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.

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[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,

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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