



January 22, 2016

Mr. Scott Smithline
Director
California Department of Resources Recycling and Recovery (CalRecycle)
1001 I Street – P.O. Box 4025
Sacramento, CA 95812-4025

Re: Consideration of Addendum #3 to the California Carpet Stewardship Plan

Dear Director Smithline:

The Carpet and Rug Institute (CRI) and our individual members whose carpet is sold in California are committed to working with CARE and CalRecycle to make carpet recycling in California a success. However, as explained below, we are very concerned with several aspects of your staff's January 26 memorandum regarding Consideration of Addendum #3 to the California Carpet Stewardship Plan Revised. Most fundamentally, we urge you to choose the first option identified by staff—approval of the addendum. That approval will be consistent with CalRecycle's statutory mandate and sound policy. Moreover, we are confident that approval will allow CalRecycle, CARE, and other interested parties to continue working together, throughout the remainder of this year, to both implement the revised plan and develop a sound plan for 2017 and the future.

We also have serious doubts about CalRecycle's authority to "provisionally" approve the plan. As CalRecycle itself recognized when its regulations were promulgated, the statute itself grants no such authority: it only authorizes disapproval of a plan, with explanation, and an opportunity for the sponsor to revise it.¹ Moreover, even CalRecycle's regulations do not make reference to "provisional approval," but only to "conditional approval."² Even if that provision is consistent with CalRecycle's statutory mandate, the use of the term "conditional" implies that any limitations on an approval would be described with specificity and be quantifiable, so that the sponsor of the plan could know what further actions CalRecycle purported to require as the plan was implemented. Unfortunately, many of the "provisional approvals" urged in the staff document suggest that CalRecycle anticipates mandating further adjustments to this plan,

¹ Final Statement of Reasons, CalRecycle, at 7 (Nov. 2, 2011).

² Cal. Code Regs. tit. 14, § 18942(b)(4).



without due process.³ This promotes uncertainty in economically turbulent times, and would be inappropriate and counterproductive.

Furthermore, CRI is concerned that CalRecycle is not adequately considering practical consequences and existing market forces, as required by law. Two critical requirements of AB 2398 are that CalRecycle approve only plans that incorporate carpet stewardship efforts that are “feasible” and do not create competitive advantages.⁴ These are important requirements. With the steep, unforeseen decline in oil prices⁵, demand for products made from post-consumer carpet has been sluggish, and the economics of carpet recycling are extraordinarily challenging. These facts have clearly and consistently been set forth by CARE in information provided to CalRecycle. CalRecycle cannot lawfully turn a blind eye toward these conditions.

The statutory terms governing CalRecycle’s goals and activities have well-established meanings. For example, when used in California statutes, the term “feasibility” implies “rejection of methods which are unworkable, excessively costly, or which would not result in a viable program.”⁶ Moreover, “fiscal constraints are a critical part of the feasibility analysis. . . .”⁷ By way of further example, the statutory definition of “feasibility” contained in the California Environmental Quality Act—and referenced in other contexts by the courts⁸—similarly mandates consideration of “economic, environmental, social, and technological factors”

³ See, e.g., H. Levenson to S. Smithline, *Request for Approval: Consideration of Addendum #3 to the California Carpet Stewardship Plan*, for Action by January 26, 2016, at 13 (Provisional Approval of CARE’s Response to Finding 6 indicates that the approval is contingent on revising the plan to allow assessments of up to 25 cents.).

⁴ For example, Section 42972(a)(2) requires that a carpet stewardship plan “[i]nclude goals that, to the extent feasible based on available technology and information, increase the recycling of . . . carpet, increase the diversion of [] carpets from landfills, increase the recyclability of carpets, and incentivize the market growth of secondary products” Cal. Pub. Res. Code § 42972(a)(2) (emphasis added). The statute’s “findings” declare that “[i]t is in the interest of the state to establish a program.”

⁵ For example, global petroleum prices have dropped from \$107/bbl in July 2014 to \$53/bbl in January 2015 to \$36/bbl by the end of December 2015.

⁶ *Morris v. Williams*, 67 Cal. 2d 733, 772 (Cal. 1967) (McComb, J., dissenting). see also *Lopez v. Nissan N. Am., Inc.* 201 Cal. App. 4th 572, 582-83 (Cal. Ct. App. 2011) (“The word ‘practicable’ does not necessarily mean the most that can possibly be done,’ but rather is synonymous with ‘feasible’ and allows for reasonable limitations, including economic, practical and technical limits.”) (internal citations omitted).

⁷ *Paterno v. State*, 113 Cal. App. 4th 998, 1024 (Cal. Ct. App. 2003).

⁸ *Chambi v. WMC-SA, Inc.*, No. G046922, 2013 WL 6236742, at *7 (Cal. Ct. App. Dec. 3, 2013).

⁹ Cal. Pub. Res. Code § 21061.1; *Ass’n of Irrigated Residents v. Cnty. of Madera*, 107 Cal. App. 4th 1383, 1401 (Cal. Ct. App. 2003).



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and whether a regulation will affect the “economic viability” of industry.⁹ CalRecycle thus has an obligation to consider and establish the feasibility of the approach it demands and approves.

We know of no analysis by CalRecycle of what level of assessment is feasible in the current—and rapidly changing—context. There is no basis whatsoever to reject or conditionally approve CARE’s proposed 100% increase. We are particularly troubled by the implication in the staff’s Recommended Additional Action in Response to Findings 1 and 6 that CalRecycle might seek to demand an increase in assessments before the expiration of this plan. This would be wholly inconsistent with both the statutory feasibility requirement and—in light of consumers’ other floor covering options—the parallel statutory requirement that actions be evenhanded, in particular, the mandate that “[t]he amount of the assessment shall not create an unfair advantage in the marketplace.”¹⁰

Our concern with the staff’s recommendation is exacerbated by the staff’s failure to recommend, in even “provisionally” approving the plan, that CalRecycle include its prior commitment to not pursue enforcement against CARE or others for alleged “noncompliance status.” This regrettably implies that CalRecycle intends to use the threat of enforcement to compel compliance with the vague “provisions” the staff has set forth. If the plan is not unqualifiedly approved, it is vital that this commitment to defer enforcement activities be restated.

Again, we stress our intention to work with CalRecycle and CARE to fulfill the commitments in the current plan and to help develop future, workable, plans. But uncertainty about CalRecycle’s intentions as the plan is implemented will not be conducive to continued, meaningful collaboration or sound public policy.

Sincerely,

The Carpet and Rug Institute



Joe W. Yarbrough
President

cc: Randy Pollack

¹⁰ Cal. Pub. Res. Code § 42972(c)(2).

