



AmericanCoatings

ASSOCIATIONSM

December 11, 2023

Shannon Choquette
Agency of Natural Resources
Department of Environmental Conservation
One National Life Drive
Montpelier, VT 05620-3520

RE: ACA Comments on Vermont's Household Hazardous Waste (HHW) Extended Producer Responsibility (EPR) Guidance Documents

Dear Shannon Choquette,

The American Coatings Association (ACA) submits the following comments to the Vermont Department of Environmental Conservation (the Department) regarding Vermont's Extended Producer Responsibility Law for Household Hazardous Waste (the Law).

Introduction

ACA is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory, and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

ACA recognizes that Vermont has become the first state to adopt an extended producer responsibility (EPR) law that broadly addresses household hazardous waste (HHW). We sincerely appreciate the opportunity to provide comments on two draft guidance documents, the "Vermont Household Hazardous Waste EPR Covered Products" and the "Vermont Household Hazardous Waste EPR Law Summary and FAQ" put forth by the Department. Our comments are presented below for your consideration.

Clarification Regarding Covered Products

The following are ACA's comments regarding the "Vermont Household Hazardous Waste EPR Covered Products" guidance document.

- Marine, Auto, Field, Traffic, and Road Paints.

One of the product categories in the guidance document is "Marine, Auto, Field, Traffic, and Road paints." ACA would like to clarify two points about this category:

(1) Field paints are considered architectural paint and are therefore included in the PaintCare program.¹ The Law states that “covered household hazardous product” does not include “architectural paints as ... defined in Section 6672 of this title.”² (See Title 10 V.S.A. § 7181 (4)(B)(iv) and Title 10 V.S.A. § 6672). The approved Vermont Paint Stewardship Program Plan specifies that field paints are covered by the Vermont Paint Stewardship Program.³ Therefore, ACA requests that field paints be removed as a covered product.

(2) Traffic and road paints are not typically considered household products. While the statute does not define “consumer,” the statute does define “consumer product” as “any product that is regularly used or purchased to be used for personal, family, or household purposes.” (See Title 10 V.S.A. § 7181 (2)). Traffic and road paints would not fall under this definition of a “consumer product” since traffic and road paints are sold to municipalities for road construction and maintenance work. These are not activities performed by a household or family. Including traffic and road paints would seemingly broaden the original scope of this program to include products outside of the defined “consumer product.” ACA requests that the Department remove traffic and road paints as covered products since they do not meet the statutory definition of being used for “personal, family, or household purposes.”

- Gas Cylinders – Spray Foam Insulation Tanks.

Similar to traffic and road paints, gas cylinders used spray foam insulation tanks (up to 50 pounds water capacity) are not typically considered household products and are not “regularly used or purchased to be used for personal, family, or household purposes.” The overwhelming majority of gas cylinder spray foam insulation tanks are sold to and used by professional installers during new construction projects or renovations. Once installed, spray foam is considered permanently affixed and does not need to be replaced for the presumed life of the structure, thereby making regular purchasing unnecessary. ACA requests the Department remove spray foam insulation gas cylinders as covered products since these products do not meet the definition of being used “regularly... for personal, family, or household purposes.”

- Aerosol Coatings.

For the last several years, ACA has supported a legislative initiative to include aerosol coatings in the paint stewardship program in California. In 2023, ACA was successful in passing this amendment and is currently working to develop the end-of-life management program for aerosol coatings. The next step in California is for PaintCare to update its California program plan to add aerosol coatings to its program.

¹ PaintCare Inc., a non-profit 501(c)(3) organization, represents paint manufacturers to plan and operate paint stewardship programs in twelve jurisdictions in the U.S. that have enacted paint stewardship laws. ACA supported the passage of the nation’s first paint stewardship law in Oregon and established PaintCare in 2009.
<https://www.paintcare.org/our-story/>.

² Vermont PaintCare Stewardship Program Plan, which was originally approved by Vermont Agency of Natural Resources in March 2014, identifies participating manufacturers and brands covered by the PaintCare Program as well as information on the architectural paint products covered under this program. Field paints by various manufactures are listed within the Vermont PaintCare Stewardship Program Plan which can be found here at this website: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/<https://www.paintcare.org/wp-content/uploads/docs/vt-program-plan-030123.pdf>.

³ See Vermont Paint Stewardship Program Plan at <https://www.paintcare.org/wp-content/uploads/docs/vt-program-plan-073123.pdf>.

ACA and PaintCare intend to expand the other PaintCare programs across the country, including in Vermont, to add aerosol coatings to the PaintCare program. This expansion will require further discussions with the Agency. Following this recent development in California, ACA and PaintCare are eager to discuss with the Department about adding aerosol coatings to the Vermont PaintCare program. ACA and PaintCare are hopeful that allowing aerosol coatings to be disposed of through PaintCare would alleviate the burden on Vermont's municipal waste streams.

Clarification on FAQs

The following are ACA's comments regarding the "Vermont Household Hazardous Waste EPR Law Summary and FAQ" guidance document.

- The first question's answer using the phrase "regardless of the generator."

In the FAQ guidance document, the answer to the first question states, "A 'covered household hazardous product' means a consumer product offered for retail sale in Vermont that is contained in its original receptacle. A product is covered if the product... is defined as hazardous waste under Vermont Hazardous Waste Management Regulations...*regardless of the generator.*" (*emphasis added*). The phrase "regardless of generator" is rather ambiguous, and it is unclear if this term is used to refer to the manufacturer (that generates the product) or the end user (that generates the waste). This ambiguity could potentially broaden the original intent of the statute by capturing products that do not meet the statutory definitions. ACA is asking for clarification on the phrase "regardless of the generator" used within the FAQ guidance document.

To illustrate this further, the Vermont HHW EPR statute does not define consumer or household, but rather, it defines "consumer product" as "any product that is regularly used or purchased to be used for personal, family, or household purposes." (See 10 V.S.A. § 7181 (2)). Furthermore, the statute defines "covered household hazardous product" as a "consumer product offered for retail sale..." (See 10 V.S.A. § 7181 (4)(A)).

On the Department's stakeholder meeting call that occurred on November 29, 2023, the Department elaborated that any covered product purchased with the original intent of the product to be used for personal, household, or family use would be considered as a covered consumer product. This reasoning aligns with the statutory definition of a "consumer product offered for retail sale" and would cover products regardless of the end user. An example of this would be a contractor seeking to purchase a cleaning product at a retail facility to be used in a business or industrial setting; that product would likely be considered a "covered consumer product" as it was offered for retail sale as is regularly used for household purposes.

What is more ambiguous is whether products purchased and used in a business or industrial setting that are not "regularly used or purchased for...personal, family, or household purposes," would be considered "covered consumer product," based on the phrase "regardless of generator" in the guidance document. One example of this type of scenario has been mentioned previously in this letter, which is regarding traffic and road paints. These products are generally only sold to municipalities for road construction and maintenance work and not for personal or household use. ACA is seeking clarification on the phrase "regardless of the generator" used in the guidance document and the scope of the statutory intent of the HHW EPR Law.

- Orphan covered product.

The FAQ addresses "Orphan covered product" and provides more insight into how orphan waste would be treated. However, this characterization seems to penalize those manufacturers that are being proactive and

responsible by participating in a stewardship organization by having those manufactures cover the costs for unresponsive manufacturers who will be free riders under this system. ACA seeks clarification on how the Department will enforce the provisions of orphan covered products, particularly for online sales. If there is no mechanism to enforce this, then the participating manufacturers are then likely to be held responsible indefinitely for free riders that are selling what should be covered products into Vermont. ACA encourages the Vermont Department of Environmental Conservation to consider alternative measures in addressing “orphan covered products” and asks for further clarification on enforcing the provisions of orphan covered products to minimize free ridership.

- Municipal costs.

In the response to Question 12 on the FAQ page, it states that “It is estimated that the Vermont HHW EPR law will cover less than 20% of the material--by weight—that HHW programs collect.” Furthermore, the statute states that “Collections costs include facility costs, equipment costs, labor, supplies, maintenance, events costs, and event contractor costs, including collection event set-up fees, environmental service fees, insurance fees, and shipping containers and materials.” (See Title 10 V.S.A. § 7183 (2)). On the stakeholder meeting call that occurred on November 29, 2023, the Department confirmed that these costs will be proportional to the amount of materials managed in related to this Law (e.g., if the materials represent 20% of the materials managed, the collection costs should not exceed 20%). ACA seeks further clarification on how these costs will be calculated.

Additionally, at the November 29 meeting, ACA asked if the Department could gather information on the municipalities costs that included expenses by category and consumer product type for the household hazardous waste; then share that information with stakeholders so that manufacturers and prospective stewardship organizations could better understand, plan for, and budget for this type of program. The Department indicated that this was a good suggestion, and ACA would like further clarification that this will occur.

General Areas for Clarification

The following are ACA’s comments on general aspects of VT’s HHW EPR Law where we are seeking further clarification that were not addressed in either of the two guidance documents.

- Public education and outreach.

The statute, under 10 V.S.A. § 7183 (4)(D), requires that the collection plan include a public education and outreach program that includes “source reduction information for consumers to reduce leftover covered household products.” ACA is asking the Department to provide clarification on what the expectations are regarding source reduction messaging.

- Stewardship organization and unreasonable barriers for participation.

The statute, under 10 V.S.A § 7184 (b)(2), states that to qualify as a stewardship organization, “an organization shall not create unreasonable barriers for participation...” ACA seeks more clarification on what the Department would deem as “unreasonable” in this regard.

- Manufacturer’s recourse.

ACA would like clarification on what avenues a manufacturer has with regards to recourse if the stewardship organization does not abide by the prescribed requirements set forth in the statute.

- Collection plan audit.

The statute, under 10 V.S.A. § 7185 (a)(2), states that the annual report must contain, “the volume or weight by hazard category, as defined by the Secretary...” ACA is seeking clarification on whether the Department will solicit input from stakeholders or use standard hazardous waste management hazard categories for this information. Furthermore, ACA seeks clarification on whether flexibility will be incorporated into this reporting requirement to account for future changes in material disposition. Also, the statute, under 10 V.S.A. § 7185 (4), states that “the weigh or volume by hazard category of covered household hazardous products sold in the State in the previous calendar year by a manufacturer participating in a stewardship organization’s collection plan.” ACA would like clarification on whether the Department would want this data to be aggregated or if the Department expects more specificity in the reporting and what that would entail.

Additionally, in the statute, under 10 V.S.A. § 7185 (b), it states that,

On or before September 1, 2030, and every five years thereafter, a stewardship organization of manufacturers of covered household hazardous products shall hire an independent third party to audit the collection plan and the plan’s operation. The auditor shall examine the effectiveness of the program in collecting and disposing of covered household hazardous products. The auditor shall examine the cost-effectiveness of the program and compare it to that of collection programs for covered household hazardous products in other jurisdictions. The auditor shall examine the effectiveness of the plan in satisfying the requirement of this chapter that all Vermonters have convenient and reasonable access to collection facilities or collection events. The auditor shall make recommendations to the Secretary on ways to increase the program’s efficacy and cost-effectiveness.

PaintCare has experienced problematic implementation and varying interpretations across different states when the statutory language was not specific. In Connecticut, which was the first PaintCare state to require an audit of the proposed PaintCare fees, the state agency initially required PaintCare to use an environmental consulting firm to conduct the audit; however, in Vermont, the Department expected a financial auditor to conduct the audit. ACA and PaintCare would like more information regarding what an auditor means.

- Announcing a stewardship organization and providing adequate time to prepare the collection plan.

The Vermont statute, under 10 V.S.A. § 7182 (b)(1), requires the stewardship organization to file a registration form on or before January 1, 2025. Additionally, July 1, 2025, is the date for the stewardship organization to submit one collection plan to the Secretary. (See 10 V.S.A. § 7183 (a)). However, the statute and the guidance documents do not provide any information on how and when Vermont will notify the stewardship organization or the public on its selection. Furthermore, the Department does not provide any information on how much time the Department will take to review the registrations and notify the selected stewardship organization.

The selected stewardship organization would need time to prepare a thorough collection plan, yet the timing is unclear and left to be somewhere in the range of less than six months. Regardless, even if the full six months were available for the selected stewardship organization to develop a collection plan, experience in

implementing the PaintCare program in 11 jurisdictions has shown that that is far too little time. The expanded reach of Vermont's HHW EPR Law requires the stewardship organization to consider thousands of products from the hundreds (if not thousands) of manufacturers. This information and list of products and manufacturers will need to be developed, reviewed, and categorized, (along with other assessment activities) for inclusion in the program's collection plan. That is merely one component of the collection plan. ACA and PaintCare would like to suggest that the agency consider a minimum time of 12 months and allow for up to 18 months for the stewardship organization to develop a program collection plan that adequately meets the requirement of Vermont's HHW EPR Law.

- Fair notice of regulatory activity.

Government agencies are required to provide fair notice and due process whenever regulatory activities are to take place. ACA is concerned on how the agency intends to regulate this activity without giving the public fair notice of implementation, enforcement, and any future changes and amendments. There are no specific procedures in place to notify the regulated community when changes were to occur. Any changes to these guidance documents could impact the compliance strategies that regulated entities have developed. Because of the lack of due process and transparency on the procedural process for any future changes, ACA is seeking clarification on whether regulations will be forthcoming or whether procedural details on giving fair notice to the public will be provided.

Conclusion

In conclusion, ACA appreciates the opportunity to provide comments on this issue, and we look forward to working cooperatively with the Vermont Department of Environmental Conservation to assist in implementing its HHW EPR Law. Please do not hesitate to contact us if you have any questions or require additional clarification.

Sincerely,



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