

RIGID PLASTIC PACKAGING CONTAINERS: STATE REGULATIONS

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I. INTRODUCTION

A number of states have expressed considerable concern with low recycling rates and the amount of plastic being landfilled. In an effort to alleviate these concerns, three states, Oregon, Wisconsin and California, have adopted rigid plastic packaging container (RPPC) minimum recycled content laws, the ultimate goal of which is to promote recycling and reduce the solid waste stream. Generally, these laws mandate that RPPCs consist of a certain percentage of recycled material, but both Oregon and California allow companies to comply by alternative means. The three state laws are discussed below.

II. WISCONSIN

Wisconsin has the most basic RPPC law. It can be found at Wisconsin Statutes Annotated, §100.297.

A. **Plastic Containers:** The Wisconsin law applies to an: "individual, separate, rigid plastic bottle, can, jar or carton, except for a blister pack, that is originally used to contain a product that is the subject of a retail sale." Therefore, manufacturers and distributors who sell containers that will be filled at a later time are subject to the law.

1. ***Size:*** The law applies to RPPCs that are 8 oz. or larger.
2. ***Retail Sale:*** "Any transfer for valuable consideration of title to tangible personal property for consumption or use that is made in the ordinary course of trade or in the usual prosecution of the retailer's business."
3. ***Exceptions:*** Food, beverage, drug, cosmetic or medical device containers are exempt if regulated under the Federal Food, Drug & Cosmetic Act (FFDCA). If, however, the FDA has approved the use of the specific recycled content in the container, the exemption is removed.

B. **Recycled Content Requirement:** Plastic containers are required to consist of at least 10% recycled or remanufactured material, by weight.

1. ***Remanufactured Material:*** Wisconsin allows remanufactured material to be included in the 10% calculation. Therefore, pre-consumer scrap, or material that is "wasted" during the manufacturing process can be included.

- C. **Enforcement:** Wisconsin has done very little enforcement of its RPPC law.
- D. **Recent Developments:** In 2004, Assembly Bill 969 was introduced. This bill proposed to raise the recycled content requirement to 25% by 2008 and sought to include a \$200 penalty provision in the law. The bill failed to pass but may indicate increased enforcement efforts.
- E. **Contact:** Wisconsin Department of Agriculture, Trade & Consumer Prot.
801 W. Badger Road
P.O. Box 8911
Madison, Wisconsin 53708
608-266-8512

III. OREGON

The Oregon Rigid Plastic Container Law was originally passed as part of the 1991 Oregon Recycling Act and can be found at Oregon Revised Statutes 459A.650-665.

- A. **Statewide Recycling Rate:** If the annual Oregon state recycling rate for RPPCs exceeds the legal requirement of 25%, all plastic container and product manufacturers are deemed in compliance with the law.
 - 1. ***Past Recycling Rates:*** Since the effective date of the law, the recycling rate has exceeded 25% every year. Therefore, every manufacturer has been in compliance with the law and no enforcement action has been taken. The 2003 statewide recycling rate was 27.0%.
 - 2. ***"Recycling Rate for Compliance Purposes":*** Many companies have chosen to rely on the overall state recycling rate to be in compliance, but the rate is not calculated until after the completion of the year and all recycling and disposal data has been collected and analyzed. Therefore, for upcoming years, Oregon publishes a "recycling rate for compliance purposes."
 - a. The rate is an estimate of what the actual recycling rate is expected to be. It is calculated by taking the actual rate for the most recent year for which data is available and looking at additional factors, such as recycling and disposal trends.
 - b. If Oregon determines that the "recycling rate for compliance purposes will be above 25% for the upcoming year, all manufacturers may rely on the projection and will be deemed in compliance with the law even if the actual rate is eventually calculated to be below 25%.

- c. If Oregon determines that the "recycling rate for compliance purposes" will be below 25%, manufacturers are responsible for individually complying with the law by other means.

B. **Rigid Plastic Container**: The law applies to all plastic bottles, jars, cups, tubs, pails, and "clamshell" containers that are designed to hold a product for sale and that are sold or offered for sale in the state of Oregon.

1. ***Size***: Minimum capacity of 8 ounces and a maximum capacity of 5 gallons. If the label lists a volume of 5 gallon or less, but the measured container liquid volume is greater than 5 gallons, the label volume must be used in determining applicability of the law.
2. ***Other Criteria***: Must be composed primarily of plastic resin and must maintain its shape when empty or full.
3. ***Non-Complete Packages***: A RPPC does not need to be a "complete package." Domed lids, if they meet the criteria, would be subject to the law.
4. ***Exceptions***: The law does not apply to the following plastic containers:
 - a. Food packagings (beverage containers are not exempt);
 - b. Medical packagings, including drug, medical device and medical food containers;
 - c. Export packagings: containers shipped outside Oregon for sale;
 - d. Tamper resistant parts, such as seals for health purposes;
 - e. Blister packs and tubes; and
 - f. Reduced containers: a container that has been reduced by 10% in size over the same product container that was used 5 years earlier.

*****Note***: Reducing the weight of a container is not a compliance option. Rather, it represents an exemption from the rule.

5. ***Two-year Exemption for Companies Making a "Substantial Investment"***: Companies will be granted a two-year exemption if:
 - a. They make a "substantial investment" in achieving a 25% recycling rate;
 - b. There are viable markets for the material collected;
 - c. The actual recycling rate is at least 20%; and
 - d. Reasonable projections indicate that the material will be recycled at a 25% rate within two years.

- C. **Compliance Options:** If the overall recycling rate is not 25%, container and product manufacturers have a few compliance options.
1. ***Recycled Content Option:*** The RPPC must consist of at least 25% post-consumer material.
 - a. Post-consumer material includes all material that would otherwise be destined for solid waste disposal.
 - b. Post-consumer material does not include remanufactured material and it may not be included in the recycled material calculation.
 2. ***Reuse Option:*** The RPPC must be used five or more times for the same or a substantially similar use.
 3. ***Recycling Rate Option:*** If the aggregate state recycling rate does not exceed 25%, a manufacturer may establish compliance by showing that their individual package is of a type that is recycled at a rate that exceeds 25%.
 - a. **Specific Types of RPPCs:** Many companies package particular types of products in product specific RPPCs (For example, packages that are readily recognized as milk jugs). If the recycling rate for all milk jugs in the state exceeds 25%, the individual jugs will be considered to be in compliance.
 - b. **Specific Types of Plastic:** Containers that consist of a certain type of plastic will be in compliance if that specific plastic type is recycled at a rate that exceeds 25%.
 - c. **Product Associated Packages:** Containers that are properly classified as "product associated packages" will be in compliance if that specific product associated package is recycled at a rate that exceeds 25%.
 - 1) **Definition:** A product associated package is a brand-specific rigid plastic container line, which may have more than one size, shape or design and which is used in conjunction with a particular product line. (i.e.: all Brand X detergent bottles).
- D. **Enforcement:** As noted, there has not been any enforcement of the law because the statewide RPC recycling rate has always been above 25%. The law does provide for a fine of \$1,000 per violation, per day.
- E. **Recent Trends:** In 2002, the statewide recycling rate for all RPPCs was only 26.2%, a figure which continues the rate's general downward trend (The rate in

2000 was 28.4%). In fact, the rate has declined in almost every year since its peak in 1995 (30.1%). Oregon has expressed concern with the possibility that the rate could fall below 25% as early as 2005. If this is the case, container and product manufacturers will no longer be able to rely on the statewide recycling rate to establish compliance with the law.

- F. **Contact:** Oregon Environmental Quality Department
Solid Waste Section
811 S.W. 6th Ave.
Portland, Oregon 97204
503-229-5913

IV. CALIFORNIA

California has the most complicated RPPC law and is the only state to have taken enforcement action. The law is known as the California Rigid Plastic Packaging Container Act, was passed in 1991, and can be found at Title 14 of the California Code of Regulations, Division 7, Chapter 4, §§17942-17946 and §§42300-42345 of the Public Resources Code. The law is monitored and enforced by the California Integrated Waste Management Board (CIWMB) ("Board").

- A. **Rigid Plastic Packaging Containers:** The law applies to rigid plastic bottles, cartons and other receptacles that have certain characteristics.
1. ***Characteristics***
 - a. Made entirely of plastic, except for lids, caps or labels (plastic buckets with metal handles are, therefore, not RPPCs);
 - b. Capable of multiple reclosures, with an attached or unattached lid or cap;
 - c. Not flexible and can maintain its shape when holding a product;
 - d. Size: Contain at least 8 fluid ounces, but no more than 5 gallons. The size is determined by the total volume of the closed container, not the exact amount of product contained within;
 - e. Normally used to store a product for seven days or longer from the time they are filled.
 - f. The following are not RPPCs:
 - 1) Blister packaging that cannot be reclosed.
 - 2) Clamshells that cannot be reclosed.
 - 3) Flexible Tubes.
 - 4) Plastic boxes that have at least one side or a lid not made of plastic.
 2. ***Exemptions:*** The following RPPCs are exempt from the law:

- a. Export packagings: RPPCs produced in or out of the state of California that are destined for shipment to locations outside the state.
- b. RPPCs containing drugs, cosmetics, food, medical devices, medical food or infant formula as defined in the FFDCA.
- c. RPPCs that contain products that are regulated by the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA).
- d. RPPCs that are manufactured for use in the shipment of hazardous materials and are prohibited from being manufactured with used material by federal packaging material specifications and testing standards set forth in 49 CFR 178.509 (plastic drums and jerricans), or that are subject to testing standards in 49 CFR 178.600 to 178.609.
 - 1) Containers that are exempt from DOT packaging requirements because they are consumer commodities or limited quantities are subject to the RPPC Law.

B. **Who is Subject to the California RPPC Law?**: The California RPPC Law applies to all "product manufacturers." The Board has traditionally maintained a broad definition of "product manufacturer" and extends the reach of the law to its furthest possible boundaries. Generally, companies subject to the law include all manufacturers, distributors, and importers of products that are packaged in an RPPC and that are sold or offered for sale in California. Further, *any* company whose name appears on the label of an RPPC that is sold in the state is subject to the regulations.

- 1. ***"Manufacturer"***: The identification of the product manufacturer, for purposes of the law, should be determined by the following hierarchy:
 - a. If the name of the entity that manufactured the product is on the label, that entity is the product manufacturer.
 - b. If the name of the entity that manufactured the product is not on the label, but the name of the distributor is, the distributor is deemed the product manufacturer for purposes of the law.
 - c. If the label does not include the name of the manufacturer or distributor, but includes the name of the importer, the importer is the product manufacturer.

C. **Compliance Options**: Product manufacturers must comply with one of the following compliance options.

****Note:** For each individual container, only one of the compliance options may be chosen.

1. **Recycled Content:** RPPCs must consist of at least 25% post-consumer resin, which would otherwise be destined for solid waste disposal. (This does *not* include remanufactured material).
2. **Reusable or Refillable:** RPPCs must be routinely reused or refilled at least 5 times.
3. **Source Reduced:** RPPCs must be "lightweighted" by 10%.
 - a. After January 1, 1995, manufacturers who seek to utilize the source reduction option must establish that their containers are reduced by 10% compared with:
 - 1) Packaging used for the product by that manufacturer on January 1, 1995; or
 - 2) The packaging used for that product by the manufacturer over the course of the first full year of commerce in California; or
 - 3) The packaging used in commerce the same year for similar products whose containers have not been considered source reduced. Similar products are products which are held by "particular type RPPCs." Comparison may be made to products made by the same manufacturer or by another.
 - b. The non-source container being used for comparison purposes, must have had the same weight for 12 consecutive months.
 - c. RPPCs are not considered source reduced if the reduction was achieved by:
 - 1) Substituting a different material type ("material type" means broad container categories such as paper, glass, aluminum etc., it does not mean individual plastic resin);
 - 2) Increasing the weight of a container and following up by reducing it;
 - 3) Packaging changes that adversely affect the potential for recycling or post-consumer content.
 - d. If the manufacturer switches to flexible packaging or sells a product without any packaging, the source reduction may be credited to other containers as part of the calculated average, discussed below in section 'E'.

4. ***Product-Associated RPPCs***: Companies may demonstrate compliance by showing that their "product-associated" container type was recycled at a 45% rate. A product associated RPPC is a brand-specific rigid plastic container line, which may have more than one size, shape or design and which is used in conjunction with a particular product line. (i.e.: all Brand X detergent bottles)
- D. **Demonstrating Compliance**: It is not necessary that each and every RPPC meet one of the compliance criteria. A company may demonstrate compliance by averaging the product associated recycling rate, post-consumer content, source reduction, or refill/ reuse data.
1. Averages may be calculated using only RPPCs sold in California or by using all containers sold nationwide.
 2. Averages may be based on an entire product line or on sublines.
 3. Averages may only include those RPPCs for which the same compliance option is cited. (If you claim source reduction for Product A and post-consumer content for Product B, you cannot use source reduction data from product B in your average even if the product has been source reduced).
 4. Every RPPC subject to the law must individually meet one of the compliance standards or be included in one of the manufacturer's averages.
 5. ***"Introduced Products"***: During the first 12 months, an RPPC is sold or offered for sale in California, all requirements under the law are waived.
- E. **Recordkeeping**: All records pertaining to RPPC compliance are required to be maintained for a total of four years following the end of a compliance year.
- F. **Certification and Enforcement**

The California Integrated Waste Management Board is authorized to initiate a certification process in order to determine whether individual companies are in compliance with the law. Once the certification information is collected and analyzed, the state may take enforcement action against a manufacturer.

1. ***Certification***
 - a. Surveys are sent to randomly chosen "product manufacturers" who are believed to sell products in RPPCs in California. The survey consists of two forms that must be completed:

- 1) Product Manufacturer Form; and
 - 2) Container Manufacturer Form: Required to be completed and submitted if the manufacturer is relying on the post-consumer or source reduction option.
- b. Manufacturers have 60 days to return the forms to the Board by certified mail. They may request a 30-day extension, which will be granted by the state at its sole discretion.

***Note:* Extensions are not readily granted and are generally reserved for situations where there has been a corporate reorganization or catastrophic act of God.

- c. Respondents have the following response options:
- 1) Demonstrate compliance with one of the options. The specific information provided will depend on the compliance option relied on. Examples include:
 - a) Percentage of post-consumer content;
 - b) Recycling rate achieved for product associated RPPC;
 - c) Average number of times the container is refilled or reused;
 - d) Percentage the RPPC was source reduced and average weight per unit of the RPPC before the source reduction.
 - 2) Admit non-compliance;
 - 3) Claim that the containers do not fall under the definition of an RPPC and, therefore, are not subject to the law;
 - 4) Claim that the products are exempt under the law; or
 - 5) Deny selling products in RPPCs in California.

2. ***Enforcement***

- a. If a company returns its certification survey and admits non-compliance with the law, the Board may initiate enforcement action. Further, if a company fails to return its form as required, the Board may presume non-compliance and take enforcement action.
- b. Compliance Agreements: Historically, the Board routinely allowed non-compliant companies to enter into compliance agreements, under which a company promised to come into compliance by a predetermined date.

- 1) No fine or other penalty was assessed if a compliance agreement was entered into.
- 2) Monitoring: The Board required the company to periodically report their progress through the submission of reports.
- 3) Compliance agreements are based on a standard blueprint contract, but are subject to negotiation.

*** In July 2005, the Board announced that they will **no longer allow companies** that are not in compliance with the RPPC Law to **enter into compliance agreements** but instead are likely to immediately assess penalties for non-compliance.

c. Penalties: The Board is now likely to immediately impose fines on a company that is not in compliance. The Board may also choose to impose fines on a company that refuses to enter into a compliance agreement.

- 1) Non-compliance is a public offense and is subject to fines of up to \$100,000. Violations are also subject to civil penalties of up to \$50,000. CIWMB has adopted a "points" system that is to be used to calculate the specific penalty that will be imposed and has published a specific formula that will be used: $\$50,000 - (1,800 \times P)$. "P" represents that number of points earned by the product manufacturer.
- 2) Providing false information on a certification survey may be prosecuted as fraud by the state attorney general.
- 3) History: Chem-Lite Industries was assessed a penalty of \$20,000 after failing to demonstrate compliance for the year 1996 and refusing to enter into a compliance agreement.

G. **Recent Developments**: In July 2005, the Board proposed a number of amendments to the RPPC Law. Among the proposed changes:

- a. The definition of a "product manufacturer" would be revised to include "all divisions, subsidiaries, and any other entity or brand name, for which the manufacturer has responsibility, regardless of whether the manufacturer's name is on the label."

- b. The “manufacturer hierarchy” (specifying that the entity that manufactured the product is the preferred responsible party, followed by the distributor and finally the importer) would be deleted.
- c. “Refillable package” would be redefined to clarify that the RPPC is returned to and refilled by the product manufacturer at least five times to replenish the original product that was held by the package. It also would clarify that the product manufacturer or its agent shall refill the container.
- d. “Reusable package” would be redefined to clarify that the RPPC is routinely reused by consumers at least five times to replenish the original product and that the product manufacturer or its agent shall offer the replacement product.
- e. “Replacement product” would be redefined to clarify that the replacement product shall be the same product, manufactured by the same company or its agent.
- f. “Rigid Plastic Packaging Container” would be redefined to delete reference to RPPCs being capable of multiple reclosure.
- g. The definition of RPPC would be modified such that containers that have metal handles or hinges would be regulated as RPPCs compared to current law where such containers are not considered RPPCs.
- h. It is also proposed that RPPC be further redefined to clarify that the size of the container shall be determined by its labeled fluid volume as opposed to the total volume of the closed container as it is defined under current law. As proposed, this revision would affect those companies that sell 5 gallons of product in containers that actually have a total volume of slightly more than 5 gallons. Under current law, such containers are outside the scope of the RPPC regulations.

H. **Contact:** California Integrated Waste Management Board
 8800 Cal Center Drive
 Sacramento, California 95826
<http://ciwmb.ca.gov/Plastic/RPPC/>
 916-341-6000