

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 560 (Laird)
Version: March 22, 2023
Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Solid waste: gas cylinders: stewardship program

DIGEST

This bill establishes a stewardship program for gas cylinder products, as defined, and would authorize producers of those products to establish one more producer stewardship organizations for that purpose.

EXECUTIVE SUMMARY

Gas cylinders create waste management issues due to their potential hazardous nature when not completely emptied and the high cost to local governments to dispose of them safely and correctly. It is estimated that 40 to 60 million single-use disposable 1 pound propane cylinders are sold in the United States each year and that the vast majority of the ones sold in California end up in landfills. And this just applies to one type of gas cylinder on the market. This bill, in an attempt to decrease the waste caused by these gas cylinders, seeks to establish a stewardship program and prohibits gas cylinder producers that are not participating in an approved stewardship program from supplying, selling, or offering for sale gas cylinders in the state. The bill is author sponsored. There is no known support or opposition. The bill passed the Senate Environmental Quality Committee on a vote of 5 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) The California Integrated Waste Management Act (IWMA) of 1989, administered by the Department of Resources Recycling and Recovery (CalRecycle), generally regulates the disposal, management, and recycling of solid waste. The act establishes stewardship programs or extended producer responsibility (EPR) programs for

various products, including, among others, carpet, mattresses, and pharmaceutical and sharps waste. (Pub. Res. Code § 40000 et. seq.)

- a) Establishes under IWMA a state recycling goal that 75% of solid waste generated is to be diverted from landfill disposal through source reduction, recycling, and composting by 2020. (Pub. Res. Code § 41780.01)
- 2) Establishes that counties and cities will provide services for the collection of household hazardous waste (HHW) and that the state will provide an expedited and streamlined regulatory structure to facilitate the collection of HHW. (Health & Safe. Code § 25218.)
 - a) Defines HHW as hazardous waste generated incidental to owning or maintaining a place of residence, but does not include waste generated in the course of operating a business at a residence. (*Id.* at subd. (e).)

This bill:

- 1) Establish a stewardship program for gas cylinder products, as defined, and would authorize producers of those products to establish one or more producer stewardship organizations for that purpose.
- 3) Prohibits gas cylinder producers that are not participating in a CalRecycle approved stewardship plan from supplying, selling, or offering for sale gas cylinders in the state.
- 4) Provides that an action that is taken by a producer or producer's designee, including, but not limited to, a producer stewardship organization, is not a violation of the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), the Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code), or the Unfair Competition Law (Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code) to the extent the producer or producer's designee, including, but not limited to, a producer stewardship organization, is exercising their authority pursuant to these provisions.

COMMENTS

1. Stated need for the bill

The author writes:

To improve our environment and reduce the number of hazardous waste products that end up in our waste facilities, Senate Bill 560 establishes an extended producer responsibility program for small gas cylinders. Too often, these small gas cylinders, which are conveniently used for recreational purposes, are often left at our beaches

or parks. Leaving someone else to dispose of them. However, properly disposing of these cylinders goes beyond putting them in a trash can. Proper disposal typically means taking them to household hazardous waste facilities, but the challenge is these facilities are not always easily accessible. When these cylinders end up in local waste facilities, the time and costs for proper disposal fall upon that local jurisdiction.

SB 560 aims to reduce the number of hazardous waste products at local facilities, beaches, and parks. Instead of the local jurisdiction carrying the burden of disposal, creating an EPR program will place a shared responsibility for end-of-life product management on producers, and other entities involved in the product chain, instead of the consumers.

2. Impact of gas cylinders on waste management and the environment

In California, an empty propane tank or cylinder can be disposed of in curbside trash or recycling, but if the tank or cylinder is not empty then it is considered HHW and must be disposed of at an HHW facility. It is extremely difficult to know whether a cylinder is completely empty. An improperly disposed of cylinder creates a serious risk of explosion, resulting in fires, and poses a grave danger to sanitation workers. For example, in 2016, and again in 2017, disposable propane cylinders exploded at a Kent County, Michigan materials recovery facility causing over \$68,000 in damages from one tank and knocking a worker off a baler.¹ Locally, the Sunnyvale Materials Recovery and Transfer (SMaRT) Station experienced an explosion and baler fire in 2016, which was most likely caused by a disposable propane gas cylinder, with another similar incident occurring in 2017.²

As the Senate Environmental Quality Committee analysis notes there is no “readily available data on the total number of gas cylinders under 20 pounds sold each year in California, the number is likely in the tens of millions.”³ However, there is data on 1 pound propane cylinders, with estimates indicating that roughly 40 to 60 million 1 pound propane cylinders are sold in the United States each year.⁴ If California accounts for 10 percent of the population, then one can extrapolate that 4 to 6 million are sold in California each year. Yosemite National Park collects anywhere from 20,000 to 25,000

¹ Arlene Karidis, *Propane Tanks Wreak Havoc at MRFs and Disposal Sites*, Waster360 (May 23, 2019), available at <https://www.waste360.com/safety/propane-tanks-wreak-havoc-mrfs-and-disposal-sites> (as of Apr. 2, 2022).

² *Hazardous Waste Management: The New Refillable 1 lb. Propane Cylinders: Sparking the Paradigm Shift Away From Disposables*, WasteAdvantage Magazine (Apr. 27, 2017), available at <https://wasteadvantagemag.com/hazardous-waste-management-the-new-refillable-1-lb-propane-cylinders-sparking-the-paradigm-shift-away-from-disposables/> (as of Apr. 2, 2022).

³ Sen. Environmental Quality Comm. analysis SB 560 (2023-24 reg. sess.) as amended Mar. 22, 2023 p. 3.

⁴ *Id.*; see also *The Definitive Camp Guide to Sustainable Propane*, IGNIK (Oct. 6, 2020), available at <https://ignik.com/blogs/news/the-definitive-camp-guide-to-sustainable-propane> (as of Apr. 2, 2022).

cylinders a year.⁵ Estimates to manage this hazardous waste at Yosemite National Park are \$3 per cylinder⁶ and \$3.50 per cylinder in Lassen National Park.⁷ Refillable cylinders have a life span of 10 to 12 years.

3. This bill seeks to establish a stewardship program for gas cylinders

a. *SB 1256 (Wieckowski, 2022)*

SB 1256 (Wieckowski, 2022) would have banned the sale, or offer for sale, in this state of a disposable propane cylinder under 2 pounds beginning on and after January 1, 2028. The bill was vetoed by Governor Newsom, who wrote:

I acknowledge there are several challenges and costs faced by local governments and solid waste management authorities responsible for the disposal of single-use propane cylinders. However, an outright ban without a plan for collection and refill infrastructure could inhibit the success of building a circular system in California.

California has successfully implemented many reuse and recycling systems, from the Beverage Container Recycling Program to several extended producer responsibility programs. These market-based solutions both significantly reduce waste and create jobs by turning a challenging product into a resource. I encourage the Legislature and stakeholders to work on a similar approach for the collection and reuse of this product that accounts for manufacturer and retail responsibility.

b. *This bill establishes a stewardship program or extender producer responsibility (EPR) program for gas cylinders designed with a capacity of under 20 pounds*

This bill seeks to address the Governor's veto message by enacting a stewardship program or extender producer responsibility (EPR) program for gas cylinders designed with a capacity of under 20 pounds. The bill applies to gas cylinders for propane, helium, isobutene, and butane. As noted by the Senate Environmental Quality Committee:

[EPR] is a strategy that places shared responsibility for end-of-life product management on the producers and all entities involved in the product chain, instead of on the general public and local governments. EPR programs rely on industry, formalized in a product stewardship organization, to develop and implement approaches to create a circular economy that makes business sense, with oversight and enforcement provided by the government. This approach provides flexibility for manufacturers, based on their expertise in designing products and the systems that

⁵ Karidis *supra* at fn. 1.

⁶ Karidis *supra* at fn. 1.

⁷ *Hazardous Waste Management: The New Refillable 1 lb. Propane Cylinders: Sparking the Paradigm Shift Away From Disposables* *supra* at fn. 2.

bring these products to market, to design systems to capture those products at the end-of-life to meet statutory goals.⁸

The bill provides a general framework of stewardship program that would be administered by CalRecycle. As the Senate Environmental Quality Committee and a coalition of organizations that support the bill in concept explain, the bill currently lacks specificity and many elements that are traditionally concluded in an EPR enacted in this state. These include, but are not limited to:

- Clear definitions on who a producer is, as most EPR programs use a tiered definition placing accountability on manufacturers first, then importers, then distributors, etc. A tiered definition of producer is essential to capture products that are manufactured outside of the state.
- Clarity on stakeholder participation in the administrative process and design of the EPR program.
- Timelines for implementation of the EPR program.
- The enforcement provision under the bill does not provide for any administrative penalties, as most EPR programs do, and lacks clarity on what entity will enforce the bill's provisions.
- A mechanism for ensuring that the cost of the program is not passed on to consumers.
- Performance standards for the program and the establishment of convenient collection sites for consumers.
- Public education programs.

4. Senate Judiciary Committee concerns related to EPR programs generally

a. The Dormant Commerce Clause

Section 8 of Article I of the United States Constitution grants the United States Congress the power to regulate interstate commerce.⁹ The converse proposition—that states may not usurp Congress's express power to regulate interstate commerce—is known as the "Dormant Commerce Clause."¹⁰ The Dormant Commerce Clause serves as an absolute bar to regulations that discriminate against interstate commerce, i.e., by favoring in-state businesses or excluding out-of-state businesses.¹¹ But "[s]tate laws that 'regulat[e] even-handedly [across all in-state and out-of-state businesses] to effectuate a legitimate local public interest...will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.' "¹² This bill prohibits a producer that fails to participate in an EPR program approved by CalRecycle from

⁸ Sen. Environmental Quality Comm. analysis of SB 707 (2023-24 reg. sess.) as amended Mar. 20, 2023 at p. 4.

⁹ U.S. Const., art. I, § 8, cl. 3.

¹⁰ See *Gibbons v. Ogden* (1824) 22 U.S. 1.

¹¹ E.g., *Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 354.

¹² *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.

selling, supplying, or offering for sale gas cylinders in this state. A producer is defined as a producer of gas cylinders. This definition does not seem to favor in-state businesses over out-of-state businesses.

A statute may also violate the dormant Commerce Clause, even if it "regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" and the burden imposed on commerce "is clearly excessive in relation to the putative local benefits." (*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142.) As this bill's provisions are intended to address the serious waste management issues and environmental impacts posed by gas cylinders, this bill would likely not be found to excessively burden interstate commerce in violation of the Dormant Commerce Clause. Going forward, the author should ensure that the provisions of the bill do not favor in-state producers versus out-of-state producers in order to not run afoul of the Dormant Commerce Clause.

b. Antitrust immunity

As with most of the EPR schemes provided for in California law, this bill includes express exemptions from various laws regulating anticompetitive behavior and unfair competition and practices. Generally EPR programs provide that certain activities engaged in by producers and stewardship organizations, such as the creation, implementation, management, cost assessments, and structuring of a stewardship plan and the establishment, administration, collection, or disbursement of a charge associated with funding the implementation of the program are categorically exempt from the Cartwright Act (California's primary antitrust law), the Unfair Practices Act, or the Unfair Competition Law because these activities are essential to a functional stewardship program. This bill, however, does not limit this exemption to those activities necessary and essential to the functioning of the EPR program for gas cylinders, but applies it simply to an action taken by a producer or the producer's designee to the extent they are exercising authority pursuant to the bill. Going forward, the author should ensure that the provisions of the bill only exempt those activities truly necessary essential to ensuring a functional stewardship program under the bill.

Even with exemptions being limited to specific actions of producers and stewardship programs, concerns have been raised about the monopolistic possibilities inherent in these programs. Strong government oversight is critical to ensure this regulatory scheme is operated in an evenhanded manner and results in the ambitious goals it sets out to accomplish. The above antitrust laws are extremely important to ensuring consumers are protected and free and fair competition is fostered. Mitigating these concerns to an extent, the bill specifically provides that the exemptions do not apply to an agreement that does the following:

- fixes a price of or for covered products, except for an agreement related to costs or charges associated with participation in a stewardship plan approved or

conditionally approved by the department and otherwise in accordance with the bill;

- fixes the output or production of gas cylinders; or
- restricts the geographic area in which, or customers to whom, gas cylinders will be sold.

This language is also similar to that found in other EPR programs.

5. Conditional support

A coalition of several environmental and waste reduction organizations write that they support the bill in concept but are requesting that amendments be made to ensure that key factors or components are included to ensure that the EPR program is a success and that external costs are minimized. Many of these factors are listed above in Comment 3)(b).

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: SB 1256 (Wieckowski, 2022) would have prohibited the sale or offer for sale of a disposable propane cylinder on and after January 1, 2028. SB 1256 was vetoed by Governor Newsom. *See* Comment 3)(a), above, for the Governor's veto message.

PRIOR VOTES:

Senate Environmental Quality Committee (5 Ayes, 0 Noes)
