, other children's products, and other products that children can be exposed to. In addition to health risk assessments, behavioral studies or product use and exposure studies, EPA and CPSC should use the Pollution Prevention Act and their other statutory and regulatory authorities (including FHSA as noted above), to prevent the use of lead and establish two standards for lead in consumer products:

1. Zero Intentionally Added Lead
2. Incidental presence of lead may not exceed a certain level, to be determined by EPA and CPSC. Nineteen states have already established a standard of 100 ppm for incidental lead levels in packaging as described below and MPCA recommends that this level be adopted as a federal standard for all consumer/household products.

As described below, Minnesota and other states have enacted several laws governing the use, sale, disposal, and phase out of products containing intentionally added lead.

Toxics in Packaging: elimination of intentionally used lead and other metals

In the early 1990's, Minnesota was one of the original group of states that developed and enacted Toxics in Packaging Legislation (Minn. Stat. § 115A.965). To date, nineteen states have adopted such legislation and nine (including Minnesota) are members of the Toxics in Packaging Clearinghouse. Toxics in Packaging laws prohibit the intentional use of lead (and three other metals) in packaging, and limit the total incidental concentration of the four metals to 100 ppm.

Listed Metals in Specified Products: Lead elimination in certain products

Minnesota's Listed Metals In Specified Products law (Minn. Stat. § 115A.9651) is unique in the US. This law prohibits the intentional use of lead (and three other metals) in inks, pigments, paints, dyes, and fungicides sold in MN. These products represent dissipative and unrecoverable use of lead with almost inevitable environmental release; these products also entail risks of exposure to manufacturing workers and users of the products, which can include children.

Lead in batteries:

Starting in the latter half of the 1980's, Minnesota laws prohibit disposal and require retailer/manufacturer takeback and recycling for all types of lead acid batteries, e.g., automotive, sealed lead acid, and other industrial and consumer batteries. These laws have helped 'close the loop' for production and disposal of lead in batteries. For battery applications where less toxic and lead free battery chemistries are feasible, laws such as this have helped drive the industry to use those less toxic chemistries, e.g., nickel-metal hydride and lithium ion. (Minn. Stat. §§ 115A.915, 115A.9152, 115A.9155, 115A.9157, 325E.115, 325E.1151, 325E.12, 325E.125, 325E.1251)

Lead in cathode ray tubes and electronics:

³ <http://www.epa.gov/opptintr/p2home/p2policy/act1990.htm>

In part to address issues of lead disposal and environmental release, Minnesota law (Minn. Stat. § 115A.9565) prohibits the disposal of electronic products containing cathode ray tubes, effective July 1, 2006. To date the Legislature has not established end of life management responsibility or lead reduction requirements for these products. However, the requirements of the European Community's RoHS Directive (RoHS: restriction of the use of certain hazardous substances in electrical and electronic equipment), which are pollution prevention requirements, are driving global efforts to reduce and eliminate lead and other toxic substances from electronics products. Other states have enacted disposal bans and end of life management responsibility requirements for CRTs.

Summary and Conclusions:

The MPCA strongly supports the Sierra Club petition to USEPA to use the full range of powers within TSCA to eliminate lead in toy jewelry and other products that children may use or be exposed to. MPCA also supports efforts to use the full range of powers within TSCA to eliminate lead in all household products, particularly those presenting the most risk to children. There is no legitimate reason to use lead in any children's product and there are few if any legitimate reasons to use lead in other consumer or non-industrial products.

At the same time, the MPCA is concerned that such efforts may be too focused on control of risk and exposure, which does not necessarily eliminate lead use. EPA, CPSC, and others should use their full range of powers, including those under the Federal Hazardous Substances Act and the Pollution Prevention Act of 1990, to prohibit the intentional introduction of lead in consumer products, to establish a very low threshold for the allowable incidental concentration of lead, and to bar the importation, domestic manufacture, distribution, and sale of such products. Only this approach will protect our children and provided USEPA and CPSC with effective enforcement thresholds. Only this approach will allow us to eliminate childhood lead poisoning in this country by 2010.

The February 2006 lead jewelry poisoning fatality in Minnesota provides an illustrative case study of avoidable confusion in roles and responsibilities among federal and state agencies over the recall of a dangerous product. Various federal and state agencies were looking at each other to act first because no agency was certain that it had the authority to compel recall of a children's product that was very close to 100 percent lead, even when it had caused the death of a child. Given this confusion, the legal authorities for agencies to issue and enforce product recalls need to be made clear and concise. Agencies should also be clearly provided with the authority to require companies to pay the consumer to ensure the return of recalled and banned items. Agencies need to be provided with sufficient resources for education, investigation, and enforcement. If all of these are undertaken, concern about children's exposure to lead, and actual exposure to lead, should be nearly eliminated.

If you have any questions or comments on this letter, please contact John Gilkeson of my staff at telephone 651-215-0199 or e-mail address: john.gilkeson@state.mn.us

Sincerely,

Cathy Berg Moeger
Director, Prevention & Assistance Division
Minnesota Pollution Control Agency

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Attachments: cited statutes