REQUEST FOR APPROVAL

To:	Caroll Mortensen Director
From:	Mark de Bie Deputy Director, Waste Permitting Compliance and Mitigation Division
Request Date:	January 17, 2012
Decision Subject:	Adoption of Proposed Revisions to the Rigid Plastic Packaging Container (RPPC) Regulations
Action By:	January 17, 2012

Summary of Request:
Staff requests adoption of the proposed revisions to the Rigid Plastic Packaging Container (RPPC) Regulations. The revisions are needed to make the regulations conform to changes in statute (Public Resources Code (PRC) Sections 42300-42345), and more effectively and efficiently implement the existing RPPC regulations (Title 14, California Code of Regulations (14 CCR), Sections 17942-17946).

Recommendation:
Once the Department adopts the Negative Declaration staff recommends adoption of the proposed revisions to the RPPC regulations so that the package may be forwarded to the Office of Administrative Law (OAL) for approval.

Action:
On the basis of the information, analysis, and findings in this Request for Approval, I hereby adopt the Proposed Revisions to the Rigid Plastic Packaging Container (RPPC) Regulations and direct staff to forward the regulatory packet to the Office of Administrative Law (OAL) for approval.

Dated: 1/17/2012

Caroll Mortensen
Director

Attachment:

1. Proposed Revised RPPC Regulations
2. Draft Staff Responses to Issues Raised in the Proposed Revised RPPC Regulations

Background Information:

The Rigid Plastic Packaging Container (RPPC) Act of 1991, (SB 235, Hart, Chapter 769) took effect on January 1, 1992 (Public Resources Code (PRC) Section 42300 et seq.) The intent of the law is to spur markets for plastic materials collected for recycling by requiring manufacturers to utilize increasing amounts of postconsumer material in their rigid plastic packaging containers. As directed in the law, regulations were adopted by the California Integrated Waste Management Board (CIWMB) on July 1, 1994 and became effective January 1, 1995.

The RPPC law requires that every rigid plastic packaging container sold or offered for sale in California, on average, must meet one of the following criteria:

1. Be made from 25 percent postconsumer material.
2. Have a recycling rate of 45 percent if it is a product-associated RPPC or a single resin-type of RPPC.
3. Be a reusable or refillable RPPC.
4. Be a source-reduced RPPC.
5. Be a container containing floral preservative that is subsequently reused by the floral industry for at least two years.

Additional compliance options that allow product manufacturers under the same corporate ownership, to meet the 25 percent recycled content compliance option through use of California plastic postconsumer material (PCM) in other products and packaging were added with the passage of Senate Bills (SB) 743 (Chesbro, Statutes 2005) and SB 1344 (Chesbro, Statutes 2006).

Product manufacturers that sell products packaged in RPPCs into California are responsible for compliance with these requirements at all times, regardless of whether or not the Department requires an individual certification of compliance. It should be noted that the RPPC regulations have been in effect since 1994 with some minor regulation modifications.

Need for Rulemaking

Five compliance certification cycles were completed for the following reporting periods: 1996; 1997-99 (combined into one certification); 2000; 2001; and 2005. Based on experience in conducting certifications and in taking enforcement actions, it became clear there were inconsistencies, inequities, complexities, and outdated provisions in the current regulations which are an impediment to the effective and efficient implementation of the law.

Additionally, with changes in statute [SB 743 (Chesbro, Chapter 666, Statutes of 2005), and SB 1344 (Chesbro, Chapter 144, Statutes 2006)], the current regulations are outdated and do not reflect the law. Specifically, there is no guidance in the existing regulations as to how product manufacturers under the same corporate ownership, may certify compliance with these new options.

Another indication of the need for the rulemaking is the lack of clarity in the regulations. Significant staff resources have been spent during compliance certifications helping the regulated community understand the existing regulations. The existing regulations have excess verbiage and a hard-to-follow format.

The proposed revisions to the RPPC regulations organize and clarify the requirements as requested by stakeholders. The proposed revisions also provide direction for the new compliance options.

Rulemaking Timeline:

During 2007, staff conducted a series of informal rulemaking advisory committee meetings and workshops. Staff analyzed and considered the information provided. Staff then develop the proposed regulations presented to the CIWMB at the November, 2007 Committee Meeting. At that time, the CIWMB Committee requested changes and directed staff to begin the formal rulemaking process.

Staff initiated the Economic and Fiscal Impact Study by mailing approximately 1,500 surveys to container and product manufacturers and plastics reprocessors to gather information on economic impacts due to the changes in the RPPC regulations. Staff received a total of 95 responses (85 manufacturers and 10 plastics reprocessors). The Department feels that the survey was statistically representative based on the sample size. However, staff conducted further research to prepare the Economic and Fiscal Impact Study using information from the Board's prior certifications; waste characterizations studies, and annual PET and All-Container Recycling Rate Calculations; the Division of Recycling's annual recycling rates; the California Board of Equalization Retail Sales Data and the Department of Finance Population Data; the U.S. Department of Commerce's Census data, the Internal Revenue Service publications; and data from various plastic industry sources. Staff also worked with the California Air Resources Board's Economic Studies Section to obtain an independent evaluation and verification that the methodology and end results were representative of the impacted community and consistent with economic analysis done for CalEPA's Boards, Departments and Offices. Staff received approval of the Economic and Fiscal Impact Study from the California Natural Resources Agency and the California Department of Finance.

The complete rulemaking package was submitted and approved by OAL which commenced the formal rulemaking process on February 11, 2011.

A 45-day public comment period for the proposed RPPC regulations was conducted from February 11 through March 28, 2011 and the public hearing was held on April 8, 2011. Workshops were held on April 8, May 17, June 8 and June 22, 2011. Based on stakeholder comments and staff input, staff made significant revisions to the proposed regulations.

A second 45-day public comment period was conducted from July 29 through September 15, 2011, with a follow-up workshop on October 5, 2011. Based on stakeholder comments and staff input, staff made additional revisions to the proposed regulations. A 15-day public comment period was conducted from October 31 through November 15, 2011.

Following November 15, 2011 staff identified some grammatical and punctuation clean-up necessary for continuity. These edits have been identified within the attached final draft of the proposed RPPC regulations. After approval of the regulations by the Executive Director, staff will finalize the regulatory package by February 13, 2012 and deliver it to OAL for approval.

Analysis:

Below is a listing of each major section within the regulations (Title 14, California Code of Regulations (14 CCR)), and the more controversial topics within those sections. Where a topic was controversial, there is a reference to Attachment 2 that has an expanded staff response

- **Definitions:**
  There was significant discussion of definitions since they set the framework for the regulations.

  - "Material Type" (Section 17943(i)): Product and container manufacturers say that the current definition is confusing. This is due, in part, to the current definition's focus on the very broad

feedstock categories of paper, glass, plastic, and aluminum. The existing language also specifically excludes "individual plastic resins" from the definition. In order to meet industry quality standards, each individual resin type is recycled separately. When a postconsumer resin is used to manufacture a container, inclusion of a different postconsumer resin may contaminate the batch and may prevent the container from meeting quality standards. Staff included individual plastic resins in the revised regulations. Material Type is also related to issues raised for Source Reduced Container through Resin Switching

(See Attachment 2, Resin Switching as Source Reduction.)

- "Postconsumer Material" (14 CCR Section 17943 (q)): The existing regulations include post-industrial material in the definition of postconsumer material. The revised regulations do not allow post-industrial material to count as postconsumer material to encourage use of more postconsumer material in RPPCs. Not including postindustrial material was an issue for product and container manufacturers. To find a middle-ground while removing post-industrial material from the definition, product and container manufacturers, plastics reprocessors, and environmentalists agreed that obsolete or unsold products that are commonly disposed, should be considered postconsumer as the products are beyond the point of being reused as scrap in a manufacturing process.

  (See Attachment 2, Eliminating Postindustrial Material from the Definition of Postconsumer Material.)

- "Reusable Rigid Plastic Packaging Container" (14 CCR Section 17943(z)): Product manufacturers say the proposed revision to the definition of reusable to exclude containers that store the original product sold in the container is not consistent with statute (PRC 42301 (d)). Statute does not define the term original product. Staff review of statute indicates that "original product" does not specify that the term does not also include the same type of product sold with the intent of continuing to store it in the RPPC.

  (See Attachment 2, Reusable Rigid Plastic Packaging Container.)

- "Rigid Plastic Packaging Container" (14 CCR Section 17943(aa)): The revised regulation creates a more level playing field while setting the same standards for almost identical containers. The almost identical containers have the same landfill disposal impacts and capacity for being source-reduced or made of postconsumer material, but have a slightly different design. There was a high-volume of comments during all public comment periods. Product manufacturers did not want to increase the number of containers subject to RPPC requirements, plastic reprocessors and environmental groups wanted to increase the number of containers subject to RPPC requirements. Product manufacturers said it would take up to five years for product manufacturers to make changes to comply.

  Another issue raised was the need to further define an RPPC's flexibility. The revised regulations use the American Society for Testing Materials (ASTM) D6988.8 Guidelines for film plastic. Using this guideline will give staff an industry accepted standard to use to determine what is and is not flexible.

  (See Attachment 2, Effective date of Regulations and Increased Number of Containers Will Be Subject to the RPPC Regulations.)

- "Source Reduced Container" (14 CCR Section 17943(af)): Source reduction allows product manufacturers to meet compliance by decreasing the RPPC weight or concentrating a product, or both, by 10 percent. The existing regulations allow product manufacturers to claim source reduction compliance by resin switching. The revised regulations eliminate the resin switching portion of the source reduction compliance option.

  There were a large number of comments, both pro and con, regarding the elimination of the resin switching portion of the source reduction compliance option. Product and container manufacturers are against eliminating resin switching as a source reduction compliance option. Plastic reprocessors and environmental groups are for eliminating resin switching as source reduction. Several reports were submitted to demonstrate greenhouse gas (GHG) emissions – for both using only virgin and using postconsumer material. Product and container manufacturers and plastic reprocessors and environmental groups submitted information on whether there is enough postconsumer resin available to meet other compliance options. Product and container manufacturers submitted information on whether the elimination of the resin switching allowance would prevent industry from advancing in new technology.

  (See Attachment 2, Resin Switching as Source Reduction and Legislative Intent, Strategic Directives and RPPC Requirements.)

- **Container Requirements & Alternative Container Compliance Method**
  Container requirements were consolidated to make information easier to find. The alternative container compliance method was added so that regulations are consistent with statute.

  - "Container Requirements" (14 CCR Section 17944): This section specifies five product manufacturer compliance options to meet RPPC requirements. Several product manufacturers requested they be allowed to use postconsumer material in products generated by other companies to meet the RPPC requirements. Existing law clearly states that the alternative container compliance method allowing use of postconsumer material in products to meet RPPC requirements is limited to companies under the same corporate ownership.

  - "Alternative Container Compliance Method" (14 CCR Section 17944.1): This section was added to include an alternative container compliance method for companies under the same corporate ownership as specified by SB 743 (Chesbro, Chapter 666, Statutes of 2005) and SB 1344 (Chesbro, Chapter 144, Statutes of 2006). No comments were received requesting changes in this section.

- **Pre-Certification Process and Compliance Certifications**
  This new process addresses product manufacturers' concerns that they did not have enough warning as to when they would have to submit a compliance certification.

  - "Pre-Certification Process" (14 CCR Section 17945.1): Stakeholders receive one year advance notice that they have been identified as a product manufacturer and may be required to certify compliance for the subsequent year. This section did not generate many comments.

  - "Compliance Certifications" (14 CCR Section 17945.2): This section provides direction on when a certification is due and other timeframes involved in the certification process, including certification extension requests. Staff amended the section to allow for an additional 30 days to submit a certification extension request.

- **Product & Container Manufacturer Certification Information**
  Product and container manufacturers said the existing certification process was confusing as information is spread throughout the current regulations. The proposed revisions consolidate the requirements. Few comments were received on these sections.

  - "Product Manufacturer Certification Information" (14 CCR Section 17945.3): This section consolidates all of the product manufacturer certification requirements for all compliance options, making the proposed revised regulations easier to follow.

  - "Container Manufacturer Certification Information" (14 CCR Section 17945.4): This section consolidates the information container manufacturers must include in their certifications to product manufacturers, thus providing clearer directions on requirements for all container certifications.

- **Compliance Calculations and Formulas**
  Product and container manufacturers said compliance and calculation formulas were confusing and hard to follow. The proposed revisions consolidate the requirements and use as many consistent variables as possible within the formulas. Very few comments were received on these sections.

  - "Compliance Calculations and Formulas" (14 CCR Section 17945.5). This section reorganizes the compliance calculations and formulas and separates them from other requirements. Additionally, the section uses as many consistent variables as possible within compliance formulas.

    The product manufacturers will use these formulas to determine their compliance with specific compliance options and the Department will use the formulas to verify the calculations.

- **Waivers and Exemptions**
  Product manufacturers said waiver and exemption information was difficult to follow.

  - "Waivers" (14 CCR Section 17946): This section has been added and replaces, in part, information contained in the existing regulations. In response to comments, staff revised the Section to specify when petitions for waivers should be submitted during the certification process.

  - "Exempt RPPC" (14 CCR Section 17946.5): Product manufacturers said they should not have to submit certifications for products, such as food, medical food or devices, and drugs that are statutorily exempt. Staff amended the section to require the product manufacturer to submit documentation, but not a certification, as to the reason it is claiming any exemptions for its RPPCs.

- **Auditing, Proprietary, Confidential, or Trade Secret Information, and Records Retention**
  The Department has developed standard practices for audits; proprietary, confidential or trade secret information and records retention. The existing regulations were modified to include the Department standards. There were few comments on these sections.

  - "Auditing "(14 CCR Section 17947): This section was modified to require standard auditing procedures and protocols.

- "Proprietary, Confidential, or Trade Secret Information" (14 CCR Section 17948): This section has been amended to refer to the Department's adopted procedures.

- "Records Retention" (14 CCR Section 17948.1): This section clarifies timeframes for records to be retained by both product and container manufacturers.

- **Advisory Opinions**
  Container manufacturers and some product manufacturers asked for advisory opinions on whether a container is an RPPC.

  - "Advisory Opinions" (14 CCR Section 17948.2): This section replaces a one-sentence statement in the current regulations, regarding when and how the Department will make determinations as to whether a specific container meets the definition of an RPPC. Product manufacturers may request advisory opinions early in the precertification and certification processes so that they will not have to provide any further information if it is not an RPPC. It provides product manufacturers an opportunity to request a determination, but limits staff workload by allowing only companies that may be requested to certify to request a determination.

- **Violations and Penalties**
  Product manufacturers said the existing regulations are confusing and it is not clear whether container manufacturers can be penalized for providing false or misleading information.

  - "Violations and Penalties" (14 CCR Section 17949): The revised regulations clarify the formulas used to determine the degree of noncompliance and applicable penalties. The revisions clarify that if the container manufacturer provides false or misleading information on its certification to the product manufacturer, the container manufacturers will be subject to the fines and penalties, and the product manufacture will not. Very few comments were received on this Section.

California Environmental Quality Act (CEQA)

Per CEQA, CalRecycle conducted a review (Negative Declaration and Initial Study Evaluating the Adoption of Revised Rigid Plastic Packaging Container Program Regulations, SCH #2011112010) to determine whether the proposed regulatory revisions may have a significant effect on the environment. Staff determined that, based on the whole record, there is no substantial evidence that the adoption of the proposed revised regulations will have a significant effect on the environment. CalRecycle adopted the Negative Declaration and Initial Study and, prior to reaching its decision on the proposed regulatory revisions, considered the Negative Declaration and Initial Study and any comments received during the public review period.

Economic and Financial Impact Analysis

In October 2008, staff initiated the Economic and Financial Impact Analysis. The study methodology was to conduct a statistically representative sampling of the regulated community. The survey questions were intended to provide data on total and per container operating and capital costs for each of the proposed amendments; increased recordkeeping costs, expected expansion of workers, etc. Surveys were mailed to approximately 1,500 container and product manufacturers, material processors, trade

associations and other stakeholders. A total of 95 responses (85 manufacturers and 10 plastics processors) were received.

The Department believes that the survey was statistically representative based on the sample size of 1500 mailings. However the low response rate meant many of the conclusions regarding the cost impacts of the revised regulations and the magnitude of the impacts could not be relied upon. Therefore the Department approached the analysis using a modified study methodology.

The modified study methodology looked at the number of RPPC, the design of the RPPCs, and other factors. The modified study methodology not only relied on the responses to the survey, but also included a number of additional data sources. Some of the major data sources included: The Department's Waste Characterization Study, Annual PET and All-Container Recycling Rate Calculations, RPPC Certification Data (1996-2005), DOR CRV/Beverage Sales and Redemption/Recycling Data; California Board of Equalization Retail Sales Data; California Department of Finance Population Data; US Department of Commerce Income and Domestic Product Data; US Census of Manufacturing; American Chemistry Council Resin Production, Sales and Recycling Data; Plastics News and other sources of virgin and secondary resin prices; Direct communication with Product and Container Manufacturer survey respondents; Internal Revenue Service Publications; and BizStat.com (profit margins and "mark-ups").

Staff also worked with the California Air Resources Board's Economic Studies Section to obtain an independent evaluation and verification that the methodology and end results were representative of the impacted regulated community. In December 2010, the California Department of Finance approved the Economic and Fiscal Impact Study.

The Economic and Financial Impact Analysis found that five proposed revisions would impact about 17 percent of all RPPCs used (or 3.94 billion RPPC) in California. The five areas include:

1. No exclusion from the definition of RPPC for similar buckets, tubs, pails, clamshells, etc.
2. Post-industrial material can no longer counted as postconsumer material in compliance calculations.
3. Resin switching will no longer be allowed to achieve compliance through source reduction.
4. Product manufacturers can achieve compliance through use of California postconsumer material in other products.
5. Increased cost in recordkeeping including retention time.

Staff determined that, overall the annual cost impact of all the regulatory amendments per container that would be required to comply is slightly more $0.005 or ½ of a cent per regulated container.

Recommendation:

The Department has determined that no reasonable alternative considered, or brought to the Department's attention, will be as effective in carrying out the statutory requirements of this program, or would be as effective and less burdensome to affected stakeholders, than the proposed action.

Once the Department adopts the Negative Declaration, staff recommends adoption of the proposed revisions to the RPPC regulations so that the package may be forwarded to the Office of Administrative Law (OAL) for approval.