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May 8, 2024

Zoe Heller, Director
Department of Resources, Recycling and Recovery
1001 I Street, Sacramento CA 95814
Via Portal for Public Comments

Re: Public Comments on Proposed Regulation ("Draft Regulations")
Released March 8, 2024 for the Plastic Pollution Prevention
and Packaging Producer Responsibility Act ("Act")

Dear Director Heller:

Thank you for this opportunity to submit comments on the Draft Regulations. EPR Group Consulting Inc is a multidisciplinary consulting firm dedicated to supporting companies seeking to comply with the EPR packaging, paper, and food service ware programs in California, Oregon, and Colorado. We submit these comments to the Department of Resources, Recycling and Recovery ("Department") on our own behalf – primarily for the purpose of requesting clarification on a few issues but also including some proposals that we believe would benefit the overall program.

COMMENTS

1. **Definition of "In the State"**

Relevant Section: §18980.1(a)(18)

Comment: We suggest eliminating the proposed definition of "in the state" in the Draft Regulations and replacing it with another definition.

Discussion: Under §18980.1(a)(18), a definition of "in the state" would apply to Public Resources Code ("PRC") §42041(w)(1) under which "producer" obligations depends on whether a company is "in the state" or not. Under the Draft Regulations, "in the state" is defined by, among other things, reference to §410.10 of the California Code of Civil Procedure – the state's long-arm statute under which courts can assert personal jurisdiction over defendants who are out-of-state based on the defendant's connections to the state.

According to the Initial Statement of Reasons ("ISOR"), this definition can be interpreted by reference to legal concepts concerning how a person's location relates to the reach of law. ISOR at 10. While there are situations where it is commonly understood that courts have personal jurisdiction over companies located or registered out-of-state, there are also situations – relevant to the Act – where personal jurisdiction may be disputed and/or the limits of personal jurisdiction is not clear with a court ruling. For example, there are recent cases addressing personal jurisdiction in the context of on-line sales. See, e.g., *Briskin v. Shopify, Inc.*, 2022 WL 1427324 (N.D. Cal. May 5, 2022).

We submit that the Department should replace the definition of "in the state" with one that provides greater clarity so that producers clearly understand their obligations under the Act.

2. **Definition of "Person"**

Relevant Section: §18980.1(a)(23)

Comment: Given the definition of "person," we seek clarity about whether an out-of-state company would be considered in-state when its branch operations or subsidiary would qualify as an in-state producer.

Discussion: Under §18980.1(a)(23), for purposes of whether an entity is considered "in-the-state" under PRC §42041(w)(definition of producer), the definition of person includes any entity who owns a controlling interest of the person. The ISOR explains that a subsidiary may have limited business activities but own the trademark that is used by a parent company in the state – and that in such a situation, the two entities will be considered a single entity. ISOR at 11.

We seek clarity within the regulations on the following scenario:

- Where a branch operation or subsidiary is located in California and is the exclusive licensee of a brand under which the products are sold but is owned by a company registered *out-of-state* – is the company considered in-state or out-of-state under the definition of "person" in §18980.1(a)(23)?

3. **Producer Responsibility for Exclusive Licensees**

Relevant Section: §18980.1(a)(27)(B)(3)(ii)

Comment: We request that the Department clarify the conditions under which an out-of-state exclusive licensee is responsible as a producer.

Discussion: Section 42041(w)(3) of the Act provides that where there are no persons that satisfy the definitions of PRC §42041(w)(1) or PRC §42041(w)(2) then the producer is the person who

sells, offers for sale, or distributes the product/covered material. Thus, under PRC §42041(w)(3), wholesalers, retailers, and distributors could all be responsible for the same covered materials.

Section 18980.1(a)(27)(B) allocates responsibility among producers such that only a single producer is responsible for the same covered materials. Under this section, responsibility is determined at the point of sale and a person is only responsible with respect to covered materials where there was otherwise not a producer before that time. Our comment concerns the second example provided in the Draft Regulations to illustrate this concept.

First, §18980.1(a)(27)(B)(i) provides that where the brand owner is in the state (a producer under PRC §42041(w)(2)), the brand owner is the producer of all covered materials used by the product except for those materials added by the distributor, except where the brand owner was already the producer prior to receipt of the distributor. Second, under §18980(a)(27)(B)(ii), where the brand owner is *not* in the state, the distributor is the producer of all covered materials, including covered materials added by the distributor.

In the §18980(a)(27)(B)(ii) example, if the brand owner is not in the state, but is an out-of-state exclusive licensee, our understanding is that under §42041(w)(2) the out-of-state licensee would be responsible for the covered materials just as the brand owner in the §18980(a)(27)(B)(i) example. The example, however, could be construed to mean that unless the brand owner is in the state, the only other entity that satisfies the definition of a producer would be the distributor.

We suggest that the Department clarify the example in §18980(a)(27)(B)(ii) to explain what the ramifications would be under PRC §42041(w)(2) where the brand owner is not in the state, but there is an out-of-state exclusive licensee .

4. Contractual Allocation of Producer Responsibilities

Relevant Section: §18980.1(a)(27)(B)

Comment: We request that the Department consider adopting a regulation that would enable producers to contract among themselves for a single producer to assume legal responsibility for certain covered materials under the Act.

Discussion: As noted above, under the definition of "producers" in the Act, there can be multiple parties responsible for the same covered materials. The Department has attempted to allocate these responsibilities under §18980.1(a)(27)(B). We suggest that the Department also allow producers to allocate these responsibilities and liabilities among themselves on a contractual basis.

In many cases, producers are going to be passing on these costs to others in the supply chain anyway – and notwithstanding who is the responsible producer under the regulations, there may be another producer who is better able to comply with the Act (e.g., better access to sales information). In other cases, there may be some questions or ambiguities, even under

§18980.1(a)(27)(B), about how producer responsibility is allocated; provided parties can at least contract among themselves for responsibility, some disputes may be avoided or resolved.

There is precedent under other environmental laws for shifting legal responsibility for compliance by contract (and doing so in the implementing regulations). For example, under the Safe Drinking Water and Toxic Enforcement Act (commonly known as "Proposition 65"), vendors and manufacturers who are both responsible parties under Proposition 65 for making warnings may contract between themselves to legally shift responsibilty for warning requirements under Proposition 65. *See* 27 Cal. Code. Regs. §25600.2(b)-(c). Under Proposition 65, the regulations provide that when a contract shifts compliance responsibility from one party to another, the party who is no longer responsible under the contract for compliance is also relieved of legal responsibility for compliance under the law.

We request that the Department adopt a rule that allows any producers responsible for the same covered materials, or any producer with affiliated companies, to contract with each other to shift responsibility for compliance to another producer or affiliated company – and to provide that such contracts serve to shift legal responsibilities for compliance under the Act.

5. Compliance Date for Registration

Relevant Section: §18980.10(a) and §18980.10(g).

Comment: We request clarification about the timeline for registration with the Department or the PRO.

Discussion: Section 18980.10(a) requires that all producers register electronically with the Department with specified contact information. In addition, §18980.10(a)(2) provides the PRO shall register on behalf of each of it participating producers (except those who choose to be reporting entities). As explained in the ISOR, consistent with PRC §42051, the PRO may register participating producers with the Department on their behalf.

The Draft Regulations do not provide any timeline for the required registration – nor is it possible for producers to register with the Department at this time because the Department has not yet established an electronic method to do so. The PRO, Circular Action Alliance ("CAA"), however, has already established an electronic registry for registration – and according to the CAA webpage, CAA expects producers to register with CAA by July 1, 2024.

We request that the Department identify a timeline for compliance in the regulations with the registration requirements so that producers understand their obligations under the Act and when these obligations arise.

Further, we request that the Department publicize this proposed timeline in advance of July 1, 2024 (whether in another version of the draft regulations or by other means) so that producers

have sufficient time and notice to evaluate their producer status before they are expected to register with the PRO.

6. Fee Assessments

Relevant Sections: §18980.6.7(a) and (b)

Comment: We suggest that the Department establish a process, or clarify the PRO's authority for establishing a process, under which participants who join the PRO before other producers, are not penalized for doing so by assuming a greater share of the fees assessed by the PRO.

Discussion: Under §18980.6.7 (a)(1) through (a)(5) of the Act, the PRO may assess substantial and significant fees against producers before the PRO Responsibility Plan ("Plan") is approved: the costs of implementing the Plan, operating costs of the PRO, costs of completing the needs assessment, and costs to cover the environmental mitigation requirements of PRC §42064 (i.e., $500 million per year).

Producers who join the PRO before others, particularly those who join before the Plan is approved, should have assurances that they will not assume disproportionate burdens relative to other participants who join later.

It may be the case that the Act conveys inherent authority upon the PRO to make such accommodations in the participation agreement between producers and the PRO. We suggest that the Department either affirm the PRO's authority to make such accomodations or identify a process in the rules (or possibly through other informal means) to assure the regulated community that such accommodations can and will be made.

7. Responsible End Markets as Applicable to Compost and Compostability

Relevant Section: §18980.4(a)(4)(B) and (b)(5)

Comment: We suggest that the Department clarify what significance the definition of a Responsible End Market ("REM") has for compostable materials.

Discussion: Sections 18980.4(a)(4)(B) and (b)(5) establish the requirements for compost and compostable REMs, including a 100% conversion standard. We submit that there could be greater clarity about whether compostable materials are subject to an REM requirement for purposes of PRC §42050(b) (which requires, by 2032, that all materials sold into California must be recyclable or eligible to be labeled compostable) – or whether the REM definitions for compostable products under §18980.4 only applies to the eco-modulated fees provisions (§18980.6.7, which requires higher bases fees for use of covered materials without REMs) and provisions for providing financial support to develop end markets (§18980.4.4) that meet the standards in §18980.4.

The definitions of "recycle" and "recycling" in the Act provide that there must be an REM, PRC §42041(aa)(3), but there is no definition for "compost" or "composting" in the Act. The Draft Regulations define "compost" without reference to an REM. §18980.1(7). The Draft Regulations, under §18980.3.3, also define products "eligible to be labeled compostable" without reference to any REM requirement but by reference to other applicable standards for composting.

We suggest that the Department clarify the purpose of the REM requirements as they apply to compost and compostable covered materials to avoid any confusion about this issue.

8. Exemptions for Certain Covered Materials

Relevant Section: §18980.2.3

Comment: We submit that the application process for exemptions for certain covered materials should also allow manufacturers of the same covered materials to apply for a general exemption applicable to all producers.

Discussion: The Act directs the Department to establish a process to identify covered materials that present unique challenges or health and safety concerns in complying with the Act – and further provides that the Department may then exempt such covered materials. PRC §§ 42060(a)(4), 42060(a)(3).

Under §18980.2.3, the process that the Department proposes is for producers to apply for an exemption for covered materials on a case-by-case basis and the Department will then evaluate and exempt the materials for each individual producer. The Act itself, however, does not limit the process to producers or to a case-by-case exemption.

We submit that this process should include manufacturers (whether a producer or a non-producer), who should be able to apply for an exemption and obtain a general exemption for use of the covered material applicable to all producers – subject to appropriate restrictions imposed by the Department on the scope of the exemption (e.g., limiting the exemption to specific uses of the covered material by producers).

Manufacturers may have better information about the nature and quality of the covered material and why an exemption is appropriate or necessary. Moreover, in some cases, the contents of the covered material may be proprietary and a manufacturer is the only appropriate party to submit an application for an exemption. In general, allowing manufacturers to submit the application for this process will be more efficient and less burdensome for both the regulated community and the Department than multiple applications from different producers for the same covered material.

We submit either a producer or manufacturer of a covered material should be able to apply for an exemption – and in the case of a manufacturer application, the exemption, if granted, would

apply on the same terms as the categorical exclusions under the Act as long as the exemption is effective (i.e., no obligations for producers).

CONCLUSION

We appreciate this opportunity to present comments on the Draft Regulations.

Best Regards,

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