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Andrew Parrish
Senior Environmental Scientist (Specialist)
California Department of Resources Recycling & Recovery
California Environmental Protection Agency
P.O. Box 4025
Sacramento, CA 95812
SB1335@calrecycle.ca.gov

RE: Proposed Regulations, Approval Process for Food Service Packaging Used at State Facilities

Dear Mr. Parrish,

The American Chemistry Council, the California Chamber of Commerce, the California Retailers Association, the Foodservice Packaging Institute, the Household and Commercial Products Association, Plastics Industry Association and the Western Plastics Association (collectively, the “Commenters”)¹ appreciate the opportunity to submit these comments on the proposed regulations of the Department of Resources Recycling and Recovery (“CalRecycle” or “Department”) to implement SB 1335 – the Sustainable Packaging for the State of California Act of 2018 – issued on March 13, 2020 (the “Proposed Regulations”).

The Commenters are committed to supporting policies and programs that increase the amount of food service packaging diverted from disposal through enhanced recycling, composting and recovery efforts. However, several aspects of the Proposed Regulations are inconsistent with the language and intent of SB 1335, exceed the Department’s statutory authority, are arbitrary, capricious and without rational basis or evidentiary support in the record, or violate due process rights. Additionally, CalRecycle has not met its statutory obligations to address the environmental and economic impacts of this rule. We respectfully request that CalRecycle revise the Proposed Regulations and address each of the following:

¹ A description of each Commenter’s membership and interests in the Proposed Regulations is provided as Attachment A.

- **Scope of Recycling and Recyclable.** The narrow construction of the terms “recycling” and “recyclable” in the Proposed Regulations contravenes the statutory mandate and legislative intent of SB 1335 by restricting recycling to a limited set of methods that exclude certain advanced technologies used to recycle plastic packaging into feedstocks to produce new products. Limiting recycling in this manner would have the added negative consequence of stifling innovation and investments in the State’s recycling sector and impede the State’s ability to meet its 75 percent diversion goal. We request that the Department incorporate our suggested revisions to the text of the Proposed Regulations as set forth below, and in the mark-up of the Proposed Regulations in Attachment B, to ensure “recycling” and “recyclable” are appropriately defined and consistent with the enacting statute, among other required changes to the proposal package to remove arbitrary barriers to recycling.
- **Public Health and Litter Impact Criteria.** The Commenters strongly oppose the “public health and litter impact” criteria in the Proposed Regulations. These criteria exceed the Department’s authority, are inconsistent with SB 1335 and arbitrarily identify certain chemistries without adequate scientific bases. CalRecycle does not have the expertise or authority to adopt the type of material restrictions and chemical disclosure obligations proposed here. Therefore, as discussed in our comments below, and as reflected in Attachment B, the criteria should be removed from the text of the Proposed Regulations in full.
- **CEQA and APA Obligations.** CalRecycle has not adequately addressed legal requirements imposed by the California Environmental Quality Act (“CEQA”) and the California Administrative Procedures Act (“APA”) that are necessary to lawfully promulgate this rulemaking. The Department must comply with all mandatory procedural requirements and properly consider the potential environmental and economic impacts that may result from the Proposed Regulations.

We provide detailed comments on each of these issues below.

I. The Terms “Recycling” and “Recyclable” in the Proposed Regulations Are Improperly Narrow, Inconsistent with SB 1335, and Unsupported by Substantial Evidence.

SB 1335 requires that food service packaging must be reusable, recyclable, or compostable in order to be used in state facilities.² Instead of defining “recyclable” in the statute, the law requires CalRecycle to define what is recyclable by taking into account broad and varied criteria.³ Contrary to its mandate, CalRecycle has proposed narrow definitions of “recycling” in Section 17989 and “recyclable” in Section 17989.4 of the Proposed Regulations, which exclude certain advanced technologies used in plastics recycling. This narrowing effectively omits one of the statutory elements, “whether packaging material regularly becomes feedstock that is used in the production of new products.”⁴

The technologies excluded by the Proposed Regulations make it possible to recycle many types of plastic into varied forms of feedstocks, including basic chemicals, to make new plastic products as well as other types of non-plastic products. These technologies are clearly within the scope of SB 1335. By excluding an entire range of technologies that can create “feedstock that is used in the production of new products,” CalRecycle is ignoring the plain language and intent of the statute. In order to be consistent with SB 1335, CalRecycle

² See Public Resources Code (“PRC”) § 42370.3.

³ The full criteria that CalRecycle must consider are:

(1) Whether the type of food service packaging is eligible to be labeled as “recyclable” in accordance with the uniform standards contained in Article 7 (commencing with Section 17580) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code.

(2) Whether the type of food service packaging is regularly collected, separated, and cleansed for recycling by recycling service providers.

(3) Whether the type of food service packaging is regularly sorted and aggregated into defined streams for recycling processes.

(4) Whether the type of food service packaging is regularly processed and reclaimed or recycled with commercial recycling processes.

(5) Whether the food service packaging material regularly becomes feedstock that is used in the production of new products.

(6) Whether the food service packaging material is recycled in sufficient quantity, and is of sufficient quality, to maintain a market value. PRC § 42370.2(a)(1) & (d).

⁴ See PRC § 42370.2(d)(5) (“For purposes of determining if a type of food service packaging is recyclable... [CalRecycle] ... shall consider, at a minimum ... Whether the food service packaging material regularly becomes feedstock that is used in the production of new products”).

must revise the scope of its “recyclable” criteria to accommodate advanced recycling technologies.

Revisions to allow advanced recycling technologies support the legislative intent behind SB 1335. The legislature viewed SB 1335 as a tool to amplify California’s ability to meet its state-wide recycling goals. If CalRecycle were to improperly limit technological innovation and what is deemed “recyclable,” as currently proposed, smaller percentages of plastic food service packaging in California will meet this definition, potentially thwarting California’s efforts to achieve its 75 percent recycling goal⁵ and also stifling innovation in the recycling sector. Bringing the scope of “recyclable” within the statutory mandate and allowing advanced recycling technologies will encourage innovation and investment in recycling and allow California to take its place as a leader in the circular economy.

A. The Proposed Regulations Contravene the Statutory Mandate of SB 1335.

The criteria for defining what constitutes recyclable food service packaging are set forth in proposed Section 17989.4 and include that the packaging must be regularly collected and recycled in accordance with certain conditions.⁶ Section 17989 of the Proposed Regulations defines “recycling” by incorporating the recycling definition from Public Resources Code (“PRC”) Section 40180.⁷ This definition explicitly excludes pyrolysis, which is a key technology, along with other heat-based technologies, for breaking down plastics so that they can be used to create feedstocks in the manufacture of new products. There is no apparent rational basis for this exclusion and/or its divergence from the language of SB 1335.

⁵ See PRC § 41780.01(a).

⁶ See Proposed Regulations, § 17989.4(a)(3).

⁷ See Proposed Regulations, § 17989(a)(22); PRC § 40180 (defining recycling as “the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace. ‘Recycling’ does not include transformation, as defined in Section 40201 or EMSW conversion.”); & PRC § 40201 (defining “transformation” as incineration, pyrolysis, distillation, or biological conversion other than composting. ‘Transformation’ does not include composting, gasification, EMSW conversion, or biomass conversion.”).

In adopting SB 1335, the legislature explicitly chose not to include a definition of “recycling” in the statute, although it has done so in other recycling legislation. (Notably, the legislature could have adopted the definition of recycling in PRC § 40180, but it did not.) This omission must be read to have meaning.⁸ When read in conjunction with the statute’s underlying purposes, which includes achieving California’s 75 percent recycling goal,⁹ this omission suggests that the legislature did not intend to limit the meaning of “recycling” or “recyclable” to the narrow definition contained in PRC § 40180. Rather, the plain language of the statute results in a broad definition of recycling, one that is inclusive of future innovation and arguably includes any technology that results in the packaging becoming “feedstock that is used in the production of new products.”¹⁰ The Proposed Regulations are inconsistent with SB 1335 in this regard, as they do not implement this statutory mandate.

Pyrolysis, which would be excluded by the Proposed Regulations, and other thermal technologies are essential forms of advanced recycling of plastics. CalRecycle has not demonstrated a basis for treating these technologies differently under this rule, and their exclusion is arbitrary, capricious, inconsistent with SB 1335, unsupported by substantial evidence and not reasonably necessary to effectuate the purpose of the Department’s statutory mandate. As discussed below in Section I.B., advanced technologies are available to convert plastics to new products such as waxes, lubricants, ingredients for detergents and cosmetics, acetic acid and windshield washer fluid, among others.¹¹ These advanced

⁸ See *California Soc’y of Anesthesiologists v. Brown*, 204 Cal. App. 4th 390, 404 (2012) (“While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose”); *Azusa Land Partners v. Dep’t of Indus. Relations*, 191 Cal. App. 4th 1, 20 (2010) (“[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded”).

⁹ Office of Senator Ben Allen, SB 1335 Fact Sheet, available at: <https://static1.squarespace.com/static/54d3a62be4b068e9347ca880/t/5af4ec7aaa4a998a191a99c6/1526000763282/SB+1335+%28Allen%29+Sustainable+Takeout+Food+Packaging+Factsheet.pdf>; California Assembly Committee on Natural Resources, SB 1335 Report (June 25, 2018), available at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1335.

¹⁰ See PRC § 42370.2(d)(5).

¹¹ Advanced recycling technologies are being successfully utilized in response to other mandatory recycling legislation in California. Eastman Chemical is currently receiving carpet as part of the State’s stewardship program for carpet recovery. The carpet is processed via Eastman’s thermal-based carbon renewal process and converts the carpet into new chemicals that can be used in new

recycling technologies are distinguishable from the types of waste disposal methods (*e.g.*, combustion for disposal and combustion of waste for energy recovery) the definition of recycling in PRC § 40180 would exclude. Where advanced technology is available to create feedstocks for manufacturing new products, it should be included in the scope of recycling in this rule.

Although CalRecycle’s rulemaking authority extends to “filling up the details” of a statute, the Department cannot narrow the scope of a key term in a manner that does not further the statute’s purposes and frustrates other recycling goals enacted by the legislature. Such a construction exceeds the Department’s authority and is inconsistent with SB 1335 and/or its statutory purposes and therefore, unlawful.¹² Accordingly, we request that CalRecycle replace the definition of “recycling” in Section 17989(a)(22) of the Proposed Regulations, at Page 4, Line 105, with the following:

the activities in which materials that would otherwise become solid waste are collected, sorted, cleansed, treated, and processed into specification-grade commodities, and consumed as raw-material feedstocks, in lieu of virgin materials, in the manufacture of new, reconstituted, or refurbished products. Recycling does not include incineration or burning waste for energy recovery.

This revised definition fulfills SB 1335’s mandate to include recycling technologies that produce feedstocks for new products.¹³ At the same time, this definition is narrow enough to eliminate waste disposal methods such as incineration or combusting waste to produce energy. Moreover, the revised definition allows plastics to be recycled by the technologies available today, while encouraging future innovation.

plastics such as eye glass frames, but also for use in coatings and other valuable end products of chemistry.

¹² See *PaintCare v. Mortensen*, 233 Cal.App.4th 1292, 1306-07 (2015) (an administrative agency “is authorized to ‘fill up the details’ of the statutory scheme”; however, they cannot be “inconsistent with a statute, alter or amend it, or enlarge or impair its scope”); *Nicolle-Wagner v. Deukmejian*, 230 Cal.App.3d 652, 657-59 (1991) (where a statute empowers an agency to adopt regulations, the regulations cannot be inconsistent or in conflict with the statute or its purposes); *In re Lucas*, 53 Cal. 4th 839, 849 (2012) (where an administrative agency construes a statute in adopting a regulation, “if the regulation does not properly implement the statute, the regulation must fail.”).

¹³ See PRC § 42370.2(d)(5).

B. The Proposed Regulations Stifle Innovation in Plastics Recycling and Limit Development of the Circular Economy.

By limiting plastics recycling to specific technologies, the definition of “recycling” proposed by CalRecycle would stifle innovation and limit opportunities to build a robust and innovative recycling economy. As defined in the Proposed Regulations, for packaging to be considered recyclable, it must be recycled using only limited technologies (*i.e.*, no pyrolysis).¹⁴ Reliance on the definition of recycling in PRC § 40180 will likely cut short exciting innovation that can convert post-use plastics, including foodservice packaging, into a wide range of feedstocks and products. A recent report by the Closed Loop Fund highlights a potential economic opportunity of up to \$120 billion in North America when new advanced technologies are utilized to make a versatile mix of new end products, chemicals and plastics.¹⁵

Advanced recycling technologies use a combination of heat, pressure, catalysts and/or solvents to convert post-use plastics and other materials into their basic building blocks. These basic building blocks can make new plastics again, and also have the versatility to create feedstocks to make useful chemicals and high-value end products. Below are some examples of the types of plastics accepted and outputs generated by advanced recycling technologies:

- Polystyrene foam (#6) can be recycled as styrene monomer and used to manufacture food packaging for meat, dairy and bakery products, electronics, automotive components, medical devices, and paper coatings.
- PET (#1) and polyester fiber can be recycled as PET monomer building blocks and used to manufacture new polyester and PET for use in durable food containers, small appliances, consumer electronics, antifreeze, and skin conditioning agents.
- PET (#1)/flexible packaging/plastic films can be recycled as cellulose based thermoplastics and used to manufacture textiles, eyeglass frames, and automotive lens applications and decorative trim.

¹⁴ See Proposed Regulations, § 17989(a)(22); PRC §§ 40180 & 40201.

¹⁵ Closed Loop Partners, Accelerating Circular Supply Chains for Plastics, available at: https://www.closedlooppartners.com/wp-content/uploads/2020/01/CLP_Circular_Supply_Chains_for_Plastics.pdf.

- Mixed plastics including films (#4)/PP (#5) /PS (#6)/miscellaneous plastics (#7) can be recycled and used to manufacture waxes, lubricants, and ingredients for detergents and cosmetics.
- Mixed plastics (combined with non-compostable materials) can be recycled to create renewable methanol used to manufacture plastics, new chemicals, and products such as acetic acid and windshield washer fluid.

The above list demonstrates the diverse value of advanced recycling and its potential to divert post-use plastics from disposal and to convert plastics to many different types of new plastics, chemicals and other useful products.

C. The Department Should Remove the Arbitrary 75 Percent Litmus Test and Baling and Sorting Limitations Included In the “Recyclable” Criteria at § 17989.4.

What is “recyclable” is further limited in the Proposed Regulations by arbitrary limitations on the meanings of “regularly” collected and recycled and procedures for baling and sorting. These aspects of the Department’s proposed recyclable criteria are inconsistent with the plain language and intent of SB 1335, exceed the authority conferred by the legislature, are arbitrary and otherwise lack a rational purpose. We urge CalRecycle to revise Section 17989.4 of the Proposed Regulations to reasonably accommodate the realities of recycling and align with SB 1335’s legislative mandates.

First, in Section 17989.4(a)(3)(A) and (B) of the Proposed Regulations, the Department arbitrarily selects 75 percent as the threshold at which recycling programs must sort and bale a material in order for the material to be eligible to be deemed “recyclable.” In support of selecting this 75 percent litmus test, the only rationale provided by the Department is that the “minimum criteria of 75 percent of recycling programs and transfer/processors is necessary to align this subsection with the state’s recycling goal for not less than 75 percent of solid waste generated to be source reduced, recycled, or composted by the year 2020 as established by AB 341.”¹⁶ However, the State’s overall recycling goals have no bearing on whether a particular type of food service packaging is

¹⁶ Initial Statement of Reasons (“ISOR”) p. 22.

recyclable. Nor are the State’s overall recycling goals listed by the legislature in SB 1335 as one of criteria that CalRecycle must consider in defining whether a particular type of food service packaging is recyclable.¹⁷ In fact, the State’s ambitious overall recycling goals actually weigh in favor including more types of food service packaging (even if individual types may have a lower recycling rate) in what is “recyclable” in order to increase overall recycling rates. Therefore, it appears that the Department has failed to comply with the controlling legislative mandates in selecting the 75 percent threshold for inclusion in the Proposed Regulation’s “recyclable” criteria.

SB 1335 requires the Department to consider all the criteria listed in PRC § 42370.2(d) in determining what constitutes “recyclable” food service packaging. These required criteria include considering “[w]hether the type of foodservice packaging is eligible to be labeled as ‘recyclable’” under the uniform standards contained in Sections 17580-81 of the Business and Professions Code.¹⁸ The “uniform standards” in those sections incorporate the U.S. Federal Trade Commission’s (“FTC”) Guidelines for Environmental Marketing Claims (i.e., the “FTC Green Guides”) by reference.¹⁹ Under the FTC Green Guides, which the legislature has mandated that the Department consider in developing its “recyclable” criteria, materials are eligible to be labeled as “recyclable” without qualification if recycling facilities that will collect and recycle the product or packaging are accessible to a “substantial majority” – defined as 60 percent – of the population where the item is sold.²⁰ In other words, it appears that the Department has not only failed to consider all of the statutory criteria mandated by SB 1335, but it has also developed Proposed Regulations which are inconsistent with said criteria, and which lack a rational basis or evidentiary support. Based on the foregoing, Section 17989.4 of the Proposed Regulations should be revised at Page 9, Lines 245-260 to incorporate consideration of the FTC’s Green Guides, as required by SB 1335, and provide that a food service packaging item is “regulatory collected and recycled”

¹⁷ See PRC § 42370.2(d).

¹⁸ See PRC § 42370.2(d)(1).

¹⁹ Business & Professions Code § 17580(a)(5) (“...Whether or not, if applicable, the consumer good conforms with the uniform standards contained in the Federal Trade Commission Guidelines for Environmental Marketing Claims for the use of the terms ‘recycled,’ ‘recyclable,’ ‘biodegradable,’ ‘photodegradable,’ or ‘ozone friendly.’”).

²⁰ 16 C.F.R. § 260.12(b)(1) (emphasis added), available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=9b3f36e8e14acd0c50df6ea32f111599&mc=true&node=se16.1.260_112&rgn=div8.

if it is collected by at least “60 percent of recycling or takeback programs” serving at least “60 percent of the population.”

Similarly, in Section 17989.5(a)(1) of the Proposed Regulations, the Department’s proposed “compostable” criteria contain the same litmus test as the one discussed above for “recyclable” food service packaging. For the same reasons as those described above and to avoid inequitable standards, the “compostable” criteria proposed by the Department should be revised to be consistent with the mandated statutory criteria in SB 1335, and the FTC’s Green Guides.²¹ In particular, the Department should replace the current language containing the 75 percent litmus test in Section 17998.5(a)(1) – (2), at Page 10, Lines 270-273 of the Proposed Regulations, with language stating that “a minimum percentage of public/private aerobic compost facilities processing post-consumer food waste and food-soiled paper must reach 60% of the population.”

Second, the Department arbitrarily limits “recyclable” at Section 17989.4(a)(3) by drawing a distinction between mixed plastic and mixed paper bales without any discernable legal justification or evidentiary support for doing so. Under the Proposed Regulations, mixed plastics that are collected and bundled for purposes of recycling would not be considered “recyclable.” Specifically, under the proposal, plastic packaging must be processed into a single named material bale to be “recyclable,” while, in contrast, a bale of paper may contain mixed paper materials.²² The proposal’s distinction between mixed paper and plastic bales, and the decision to allow processing and recycling of the former but not the latter, is arbitrary, capricious, unsupported by substantial evidence, inconsistent with SB 1335 and otherwise exceeds the Department’s rulemaking authority.

The level at which reporting entities should report an item as “recyclable” to the Department should not be mandated by the Department. Rather, the buyer of the bale should

²¹ See PRC § 42370.2(e)(4); 16 C.F.R. § 260.7(d), available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>

²² See Proposed Regulation, § 17989.4(a)(3); § 17989(a)(16)(defining “material” as “the type of feedstock used to make a food service packaging item including, but not limited to, glass, ceramic, metal, fiber (i.e., derived from cellulose), or plastic. Material is inclusive of any coatings or other ingredients used to make a food service packaging item. A plastic material may be identified by either the name of the plastic resin (#1-6 in accordance with PRC Sections 18013-18015) or by the name of the plastic polymer (e.g., polylactic acid”).

determine whether the bale is recyclable, allowing the realities of the market to determine what is recyclable, and allowing for advancements in recycling technologies and infrastructure. As discussed in Section I.B. above, mixed plastics can be recycled by advanced recycling technologies to produce new and useful products, including waxes, lubricants, ingredients for detergents and cosmetics, acetic acid and windshield washer fluid. The ability to process mixed plastics comprised of different resins in rigid, foam and flexible form while reducing costs from additional sortation represents an exciting innovation that should be encouraged in California, not discouraged. Limiting what is “recyclable” to only bales of single material plastics is not reflective of current recycling technologies and limits future innovation. Generally, most advanced recycling facilities can take mixed #3 - #7 plastics as well as multi-layer pouches and flexible films, while some facilities focus on specific types of plastics. It is likely that advances in technology will further expand the opportunities for recycling facilities to accept mixed plastics.

Based on the above reasons, we request that these arbitrary and inappropriate distinctions and limitations be stricken by removing the clause at Page 9, Lines 248-249 that reads “and are sorted and aggregated into a single named material bale by at least 75 percent of transfer/processors.” We also request that the clause at Page 9, Lines 257-260 which reads “and all food service items collected by the takeback program shall be transported to a transfer/processor or recycling facility for aggregation into a single named material bale” be stricken. Finally, Section 17989.4(a)(3)(C) at Page 9, Lines 261-262, which allows mixed paper bales to be classed as single named material, should also be deleted.

D. The Proposed Regulations Would Frustrate the Legislative Intent of SB 1335 By Impeding Efforts to Meet California’s 75 Percent Diversion Goal.

The legislature’s intention in enacting SB 1335 was to advance California’s efforts to achieve the State’s 75 percent recycling goal.²³ Including advanced technologies in the scope of what is “recyclable” is fully consistent with and essential to fulfilling that stated purpose.

²³ See Office of Senator Ben Allen, SB 1335 Fact Sheet, available at: <https://static1.squarespace.com/static/54d3a62be4b068e9347ca880/t/5af4ec7aaa4a998a191a99c6/1526000763282/SB+1335+%28Allen%29+Sustainable+Takeout+Food+Packaging+Factsheet.pdf> (the bill will “assist California in meeting its goal of diverting 75% of waste from landfills by

The latest statewide recycling data shows that California’s 2017 statewide recycling rate for paper and plastics is 40 percent. Of this 40 percent, 14 percent of total material generated was done through source reduction and mechanical recycling and another 14 percent was exported.²⁴ Following China’s National Sword decision to ban receipt of post-use materials including paper and plastics from the United States and other countries, the market for recyclables has contracted dramatically, making the recycling of all materials more challenging. California should not limit the definition of “recyclable” to a narrow set of existing mechanical recycling technologies that have demonstrated limitations. If the definition of recycling is revised to include advanced technologies, there is potential to significantly increase the recycling rate for plastics in California.

Nearly all the State’s current recycling is conducted via conventional mechanical recycling where plastics have to be separated and segregated by resin where they are then washed, cleaned, melted and extruded into new plastic pellets. Mechanical recycling can successfully produce a variety of plastic products, usually durable products, such as crates, pallets, railroad ties and backyard decking. However, mechanically recycled plastics pose a challenge for food contact packaging and fluctuations in market demand. In addition, there are limits in the number of times some materials can be recycled through mechanical practices, as mechanically recycled plastics lose additional properties and integrity each time they are mechanically recycled. Many European countries, such as Germany and Norway, have found it challenging to mechanically recycle more than 50 percent of their post-use plastics.²⁵

In order to achieve the State’s 75 percent recycling target, innovation via advanced recycling technologies will be critical. Advanced technologies will allow additional types of plastics to be recycled. By narrowly defining what is “recyclable” in the Proposed

2020.”); *see also* California Assembly Committee on Natural Resources, SB 1335 Report (June 25, 2018), available at:

http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1335.

²⁴ State of Disposal and Recycling in California for Calendar Year 2018, p. 4, 14. (April 6, 2020), available at: <https://www2.calrecycle.ca.gov/Publications/Download/1453>.

²⁵ Plastics – The Facts 2019, p. 31. Plastics Europe. (2019), available at: https://www.plasticseurope.org/download_file/force/3183/181.

Regulations, California would be shutting down this potentially fruitful avenue toward achieving its recycling goals.

E. Clarifications Are Needed In § 17989.1 Regarding the Frequency With Which the List of Approved Food Service Packaging Will Be Updated.

Section 17989.1 lacks necessary clarity and specificity regarding the frequency in which CalRecycle intends to re-evaluate and update the List of Approved Food Service Packaging (the “List”) after initial publication. Section 17989.1 is also arbitrary and improperly establishes a burdensome and duplicative application process, and authorizes the Department to remove food packaging items from the List even if they are still considered to be “reusable”, “recyclable” or “compostable” under the applicable regulatory criteria. These provisions are inconsistent with SB 1335, exceed the Department’s authority and likely violate the food service packaging manufacturers’ due process rights.²⁶

First, Section 17989.1(c) states vaguely that “[f]ollowing publication of the initial List [of Approved Food Service Packaging], the department shall evaluate applications and update the List with additional food service packaging items on an ongoing basis.” Section 17989.1(g), on the other hand, more specifically states that a food service packaging manufacturer is required to submit a new application within 180 days of receiving notification from the Department that it is “evaluating the List to determine whether each of the approved food service packaging items is reusable, recyclable, or compostable” and that the Department may remove a food service packaging item from the List if an application is not received within 180 days.”

Leaving the cadence of when CalRecycle will consider new applications totally within CalRecycle’s discretion could create a lengthy gap between List revisions and result in packaging that otherwise meets the recyclable criteria being omitted from the List. CalRecycle should revise the Proposed Regulations to provide that CalRecycle will consider

²⁶ See *B.C. Cotton, Inc. v. Henry J. Ross*, 33 Cal.App.4th 929, 954 (1995) (due process principles attach to quasi-judicial functions performed by state agencies, such as exercising the discretion to grant or deny an application and as such the procedures employed by the agency must satisfy “at least minimal requirements of procedural due process,” which “at rock-bottom minimum” includes “some form of notice and an opportunity to respond”).

applications for food service packaging to be included on the List on a regular cadence, every 180 days, so that the regulated community has an opportunity to apply to CalRecycle to advance new opportunities for recycling as recycling technologies and the recycling infrastructure evolve.

Accordingly, CalRecycle should revise proposed Section 17989.1(c) to state that the List will be updated at least every 180 day basis, to coincide with the 180 day cycle in Section 17989.1(g). This will provide necessary clarity on the frequency in which the List will be re-evaluated and updated,

Second, the Proposed Regulations provide that CalRecycle can remove approved food service packaging from the List in a manner that is inconsistent with the statute and that infringes on the manufacturers' due process rights. CalRecycle should strike the language in Section 17989.1(g), at Page 7, Lines 188-189, which provides that the Department may "remove" a food service packaging item from the list if a manufacturer fails to submit a "new application" within 180 days of the Department's re-evaluation notification. SB 1335 does not confer the Department with this type of punitive authority and it is otherwise in excess of and/or in conflict with the Department's authority under SB 1335, inasmuch as the statute only authorizes the Department to remove a food service packaging item from the List if it finds that the packaging is not reusable, recyclable, or compostable.²⁷ Requiring a new application in these circumstances infringes on the manufacturer's due process rights. We request that CalRecycle remove this requirement from the proposal. Additionally, Section 17989.1(f) provides that if CalRecycle determines that approved food service packaging no longer meets relevant criteria, it may remove the packaging from the List. Again, this infringes on the manufacturers' due process rights. CalRecycle should give the manufacture prior notice and an opportunity to respond to CalRecycle's concerns before CalRecycle removes the packaging from the list, per Section 17989.1(f), Lines 182-184.

²⁷ See PRC § 42370.3(b).

II. The Material Restrictions and Chemical Disclosure Obligations Contained in § 17989.2 As “Public Health and Litter Impacts Criteria” Exceed CalRecycle’s Authority and Should be Deleted Entirely.

Section 17989.2 of the Proposed Regulations arbitrarily and unlawfully seeks to impose material restrictions and chemical disclosure obligations through the guise of “public health and litter impacts criteria.” The requirements contained in this section are beyond the scope of CalRecycle’s competency or authority and are not explicitly or impliedly authorized by SB 1335.²⁸ As such, this section should be deleted in its entirety.

SB 1335 does not authorize CalRecycle to develop a separate set of “public health and litter” criteria that may be used in determining whether food service packaging qualifies to be on the list of approved food service packaging.²⁹ SB 1335 only permits the Department to develop three sets of criteria in its regulations: “reusable”, “recyclable” and “compostable.”³⁰ Accordingly, Section 17989.2 is inconsistent with SB 1335 and exceeds CalRecycle’s rulemaking authority.

As proposed, this section also lacks a strong scientific foundation, as it arbitrarily identifies specific chemistries that may be used as a basis for disclosing or restricting certain packaging types, inappropriately seeks to utilize the Proposition 65 list as a basis for regulation, and despite a specific reference in the enacting statute does not appear to take into account the U.S. Food and Drug Administration’s (“FDA”) regulation of food contact substances.

Under existing FDA regulations, before a chemical used in food packaging (termed a “food contact substance”) can be sold or distributed in commerce, it must be reviewed by FDA to determine whether there is sufficient scientific data to demonstrate that the

²⁸ See *PaintCare v. Mortensen*, 233 Cal.App.4th 1292, 1306-07 (2015) (an administrative agency “is authorized to ‘fill up the details’ of the statutory scheme”; however, they cannot be “inconsistent with a statute, alter or amend it, or enlarge or impair its scope”); *In re Lucas*, 53 Cal. 4th 839, 849 (2012) (where an administrative agency construes a statute in adopting a regulation, “if the regulation does not properly implement the statute, the regulation must fail.”).

²⁹ See PRC § 42370.2(g) (“**In developing regulations pursuant to subdivision (a),** the department **may take into account** potential impacts on litter, public health, and wildlife”); PRC § 42370.2(a)(1) (the department shall adopt regulations to establish a process, **and develop criteria,** for determining the types of food service packaging **that are reusable, recyclable, or compostable.**) (emphasis added).

³⁰ See PRC § 42370.2(a)(1).

substance is safe for its intended use in packaging (based on a standard of “reasonable certainty of no harm”).³¹ In order to demonstrate that a food contact substance is safe for its intended use, FDA requires submission of extensive upfront test data regarding chemical composition, migration levels, and toxicity.³² FDA can withdraw its approval for a food contact substance at any time if available data no longer demonstrates that the food contact substance is safe for its intended use.³³ Although SB 1335 states that the Department should take into account “existing scientific information available from the United States Food and Drug Administration...,” it does not appear to have done so under the existing language in this section.³⁴

Section 17989.2 also includes a requirement that manufacturers “disclose the names of any chemical(s) included on the Proposition 65 list that are used in the manufacturing of a food service packaging item.” Apart from the unlawful nature of this chemical disclosure requirement, as described above, this requirement is also arbitrary inasmuch as it does not achieve the Department’s stated objective of “minimizing public health and litter impacts.” Chemicals on the Proposition 65 list, or any other list, provide little to no information on how that chemical is used in manufacturing the product, the levels at which a person may be exposed and whether those exposure levels are cause for concern. How will the Department, or the public, evaluate food packaging manufactured using chemicals that are on the Proposition 65 list, but where the final food packaging material itself does not contain the chemical or exposures are so low as to fall below the safe harbor level (and thus, are exempt from the warning requirement)? Furthermore, how will the Department consider food service packaging items that have safe use determinations (“SUDs”)? The Proposition 65 list is not a list of restricted chemicals and, in addition to the reasons explained previously, it would also be inappropriate for the Department to utilize the list as a back-door approach to restricting certain food service packaging items.

Additionally, the Proposed Regulations in this section contain terms and phrases that are vague or completely undefined. For example, Section 17989.2(a)(4) states “if a food

³¹ See 21 U.S.C. § 348(h)(1).

³² See 21 C.F.R. §170.101; FDA Form 3480, available at: <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/ucm076880.pdf>.

³³ See 21 C.F.R. §170.105(a).

³⁴ See PRC § 42370.2(g)(4).

service packaging item is identified by another state agency, or another state or federal government organization to have the potential to contribute to an adverse public health impact (e.g. through publications or reports provided by the Office of Environmental Health Hazard Assessment’s Prop 65 program or the Department of Toxic Substances Control’s Safer Consumer Products Program) the department may not include or remove the food service packaging item from the List.”³⁵ Phrases such as “another state or federal government organization”; “potential to contribute to an adverse health impact”; and “publications or reports” are all undefined. Moreover, this criterion lets any single government entity’s finding drive the listing outcome no matter how outdated, flawed or inconsistent with scientific consensus that finding may be. For these and the reasons described above, these proposed provisions must be deleted in their entirety. At the very least, the criterion should be limited to the findings of select, credible, and up-to-date scientific authorities, specifically the FDA and the California Department of Public Health.

Section 17989.2(a)(5) of the Proposed Regulations is also unreasonably vague, arbitrary in nature, and lacking in scientific foundation, as it states that if food service packaging is “subject to a ban, fee for distribution (e.g. a fee for a single use disposable cup at point of sale), or other restrictions, at least in part due to litter or ocean debris concerns, in city or county ordinances, the department may not include or remove food service packaging items made from that material from the List.” This language should be deleted in its entirety. Local ordinances prohibiting certain types of food service packaging, such as polystyrene foam products, often are enacted without any requirements that likely replacement products are actually recycled or composted. These ordinances also have little to no impact on reducing overall litter or trash and as stated by the State Water Resources Control Board (“Water Board”), product bans would not assist in compliance with the Board’s Statewide Trash Policy.³⁶ The Water Board stated:

³⁵ Proposed Regulations, Page 7, Line 208 – Page 8, Line 214 (emphasis added).

³⁶ Cal. State Water Res. Control Bd., Amendment to the Water Quality Control Plan for the Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California 96 (Apr. 7, 2015), available at: https://www.waterboards.ca.gov/water_issues/programs/trash_control/docs/trash_sr_040715.pdf (“2015 Water Board Report”).

Other types of product bans enacted by an ordinance, such as take-out items, may involve a substitution of the banned item. Mere substitution would not result in reduced trash generation if such product substitution would be discarded in the same manner as the banned item. Any such product ban enacted by an ordinance that would not reduce trash would not assist in achieving compliance.³⁷

It is also unclear how the Department will implement this provision due to shortcomings in the proposal. The type of “restrictions, at least in part due to ocean debris concerns” that would bar a packaging item from inclusion in the List are completely unspecified, and the vagueness limits our ability to provide informed and specific comments. Hypothetically, if a small town (population of 5,000 or less) enacts an ordinance banning all “single use” food service packaging items and mandating restaurants only use reusable items, would this impact the Department’s List? A local ordinance banning or imposing a fee on a particular food service packaging item has no bearing as to the recyclability or compostability of that product. On the other hand, if local actions result in additional food service packaging items being added to a local recycling or composting program, the Department should take into consideration this type of information when creating or updating its List. The intent of SB 1335 is to establish a foundation for determining the recyclability and compostability of food service packaging based on real world data and clear criteria that are enumerated in the statute. This provision is inconsistent with the language and intent of SB 1335 and exceeds CalRecycle’s authority. Therefore, it should be deleted in full with the rest of Section 17989.2, from Page 7, Line 194 through Page 8, Line 222.

III. CalRecycle Must Comply With CEQA’s Requirements During this Rulemaking, Including Evaluating the Potential Environmental Impacts that May Result From Adopting the Proposed Regulations.

CalRecycle’s current rulemaking activities constitute a “project” under the California Environmental Quality Act.³⁸ However, there is no information in the rulemaking file indicating that CalRecycle is complying with its legal obligations under CEQA to evaluate the

³⁷ *Id.*

³⁸ 14 C.C.R. § 15378; *John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd.*, 20 Cal. App. 5th 77, 98, (Ct. App. 2018).

potential environmental impacts that may result from adopting the Proposed Regulations. Any assumption on CalRecycle's part that it is exempt from conducting the reviews required under CEQA would be arbitrary, erroneous and unlawful, as it is reasonably foreseeable from the subject matter of the Proposed Regulations that CalRecycle's actions may cause changes in the environment.³⁹ Further, if adopted in their current form, the Proposed Regulations are likely to have significant environmental impacts that must be evaluated in a full environmental review.

A. The Environmental Impacts of Plastic Packaging Substitutes Are Often Higher.

All food packaging, regardless of the material it is composed of, has an environmental impact across the product's life cycle. Although the primary focus of SB 1335 is to ensure food service packaging is recyclable, compostable or reusable, CEQA requires a full evaluation of all impacts that may result from the Department's rulemaking, including other environmental impacts that may result from the increased usage of certain types of non-plastic packaging that is anticipated under the Proposed Regulations.

According to the Initial Statement of Reasons, CalRecycle anticipates that polystyrene and polypropylene food service packaging will not be considered "recyclable" under the current version of the Proposed Regulations and that a "wide range" of compostable plastic materials will not satisfy the Department's proposed "compostable" criteria.⁴⁰ Thus, an increase in substitute products, including reusable and non-plastic compostable food service packaging, is expected to result under the Proposed Regulations.⁴¹ CalRecycle is required by CEQA to evaluate the environmental impacts that may result from the increased usage of these substitute products.

³⁹ We note that during CalRecycle's 2012 Revised Rigid Plastic Packaging Container Program rulemaking, the agency complied with its obligations under CEQA by conducting an initial study to determine if the proposed rigid plastic packaging regulations may have a significant effect on the environment. See CalRecycle 2012 Rigid Plastic Packaging Container Program Rulemaking File, available at: <https://www2.calrecycle.ca.gov/Docs/102989>.

⁴⁰ ISOR, pp. 34, 39.

⁴¹ ISOR, pp. 38-39.

The environmental impact of substitutes can be substantial. The Royal Society of Chemistry has stated that it is “critical” to “consider the environmental impact of a packaging choice across all stages, from manufacture, transport and use, through to recycling and disposal”, noting that “many materials used as alternatives to plastic in packaging ... can have significantly higher CO₂ impacts or water usage compared to plastic packaging.”⁴² With respect to polystyrene in particular, the environmental impacts caused by substitute products are well recognized by experts and California regulators alike. The Water Board stated in a 2015 report that “bans on polystyrene food containers would cause a shift to materials with other significant environmental impacts.”⁴³ Additionally, the Water Board’s Report notes that some lifecycle studies have shown that policies which force a shift from plastic to paper materials result in significant increases in greenhouse gas emissions, energy usage and waste generation.⁴⁴ According to a 2018 Report prepared by Ramboll, a leading environmental consulting firm, the increased use of substitute products to replace expandable polystyrene (“EPS”) could have significant environmental impacts which fall within the following CEQA technical areas: utilities and service systems, hydrology/water quality, biological resources, air quality, greenhouse gases, aesthetics, and agriculture/forest resources.⁴⁵ Several lifecycle assessments have shown that polystyrene food service products consume less energy and water, and generate less greenhouse gases in production and transport than their substitutes.⁴⁶ Alternatives to polystyrene food service products are

⁴² Royal Society of Chemistry, Materials Chemistry Division, Sustainable Plastics – The Role Of Chemistry, Version 1.0, 10 (April 24, 2019), available at: <https://www.rsc.org/globalassets/04-campaigning-outreach/policy/environment-health-safety-policy/plastics-sustainability.pdf>.

⁴³ 2015 Water Board Report, *supra*, Appendix A-9, available at: https://www.waterboards.ca.gov/water_issues/programs/trash_control/docs/trash_a_040715.pdf

⁴⁴ *Id.*

⁴⁵ Ramboll, Research Regarding the Environmental Impacts of Substitutes to EPS 2 (Oct. 2018) (“2018 Ramboll Report”), copy included as Attachment C.

⁴⁶ Franklin Associates, Life Cycle Assessment of Hefty Polystyrene Foam Plates and Two Coated Paperboard Disposable Plates (Nov. 30, 2015), available at: https://www.pactiv.com/Pactiv/PDF/LCA_of_Foam_and_Paper_Plates_with_PR_Approval.pdf; Am. Chemistry, New Study: Polystyrene Foam Foodservice Cups and Plates Use Less Energy (Mar. 24, 2011), available at:

<https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/New-Study-Polystyrene-Foam-Cups-and-Plates-Use-Less-Energy.html> (citing Franklin Associates, Life Cycle Inventory of Foam Polystyrene, Paper-based, and PLA Food Service Products (Feb. 4,

also associated with increases in particulate emissions, VOC emissions and criteria air pollutant emissions.⁴⁷ Alternatives to plastic food service products – including namely, compostable paper products – are also associated with decreased water quality, increased water usage, and increased forest products consumption.⁴⁸

Another substitution effect that CalRecycle must evaluate is the environmental impacts caused by littering non-plastic products. Although CalRecycle states in its Initial Statement of Reasons that “increasing the use of reusable, recyclable, or compostable food service packaging items in state facilities will result in less litter,” numerous industry and government agency studies have found that the use of substitutes for plastic products such as polystyrene does not reduce litter. Rather, it only changes the composition of the litter to substitute products that often have greater environmental impacts. Michael Harding, an expert with over 35 years of experience in pollution control has found that litter is a problem of human behavior:

The source of all categories of trash and litter is anthropogenic, meaning that if one particular type of container, bag or food ware is banned (i.e., plastic/polystyrene) whatever material takes its place will in all likelihood be discarded and introduced into the storm drain unless public education programs, improved collection management, anti-littering enforcement programs are proportionally increased.⁴⁹

2011), available at: https://www.plasticfoodservicefacts.com/wpcontent/uploads/2017/12/Peer_Reviewed_Foodservice_LCA_Study-2011.pdf; David Biello, How to Solve Global Warming: It's the Energy Supply, Scientific American Apr. 13, 2014, available at: <https://www.scientificamerican.com/article/how-to-solve-global-warming-its-the-energy-supply/>.

⁴⁷ 2018 Ramboll Report, *supra*, at 3, 7.

⁴⁸ 2018 Ramboll Report, *supra*, at 9-10; Am. Chemistry, New Study: Polystyrene Foam Food Service Cups and Plates Use Less Energy (Mar. 24, 2011), available at: <https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/New-Study-Polystyrene-Foam-Cups-and-Plates-Use-Less-Energy.html> (citing Franklin Associates, Life Cycle Inventory of Foam Polystyrene, Paper-based, and PLA Food Service Products (Feb. 4, 2011), available at: https://www.plasticfoodservicefacts.com/wpcontent/uploads/2017/12/Peer_Reviewed_Foodservice_LCA_Study-2011.pdf; U.S. Environmental Protection Agency, Basic Information about Lead Air Pollution Webpage, available at: <https://www.epa.gov/lead-airpollution/basic-information-about-lead-air-pollution#ecosystems>; Union of Concerned Scientists, Planting for the Future: How Demand for Wood Products Could Be Friendly to Tropical Forests (Oct. 2014), available at: <https://www.ucsusa.org/ourwork/global-warming/stop-deforestation/planting-future-demand-wood-products>.

⁴⁹ Michael Harding, Comments on Bay Area Stormwater Management Agencies Association's Preliminary Baseline Trash Generation Rates for San Francisco Bay Area MS4s and Trash Load

Empirical data from a 2008 City of San Francisco Report reached a similar conclusion.⁵⁰

Further, consumers may be more likely to litter non-plastic substitutes because they wrongly believe that littering products marketed as ‘biodegradable’ does not impact the environment. In other words, people may wrongly think that littering paper or compostable food packaging products is benign, so they are more likely to litter those products than plastics packaging like polystyrene. Indeed, CalRecycle acknowledged this substitution effect in its 2004 Report to the Legislature on Polystyrene:

We must realize that using biodegradable food service products alone will not eliminate litter problems. Some have argued that it may even increase litter if consumers believe that it no longer poses an environmental problem.⁵¹

A shift to reusable products brings alternative environmental impacts, such as additional water, energy consumption, and the need for cleaning and disinfecting. Thus, the potential impacts caused by the anticipated increase in non-plastic substitute products is potentially significant. Nevertheless, there is no evidence in the rulemaking file that CalRecycle has made any attempt to analyze the potential impacts that may result from the Proposed Regulations, as is required by CEQA.

B. The Environmental Impacts Resulting From the Anticipated Increase in Composting and Recycling Operations Must Also Be Evaluated.

According to page 38 of the Initial Statement of Reasons, CalRecycle anticipates that under the Proposed Regulations, “recycling and composting facilities will receive increased quantities of food service packaging for processing.” The environmental impacts that will

Reduction Tracking Method 2 (Mar. 20, 2012), available at: https://www.waterboards.ca.gov/rwqcb2/water_issues/programs/stormwater/MRP/02-2012/Comments/Dart/MHR.pdf.

⁵⁰ 2015 Water Board Report, *supra*, at Appendix A-17 to A-19.

⁵¹ Cal. Integrated Waste Mgmt. Bd., Use and Disposal of Polystyrene in California 6 (Dec. 2004), available at: <https://www2.calrecycle.ca.gov/Publications/Download/563>.

result from the anticipated increases in these operations require a full environmental review under CEQA.

It is well known that composting is a source of greenhouse gas emissions, including carbon dioxide and methane.⁵² However, according to the California Air Resources Board (“CARB”), composting is also a source of volatile organic compounds (“VOCs”)/reactive organic gases (“ROG”), particulate matter and ammonia.⁵³ The 2008 CARB emissions inventory estimated that ROG emissions from composting operations in California were approximately 38.02 tons per day.⁵⁴ Given that the Department anticipates an increase in the amount of compostable food service packaging that will be sent for composting under the Proposed Regulations, it follows that air emissions from these composting operations will also increase. There is no evidence in the rulemaking file that CalRecycle has properly evaluated the nature or extent of these environmental impacts, as required by CEQA.

The environmental impacts that may result from an increase in recycling operations in general under the Proposed Regulations, as well as an increase in the recycling of polystyrene substitutes specifically, must also be evaluated under CEQA. A 2017 CalRecycle Report found that the greenhouse gas impacts of recycling polystyrene were lower than nearly all of its paper and plastic substitutes.⁵⁵ Additionally, polystyrene is made of nearly 95 percent air; therefore, it generates less solid waste in both weight and volume than its substitute products.⁵⁶ And, as noted above, CalRecycle anticipates that the amount of materials that will be sent to recycling facilities in the State will increase under the Proposed Regulations. There is no evidence in the rulemaking file that CalRecycle has evaluated any of the environmental impacts that may occur under the Proposed Regulations in this regard, including the impacts associated with increasing the amount of materials that are collected,

⁵² California Air Resources Board, Compost Emissions Workgroup Webpage, available at: <https://ww3.arb.ca.gov/cc/compost/compost.htm>; see also ARB Emissions Inventory Methodology for Composting Facilities (March 2, 2015), available at: https://ww3.arb.ca.gov/ei/areasrc/composting_emissions_inventory_methodology_final_combined.pdf; 2018 Ramboll Report, *supra*, at 3.

⁵³ California Air Resources Board, Compost Emissions Workgroup Webpage, available at: <https://ww3.arb.ca.gov/cc/compost/compost.htm>.

⁵⁴ *Id.*

⁵⁵ CalRecycle Packaging Report Workshop Background Document 32, Table A8 (Oct. 10, 2017), available at: <https://www2.calrecycle.ca.gov/PublicNotices/Documents/8345>.

⁵⁶ 2018 Ramboll Report, *supra*, at 2.

transported and processed for recycling in the state and/or the impacts associated with recycling more polystyrene substitute materials. CEQA requires a full environmental review of these and any other potential impacts that may be caused by the Proposed Regulations.

IV. CalRecycle Has Not Fulfilled Its Procedural Obligations Mandated under the California Administrative Procedures Act.

Under the California Administrative Procedures Act (“APA”), CalRecycle is required to complete certain basic procedural requirements during the rulemaking process in order to, among other things, ensure meaningful public participation in the adoption of agency regulations, and to avoid the imposition of unnecessary or unreasonable regulations, including those that unnecessarily burden or duplicatively regulate California businesses. For the reasons described below, CalRecycle has not satisfied its procedural obligations under the APA, as it has not adequately assessed the potential adverse economic impacts that will be caused by the promulgation of the Proposed Regulations, it has not fully estimated the costs associated with the Proposed Regulations, and it has not properly addressed the duplicative nature of certain aspects of the Proposed Regulations.

A. The Proposed Regulations Will Stifle Innovation and Investments in the Recycling Industry.

Under the APA, CalRecycle must assess the potential for adverse economic impacts on California business enterprises and individuals as part of its effort to avoid the imposition of “unnecessary or unreasonable regulations.”⁵⁷ CalRecycle is also required to prepare an economic impact analysis addressing, among other things, whether and to what extent the Proposed Regulations will impact the creation of new businesses and jobs in the State, as well as the impacts to investments and/or incentives for innovation in the State.⁵⁸

The Department’s Economic and Fiscal Impact Statement and Initial Statement of Reasons hastily conclude that the Proposed Regulations will only impact two types of private

⁵⁷ Gov’t Code §§ 11346.3(a), 11346.5(a)(8).

⁵⁸ Gov’t Code § 11346.3(b)(1)(A)-(C); Economic and Fiscal Impact Statement, Parts A.1. & E.5.

sector businesses: food service facilities and food service packaging manufacturers.⁵⁹ Additionally, according to the Economic and Fiscal Impact Statement “no change is expected” to investments or incentives for innovation in the State as a result of the Proposed Regulations.⁶⁰ The Department is mistaken because it has inadequately assessed the impacts as required under the law.

As currently written, the Proposed Regulations will adversely affect existing businesses in emerging areas of the State’s recycling sector, such as secondary Material Recovery Facilities (“MRFs”). The Proposed Regulations will also stifle innovation and investments in the State’s recycling sector, including those being explored for secondary MRFs and advanced recycling technologies.

The Proposed Regulations will disenfranchise existing secondary sortation MRFs in the State and disincentive any further investments or expansions in this segment of the market. As currently written, the Proposed Regulations do not allow mixed-named bales beyond paper.⁶¹ This threatens current and future businesses in the State that process mixed plastic bales from city MRFs, such as Titus Secondary Sortation. Titus processes mixed plastic bales received from city MRFs and sells the sorted plastic to companies that use the recovered plastic as recycled feedstock in their resin production lines.⁶² If the Proposed Regulations are adopted as currently written, the future investments in businesses employing these processes will be threatened.

The Proposed Regulations will also stifle investments in advanced plastic recycling which are emerging across the country. China’s National Sword Policy, which restricts the importation of certain solid waste materials, although disruptive to recycling programs in California and elsewhere, has created an opportunity for U.S. investment in both improved sortation technology and in advanced plastic recycling and recovery technologies. Since July 2017, there has been more than \$4.8 billion in announced new investments in plastics

⁵⁹ Economic and Fiscal Impact Statement, Appendix, Part A.3.; ISOR, p. 36.

⁶⁰ Economic and Fiscal Impact Statement, Part E.5.

⁶¹ See Proposed Regulations, § 17989.4(a)(3)(c).

⁶² See <https://titusmrfservices.net/>.

recycling (both mechanical and advanced technologies).⁶³ This emerging class of recycling and recovery technologies can convert used plastics into a range of products, including new plastics and chemicals, raw materials for manufacturing, and transportation fuels.⁶⁴

CalRecycle's economic impact analysis improperly narrows the scope of its analysis in this regard by failing to consider the impacts that will be felt by businesses seeking to develop new and innovative technologies in the State's recycling sector. These impacts are direct and have the potential to be significant. Therefore, they must be evaluated by the Department and its economic impact analysis should be revised accordingly.

B. COVID-19-Related Compliance Costs Must Be Added to the Economic Impact Analysis.

CalRecycle's economic impact analysis is also incomplete, in so much as it fails to consider the COVID-19-related costs that will invariably result under the Proposed Regulations, especially in light of the announcement of a \$54 billion State budget deficit.⁶⁵ Many families, consumers, and business are experiencing tremendous economic difficulties resulting from COVID-19 and the financial impacts resulting from COVID-19 are likely to be

⁶³ American Chemistry Council's Economics and Statistics Department (2020) (tracking public announcements of facility investments), available at <https://plastics.americanchemistry.com/advanced-recycling-resources/investments-in-advanced-recycling-us.pdf> ; see also Key Learnings Report: Rflex Bale Production at Pilot Facility. Materials Recovery for the Future Research Program (Jan. 20, 2020), available at <https://www.materialsrecoveryforthefuture.com/wp-content/uploads/Key-Learnings-Report-rFlex-Bale-Jan-2020.pdf>; Closed Loop Partners, Accelerating Circular Supply Chains for Plastics, available at: https://www.closedlooppartners.com/wp-content/uploads/2020/01/CLP_Circular_Supply_Chains_for_Plastics.pdf; U.S. Department of Energy Plastic Innovation Challenge Webpage, available at: <https://www.energy.gov/plastics-innovation-challenge/plastics-innovation-challenge>; U.S. Energy Department and American Chemistry Council Sign Memorandum of Understanding to Collaborate on Innovative Plastics Recycling Technologies" News Release, (Feb. 3 2020), available at: <https://www.energy.gov/articles/us-energy-department-and-american-chemistry-council-sign-memorandum-understanding>.<https://www.materialsrecoveryforthefuture.com/wp-content/uploads/Key-Learnings-Report-rFlex-Bale-Jan-2020.pdf>.

⁶⁴ See Closed Loop Partners, Accelerating Circular Supply Chains for Plastics, available at: https://www.closedlooppartners.com/wp-content/uploads/2020/01/CLP_Circular_Supply_Chains_for_Plastics.pdf.

⁶⁵ CNBC, "California faces a staggering \$54 billion budget deficit due to economic devastation from coronavirus" (May 7, 2020), available at: <https://www.cnbc.com/2020/05/07/california-faces-a-staggering-54-billion-budget-deficit-due-to-economic-devastation-from-coronavirus.html>.

felt for several months, if not years in the future. The Proposed Regulations will compound those challenges by restricting use of reliable and more economic packaging options. In order to comply with its obligations under the APA, the Department must revise its economic impact analysis to incorporate any previously unidentified costs, as well as the costs and economic impacts that now exist in light of the COVID-19 pandemic, which may result from the Proposed Regulations. These include, but are not limited to most notably, the costs associated with the anticipated increase in usage of reusable food service packaging, such as the costs associated with properly cleaning and disinfecting the products, as recommended by federal and state health agencies.⁶⁶

C. Duplication or Conflicts with Existing Federal Laws and Regulations Have Not Been Properly Analyzed and Avoided.

CalRecycle has not properly identified or evaluated the overlapping regulations that currently exist at the federal level, including those adopted by the FDA to regulate food contact substances and the inconsistencies with the FTC's Green Guides. Instead, on Page 37 of the Initial Statement of Reasons, the Department erroneously asserts that the "regulations do not duplicate or conflict with any federal law or regulation" and in support proffers the unsound rationale that "the department found that there are no federal laws or regulations comparable to the proposed regulations." The Department's analysis in this regard is unequivocally inadequate under the governing requirements in the APA.

Section 11346.2(b)(6) of the Government Code does not limit CalRecycle's obligation to identifying "comparable" regulatory regimes at the federal level. Section 11346.2(b)(6) states that CalRecycle must "describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues." (emphasis added).

⁶⁶ See Cal/OSHA Guidance, including the "Increase Cleaning and Disinfection" Section, available at: <https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Grocery-Stores.pdf>; Centers for Disease Control and Prevention, COVID-19 Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes, available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

Furthermore, CalRecycle may only adopt regulations “addressing the same issues” as those contained in the Code of Federal Regulations upon a finding that certain specified justifications exist warranting the overlapping regulations.⁶⁷ Thus, in order to fulfill its procedural obligations under the APA, CalRecycle must: 1) identify all federal regulations that address any of the same issues or subject matters that any of the provisions in the Proposed Regulations also seeks to duplicatively address; 2) describe the efforts undertaken by CalRecycle to avoid any such “unnecessary duplication or conflicts”; and 3) where such overlap still exists, as is the case here, CalRecycle cannot proceed with adopting the regulations unless it makes the finding in its Initial Statement of Reasons that the overlapping requirements are warranted under one of the justifications enumerated in the statute.

As described above in Sections I and II of the comments, the Proposed Regulations as currently written contain provisions that overlap with federal regulations adopted by the FDA and FTC. As such, CalRecycle has failed to fulfill its obligations under the APA in this regard, and the Proposed Regulations cannot be lawfully adopted until these conflicts are properly addressed in the rulemaking.

* * *

The Commenters appreciate the opportunity to share our views and concerns on the Proposed Regulations. We urge the Department to revise the language in the Proposed Regulations, in light of the above comments, and to make the revisions that we have offered in Attachment B in order to adhere to the mandates of SB 1335 and to promote innovation and investments in the State’s recycling sector. We also urge the Department to revisit its statutory obligations under CEQA and the APA in order to ensure that all impacts of the Proposed Regulations, including those that may be unintended, are appropriately evaluated.

⁶⁷ Gov’t Code § 113462(b)(6) (“These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications: (A) The differing state regulations are authorized by law. (B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.”)

Should you have any questions, please do not hesitate to contact me at (916) 448-2581 or
Tim_Shestek@americanchemistry.com.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Ti Sh", with a long horizontal flourish extending to the right.

Tim Shestek
Senior Director, State Affairs
American Chemistry Council

On behalf of the following organizations:

California Chamber of Commerce

California Retailers Association

Foodservice Packaging Institute

Household and Commercial Products Association

Plastics Industry Association

Western Plastics Association

Attachment A
Statements of Commenters' Membership and Interests in the Proposed Regulations

I. American Chemistry Council

The American Chemistry Council, acting on behalf of its members and including its self-funded groups and their members (collectively “ACC”), submits these comments and represents a diverse set of companies engaged in all aspects of the U.S. business of chemistry, including the manufacture of plastics and chemicals relied upon in food service packaging. The business of chemistry is a \$553 billion enterprise that provides approximately 542,000 high-paying jobs, drives innovations enabling a more sustainable future, and is helping to solve the biggest challenges facing our country and the world. ACC and its participating companies have been cornerstones of the global effort to address marine debris and plastic waste and their initiatives include helping develop, launch, and support the Alliance to End Plastic Waste; Circulate Initiative; the Declaration of the Global Plastics Associations for Solutions on Marine Litter; the Wrap Recycling Action Program; and the Materials Recovery for the Future project. ACC’s Plastics Division and its members are working towards a goal of making all U.S. plastic packaging reusable or recoverable by 2030, and reused, recycled, or recovered by 2040. ACC’s Plastics Foodservice Packaging Group (“PFPG”) represents suppliers of plastic food service and packaging products and is committed to supporting policies and programs that increase the amount of food service packaging diverted from disposal through enhanced recycling, composting and recovery efforts. Polystyrene manufacturing directly supports over 4,500 jobs in California, including 700 California residents employed by PFPG members.

II. California Chamber of Commerce

The mission of the California Chamber of Commerce (“CalChamber”) is to serve as an advocate and resource for California employers and to engage in other activities, domestically and internationally, that enhance the California economy and make the state a better place to live, work and do business. For more than 125 years, the CalChamber has been dedicated to maintaining our state’s economic vitality by meeting the needs of California employers. The CalChamber works to promote the growth of California business, protect California businesses from excessive government mandates and prepare California for the future by lobbying for improvements to the state’s infrastructure and education system. Representing 14,000 companies of all types and sizes, the CalChamber is one of the state’s largest, broad-based business advocates to government. CalChamber members employ one-fourth of the private sector workforce in California. More than two thirds of CalChamber members have 100 or fewer employees.

III. California Retailers Association

The California Retailers Association (“CRA”) works on behalf of California’s retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of \$330 billion annually and employs 3,211,805 people—one fourth of California’s total employment. CRA is the only statewide trade association representing all segments of the

retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug and specialty retail such as auto, vision, jewelry, hardware and home stores.

IV. Foodservice Packaging Institute

Founded in 1933, the Foodservice Packaging Institute (“FPI”) is the trade association for the foodservice packaging industry in North America. FPI promotes the value and benefits of foodservice packaging and serves as the industry’s leading authority to educate and influence stakeholders. Members include raw material and machinery suppliers, manufacturers, distributors and purchasers of foodservice packaging.

V. Household & Commercial Products Association

The Household & Commercial Products Association (“HCPA”) is the premier trade association representing companies that manufacture and sell \$180 billion annually of products used for cleaning, protecting, maintaining, and disinfecting homes and commercial environments. HCPA member companies employ 200,000 people in the U.S. whose work helps consumers and workers to create cleaner, healthier and more productive lives. HCPA members are committed to developing and using recyclable and compostable packaging. However, the proposed regulations for foodservice packaging could create a precedent for all packaging materials that would negatively impact the ability of our members to innovate their packaging to improve the environmental footprint. For these reasons, we support the comments developed by ACC.

VI. Plastics Industry Association

The Plastics Industry Association (“PLASTICS”) is the only association that supports the entire plastics supply chain. Founded in 1937, it has a track record of fostering collaboration between each segment of the industry and evolving right alongside the plastics industry as a whole. With the increased attention on plastics, it connects companies and the nearly one million employees in the industry to encourage innovation to meet the needs of tomorrow. PLASTICS has expanded its resources and tools available to members to help them come together to help positively shape the future of the industry. The association has expanded its focus on sustainability to drive value creation for society, the environment and the industry. Through the Zero Net Waste Program, participants are equipped with tools to divert up to 90% of their total waste away from the landfill. The Material Recovery for the Future research program is on track to produce 6,000,000 tons of recycled flexible plastic packaging from the consumer waste stream. And the Pacific Northwest Sorting Demonstration project demonstrated an estimated 50,000 tons per year of additional recyclable material could be recovered in the region through the utilization of additional mechanical sorting equipment. California is ranked 1st in plastics industry employment with almost 80,000 employees statewide. Downstream dependent industries like the food service industry employ another 4.5 million people. The industry has a \$4.2 billion state payroll and in combination with dependent industries pays \$22 billion in state payroll taxes.

VII. Western Plastics Association

The Western Plastic Association (“WPA”) is a trade association dedicated to representing the broad interests of the Plastic Industry in the Western States of the United States and Canadian Provinces of North America.

Attachment B
Revisions to Text of Proposed Regulations

Additions to the text are marked in bold/italics and red font.
Deletions to the text are marked in strikethrough and red font.

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Proposed Regulations

Sustainable Packaging for the State of California Act of 2018

TITLE 14: NATURAL RESOURCES
DIVISION 7. DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
CHAPTER 4 RESOURCE CONSERVATION PROGRAMS
ARTICLE 8. SUSTAINABLE PACKAGING FOR THE STATE OF CALIFORNIA

§ 17989. Definitions.

The definitions of this Article supplement and are governed by the definitions set forth

in Chapter 6 (commencing with Section 42370), Part 3, Division 30 of the Public Resources Code (PRC).

(1) “Accept” means a compost facility knowingly incorporates a food service packaging item into its routine daily operations for processing at the end of the item’s intended purpose. A food service packaging item is not considered “accepted” under this Article if the compost facility that received the item does not compost the item or identifies the item as a physical contaminant. “Physical contaminant” has the same meaning as defined in the California Code of Regulations Title 14, Division 7, Chapter 3.1, Article 1, Section 17852, subsection

(a)(32).

(2) “Aesthetic change” means a change in the coloration and/or treatment of a food service packaging item using inks, dyes, pigments, decals, or other methods that does not affect the material composition, or construction of an approved food

24 service packaging item in a manner that impacts its ability to meet all applicable
25 requirements of Sections 17989.2-17989.5.

26 (3) “Collect” means that a food service packaging item is picked up and delivered to a
27 recycling or composting facility after being used to serve or transport food or
28 beverages.

29 (4) “Compost facility” has the same meaning as “compostable materials handling
30 operation” or “facility” as defined in Division 7, Chapter 3.1, Article 1, Section
31 17852, subsection (a)(12) or “large volume in-vessel digestion operation,”
32 “medium volume in-vessel digestion facility,” or “limited volume in-vessel
digestion

33 operation” as defined in Division 7, Chapter 3.2, Article 1, Section 17896.2,
34 subsection (a).

35 (5) “Cooking or food preparation technique” includes, but is not limited to, the
36 following:

37 (A) Cooking techniques, such as steaming, microwaving, simmering,
boiling,
38 broiling, grilling, frying, or roasting.

39 (B) Beverage preparation techniques, such as blending, brewing, steeping,
40 juicing, diluting, or pouring.

41 (C) Food preparation techniques, such as defrosting, rinsing, washing, diluting,
42 cutting, portioning, mixing, blending, assembling, coating, dipping, garnishing,
43 or icing.

44 (6) “Department” means the Department of Resources Recycling and Recovery
45 (CalRecycle).

46 (7) “Food service facility” means an operation or business that stores, prepares,
47 packages, serves, vends, or otherwise provides prepared food and is also one of
48 the following:

49 (A) An operation or business that is located in a state-owned facility, including
50 but not limited to: cafeterias, restaurants, catering companies, shops,
51 markets, delis, Department of Corrections and Rehabilitation commissaries,
52 University of California food courts and dormitories, and Legislative
offices.

53 (B) An operation or business operating on or acting as a concessionaire on State
54 property.

55 (C) An operation or business under contract to provide food service to a
56 State
56 agency.

57 (8) “Food service packaging item” means a specific combination of the food service
58 packaging type (e.g., plate, cup, bowl) and the material(s) the type of food service
59 packaging is made of (e.g., polyethylene terephthalate (PET), polylactic acid
60 (PLA)-lined paperboard).

61 (9) “Food service packaging manufacturer” means a person that makes the
62 food
service packaging item(s).

63 (10) (A) “Food service packaging type” or “type of food service packaging” means a
64 product used for serving or transporting prepared, ready-to-consume food or
65 beverages that meets one or more of the following conditions:

- 66 (i) Comes into direct contact with the prepared food or beverage;
- 67 (ii) Keeps the prepared food or beverage contained while transporting it on or
68 off a food service facility’s premises; or
- 69 (ii) Aids in the consumption of the prepared food or beverage.

70 (B) “Food service packaging type” does not include beverage containers or single-
71 use disposable items, such as straws, cup lids, plastic bags, and utensils, or
72 single-use disposable packaging for unprepared foods.

73 (11) “Group of food service packaging items” or “group of items” means food service
74 packaging items made by one or more food service packaging manufacturer(s)
75 submitted under one application to meet the requirements of this Article.

76 (12) “Hauler” has the same meaning as defined in Division 7, Chapter 9, Article 9.25,
77 Section 18815.2, subsection (a)(32).

78 (13) “Jurisdiction” has the same meaning as defined in PRC Section 40145.

79 (14) “List of Approved Food Service Packaging” or “List” means the published list of
80 the food service packaging items approved by the department for use at food
81 service facilities.

82 (15) “Mass produced” means that a food or beverage product is manufactured and/or
83 packaged by a third-party not affiliated with a food service facility and is intended
84 to be sold or distributed to the general marketplace including, but not limited to,
85 food service facilities without the use of any cooking or food preparation
86 techniques.

87 (16) “Material” means the type of feedstock used to make a food service packaging
88 item including, but not limited to, glass, ceramic, metal, fiber (i.e., derived from
89 cellulose), or plastic. Material is inclusive of any coatings or other ingredients used
90 to make a food service packaging item. A plastic material may be identified by
91 either the name of the plastic resin (~~#1-6 in accordance with PRC Sections 18013-~~
92 ~~18015~~) or by the name of the plastic polymer (e.g., polylactic acid).

- 93 (17) “On-site” means the location of the food service facility where the food is served
94 and does not include centralized facilities that store food service packaging items
95 for distribution to multiple food service facilities.
- 96 (18) “Person” has the same meaning as defined in PRC Section 40170.
- 97 ~~(19) “Per- and polyfluoroalkyl substance (PFAS)” means a chemical that contains at~~
98 ~~least one fully fluorinated carbon atom.~~
- 99 (20) “Plastic bag” means an open-top carryout style plastic bag with handles that
100 cannot be closed or sealed, by design.
- 101 ~~(21) “Proposition 65 list” means the list of chemicals known to the State of California~~
102 ~~to cause cancer, birth defects, or other reproductive harm pursuant to the Safe~~
103 ~~Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code~~
104 ~~Sections 25249.5-25249.14.~~
- 105 ~~(22) “Recycling” has the same meaning as defined in PRC Section 40180. means~~
~~the activities in which materials that would otherwise become solid waste are~~
~~collected, sorted, cleansed, treated, and processed into specification-grade~~
~~commodities, and consumed as raw-material feedstocks, in lieu of virgin~~
~~materials, in the manufacture of new, reconstituted, or refurbished products.~~
~~Recycling does not include incineration or burning waste for energy~~
~~recovery.~~
- 106 (23) “Recycling facility” means an entity that meets the definition of “recycling center”
107 in Division 7, Chapter 3, Article 6.0, Section 17402.5, subsection (d).
- 108 (24) “Recycling program” means a diversion program, as defined in PRC Section
109 40127, that is established by a California jurisdiction for the purpose of providing
110 recycling or organics collection services to residents or businesses. A recycling
111 program must include services provided by a hauler that is authorized under a
112 contract, an agreement, a permit, or other authorization with a jurisdiction to
113 regularly collect materials, as defined in subsection 17989 (a)(16), within the
114 jurisdiction for recycling. “Recycling program” does not include a takeback
115 program, as defined in subsection 17989 (a)(27).
- 116 (25) “Safe and timely manner” means a food service packaging item achieves 90
117 percent biodegradation within 60 days in the active compost process, as defined
118 in Division 7, Chapter 3.1, Article 1, Section 17852, subsection (a)(1), and is
119 verified by a third-party certification entity to meet one of the following standards,
120 as applicable:
121 (A) ASTM D6400 – 19: Standard Specification for Labeling of Plastics Designed

122 to be Aerobically Composted in Municipal or Industrial Facilities, or
123 (B) ASTM D6868 – 19: Standard Specification for Labeling of End Items that
124 Incorporate Plastics and Polymers as Coatings or Additives with Paper and
125 Other Substrates Designed to be Aerobically Composted in Municipal or
126 Industrial Facilities.

127 (26) “Sort” means to manually and/or mechanically separate food service packaging
128 items and similar constituent materials into streams for aggregation.

129 (27) “Takeback program” means a program that collects food service packaging items
130 for reuse or recycling. A takeback program shall include convenient options for
131 customers to return the food service packaging items subject to the takeback
132 program. A takeback program may require a customer to pay a deposit or may
133 include incentives offered by a food service packaging manufacturer or food
134 service facility to ensure the food service packaging items are collected for reuse
135 or recycling.

136 (28) “Third-party certification entity” means an independent laboratory that is ISO/IEC
137 17025 accredited by an International Laboratory Accreditation Cooperation
138 Mutual Recognition Arrangement (ILAC MRA) signatory, and performs applicable
139 testing methods to certify a food service packaging item. “ISO/IEC 17025” means
140 the International Organization for Standardization/International Electrotechnical
141 Commission general requirements for the competence of testing and calibration
142 laboratories.

143 (29) “Transfer/processor” has the same meaning as in Division 7, Chapter 9, Article
144 9.25, Section 18815.2, subsection (a)(62).

145

146 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:
147 Sections 42370.1, 42370.2, and 42370.3, Public Resources Code.

148 **§17989.1. List of Approved Food Service Packaging.**

149 (a) The List of Approved Food Service Packaging (List) published on the department’s
150 website shall include, at a minimum, the following information for each food service
151 packaging item:

- 152 (1) An indication that the food service packaging item is determined by the
153 department to be reusable, recyclable, or compostable, and meets all
154 applicable requirements of Sections 17989.2-17989.5.
- 155 (2) A description of the type of food service packaging (e.g., plate, cup, bowl, tray)
- 156 (3) The material(s) used to manufacture the food service packaging item (e.g.,
157 polyethylene terephthalate (PET), polylactic acid (PLA)-lined fiberboard).
- 158 (4) The applicable sizes, in ounces or diameter, of the food service packaging
159 item.
- 160 (5) The name of the food service packaging manufacturer.
- 161 ~~(6) As applicable, the names of chemicals contained in the food service packaging~~
162 ~~item, and their Chemical Abstract Service Registry Numbers (CASRN), that~~
163 ~~are included on the Proposition 65 list.~~
- 164 (b) The department shall establish the initial List required by subsection 42370.3(a) of the
165 PRC, as follows:
- 166 (1) A food service packaging manufacturer, or person acting on its behalf, who
167 wishes to have items included on the List, shall submit an application to the
168 department pursuant to Section 17989.6 within 30 days of the date these
169 regulations become effective.
- 170 (2) The department shall evaluate each application in the order it is received to
171 determine if a food service packaging item meets the applicable criteria of
172 this Article and will be added to the List.
- 173 (c) Following publication of the initial List, the department shall evaluate applications and
174 update the List with additional food service packaging items on an ongoing basis, **but no**
less often than every 180 days.
- 175 (d) The department shall notify the Department of General Services and the public within
176 30 days of making any changes to the List.
- 177 (e) A food service packaging manufacturer, or person acting on its behalf, shall submit a
178 new application to the department for evaluation within 30 days when non-aesthetic
179 changes are made to an approved food service packaging item. The department
180 shall notify the manufacturer and remove the food service packaging item from the
181 List if the item no longer meets the applicable criteria.

182 (f) If the department determines that an approved food service packaging item does not
183 meet the requirements of this Article, the department shall notify the manufacturer and
184 remove the food service packaging item from the List *only after providing the*
manufacturer with 60 days' notice and an opportunity to respond to the
department's determination.

185 (g) A food service packaging manufacturer, or person acting on its behalf, shall submit a
186 new application to the department within 180 days of being notified by the department
187 that it is evaluating the List to determine whether each of the approved food service
188 packaging items is reusable, recyclable, or compostable. ~~If a new application is not~~
189 ~~received within 180 days the food service packaging item may be removed from the~~
190 ~~List.~~

191
192 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:
193 Sections 42370.2 and 42370.3, Public Resources Code.

194 ~~§17989.2. Public Health and Litter Impacts Criteria.~~

195 ~~(a) Food service packaging items included on the List shall meet the following criteria to~~
196 ~~minimize public health and litter impacts:~~

197 ~~(1) A food service packaging item that is subject to the Toxics in Packaging~~
198 ~~Prevention Act (Health and Safety Code Sections 25214.11-25214.26) shall~~
199 ~~not contain lead, mercury, cadmium, or hexavalent chromium in an amount~~
200 ~~that may pose a threat to public health or that exceeds 100 parts per million~~
201 ~~by weight of the sum of these metals.~~

202 ~~(2) A manufacturer, or person acting on its behalf, shall disclose the names of any~~
203 ~~chemical(s) included on the Proposition 65 list that are used in the~~
204 ~~manufacturing of a food service packaging item.~~

205 ~~(3) A food service packaging item made from plastic or fiber and that is recyclable~~
206 ~~or compostable shall not contain PFASs, as measured by total fluorine at~~
207 ~~concentrations above 100 parts per million.~~

208 ~~(4) If a food service packaging item is identified by another state agency, or~~
209 ~~another state or federal government organization to have the potential to~~
210 ~~contribute to an adverse public health impact (e.g., through publications or~~
211 ~~reports provided by the Office of Environmental Health Hazard Assessment's~~

212 ~~Prop 65 program or the Department of Toxic Substances Control's Safer~~
213 ~~Consumer Products Program) the department may not include or remove the~~
214 ~~food service packaging item from the List.~~

215 ~~(5) If a food service packaging material is subject to a ban, fee for distribution~~
216 ~~(e.g., a fee for a single use disposable cup at point of sale), or other~~
217 ~~restrictions, at least in part due to litter or ocean debris concerns, in city or~~
218 ~~county ordinances, the department may not include or remove food service~~
219 ~~packaging items made from that material from the List.~~

220

221 ~~Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:~~
222 ~~Sections 42370.2 and 42370.3, Public Resources Code.~~

223 **§17989.3. Reusable Food Service Packaging Criteria.**

224 (a) A food service packaging item is "reusable" and shall be included on the List if the
225 department determines it meets the requirements of Section 17989.2 and it either:

226 (1) Maintains its shape, structure, and function after 125 cycles in a cleaning
227 and sanitizing process as defined in California Health and Safety Code
228 Section 114101 and 114099.7, respectively, as demonstrated by a third-
229 party certification entity; or

230 (2) The manufacturer of the food service packaging item provides an express
231 warranty that the food service packaging item can be reused for its intended
232 purpose for a minimum of one-year or the manufacturer will take back and
233 replace the item at the manufacturer's expense.

234

235 ~~Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:~~
236 ~~Sections 42370.2 and 42370.3, Public Resources Code.~~

237 **§17989.4. Recyclable Food Service Packaging Criteria.**

238 (a) A food service packaging item is "recyclable" and shall be included on the List if
239 the department determines it meets the requirements of Section 17989.2 and all
240 the following criteria:

241 (1) The food service packaging item shall be a minimum of two (2) inches
242 measured in two dimensions (i.e., a minimum surface area of four inches).

243 (2) The food service packaging item shall not contain additives that initiate or
244 accelerate fragmentation.

245 (3) The food service packaging item is regularly collected and recycled as
246 follows:

247 (A) The food service packaging material is collected by **at least 6075**

percent of

248 recycling **or takeback** programs **servng at least 60 percent of the**
population.

~~_____ and are sorted and aggregated into a single~~

249 ~~named material bale by at least 75 percent of transfer/processors, or~~

250 ~~(B) The food service packaging item is included in a takeback program~~

251 ~~that collects at least 75 percent of the food service packaging items~~

252 ~~for reuse or recycling.~~

253 ~~(i) Takeback programs that include reuse shall indicate the~~

254 ~~number of times the food service packaging item may be reused~~

255 ~~prior to being recycled.~~

256 ~~(ii) Takeback programs shall collect at least 75 percent of the food~~

257 ~~service packaging items, and all food service items collected by~~

258 ~~the takeback program shall be transported to a transfer/processor~~

259 ~~or recycling facility for aggregation into a single named material~~

260 ~~bale.~~

261 ~~(C) For purposes of this Article, mixed paper bales are considered a~~

262 ~~single named material bale.~~

263

264 ~~Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:~~

265 ~~Sections 42370.2 and 42370.3, Public Resources Code.~~

266 **§17989.5. Compostable Food Service Packaging Criteria.**

267 (a) A food service packaging item is “compostable” and shall be included on the List

268 if the department determines it meets ~~the requirements of Section 17989.2 and~~ all

269 the following criteria:

270 (1) The food service packaging material is regularly collected for composting,
meaning that a minimum percentage of public/private aerobic compost
facilities processing post-consumer food waste and food-soiled paper
must reach 60 percent of the population.

271 ~~by a minimum of 75 percent of organics recycling programs.~~

272 ~~(2) The food service packaging item is accepted by at least 75 percent of~~
273 ~~compost facilities permitted to accept mixed materials.~~

274 (3) The food service packaging item biodegrades in a safe and timely manner.

275 (4) The food service packaging item complies with the Federal Trade
276 Commission Guides for the Use of Environmental Marketing Claims (part
277 260 commencing with Section 260.1 of Subchapter B of Chapter I of Title
278 16 of the Code of Federal Regulations).

279

280 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:
281 Sections 42370.2 and 42370.3, Public Resources Code.

282 **§17989.6. Application Requirements and Submittal Process.**

283 (a) If a food service packaging manufacturer, or person acting on its behalf, would like to
284 add a food service packaging item to the List, an application shall be submitted to the
285 department for each food service packaging item or group of food service packaging
286 items that meet the applicable requirements of Sections 17989.32-17989.5. The
287 application shall contain the following and be submitted electronically:

288 (1) Contact information

289 (A) Name and title of the person submitting the application

290 (B) Company or organization name

291 (C) Company or organization mailing and physical address

292 (D) Phone number

293 (E) Email address

294 (F) Name of the manufacturer(s) of the food service packaging item or
295 group of items

296 (2) A statement that the application is being submitted to be considered for
297 determining if the food service packaging item or group of items is reusable.

- 298 recyclable, or compostable.
- 299 (3) A description of the food service packaging item or group of items.
- 300 (4) As applicable, a description of the material(s) used to manufacture the food
- 301 service packaging item or group of items.
- 302 ~~(5) As applicable, documentation that a food service packaging item or group~~
- 303 ~~of items meets the requirements of subsection 17989.2(a)(1).~~
- 304 ~~(6) As applicable, the chemical name(s) and CASRN(s) to demonstrate~~
- 305 ~~compliance with subsection 17989.2(a)(2). Disclose whether a Proposition~~
- 306 ~~65 warning is required for exposure(s) to the chemical(s) resulting from the~~
- 307 ~~use of the food service packaging item or group of items.~~
- 308 (7) As applicable, the accreditation number(s) of the ISO/IEC 17025
- 309 laboratory(ies) used to demonstrate compliance.
- 310 (8) A declaration signed under penalty of perjury by the food service packaging
- 311 manufacturer, or person acting on its behalf, stating that all information and
- 312 data submitted as part of the application is true and correct.
- 313 (b) A food service packaging manufacturer, or person acting on its behalf, shall label any
- 314 portions of the application it believes are confidential or proprietary that it wants the
- 315 department to maintain as confidential pursuant to Section 17989.6(f)(3). Applications
- 316 submitted to the department shall not contain redactions. Any portion(s) of an
- 317 application that are not labeled or identified as confidential shall be deemed a public
- 318 document.
- 319 (c) In addition to the items submitted under subdivision (a), an application for a reusable
- 320 food service packaging item or group of items shall include test results from a third-
- 321 party certification entity that demonstrate compliance with subsection 17989.3(a)(1)
- 322 or the manufacturer's warranty as required by subsection 17989.3(a)(2).
- 323 (d) In addition to the items submitted under subdivision (a), an application for a
- 324 recyclable food service packaging item or group of items shall include information to
- 325 demonstrate compliance with Section 17989.4. Applications shall include:
- 326 (1) The measurement of two dimensions, in inches, of the food service
- 327 packaging item or each item in a group of food service packaging items.
- 328 (2) A statement that the food service packaging item or group of items do not
- 329 contain additives to initiate or accelerate fragmentation.

- 330 (3) As applicable, test results from a third-party certification entity that
331 demonstrate compliance with subsection 17989.2(a)(3). Tests shall be
332 conducted within six (6) months of the application submittal date.
- 333 (4) As applicable, information demonstrating that the food service packaging
334 item is regularly collected for recycling as required by subsection
335 17989.4(a)(3).
- 336 (e) In addition to the items submitted under subdivision (a), an application for a
337 compostable food service packaging item or group of items shall include information
338 to demonstrate compliance with Section 17989.5. Applications shall include:
- 339 (1) Information demonstrating that the food service packaging material is
340 regularly collected for composting ~~by a minimum of 75 percent of organics~~
341 ~~recycling programs. as required by subsection 17989.5(a)(1).~~
- 342 ~~(2) Information demonstrating that the food service packaging item or group~~
343 ~~of items are accepted by at least 75 percent of compost facilities permitted~~
344 ~~to accept mixed materials, as defined in Division 7, Chapter 3.1, Article 1,~~
345 ~~Section 17852, subsection (a)(26), and that the material is not screened~~
346 ~~out for disposal prior to or after active composting.~~
- 347 (3) Test results from a third-party certification entity that demonstrates the
348 food service packaging item or group of items biodegrades in a safe and
349 timely manner.
- 350 (4) As applicable, test results from a third-party certification entity that
351 demonstrate compliance with subsection 17989.2(a)(3). Tests shall be
352 conducted within six (6) months of the application submittal date.
- 353 (5) A statement that the food service packaging item or group of items
354 complies with the Federal Trade Commission Guides for the Use of
355 Environmental Marketing Claims (part 260 commencing with Section
356 260.1 of Subchapter B of Chapter I of Title 15 of the Code of Federal
357 Regulations).
- 358 (f) The department shall review submitted applications in the order in which they are
359 received and as follows:

360 (1) The department shall review each application to determine if it is complete.
361 For purposes of this review, “complete” means that all documentation
362 required by this section has been submitted.
363 (A) The department shall notify a food service packaging manufacturer,
364 or person acting on its behalf, if the application is complete.
365 (B) If the department determines that an application is incomplete, the
366 department shall notify a food service packaging manufacturer, or
367 person acting on its behalf, of this determination and shall specify the
368 basis for the determination and the number of days allotted to provide
369 the supporting documentation.
370 (2) The department shall evaluate each complete application to determine if a
371 food service packaging item or group of items meets the applicable criteria
372 required by this Article.
373 (A) Upon approval, the department shall add the food service packaging
374 item or group of items to the List and notify the food service
375 packaging manufacturer, or person acting on its behalf.
376 (B) If the department determines that a food service packaging item or
377 group of items does not meet the applicable requirements to this
378 Article, the food service packaging manufacturer, or person acting
379 on its behalf shall be notified.
380 (3) The department shall maintain the confidentiality of information submitted
381 in each application as required by the California Public Records Act
382 (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the
383 Government Code), Section 40062 of the PRC, and Article 4 of Chapter 1
384 of this Division (commencing with Section 17041).
385
386 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:
387 Sections 42370.2, 42370.3, 42370.4, and 42370.5, Public Resources Code.

388 **§17989.7. Noncompliant Food Service Packaging Inventories.**

389 (a) Upon the removal of a food service packaging item or group of food service packaging
390 items from the List pursuant to subsection 17989.1(f), a food service facility may use
391 its remaining food service packaging item inventory under the following conditions:

392 (1) The food service facility possessed that specific inventory of food service
393 packaging item(s) before the date the List was published or subsequently
394 updated.

395 (2) The food service facility possessed that specific inventory of food service
396 packaging item(s) before the List maintained pursuant to Section 42370.3
397 of the PRC was updated to remove the food service packaging item and the
398 food service packaging item was on the List when the food service facility
399 took possession of the food service packaging item.

400 (3) The food service facility acquired that specific inventory of food service
401 packaging items pursuant to a contract entered into before the date the List
402 was published or subsequently updated.

403 (4) The food service facility acquired that specific inventory of food service
404 packaging item(s) pursuant to a contract entered into before the List
405 maintained pursuant to Section 42370.3 of the PRC was updated to remove
406 the food service packaging item and the food service packaging item was
407 on the list when the food service facility entered into the contract.

408 (b) For a contract that is subject to this section and that is entered into, renewed, or
409 updated after the date the List was published or subsequently updated, the food
410 service facility shall be responsible for ensuring that the food service packaging items
411 it purchased are on the List.

412
413 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:

414 Sections 42370.2, 42370.3, and 42370.4, Public Resources Code.

415 **§17989.8. Records.**

416 (a) A food service facility shall provide the department with reasonable and timely access
417 to its food service packaging item purchasing records by submitting the following
418 information within 60 days of a written request:

419 (1) For reusable food service packaging items, pursuant to Section 17989.3:
420 invoice(s) or purchase order(s), which includes, the date(s) the food service
421 packaging item(s) were purchased, the food service packaging material, the
422 type of food service packaging purchased, the manufacturer of the food
423 service packaging item(s), and the number of food service packaging items
424 purchased.

425 (2) For recyclable and compostable food service packaging items, pursuant to
426 Section 17989.4 and 17989.5 respectively: invoice(s) or purchase order(s),
427 which includes, the date(s) the food service packaging item(s) were
428 purchased, the food service packaging material, the type of food service
429 packaging purchased, the manufacturer of the food service packaging
430 item(s), and the number of food service packaging items purchased.

431
432 Authority cited: Sections 40401, 40502, and 42370.2, Public Resources Code. Reference:
433 Sections 42370.5 Public Resources Code.

Attachment C
2018 Ramboll Report
(Provided in Separate Electronic File)