

No. 1994-112

AN ACT

HB 337

Regulating toxic materials used in packaging and components thereof; and providing for additional duties of the Department of Environmental Resources, for certain procedures, for remedies and enforcement and for civil and criminal penalties.

TABLE OF CONTENTS

Chapter 1. Preliminary Provisions

- Section 101. Short title.
- Section 102. Legislative findings.
- Section 103. Definitions.

Chapter 3. Regulation of Toxic Packaging

- Section 301. Toxic packaging prohibited.
- Section 302. Exemptions.
- Section 303. Certificate of compliance.

Chapter 5. Investigatory Powers

- Section 501. Right to enter and inspect.

Chapter 7. Enforcement

- Section 701. Unlawful conduct.
- Section 702. Enforcement orders.
- Section 703. Restraining violations.
- Section 704. Civil penalties.
- Section 705. Criminal penalties.
- Section 706. Remedies of citizens.
- Section 707. Concurrent remedies.

Chapter 9. Miscellaneous Provisions

- Section 901. Removal of additional toxic substances.
- Section 902. State review.
- Section 903. Public access.
- Section 904. Repeals.
- Section 905. Effective date.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

CHAPTER 1
PRELIMINARY PROVISIONS

Section 101. Short title.

This act shall be known and may be cited as the Safe Packaging Act.

Section 102. Legislative findings.

The General Assembly finds and declares as follows:

(1) The management of solid waste can pose a wide range of hazards to public health and safety and to the environment.

(2) Packaging comprises a significant percentage of the overall solid waste stream.

(3) The presence of heavy metals in packaging is a part of the total concern in light of their likely presence in emissions or ash when packaging is incinerated or in leachate when packaging is landfilled.

(4) Lead, mercury, cadmium and hexavalent chromium, on the basis of available scientific and medical evidence, are of particular concern.

(5) It is desirable as a first step in reducing the toxicity of packaging waste to eliminate the addition of these heavy metals to packaging.

(6) The intent of this act is to achieve this reduction in toxicity without impeding or discouraging the expanded use of postconsumer materials in the production of packaging and its components.

Section 103. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Department.” The Department of Environmental Resources of the Commonwealth.

“Distributor.” Any person, firm or corporation who takes title to goods purchased for resale.

“Package.” A container providing a means of marketing, protecting or handling a product and shall include a unit package, an intermediate package and a shipping container as defined in American Society for Testing Materials (ASTM) D996. The term shall also mean and include the unsealed receptacles such as carrying cases, crates, cups, pails, rigid foil and other trays, wrappers and wrapping films, bags and tubs. Tin-plated steel that meets ASTM specification A623, hot-dip and electrolytic galvanized steel meeting ASTM specification A525 and A879 respectively, and galvanized wire meeting specification A641 or A777 shall be considered as a single package component. The term shall not include a ceramic cup which incidentally serves as a package for another product at the time of sale where said cup’s primary purpose and value is as a cup rather than a package for another product.

“Packaging component.” Any individual assembled part of a package such as, but not limited to, any interior or exterior blocking, bracing, cushioning,

weatherproofing, exterior strapping, coatings, closures, inks, labels, dye, pigments, adhesives, stabilizers or any other additive.

CHAPTER 3 REGULATION OF TOXIC PACKAGING

Section 301. Toxic packaging prohibited.

(a) Sale of package or component.—As soon as feasible but not later than two years from the effective date of this act, no package or packaging component shall be offered for sale or for promotional purposes by its manufacturer or distributor in this Commonwealth which includes, in the package itself or in any packaging component, inks, dyes, pigments, adhesives, stabilizers or any other additives containing any lead, cadmium, mercury or hexavalent chromium which has been intentionally introduced as an element during manufacturing or distribution, as opposed to the incidental presence of any of these elements.

(b) Sale of product.—As soon as feasible but not later than two years from the effective date of this act, no product shall be offered for sale or for promotional purposes by its manufacturer or distributor in this Commonwealth in a package which includes, in the package itself or in any of its packaging components, inks, dyes, pigments, adhesives, stabilizers or any other additives containing any lead, cadmium, mercury or hexavalent chromium which has been intentionally introduced as an element during manufacturing or distribution, as opposed to the incidental presence of any of these elements.

(c) Steel strapping.—For the purposes of this section, the use of lead in the process of manufacturing steel strapping shall not be considered intentional introduction.

(d) Schedule of limit on concentration levels.—The sum of concentration levels of lead, cadmium, mercury and hexavalent chromium present in any package or packaging component shall not exceed the following:

- (1) Six hundred parts per million by weight (0.06%) effective two years after adoption of this act.
- (2) Two hundred fifty parts per million by weight (0.025%) effective three years after adoption of this act.
- (3) One hundred parts per million by weight (0.01%) four years after adoption of this act.

Section 302. Exemptions.

All packages and packaging components shall be subject to this act except the following:

- (1) Those packages or package components with a code indicating date of manufacture that were manufactured prior to the effective date of this act or any alcoholic beverage bottled before the effective date of this act.
- (2) Those packages or packaging components to which lead, cadmium, mercury or hexavalent chromium have been added in the manufacturing, forming, printing or distribution process in order to comply with health or

safety requirements of Federal law or for which there is no feasible alternative, provided that the manufacturer of a package or packaging component must petition the department for any exemption under this paragraph for a particular package or packaging component based upon either criterion. The department may grant a two-year exemption if warranted by the circumstances. This exemption may, upon meeting either criterion of this paragraph, be renewed for two years. For purposes of this paragraph, a use for which there is no feasible alternative is one in which the regulated substance is essential to the protection, safe handling or function of the package's contents.

(3) Packages and packing components that would not exceed the maximum contaminant levels set forth in section 301(d) but for the addition of postconsumer materials. This paragraph shall expire five years after the effective date of this act.

(4) For two years from the effective date of this act, any glass or ceramic package that is recyclable, refillable or reuseable that, as a unit, meets all current United States Food and Drug Administration guidelines or regulations applicable to a food contact area relating to limits on potentially harmful substances contained in the glazing, pigment, glass or ceramic material used to make the package.

Section 303. Certificate of compliance.

(a) Issuance.—As soon as feasible but not later than two years after the effective date of this act, a certificate of compliance stating that a package or packaging component is in compliance with the requirements of this act shall be furnished by its manufacturer or supplier to its purchaser, provided, however, where compliance is achieved under an exemption provided in section 302(2) or (3), the certificate shall state the specific basis upon which the exemption is claimed. The certificate of compliance shall be signed by an authorized official of the manufacturing or supplying company. The purchaser shall retain the certificate of compliance for as long as the package or packaging component is in use by the purchaser to package products. A manufacturer of packaging or packaging components may issue one certificate of compliance to each customer covering every package or packaging component sold to that customer. A copy of the certificate of compliance shall be kept on file by the manufacturer or supplier of the package or packaging component. Certificates of compliance or copies thereof shall be furnished to the department upon its request and to members of the public.

(b) Subsequent changes.—If the manufacturer or supplier of the package or packaging component reformulates or creates a new package or packaging component, the manufacturer or supplier shall provide an amended or new certificate of compliance for the reformulated or new package or packaging component. The requirement to provide an amended certificate will not be triggered by changes in size, shape and label copy unless such changes affect compliance hereunder.

CHAPTER 5 INVESTIGATORY POWERS

Section 501. Right to enter and inspect.

The department shall have the right to enter the premises of a package manufacturer or product manufacturer at which packages or packaging components are manufactured or stored in order to determine compliance with the provisions of this act or any rule or regulation adopted hereunder.

CHAPTER 7 ENFORCEMENT

Section 701. Unlawful conduct.

It shall be unlawful for any person to:

- (1) Violate any provision of this act.
- (2) Tender for sale to a wholesaler or retailer any package, packaging component or packaged product in violation of this act.
- (3) Furnish a certificate under section 303 when the package or packaging component does not comply with section 301.

Section 702. Enforcement orders.

(a) Issuance.—The department may issue such orders to persons as it deems necessary to aid in the enforcement of this act. The power of the department to issue an order under this act is in addition to any other remedy which may be afforded to the department under this act or any other act.

(b) Compliance.—It shall be the duty of any person to proceed diligently to comply with any order issued under subsection (a). If the person fails to proceed diligently or fails to comply with the order within the time, if any, as may be specified, the person shall be guilty of contempt and shall be punished by the court in an appropriate manner, and, for this purpose, application may be made by the department to the Commonwealth Court, which is hereby granted jurisdiction.

Section 703. Restraining violations.

(a) Injunctions.—In addition to any other remedies available to the department, the department may institute a suit in equity in the name of the Commonwealth where unlawful conduct exists for an injunction to restrain a violation of this act or any order issued pursuant thereto. The Commonwealth shall not be required to furnish bond or other security in connection with such proceedings. In addition to an injunction, the court, in the equity proceedings, may levy civil penalties as specified in section 704.

(b) Jurisdiction.—In addition to any other remedies provided for in this act, upon relation of any district attorney of any county affected or upon relation of the solicitor of any county or municipality affected, an action in equity may be brought in a court of competent jurisdiction for an injunction to restrain any and all violations of this act or the regulations promulgated pursuant thereto.

(c) **Concurrent remedies.**—The penalties and remedies prescribed by this act shall be deemed concurrent, and the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy hereunder, at law or in equity.

(d) **Venue.**—Actions instituted under this section may be filed in the appropriate court of common pleas or in the Commonwealth Court, which courts are hereby granted jurisdiction to hear these actions.

Section 704. Civil penalties.

(a) **Assessment.**—In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act or any order of the department issued under this act, the department may assess a civil penalty upon a person for such violation. In determining the amount of the penalty, the department shall consider the willfulness of the violation, savings resulting to the person in consequence of the violation, deterrence of future violations and other relevant factors.

(b) **Escrow.**—When the department assesses a civil penalty, it shall inform the person of the amount of the penalty. The person charged with the penalty shall then have 30 days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, either to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or with a bank in this Commonwealth or to post an appeal bond in the amount of the penalty. The bond must be executed by a surety licensed to do business in this Commonwealth and must be satisfactory to the department. If, through administrative or judicial review of the proposed penalty, it is determined that no violation occurred or that the amount of the penalty shall be reduced, the department shall, within 30 days, remit the appropriate amount to the person with any interest accumulated by the escrow deposit. Failure to forward money or the appeal bond to the department within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(c) **Amount.**—The maximum civil penalty which may be assessed under this section shall be \$10,000 per violation. Each violation of any provision of this act or any order issued under this act shall constitute a separate offense under this section.

(d) **Period of limitation.**—Action under this section must be brought within five years of the alleged violation.

Section 705. Criminal penalties.

(a) **Summary offense.**—Any person who violates any provision of this act or any order issued hereunder shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of not less than \$100 and not more than \$1,000 and costs and, in default of the payment of such fine and costs, to undergo imprisonment for not more than 30 days.

(b) **Misdemeanor.**—Any person who violates any provision of this act or any order issued under this act commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of not less than \$1,000

but not more than \$10,000 per day for each violation or to imprisonment for a period of not more than one year, or both.

(c) Second or subsequent offense.—Any person who, within two years after a conviction of a misdemeanor for any violation of this act, violates any provision of this act or any order issued under this act commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not less than \$2,500 nor more than \$25,000 for each violation or to imprisonment for a period of not more than two years, or both.

(d) Violations to be separate offense.—Each violation of any provision of this act or any order issued under this act shall constitute a separate offense under subsections (a), (b) and (c).

Section 706. Remedies of citizens.

(a) Authority to bring civil action.—Except as provided in subsection (c), any aggrieved person may commence a civil action on his own behalf against any person who is alleged to be in violation of this act.

(b) Jurisdiction.—The Environmental Hearing Board is given jurisdiction over citizen suit actions brought under this section against the department. Actions against any other persons under this section may be taken in a court of competent jurisdiction. The jurisdiction is in addition to any rights of action now or hereafter existing in equity or under the common law or statutory law.

(c) Notice.—No action may be commenced under this section prior to 60 days after the plaintiff has given notice of the violation to the secretary and to any alleged violator of this act or of a regulation or order of the department under this act which has allegedly been violated, nor shall any action be commenced under this section if the secretary has commenced and is diligently prosecuting an administrative action against an alleged violator before the Environmental Hearing Board or a civil or criminal action in a court of the United States or a state to require compliance with this act.

(d) Award of costs.—The Environmental Hearing Board or a court of competent jurisdiction, in issuing any final order in any action brought under subsection (a), may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the board or court determines the award is appropriate.

Section 707. Concurrent remedies.

The penalties and remedies prescribed by this act shall be deemed concurrent, and the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy hereunder, at law or in equity.

CHAPTER 9 MISCELLANEOUS PROVISIONS

Section 901. Removal of additional toxic substances.

(a) Regulations.—The department may propose to the Environmental Quality Board a regulation to remove additional toxic substances contained

in packages or packaging components that it determines will pose a significant threat to public health or environment based on scientific and medical evidence and a risk assessment it performs. These additional substances may include, but need not be limited to, substances that are found to be carcinogenic or mutagenic.

(b) Risk assessment.—The risk assessment developed by the department must include a determination of whether the substance presents or will present an unreasonable risk to public health or the environment, utilizing a nationally recognized risk assessment protocol. This protocol should take into account the magnitude and severity of the harm as weighed against the benefits of the substance or mixture to society as well as the availability of substitutes for the substance or mixture and other adverse effects which such proposed action may have on society.

(c) Consultations and hearings.—Prior to recommending any additional toxic substances, the department shall consult with CONEG, the American Society for Testing and Materials, the United States Environmental Protection Agency and the Northeast Recycling Council of the Council of State Governments on the recommendation. The department shall also hold at least one public hearing on its recommendation prior to proposing a regulation to the Environmental Quality Board.

Section 902. State review.

The department shall, in consultation with the Source Reduction Council of the Council of Northeastern Governors, review the effectiveness of this act no later than 36 months after its adoption and shall provide a report based upon that review to the Governor and the General Assembly. The report may contain recommendations to add other toxic substances contained in packaging to the list set forth in this act in order to further reduce the toxicity of packaging waste and shall contain a recommendation whether to continue the recycling exemption as it is provided for in section 302(3) and the exemption under section 302(2) and a description of the nature of the substitutes used in lieu of lead, mercury, cadmium and hexavalent chromium.

Section 903. Public access.

(a) Certificate of compliance.—Any request from a member of the public for any certificate of compliance from the manufacturer or supplier of a package or packaging component shall be:

(1) Made in writing with a copy provided to the department.

(2) Made specific as to package or packaging component information requested.

(3) Responded to by the manufacturer or supplier within 60 days.

(b) Confidential information.—The department may, upon request, designate records, reports or information as confidential when the person providing the information demonstrates that the information containing the trade secrets, processes, operations, style of work or apparatus of a person is confidential business information. When submitting information to the department under this act, a person shall designate the information which the

person believes is confidential or shall submit the information separately from other information being submitted.

Section 904. Repeals.

All acts and parts of acts are repealed insofar as they are inconsistent with this act.

Section 905. Effective date.

This act shall take effect in 60 days.

APPROVED—The 7th day of December, A.D. 1994.

ROBERT P. CASEY