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M E M O R A N D U M

To: Senate Committee on Judiciary and Public Safety

From: National Waste & Recycling Association – MN Chapter

Re: Packaging Waste and Cost Reduction Act, SF 3561

Date: March 19, 2024

The National Waste & Recycling Association ("NWRA") is pleased to offer comments on the Packaging Waste and Cost Reduction Act, SF 3561 ("PWCRA"), scheduled for hearing before the Committee on March 20, 2024. NWRA is concerned that in its current form, the PWRCA violates several state and federal constitutional provisions, is unduly complex and burdensome, is problematically vague in key respects, and will run counter to its stated goals. NWRA therefore urges the Committee to oppose PWCRA and vote against moving the bill forward.

Legal Deficiencies in the PWRCA

The PWRCA is a sprawling, complex bill, proposing major new regulation of packaging wastes in a series of stages through the late 2030s. Yet despite its size and complexity, it is also quite vague given the scope of the regulations and the punitive enforcement provisions proposed. For purposes of the March 20 hearing and the Judiciary Committee's jurisdiction, NWRA will focus on the legal issues with the bill.

The PWRCA violates the nondelegation doctrine

The nondelegation doctrine is rooted in Article 1 of the Minnesota Constitution. As discussed by the Minnesota Court of Appeals last year, the doctrine is focused on ensuring that the law is made the peoples' elected representatives. *Minn. Auto. Dealers Ass'n v. Minn. Pollution Control Agency*, 986 N.W.2d 225, 231-32 (Minn. Ct. App. 2023) ("*MADA v. MPCA*"). The most common nondelegation question is whether the Legislature has given reasonably clear guidance and criteria for administrative agencies to apply in rulemaking. *Id.* For example, the question in *MADA v. MPCA* was whether the MPCA had violated the doctrine by adopting California air pollution control regulations "as amended". The Court concluded that MPCA's adoption of the California rules did not violate the doctrine, both by virtue of the specific structure of the Clean Air Act and by accepting the MPCA's representation that any substantive changes would undergo formal rulemaking.

The PWRCA poses a different problem, in that it essentially makes one or more private entities – the Producer Responsibility Organizations ("PROs") – a rulemaking body. The PROs, none of which presently exist, are charged with developing stewardship plans that have the force of law. While it is true that proposed stewardship plans are subject to limited public comment and approval by the MPCA, the procedures for development and adoption of stewardship plans fall far short of the due process protections afforded by the Minnesota Administrative Procedure Act. The need for adequate due process through rulemaking is especially acute here, where the PWRCA imposes $25,000/day penalties for first time violators of stewardship plans. PWRCA § 22(b). NWRA therefore urges the Committee to reject the PWRCA in its current form for violation of the nondelegation doctrine.

The PWRCA violates the Dormant Commerce Clause

Article 1, § 8, cl. 3 of the United States Constitution gives Congress the power to regulate interstate commerce, and this has long been held to involve a "dormant" dimension, limiting States' ability to regulate interstate commerce themselves. The Supreme Court most recently addressed the issue in *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023). Although the Court was highly divided on the proper standard, a majority of the Court agreed that a state law is unconstitutional if it "substantially burdens" interstate commerce.

There can be little doubt that the PWRCA poses a substantial burden on interstate commerce. The bill would prohibit the sale of covered materials "into the state", unless the producer complies with an approved stewardship plan and meets the law's reusability, recyclability, compostability, and collection system requirements. PWRCA § 9, Subd. 1(b), (c). These would have the effect of projecting the PWRCA's requirements into the national markets of covered materials. Unlike the facts of *Nat'l Pork Producers Council*, where the law's standards were reasonably clear and capable of conformance (and yet still may have been unconstitutional), the PWRCA would set up a byzantine system of shifting standards for covered materials. Consequently, it substantially burdens interstate commerce and is likely unconstitutional.

The PWRCA interferes with constitutionally protected freedoms of association

NWRA is troubled by the PWRCA's compulsory participation requirements, which mandate that producers participate and fund the PROs, pay for the Commissioner's costs, and effectively mandate service providers to do the same. PWRCA § 9, Subd. 2, § 10. Freedom of association is guaranteed by the Minnesota and U.S. Constitutions, and includes the converse right not to be compelled to support political and ideological causes with which one disagrees, and the freedom not to speak or to have one's money used to advocate ideas one opposes. *Hurley v. Irish–American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557 (1995); *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990).

Implementation and enforcement of the PWRCA is entirely funded by fees levied on producers through compulsory subsidies of the PROs and Commissioner. Compulsory subsidies are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met: (1) there must be a comprehensive regulatory scheme involving a mandated association among those who are required to pay the subsidy; and (2) compulsory fees can be levied only insofar as they are a necessary incident of the larger regulatory purpose which justified the required association. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310 (2012). Surviving the first criteria is exceedingly rare because mandatory associations are permissible under the First Amendment only

when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. *Id.* There can be no serious argument that the PWRCA is the only means to reduce packaging wastes. The Minnesota Waste Management Act has employed many different tools over the past 30 years to improve management of various wastes, without ever requiring anything resembling the PWRCA. The PWRCA is therefore likely to violate state and federal constitutional protections for freedom of association.

The antitrust protections are insufficient

To the extent the PWRCA proceeds, the antitrust provision in the bill is too narrow. Section 18 immunizes PROs from antitrust liability, but provides no protections to producers and service providers who are required by law to implement the stewardship plans developed by the PROs. Overall, the PWRCA imposes a highly centralized, inherently anticompetitive structure on the sale, use, collection, and disposal of covered materials. PROs, immunized from antitrust liability, are likely to develop stewardship plans that have anticompetitive elements. At a minimum, producers and service providers must also be immunized from antitrust liability to the extent they are complying with the requirements of the PWRCA or stewardship plans approved by the MPCA.

The Producer Responsibility Advisory Board poses severe conflict of interest issues

The proposed Producer Responsibility Advisory Board ("PRAB") creates significant conflict of interest problems, in that the PRAB members will be developing policy recommendations for how their constituent organizations should be regulated. The PWRCA will certainly result in a *dramatic* increase in the cost of selling, using, and managing packaging and packaging wastes, and each segment of the packaging supply chain will have strong incentives to shift those costs to other elements of the chain. While consultation with regulated industry is generally appropriate and necessary in any statutory scheme, the PRAB has a much more formal and influential role, and is rife with conflict of interests risks. In many ways this is a consequence of the nondelegation doctrine problem NWRA has previously highlighted; turning private associations into *de facto* regulators creates a host of problems, including conflict of interest issues.

The drafters of the PWRCA appear to have recognized this, but the proposed remedy – development of vague "conflict of interest policies – merely highlights the problem. *See* PWRCA § 5, Subd. 11. For example, the conflict of interest provision purports to address "perceived" conflicts of interest – whatever those are – arising from a member's "employment." This would appear to create circumstances in which members can be forced to recuse themselves from opining on the very subjects with which they have expertise and for which they were appointed to the PRAB. Overall, Subdivision 11 is a band-aid that cannot solve the inherent contradictions arising from the PWRCA's scheme.

These comments have only scratched the surface of the many issues with the PWRCA. There is good reason to believe that the net effect of the PWRCA will simply be to increase costs for all Minnesota consumers of packaging, including those least able of afford it. NWRA will reserve its policy concerns with the PWRCA for other forums.