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Environmental Alert

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Court approves Oregon EPR injunction pending appeal, bond required

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Members of the National Association of Wholesaler-Distributors (NAW) receive interim relief from Oregon's extended producer responsibility (EPR) fees with court approval and required bond.

What's the impact?

- The court granted NAW's motion to stay the judgment upholding Oregon's EPR packaging law and reinstate the February 2026 preliminary injunction pending appeal, conditioned on a court-approved bond equal to EPR fees that would otherwise be due.
- Relief will take effect only after the court approves and receives the bond. The bond must be renewed and adjusted annually.
- The order does not extend relief to non-NAW producers.

On November 16, the US District Court for the District of Oregon granted NAW's motion for a stay and injunction pending their appeal in *National Association of Wholesaler-Distributors v. Feldon*, case no. 3:25-cv-1334. Relief will take effect only after the court approves and receives the required bond.

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As we previously reported, the court entered judgment on August 28 upholding Oregon's Plastic Pollution and Recycling Modernization Act (the Act), ORS §§ 459A.860–.975, against NAW's dormant Commerce Clause and due process challenges. That judgment automatically dissolved the preliminary injunction the court had entered on February 6. NAW filed its notice of appeal on September 24 and moved for interim relief under Federal Rule of Civil Procedure 62(d) on October 16.

The court's reasoning

The court applied the Ninth Circuit's preliminary injunction standard, including its alternative "serious questions" test. Considering its merits ruling, the court stated that it "cannot—and does not—conclude that NAW is 'likely to succeed on the merits' of its appeal." Even so, it acknowledged that NAW has raised serious questions about federalism and the limits of a state's power to shift end-of-life pollution costs onto out-of-state producers. Under the alternative test, those questions can support relief if irreparable harm is likely, the balance of hardships tips sharply toward NAW, and the public interest supports relief.

The court found that NAW members would likely suffer irreparable harm without relief. Fees under the Act are paid to Circular Action Alliance-Oregon (CAA-Oregon), a private entity that is not a party to the case. The court accepted NAW's argument—which Oregon did not appear to dispute—that members likely could not recover those payments if NAW prevailed on appeal. Members therefore faced a choice between making potentially unrecoverable payments and risking interest and substantial penalties for nonpayment.

On the balance of hardships, the court was skeptical that delaying collection of NAW members' fees for a year or two would significantly affect CAA-Oregon's operations because those fees represent a relatively small share of its budget. However, the court agreed with Oregon that allowing NAW members to defer payments for several years without interest would give them an unfair competitive advantage over producers that continued paying.

To address both concerns, the court required a bond payable to the court in an amount roughly equivalent to NAW members' annual fees. The court explained that members could recover the deposited funds if NAW prevailed, while the deposit would substantially reduce the competitive advantage of withholding payment. The court found that the balance of equities would tip sharply in NAW's favor only if an appropriate bond is posted.

Bond requirement

The court directed the parties to confer promptly on the amount of the bond. In its discussion, the court identified unpaid annual fees NAW members would owe in 2027 if the judgment is affirmed as the initial benchmark. The bond must be renewed and adjusted annually to approximate the applicable unpaid annual fees.

If the parties cannot agree, each may submit a proposed amount supported by written argument and evidence. No stay or injunction takes effect until the court approves and receives the required bond.

Recommended steps for regulated companies

- **NAW members:**
    - **Continue compliance efforts until the bond is approved and posted.** The Act's fee, reporting, and other obligations apply, as well as interest and penalties, until the bond is in place. Confirm your membership status and watch for NAW's notice that the injunction is in effect. Ask NAW how it will fund the bond and whether members will be asked to contribute.
    - **Reserve for deferred fees.** The injunction defers fees but does not excuse them. If the Ninth Circuit affirms the district court's ruling on the merits, members should expect to owe the deferred fees, which the bond is sized to secure. Members should continue to calculate, document, and set aside amounts for their annual obligations.
- **Non-members:** The relief applies only to NAW members. Non-members must continue to comply with the Act and CAA-Oregon requirements. The court noted that CAA reports it is returning about $80 million in program reserves to producers through reduced 2027 fee rates. Companies should factor this into their budgets.
- **Other states:** The order does not affect EPR obligations in California, Colorado, or other states, or legal challenges to those EPR programs. Continue tracking state-specific registration, reporting, and fee deadlines, and keep records of reporting, fees, and PRO-imposed obligations.

What's next

The parties will confer on the required bond per the court's direction. Once the court approves the bond and NAW deposits it, the injunction will take effect. The bond will then be renewed and adjusted each year.

NAW's appeal will proceed in the Ninth Circuit. The appeal is expected to take more than a year.

Pending challenges to EPR programs in California (*Nebraska v. Heller*, case no. 2:26-cv-02214 (E.D. Cal)) and Colorado (*NAW v. Ryan*, case no. 1:26-cv-03460 (D. Colo.)); *Independent Lubricant Manufacturers Association v. Colo. Dept. of Public Health and Environment*, case no. 2026CV30902 (Colorado District Court, Denver County)) remain active. Courts in those cases may draw on both the Oregon ruling on the merits and this interim-relief order.

We will continue to monitor implementation of the stay, the Ninth Circuit appeal, and other EPR litigation, and will provide further updates.

Nixon Peabody's Environmental team helps companies navigate extended producer responsibility requirements, assess the implications of ongoing litigation, and manage compliance across jurisdictions. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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