



AmericanCoatings

ASSOCIATIONSM

Darla Arians
Producer Responsibility Lead
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, CO 80246
Email: eprcomments@state.co.us

RE: ACA's Recommendations to the Proposed Producer Responsibility Regulations under the Solid Waste and Materials Management Program, Sections 1 and 18.

Dear Darla Arians:

The American Coatings Association (ACA)¹ submits the following comments to the Colorado Department of Public Health and Environment (CDPHE) with regards to the proposed regulations for the Extended Producer Responsibility (EPR) program under the Solid Waste and Materials Management Program, which at this time were for the released Sections 1 and 18 of the regulations pertaining to Solid Waste Sites and Facilities. The ACA represents approximately 96% of the paint and coatings products manufactured in the United States, including architectural, industrial and specialty coatings.

The \$29.5 Billion paint and coatings industry manufactures a wide variety of coatings products for consumers, businesses, and manufacturing establishments alike. With the exception of powder coatings, most paint and coatings products are in liquid form and utilize containers in a range of sizes. The sizes range from small containers of less than a liter or pint to large containers that hold several hundred gallons. These containers are typically either metal, plastic, or a hybrid of metal and plastic. With the increasing number of packaging laws across the country, ACA members will be required to evaluate the packaging being used for paint and coatings products to ensure compliance with these laws. Consequently, ACA has a significant interest in assisting our industry in compliance with any regulatory requirements.

Currently, Maine, California, Colorado and Oregon have passed extended producer responsibility (EPR) laws for packaging, with Colorado having passed its Producer Responsibility Program for Statewide Recycling in 2022. However, with individual states

¹ 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.

passing their own version of the law on this means that the differences within each of these states' EPR laws will be extremely problematic and burdensome for industry. Developing compliance plans for companies that manufacture products for a coast-to-coast customer base will be extremely challenging. Furthermore, the coatings industry routinely conducts interstate transactions where their products are shipped across state lines, which thereby requires these companies to comply with applicable federal and state laws. It can be extremely difficult to track product shipments on a state-by-state basis.

To promote compliance to these EPR laws across the paint and coatings industry, ACA recommends that Colorado consider the following recommendations and points of clarification to help align with other existing EPR laws across the country and to support the implementation of Colorado's EPR program.

- 1. Exempt plastic packaging materials that comply with other federal regulations, such as Title 49 of the Code of Federal Regulations (CFR) Part 178 regarding the transportation of dangerous goods or hazardous materials and Title 29 CFR 1910.1200 regarding hazardous or flammable products.**

Currently, the only state to provide these exemptions for appropriate packaging under 49 CFR and 29 CFR is California.² Under 49 CFR §199.9, it states that "...this part preempts any State or local law, rule, regulation, or order to the extent that: (1) Compliance with both the State or local requirement..." Based on the preemption clause within 49 CFR, the federal regulation would prevail when compliance to both the state requirement and the federal requirements is not possible. In addition, an exemption for packaging used to contain hazardous or flammable products regulated is found under 29 CFR Part 1910.

The proposed Colorado regulations does not address plastic packaging used for hazardous, dangerous or flammable goods that complies with either 49 CFR or 29 CFR. Certain paint and coatings products, such as paint thinners and strippers, are deemed flammable or hazardous and must be handled and packaged accordingly to ensure safety for those handling the products and while the product is in transit. Additionally, the coatings industry is a nation-wide industry that transports products into and across each state and would be required to meet federal transportation regulations.

Providing exemptions to these two federal statutes would not only align with another state's EPR laws but also help promote implementation for these paints and coatings products as they are sold across this country. ACA recommends that the CDPHE consider adding these two exemptions to the federal regulations to ensure proper packaging, handling and transport for products that are required to meet these federal regulations.

- 2. Modify the producer registration deadline to July 1, 2025.**

² California's Act in Section 42021 (e)(2)(C).

The Colorado statute, HB 22-1355, was signed into law in June 2022. Within that statute, the date for the EPR program implementation and the date by which producers “shall not sell or distribute any products that use covered materials in the state unless the producer is participation in the program...” was stated as July 1, 2025. See HB 22-1355, Sec. 25-17-708. However, under Sec. 18.2.5 Producer Requirements of the proposed regulations, it states a date of July 1, 2024, for producers to notify the department unless the producer has submitted an individual program plan.

The statutory date of July 1, 2025, effectively gave the public notice of when producers would need to comply by. Setting forth an earlier date fails to give the public, especially those within the regulated community, fair and adequate notice of this requirement. Additionally, this is now April 2024, and the regulations are not yet finalized. Having a required deadline that is a mere two months away without having finalized the regulations is impractical and unattainable. The regulations would likely be finalized after July 1, 2024, which means that many of those within the regulated community would already be in violation. ACA recommends that the CDPHE consider modifying the producer registration date to July 1, 2025, whether the producer filed an individual program plan or not.

3. Clarify how statutorily exempt products are recognized as such.

Under Sec. 18.3.2(A) Exempt Materials – Statutorily-Exempt Materials of the proposed regulations, it lists the statutorily exempt materials because the list of materials does not fall within the definition of covered materials specified by section 703(13)(b) of the act that was passed. However, if a producer has products that would fall under one of the prescribed statutorily exempt products listed within this category, but those products are mistakenly mischaracterized and treated as a covered product, it is unclear how a producer would rectify the situation. Would a producer notify the producer responsibility organization of this mischaracterization or would the producer directly notify CDPHE of this mischaracterization. Furthermore, it is unclear what type of due process a producer is owed should a product or material be characterized as covered when it should be exempt and what timeframes the CDPHE would need to abide by to respond to this type of claim. ACA requests that the CDPHE provide clarification on how statutorily exempt products are properly recognized and what due process requirements the CDPHE would need to abide by.

4. Clarify the procedure on how to seek an exemption from by the Commissioner.

Under Sec. 18.3.2(B) Exempt Materials - Commission-Exempt Covered Materials of the proposed regulations, it states that the “Commission may exempt any other material that, based on an analysis by the PRO of the operational and financial impacts of the proposed changes and after consultation with the advisory board, it determines by rule to not be a covered material.” While this section provides a useful avenue for any unforeseen materials to be exempt from the program and how the CDPHE plans to conduct the review process, it is unclear who would initiate this process and how to pursue this process. Furthermore, it is also unclear what timeframes the CDHPE would be held to during this review process. ACA

requests that the CDPHE clarify how a producer would initiate this process and what due process requirements the CDPHE would need to abide by.

Conclusion

ACA appreciates the opportunity to provide comments on this issue and look forward to working cooperatively with the CDPHE on this matter.

Sincerely,

/s/

Heidi K. McAuliffe
Vice President, Government Affairs

/s/

Suzanne Chang
Counsel, Government Affairs

Sent via email