
CalChamber
Western Growers
Fresh produce from our families to yours
California Retailers Association
Consumers Economy Jobs
CBIA
California Building Industry Association
California Restaurant Association
American Chemistry Council
CICC
Chemical Industry Council of California
CALASIAN
chamber of commerce
FPI
Foodservice Packaging Institute
IDFA
International Dairy Foods Association
cga
NAMA
Bringing convenience to life.
CMTA
California Manufacturers
Dairy Institute of California
Snacking. Nutrition. Convenience.
SNAC International
cba
Consumer Brands Association
American Beverage
Driving Solutions Together
IBWA
International Bottled Water Association
California Food Producers
Wine Institute
VICA 75th
Almond Alliance
California Strawberry Commission
Agricultural Council of California
California Cattlemen's Association
CCA
Since 1917
PLASTICS
Industry Association
California Hispanic Chambers of Commerce
NCA
National Confectioners Association
AMERIPEN
American Institute for Packaging and the Environment
the toy association
Inspiring Generations of Play
Laguna Hills Chamber of Commerce
Can Manufacturers Institute
CANS: Infinitely Recyclable
The Chamber
Long Beach Area Chamber of Commerce
Santa Barbara South Coast Chamber of Commerce
From Goleta to Carpinteria
CRC
Coalition for Responsible Celebration
Lake Elsinore Valley Chamber of Commerce
North San Diego Business Chamber
Connections start here.
Brea Chamber
Catalyst. Convener. Champion.
Simi Valley Chamber
The Heartbeat of Business
Greater Conejo Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Adelanto • Apple Valley • Hesperia • Victorville
WUD
Western United Dairies
West Ventura County Business Alliance
Yorba Linda Chamber of Commerce
Where Business Happens
Rancho Cordova Chamber of Commerce
Household & Commercial Products Association
Innovative Products For Home. Work. Life.
Torrance Area Chamber of Commerce

November 4, 2024

Submitted Electronically via CalRecycle's Public Comment Portal

Claire Derksen
SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations
California Department of Resources Recycling and Recovery (CalRecycle)
Regulations Unit
1001 I Street, MS-24B
Sacramento, CA 95814

Re: Senate Bill 54: Plastic Pollution Prevention and Packaging Producer Responsibility Act

Dear Ms. Derksen:

The undersigned organizations (the "Coalition") thank you for the opportunity to submit additional comments regarding CalRecycle's (the "Department") Revised Proposed Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations (the "Proposal"). The Coalition appreciates the Department's extension of the public comment period to November 4, 2024. The Coalition consists of 47 California-based and national organizations and businesses of varying sizes that collectively represent nearly every major business sector that will be impacted by the Department's Proposal.

Members of the Coalition have been actively engaged with the Department, stakeholders, and policymakers in helping create a framework for achieving California's ambitious recycling and climate goals. In addition to Senate Bill 54 ("SB 54"), the Coalition and its members have provided feedback on other laws and rulemakings, including Senate Bill 343 ("SB 343") and Assembly Bill 1201 ("AB 1201"). For instance, on March 1, 2024, several members of the Coalition submitted a letter to the Department with initial questions regarding SB 343's Preliminary Findings Report. On May 8, 2024, the Coalition submitted a letter discussing 35 issues concerning the Proposal's first draft ("May 8 Letter").

The Coalition understands the scope of the task before the Department and the challenges of simultaneously adopting several interplaying laws and regulations on short timeframes. That said, the Department has yet to respond to the Coalition's members who provided feedback and questions on SB 343's Preliminary Findings Report, nor has the Department published the Final Findings Report, which will serve a crucial role in implementing the final Proposal. And the Department did not provide a draft or proposed final statement of reasons or any similar document in promulgating the revised Proposal, which would have facilitated stakeholders' review of the Proposal. As noted in several instances below, the Coalition is grateful that the Department has addressed some of the issues it identified in its May 8 Letter, but many of the issues it raised were not addressed. The absence of an explanation by the Department as to why these changes were not addressed has hindered the Coalition's ability to meaningfully comment on the revised Proposal and to provide substantive responses and feedback for both the Department's and the public's consideration during this rulemaking process. For the sake of brevity, the Coalition will not repeat its discussion of each and every issue addressed in its May 8 Letter, but hereby incorporates that letter by reference as "Attachment A." Where the Coalition believes that additional information would be helpful regarding certain issues from its May 8 Letter, we provide further discussion below. For such issues, we refer to the issue number from

our May 8 Letter. We then discuss new concerns and questions we identified in the revised Proposal.

The Proposal presents significant challenges to the Producer Responsibility Organization ("PRO"), the producer community, and businesses as a whole, imposing compliance burdens that collectively risk undermining the fundamental objectives of the law. SB 54 was designed to advance an innovative, producer-driven framework aimed at achieving high recycling rates, reducing waste, and promoting a circular economy. However, the extensive regulatory requirements imposed by the Department on producers effectively overlay a command-and-control approach that conflicts with the intended structure of Extended Producer Responsibility ("EPR"). This shift introduces inefficiencies, raises compliance complexities and costs, and undermines the PRO's ability to meet the statutory requirements outlined in SB 54.

The Proposal leaves minimal room for the adaptive, market-based solutions that EPR frameworks typically employ with an overly prescriptive, top-down approach. Instead of empowering producers and the PRO to have the flexibility to determine how best to invest in cost effective and efficient recycling systems that align with SB 54's goal of creating a circular economy, the Proposal creates a compliance environment that is cumbersome, costly, and often too prescriptive.

Additionally, the requirement that packaging materials remain recyclable or compostable, irrespective of their primary function in maintaining product safety or compliance with federal laws, creates further compliance challenges. For instance, materials essential for food safety or product integrity are not given due exemptions, despite federal mandates that preclude many viable recycling or composting options and the fact that SB 54 expressly considers this by empowering the Department to grant such exemptions.

In sum, the complex regulatory overlay imposed by the SB 54 framework risks negating its intended producer-responsible, market-driven approach by imposing rigid control over implementation. To genuinely advance SB 54's objectives of source reduction, increased recyclability, and a circular economy, the Proposal should prioritize producer flexibility and technological innovation, providing a balanced framework that supports the PRO without hampering compliance feasibility as it works to make a viable and implementable plan that achieves the mandates outlined in SB 54.

The Coalition continues to view this rulemaking process as an ongoing dialogue and would welcome the opportunity to meet with the Department to discuss the below issues and any questions or comments the Department may have. The Coalition looks forward to reviewing the Department's Final Statement of Reasons ("FSOR") to understand the rationale as to why some of its comments were not accepted, but again the Coalition would have appreciated the opportunity to provide further feedback for the Department's consideration before the Proposal is finalized and becomes binding.

Further Discussion Regarding Issues In May 8, 2024 Letter

Issue 4: It is still unclear how alternative programs can be "responsible for" a covered material category "trending towards" SB 343's 60 Percent Curbside Criteria, and the Coalition encourages the Department to provide clarity in its FSOR.

Comment: The Department made no changes in response to the Coalition's comment regarding proposed sections 18980.3.1(b) and 18980.3.1(e)(1)(A), which provide in relevant part, respectively, that a covered material category may be designated as "trending towards" recyclability if the Department determines "it is more likely than not" that the material will satisfy SB 343's 60 Percent Curbside Criteria, but that for this to happen, the Department must determine that "improvements in . . . alternative programs" are "responsible for" for the trend.

The Coalition observed that it is unclear how or under what conditions improvements in alternative programs can be "responsible" for a trend and asked that the Department clarify how these programs interact. The Coalition suggested that if such clarity cannot be provided, the Department strike proposed section 18980.3.1(e)(1)(A).

The Coalition reiterates its prior comment and requests that the Department either provide clarity in its FSOR or strike proposed section 18980.3.1(e)(1)(A).

Issue 14: The Proposal's exclusion of "home compostable" covered material is counterproductive to SB 54's goals of diverting waste away from landfills.

Comment: The Coalition explained in its May 8 Letter that the Proposal should place composting on an equal footing with recycling and clarify that covered material that meets the requirements to be labeled as "home compostable" under AB 1201 be designated as "compostable" for purposes of SB 54. The Department took the opposite approach and categorically excluded "home compostable" covered material from the "compostable" category. *See* Proposed § 18980.3.3(e) ("Satisfying the legal requirements to be labeled 'home compostable' pursuant to [AB 1201] or any other law shall not be construed to mean that any covered material is eligible to be labeled as 'compostable' for purposes of section 42050(b).").

The Department's exclusion of "home compostable" covered material is inconsistent both with the text and intent of SB 54. SB 54 provides that all covered material must be recyclable or "eligible for being labeled 'compostable' in accordance with Chapter 5.7 (commencing with Section 42355)." Public Resources Code ("PRC") § 42050(b). Chapter 5.7 (Pub. Res. Code § 42355 *et seq.*) addresses both industrial and home compostable packaging. PRC section 42357(a) designates when covered material may be labeled as "home compostable" and specifies that it must satisfy the OK compost HOME certification. As such, SB 54 plainly directs that "home compostable" covered material be included.

Excluding "home compostable" covered material also defies SB 54's intent. As recognized in the June 29, 2022 Assembly Appropriations Committee Report, SB 54 is aimed at "decreasing single-use packaging and the most problematic plastic food service ware products sold in California and ensuring that the remaining items are effectively composted and recycled…." No distinction is made between packaging that is "industrially composted" and packaging that is "home composted"—nor does such a distinction make sense. SB 54 seeks to help the Department "achiev[e] the state's waste diversion goals by reducing disposal of municipal solid waste," and "home compostable" packaging advances this objective. *See* SB 54, Assembly Appropriations Committee Report (Jun. 29, 2022), at 4-5. The Department should incentivize the development of "home compostable" covered material by both striking proposed section 18980.3.3(e) and including "home compostable" material within the broader category of "compostable" covered material.

Issue 16: For disputes concerning costs pursuant to proposed section 18980.8(h), binding arbitration should not be a requirement, but rather an option upon mutual agreement.

Comment: The Coalition strongly supports the Department clarifying in proposed section 18980.8(g) that only expenditures tied to SB 54-related *enhancements* of the local jurisdiction's existing waste management and recycling services are reimbursable. By clarifying what is (and what is not) reimbursable, the Department effectuates the plain text and intent of SB 54. The Coalition further appreciates the Department's addition of subsection (h) to proposed section 18980.8.

However, the Proposal injected a provision permitting local governments and recycling service providers, at their option, to unilaterally require *binding* arbitration where no such directive was provided under SB 54. Mediation and *non-binding* arbitration, or mutually agreed binding arbitration, should be utilized instead to address any disputes concerning costs pursuant to subsection (h). In sum, the Coalition supports the overall intent of this section of the Proposal and urges the Department to maintain the regulatory text with a modification that calls for non-binding arbitration unless both the PRO and the local government or recycling service provider mutually agree to binding arbitration.

Issue 17: The Proposal's requirement that the PRO charge malus fees to producers who use covered materials that contain Proposition 65-listed chemicals is inconsistent with Proposition 65 and would expose companies that comply with Proposition 65 safe harbor levels and court-issued consent judgments to liability.

Comment: The Proposal provides that "a PRO shall charge a malus fee to producers who use covered material that contains a chemical listed on the list established pursuant to section 25249.8 of the Health and Safety Code ["Proposition 65"]." Proposed § 18980.6.7(h). The Department did not make any changes to this section in response to the Coalition's prior comment.

As the Coalition explained in its May 8 Letter, Proposition 65 is not a product safety law that limits the amount of chemicals that can be in a product or that bans products. Rather, it is a "right-to-know" law that imposes stringent warning requirements. The state agency responsible for overseeing Proposition 65, the Office of Environmental Health Hazard Assessment ("OEHHA"), does not refer to chemicals listed under Proposition 65 as "hazardous material," nor does the Department of Toxic Substances Control ("DTSC") or the Department. As such, the Proposal's designation of covered materials containing Proposition 65-listed chemicals as "hazardous material" under SB 54 (at PRC section 42053(e)) has no basis on a textual level.

The Coalition adds that, as revised, the Proposal would expose businesses that comply with Proposition 65 to malus fees. Proposition 65 does not require that warnings be provided based on the presence of a listed chemical in a product at any level. Instead, it exempts from the warning requirement an "exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity." Health & Safety Code § 25249.10(c). The warning threshold for listed carcinogens is known as the "no significant risk level" or "NSRL," and the warning threshold for reproductive toxins is known as the maximum allowable dose level or "MADL."

For some chemicals, OEHHA has established nonmandatory "safe harbor" levels for which warnings are not required as a matter of law. 27 C.C.R. § 25705 (carcinogens); *Id.* § 25805 (reproductive toxins). BPA, for example, has a safe harbor level of 3 micrograms per day via the dermal exposure route from solid materials. *Id.* § 25805(b).

Businesses are not bound by these levels and are entitled to prove that higher levels should apply. *Id.* §§ 25701, 25801. For some chemicals for which safe harbor levels have not been established, courts have approved consent judgments that have set *de facto* industry standards; for listed phthalates like Di(2-ethylhexyl) phthalate ("DEHP"), for example, that concentration level is 1,000 parts per million.

As a result, businesses can comply with Proposition 65 even though a listed chemical(s) is present in its packaging, provided the concentration is below the respective safe harbor level(s) or, if the business is bound by a court-approved consent judgment, the level(s) set in that agreement. OEHHA itself acknowledges, "*A business does not need to provide a warning when exposure from an individual product is too low to significantly contribute to an overall risk of cancer or harmful reproductive effects.*"[1] The agency also "discourage[s]" businesses "from providing a warning that is not necessary."[2]

Accordingly, by requiring that the PRO charge a malus fee to producers who use covered materials containing chemicals listed under Proposition 65, at any level, the Proposal would punish businesses that comply with Proposition 65. A business that reformulates its packaging to comply with a safe harbor level set by OEHHA (i.e., 1,000 times lower than the level where no harm was observed in animal studies for reproductive toxins) or that complies with a court-approved consent judgment for a listed chemical would comply with Proposition 65, but still be subject to malus fees under the Proposal. Further, no business can feasibly confirm that all of its packaging does not contain, at any level, any of the 900-plus chemicals listed under Proposition 65.

The Proposal, moreover, will raise practical concerns as laboratory technologies improve. As revised, the Proposal provides that malus fees must be assessed if a Proposition 65-listed chemical is present at any level. If a laboratory developed a technology that could detect listed chemicals in the parts per trillion range, it follows that a detection of one part per trillion would expose a business to a malus fee. Such a detection would not pose a harm to human health, let alone qualify as "hazardous material" as contemplated in SB 54.

The Coalition reiterates its view from its May 8 Letter that the language of SB 54 is sufficiently clear that the malus fee should be charged based on the presence of ***hazardous material*** as identified by OEHHA, DTSC, or the Department.[3] If the Department is inclined to incorporate

---

[1] OEHHA, "Toxic Chemicals, Proposition 65 Warnings, and Your Health: The Big Picture," available at https://www.p65warnings.ca.gov/fact-sheets/toxic-chemicals-proposition-65-warnings-and-your-health-big-picture.

[2] OEHHA, "Businesses and Proposition 65," available at https://oehha.ca.gov/proposition-65/businesses-and-proposition-65.

[3] The Coalition acknowledges that some commenters have suggested that NSRL and MADL should control when malus fees are assessed. The Coalition disagrees that this approach is workable. OEHHA has not established NSRL and MADLs for hundreds of chemicals; the

specific citations for clarity, it should replace the reference to Proposition 65 with specific references to DTSC's, the Department's, and/or OEHHA's regulations for characterizing hazardous waste. *See, e.g.*, 11 C.C.R. § 66261.20 *et seq.*

Issue 21: The Proposal should be consistent that only the weight of plastic in multi-material covered material is considered "plastic."

Comment: The Coalition appreciates the Department addressing its suggestion that exemptions be added for material that has components that are of "de minimis weight or volume." Proposed § 18980.2.2(b). The Coalition also acknowledges that the Department amended the definition of plastic to provide that "for purposes of subdivision (a) of section 18980.9 and subdivision (f) of section 18980.6.7, the weight of plastic covered material is the weight only of the plastic, as defined in subdivision (t) of section 42041 of the Public Resources Code, that the covered material comprises." Proposed § 18980.1(a)(15).

It is unclear why this revision is limited to proposed section 18980.9(a)—which refers to the source reduction 2023 baseline—and proposed section 18980.6.7(f)—which refers to how plastic weight shall be measured for the environmental mitigation fee setting. To ensure that producers' recycling rates for "plastic" are accurately reflected—and to establish a consistent approach for baseline reporting and annual reporting to measure progress against this benchmark—this clarification should include all sections in which the weight of plastics are measured and reported. *See, e.g.*, Proposed §§ 18980.2.1; 18980.3.2; 18980.4; 18980.4.3; 18980.6.7; 18980.6.8; 18980.7.6; 18980.7.7; 18980.8.1; 18980.9; 18980.9.1; 18980.10.2.

Issue 25: The terms "import" and "imported" should be removed from the Proposal or defined to not include products that are transiting through California.

Comment: The California Association of Port Authorities reports that "more than 40% of the total containerized cargo entering the United States arrives at California ports and almost 30% of the nation's exports flow through ports in the Golden State."[4] It follows that a potentially significant amount of imports that are destined for other states and exports that are destined for other countries pass through California ports without ever leaving their cargo containers. These products will never touch California soil or be disposed of in the state, and it follows that they should not be included in SB 54's recycling rate calculation because California is not their "end market."

The Coalition stressed in its May 8 Letter that SB 54 is intended only to apply to products entering the stream of commerce through the State of California. The Coalition refers the Department to pages 25-26 of this letter, where the Coalition cited positions by Senator Ben Allen and SB 54's statutory text that compel this conclusion. To address this issue, the Coalition

---

approach advocated by these commenters would therefore impose malus fees for these chemicals based on their presence at any level (even those not causing harm). Further, Proposition 65's warning thresholds are based on exposure, not concentration. Based on frequency of use and contact, two products can cause exposures at different rates and therefore have different permissible concentrations. The Coalition maintains that Proposition 65 is not an appropriate reference point for imposing malus fees.

[4] CAPA, "California Ports – Gateways to America," available at https://californiaports.org/job-creation/.

suggested that the Department either define the terms "import" and "imported" to exempt covered materials transitioning through California, or delete these terms from proposed sections 18980.1(a)(27)(C), 18980.5.2(a)(3), 18980.5.2(a)(4), 18980.5.2(a)(4)(B), 18980.6.7(d)(2)(A), and 18980.6.7(f) because they are not found in the respective authorizing sections of SB 54.

Clarity from the Department is needed to ensure that covered materials that are not disposed in California are not factored into the recycling rate. For example, a product that is packaged outside of California in a different U.S. state, shipped to a California port, and then placed on an oceangoing vessel for overseas transport will not have the opportunity to be recycled in the state; the original packaging containing the product, including all primary, secondary, and tertiary packaging is never disturbed throughout the process of passing through California. It therefore should not be included within the scope of SB 54.

Absent clarity from the Department that this covered material is not covered by SB 54, the Proposal will effectively elevate SB 54's recycling rates to levels that are higher than those contemplated in SB 54. Indeed, not exempting "imported" materials could make achieving SB 54's recycling rates impossible. In addition, the Coalition observes that the Proposal's regulation of, and malus fee provisions for, covered material destined for other jurisdictions could constitute discrimination against foreign commerce under the commerce clause. *See, e.g., Pacific Merchant Shipping Ass'n v. Voss*, 12 Cal. 4th 503 (1995).

In its May 8 Letter, the Coalition informed the Department that California's Rigid Plastic Packaging Container law already provides precedent for the exemption we request:

> The following rigid plastic packaging containers are exempt from this chapter:
>
> > (a) Rigid plastic packaging containers produced in or out of the state which are destined for shipment to other destinations outside the state and which remain with the products upon that shipment.

PRC § 42340(a).

In addition, we direct the Department's attention to other laws that contain similar exemptions. For example, while the California Oil Recycling Enhancement ("CORE") Act surcharge applies to products that are "imported" into the state, the application of the CORE Act is limited to products that are actually used in California:

> Except as provided in subdivisions (c) and (d), every oil manufacturer shall pay to the board, on or before the last day of the month following each quarter, an amount equal to six and one-half cents ($0.065) for every quart, or twenty-six cents ($0.26) for every gallon, of lubricating oil sold or transferred in the state, <u>or imported into the state for use in the state in that quarter</u>.

PRC § 48650(a) (emphasis added).

Likewise, California's Beverage Container Recycling Program is restricted to beverage containers that are sold in the state:

> "Distributor" means every person who engages in the sale of beverages in beverage containers to a dealer in this state, including any manufacturer who engages in these

sales. "Distributor" includes any person who imports beverages from outside of this state for sale to dealers or consumers in this state.

PRC § 14511 (emphasis added).

California's Battery Stewardship Program contains similar language. In defining "importer," that law provides:

> "Importer" means either of the following:
>
> (1) A person qualifying as an importer of record for purposes of Section 1484(a)(2)(B) of Title 19 of the United States Code with regard to the import of a covered battery that is sold, distributed for sale, or offered for sale in or into the state that was manufactured or assembled by a company outside of the United States.
>
> (2) A person importing into the state for sale, distributing for sale, or offering for sale in the state a covered battery that was manufactured or assembled by a company physically located outside of the state.

PRC § 42420.1(h) (emphasis added).

Each of these end-of-life programs applies to products for which California is the "end market." The Department should revise the Proposal in accord in order to avoid conflicts with the Commerce Clause and to effectuate the purposes of SB 54.

Issue 28: The Proposal still does not provide sufficient emphasis or clarity on how the Department will provide exemptions for those facing unique challenges and conflicts with federal law.

Comment: In its May 8 Letter, the Coalition encouraged the Department to publish a list of additional federal laws and regulations that pose a potential conflict with regulations or requirement of the Department or the PRO. While SB 54 provides a non-exhaustive list of such federal laws, the Legislature acknowledged that this was just a partial list and that a producer's other obligations under federal law do and will in fact frustrate their ability to meet the requirements that stem from SB 54.

In light of the Proposal's silence on this issue, the Coalition urges the Department to "consider relevant information on reduction programs and approaches in other states . . . [and] the European Union," as required by SB 54, in its assessment of producers' unique challenges and the conflicts with satisfying federal law. PRC § 42060(c).

For example, Maine's extended producer responsibility law provides a partial exemption for producers selling perishable food, including fresh meats, poultry, and seafood. *See* 38 M.R.S. § 2146(2)(D). One reason for this is that packaging for fresh protein implicates serious health and safety concerns, as well as the federal regulatory regime for meat and poultry overseen by the U.S. Department of Agriculture's Food Safety and Inspection Service ("FSIS"). In fact, when warning consumers about the health hazards of handling and storing fresh protein, FSIS explicitly instructs consumers to place raw meats in separate plastic bags to prevent leaked juices from contacting other groceries or surfaces, and further cautions against reusing any packaging

materials associated with raw meat.[5] The federal agency also makes clear that "[p]lastic wrap [and] foam meat trays . . . have been approved for a specific use and should be considered one-time-use packaging. Bacteria from foods that these packages once contained may remain on the packaging and thus be able to contaminate foods or even hands if reused."[6] Indeed, plastic film packaging that safely wraps fresh protein products has been carefully optimized for its durability (resistance to tearing), impermeability (protecting products from oxidation, moisture, and other airborne contaminants), and safety (resisting transfer of chemicals to the product). These features are paramount when it concerns fresh protein products because of the heightened risks of foodborne illness, cross-contamination, and significantly shorter shelf-life. Plastic film packaging for fresh protein, accordingly, must be approved by FSIS as an appropriate "food contact substance."

For other types of food, federally approved food contact materials and packaging formats have been optimized to protect consumers from food-borne pathogens and have proven through years of experience to be successful in conveying healthful, high quality foods to consumers. The Centers for Disease Control and Prevention ("CDC") emphasizes that low-acid foods, including but not limited to vegetables and meats, are common sources of botulism when improperly packaged. Clostridium botulinum thrives in anaerobic conditions, and inadequate packaging can create an environment conducive to toxin production.[7] Forcing significant packaging overhauls on a tight timeline may risk public health as well as the security of the food supply, particularly at a time when climate change is impacting crops and supply chain disruptions are challenging food producers.[8] These are unique challenges with potentially significant impacts on public health and food security that should be addressed by the Department in its Proposal implementing SB 54.

Various other pre-market approval regimes exist at the federal level with respect to product packaging. While the Department of course has expertise in recycling, industry stakeholders have especially deep knowledge of the federal regulatory settings in which they do business and are therefore well positioned to assess the competing obligations under federal law and SB 54. The Coalition encourages the Department to engage with these stakeholders in assessing the vast federal regulatory landscape that conflicts or potentially conflicts with SB 54's requirements.

The Coalition further reiterates its recommendation that the Department consider eco-modulation fees on packaging decisions that are specially formulated to meet legal obligations (including

---

[5] USDA Food Safety and Inspection Service, "Ground Beef and Food Safety," available at https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/meat/ground-beef-and-food-safety; *see id.* "Lamb from Table to Farm," available at https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/meat-fish/lamb-farm-table (advising consumers to place raw lamb in "disposable plastic bags").

[6] USDA Food Safety and Inspection Service, "Meat and Poultry Packaging," available at https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/meat-and-poultry-packaging.

[7] CDC, "Foodborne botulism," available at https://www.cdc.gov/botulism/prevention/home-canned-foods.html.

[8] U.S. Environmental Protection Agency, "Climate Change Impacts on Agriculture and Food Supply," available at https://www.epa.gov/climateimpacts/climate-change-impacts-agriculture-and-food-supply.

regulations and guidance) on the national level to be one form of the federal "conflict" that SB 54 discusses and instructs the Department to avoid in implementing the law.

If the Department declines to publish an additional list of federal laws presenting a conflict with SB 54, then the Coalition urges the Department to revise how it will evaluate exemption requests based on "unique challenges" pursuant to PRC section 42060(a)(3). Specifically, the Proposal should place special emphasis on the conflicting obligations and incentives under federal law and SB 54. *See* Proposed § 18980.2.4(c)(4).

Issue 29: The Department should recognize and consider the unique challenges posed by flexible films.

Comment: The Coalition emphasized that flexible films are essential to the mobile economy, to health and safety, and to consumer satisfaction but are not included in most curbside collection programs. The Coalition expressed its concern that the Proposal's requirements could result in a *de facto* ban on flexible films regardless of the materials used, unless the Department provides a traditional exemption. With the Department not having published additional guidance or a statement of reasons with its revised Proposal that explains how flexible films will be impacted, the Coalition reiterates its concern that the Proposal could disrupt the market for these products and stresses that the PRO will need more time to determine the best way to increase collection rates for this material.

The Coalition refers the Department to the Plastic Recyclers Europe ("PRE") 2022 report "Flexible Films Market in Europe State of Play."[9] In 2018, the European Union ("EU") adopted its Packaging and Packaging Waste Directive, which, as revised, requires that all packaging be recycled at rates of 65% by 2025 and 70% by 2030. The recycling rates for plastic products, meanwhile, are 50% by 2025 and 55% by 2030.[10] PRE, as the organization representing European plastic recyclers, has encountered and studied the difficulties of recycling flexible films at these rates.

PRE's report, at pages 21-25, discusses some of the unique challenges flexible films pose for recycling. Among other issues, PRE reports that gaps exist in current collection systems that make the recovery of flexible films difficult; in 2018, only 46% of the quantity of polyethylene flexible films were collected for recycling. Additionally, many collection systems do not sort polypropylene and PET flexible films for separate recycling, which results in the majority of these films ending up in reject streams. PRE reports that collection system issues led to only 23% of polyethylene flexible films and 15% of flexible films overall being recycled.

The nature of flexible films also poses unique recycling challenges. Flexible films feature a variety of different polymers. PRE notes that, at present, there is no current mechanical approach for separating different polymer layers for flexible films. PRE suggests that reducing the diversity of polymers in flexible films could be a solution to increasing the recyclability of flexible films, but that additional time is needed for this to happen. Further, small food flexible

[9] PRE, "Flexible Films Market in Europe State of Play," available at https://www.plasticsrecyclers.eu/wp-content/uploads/2022/10/flexible-films-market.pdf.
[10] European Commission, "Packaging waste," available at https://environment.ec.europa.eu/topics/waste-and-recycling/packaging-waste_en.

films generally end up in mixed plastic factions, which, when reprocessed, have insufficient mechanical strength for film blowing.

PRE emphasizes that additional research and development is "needed to provide continual improvement in processes, to solve particular problems in recyclability, and to open up the potential for step changes in how collection, sorting and recycling is optimized for a circular economy."[11] The Coalition encourages the Department to recognize the same and consider how the Proposal can address the unique challenges posed by flexible films.

Issue 34: Further clarity is needed in the assessment of penalties when a Corrective Action Plan has been approved and a producer is complying with it.

Comment: The Coalition is concerned that proposed section 18980.13.1(b) creates confusion over the assessment of civil penalties for prior violations that a producer is working to remedy through a corrective action plan that the Department approved. PRC section 42081(b) clearly prohibits the Department from penalizing a producer who is complying with the corrective action plan, and the Proposal, *see* section 18980.13.1(b)(6), suggests that an approved corrective action plan "may enable the avoidance of penalties" under SB 54. At the same time, the Proposal states that "approval of a corrective action plan does not in any way excuse violations of any requirements" of SB 54, *id.*, nor does the Department's permitting submission of a corrective action plan or consideration thereof affect the Department's authority to enforce penalties. Proposed § 18980.13.1(b)(3).

If, for example, a producer is on track to completing an approved corrective action plan that lasts 24 months, does the Department have the authority to still penalize that producer prior to the twenty-fourth month? The Coalition encourages the Department to clarify that, once a corrective action plan has been approved, the Department cannot issue penalties for the underlying violation while the producer is in the process of meeting the corrective action plan. That is, no penalty can be issued unless (1) the producer fails to achieve the corrective action plan's targets—in part or in full—by the prescribed deadline(s), or (2) the producer's notice or actions indicate that it has abandoned the corrective action plan.

This revision to the Proposal would be consistent with SB 54's emphasis on forbearance. PRC section 42081(b)(1) encourages the Department to provide an opportunity for the producer to present a remedial plan for its noncompliance "[*b*]*efore* determining whether to assess a penalty." (Emphasis added). This section further states that, "if the producer complies with the corrective action plan," the Department "shall not assess [the] penalty" that would otherwise have been assessed. Together, these provisions illustrate that, with respect to a producer's noncompliance—not resulting from bad faith or willful failure to comply—the Legislature intended the Department's oversight to be more remedial than punitive.

The Coalition supports the Department's decision to toll the accrual of penalties for violations identified in the approved corrective action plan as long as the plan remains in effect and is being complied with. Building off the tolling provisions in proposed sections 18980.13.1(d) and (e), the Department should further clarify whether, if a producer attempts but is unable to meet part

[11] PRE, "Flexible Films Market in Europe State of Play," at 26, available at https://www.plasticsrecyclers.eu/wp-content/uploads/2022/10/flexible-films-market.pdf.

or all of the corrective action plan's targets, the Department is able to assess penalties as if they had continually accrued from the date 30 calendar days after the initial notice of violation. In clarifying this matter, the Department should apply the "substantial efforts" standard as described in PRC section 42081(b)(2) and provide the following:

> Partial or complete noncompliance with the corrective action plan authorizes the Department to assess penalties accrued only until the date of the corrective action plan's approval, provided that the producer made "substantial efforts" to comply.

In other words, if the producer made "substantial efforts" to fully comply with a 24-month corrective action plan but still falls short, the Department cannot assess penalties as if they had accrued each and every day from the time the notice of violation was issued.

New Issues in Revised Proposal

Article 1: Definitions

Issue 36: The revised definition of "product" in proposed section 18980.1(a)(18) needs to be revised to avoid ambiguity and ensure that there is one clear producer for each product.

Comment: The revised definition of "product" in proposed section 18980.1(a)(18) includes the following new text: "A product uses covered material if the physical good is covered material . . . ." (emphasis added). This new definition of "product" has the potential to create confusion about who exactly is the "producer" of a given item. SB 54 defines "producer" as "a person who manufactures a product that *uses* covered material . . . ." PRC § 42041(w)(1) (emphasis added). This is quite different from a product that *is* covered material.

It is critical for the regulated community to know who the "producer" of each product is. Many parties may be involved in bringing a product to market, from the developer and brand owner to the ingredient suppliers to the manufacturer of the finished good to the manufacturer of the packaging used for the finished good. The Proposal needs to avoid any ambiguity about who is the producer of each product with obligations under SB 54.

Because packaging *is* "covered material," the language in proposed section 18980.1(a)(18) allows for responsibility to be placed on the manufacturer of the packaging, rather than on the manufacturer of the finished good or the party whose brand name appears on the finished good. This would create confusion as to whether the obligated "producer" of a given product (e.g., a can of beans) is the manufacturer of the beans or the manufacturer of the can. The same would apply for the other category of covered material, i.e., food service ware defined in PRC section 42041(e)(1)(B). Because plastic single use food service ware is covered material, proposed section 18980.1(a)(18) appears to obligate both the restaurant that filled the plastic soft drink cup and the manufacturer of the cup.

The statutory definitions of "covered material" and "producer" are clear, however. For a product that is not food service ware, e.g., beans, the producer is clearly the manufacturer of the beans, which *uses* a can as "packaging," under PRC section 40241(s). The can manufacturer is not the producer. For a product that is unfilled plastic single-use food service ware, e.g., plastic cups, the producer is also the manufacturer of the cups, which might be a plastic sleeve or a cardboard

carton as "packaging." The manufacturer of the outer packaging is not the producer. And for a product that is served in plastic single-use food service ware, the producer is the restaurant serving it, not the manufacturer of the food service ware.

The ambiguity introduced by proposed section 18980.1(a)(18) can be avoided by simplifying the definition of "product" to state that it "means a physical good that uses covered material." The Coalition urges the Department to make this revision.

Article 2: Covered Material and Covered Material Categories

Issue 37: Primary packaging that is necessary to satisfy health and safety or legal requirements directly related to the good should be designated as a Categorically Excluded Material, similar to secondary and tertiary packaging that is necessary for these purposes.

Comment: The Coalition agrees with the Department's designation as a Categorically Excluded Material[12] all secondary and tertiary packaging that "is necessary to satisfy the health and safety or legal requirements directly related to the good." Proposed § 18980.2(b)(3).

For some products—such as those requiring tamper-evident packaging—primary packaging may similarly be necessary to satisfy health and safety or legal requirements. Because producers are required to provide this packaging, the Department should similarly designate such primary packaging as a Categorically Excluded Material.

Issue 38: The Department should revise the Proposal to provide that "packaging" does not include fountain equipment.

Comment: The Coalition requests further clarification of the requirements for fountain equipment used in restaurants and food service locations. Specifically, fountain services syrup pouches or bags (hereinafter "fountain equipment") do not fit under the definition of "packaging," as defined by subdivisions of PRC section 42041, or under the category of "covered material" as defined in SB 54.

Fountain equipment used to make a beverage is a sophisticated manufacturing device. This fountain equipment contains concentrated liquid or syrup that must be reconstituted with carbonated water or another liquid before it is fit for consumption, functioning as part of the beverage production process. The syrup mixing, which occurs within the closed environment of the fountain equipment, is essential to delivering the end product in its intended form, rather than serving as packaging intended for product containment, transportation, or display and sales to a consumer.

Fountain beverages are manufactured using this fountain equipment, which is a "bag in box" or cartridge that mixes the fountain syrups with carbonated water or still water to create various types of beverages. This process aligns the fountain equipment with a barrel or cask used in the manufacturing process of wine or distilled spirits, as when in those containers, the liquid is not designed for consumer consumption and is not yet consumable and still undergoing an aging

[12] The Coalition appreciates the Department addressing its comment that over the counter ("OTC") drugs be identified as Categorically Excluded Materials (Issue 27 in the May 8 Letter).

process. The fountain equipment process also contains a liquid that is not yet consumable and still requires processing before recognizable as a product for consumers.

Fountain beverages serve an important role in a circular economy and are necessary to support the increased use of reusable and refillable containers. One fountain 15-gallon service syrup pouch contains the amount of syrup used to produce the equivalent of roughly 192 twenty-ounce PET bottles to be consumed via a reusable cup or even a takeaway cup made of recyclable material with opportunities for multiple refills of a single vessel. That number does not even account for the average refill rate.

The Coalition therefore requests that proposed section 18980.2 be revised to clarify that fountain equipment is categorically excluded from the definition of "covered material." Alternatively, the Coalition requests that the Department define "packaging" to exclude fountain equipment. Exempting fountain equipment will support the sustainable practices of the beverage industry and further the goals of SB 54.

Issue 39: It is not feasible in every instance for advertisements and marketing to explicitly refer to packaging and food service ware as "reusable" and "refillable."

Comment: The Proposal adds a requirement at proposed section 18980.2.1(a)(4)(D) that, in order to be considered "reusable" or "refillable" for purposes of SB 54, "[a]ll advertisements and other marketing related to the item by the producer must explicitly describe the item as 'reusable' or 'refillable' or otherwise clearly explain that the item is reusable for refillable." For various reasons, the Department should remove this requirement.

As a threshold matter, the Coalition believes that this requirement is superfluous because producers will already be required to label "reusable" or "refillable" products as such. This requirement, moreover, imposes an undue burden on businesses to ensure that *all* forms of advertising and marketing meet this requirement. Where time or space is limited, this may not always be possible. For example, some streaming network advertisements last only a few seconds, while others are limited by character usage. A blanket requirement that the words "reusable" or "refillable" be included in all marketing is not feasible in the modern advertising market.

It is also not feasible in many cases for businesses to conduct "California-specific" advertising. While the Department has specified criteria for the use of "reusable" and "refillable" in California, other states have not provided such criteria; indeed, the Coalition is unaware of any other state having done so. The term "reusable" or "refillable" could be construed as environmental benefit claims that are high risk in the advertising context. To the extent the Federal Trade Commission's forthcoming updates to its "Guides for the Use of Environmental Marketing Claims" ("Green Guides"), would define either of these terms in ways that vary from the Proposal, some states (along with California) incorporate the Green Guides into their state laws. *See, e.g.*, Maine Rev. Stat. § 2142; Minnesota Stat. Ann. § 325E.41. In such a scenario, complying with the Proposal could expose businesses to liability in other states, where they cannot prevent every form of print or electronic marketing from reaching. The Department should accordingly remove the advertising and marketing requirement in proposed section 18980.2.1(a)(4).

Issue 40: The Coalition supports the use of QR code instructions for reusing and refilling.

Comment: The Coalition agrees with the Department's additional language specifying when packaging and food service ware qualify as "reusable" or "refillable." Specifically, the Coalition expresses its agreement with proposed section 18980.2.1(a)(4)(E)(ii) that instructions for reuse and refill may be provided via a QR code. For many products, there is limited space available on the packaging. QR codes permit businesses to provide detailed instructions to consumers without space limitations, a benefit that is especially important where multiple steps and information may be required to reuse or refill a product.

Issue 41: "Sufficient durability" for reusable and refillable packaging and food service ware should be defined based on the number of times a product is reused or refilled.

Comment: Proposed section 18980.2.1(a)(5)(A) provides that, in order for packaging or food service ware to be "designed for durability to function properly in its original condition for multiple uses," packaging or food service are must "[b]e sufficiently durable to remain usable when used multiple times over at least three years following its initial use."[13] The Coalition believes that the "number of uses" is a more appropriate metric for determining whether a product is reusable or refillable than a time-based metric.

Different product types are used with differing frequencies, and it therefore follows that they are reused or refilled with differing frequencies. For example, a container for beverages may be reused on a daily or weekly basis, while a container for a specialty food or soup product may be reused once per year. If a strict time-based metric is used to assess whether a product is "sufficiently durable," this hypothetical beverage container could fail to qualify if it no longer can be re-used after two years (and 104 refills, if refilled once per week), while the specialty soup product container would be sufficiently durable while having been only refilled three times during a three-year period. This outcome is inconsistent with SB's 54 intent of "decreasing single-use packaging" by punishing a producer whose product prevent 103 pieces of single-use packaging from entering the waste system.

To address this concern, the Coalition recommends that the Department adopt a use-based metric for defining "sufficient durability" by revising proposed section 18980.2.1(a)(5)(A) as follows:

> (A) Be sufficiently durable to remain usable when used ~~multiple~~ three times ~~over at least three years~~ following its initial use.

Issue 42: The Department's creation and definition of the term "significant effect on the environment" as used in proposed section 18980.2.1(a)(6)—but found nowhere in the text of SB 54—impermissibly adds a criterion for packaging or food service ware to qualify as "refillable" or "reusable."

Comment: PRC section 42041(af) establishes four criteria that packaging or food service ware must meet for it to qualify as "refillable" or "reusable" by a producer. (There are only three criteria when qualifying for "refillable" or "reusable" by a consumer). One of these criteria states that the packaging or food service ware must be supported by infrastructure that ensures

[13] The Coalition appreciates the Department adopting its suggestion (Issue 20 in the May 8 Letter) that the concept of "more likely than not" to be reused or refilled should be replaced with "designed" to be reused or refilled.

such packaging or food service ware can be "conveniently and safely reused or refilled" multiple times.

In proposed section 18980.2.1(a)(6), the Department unnecessarily and inappropriately defines the term "safely reused or refilled" to mean, among other things, that such reuse or refill does not pose a "significant effect on the environment." The Proposal then defines "significant effect on the environment" as a "substantial, or potentially substantial, adverse change in physical conditions, such as with respect to land, air, water, minerals, or animals, resulting from an operation, practice, product, substance, action, or any other cause." Proposed § 18980.1(a)(26).

The Coalition objects to this backdoor effort to rewrite the criteria for "refillable" or "reusable" packaging or food service ware by introducing a novel term that makes it significantly more difficult for a producer's packaging or food service ware to qualify as "refillable" or "reusable." In effect, the Department's addition of this regulatory provision heightens a standard that is already and unambiguously defined by the Legislature. By unilaterally rewriting the standard for "refillable" or "reusable" packaging or food service ware in a way that is logically and textually inconsistent with SB 54, the Department exceeds its statutory authority and undermines the legislative goal of encouraging more reusable and refillable packaging and food service ware.

First, whether a cup can be reused or refilled *safely*, for instance, hinges on the direct health or safety risk to the *consumer*—not some broader, vague "effect" on the environment at large. The act of refilling or reusing a cup (or any other item of food service ware or packaging) inextricably serves the benefit of the individual consumer or user. The direct connection between the consumer (or producer) reusing or refilling the item and the act of reusing or refilling the item is incorporated into the definition of "reuse" and "refill." *See* PRC §§ 42041(af)(1), (2).

Second, SB 54's criterion that the packaging or food service ware be "conveniently" reused or refilled as well is further evidence that the evaluation is centered around a *person*—not "land, air, water, minerals, or animals," as the Proposal's new definition suggests. Only people can enjoy the convenience of reusing packaging or food service ware. That the person-focused term "conveniently" precedes "safely" lends further support to the conclusion that the "safe" reusing or refilling is evaluated by reference to the consumer's health and safety.

The Coalition thus recommends that proposed section 18980.2.1(a)(6) be revised as follows:

> For purposes of subparagraph (C) of paragraphs (1) and (2) of subdivision (af) of section 42041 of the Public Resources Code, packaging or food service ware can be safely reused or refilled by the producer or consumer, as applicable, if such reuse or refill does not pose an additional significant health or safety risk to the consumer ~~or additional risk of significant effect on the environment compared to its single-use counterpart~~ and occurs under circumstances that comply with all applicable state, local, and federal laws and regulations concerning health and safety. ~~Notwithstanding the foregoing, if packaging or food service ware cannot be reused or refilled without unreasonable risk to health or safety or of significant effect on the environment, it shall be considered not safely reusable or refillable, regardless of applicable laws and regulations.~~

<u>Issue 43</u>: The Department should clarify the meaning of "clearly greater costs" of "accessing the infrastructure" in proposed section 18980.2.1(a)(7)(E).

Comment: Proposed section 18980.2.1(a)(7)(E) provides that—for purposes of having "infrastructure for ensuring that packaging or food service ware items can be conveniently and safely reused or refilled for multiple cycles"—"[a]ccessing the infrastructure must not impose clearly greater costs to the consumer than those associated with the acquisition of the item."

This section would benefit from additional clarity in multiple respects. First, the term "clearly greater" is undefined. Second, the Department should clarify that this requirement does not mean that the cost of refilling cannot exceed the original acquisition cost of the item. Such a requirement could exempt from "refillable" products that were purchased on sale or on promotion (indeed, some companies may incentivize customers to purchase their refillable products in the first instance with a special promotion). At minimum, this section should be tied to the current market price of the product.

Issue 44: As is the case with food service ware items, the Proposal should classify as reusable or refillable packaging which, by its nature, does not require infrastructure for bulk or large format packaging to be conveniently and safely used multiple times.

Comment: Proposed section 18980.2.1(a)(9)(E) provides that, with respect to SB 54's requirement that infrastructure for bulk or large format packaging be adequate or convenient (at PRC section 42041(af)(2)(C)), the requirement "shall be deemed fulfilled with respect to food service ware items that, by their nature, do not require infrastructure for bulk or large format packaging to be conveniently and safely used multiple times." The Department should similarly exempt packaging for all other products that meet this criteria.

SB 54 aims to prevent single-use packaging from entering California's waste stream. Many products (e.g., some personal care products that are not used on a frequent basis in large amounts) are refilled on a one-to-one basis, and companies should be rewarded for incentivizing their customers to refill these products. From a policy perspective and with SB 54's legislative intent in mind, excluding packaging that does not require infrastructure for bulk or large formats on this basis alone does not encourage the development of refillable products—i.e., consumers who purchase personal care products that are not frequently used in large amounts are unlikely to buy this type of product in bulk.

Issue 45: Participating producers must be permitted to directly apply to the Department to exempt covered material that presents unique compliance challenges or is necessary to protect health and safety.

Comment: The first sentence of proposed section 18980.2.4(a) states that "[o]nly a PRO or an Independent Producer may submit a request for an exemption pursuant to paragraph (3) of subdivision (a) of section 42060 or paragraph (4) of subdivision (a) of section 42060 of the Public Resources Code." This new language eliminates the ability of participating producers to request an exemption directly from the Department for covered material that cannot comply with SB 54 due to unique compliance challenges or health and safety reasons. Rather, pursuant to this new language, participating producers seeking an exemption must submit an application to the PRO, and then the PRO has sole discretion to decide whether to submit a producer's application to the Department according to procedures it alone deems appropriate. This new language in proposed section 18980.2.4(a) is highly problematic. It should be deleted and reverted to the Proposal's original language set forth in the initial proposed section 18980.2.4(b).

By removing the ability for a participating producer to directly request an exemption from the Department, producers are prohibited from exercising due process rights to utilize the express legislative intent in SB 54 to petition the responsible agency, here the Department, for an exemption under PRC sections 42060(a)(3) and (4).

PRC sections 42060(a)(3) and (4) require the Department to establish procedures for identifying covered material that cannot comply with SB 54 and for exempting such material from SB 54's requirements. If the Department fails to establish these procedures, adopts procedures that do not comport with due process requirements, or makes an arbitrary and capricious decision to deny an exemption request, producers harmed by those actions have legal recourse. *See, e.g.*, PRC § 45040 (aggrieved party may file petition for writ of mandate against Department). However, proposed section 18980.2.4(a)'s delegation of this decision making responsibility to the PRO, which is not a public agency and is not subject to the decision making restrictions and obligations that apply to the Department, impermissibly deprives producers of their right to petition the Department, stripping away their rights to due process. For instance, if a participating producer is required to submit an application for an exemption through the PRO, as required by proposed section 18980.2.4(a), but the PRO does not agree that the producer should be granted an exemption and thus refuses to submit that producer's application to the Department, there is no avenue for that producer to seek an exemption directly with the Department or to seek legal recourse for the PRO's decision not to submit the application to the Department. The PRO of course is formed by producers, and so its decisions may reflect those of competitors to the applicant.

Allowing producers to seek an exemption pursuant to PRC sections 42060(a)(3) and (4) directly from the Department, as the Legislature intended, removes an unnecessary and improper compliance hurdle and furthers the public policy goals of the state. For producers who rely on covered materials that cannot comply with SB 54, which includes plastic packaging that is critical to ensuring the safety of fresh produce in compliance with federal laws and guidelines, the ability to obtain an exemption from the requirements of SB 54 is paramount. Proposed section 18980.2.4(a) impairs the ability of producers to comply with SB 54 and unnecessarily increases compliance costs, which runs contrary to the state's public policy goals, including improving access to safe and affordable food.[14] The Western Growers Association ("WGA") submitted extensive comments supported by scientific data demonstrating that plastic packaging is critical to protecting and preserving fresh produce, reducing the risk of harmful contamination, extending food shelf life, and reducing waste. Plastic packaging for fresh produce items presents unique challenges due to the way fresh produce continues to respire and have several metabolic processes continue well after post-harvest, preventing food tampering and cross-contamination.

The Coalition strongly urges the Department to eliminate the first sentence of proposed section 18980.2.4(a) and instead implement the prior language in the initial Proposal at section 18980.2.4(b) which stated: "A PRO, participating producer, or Independent Producer may submit an application to the Department to request that covered material be deemed exempt pursuant to this section. An application shall only be considered if it contains all the elements

[14] *See* Cal. Dept. Public Health, Century for Family Health, "Hunger, Nutrition, and Health," available at https://www.cdph.ca.gov/Programs/CFH/Pages/Hunger,-Nutrition,-and-Health.aspx.

prescribed in this section." In addition, the prior language in other portions of the initial Proposal at section 18980.2.4, consistent with the prior subsection (b), should be added back into the Proposal.

Issue 46: The scope of the exemption for covered material must be consistent with SB 54.

Comment: The initial language in proposed section 18980.2.4(a) stated the following: "Pursuant to section 42060(a)(3) and 42060(a)(4) of the Public Resources Code, the Department may, in its sole discretion, exempt particular covered material from the requirements of the Act and this chapter." (Emphasis added). However, the new language in Proposed § 18980.2.4(a) states the following: "The effect of such an exemption is that exempted covered material may be sold, offered for sale, imported, or distributed regardless of whether the covered material satisfies the requirements pursuant to section 42050 of the Public Resources Code." (Emphasis added).

The removal of the language, "from the requirements of the Act and this chapter," is inconsistent with the scope of the exemption set forth in SB 54 and intended by the Legislature. *See* PRC § 42060(a)(3)(A) ("The department may exempt covered material identified pursuant to this subparagraph from this chapter.") (Emphasis added); PRC § 42060(a)(4) ("The department may exempt that covered material from this chapter.") (Emphasis added). Failing to explicitly state that the Department may exempt covered material "from this chapter" creates uncertainty regarding the intended scope of proposed section 18980.2.4 and conflicts with the underlying statutory authority for the Proposal as set forth in PRC sections 42060(a)(3) and (4).

In addition, the new language in proposed section 18980.2.4(a) stating that the "effect of such an exemption is that exempted covered material may be sold, offered for sale, imported, or distributed regardless of whether the covered material satisfies the requirements pursuant to section 42050 of the Public Resources Code[,]" is overly restrictive. SB 54's intended scope of the exemption is broader than the source reduction, compostability, and recycling rate requirements of PRC section 42050. For example, and without limitation, covered material that is exempted "from this chapter," as SB 54 states, would also be exempt from any requirements in SB 54 to eliminate covered material, lightweighting requirements, the imposition of a malus fee, optimization requirements, responsible end market requirements, verification requirements, and all PRO requirements that are intended to implement these inapplicable provisions. Accordingly, this additional language in proposed section 18980.2.4(a) is inconsistent with SB 54.

Finally, the last sentence of proposed section 18980.2.4(a) states: "The exemption does not affect the status of single-use packaging or single-use plastic food service ware as covered material or the obligations of producers with respect to covered material." This language is concerning and confusing because it is inconsistent with SB 54's intended purpose of the exemption and with other provisions in the Proposal. There is no clear delineation between requirements for covered materials, which would not apply to exempt materials, and requirements for producers of covered materials. In many cases, the phrasing used in SB 54 does not differentiate between the two. The Department's proposal to require producers to comply with all "obligations with respect to covered materials," even with respect to exempt materials, impermissibly limits the scope of the exemption contemplated by the Legislature in SB 54. *See* Gov. Code §§ 11349, 11349.1.

The uncertainty injected into the Proposal with these revisions to section 18980.2.4(a) will unnecessarily increase the cost and complexity of compliance for the Department, the PRO, and the producers. The lack of clear distinction in SB 54 between covered material requirements, which an exemption would eliminate, and a producer's "obligations with respect to covered materials" makes it impossible for producers of exempt material to determine what they must do to comply with their legal obligations. This type of ambiguity invariably leads to disputes that must be resolved by the courts.

The Coalition strongly urges the Department to eliminate the new language contained in the second and third sentences of proposed section 18980.2.4(a), and add back in the initial section 18980.2.4(a) language which stated: "Pursuant to section 42060(a)(3) and 42060(a)(4) of the Public Resources Code, the Department may, in its sole discretion, exempt particular covered material from the requirements of the Act and this chapter." These changes will ensure the scope of the exemption is consistent with SB 54.

Issue 47: The Department, not the PRO, must establish procedures for evaluating producer applications to exempt certain covered material, pursuant to the authorization in SB 54.

Comment: Proposed section 18980.2.4(b)(1) inappropriately shifts the Department's obligations, as set forth in PRC sections 42060(a)(3) and (4), to the PRO by granting the PRO broad discretion to "establish any procedure it deems appropriate for receiving applications prepared in whole or part by a producer or group of producers and deciding whether to submit the applications to the Department." In addition, proposed section 18980.2.4(b)(2) improperly authorizes the PRO to unilaterally determine whether an application "meet[s] the standards set forth in this section for approval[,]" i.e., the standards set by the PRO.

Of particular concern is the broad discretion that proposed section 18980.2.4 grants the PRO to effectively deny a producer's exemption request for any reason by simply declining to provide the producer's application to the Department. This restriction on the PRO's ability to submit producer applications to the Department without first determining whether the application "meet[s] the standards set forth in this section for approval" exacerbates the problem. Proposed § 18980.2.4(b)(2). PRC section 42060 clearly states that the Department is responsible for establishing the process for identifying covered material that should be exempt under PRC sections 42060(a)(3) and (4) and for determining which exemptions are appropriate. There is no authority in SB 54 for the Department to shift any of these statutory responsibilities to the PRO.

The Coalition recommends that the language in proposed section 18980.2.4(b) be deleted, and that the Department adopt regulations whereby the Department, not the PRO, establish the process for identifying covered material that should be exempt under PRC section 42060(a)(3) and (4) and for determining which exemptions are appropriate.

Article 3: Evaluations of Covered Material and Covered Material Categories

Issue 48: Modifications to the independent third-party validation for postconsumer recycled content are needed for effectiveness and accuracy.

Comment: Proposed section 18980.3.4 require a demonstration that an alternative third-party validation "will result in more consistent and accurate assessment of postconsumer recycled content," including an explanation of the differences between the Association of Plastic Recyclers ("APR") validation program and the additional third-party program. The statute does not require the similar third party to provide an approach that has a performance standard that is greater than that of APR, including on the point of stringency of the program. The Department should only require the PRO to provide evidence of the similarity of the program for validation. This can be achieved through a variety of internationally, and nationally, recognized standard setting bodies.

Issue 49: The requirements for review of certain technologies at proposed section 18980.3.6 need to be revised.

Comment:

a. The proposed technology review requirements will limit innovations needed to reduce plastic in the environment.

The Coalition appreciates that the Department includes a mechanism to consider new recycling technologies and supports an approach that allows for review and certification of new technologies. Certifiers provide extensive technical experience with recycled content and are an important mechanism for establishing consistent standards and accounting methods. However, the Department's proposed requirements for peer review and certification create a lengthy and cumbersome process that does not provide sufficient incentive for new technologies to be developed. This limits recycling technologies that are needed to augment conventional mechanical recycling in order to achieve the state's ambitious goals as set forth in SB 54. For example, instead of landfilling mixed or soiled plastics, advanced recycling technologies can place these plastics back into products for consumer use.

PRC section 42041(aa)(5) requires the Department to encourage recycling technologies while ensuring that such technologies protect public health and the environment. Developing and scaling cutting-edge technologies and processes to increase plastics recovery and decrease waste is pivotal to meeting those goals. The Coalition supports regulations that accommodate and support innovative technologies, but these regulations should include criteria that evaluates the technology based on recycling outcomes rather than a mere comparison to mechanical recycling.

This proposed process of peer review and certification is inconsistent with other types of certifications required by the State. For example, SB 54 relies on a certification program to validate postconsumer recycled content ("PCR") without requiring a second layer of peer review. A single step certification for chemical recycling technology would allow for consistency within the same legislation. As another example, California also sets up a more streamlined one-step certification program in SB 253, California's Corporate Climate Data Accountability Act. Under that law, codified at Health & Safety Code section 38532, regulated entities obtain an assurance

from an independent third-party provider and ensures the credibility of the provider by including requirements that assurance providers must meet. A second peer review step is not necessary.

b. The conflict requirements for the peer review panel are inconsistent with widely understood ethics restrictions.

The Proposal extensively defines when a member of the peer review panel has a conflict of interest that would prevent it from validating a recycling technology. Proposed § 18980.3.4(b)(4)(B)(i)-(ii). As currently drafted, it may be impossible for a PRO to find any independent panelist because the Proposal presumes that a conflict exists if a panelist has any connection to a study.

These requirements are overbroad, are contrary to legal and academic ethical restrictions, and will limit the qualified and knowledgeable professionals eligible to participate on the peer review panel. Conflicts of interest should be evaluated on whether the party has a financial, personal, or business interest that would influence professional decisions or affect the panelist's ability to conduct an impartial analysis.

The Coalition recommends that the Department adopt conflict requirements that are similar to those used in academic settings. For example, the National Academy of Sciences ("NAS") sets forth a stringent code of conduct that requires all NAS members to disclose all relevant relationships, including financial relationships, that "may be perceived to influence the outcome of their research" and to not commit scientific misconduct such as falsification of data.[15] The Department should adopt ethics requirements similar to these, rather than preventing any scientist that is remotely connected with a study to participate on the peer review panel.

c. Comparing chemical technologies to mechanical technologies will not result in accurate data on hazardous waste generation.

The Coalition recognizes that PRC section 42041(aa)(5) directs the Department to include criteria in the Proposal to determine whether plastic recycling technologies produce "significant amounts of hazardous waste." Yet, SB 54 does not limit that evaluation to a comparison between a new technology and mechanical recycling technologies. This comparison is inappropriate because there are numerous differences between a chemical recycling (or advanced technology) and a mechanical recycling technology. Chemical and mechanical recycling processes have very different inputs and outputs. For example, chemical recycling can process a much wider variety of plastic than mechanical technologies, including plastics that are not mechanically recycled in *any* state. Accordingly, no comparison between these two recycling methods will be accurate, as the methods have different feedstocks and therefore generate different types of waste. Mechanical and chemical recycling are also regulated under very different legal frameworks. If

[15] National Academy of Sciences, "Code of Conduct" (Oct. 21, 2021), available at: https://www.nasonline.org/wp-content/uploads/2024/02/nas-code-of-conduct.pdf

the technologies are to be compared, they would need to be evaluated under one consistent statutory and regulatory approach.

Instead, the Department should use alternative criteria to evaluate whether a recycling technology is suitable for manufacturing plastic that qualifies as postconsumer recycled content. In addition to hazardous waste generation, PRC section 42041(aa)(5) requires the Department to consider additional impacts such as the "generation of greenhouse gases, environmental impacts, environmental justice impacts, and public health impacts." To determine whether a new technology meets the regulatory requirements, the Department should evaluate: (1) the extent to which the technology diverts covered materials from landfills; (2) the extent to which the technology will increase the amount of recycled material in applications that cannot typically be addressed by mechanical recycling, such as medical and food-grade packaging; and (3) how the technology improves the comprehensive environmental outcomes of covered materials, particularly the impact on climate. These criteria are important to ensure that recycling is maximized to the extent possible, and the Department should use a comparative life cycle assessment to conduct its analysis.

As currently written, the Proposal may limit technology that can recycle hard-to-recycle plastics. For example, it is difficult to use mechanically recycled plastics for food or pharmaceutical packaging. However, because chemical recycling feedstock is similar to virgin plastics in its application, it can be used for food and pharmaceuticals. The Department should ensure that the Proposal does not unnecessarily limit the use of technologies that can further SB 54's goal of maximizing waste diversion from landfills and ensuring that recycled plastics are available for use in packaging.

d. The considerations included in the hazardous waste study are overbroad.

The Proposal specifies that the "hazardous waste" under review includes many categories of waste, but SB 54 does not require this overbroad approach. Because concerns about plastics often relate to toxic substances, an evaluation of "significant hazardous waste" should focus on prohibiting generation of toxic hazardous waste. This is consistent with the current regulatory requirements to consider risks to public health and the environment. Hazardous waste that is treated and managed in accordance with the relevant state and federal laws and does not pose risk should not be considered "significant" and deemed hazardous waste "produced" by the technology.

SB 54 requires the Department to include criteria to exclude "plastic recycling technologies that produce significant amounts of hazardous waste." PRC § 42041(aa)(5). The Department should utilize its discretion to interpret the undefined term "significant" in SB 54 to mean any "production" of hazardous waste that causes risk to public health or the environment. If hazardous waste resulting from a recycling technology is treated in accordance with the relevant state and federal laws and does not pose risks to public health or the environment, it should not be deemed "significant" hazardous waste produced by the technology.

Additionally, the content of the study should more closely align with hazardous waste generation. The Proposal would require a technology review of a chemical recycling technology

to consider "how widely the technology has been employed in recycling." Proposed § 18980.3.6(a)(3)(A)(i). However, this criteria is not relevant to evaluating the amount of significant hazardous waste that a technology might generate and should be removed from the Proposal.

Furthermore, the Department's analysis should account for the different phases of the technology being reviewed, and the types of feedstocks that are used.

e. The Proposal burdens the PRO with evaluating whether a recycling technology generates significant hazardous waste.

The Proposal burdens the PRO with determining if a recycling technology generates significant hazardous waste. However, organizations with industry expertise, such as a trade association, are better situated to conduct this analysis and meet the requirements of the Proposal.

Alternatively, if the Department decides to move forward with requiring a peer-reviewed scientific study, it should instead task a qualified third-party certifier with developing uniform criteria to conduct this evaluation and apply the criteria to chemical recycling technologies as needed. The Department could revise the Proposal to require a PRO to select a qualified third-party organization within six months of the effective date of the Proposal, and to require the third-party certifier to complete any requested evaluation of a new technology within one year of the start of the evaluation process. It is necessary that such a third-party organization be selected quickly to allow time for a recycling technologies to be evaluated in a timely manner.

f. The PRO should be allowed to incorporate any approved technology.

The Department's finalized requirements for chemical recycling technologies should make clear that any approved technology may be incorporated into the PRO's producer responsibility plan. After undertaking such a rigorous review process by a third-party or certification, an approved technology should be presumed to be allowable recycling technology for PRO consideration and adoption in its plan. Further, if additional recycling standards and certifications are enacted by governmental entities or reputable third parties, the Department should allow the PRO the ability to incorporate that technology after it meets the relevant standards or certification requirements. In several places in the Proposal, a process is created to recognize third party certification—recycling technology should be included. Third-party certification would allow California to benefit from additional expertise and audit compliance.

Article 10: Registration and Data Reporting Requirements

<u>Issue 50</u>: Producers of covered material exempt from SB 54 should not be required to register with the Department.

<u>Comment</u>: Proposed section 18980.10(a) requires that "each producer, <u>including producers of covered material seeking an exemption</u> pursuant to sections 18980.2.3, 18980.2.4, or 18980.5.2, <u>shall register</u> electronically in a manner established by the Department." (Emphasis added). This new requirement mandating that producers must register with the Department even if they are seeking an exemption and the Department approves such an exemption, is onerous for both the

producer and the Department, risks causing delays in processing, and increases fees for producers, which collectively increases the challenges to implementation of SB 54.

To reduce the administrative and financial burdens for producers and the Department, the Coalition recommends deleting this language in proposed section 18980.10(a) requiring producers seeking an exemption to register with the Department. Instead, the Coalition strongly recommends that the Department establish a straightforward self-certification regime whereby producers who claim an exemption certify under penalty of perjury that they meet the criteria for an exemption pursuant to SB 54 and the Proposal, and submit that certification to the Department. Upon such submission, producers will be considered exempt unless and until the Department, upon its review of the producer's application materials, determines otherwise. This will save the Department the need to review each application and avoid the delay involved in awaiting approvals, while otherwise reducing administrative costs for producers and the PRO as well.

* * *

Finally, we note that the Proposal sets forth an aggressive timeline for compliance, resulting in an enormous burden for industry at a time when businesses are navigating inflationary pressures. Given the deadlines in the Proposal, the PRO will only have a short amount of time to collect funds, invest in materials recovery facilities, and establish end markets before the first deadline is triggered on January 1, 2028 for 30 percent of plastic covered material to be recycled. Investing in new equipment and educating the public on best practices will take time and cost money. None of this can be done without the Department allowing the PRO the flexibility and efficiency called for by SB 54. We implore the Department to carefully evaluate progress by the PRO and industry in general during the first few years of SB 54's implementation in order to consider possible adjustments to the recycling rates and dates, as permitted by PRC section 42062(b), for current unforeseen and anomalous market conditions. The Coalition is dedicated to working with the Department to achieve the goals of SB 54, and to do so, the Proposal must take into account the practical challenges to both the industry and the Department with respect to recycling rates and dates.

The Coalition appreciates the opportunity to submit these comments for the Department's consideration and looks forward to continuing our productive dialogue to ensure the fair, balanced, and faithful implementation of SB 54 in accordance with the Legislature's direction.

Respectfully submitted,

Adam Regele
Vice President of Advocacy and Strategic Partnerships
California Chamber of Commerce

On behalf of the following organizations:

Agricultural Council of California, Tricia Geringer
Almond Alliance, Blake Vann
AMERIPEN, Dan Felton
American Beverage Association, Rick Rivas
American Chemistry Council, Tim Shestek
Brea Chamber of Commerce, Lacy Schoen
California Asian Chamber of Commerce, Johnnise Foster-Downs
California Building Industry Association, Nick Cammarota
California Cattlemen's Association, Kirk Wilbur
California League of Food Producers, Trudi Hughes
California Grocers Association, Daniel Conway
California Manufactures & Technology Association, Robert Spiegel
California Restaurant Association, Matt Sutton
California Retailers Association, Sarah Pollo Moo
California Strawberry Commission, Rick Tomlinson
Can Manufacturers Institute, Greg Hurner
Chemical Industry Council of California (CICC), Lisa Johnson
Coalition for Responsible Celebration, Maria Stockham
Consumer Brands Association, John Hewitt
Dairy Institute of California, Katie Davey
Foodservice Packaging Institute, Carol Patterson
Greater Conejo Valley Chamber of Commerce, Danielle Borja
Greater High Desert Chamber of Commerce, Mark Creffield
Hispanic Chambers of Commerce, Julian Canete
Household Commercial Products Association, Christopher Finarelli
International Bottled Water Association, JP Toner
International Dairy Foods Association, Danielle Quist
Laguna Hills Chamber of Commerce, Sheri Feinberg
Lake Elsinore Valley Chamber of Commerce, Kim Joseph Cousins
Long Beach Area Chamber of Commerce, Jeremy Harris
National Automatic Merchandising Association (NAMA), Robert Jackson
National Confectioners Association, Jennifer Gardner
North San Diego Business Chamber, Sophia Hernandez
Plastics Industry Association, Kelly Hitt
Rancho Cordova Area Chamber of Commerce, Diann H. Rogers
Santa Barbara South Coast Chamber of Commerce, Dustin Hoiseth
Simi Valley Chamber of Commerce, Anthony Angelini
SNAC International, Christine Cochran
Torrance Area Chamber of Commerce, Donna Duperron
Toy Association, Charlotte Hickox
Valley Industry & Commerce Association, Victor Reyes-Morelos
West Ventura County Business Alliance, Nancy Lindholm
Western Growers Association, Gail Delihant
Western United Dairies, Anja Raudabaugh
Wine Institute, Anna Ferrera

Yorba Linda Chamber of Commerce, Alex Berrios-Hernandez

cc: Christine Aurre, Legislative Affairs Secretary

May 8, 2024

Submitted Electronically via CalRecycle's Public Comment Portal

Claire Derksen
SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations
California Department of Resources Recycling and Recovery (CalRecycle)
Regulations Unit
1001 I Street, MS-24B
Sacramento, CA 95814

Re: Senate Bill 54: Plastic Pollution Prevention and Packaging Producer Responsibility Act

Dear Ms. Derksen:

The undersigned organizations (the "Coalition") thank you for the opportunity to submit comments regarding CalRecycle's Proposed Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations (the "Proposal"), along with its accompanying Initial Statement of Reasons ("ISOR"). The Coalition appreciates CalRecycle's extension of the public comment period to May 8, 2024. The Coalition consists of 39 California-based and national organizations and businesses of varying sizes that collectively represent nearly every major business sector that will be impacted by CalRecycle's Proposal.

The Coalition acknowledges that achieving California's ambitious recycling and climate goals is a complex endeavor that has required the simultaneous adoption of multiple pieces of legislation and implementing regulations, as well as the publication of numerous studies by CalRecycle. Members of the Coalition have been actively engaged with stakeholders and policymakers on Senate Bill 54 ("SB 54"), Senate Bill 343 ("SB 343"), and other recycling and climate legislation for many years. The Coalition understands the scope of the task before CalRecycle and thanks CalRecycle for hosting numerous public workshops and carefully considering the feedback of all stakeholders through these rulemaking processes.

Below, the Coalition summarizes its primary concerns and questions regarding the Proposal. The Coalition views this rulemaking process as an ongoing dialogue and fully anticipates that CalRecycle may make revisions that require another notice and comment period, additional workshops, and meetings with stakeholders. The Coalition would welcome the opportunity to meet with CalRecycle to discuss the below issues and any questions or comments CalRecycle may have.

Integration With Senate Bill 343 and Other Rulemakings

Issue 1: Other recycling laws, and the pending rulemakings implementing those laws—most notably SB 343—play critical roles in the Proposal. Until these rulemakings are finalized, it is unclear how these rulemakings will impact the Proposal and therefore it is difficult to make fully informed comments on the Proposal.

Comments: The Coalition acknowledges that creating a framework for achieving California's recycling and climate goals has required the simultaneous adoption of several laws and implementing sets of regulations in a process that is ongoing. Because these laws and regulations interact and sometimes overlap with each other, it is critical that CalRecycle address discrepancies and inconsistencies that may arise among them. Until these rules are finalized, it is unclear how they will impact the Proposal, and it is therefore impossible for the Coalition's comments to be fully informed.

SB 343 in particular is critical because it establishes the criteria that products must meet in order to be considered "recyclable" in California. The Proposal incorporates SB 343's recyclability standards as the benchmarks that covered material categories must meet in order to be considered "recyclable" under SB 54. Proposed § 18980.3(b) (citing PRC § 42355.51(d)(2)). SB 343 also

sets the benchmarks for "trending towards" recyclability determinations under SB 54 and the Proposal. PRC § 42061(3)(B); Proposed § 18980.3.1(b).

CalRecycle is still in the process of determining what materials are classifiable as "recyclable" pursuant to SB 343. On December 28, 2023, CalRecycle published its SB 343 Preliminary Findings Report for the required characterization study of material types and forms that routinely become feedstock used in the production of new products and packaging. On March 1, 2024, several members of the Coalition submitted a letter to CalRecycle with 15 initial questions regarding the SB 343 Preliminary Findings Report.[1] Among other questions, the letter asked:

- Are manufacturers expected to have separate labels for California and states that require chasing arrows symbols? For example, Michigan law requires all plastic products sold within the state to be labeled with the resin code with the chasing arrows symbol and imposes a fine of $500 per violation. Mich. Comp. Laws §§ 324.16102(1), 324.16104(1).[2]

- What does it mean for material types and forms to be sorted by large volume transfer or processing facilities that "collectively serve at least 60 percent of recycling programs statewide," and how is this criteria different from the 60 percent of the population under access requirement? PRC § 42355.51(d)(2).

- Table 2 of the SB343 Preliminary Findings Report provides figures for the recovery of material types and forms at 37 facilities in 30 of 58 California counties (51.7 percent). How does this finding comport with the 60-percent threshold requirements in PRC § 42355.51(d)(2)?

More extensive comments on the Preliminary Findings Report were submitted by CalChamber and other members of the Coalition on or before the April 1, 2024 deadline set by CalRecycle, and those comments are hereby incorporated by reference. As of the date of this letter, CalRecycle has not yet published its SB 343 Final Findings Report or made available on its website the comments received. As a result, it is uncertain what materials will be considered "recyclable" under the Proposal, as well as what materials may be eligible for a "trending towards" determination of recyclability. In addition, pending legislation - Senate Bill 1231 (SB 1231) - currently under consideration would make additional changes to the SB 343 process and requirements. The Coalition urges CalRecycle to more closely coordinate its implementation of

[1] The Coalition hereby incorporates this letter—titled "**Initial Questions** – California Senate Bill 343 Preliminary Findings Report"—by reference.

[2] Some countries also require that plastic products be labeled with a resin code with chasing arrows symbols. There is an issue as to whether Senate Bill 343's restrictions on the use of the chasing arrows symbol constitute a Technical Barrier to Trade under World Trade Organization agreements.

SB 54 and SB 343 and to be prepared to incorporate the direction of the Legislature should it enact SB 1231, which is now pending.

Furthermore, proposed section 18980.3.1 requires CalRecycle to provide "an opportunity for public engagement and allow public comment and submission of relevant information and evidence" with respect to its preliminary identification of covered material categories. This would allow producers or the PRO to ask CalRecycle to change the characterization of a covered material category. However, the cost of consumer studies and other analyses necessary to request such a change could be prohibitive. In addition, it will be difficult to request changes to the covered material categories until the rulemaking for SB 343 is finalized because the Proposal incorporates SB 343's standards as those the covered material categories must meet in order to be considered "recyclable." *See* Proposed § 18980.3(b) (citing PRC § 42355.51(d)(2)).

The Coalition believes that CalRecycle should respond to the questions raised by some of its members, as well as all other stakeholders, regarding SB 343 before finalizing rulemakings like the Proposal that incorporate SB343's standards. The Coalition encourages CalRecycle to publish guidance clarifying how these laws and regulations will interact and to convene stakeholder meetings to discuss the harmonization of these laws and regulations before issuing a revised version of the Proposal for comment, much less finalizing the Proposal.

Issue 2: SB 54 provides that covered material is deemed compostable if it meets the requirements to be labeled "compostable" under Assembly Bill 1201, and CalRecycle lacks the authority to alter the statute by prescribing collection rate requirements that a material must meet in order to be considered compostable.

Comments: In addition to incorporating requirements from SB 343 in SB 54, the Legislature also incorporated statutory criteria from Assembly Bill 1201(PRC § 42355 *et seq.*) ("AB 1201"). Among other requirements, AB 1201 establishes "specified criteria" that govern when products may be labeled "compostable" or "home compostable."[3] The Legislature adopted AB 1201 to "remove the barriers faced by compost producers and enable products that are labeled compostable to be truly compostable."[4]

Just as SB 54 incorporates SB 343 as the benchmark for determining whether a product is "recyclable," SB 54 incorporates AB 1201 as the benchmark for determining whether a product is "compostable." Specifically, SB 54 provides:

- PRC § 42061(d): Covered material is deemed compostable if it meets the requirements to be labeled compostable pursuant to Chapter 5.7 (commencing with Section 42355).

[3] Legislative Counsel's Digest, Assembly Bill 1201, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1201

[4] AB 1201, Assembly Floor Analysis (Sept. 9, 2021) (available for download at above LegInfo link).

- PRC § 42050(b): [Producers must] [e]nsure that all covered material offered for sale, distributed, or imported in or into the state on or after January 1, 2032, is recyclable in the state or eligible for being labeled "compostable" in accordance with Chapter 5.7 (commencing with Section 42355).

The Proposal's "Eligibility to be Labeled Compostable" section expressly contradicts these provisions of SB 54. Proposed section 18980.3.3(a) states that "[t]he criteria concerning the lawfulness of discrete labels themselves, such as restrictions on the manner of labeling pursuant to section 42357(g)(1)(D) or (g)(2) of the Public Resources Code, shall not be construed to concern eligibility."

The Proposal then goes on to create new criteria for covered material categories to be considered "compostable." Prior to January 1, 2026, covered material categories must be composed of materials that are regularly collected for composting by at least 50 percent of organic waste recycling programs statewide and accepted by at least 50 percent of the compost facilities in the state that are permitted to accept mixed materials. Proposed § 18980.3.3(b)(2)(A). These rates increase to 75 percent on January 1, 2026. *Id.* § 18980.3.3(b)(2)(B).[5]

CalRecycle explains in its ISOR that the purpose of proposed section 18980.3.3(a) is to "interpret generally the concept of being 'eligible for being labeled compostable' in section 42050(b)" of SB 54. ISOR at 72. The Department then states that its "interpretation is necessary because [SB 54] does not concern the lawfulness of labeling practices, but rather whether covered material, as a practical matter, can be composted." *Id.* With respect to the 50 and 75 percent rates, CalRecycle claims that SB 54 "provides no standards, but the statutorily mandated criterion cannot be applied consistently without any." *Id.* at 74. The Department then states that the 50 and 75 percent rates "are consistent with regulations already adopted (14 CCR section 17989.5) for whether packaging used in state food service facilities can be considered compostable." *Id.*

CalRecycle is mistaken that SB 54 "provides no standards" for labeling products as "compostable." SB 54 expressly incorporates AB 1201 as the benchmark for determining whether products may be labeled as "compostable." PRC §§ 42061(d); 42050(b). CalRecycle, as the agency adopting regulations to implement SB 54, lacks the authority to add additional criteria that the Legislature did not include in the statute. Had the Legislature intended that SB 54 incorporate the compostability rates from 14 CCR section 17985.5, then it would have included a reference to this regulation in PRC sections 42061(d) and 42050(b). Instead, the

[5] Aside from the Department's lack of authority to set such rates, the Coalition believes that any such target rates that may be considered for purposes of future policymaking must incorporate a more gradual transition period to allow compostable packaging to be integrated into these streams. Further, in line with the Coalition's above recommendations, these target rates must also include home compostable packaging.

Legislature only incorporated AB 1201's standards. CalRecycle cannot "interpret generally" SB 54 by including language that contradicts specific provisions of SB 54.

Furthermore, nothing in the provision that authorizes CalRecycle to approve a third-party certification entity to certify products according to the stated standard specification (PRC § 42357(g)(1)) contemplates that CalRecycle is empowered to establish additional criteria aside from the specification, such as collection and composting rates, for the certification entity to apply. Indeed, because SB 343 clearly sets collection and recycling rates for use of the term "recyclable," the fact that AB 1201 does no such thing for use of the term "compostable" shows that CalRecycle's Proposal in this regard is outside its authority and contrary to law.

CalRecycle should accordingly strike most, if not all, of proposed section 18980.3.3. Should CalRecycle be inclined to retain this section, it should merely repeat the language stated in SB 54: "***Covered material is deemed compostable if it meets the requirements to be labeled compostable pursuant to Chapter 5.7 (commencing with Section 42355***)." CalRecycle lacks authority to modify this statutory provision and to include collection and composting rates as criteria in determining whether a product is compostable, whether through CalRecycle's authority to approve a third-party certification entity or otherwise.

CEQA Review

Issue 3: SB 54 Regulations should not be promulgated until CEQA review is complete.

Comments: Because CalRecycle's adoption of implementing regulations is subject to CEQA, CalRecycle should have made a determination on the type of CEQA review that will be required before it released its Proposal. This is a necessary component of the rulemaking process and should be known prior to, or at least at the beginning of, SB 54's rulemaking process. The Coalition is concerned that stakeholders are unable to comment meaningfully on the Proposal without considering its potential environmental impacts—which of course cannot be presumed to be positive.

The Coalition appreciates that in the Standardized Regulatory Impact Assessment ("SRIA"), CalRecycle acknowledges that:

> Meeting the 2032 SB 54 recycling rate target will require California to develop infrastructure to optimize its recycling and disposal waste streams. . . . Expanded infrastructure for collection, sortation, and processing will need to accommodate approximately eight times the current capacity for plastic covered material and approximately two times the total capacity for all covered materials in the existing recycling systems due to the Proposed Regulations.[6]

[6] It is estimated that meeting SB 54's recycling targets for 2032 will require the new construction of at least 16 large, 6 medium, and 8 small MRFs, plus expansion of existing facilities to accommodate greater tons per year processing.

CEQA review is critical for a proposal of this magnitude because the policies implemented will have significant environmental impacts.[7] There are likely to be impacts on greenhouse gas emissions, water usage, transportation, disposal of food wastes, and more local impacts due to siting of infrastructure. These environmental impacts must be disclosed properly, with an opportunity for stakeholders to comment, so that CalRecycle can promulgate its final regulations with full consideration of potential environmental impacts.

"Recyclable" Criteria and "Trending Towards" Recyclability

Background: Pursuant to SB 343, products are not considered "recyclable" under the Proposal unless: (1) the material type and form is collected for recycling by recycling programs that collectively encompass at least 60 percent of the population of the state; and (2) the material type and form is sorted into defined streams for recycling processes by large volume transfer or processing facilities that process materials and collectively serve at least 60 percent of the recycling programs statewide ("60 Percent Curbside Criteria"). PRC §§ 42355.51(d)(2)(A), (B).

SB 343 allows products that do not meet the 60 Percent Curbside Criteria to be labeled "recyclable" in certain circumstances. First, a product or packaging that does not meet either or both of the 60 Percent Curbside Criteria is "recyclable" if the product or packaging has a demonstrated recycling rate of at least 75 percent. PRC § 42355.51(d)(4). Second, a product or packaging that is not collected pursuant to a curbside collection program is recyclable if it "has sufficient commercial value to be marketed for recycling" and can be transported, sorted, and aggregated into defined streams by material type and form. *Id.* § 42355.51(d)(5). To qualify as "recyclable" pursuant to this criteria, at least 60 percent of the product or packaging must be recovered by non-curbside collection programs; this threshold increases to 75 percent on January 1, 2030. *Id.* Third, a product or packaging is considered "recyclable" if it is part of a program established pursuant to state or federal law (on or after January 1, 2022) governing the recyclability or disposal of the product or packaging that CalRecycle determines will not increase contamination or curbside recycling or deceive consumers as to the recyclability of the product or packaging. *Id.* § 42355.51(d)(6). The Proposal refers to materials that satisfy these alternative criteria as being "excepted" from the 60 Percent Curbside Criteria. Proposed §18980.3(c).

SB 54 also authorizes CalRecycle to identify materials that do not meet SB 343's 60 Percent Curbside Criteria as "recyclable" if they are "trending towards" meeting the 60 Percent Curbside Criteria and towards a "measurable increase of statewide collection and sorting rates through either statewide recycling programs or alternative programs." PRC § 42061(a)(3). The Proposal provides that CalRecycle may make this determination only if it preliminarily concludes, in its sole discretion, that the following conditions are met:

[7] The Coalition notes that CalRecycle published its request for qualifications for the SB 54 Regulations CEQA Initial Study and Subsequent MND, ND or EIR (RFQ Number DRR23058) on February 22, 2024 (https://shorturl.at/uAF12) and awarded it on April 22, 2024.

1. The update to the material characterization study or other available information demonstrates an increase in the collection and sorting of materials.
2. Such an increase is more likely than not to continue.
3. Such an increase is more likely than not to result in the covered material satisfying the requirements of SB343's 60 Percent Curbside Criteria before the next mandatory update to the material characterization study.

Proposed § 18980.3.1(b). Later, the Proposal states that CalRecycle may only finalize the identification of a material category as "trending towards" recyclability if "[i]mprovements in statewide recycling programs or alternative programs, such as takeback systems, are responsible for the increase in statewide collection and sorting rates underlying the Department's preliminary identification of the covered material category." Proposed § 18980.3.1(e)(1)(A).

Issue 4: It is unclear how alternative programs can be "responsible for" a CMC "trending towards" SB 343's 60 Percent Curbside Criteria.

Comments: The Proposal provides that a covered material category may be designated as "trending towards" recyclability if CalRecycle determines it is "more likely than not" that the material will satisfy SB 343's 60 Percent Curbside Criteria. Proposed § 18980.3.1(b). But the Proposal later states that CalRecycle must also determine that improvements in statewide recycling programs or alternative programs are "responsible for" the increase in statewide collection and sorting rates. Proposed § 18980.3.1(e)(1)(A). These provisions appear to conflict.

The Coalition requests that CalRecycle clarify how these provisions interact. It is unclear how "improvements in . . . alternative programs" can be "responsible for" a covered material category achieving SB 343's 60 Percent Curbside Criteria. If the apparent conflict cannot be resolved, the Coalition suggests that CalRecycle strike proposed section 18980.3.1(e)(1)(A).

Issue 5: The terms "statewide recycling programs" and "alternative programs" in proposed section 18980.3.1(e)(1)(A) are not defined.

Comments: The Proposal provides that a covered material category may only be designated as "trending towards" recyclability if CalRecycle determines that "[i]mprovements in statewide recycling programs or alternative programs, such as takeback systems, are responsible for the increase and statewide collection and sorting rates . . . ." Proposed § 18980.3.1(e)(1)(A). Neither the term "statewide recycling program" nor "alternative program" is defined.

To remove any ambiguity regarding the meaning of "statewide recycling programs," the Coalition recommends that CalRecycle define this term in proposed section 18980.1. In the Coalition's view, a majority of counties suffices to qualify a program as "statewide".

- "Statewide recycling program" means a program that includes the collection of material, including, but not limited to, covered materials, including curbside collection programs, that is implemented in at least 30 counties.

The term "alternative program" is also not defined. The Proposal does define, however, the term "alternative collection" as meaning "a program that collects covered materials regardless of whether the covered material is discarded or considered solid waste and is not 'curbside collection' as defined in section 42041(g) of the Public Resources Code." Proposed § 18980.1(a)(2).

There are no apparent distinctions between the terms "alternative program" and "alternative collection," and it appears that the term "alternative program" is intended to have the same meaning as "alternative collection." The Coalition recommends that CalRecycle clarify that the term "alternative program" is intended to have the same meaning as "alternative collection."

Responsible End Markets

Issue 6: Focus Responsible End Market verification only on the stage in which the recycling and recovery of materials or the disposal of contaminants is conducted.

Comments: The Proposal states that an "end market is a materials market in which the recycling and recovery of materials or the disposal of contaminants is conducted." Proposed § 18980.4(b). This section then goes on to list specific types of facilities and activities that are considered Responsible End Markets for each material type.

The Coalition believes that requiring Responsible End Market identification and verification to include the product manufacturer stage, except for any situations where the removal of contaminants occurs simultaneously at this stage, is an unnecessary burden that could jeopardize continued recycled material demand in some cases while adding substantial costs with little or no additional benefit to the environment and integrity of recycling systems.

The final paragraph in this section may be read as consistent with this position, but it is not clear. To clarify and align this final paragraph with the citation above, we suggest that CalRecycle revise it to specify that only the stages where contaminants are recovered and disposed need be verified by the PRO, and that these stages be identified in the PRO Plan.

Issue 7: Revise end market viability requirements.

Comments: The Proposal sets forth requirements for a PRO to "ensure viability of responsible end markets," including by "[p]roviding financial support to end markets to assist them in satisfying the standards specified in section 18980.4(a)." Proposed § 18980.4(a)(1).

Because there is presumably no intent for this financial support to be infinite and instead it is intended to be tied to meeting the goals of SB 54, the Coalition proposes that this section be revised as follows (in bold italics):

(a) To ensure viability of ***adequate*** responsible end markets ***sufficient to satisfy the requirements of the Act***, a PRO or Independent Producer shall***, to the extent necessary***:
    (1) Provide ***adequate*** financial support to end markets to assist them in satisfying the standards specified in section 18980.4(a).

<u>Issue 8:</u> Requirements that Responsible End Markets further process and recycle incompatible material should take into account economic limitations.

<u>Comments:</u> To be considered a Responsible End Market, proposed section 18980.4(a)(3)(B) requires an entity to send "incompatible materials that can be further processed and recycled … to entities that are authorized to further process and recycle the material" and to dispose of "incompatible materials that cannot be further processed and recycled." But these requirements fail to account for the economic limitations determinative of the viability of further recycling incompatible materials.

Markets for recycled materials are complex and dynamic. These markets provide a financial benefit to manufacturers if there is demand for a by-product or waste of a recycled material. Therefore, recycled material manufacturers will seek a financial benefit by selling their waste rather than paying to send the material to landfill, if possible. A provision requiring an entity to send incompatible materials for further processing assumes that there is a cost-effective process to collect, sort and economically send the incompatible material. After processing recycled material, the waste or incompatible material is mixed with many types of incompatible materials, in many situations. Separating these different materials is extremely challenging given current technological limitations. Although there is a business benefit to selling incompatible materials, there is virtually no market for a mix of incompatible materials given these limitations.

To appreciate the complexities of the separation requirements and logistics for shipping materials, the Coalition recommends revising proposed section 18980.4(a)(3)(B) as follows (in bold italics):

(i) For incompatible materials that can be further processed and recycled ***economically***, the end market shall send materials to entities that are authorized to further process and recycle the material.

(ii) For incompatible materials that cannot be further processed and recycled ***economically***, the end market shall dispose of the material in a way that prevents environmental, public health, and safety risks.

<u>Issue 9</u>: The costly annual verifications and audits of Responsible End Markets should be optional resources for a PRO or Independent Producer to utilize flexibly as needed rather than mandated requirements.

<u>Comments</u>: The Proposal requires that a "PRO or Independent Producer shall conduct an annual verification of each end market it uses." Proposed § 18980.4.2. It also requires that a "PRO or Independent Producer shall have annual audits and investigations of responsible end markets conducted and completed. All investigations and audits shall be conducted by an independent third-party, with all financial audits being conducted by an independent public accountant certified in the United States." *Id.* § 18980.4.3. Annual reviews of dozens and potentially hundreds of Responsible End Markets is excessive and unrealistic to manage, and would burden the PRO with substantial costs, time, and effort.

The Coalition supports the greatest flexibility for the PRO to ensure Responsible End Markets are compliant with the regulations. It does not believe it is necessary to burden the PRO with audit and verification mandates when the PRO will be best positioned to determine how and when such verifications and audits are necessary to achieve the goals of SB 54.

The Coalition's proposed revisions to these sections are as follows (in bold italics and strikethrough):

> Proposed § 18980.4.2. End Market Verification
>
> (a) A PRO or Independent Producer ~~shall~~ ***may*** conduct ***a*** ~~an annual~~ verification of each end market it uses ***once per year or at an appropriate frequency, as determined by the PRO or Independent Producer, to ensure each end market is in compliance***.
>
> Proposed § 18980.4.3. End Market Audits and Investigations
>
> (b) A PRO or Independent Producer ~~shall~~ ***may*** have ~~annual~~ audits and investigations of responsible end markets conducted and completed ***once per year***. All investigations and audits shall be conducted by an independent third-party, with all financial audits being conducted by an independent public accountant certified in the United States.

<u>Issue 10:</u> The Responsible End Markets for plastic should be reclaimers that process plastic into intermediate product provided to entities that create a new product.

<u>Comments:</u> The Proposal states that "Responsible End Market" has "the same meaning as section 42041(ad) of the Public Resources Code and meets the criteria specified in section 18980.4." Proposed § 18980.1(a)(32). SB 54 defines "Responsible End Market" as:

> a materials market in which the recycling and recovery of materials or the disposal of contaminants is conducted in a way that benefits the environment and minimizes risks to public health and worker health and safety. The department may adopt regulations to identify Responsible End Markets and to establish criteria regarding benefits to the environment and minimizing risks to public health and worker health and safety.

PRC § 42041(ad). The Proposal sets forth definitions related to specific covered materials. "For covered material made of plastic, end markets include, but are not limited to, entities that create a new product by molding, extruding, or thermoforming processed material." Proposed § 18980.4(b)(4).

The Coalition proposes that the Responsible End Market for plastics be defined to primarily be reclaimers, including entities that accept aggregated postconsumer and/or postindustrial plastic materials and perform operations to allow them to return to commerce as useful raw materials or new finished products. The Responsible End Market to be verified should be the point where the material is processed into saleable intermediate product (e.g. flake, pellet, ingot etc.) to be used as product feedstock, which is also the point in the process where contaminants are removed and disposed of. There will naturally be fewer of these entities than the entities who ultimately

convert this intermediate product into new products, making compliance more transparent and more enforceable for the Department. More importantly, downstream converters do not usually know what the inputs are at the reclaimer and may obtain reclaimed material from multiple converters, thereby making it difficult to calculate yields accurately.

The Coalition recommends that CalRecycle revise proposed section 18980.4(b)(4) to state the following (in bold italics):

> For covered material made of plastic, end markets include, but are not limited to, ***reclaimers that process plastic into intermediate products that are provided to*** entities that create a new product by molding, extruding, or thermoforming processed material."

The Coalition additionally recommends that CalRecycle revise the proposed definition of "Intermediate product" by striking an unnecessary word that could cause legal confusion, as follows (in bold italics and strikethrough): "(B) ~~**Physically**~~ ***A***ltered from its original state." Proposed § 18980.1(a)(16)(B).

Recycling Rate Calculation

Issue 11: The Proposal's downward adjustment for incompatible material is not suitable for weight-based recycling rate calculations and could make SB 54's recycling rate targets unattainable for most covered material categories.

Comments: For purposes of the calculating recycling rate, the Proposal provides that "[m]aterial shall be considered recycled when it has been accepted by a responsible end market and is not incompatible material removed by the responsible end market." Proposed § 18980.3.2(a)(1). This number (expressed in tons) serves as the "numerator" in the recycling rate calculation, with the number of tons sold into the California market (i.e., the total amount recycled plus the total amount disposed) serving as the "denominator." Proposed § 18980.3.2(c).

For the Proposal to be workable, all covered material tons accepted by Responsible End Markets should be considered "recycled"—i.e., this number should serve as the numerator, with no downward adjustment for incompatible material. This calculation is consistent with SB 54's definition of "recycle" and "recycling," which provides in relevant part:

- PRC § 42041(aa): "Recycle" or "recycling" means the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise be disposed of onto land or into the water or the atmosphere, and returning them to, or maintaining them within, the economic mainstream in the form of recovered material for new, reused, or reconstituted products, including compost, that meet the quality standards necessary to be used in the marketplace.

    - (3) ***To be considered recycled, covered material shall be sent to a responsible end market***. (emphasis added).

CalRecycle added the downward adjustment into the Proposal and explained in the ISOR that "[s]ubsection (a)(1) specifies that materials are considered recyclable when accepted and not

removed by an end market, which is necessary to ensure that recycling rate calculations accurately reflect the actual recycling of materials, rather than just the collection." ISOR at 71. This methodology, however, will result in the underreporting of actual weight-based recycling rates.

As an example, aluminum products are often lined with lacquer. For purposes of determining the denominator, the total weight of the product, including the lacquer, is considered. Removing the weight of the lacquer as incompatible material in the numerator, while keeping it in the denominator, will result in the numerator being less than the denominator, thereby inappropriately reducing the recycling rate. Indeed, the downward adjustment will make it impossible to achieve a 100% recycling rate. After adjustments are made for units of the product that are actually not recycled, it is difficult to imagine many, if any, covered material categories attaining SB 54's ambitious recycling rates. Furthermore, it is unclear whether it is feasible for Responsible End Markets to determine recycling yield and incompatible material amounts for each covered material category. In order to recognize this reality, and to be consistent with the statute, CalRecycle should remove the downward adjustment and count all covered material tons collected by Responsible End Markets as "recycled."

Accordingly, consistent with SB 54, CalRecycle should revise proposed section 18980.3.2(a)(1) to state that "***[m]aterial shall be considered recycled when it has been accepted by a responsible end market***."

Issue 12: The definition of "disposal of covered material" is inconsistent with the intent of SB 54 and could lead to unintended consequences.

Comments: Proposed section 18980.3.5 states that:

> covered material sent to one of the following facilities, operations, or used for one of the following activities in or outside of the state, shall be deemed to constitute disposal of covered material: (a) Final deposition at a landfill, (b) Used as alternative daily cover … (c) Energy generation or fuel production … (d) Other operations, facilities or activities with processes that results in the final deposition of covered material onto land, into the atmosphere, or into the water of the state or out of the state . . . .

First, defining "disposal" in connection with "facilities" and "operations" is inconsistent with the intent of SB 54. In the context of the recycling rates and dates set by SB 54, the statute's intent is to "establish a producer responsibility program designed to ensure that producers of single-use packaging and food service ware covered by this program take responsibility for the costs associated with the end-of-life management of that material and ensure that the material is recyclable or compostable." PRC § 42040(b)(3)(B). The focus is on managing covered materials. It is not, by contrast, intended to regulate which facilities and operations manage covered materials or how they do so via which processes or technologies. The statute was drafted without mandating the specific means of achieving its goals in order to provide flexibility for the industry to achieve the ambitious recycling rates and deadlines in SB 54 as efficiently and effectively as possible.

This is correctly acknowledged by CalRecycle in the ISOR: "The proposed regulations do not mandate the use of specific technologies or equipment, nor specific actions or procedures." ISOR at 230. Instead, PROs have the flexibility to "evaluate technologies that can be used to recycle the covered materials." ISOR at 96 (§18980.4.4 End Market Viability, Subsection (a)(4)(A)(i)); *see also id.* at 152 (§ 18980.6.1 Producer Responsibility Plan, Subsection (b)) ("The purpose of these subsections is to require additional information in the producer responsibility plan regarding technologies and means that will be utilized to achieve recycling requirements …. The statute is vague in this regard, so CalRecycle proposed these regulations to obtain specific information required for a complete understanding of these technologies."). "CalRecycle expects that there will be increased incentive to develop new processes for recycling covered material as well. It may be more cost-effective to develop a recycling process for a material that is not recyclable currently rather than developing an entirely new material that performs the same function." ISOR at 220.

The type of facility or operation should not determine how the disposal of covered material is defined. It is inconsistent with SB 54's intent, as acknowledged by CalRecycle in the ISOR. Only the activities constituting management of the covered material itself should define "disposal."

Second, the use of "facilities" and "operations" expands the definition of "disposal" beyond its intended meaning in the statute. This proposed section risks being interpreted as excluding from the recycling rate any covered material that is recycled at any facility that also disposes of some piece or portion of covered material, even when it is necessary because the nature of that piece or portion of covered material cannot be recycled. Under this interpretation, a facility that does not recycle 100% of all covered materials might be deemed to not produce any recycled material, i.e., *any* covered material recycled at that facility would be considered "disposal." This is entirely unworkable because all recycling operations that receive covered material will inevitably send some portion of those covered materials to the landfill; none can achieve a 100% recycling rate. It is not technically or practically feasible for 100% of all covered materials to be recycled given the nature of covered materials themselves. Thus, under a possible reading of this proposed section, covered materials that are in fact being recycled by these facilities—and would otherwise be covered but for the disposal of a portion thereof— would not be considered recycled for purposes of the recycling rate. Such a result would render SB 54's targets impossible to accomplish.

Recycling is an imprecise process, and some waste is inevitable regardless of what processes or technologies are used. Greater flexibility, and a more nuanced recognition of the practical realities of recycling, are necessary to avoid the significant obstacles posed by this proposed definition. To avoid an outcome that could be interpreted as treating all covered material as being disposed of if *any portion* of covered material is sent to a landfill, the Coalition recommends the following language adjustments to proposed section 18980.3.5 (in bold and strikethrough):

> "For the purposes of this chapter, covered material***, or portion thereof,*** ~~sent to one of the following facilities, operations, or used for one of the following activities in or outside of the state,~~ shall be deemed to constitute disposal of ***said*** covered material***, or portion thereof, if used for one of the following activities in or outside of the state***:"
>
> (a) Final deposition at a landfill.

(b) Used as alternative daily cover as specified in section 20690 of Title 27 of the California Code of Regulations or intermediate cover as specified in section 20700 of Title 27 of the California Code of Regulations.

(c) Energy generation or fuel production, except for anaerobic digestion of source separated organic materials.

(d) Other ~~operations, facilities, or~~ activities ~~with processes~~ that result~~s~~ in the final deposition of covered material onto land, into the atmosphere, or into the waters of the state or out of the state, including but not limited to, littering, open burning, or illegal dumping.

Issue 13: The PRO should have the authority to establish a certification process to ensure an accurate recycling rate.

Comments: The Proposal requires that a Responsible End Market "[d]ocument the chain of custody of materials transported from origination to the end market." Proposed § 18980.4(a)(2)(A). It also requires that "[f]or any independent supply chain entity that manages covered material, the end market or supply chain entity shall agree to … [m]aintain chain of custody information for any collected covered material or intermediate product." Proposed § 18980.4.1(c)(1).

The Coalition supports these chain of custody requirements but encourages CalRecycle to provide the greatest flexibility for the PRO to efficiently ensure accuracy when calculating the recycling rate. Accordingly, the Coalition recommends revising the Proposal to provide the PRO with explicit authority to determine whether and how to establish a certification program, as part of the PRO plan, to ensure that intermediate products processed from covered materials are counted as recycled if the Responsible End Market can confirm that those intermediate products are sold to an entity that in turn converts those intermediate products into new products. Such a certification program will further increase accountability and transparency regarding how intermediate products contribute to the recycling rate, which is essential to efficiently achieving the ambitious goals of SB 54, while allowing the PRO to rely on one or more third-party certification entities who can be more efficiently monitored and managed by the PRO.

"Compostable" and "Home Compostable"

Issue 14: The Proposal should establish a more viable pathway for compostability and is required to include "home compostable" products within the broader category of "compostable" products.

Comments: While SB 54 clearly treats compostable material as a pathway of compliance and, indeed an essential piece of achieving the State's recycling targets, the draft Proposal hardly addresses, much less fulfills, that legislative intent. The Coalition strongly encourages CalRecycle to revisit its position on compostability so as to avoid stunting the market for compostable packaging. CalRecycle should amend its draft Proposal to provide a viable pathway for certified compostable plastics to comply with the regulatory framework in development.

Under SB 54, all covered material must be (1) "recyclable in the state" or (2) "eligible for being labeled compostable in accordance with Chapter 5.7." PRC § 42050(b). Throughout the statute, compostability is repeatedly referenced in conjunction with recyclability, and in some cases given special attention to encourage compostability as a critical part of the Legislature's vision for waste diversion. Section 42050's mandate thus sets forth a two-pronged plan where "recyclable" and "compostable" are put on equal footing.

Meanwhile, Chapter 5.7 of the Public Resources Code, which supplies the statutory anchor for SB 54's statements on compostability, encompasses two overlapping but distinct forms of compostable products: industrial compostable and home compostable. Because home composting favors inherently biodegradable polymers that are more susceptible to microbial activity as opposed to the hydrolysis that occurs in industrial composting, products labeled as "home compostable" must meet more stringent criteria than for "compostable" products, i.e., those that are suitable for industrial composting. The reference in SB 54's section 42050(b) to "eligible for being labeled compostable" therefore was intended, in context, to include products that are eligible for being labeled either "compostable" or "home compostable." Further evidence of this intent is found in SB 1046, which was passed during the same legislative session as AB 1201 and is now codified under PRC section 42281.2. That law provides that a compostable bag can be *either* "compostable" or "home compostable" pursuant to Section 42357 – no preferential treatment is given to one over the other.

Nevertheless, the draft Proposal ignores home compostability in its discussion of compostable products and responsible end markets, referring instead only to industrial compostability. In doing so, it risks nullifying a central component of Chapter 5.7 and SB 54, and an important option for reaching the rates and dates set out in SB 54. This is contrary to the statute and its intent.

Incorporating "home compostable" into SB 54's regulations, just as industrial "compostable" is in the Proposal, will further the Legislature's goal of diverting waste away from landfills, which has important implications for greenhouse gas emissions.[8] Landfilling organic waste, including compostable packaging, results in that matter decomposing under anaerobic conditions that generate methane emissions. Methane is 28 times more potent than carbon dioxide at trapping heat in the atmosphere, and this potency factor makes methane one of the driving forces of climate change.[9] However, when the same organic matter is composted, whether at home or at composting facilities, no methane is generated. Diverting compostable packaging toward responsible end markets also significantly reduces the growing mass of unproductive matter sitting in landfills.

---

[8] CalRecycle must consider the effects of its regulations on greenhouse gas emissions. *See* PRC § 42041(aa)(5) ("The department's regulations *shall* encourage recycling that minimizes . . . generation of greenhouse gases"); PRC § 42060(b)(2) ("In establishing a recycled content requirement, the department or PRO shall consider the amount of organic waste and analyze the greenhouse gas emissions associated with that organic waste.")

[9] *See* EPA, "Importance of Methane" (Last updated Nov. 1, 2023), available at https://www.epa.gov/gmi/importance-methane#:~:text=Methane%20is%20more%20than%2028,due%20to%20human%2Drelated%20activities.

Foodware companies are especially constrained in meeting recycling targets under the current Proposal. For producers of single-use foodware (such as utensils, straws, plates, and cups), compostability will be the primary means of meeting recycling targets. To achieve these ambitious goals without forcing consumers to shoulder additional costs, foodware producers must be able to use compostability in all its statutorily permissible forms, which include home compostability.

The Coalition believes the Proposal needs to be significantly revised in order to fulfill the Legislature's intent to support composting on an equal footing with recycling, and to encourage home composting as much as industrial composting.

Issue 15: The Proposal should encourage innovative compostable covered material.

Comments: The Coalition is concerned that proposed section 18980.3.3(c) severely hinders the growth of markets in innovative compostable packaging. This draft provision appears to exclude covered materials that are made of fiberboard that incorporates polymers, even if the polymer exhibits all of the features of a compostable material that degrades in industrial composting facilities at comparable rates as food and yard waste.

Excluding the possibility of biodegradable polymers is misplaced, especially in light of recent advances that prove the technological viability and compatibility of compostable polymers with the diverse composting systems in California. For instance, a recent Closed Loop Partners study demonstrated that compostable plastic packaging achieved a remarkable 98% disintegration across various composting technologies and operating conditions. These innovations reduce the need for other, less desirable packaging designs. If a covered material achieves compostability certification based on current or future standards, then CalRecycle should incentivize the composting industry to invest in designing systems that accommodate these materials.

PRO Funding

Issue 16: The lack of clarity regarding the eligibility of reimbursable local expenditures invites confusion that could cost billions.

Comments: The Coalition recommends that CalRecycle provide more clarity as to the PRO's funding of eligible costs for reimbursement where those costs are incurred by local jurisdictions. Among some municipalities, there is an apparent confusion over the PRO's obligations to reimburse local governments for implementation costs. The Coalition is aware that some public stakeholders hold the mistaken belief that the Legislature intended for producers and the PRO to be responsible for all costs associated with a local jurisdiction's waste management and recycling services. In other words, these local governments believe that their need to financially support current waste management and recycling infrastructure will be entirely supplanted by funding from the PRO. That is expressly contrary to SB 54's plain text and its legislative intent.

In revising its regulations, CalRecycle should forestall any blurring of the lines between costs locally incurred for operation and maintenance of the present waste management infrastructure (pre-SB 54 program rollout) and costs incurred by local jurisdictions for future enhancements to that existing infrastructure (post-SB 54 program rollout).

Public Resources Code section 42040(b)(2)(B) provides that it is "the intent of the Legislature in enacting this chapter to ensure that local jurisdiction will be made financially whole for any ***new costs*** incurred ***associated with the implementation of this chapter*** and its implementing regulations" (emphasis added). To implement SB 54, the Legislature understood that some local jurisdictions will need to take additional steps beyond the measures currently in place to accomplish the State's ambitious recycling goals set by SB 54. But a local jurisdiction's pre-existing costs of waste collection and recycling are ineligible for reimbursement. SB 54 repeatedly references costs associated with *enhancing* the existing systems and infrastructure. For instance, under subdivision (j) of PRC section 42051.1, the PRO's budget shall be designed to fund the costs incurred by local jurisdictions related to "***improvements*** to collection, sorting, decontamination, remanufacturing, and other infrastructure necessary to achieve recycling rates." Similarly, under section 42051.1(i)(3), the PRO's budget should accomplish, among other things, expansion and enhancement of existing systems to achieve SB 54's recycling goals through:

- "**Expanding** access to or improvement of curbside collection services"
- "**Expanding** access to dropoff recycling services or other mechanisms . . . as necessary in order to **supplement** curbside collection services to achieve the requirements of [SB 54]."
- "[F]acilitating deployment of innovative **enhanced** collection . . ."
- "**Enhancing existing** materials recycling or composting **infrastructure** . . ."

Legislative analysis released by the Assembly Appropriations Committee lends further support for distinguishing present and future infrastructure costs for purposes of reimbursement eligibility. The Committee described SB 54 in its June 29, 2022 report as follows:

> By requiring, among other things, local jurisdictions and recycling service providers to include covered material in their collection and recycling programs, **this bill imposes a state-mandated local program**. Regulated parties will ultimately reimburse local jurisdictions for **these costs**; however, the state may need to initially reimburse local jurisdictions for any **costs incurred as a result of this bill** until PRO reimbursement funds become available.

Costs that local jurisdictions presently incur—with no state-mandated local program in place—are not eligible for reimbursement through producer funding; local jurisdictions are still responsible for funding those baseline expenses. That the Legislature has not once articulated its intention for PRO funding to completely replace pre-existing, pre-enhancement expenses is further evidence that imposing such a costly responsibility on producers was not intended. Instead, costs incurred for the *future enhancements* to existing collection and recycling programs are eligible for reimbursement. This distinction and division of responsibility is absolutely critical to producers lest they be forced to shoulder the responsibility for billions of dollars' worth of funding.

It is therefore the Coalition's recommendation that CalRecycle revise its proposed regulations to provide specific definitions and criteria for determining what constitutes "new costs" eligible for

reimbursement because they are associated with the implementation of SB 54. CalRecycle should also clarify the meaning of "reasonable costs," a term used in PRC section 42051.1(g)(2) but not defined in SB 54 or the Proposal. CalRecycle should further define the contours of new or enhanced collection and recycling services whose costs are reimbursable by producers. And CalRecycle should clarify the criteria for determining whether a system enhancement qualifies as a "new cost" associated with implementation of SB 54 based on when it was designed and approved, among other criteria.

Additionally, where a dispute arises between the PRO and a local jurisdiction (e.g., determining and paying the reasonable costs incurred by local jurisdictions), it should not be a matter litigated in the courts in the first instance due to the need for more prompt clarity and continued funding of system enhancements in order to meet SB 54's ambitious deadlines. CalRecycle should instead provide and encourage use of an alternative dispute resolution process, subject to appropriate appeals, in order to expedite decisions and clarity.

The Coalition does not underestimate the difficulties inherent in drawing lines concerning these funding decisions, but those difficulties should prompt CalRecycle to address these issues promptly. The Coalition believes a stakeholder workshop would assist CalRecycle in identifying the issues and considering alternatives for clarifying them in a revised version of the Proposal. Taking these steps to clarify the regulatory framework is necessary to avoid misinterpretation and ensure uniform understanding among stakeholders from all perspectives.

Malus Fees/Proposition 65

Issue 17: The Proposal's requirement that the PRO charge malus fees to producers who use covered materials that contain Proposition 65-listed chemicals is not workable because Proposition 65 is an exposure-based statute that does not identify "hazardous materials."

Comments: SB 54 provides that the PRO shall adjust a producer's fee using malus fees or credits, with those adjustments based on nine different factors, as applicable. PRC § 42053(e). One of the nine factors is the "[p]resence of hazardous material as identified by the Office of Environmental Health Hazard Assessment ["OEHHA"], the Department of Toxic Substances Control ["DTSC"] or [CalRecycle]." *Id.* § 42053(e)(4).

The Proposal attempts to "add specificity" (ISOR at 127) to this factor by mandating that "a PRO shall charge a malus fee to producers who use covered material that contains a chemical listed on the list established pursuant to section 25249.8 of the Health and Safety Code ["Proposition 65"]." Proposed § 18980.6.7(h). CalRecycle observed in its FSOR that the Proposition 65 list identifies chemicals known to the state to cause cancer or reproductive toxicity and stated that incorporating the list into SB 54's implementing regulations "is necessary to define what 'hazardous material' means, incentivize producers to use covered materials that do not contain chemicals listed on the Prop 65 list, and to prevent a PRO from awarding credit to a producer for using a covered material that contains a potentially hazardous substance." ISOR at 127.

Proposition 65 is not a product safety law that limits the amount of chemicals that can be in a product or that bans product. Instead, it is a "right-to-know" law that imposes warning requirements. Neither OEHHA, DTSC, nor CalRecycle has ever found that the *presence* of a Proposition 65-listed chemical in a material, at any level, qualifies a material as a "hazardous material" that should be regulated And with good reason—Proposition 65 does not require that a product carry a warning merely because it *contains* a listed chemical. Rather, a warning is only required where the ordinary use of a product will expose individuals to listed chemicals at levels that exceed the warning thresholds for cancer or reproductive harm. The warning threshold for listed carcinogens is known as the "no significant risk level" ("NSRL"). Cal. Health & Safety Code § 25249.10(c). The warning threshold for listed reproductive toxins is known as the maximum allowable dose level ("MADL").

Assessing whether an exposure exceeds the NSRL or MADL requires product- and chemical-specific determinations. With respect to carcinogens, for example, this assessment is "determined by multiplying the level in question (stated in terms of a concentration of a chemical in a given medium) times the reasonably anticipated rate of exposure for an individual to the given medium of exposure measured over a lifetime of seventy years." 27 C.C.R. § 25721(c); *see id.* § 25821(b) (specifying how to calculate "reasonably anticipated rate of exposure" to reproductive toxins). Determining the "reasonably anticipated rate of exposure" depends on several factors, including the product at issue (e.g., plastic bottles or metallic cans), the exposure pathway (e.g., exposures by ingestion versus dermal contact), and the manner in which the product is used (e.g., a plastic product consumers use their entire hands to grip has a larger surface area for exposure than a smaller plastic product that consumers only touch with their fingers).

Determining the level of exposure for ***any*** Proposition 65-listed chemical is an expensive, expert-intensive process. Indeed, because the costs of proving that an exposure does not exceed the MADL or NSRL are much higher than the costs of settlement (by several times), defendants who are accused of violating Proposition 65 often choose to settle instead of litigating this defense. *See DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 185 (2007) (NSRL is an "affirmative defense"); *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1216 (2006) (Proposition notices are "intended to frighten all but the most hardy of targets (certainly any small ma and pa business) into a quick settlement . . . ."). Detection of very low levels of certain Proposition 65 listed chemicals—for example, lead in metals or PCB's in fiber products—is quite easy to do given both the sophistication of modern analytical testing methods and the ubiquity of low levels of such chemicals in the environment due to natural or industrial sources. Importing the Proposition 65 list into determination of hazardous materials under SB 54 will therefore risk a determination that virtually all packaging is "hazardous" and therefore appropriately charged a malus fee.

Some businesses test their products and packaging for the presence of certain chemicals and use prior settlements as guidance for how exposures may be calculated. No business, however, is economically capable of testing each of their products and packaging for the presence of *every*

chemical listed under Proposition 65. OEHHA reports that the Proposition 65 list now contains approximately 900 chemicals.[10] As a result, in its current form, the Proposal would expose producers to malus fees if any of their products contain any one of approximately 900 chemicals, at *any* level, including levels well below the applicable NSRL and MADL. This is an inappropriate use of the Proposition 65 list, which was developed for an entirely different purpose.

OEHHA has accordingly never classified products containing Proposition 65-listed chemicals as "hazardous materials" simply because they contain such chemicals. Indeed, OEHHA does not instruct consumers to avoid products with Proposition 65 warnings: "Consumers can decide on their own if they want to purchase or use the product. A Proposition 65 warning does not necessarily mean a product is in violation of any product-safety standards or requirements."[11]

Other agencies, by contrast, identify certain materials or waste as "hazardous." For example, DTSC identifies waste as "hazardous" if it exhibits any one of four characteristics: ignitability; corrosivity; reactivity; toxicity. *See* 11 C.C.R. § 66261.20 *et seq*. The Health and Safety Code, meanwhile, identifies certain materials as "household hazardous waste" (e.g., latex paint, used oil). Cal. Health & Safety Code § 25218.1.

The Coalition does not believe that it is necessary for SB 54's implementing regulations to add "specificity" as to when the PRO will charge malus fees for the presence of "hazardous material," and certainly not via reference to the Proposition 65 list. In the Coalition's view, the language of SB 54 is sufficiently clear that malus fees shall be charged based on the presence of ***hazardous material*** as identified by OEHHA, DTSC, or CalRecycle. The Coalition believes that no additional citations are needed and that the PRO is best situated to determine whether covered material constitutes a "hazardous material" identified by these agencies. If CalRecycle is inclined to incorporate specific citations for clarity, CalRecycle should replace the inappropriate reference to Proposition 65 in proposed section 18980.6.7(h) with references to DTSC's and CalRecycle's regulations for characterizing hazardous waste.

"Reusable" and "Refillable"

Issue 18: The Proposal should distinguish between "reusable" and "refillable" packaging or food service ware that is reused or refilled by producers as opposed to consumers.

Comments: The Proposal incorporates SB 54's definitions of "reusable," "refillable," "reuse," and "refill." Proposed § 18980.1(a)(34) (providing that these terms have the same definition as section 42041(af) of the PRC). With respect to these terms, SB 54 provides:

[10] OEHHA, *About Proposition 65* (last accessed Apr. 22, 2024), available at https://oehha.ca.gov/proposition-65/about-proposition-65.
[11] OEHHA, *Proposition 65 FAQs* (Feb. 1, 2014), available at https://oehha.ca.gov/proposition-65/proposition-65-faqs

- (1) For packaging or food service ware that is **reused or refilled by the producer**, it satisfies all of the following:
    - (A) Explicitly designed and marketed to be utilized multiple times for the same product, or for another purposeful packaging use in a supply chain.
    - (B) Designed for durability to function properly in its original condition for multiple uses.
    - (C) Supported by adequate infrastructure to ensure the packaging or food service ware can be conveniently and safely reused or refilled for multiple cycles.
    - (D) Repeatedly recovered, inspected, and repaired, if necessary, and reissued into the supply chain for reuse or refill for multiple cycles.
- (2) For packaging or food service ware that is **reused or refilled by a consumer**, it satisfies all of the following:
    - (A) Explicitly designed to be utilized multiple times for the same product.
    - (B) Designed for durability to function properly in its original condition for multiple uses.
    - (C) Supported by adequate and convenient availability of and retail infrastructure for bulk or large format packaging that may be refilled to ensure the packaging or food service ware can be conveniently and safely reused or refilled by the consumer multiple times.

PRC § 42041(af) (emphases added).

To ensure that the Proposal carries the same distinction as SB 54 with respect to packaging or food service ware refilled or reused by the producer as opposed to the consumer, the Coalition recommends that CalRecycle revise proposed section 18980.1(a)(34) as follows:

- (34) "Reusable," "refillable," "reuse" and "refill" have the same definition as provided in section 42041(af)(1) of the Public Resources Code ***for packaging or food service that is reused or refilled by the producer***, and these terms have the same definition as provided in section 42041(af)(2) of the Public Resources Code ***for packaging or food service that it reused or refilled by the consumer***.

Issue 19: The term "usage" in the definition of "reuse" and "refill" in Proposed Section 18980.1(a)(34) is not necessary.

Comments: Proposed section 18980.1(a)(34) (with emphasis added) provides:

- The terms "reuse" and "refill" refer to **usage** packaging or food service ware that is reusable or refillable pursuant to [Senate Bill 54].

The Coalition disagrees with the statement in CalRecycle's ISOR (at 16) that the term "usage" is necessary because "without additional usage, there would just be a single use, which necessarily cannot qualify as something as having been reused or refilled." The "reusable" and "refillable"

definitions incorporated from SB 54 do not include the word "usage," which is undefined in the Proposal. In any event, a product that meets the applicable criteria set forth in SB 54 for "reusable" may be "reused," and a product that meets the applicable criteria set forth in SB 54 for "refillable" may be "refilled." The Coalition does not believe that the word "usage" adds any clarity to these requirements. At a minimum, if CalRecycle believes additional clarity is needed, it should define the term "usage" or explain its meaning in detail.

Issue 20: Producers cannot determine whether it "is more likely than not" that packaging or food service ware will be used on more than one occasion without being discarded or disposed within five years after commencement of its initial use.

Comments: The Proposal provides that, for packaging or food service ware to be considered used or refilled multiple times or for multiple cycles, or for use to be considered multiple uses, the following condition must be satisfied: "The item is **more likely than not** to be used on more than one occasion without being discarded or disposed within five years after commencement of its initial use." Proposed § 18980.1(a)(34)(E)(1) (emphasis added).

Producers are not able to determine whether it is "more likely than not" that packaging or food service ware will be used on more than one occasion, and indeed, producers do not collect data on this metric. As a result, it is unclear how producers or the PRO could make this determination. The Coalition recommends that CalRecycle replace the phrase "more likely than not" with "***designed***." The Proposal should encourage the innovation and production of packaging and food service ware that is designed to be reused or refilled.

Definitions

Issue 21: The definition of "plastic" is inconsistent with how the recycling industry classifies, treats, and manages materials.

Comments: Under Proposed section 18980.1(a)(24), the term "plastic," when used to describe a component of covered material or other physical good,

> means the component or good contains or is made partially or entirely of plastic, as defined in section 42041(t) of the Public Resources Code, excluding plastic present in components or goods that otherwise do not contain plastic as a result of contamination not caused by the producer, a person acting on behalf of the producer, or a third party responsible for the manufacture or handling of such components or goods.

The proposed definition includes all multi-material packaging components made partially of plastic. This is inconsistent with how the recycling industry classifies, treats, and manages those materials. For some of these materials (e.g., polycoated paperboard), processing facilities recognize that a small amount of plastic will come along with the primary material, and it is not a barrier to recycling. In addition, if a material like this were treated as a plastic and subject to the source reduction requirements, the statutory intent is unlikely to be met, because reductions to the non-plastic portion (which is a significant portion) would appear as a plastic reduction.

Instead, for these materials, a de minimis level of plastic should be established that would render the material classified as a non-plastic.

Issue 22: The Proposal's definition of "component" is too granular and lacks clarity.

Comments: Under section 18980.3.2(d) of the Proposal, if a covered material "comprises components that are detachable and not all within a single covered material category, then a recycling rate shall be calculated for each detachable component using the covered material category applicable to the component." Reporting these recycling rates at such a granular level is likely to prove unworkable. Presently, CalRecycle has published a list of 98 covered material categories. Not all manufacturers, however, track individual component pieces based on these precise material and form categories. While the Coalition understands that SB 54 addresses plastic components, the Proposal places burdensome requirements to track all small pieces that are "readily distinguishable from other pieces," as defined, across nearly one hundred categories. The Coalition encourages CalRecycle to alleviate the expected burdens as much as possible, including through special exemptions and de minimis thresholds. In refining the component-based provisions, the Coalition encourages CalRecycle to solicit views from stakeholders on the appropriate granularity of reporting obligations.

Additionally, section 18980.1(a)(6) of the Proposal lacks clarity as to the appropriate definition of "component" for purposes of the plastic source reduction requirements. While (A) uses the phrase "distinguishable . . . with respect to its composition or function," (B) uses the term "detachable." The Coalition believes the appropriate term should be "distinguishable" and that CalRecycle should clarify this section to avoid confusion in calculating and reporting recycling and reduction targets.

Issue 23: The definition of "plastic or polymers" should distinguish between materials that break down in the environment and those that persist.

Comments: "Plastic or polymers" means, "for purposes of determining whether section 42356.1(d) of the Public Resources Code exempts a fiber product from having to comply with a standard specification to be eligible to be labeled 'compostable' pursuant to section 42050(b) of the Public Resources Code, material comprising chemical compounds that did not occur naturally and that are plastic or other chemical compounds comprising molecules bonded together in long, repeating chains." Proposed § 18980.1(a)(25).

The terms "occur naturally" and "chemical compounds" in this definition need to be clarified to distinguish between materials that break down in the natural environment (e.g., PHA) and those that produce micro plastics and persist in nature (e.g., conventional plastics). While the Coalition does not opine on whether all bioplastics should be included in this (such as materials that act like conventional plastics but are sourced with plant molecules instead of fossil molecules), we respectfully request that CalRecycle establish criteria that recognizes the benefits of innovative materials that present fewer end-of-life impacts. Innovative materials that should be encouraged included polymers that break down in organic recycling infrastructure, but do not break down into micro plastics that persist in nature.

Issue 24: "In the state" is not clearly defined.

Comments: Under Proposed section 18980.1(a)(18), the term "in the state," as used with respect to a person:

> means that service of process, excluding service by publication and any other manner of service requiring a court order, on the person may be completed in the state pursuant to sections 413.10 to 417.40 of the Code of Civil Procedure (Article 1 of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure) or section 2110 of the Corporations Code, and the person is subject to jurisdiction of California courts pursuant to section 410.10 of the Code of Civil Procedure based on the manufacture, sale, offer of sale, or distribution in the state of products using covered material.

As drafted, "in the state" is defined to mean someone who is subject to service of process *and* subject to the jurisdiction of California state courts. The Proposal should clarify whether this means that an entity must be registered with the Secretary of State, and/or whether an entity that is actively selling products in California, without registration, has a nexus sufficient to subject it to service of process.

Issue 25: The term "importing" should either be removed entirely from the Proposal or clearly defined not to capture products imported into the state while engaged in foreign commerce for the purpose of overseas export or sale/use in other U.S. states.

Comments: SB 54 makes clear that any one of three specific actions related to covered materials—selling, offering for sale, or distributing—are the standards used to determine whether the various provisions and requirements of SB 54 apply. The Proposal, however, introduces an additional standard that would trigger the provisions of SB: the act of "importing" a covered material into the state. The term "import" or "importing" is not included in the standard written into SB 54's statutory provisions for this purpose, nor is it defined in the Proposal. The term "importing" should either be removed from the Proposal as an act that would trigger the application of SB 54's statutory requirements, or should be clearly defined within the regulations to ensure that it does not capture products that are "imported" into the state while engaged in foreign commerce for the purpose of overseas export or import and/or transit to states other than California. Otherwise, failing to clearly define "importing" could capture plastic products that do not enter the stream of commerce in California, nor the waste stream at all.

SB 54 was intended to apply only to plastic products entering the stream of commerce within the State of California. When SB 54 was being considered by the California Legislature, the bill's author Sen. Ben Allen stated repeatedly: "Senate Bill 54 will reduce the amount of waste that burdens taxpayers and local governments, plagues human health, and pollutes our natural environment by decreasing single-use packaging and the most problematic plastic food service ware products sold in California and ensuring the remaining items are effectively composted and recycled." *See* Assembly Natural Resources Committee Analysis of SB 54 (Allen) (Jun. 28, 2022); Assembly Appropriations Committee Analysis of SB 54 (Allen) (Jun. 29, 2022); Assembly Floor Analysis of SB 54 (Allen) (Jun. 29, 2022).

The statutory provisions of SB 54 further demonstrate that the intent of this law is to address the impacts that plastic waste generated within California have on local government entities within

California that are responsible for receiving it. *See, e.g.*, PRC § 42042(b)(2)(A) ("The new statewide comprehensive circular economy framework established by this chapter is intended to shift the burden of costs to collect, process, and recycle materials from the local jurisdictions to the producers of plastic products."); *id.* § 42042(b)(3)(C) ("It is also the intent of the Legislature that these improvements will allow California, going forward, to better harmonize curbside collection programs as local jurisdictions will collect material identified as either recyclable or compostable if that material is found to be suitable for curbside collection.").

SB 54 makes clear that its provisions are triggered when an entity, within the state (i) sells a product that uses covered materials, (ii) offers a product for sale that uses covered materials, and/or (iii) distributes a product for sale that uses covered materials. *See* PRC § 42041(w) (emphasis added):

(1) "Producer" means a person who manufactures a product that uses covered material and who owns or is the licensee of the brand or trademark under which the product is used in a commercial enterprise, sold, offered for sale, or distributed in the state.
(2) If there is no person in the state who is the producer for purposes of paragraph (1), the producer of the covered material is the owner or, if the owner is not in the state, the exclusive licensee of a brand or trademark under which the product using the covered material is used in a commercial enterprise, sold, offered for sale, or distributed in the state. For purposes of this subdivision, a licensee is a person holding the exclusive right to use a trademark or brand in the state in connection with the manufacture, sale, or distribution of the product packaged in or made from the covered material.
(3) If there is no person in the state who is the producer for purposes of paragraph (1) or (2), the producer of the covered material is the person who sells, offers for sale, or distributes the product that uses the covered material in or into the state.
(4) "Producer" does not include a person who produces, harvests, and packages an agricultural commodity on the site where the agricultural commodity was grown or raised.
(5) For purposes of this chapter, the sale of covered materials shall be deemed to occur in the state if the covered materials are delivered to the purchaser in the state.

While the Proposal incorporates reference to the three statutory criteria stated above of "selling, offering for sale, or distributing" products that use covered materials, it has also unnecessarily and inappropriately included a new, fourth criteria of "importing" products that use covered materials. *See* Proposed §§ 18980.1(a)(27)(C), 18980.5.2(a)(3), 18980.5.2(a)(4), 18980.5.2(a)(4)(B), 18980.6.7(d)(2)(A), and 18980.6.7(f).

There are two critical reasons why inclusion of this new term is problematic. First, there is no statutory authority for use of the term "import" in the Proposal because it is not used in SB 54. Second, the term "import" is not defined in SB 54 nor in the Proposal. Absent an explicit definition, the term "import" could be improperly applied to situations where product using the covered material transits through the state of California while engaged in foreign commerce. In many cases, product is packaged outside of California, shipped to a California port, and placed on an oceangoing vessel for overseas transport. The original packaging unit protecting the product, including primary, secondary, and tertiary packaging, is not opened or disturbed during the process. California's port authorities collectively process 30% of all exports in the United States and a portion of these exports are plastic products that could potentially be subject to the

provisions of SB 54. None of these products enters the stream of commerce within the State of California, and therefore none of these products creates the potential for plastic waste in this state that would be collected by local jurisdictions in a manner that would be subject to the provisions of SB 54.

Unless this issue is addressed within the Proposal, it creates the troubling potential for the term "import" to be interpreted in a manner that could make these foreign commerce products subject to the provisions of SB 54, which is clearly well beyond the intended scope of SB 54. Thus, as drafted, the proposal captures plastic products that do not enter the stream or commerce in California, nor the waste stream within California, thereby conflicting with the intent and scope of SB 54.

It is imperative that the term "import/imported" be addressed in one of two ways within the Proposal:

1) It is clearly defined to exempt plastic products transiting through California for purposes of §18980.1(a)(27)(C), §18980.5(c), §18980.5.1(a)(2), §18980.5.1(c), §18980.5.2(a)(3), §18980.5.2(a)(4), §18980.5.2(a)(4)(B), §18980.6.7(d)(2)(A), §18980.6.7(f), §18980.6.8(a)(1), §18980.6.8(a)(2), §18980.6.8(a)(6), §18980.7.7(a)(1), §18980.7.7(a)(2), §18980.7.7(a)(6), §18980.10.2(a), §18980.10.2(e) and §18980.13(g) of the Draft Regulations.

   There is already statutory precedent for this precise exemption in the PRC under California's Rigid Plastic Packaging Container law, which reads as follows:

   PRC § 42430: The following rigid plastic packaging containers are exempt from this chapter:(a) Rigid plastic packaging containers produced in or out of the state which are destined for shipment to other destinations outside the state and which remain with the products upon that shipment.

2) Absent the addition of a clarifying definition as described above, the term should be deleted from §18980.1(a)(27)(C), §18980.5.2(a)(3), §18980.5.2(a)(4), §18980.5.2(a)(4)(B), §18980.6.7(d)(2)(A), and §18980.6.7(f) of the Draft Regulations due to the fact that term is not found in the respective authorizing sections of statute.

Covered Material Category List

Issue 26: Steel cans, cartons and aseptic containers are not listed as potentially recyclable under CalRecycle's covered material category list.

Comments: CalRecycle's present CMC list does not include steel cans, cartons and aseptic containers as potentially recyclable. Yet, these materials in their respective forms "routinely becomes feedstock used in the production of new products or packaging." PRC § 42355.51(d)(1). Steel cans, for example, have an exceptionally high collection rate – they are accepted by recycling programs for jurisdictions that encompass 95 percent of the state population, well above the 60 percent threshold set by PRC section 42355.51(d)(2)(A). *See* SB 343 Material Characterization Study Preliminary Findings (December 2023), at 10. Steel cans can be recycled infinitely with no loss of their quality or functionality during the recycling

process. For that reason, food and beverage companies often use steel cans to package their products. And, because of steel's magnetic properties, steel cans are readily sorted into defined streams for recycling processes by large and small material recovery facilities. The SB 343 Material Characterization Study Preliminary Findings determined that 65% of the surveyed population served by materials recycling facilities recover steel cans. *Id.* at 16. Although the data showed steel cans falling short of the criteria in PRC § 42355.51(d)(2)(B), this material category is trending toward meeting the recyclability requirements.

The Coalition is aware of access and sortation data maintained by the Carton Council of North America (CCNA) and we strongly urge CalRecycle to consider and adopt this data to supplement its own MCS data. For access, CCNA's review of the Materials Characterization Study report identified over 60 communities where California residents have access to aseptic containers and carton recycling that were not counted in the preliminary report. If these communities are included, then 69 percent of California's population has access to recycling for aseptic containers and 72 percent can recycle cartons. With the inclusion of this additional information, we believe that aseptic containers and cartons exceed the threshold for "access" to recycling as defined in SB 343.

For sortation, CCNA's data identifies 32 MRFs in California that accept aseptic containers and cartons as part of their inbound stream for recycling. Eleven of those MRFs sort cartons into PSI Grade 52, while the remaining 21 MRFs bale cartons included in mixed paper to be sent on for recycling. According to CCNA, MRFs that instruct residents to put cartons in bins, accept those cartons and then include those cartons in mixed paper, should qualify as taking the appropriate actions of "sorting cartons into a defined recycling stream." With all the MRFs that CCNA identified as accepting and processing cartons for recycling, we believe that cartons meet the recycling threshold based on sortation, as specified in SB 343.

As noted above, due to the differing timelines for implementation of SB 343 and SB 54, it is uncertain what materials will be considered "recyclable" under the Proposal, as well as what materials may be eligible for a "trending towards" determination of recyclability. Pending legislation (SB 1231) would require the Department to consider petitions for such "trending towards" determinations, and steel cans are a prime candidate. The Coalition urges CalRecycle to accept such petitions on a provisional basis well in advance of the effective date of SB 1231 and to provide informal guidance on its likely decisions in advance as well, in order to avoid the unnecessary disruption that would otherwise result for the producers who package their goods in covered materials trending toward recyclability.

Categorically Excluded Materials

Issue 27: The Proposal ignores the statute's exclusion for "medical products" by defining it as coextensive with the exclusion for federally defined "drugs" and "devices."

Comment: SB 54 excludes from the definition of "covered material":

> (A) Packaging used for any of the following products:

> (i) Medical products ***and*** products defined as devices or prescription drugs, as specified in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Secs. 321(g), 321(h), and 353(b)(1)).

PRC § 42041(e)(2)(A)(i) (emphasis added). But proposed section 18980.2(a)(1) categorically excludes as covered material only the second portion of subsection (i):

> Packaging used for products described in section 42041(e)(2)(A)(i) of the Public Resources Code as "medical products and products defined as devices or prescription drugs," which means the following products:
>
> > (A) "Drugs," as defined under section 321(g) of Title 21 of the United States Code, including drugs that require prescriptions pursuant to section 353(b)(1) of Title 21 of the United States Code.
> >
> > (B) "Devices," as defined by section 321(h) of Title 21 of the United States Code.

Contrary to the plain language of SB 54, this exclusion entirely omits "medical products" and is improperly limited to the federal definition of "drugs" and "devices" as specified in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 321(g), 321(h), and 353(b)(1)).

"Medical products" and "products defined as devices or prescription drugs" are stated in PRC § 42041(e)(2)(A)(i) as two separate categories of products. Only the latter includes the qualifier "as specified in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Secs. 321(g), 321(h), and 353(b)(1))." The term "medical products" therefore has an intended meaning beyond "drugs" and "devices." CalRecycle must include and define "medical products" within proposed section 18980.2(a)(1); otherwise, that term, which is specifically used in PRC section 42041(e)(2)(A)(i), is rendered meaningless. *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd*., 23 Cal. App. 5th 1129, 1196 n.85 (2018) ("In construing a statute, 'effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning.'") (internal citations omitted).

The consequence of this overly narrow exclusion is that medical products (other than "drugs" and "devices") that would otherwise be excluded are improperly included within the scope of covered material. The term "medical products" does not appear to be defined in federal or state law. But since it cannot simply mean prescription drugs and devices, which are separately excluded, it must encompass another category of products that are medical in nature. The most obvious meaning is over-the-counter ("OTC") drugs, which are also regulated by U.S. Food and Drug Administration ("FDA"). These products are all "medical" in nature because, like prescription drugs, they are "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease . . . ." 21 U.S.C. § 321(g)(1). The only difference is that the FDA has determined that they can be used appropriately by consumers for self-diagnosed medical conditions, do not need a health practitioner for safe and effective use, and have a low potential for misuse and abuse. *See generally* 21 U.S.C. § 379aa(a)(2).

FDA heavily regulates packaging for OTC drug products to ensure safety, quality, and stability. All ingested OTC drug medicines must include tamper-evident packaging to help protect

consumers against malicious tampering of products. Similarly, the Poison Prevention Packaging Act was intended to prevent children from exposure to many drugs, including OTC drugs, and other products. And the Consumer Product Safety Commission has the authority to require child-resistant packaging and has promulgated regulations requiring drug manufacturers to comply with specific safety requirements for OTC drugs and prescription drugs. OTC drugs are therefore very much like prescription drugs, which are specifically excluded, and so it would fulfill the intent of the statute for the regulations to clarify that the term "medical products" includes OTC drugs.

To ensure compliance with the plain language and intent of SB 54, CalRecycle must define "medical products," as that term is used in PRC section 42041(e)(2)(A)(i), separate from the federal definitions of "drugs" and "devices." At the very least, "medical products" should be defined to include OTC drugs and their associated packaging.

Unique Challenges and Conflicts with Federal Law

Issue 28: The Proposal does not provide sufficient emphasis or clarity on how CalRecycle will provide exemptions for those facing unique challenges and conflicts with federal law.

Comments: SB 54 provides that "[n]either the department nor the PRO shall impose any requirement, including, but not limited to, a recycled content requirement, in direct conflict with a federal law or regulation." PRC § 42060(b)(2). Under the same section, CalRecycle is directed to "identify covered material that, while determined to be single use[,] . . . presents unique challenges in complying" with SB 54, and subsequently make exemptions based on that determination. PRC § 42060(a)(3).

Together, these provisions emphasize the Legislature's understanding that some producers will have unique challenges in complying with SB 54, and that among the most significant of these challenges are potential conflicts with federal law.

For food and drug packaging alone, companies must operate under a broad web of federal statutes and regulations, including but not limited to, the Poison Prevention Packaging Act, the Food, Drug, and Cosmetic Act, the Federal Meat Inspection Act, and the Poultry Products Inspect Act. These laws, among others, impose federal mandates with respect to the packaging design, labeling, and material specifications that have the potential for direct conflict with the obligations imposed by SB 54. For example, before a material may be used in a manner that contacts food, it must be approved under the federal regime as an appropriate "food contact material." Likewise, there are shelf stability and shelf life requirements for many foods, drugs, and other products, in addition to requirements for ensuring that packaging prevents certain products from being accessible to children or mentally-compromised adults and for providing consumers and retailers with a readily available method of determining whether a product has been opened before (tamper-evident packaging).

These requirements serve critical goals of public health and safety that cannot be compromised. They restrain the choice of alternative materials for packages, particularly of new materials. In many circumstances, they require lengthy testing and federal agency reviews before new

packaging can be introduced under federal law. In short, compliance with these federal requirements requires significant time and resources that present unique challenges for participation in the SB 54 regime.

Furthermore, single-use packaging is often the only viable option for shelf-stable foods, including pantry staples such as dried fruit, rice, nuts, etc., which are critical to the food supply. There are no compostable packaging options for these long shelf-life foods, and single-use food packaging for these items cannot be eliminated without risking increases in other wastes, especially organic wastes that, as the Department knows, are a significant portion of the California waste stream and considered contributors to greenhouse gas emissions. CalRecycle needs to use its authority to grant exemptions for products with unique challenges, in the process outlined in the Proposal, in order to avoid significant, negative impacts on the availability and affordability of food.

The source reduction requirements of PRC § 42057 are a critical challenge for these types of packaging, where a direct conflict with federal requirements exists. But these conflicts also arise with respect to the imposition of eco-modulated fees on producers that use single-use packaging that is subject to federal pre-market approvals. For products not covered by a federal regulatory regime, eco-modulated malus fees can provide an appropriate economic incentive to redesign packaging and/or use alternative materials. But for products whose packaging requires long lead times for testing and federal approvals, which are out of the producer's control, such fees are simply punitive. The Legislature therefore rightly recognized that, whether these requirements pose "unique challenges" or constitute "direct conflict[s] with [] federal law," exemptions are warranted for producers that would otherwise face this dilemma.

To alleviate these pressures, the Coalition requests that CalRecycle publish in its revised Proposal a list of federal laws and regulations that have the potential to conflict with requirements of CalRecycle or the PRO under SB 54. This list should be extensive, although it necessarily cannot be exhaustive due to the complexity of federal law, and it should be amended as necessary to include federal law in the future that CalRecycle reasonably anticipates will conflict with existing CalRecycle and PRO requirements. Although PRC section 42060(b)(2) presently lists federal statutes and regulations (fewer than ten) that are presumed to pose direct conflicts, it would be helpful for CalRecycle to take further steps to inform producers of the federal laws that conflict with their obligations under to SB 54 and its implementing regulations. CalRecycle should engage with stakeholders who can help inform this process.

Additionally, when identifying which federal laws and regulations that "directly conflict" with the requirements of the department or the PRO as a result of SB 54, CalRecycle should endeavor to be as broad as possible. For example, there can be arguments about what constitutes a "direct" conflict considering that SB 54 and its programmatic rollout largely depends on eco-modulation of fees collected by the PRO. The Coalition believes that penalizing producers (through higher fees) for packaging that is federally required and/or pre-approved directly conflicts with federal law because it undermines the purposes of federal law and stands as an obstacle to achievement of the federal goals, which include public health and safety.

Furthermore, in providing this clarification, CalRecycle should be particularly sensitive to the prospect that source reduction and recycling mandates will adversely impact producers of fresh food, and ultimately, the public's access to affordable and reliable sources of fresh food. Producers of fresh meat and poultry are especially vulnerable to experiencing "unique challenges" in complying with SB 54. The meat packaging that is disposed of will always contain some level of microbial contamination that was left from the raw meat. These organisms vary by the type of meat, but they all pose a risk of causing foodborne illnesses. Workers collecting and processing meat packaging that carries microbes are susceptible to illness, but that vector can be made worse under SB 54 regulations that prioritize complicated recycling benchmarks over worker health and safety. And although microbial contamination can be largely eliminated from meat packaging before being recycled, this can require installing expensive equipment to wash, dry, sanitize, and properly recycle the packaging material. The food industry is invested in creating sustainable packaging, but all decisions must be made with uncompromising product safety and protection of consumers and workers in mind.

The Coalition encourages CalRecycle to work with the California Department of Food and Agriculture ("CDFA") to ensure food safety and public health are of paramount consideration and to identify additional supply chain-related issues that increase the risk of spreading pests and diseases with widespread public health and economic consequences. By recognizing the unique needs of packaging for fresh foods, the Proposal can ensure that distributors of agricultural commodities can continue to use, without penalty, materials that are proven to ensure food safety, while doing their part to contribute toward the goals of SB 54.

Issue 29: Flexible films pose a unique challenge that CalRecycle should recognize.

Comments: Flexible films present one of the more complicated challenges of the Proposal to producers, the PRO, and the waste industry. This packaging form is essential to the mobile economy, to health and safety, and to consumer satisfaction, but it is not included in most curbside collection programs. Because of these challenges and the aggressive nature of the target recovery rates, the Coalition is concerned that the Proposal's requirements could result in a *de facto* ban on flexible films regardless of the materials used unless the Department provides a transitional exemption. The PRO has the ability to assess and address the infrastructure needs for all materials including flexible films, but it must be provided with the time to do so. For flexible films, it is clear that more time will be needed for the PRO to determine the best ways to increase collection rates, including whether the curbside collection infrastructure can be updated to accept these materials, if it is feasible to expand current store drop-off programs, or whether to add novel reverse logistics options where films are collected from consumers directly. The reality of the current infrastructure, the complexity of the film packaging materials, and the lack of a robust end market present a sizeable challenge for achieving SB 54's aggressive recovery rates for flexible films, and we encourage CalRecycle to consider the unique challenges in complying and provide unique treatment, as it is authorized to do so, for this important packaging component.

Issue 30: The proposed exemption period of one year is too short.

Comments: Under the Proposal, if an application for exemption is approved by CalRecycle, the producer's exemption automatically expires one year from the date of approval. This is too hard and short of a cutoff for the exemption period. Producers applying for an exemption for certain materials, *see* Proposed §§ 18980.2.1, 18980.2.3, and small producers applying for an exemption, *see* Proposed § 18980.5.2, should be afforded at least a two-year exemption period, particularly given the anticipated length of the application process. Longer exemption coverage is important in providing producers stability and protection from avoidable hardships, and it also ensures that producers are not constantly in a state of applying for an exemption. Further, the Proposal should more clearly state that the Director of CalRecycle has discretion to extend, but not shorten, the two-year exemption period.

Environmental Justice

Issue 31: For applications requesting an exemption for a covered material based on unique challenges in complying with SB 54, the Proposal should require that the environmental justice impacts be considered for both exempting and not exempting the covered material.

Comments: Proposed section 18980.2.3(c)(5)(A)(v) provides that applications requesting an exemption for a covered material based on unique challenges in complying with SB 54 include a discussion on the "potential impacts of the covered material on environmental justice communities from exempting or not exempting the covered material." The Coalition supports this provision.

An assessment of both the advantages and disadvantages of exemption on environmental justice communities is necessary for CalRecycle to make informed decisions regarding an exemption's environmental justice impacts. Concerning unhoused individuals who lack access to adequate sanitation, for example, single-use sanitation and hygiene products—often provided from charities and nonprofits—can provide a valuable lifeline.[12] A ban on these products could negatively impact these individuals' access to hygiene and sanitation products. Likewise, some consumers who must make ends meet on each paycheck, welfare or insurance payment, or other fixed income are not able to afford to purchase larger containers of basic household goods like cleaning products or personal care products and thereby have their money tied up in what is essentially excess stored product. Some consumers therefore need to purchase smaller sizes that fit their cashflow and budget, and indeed, some retailers offer smaller sizes specifically intended for this demographic.

Accordingly, CalRecycle's environmental justice review should include an analysis of both the advantages and disadvantages of exemptions for covered material.

[12] Cynthia R. Harris, "Single-Use Plastic Bans Bring Unintended Consequences for People Experiencing Homelessness and Developing Countries," Environmental Law Institute (Aug. 28, 2019), available at https://www.eli.org/vibrant-environment-blog/single-use-plastic-bans-bring-unintended-consequences-people-experiencing

Data Reporting Corrections

Issue 32: The Proposal's 10 business-day deadlines to correct errors in previously submitted reports and to revise reports identified by CalRecycle are not workable in practice.

Comments: The Proposal's Data Reporting Submission requirements provide (at proposed section 18980.10.1):

- (2) If a reporting entity identifies an error in a previously submitted report, they shall notify the Department and correct the error within 10 business days.
- (3) If the Department notifies a reporting entity in writing of an error in a previously submitted report, the reporting entity shall revise the report to correct the error within 10 business days.

The Coalition is concerned that the Proposal's deadlines of 10 business days do not provide sufficient time for reporting entities to correct errors. Depending on the scope of an error, reporting entities may need more than 10 business days to ensure that their revised data reports are accurate. Further—especially with respect to small businesses that may have only employee who manages data reports—a 10-business-day-deadline may be infeasible if the responsible employee is out of the office, or if the error is discovered near a holiday.

The Coalition believes that deadlines of 30 calendar days will provide sufficient time for reporting entities to correct errors in their data reports. In addition, using a calendar day-based deadline will prevent questions from arising regarding whether a particular day or holiday is a "business day" in California, which is important because not all holidays are observed in all states.

Penalties

Issue 33: The penalties provision should be made clearer and more workable.

Comments: The Coalition has serious concerns related to the penalty accrual schedule detailed in section 18980.13 of the draft Proposal. We respectfully request that the words "thirtieth" and "thirty-first" (subdivision (d) and (e) respectively) be struck and replaced with the word "ninetieth." An extension on the penalty fee accrual timeline to ninety days allows producers to correspond with CalRecycle and the PRO and consider options for compliance and/or resolution of disputes. A longer period before penalty fee accrual ensures enough time for a thorough and accurate process to address errors and or systemic issues regarding compliance.

Further, section 18980.13 of the Proposal does not explain how a producer can provide sufficient weight data associated with "unknown" components (pursuant to section 18980.3.2(d)(4)) or take steps to align if it lacks data on those particular components. Without this guidance, there is

a risk that producers will be held liable in perpetuity for data gaps that, despite good-faith efforts, cannot be filled as a practical matter.

Subdivision (a) of section 18980.13 also raises some concerns over the scope of CalRecycle's investigatory powers. For instance, the phrase "records and information regarding compliance" is sufficiently malleable that it can encompass vast amounts of trade secrets and other sensitive business information that have no direct relationship with recycling. For some companies, the recycling calculations that would ultimately be submitted are based off of internal sales data and interactions with third parties. These companies are concerned that a state entity could probe into private data underlying calculations submitted to comply with the regulations. This section should be amended to establish stronger safeguards and limits to the scope of CalRecycle's investigations to balance CalRecycle's need for compliance, on the one hand, and companies' interests in protecting confidential data from invasion.

Corrective Action Plans

<u>Issue 34</u>: The Proposal needs to acknowledge that a corrective action plan may be partially violated or complied with, rather than assuming it will either be fully violated or fully implemented.

<u>Comments</u>: Proposed section 18980.13.1 covers corrective actions plans as permitted under PRC section 42081(b). Such plans may be quite complex and cover multiple requirements with different timelines, reporting obligations, and other requirements. Provisions in the Proposal permit extensions and modifications for corrective action plans, as well as tolling of penalties for the underlying violations, but do not specify how the Department will address the likely situation in which extensions or modifications are needed only for certain provisions, and not all, of a corrective action plan, or in which violations of some provisions continue while others have been rectified in accordance with the plan.

Because there can be significant consequences, in the form of administrative civil penalties, for ongoing non-compliance, and because CalRecycle should have the ability to tailor its enforcement to specific requirements in a corrective action plan, the Coalition believes these provisions should contemplate situations of partial compliance and partial non-compliance. To that end, the Coalition recommends the following revisions (additions in ***bold italics***):

> 18980.13.1(b): If an entity was unable to comply with ***some or all requirements of*** an approved ***corrective*** ~~correction~~ action plan, it may submit a written request for an extension demonstrating that the requirements of section 42081(b)(2) of the Public Resources Code have been met. The Department may, in its sole discretion, either consider such a request ***with respect to some or all of the requirements of the corrective action plan*** or initiate enforcement proceedings for ~~the~~ ***those*** outstanding violations ***that have not been addressed*** **by the entity's partial compliance with the corrective action plan** as described in this article. . . .

18980.13.1(c): . . . If the Department approves a corrective action plan, accrual of penalties for the violations to be corrected shall be tolled for as long as the corrective action plan remains in effect and is complied with ***as to each such violation***.

18980.13.1(e): The Department may issue notices of violation for failure to comply with ***some or all requirements of*** the plan, and penalty accrual for the ***respective*** violations cited in the notice of violation shall resume as described in section 42081(a)(3) of the Public Resources Code, and the Department may initiate enforcement proceedings for such violations as described in this article. The Department may, upon demonstration by the entity that it has remedied ***some or all of*** the violations cited in the notice, reinstate tolling of penalties ***for such violations***, and deem the corrective action plan still in effect ***as to some or all of its requirements***.

Administrative Civil Penalties

Issue 35: CalRecycle lacks authority to make participants in a PRO liable for acts or omissions of the PRO.

Comments: Proposed section 18980.13.2 provides: "If a PRO acting on behalf of its participants causes participants to be in violation in [sic] the Act or this chapter, such participants shall not be exempt from penalties on the grounds that their noncompliance was caused by the PRO's conduct." The Coalition objects to this effort to rewrite the commonly applicable rules of liability for civil penalties for this specific situation because CalRecycle lacks this authority and because it is contrary to due process and sound policy.

PRC section 42080 provides that: "Failure to comply with the requirements of this chapter . . . shall subject a PRO, producer, wholesaler, or retailer to penalties . . . ." The statute does not make a producer, wholesaler, or retailer jointly and severally liable for the PRO's failure to comply, much less authorize the Department to do so. The PRO is a separate legal entity with its own board of directors and is not under the control of any individual participant. Furthermore, membership in the PRO is practically compulsory – the alternative of meeting the statute's requirements independently is likely to be prohibitively expensive and resource intensive for most producers.

If the conduct of the PRO, which is not directed by an individual participant producer, causes that participant producer to be out of compliance with the requirements of the statute or its implementing regulations, then under ordinary and long-standing principles of liability and due process, the non-compliance by the producer would be excused, and the Department would be limited to enforcing solely against the PRO for its own acts or omissions, which is well within the Department's powers. Indeed, this fundamental liability regime ensures that each of the entities has sufficient incentives to comply without risking liability for conduct outside its control. The Coalition therefore requests that the Department strike this provision from the final version of the regulations.

* * *

Finally, we note that the Proposal sets forth an aggressive timeline for compliance, resulting in an enormous burden for industry at a time when businesses are navigating inflationary pressures. Given the deadlines in the Proposal, the PRO will only have a short amount of time to collect funds, invest in materials recovery facilities, and establish end markets before the first deadline is triggered on January 1, 2028 for 30 percent of plastic covered material to be recycled. Investing in new equipment and educating the public on best practices will take time and cost money. None of this can be done without CalRecycle allowing the PRO the flexibility and efficiency called for by SB 54. We implore CalRecycle to carefully evaluate progress by the PRO and industry in general during the first few years of SB 54's implementation in order to consider possible adjustments to the recycling rates and dates, as permitted by PRC § 42062(b), for current unforeseen and anomalous market conditions. The Coalition is dedicated to working with CalRecycle to achieve the goals of SB 54, and to do so, the Proposal must take into account the practical challenges to both the industry and CalRecycle with respect to recycling rates and dates.

The Coalition appreciates the opportunity to submit these comments for CalRecycle's consideration and looks forward to continuing our productive dialogue to ensure the fair, balanced, and faithful implementation of SB 54 in accordance with the Legislature's direction.

Respectfully submitted,

Adam Regele, Vice President Advocacy and Strategic Partnerships
California Chamber of Commerce

On behalf of the following organizations:

Air Conditioning Heating & Refrigeration Institute (AHRI), Samantha Slater
American Beverage Association, Rick Rivas
American Chemistry Council, Tim Shestek
AMERIPEN, Dan Felton
California Apple Commission, Todd Sanders
California Blueberry Association, Todd Sanders
California Blueberry Commission, Todd Sanders
California Cotton Ginners and Growers Association, Roger Isom
California Grocers Association, Daniel Conway
California League of Food Producers, Trudi Hughes
California Manufacturers & Technology Association, Robert Spiegel
California Strawberry Commission, Rick Tomlinson
California Restaurant Association, Matt Sutton
California Retailers Association, Ryan Allain

California Walnut Commission, Robert Verloop
Chemical Industry Council of California (CICC), Lisa Lohnson
Coalition for Responsible Celebration, Maria Stockham
Consumer Brands Association, John Hewitt
Council for Responsible Nutrition, Mike Meirovitz
Dairy Institute of California, Katie Davey
Distilled Spirits Council of the United States (DISCUS), Adam Smith
Flexible Packaging Association, Alison Keane
Foodservice Packaging Institute, Carol Patterson
Industrial Environmental Association, Jack Monger
International Bottled Water Association, Cory Martin
National Confectioners Association, Brian McKeon
Nisei Farmers League, Manuel Cunha, Jr.
Olive Growers Council of California, Todd Sander
Personal Care Products Council, Karin Ross
PLASTICS, Kris Quigly
Plumbing Manufacturers International, Kerry Stackpole
The Toy Association, Erin Raden
Vinyl Institute, Ned Monroe
Western Agricultural Processors Association, Roger Isom
Western Growers Association, Gail Delihant
Western Plant Health Association, Renee Pinel
Window & Door Manufacturers Association, Michael P. O'Brien
Wine Institute, Anna Ferrera