



April 30, 2020

California Mattress Advisory Committee

RE: Mattress Recycling Council's Response to California Mattress Recycling Advisory Committee's Comments Concerning MRC's Draft Contingency Plan

Dear Mattress Advisory Committee:

The Mattress Recycling Council California, LLC (MRC) hereby responds to issues raised by the California Mattress Recycling Advisory Committee's (AC) April 1, 2020 letter concerning the draft contingency plan that MRC proposed on March 16, 2020 (the Contingency Plan):

1. Charges prior to or after decertification

AC Comment:

"Under Section (D)(ii)(1), it is the concern of the Committee that the Successor Organization (SO) would be responsible for charges remitted to MRC before its decertification, which would have been out of the control of the SO. If this is the case, MRC would not be held responsible for actions it has taken prior to decertification, and therefore nullifies accountability for the organization."

MRC Response:

The word "charges" used in (D)(ii)(1) of the Contingency Plan refers to the recycling fee collected on the sale of a new or renovated mattress at the point of sale and collected by the SO to fund the recycling of used mattresses pursuant to this chapter. See CA Pub. Res. Code § 42986(n). Therefore, Section (D)(ii)(1) simply means that if the Department establishes a trust fund after decertifying MRC, the trust fund may then receive all recycling fees (that is, "charges") that previously would have been remitted to MRC. Accountability of MRC is not nullified. Once the trust fund is established, MRC's role in receiving recycling fees (and therefore its accountability) ends.

2. Clarification on the obligation of novation

AC Comment:

"Under Section (F)(iii), the option for CalRecycle (the department) and/or SO to choose whether or not to novate existing contracts must be spelled out. As is, it is unclear whether novation is an obligation or option for the SO, contractor, and/or the department. For example, it is pertinent that the department not be obliged to continue contracting with MRC because they have secured a multi-state discount with a third-party."

MRC Response:

A novation is an agreement made between two contracting parties to allow for the substitution of a new party for an existing one. Under Section (F)(iii) of the Contingency Plan, MRC will attempt to novate all of its contracts with third parties that exist when MRC's responsibilities are transferred to the SO. A novation amounts to a change in the terms of a contract. As a result, a novation is in a sense an "option" to the party being asked to agree to the novation since that party has no obligation to accept the change.

But the novation process provides no "options" for either the Department (the Department would not be a party to the contracts being novated) or the SO (since the SO would simply be taking MRC's place on the outstanding contracts). Furthermore, this provision of the Contingency Plan has nothing to do with establishing any contract between the Department and MRC.

3. Uniform use of terminology**AC Comment:**

"For the purposes of continuity and clarity, we ask that the terminology used is kept uniform across all communications and adherent to current statute. For example, "SO" refers to "Successor Organization" in both the law and the draft contingency plan, but is referred to as "Sustainability Organization" in the PowerPoint presentation of the contingency plan. This minor tweak will be helpful for continuity purposes."

MRC Response:

MRC will change the PowerPoint to correct this mistake. Since the language is consistent between AB 187 and the Contingency Plan, no change is required in the Contingency Plan.

4. Narrowing the choice between a trust and escrow account**AC Comment:**

"Under Section (G), the plan directs MRC to transfer unexpended funds to either a trust or escrow account. Given the fact that these two programs function quite differently, we seek further clarification on which account type is preferred. It is the recommendation of the AC that the department evaluates which type they are most familiar with to have information on hand in the situation the CP is needed."

MRC Response:

Please see the Department's April 17 letter responding to the AC's comments on the Contingency Plan.

5. Clarification of "agent" description**AC Comment:**

"Throughout the plan, the option is given to allow an "agent" to administer the program while a SO is established. While the duties are clearly spelled out, we seek further clarification of who selects or

appoints the agent, the qualifications for selecting the agent, and whether it is designed to be an individual or board.”

MRC Response:

Please see the Department’s April 17 letter responding to the AC’s comments on the Contingency Plan.

6. Clarification of expansion plan

AC Comment:

“Under Section (F)(ii), the section describes the goal of this transfer process is to maintain continuity of MRC’s mattress processing capacity, including the implementation of expansion plans and the AC recommends clarifying the expansion processes or strategies as not to be confused with the Plan, which would require additional review.”

MRC Response:

MRC removed the language “expansion plans” to avoid any confusion with the plan.

7. Pending litigation obligations

AC Comment:

“Under Section (F)(ii)(7), it is noted that MRC will be responsible for pending litigation and other disputes. The AC seeks further clarification on the authority the Department has to approve/disapprove the transfer of pending litigation.”

MRC Comment:

Please see the Department’s April 17 letter responding to the AC’s comments on the Contingency Plan.

8. Clarification on reimbursement obligations

AC Comment:

“Under Section (D)(iii)(5), the AC wants reassurance that the Department will have access to the additional administrative funds needed to establish the trust or escrow account and in a timely manner as not to disrupt the continuity in the administration of the program.”

MRC Comment:

Section (D)(iii)(5) of the Contingency Plan provides that MRC will transfer to any agent appointed by the Department pending certification of the SO various ongoing MRC operations, including “5. maintaining existing consumer drop-off incentives through reimbursements to parties contracted to pay the consumer incentive.” Separately, Section (D)(ii)(1) of the Contingency Plan provides that once a trust fund or escrow has been established, the trust fund or escrow would receive the recycling fees (that is, the “charges”) that MRC previously received. This would provide the trust fund or escrow account the funds it needs to administer these and other operations formerly performed or administered by MRC. Furthermore, Section (D)(i) of the Contingency Plan provides

that if instructed by the Department, MRC will establish a trust fund or escrow account. As such, MRC will incur the cost of fulfilling that obligation. Therefore, the Department will require no access to any funds to establish the trust fund or escrow account.

MRC appreciates the Advisory Committee's review and comments on the Contingency Plan. In addition to the change in response to comment 3 (edit PPT to reflect consistent terminology for successor organization) and comment 6 (strike language related to "expansion plans"), MRC made two minor editorial changes to the Draft Contingency Plan.

1. Section I.F. MRC struck "That process will include". MRC made this change because the text that follows this sentence is not a process but is more accurately a list of the SO's responsibilities.
2. Section II. B. MRC changed "an" to "a" before "successor organization".

We have attached a copy of the final contingency plan which MRC submitted to the Department today, April 30, 2020, which reflects these changes. Please let MRC know if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike O'Donnell". The signature is fluid and cursive, with the first name "Mike" and last name "O'Donnell" clearly distinguishable.

Mike O'Donnell
Managing Director
Mattress Recycling Council

cc:

Ken DaRosa, Acting Director for CalRecycle

Cynthia Dunn, CalRecycle Product Stewardship Section Supervisor

Heather Beckner, CalRecycle Acting Extended Producer Responsibility Unit Supervisor

Nicole Castagneto, CalRecycle Environmental Scientist, Extended Producer Responsibility Unit