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

November 4, 2024

Submitted Electronically via CalRecycle's Public Comment Portal

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

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

Dear Ms. Derksen:

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

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

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

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

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

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

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

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

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

Further Discussion Regarding Issues In May 8, 2024 Letter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRC § 42340(a).

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

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

PRC § 48650(a) (emphasis added).

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

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

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

PRC § 14511 (emphasis added).

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

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

PRC § 42420.1(h) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Issues in Revised Proposal

Article 1: Definitions

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

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

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

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

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

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

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

Article 2: Covered Material and Covered Material Categories

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 3: Evaluations of Covered Material and Covered Material Categories

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

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

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

Comment:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 10: Registration and Data Reporting Requirements

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

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

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

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

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

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

Respectfully submitted,

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