



May 8, 2024

Zoe Heller, Director
Department of Resources Recycling and Recovery (CalRecycle)
P.O. Box 4025
Sacramento, CA 95812

RE: SB 54 Proposed Draft Regulatory Text

Dear Ms. Heller,

On behalf of the undersigned organizations, we submit these comments regarding CalRecycle’s draft regulatory text for the Plastic Pollution Prevention and Packaging Producer Responsibility Act. Collectively, we represent a broad and diverse subsection of the food and agriculture community that may be subject to this sweeping regulation. While the good intentions of this regulation are made clear, we have serious concerns regarding

the feasibility of compliance with this Act. We look forward to engaging CalRecycle further throughout the upcoming rulemaking process.

Agricultural Commodities and SB 54

We encourage CalRecycle to explore the inclusion of certain covered materials by working with sister agencies to determine industry-specific concerns related to including those materials within this Act. Specifically, as it relates to agriculture, we encourage 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, which can wreak havoc on our state and lead to costly outcomes.

We also strongly support the provision in SB 54 stating that “*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.

Fresh produce packaging serves essential functions in maintaining agricultural products' quality, safety, and shelf life. Therefore, we support the language in the legislative text protecting packaging used for fresh produce from post-consumer recycled content requirements. The stringent requirements for post-consumer recycled content could limit the availability of suitable packaging materials that meet the strict standards necessary to preserve the freshness, safety, and integrity of perishable goods. By recognizing the unique needs of fresh produce packaging, this regulation can ensure that farmers and distributors can continue to use materials that prioritize food safety, minimize food waste that increases our carbon footprint and ensures nutritious fresh produce for consumers

Exemption Termination

Notwithstanding any other provision of this section, we ask CalRecycle to include language in the draft regulatory text that requires CalRecycle to provide adequate communication and notification to the applicant of an exemption before cancellation. Notification should be delivered promptly, consistent with other notification requirements in this Act.

Furthermore, we ask CalRecycle to consider a ninety-day period to be granted to applicants to remedy their applications before an approved exemption is terminated.

Recyclability and End Market Infrastructure

We urge CalRecycle to establish partnerships with relevant agencies and commit to expediting and increasing the permitting of manufacturing plants and facilities considered end markets by the Act.

We seek clarification on how recycling rates will be achieved given the current lack of end markets, which is an obstacle that is expected to continue for the commencement of enforcement of the Act. We ask that CalRecycle include details in the regulation regarding how the state will pave the way for the end market infrastructure to be developed, including permitting of facilities and more.

End Market Verification, Audit, and Investigation

Regarding end market verification and audits, we oppose these activities being the responsibility of the Producer Responsibility Organization (PRO) and Independent Producers. Verification and audits are and should remain the responsibility of the relevant permitting and regulatory agencies. While the PRO may verify licenses and permits are up to date for use by producers within their organization, they should not be responsible for the other activities listed above. While the PRO coordinates with CalRecycle, it is not a public agency. It lacks the required guardrails to perform actions on behalf of a public agency regulated by accountable branches of our state government. Increasing infrastructure to support the Act's requirements should be CalRecycle's responsibility. Should additional funding or resources be required to increase the number of end market facilities, it is incumbent on CalRecycle, in coordination with other public agencies, to secure the necessary funding and capacity.

Eco-modulated Fees and Fee Schedule: Malus Fees for Use of Covered Material Containing Prop-65 Listed Chemicals

CalRecycle should reconsider fees for the use of covered materials that contain chemicals listed on the Proposition 65 (Prop 65) List. The Prop 65 List, maintained and regulated by the California Office of Environment Health Hazard Assessment (OEHHA), contains over 900 chemicals. Many of these chemicals found in products occur naturally and are not a direct result of processing or production and end up in products through unintentional exposure. Charging malus fees for the presence of Prop 65 listed chemicals in covered materials would create additional challenges for producers who cannot limit or exclude these chemicals. These fees would contribute further to the immense cost of this regulation and are unnecessary given the already existing fee mechanisms within this regulation. Additionally, OEHHA and the Attorney General's Office both regulate and enforce Prop. 65. CalRecycle does not have any jurisdiction or authority in this area.

Credits for Producers Using Renewable Materials

CalRecycle should consider providing additional credits for producers who, after processing an agricultural commodity for human consumption, offer a viable byproduct for repurposing into a renewable material designated for use in alternative packaging. The agriculture industry has a long history of repurposing byproducts from commodities. Incentivizing repurposed byproducts suitable for alternative packaging will advance our state and industries' progress toward a closed-loop economy.

Source Reduction Adjustment Data

Regarding source reduction data, we appreciate that the draft includes consideration of economic indicators. However, we encourage CalRecycle to consider additional alternative sources for economic indicators beyond those listed in § 18980.8.3(c)(2). While those already listed in the draft regulatory text are widely trusted, we are concerned that they may not fully capture economic indicators specific to particular products or industries.

Some alternatives we suggest adding are sources from the University of California system, industry-specific financial institutions, and sister state agencies. Capturing granular economic details and indicators specific to products or industries has become increasingly important in the face of supply chain and infrastructure challenges posed by climate change-fueled natural disasters and other supply chain challenges recently seen during the COVID-19 pandemic.

Source Reduction Baseline Reporting

We respectfully request the word “All” be struck from the draft regulatory language so that it reads as follows:

‘Reporting Entities must include in their annual reports for 2027, the total amount of plastic covered material by weight and number of plastic components produced in California in the 2023 calendar year’

This makes the language more clearly aligned with definitions listed in the Act and does not leave ambiguous regulatory text to provide clear and concise guidance to regulated entities.

Data Reporting Submission

Given the complexity of this regulation and the need to communicate among producers, the PRO, and CalRecycle to meet reporting requirements, we ask CalRecycle to consider an extended period for a producer to revise the errors in a data report from ten days to ninety days. More than ten days are needed to correspond between a producer, the PRO, and CalRecycle. Given the multiple points at which an error may occur, it unnecessarily limits the period for notification and correction to ten days. A longer window would allow producers, the PRO, and CalRecycle to identify the point of error and correct any systemic issues with the data reporting while also remedying the immediate error without risking fees or penalties.

Enforcement Oversight by the Department and Administrative Civil Penalties: Compliance Investigations

While some producers have robust and easily accessible documentation, some smaller producers have fewer resources and employees with access to compliance evaluation and investigation documentation. Therefore, regarding investigations or any other need for CalRecycle and its representatives to access a producer’s site or offices, we ask that producers receive notice before an authorized department employee or agent visits the premises. Specifically, we ask the regulatory text be amended so that 72 hours of notice to a producer is required before an authorized department employee or agent enters the premises. Granting permission to CalRecycle to enter a producer's premises without notification provides CalRecycle with oversight powers beyond the scope of this Act and existing Department authority.

Penalty Accrual Schedule

This coalition has serious concerns about the penalty accrual schedule detailed in §18980.13 of the draft regulation. We respectfully request that the words “thirtieth” and “thirty-first” be struck from the draft language in this section 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. A longer period before penalty fee accrual ensures enough time for a thorough and accurate process to address errors and systemic compliance issues.

Corrective Action Plans

We support most of the language in the draft regulatory text regarding corrective action plans. Corrective action plans allow producers to continue working toward compliance as they navigate the complexities of this regulation. Corrective action plans will help producers, the PRO, and CalRecycle identify potential systemic issues with the regulation or infrastructure associated with recycling materials, end market facilities, or the developing closed-loop economy.

However, CalRecycle must consider language that will pause the accrual of penalties while CalRecycle considers corrective action plans under review. Producers cannot be expected to act on correcting errors in their reporting or sourcing while such actions are still waiting for approval by CalRecycle. We recommend that upon receipt of a corrective action plan from a producer or PRO, CalRecycle pauses all accrual of fees.

Procedure for a Hearing

We take considerable issue with the lack of due process regarding the procedure for hearings laid out in this section. Producers and PROs cannot expect a just and fair hearing organized by the regulatory body enforcing the text of the Act, especially for producers or PROs raising concerns regarding the regulation itself. There are considerable precedents and examples available for CalRecycle to consider replicating a hearing process that utilizes an independent administrative hearing process that is not responsible to, or managed directly by, CalRecycle.

Recyclability of Metal Cans and Dairy Box Tops

This coalition has additional concerns about the recyclability of “bimetal/steel/tin metal cans” as it relates to the draft SB 343 Preliminary Findings Report. While the rulemaking processes for SB 343 and SB 54 are different, their impacts on one another are closely correlated. This is especially true regarding metal cans. Within the SB 343 Preliminary Findings Report, CalRecycle appears to have concluded, according to the Collection Test, that only jurisdictions with “food and beverage cans” being collected qualified for aluminum recycling, and those that marked “Bimetal/Steel/Tin Metal cans” (“metal cans”) did not qualify. This determination contradicts existing recycling data, including CalRecycle’s SB 54 Covered Material Category List. This determination within the SB 343 Preliminary Findings Report will have serious implications for SB 54 rulemaking and the recyclability of metal cans, a significant stream of recyclable material.

Similar concerns persist regarding gable-top cartons and aseptic containers. According to CalRecycle's SB 343 Material Characterization Study Preliminary Findings, gable-top cartons (non-CRV) and aseptic containers (non-CRV) did not meet either of the 60% thresholds for recyclability criteria in SB 343. Gable-top cartons and aseptic containers are common packaging materials used for fluid milk products and juices. Half-pint milk and juice cartons are widely used in California's school meal programs and are prized for their portability from school to home via Regional Food Bank's Backpack Programs. The loss of the recycling symbol on aseptic and gable top cartons will lead to local jurisdictions no longer accepting these items for recycling curbside, resulting in a reduction in recycling rates across California. This would negatively impact the ability of these packaging materials to meet SB 54 requirements for all single use packaging materials (including cartons) to be recycled by 2023. We believe the data collection efforts for the Material Characterization Study did not capture the complete picture of gable top carton and aseptic container/carton recycling in California and urge CalRecycle to consider current additional recycling data from the Carton Council of North America (CCNA).

Producer Responsibility Organization

We ask CalRecycle to consider language throughout the draft regulatory text that subjects the PRO to the same public notice and comment requirements as CalRecycle to ensure a fair and equitable implementation process. The PRO should only be granted the discretion outlined in the draft regulatory text if the public is granted similar access as it would have if it were a public agency.

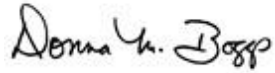
We have additional concerns about the cost of this regulation and the burden it will put on producers and CalRecycle. This ambitious regulation is expected to be one of the most robust in California's history. Given this reality, we have concerns about ballooning costs for the PRO in administering their ERP and enforcing the Act. Therefore, we ask that language be included that places a five percent cap on administrative fees to reduce the cost burden on California businesses and encourage fiscal responsibility within the PRO.

Thank you for your time and consideration of our comments. Given the vast scope of this regulation, we request a meeting with CalRecycle staff and leadership to discuss our concerns in greater detail. Should you have any questions or would like to reach out for scheduling purposes, please do not hesitate to contact Emily Rooney, president of the Agricultural Council of California, at emily@agcouncil.org.

Sincerely,



Emily Rooney, President
Agricultural Council of California



Donna Boggs, Associate Director
California Seed Association



Adam Borchard, Director of Government and Public Policy
California Fresh Fruit Association



Casey Creamer, President
California Citrus Mutual



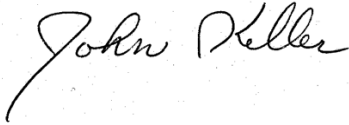
Katie Davey, Executive Director
Dairy Institute of California



Gail Delihant, Director of Government Affairs
Western Growers Association



Jon Gaeta, Director of State Affairs
RISE (Responsible Industry for a Sound Environment)



John Keller, Chairman
Plant California Alliance



Darrin Monteiro, VP, Member and Government Relations
California Dairies, Inc.



Debbie Murdock, Executive Director, President, Executive Director
Association of California Egg Farmers
California Pear Growers Association
Pacific Egg & Poultry Association



Brooke Palmer, Executive Director
California Association of Wheat Growers



Ann Quinn, Executive Vice President
California State Floral Association
California Warehouse Association



Todd Sanders, Executive Director
California Apple Commission
California Blueberry Association
California Blueberry Commission
Olive Growers Council of California



Rick Tomlinson, President
California Strawberry Commission



Jane Townsend, Executive Director
California Bean Shippers Association



Robert Verloop, Executive Director/CEO
California Walnut Commission



Chris Zanobini, CEO
California Grain and Feed Association

CC: Secretary Ross, California Department of Food and Agriculture