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Chapter 5: The Bottle Bill Budget Band-Aid

Clayton S. III McCarl

University of the Pacific; McGeorge School of Law

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Chapter 5: The Bottle Bill Budget Band-Aid

Clayton S. McCarl, III

Code Sections Affected

Public Resources Code §§ 14560, 14574, 14580, 14581 (amended);
Water Code §§ 13476, 13480 (amended).
ABX8 7 (Committee on Budget); 2010 STAT. Ch. 5
(*Effective March 8, 2010*).

I. INTRODUCTION

Just a few years ago, the California Beverage Container Recycling Fund (BCRF) operated with a \$200 million surplus.¹ By 2010, the BCRF ran out of money and was insolvent; the program needed a legislative bailout.²

Prior to the economic meltdown,³ a 2007 management report for the program outlined plans to reduce the surplus by funding new recycling incentives.⁴ The 2007 report also provided projections of future year-end balances.⁵ “Current Fund forecasts indicate that the year-end Fund balance will decline to \$197 million at the end of [Fiscal Year (FY)] 2006-07, and will continue to decline to \$182 million by the end of FY 2007-08 Forecasts beyond FY 2007-08 are considered unreliable”⁶ The report did not predict that the state’s General Fund would borrow so much money that the recycling program would not be able to pay its bills in 2010.⁷

1. See DEP’T OF CONSERVATION, DIV. OF RECYCLING, CALIFORNIA BEVERAGE CONTAINER RECYCLING PROGRAM HISTORY AND FUND MANAGEMENT OPTIONS 9 (2007), <http://www.calrecycle.ca.gov/BevContainer/Publications/LAORreport07.pdf> [hereinafter 2007 REPORT] (on file with the *McGeorge Law Review*) (reporting a FY06 year-end balance of \$213,979,000).

2. See generally ASSEMBLY FLOOR, ANALYSIS OF AB 7 X8, at 3 (Feb. 25, 2010) (discussing the California Beverage Container Recycling Fund’s insolvency).

3. Proclamation, Governor Arnold Schwarzenegger, Fiscal Emergency Proclamation (Jan. 8, 2010), available at <http://gov38.ca.gov/proclamation/14143/> [hereinafter Schwarzenegger Proclamation] (on file with the *McGeorge Law Review*) (describing California’s “dire fiscal situation”).

4. 2007 REPORT, *supra* note 1, at 13.

5. *Id.* at 10.

6. *Id.*

7. See *id.* at 31 (expressing only the desire to lower the fund balance in 2007); Notice from Jason Marshall, Acting Assistant Dir. for Recycling, Dep’t of Conservation, Div. of Res. Recycling & Recovery, Proportional Reductions in Payments (Oct. 20, 2009), available at <http://www.calrecycle.ca.gov/BevContainer/Notices/2009/PRPN.pdf> [hereinafter Marshall Notice] (on file with the *McGeorge Law Review*) (alerting program participants to the cash shortage).

Chapter 5 of the Eighth Extraordinary Session⁸ helps the BCRF immediately generate extra revenue and balance its 2009-10 budget.⁹

II. LEGAL BACKGROUND

The goal of the California Beverage Container Recycling and Litter Reduction Act¹⁰ (CA Bottle Bill) is to make recycling profitable.¹¹ The state collects a deposit from the sale of beverage containers and pays back the deposit if the container is recycled.¹² The leftover funds (known as “donated” funds) pay administrative costs and handling fees to organizations involved in the recycling process.¹³ On November 1, 2009, the BCRF cut payments to recycling organizations due to inadequate funds.¹⁴

A. *The Mechanics of the California Bottle Bill*

The CA Bottle Bill places a regulatory fee, the California Redemption Value (CRV), on the sale of soft drinks, beer, water, and other “ready-to-drink” liquids in bottles and cans.¹⁵ Beverage distributors pay five cents for every container offered for sale in California—ten cents if the container can hold at least twenty-four fluid ounces—to the state for the BCRF.¹⁶ The distributors have a three-month window to pay the state after a beverage sale, and they keep 1.5% of these fees to cover administrative costs.¹⁷

The BCRF pays the CRV as a refund when consumers return a bottle to a recycling center.¹⁸ Consumers may take bottles to a center and collect the money personally or “donate” bottles to curbside collection groups.¹⁹ The BCRF also

8. See AB 7, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as introduced on Jan. 15, 2010) (explaining the purpose of the Eighth Extraordinary Session). Each legislative session restarts the numbering of bills and chapters. Governor Schwarzenegger called this special session in response to the fiscal crisis. *Id.*

9. DEP’T OF RES. RECYCLING AND RECOVERY, QUARTERLY REPORT ON STATUS OF THE BEVERAGE CONTAINER RECYCLING FUND 3 (July 2010), available at <http://www.calrecycle.ca.gov/BevContainer/RecycleFund/2010/JulStatus.pdf> [hereinafter 2010 REPORT] (on file with the *McGeorge Law Review*).

10. California Beverage Container Recycling and Litter Reduction Act, CAL. PUB. RES. CODE §§ 14500-99 (West 2007).

11. *Id.* § 14501(f).

12. *How California’s Bottle Bill Works*, CALIFORNIANS AGAINST WASTE, http://www.cawrecycles.org/issues/bottle_bill/how [hereinafter CALIFORNIANS AGAINST WASTE] (on file with the *McGeorge Law Review*).

13. *Id.* (summarizing the CA Bottle Bill and describing handling fees).

14. Marshall Notice, *supra* note 7.

15. See CAL. PUB. RES. CODE § 14504 (defining beverage for the CA Bottle Bill); *id.* §§ 14560-61 (describing the CRV); *id.* § 14562 (explaining the regulatory fee).

16. *Id.* §§ 14512.7, 14560(a).

17. *Id.* § 14574(a)(1)-(2).

18. See *id.* §§ 14572-73.5 (describing how the department pays a processor which pays a certified recycling program which pays a consumer).

19. CALIFORNIANS AGAINST WASTE, *supra* note 12.

pays recycling centers a handling fee for processing redeemed containers.²⁰ The Department of Resources Recycling and Recovery (CalRecycle) labels the CRV state revenue from beverage container sales “CRV In” and labels the CRV disbursements for recycling “CRV Out.”²¹ Because not all beverage containers are recycled, unredeemed CRV refunds play a key role in financing the BCRF.²² In addition to recycling refunds, the BCRF annually provides millions of dollars to recycling development and education programs.²³

B. Empty Coffers

During California’s current fiscal crisis, the state borrowed several hundred million dollars from the CA Bottle Bill program.²⁴ The unpaid debt, combined with declining sales and an increase in consumer recycling, brought the BCRF to insolvency.²⁵ “The fund ran out of money and . . . stopped paying [the] handling fee”²⁶ As a result of unpaid bills from the BCRF, recycling organizations across the state have closed facilities and cut jobs.²⁷ The California Chamber of Commerce (CalChamber) joined with recycling organizations and petitioned for writs of mandate to force the state to repay over \$400 million transferred from the BCRF to the General Fund.²⁸ Ultimately, the court rejected all of CalChamber’s claims and denied the requested writs.²⁹

20. CAL. PUB. RES. CODE § 14513.4.

21. See 2010 REPORT, *supra* note 9, at 5 (using the CRV In and CRV Out labels to avoid confusion on finance charts).

22. See generally *Bottle Bills in the USA: California*, BOTTLEBILL.ORG, <http://www.bottlebill.org/legislation/usa/california.htm> (on file with the *McGeorge Law Review*) (discussing the role of unredeemed deposits).

23. CAL. PUB. RES. CODE § 14581 (listing many grant programs funded by the BCRF).

24. *CalChamber Sues State to Return Beverage Recycling Funds to Program*, CALCHAMBER.COM, Jan. 13, 2010, <http://www.calchamber.com/headlines/pages/calchambersuesstatetoreturnbeveragerecyclingfundsto-program.aspx> (on file with the *McGeorge Law Review*) (“Since 2002, the state of California has “borrowed” a total of \$566.7 million from the BCRF to make up for budget shortfalls in the General fund.”).

25. ASSEMBLY FLOOR, ANALYSIS OF AB 7 X8, at 3 (Feb. 25, 2010).

26. Lisa Vorderbrueggen, *Recycling Centers Fall Victim to State’s Budget Woes*, CONTRA COSTA TIMES, Jan. 1, 2010, available at <http://www.container-recycling.org/media/newsarticles/archives/2010/CA-1-1-RecyclingCentersFall.htm> (on file with the *McGeorge Law Review*).

27. Curt Harler, *Appropriations Committee*, RECYCLING TODAY, Apr. 2010, at 124.

28. Complaint at 1, 13, *Tomra Pacific, Inc. v. Chiang*, No. RG09-483580 (Cal. Sup. Ct. (Alameda) Nov. 9, 2009) (on file with the *McGeorge Law Review*); see also Order Denying Petition at 1-2, *Tomra Pacific, Inc. v. Chiang*, No. RG09-483580 (Cal. Sup. Ct. (Alameda) June 15, 2010) [hereinafter *Petition Order*] (on file with the *McGeorge Law Review*) (explaining that the court heard petitions from Tomra Pacific and CalChamber in a consolidated case).

29. *Petition Order*, *supra* note 28, at 5.

III. CHAPTER 5

Chapter 5 is an urgency statute responding to California's fiscal emergency.³⁰ Chapter 5 amends management provisions of the CA Bottle Bill and addresses the BCRF's insolvency.³¹ The act mandates quarterly program review to ensure the BCRF has adequate funds.³² This legislation cuts approximately \$80 million in program costs by suspending several grants during the 2010 and 2011 calendar years.³³

Chapter 5 shortens the payment window after a beverage sale from three months to two months through June 2012.³⁴ In early 2012, CalRecycle must provide an assessment on the status of the BCRF and the impact of returning to a three-month window.³⁵ Chapter 5 includes a pending version of section 14574 that will automatically take effect on July 1, 2012 and reinstate the three-month window unless the Legislature intervenes.³⁶

Finally, Chapter 5 prevents future uses, loans, or transfers of money for purposes outside the CA Bottle Bill,³⁷ and it authorizes retroactive payments for unpaid bills during the 2010 calendar year.³⁸

IV. ANALYSIS

The legislative history of Chapter 5 speaks volumes about its purpose: Chapter 5 is a quick response to address immediate concerns, not long-term problems.³⁹ After introducing an empty placeholder bill on January 15, 2010,⁴⁰ the

30. 2010 Cal. Stat. ch. 5, §§ 9-10, at 97 (as enacted by Chapter 5, but not amending any code); Schwarzenegger Proclamation, *supra* note 3.

31. ASSEMBLY FLOOR, ANALYSIS OF AB 7 X8, at 3 (Feb. 25, 2010). Though not discussed in this article, Chapter 5 also amends two Water Code sections to access federal grant funds. *Id.*

32. *See* 2010 Cal. Stat. ch. 5, § 1, at 96 (as amended on Feb. 17, 2010, but not enacted) (amending section 14560 so that reviews of program funds will occur "at least once every three months" instead of "periodically"). Once the program determines that there may be inadequate funds to provide the statutory recycling refunds, it must now wait ninety days after notifying the Legislature before cutting spending. AB 7 §§ 1, 5 (as amended on Feb. 17, 2010, but not enacted) (showing the changes between Chapter 5 and prior law). Only months after enacting Chapter 5, the Legislature introduced even more program review and reporting requirements. CAL. PUB. RES. CODE § 14556 (enacted by 2010 Stat. Ch. 718).

33. ASSEMBLY FLOOR, ANALYSIS OF AB 7 X8, at 2 (Feb. 25, 2010); CAL. PUB. RES. CODE § 14581(a)(5)(A)-(B) (amended by Chapter 5) (suspending \$1.5 million annually awarded "in the form of grants for beverage and litter reduction programs"); *id.* § 14581(a)(7)(B) (amended by Chapter 5) (suspending \$5 million annually spent for public education); *id.* § 14581(a)(9) (amended by Chapter 5) (suspending \$20 million annually awarded for recycling market development grants); *id.* § 14581(a)(11) (amended by Chapter 5) (suspending a \$20 million five year community recycling program).

34. *Id.* § 14574(a)(2) (amended by Chapter 5).

35. *Id.* § 14574(c) (enacted by Chapter 5).

36. Cal. Stat. ch. 5, § 3, at 96 (as amended on Feb. 17, 2010, but not enacted) (showing the changes between Chapter 5 and prior law); CAL. PUB. RES. CODE § 14574(d) (enacted by Chapter 5).

37. CAL. PUB. RES. CODE § 14580(e) (enacted by Chapter 5).

38. *Id.* § 14581(f) (amended by Chapter 5).

39. *See generally* Veto Message of SB 402, Governor Arnold Schwarzenegger, to Cal. State Senate

Legislature added all of the content on February 17, 2010 and passed the bill eight days later.⁴¹ The Governor approved the act for immediate effect on March 8, 2010.⁴²

A. *Chapter 5: An Effective Triage*

Chapter 5 addresses the imminent problems facing the CA Bottle Bill with four key provisions: suspended grant programs; retroactive payments to recycling organizations; a ban on transfers out of the BCRF; and an extra month of revenue shifted forward from 2012.⁴³ The suspended grant programs save approximately \$28 million in FY 2009-10 and approximately \$56 million in FY 2010-2011.⁴⁴ Retroactive payments will breathe new life into recycling programs that have been forced to cut services and staff.⁴⁵ Chapter 5 prevents further abuse of the BCRF by declaring that “it is essential that any money in the fund be used solely for the purposes authorized in this division and should not be used, loaned, or transferred for any other purpose.”⁴⁶ These measures are effective, but they do not bring money back into the BCRF.⁴⁷

Because of the accelerated payments, the BCRF will receive thirteen months of revenue in 2010 and only eleven months of revenue in 2012.⁴⁸ CalRecycle projects the accelerated payment from beverage distributors will generate an extra \$93,885,992 and enable the program to pay its bills during FY 2009-10.⁴⁹ Because there will be one less month of revenue in 2012, this approach merely moves the cash shortage into the future unless the two-month payment schedule becomes permanent.⁵⁰ Chapter 5 does not address the outstanding debt from the

(Oct. 12, 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0401-0450/sb_402_vt_20091012.html [hereinafter Veto Message] (on file with the *McGeorge Law Review*) (proposing the accelerated payment plan as a temporary solution).

40. AB 7, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as introduced on Jan. 15, 2010).

41. AB 7, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as enrolled on Feb. 25, 2010).

42. AB 7, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as enacted).

43. See generally ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF SB 1401, at 2 (June 21, 2010) (summarizing Chapter 5 but omitting the ban on transfers).

44. ASSEMBLY FLOOR, ANALYSIS OF AB 7 X8, at 2 (Feb. 25, 2010).

45. See generally Vorderbrueggen, *supra* note 26 (discussing the hardships recycling centers faced during the frozen payments).

46. CAL. PUB. RES. CODE § 14580(e) (enacted by Chapter 5).

47. See generally 2010 REPORT, *supra* note 9, at 3 (explaining that the California Beverage Container Recycling Program will be able to pay its 2010 bills because of the accelerated payment provision).

48. Chapter 5 is designed to shift payments forward until 2012 then automatically revert to the three month payment period on July 1, 2012. AB 7 §§ 2-3, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as amended on Feb. 17, 2010) (showing the changes between Chapter 5 and prior law); CAL. PUB. RES. CODE § 14574(d) (enacted by Chapter 5).

49. 2010 REPORT, *supra* note 9, at 3, 6.

50. See generally CAL. PUB. RES. CODE § 14574(c) (amended by Chapter 5) (acknowledging the future impact by requiring an assessment by CalRecycle on the fiscal impacts before the bimonthly payment period expires).

California General Fund—the General Fund took \$99.4 million from the BCRF in FY 2009-10 alone.⁵¹ The state made a loan repayment of \$68.2 million in December 2010, but the BCRF continues to depend on future loan repayments.⁵²

B. The Looming Problem: Too Much Recycling?

The BCRF lost \$148,176,550 in FY 2008-09.⁵³ Most of that loss resulted from loans and transfers to other state funds, but the costs to operate the CA Bottle Bill program exceeded the revenue collected through “CRV In.”⁵⁴ While The CA Bottle Bill previously generated millions of dollars in profit annually,⁵⁵ the recycling program has not been profitable in recent years.⁵⁶ One key factor sent the program budget out of balance: too many people recycled.⁵⁷ The CA Bottle Bill thrived in years past because the volume of beverage containers not recycled paid for the administrative costs with leftover profit.⁵⁸ The BCRF loses money on every container recycled and gains money for every container thrown away.⁵⁹ Recycling now exceeds the eighty percent target rate established in the CA Bottle Bill;⁶⁰ the program is just not designed to sustain higher recycling levels.⁶¹ According to the quarterly program review reports, the grant programs and other costs are “statutorily-set expenditures that the Recycling Fund cannot support as long as the program experiences high recycling rates.”⁶² Politicians disagree on how to fix the system, and Governor Schwarzenegger vetoed the last

51. 2010 REPORT, *supra* note 9, at 6.

52. DEP’T OF RES. RECYCLING AND RECOVERY, QUARTERLY REPORT ON STATUS OF THE BEVERAGE CONTAINER RECYCLING FUND 4 (Jan. 2011), available at <http://www.calrecycle.ca.gov/BevContainer/RecycleFund/2011/JanStatus.pdf> [hereinafter 2011 REPORT] (on file with the *McGeorge Law Review*) (“Continued repayment of prior year loans will be required to maintain a prudent reserve and make all of the payments authorized by AB 7(8X).”).

53. See 2010 REPORT, *supra* note 9, at 6 (subtracting the FY 2009-10 annual balance forward from the FY 2008-09 annual balance forward).

54. *Id.* (reporting the separate values for income, transfers, and expenditures).

55. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1401, at 2 (June 30, 2010).

56. See 2010 REPORT, *supra* note 9, at 6. The total annual expenditures, both recorded and projected, exceed the annual “CRV In” revenue in FY 2008-09, FY 2009-10 (excluding the accelerated payment), and FY 2010-11. *Id.*

57. See *id.* (noting that 80% total recycling is the threshold for profit).

58. See 2010 REPORT, *supra* note 9, at 6 (showing that the CRV Out expenses overshadow the administrative costs).

59. The beverage distributor never even pays the entire refund value collected by recyclers because it subtracts a percent for administrative costs. CAL. PUB. RES. CODE § 14574(a)(1).

60. *Id.* § 14500(c); Notice from Margo Reid Brown, Director, CalRecycle, Biannual Report of Beverage Container Sales, Returns, Redemption, and Recycling Rates (May 10, 2010), available at <http://www.calrecycle.ca.gov/BevContainer/Notices/2010/Biannual.pdf> (on file with the *McGeorge Law Review*).

61. See generally ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1401, at 2 (June 30, 2010) (describing that rising recycling rates threaten the CA Bottle Bill).

62. 2011 REPORT, *supra* note 52, at 4.

bill attempting to redesign the CA Bottle Bill fee structure.⁶³ While Chapter 5 fixed the immediate cash flow problem,⁶⁴ the CA Bottle Bill needs future amendments that will ensure recycling program funding even if recycling rates continue to rise.⁶⁵

V. CONCLUSION

Chapter 5's accelerated payment schedule successfully took an insolvent CA Bottle Bill recycling program and balanced its 2009-10 budget.⁶⁶ However, when Governor Schwarzenegger proposed the plan, he knew that it was only a short-term fix: "I recognize this action will not solve the problems faced by the Fund, but . . . it should smooth out the challenges in the current fiscal year as we work out additional, long-term solutions."⁶⁷ The accelerated payment plan creates an additional month of revenue in 2010 and results in one less month of revenue when the plan expires in 2012.⁶⁸ A few long term issues continue to haunt the program: unpaid loans to the General Fund,⁶⁹ the pending expiration of the accelerated payments,⁷⁰ and the unsustainable recycling rate.⁷¹ Considering the critical situation of the insolvent BCRF when the Legislature passed Chapter 5, the short-term achievements make Chapter 5 a crucial amendment to the CA Bottle Bill despite any unsolved long-term issues.⁷²

63. The Governor criticized SB 402's attempt to collect CRV on non-recyclable materials. Veto Message, *supra* note 39. Collecting a fee on non-recyclable materials could be an effective way to finance the state's recycling while internalizing disposal cost into commercial products such as beverage containers. See generally Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51, 62-63 (2006) (discussing the policy of internalizing product disposal costs).

64. See 2010 REPORT, *supra* note 9, at 3 (crediting AB 7 with balancing the program budget).

65. See generally ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1401, at 2 (June 30, 2010) (describing that rising recycling rates threaten the CA Bottle Bill).

66. 2010 REPORT, *supra* note 9, at 3.

67. Veto Message, *supra* note 39.

68. Chapter 5 is designed to shift payments forward until 2012 then automatically revert to the three month payment period on July 1, 2012. AB 7 §§ 2-3, 2010 Leg., 8th Ext. Sess. (Cal. 2010) (as amended on Feb. 17, 2010) (showing the changes between Chapter 5 and prior law); CAL. PUB. RES. CODE § 14574(d) (as amended, repealed, and introduced by Chapter 5).

69. See generally Order Denying Petition at 1, 2, *Tomra v. Chiang*, No. RG09-483580 (Cal. Sup. Ct. (Alameda) June 15, 2010) (denying writs to compel repayment of loans).

70. See generally CAL. PUB. RES. CODE § 14574(d) (amended by Chapter 5) (establishing a temporary accelerated payment schedule).

71. See generally ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1401, at 2 (June 30, 2010) (describing that rising recycling rates threaten the CA Bottle Bill).

72. See 2010 REPORT, *supra* note 9, at 3 (explaining that the California Beverage Container Recycling Program will be able to pay its 2010 bills because of Chapter 5).