



Heal the Bay

May 8, 2024

California Department of Resources and Recycling (“CalRecycle”)  
SB 54 Regulation Implementation Team  
Packing EPR Section Regulations Unit  
Legal Affairs Office

Submitted via [CalRecycle Public Comment Form](#)

**Subject: SB 54: Plastic Pollution Prevention and Packaging Producer Responsibility Act - Draft Regulation Comments**

Dear CalRecycle Staff,

The undersigned organizations are committed to the strongest implementation of SB 54, the Plastic Pollution Prevention & Packaging Producer Responsibility Act, and appreciate the opportunity to provide comments on the proposed regulations.

Overall, successful implementation hinges on CalRecycle maintaining strong oversight of the Producer Responsibility Organization and the implementation process. Processes must be clearly laid out and transparent, including data collection, and true and effective source reduction must be prioritized by cultivating robust, equitable reuse and refill systems, all while centering and prioritizing environmental justice and tribal voices.

We are providing comments on the topics below:

1. [Ensuring Effective Allocation of Mitigation Funds](#)
2. [Accurately Calculating Expanded Polystyrene Recycling Rate and Prohibiting EPS Foodware Statewide](#)
3. [Prioritizing Effective Source Reduction Through Investments in Refill and Reuse Systems](#)
4. [Prohibiting Chemical Recycling, Advanced Recycling, and Related Technologies](#)
5. [Ensuring Responsible End Markets](#)
6. [Minimizing Exemptions & Increasing Transparency](#)
7. [Ensuring Transparency and Accountability](#)
  - a. Data Transparency
  - b. Producer Responsibility Organization Oversight and Accountability
  - c. Need for a Clear Process for Public Comment on the Draft PRO Plans
8. [Clarifying & Streamlining Terminology](#)
9. [Ensuring Consistent Methodologies are Used to Calculate Post-Consumer Recycled Content, and Not Allow Mass Balance Methodologies](#)

## **TOPIC #1: Ensuring Effective Allocation of Mitigation Funds**

Overall, there are concerns about the mitigation funds, the process and how to ensure that the funding will go to the most burdened communities by pollution. Although the mitigation funds will be allocated through the legislative budget process and are not addressed in the draft regulations, **it is critical to ensure environmental justice and tribal representation throughout the SB 54 implementation process and establish a clear process and understanding of how the mitigation funds will be allocated to communities most burdened by plastic pollution.**

Specifically, we would like CalRecycle to provide more detail in the regulations regarding how and where SB 54 mitigation fund resources will be distributed. Additional detail in advance will help local communities plan and prepare for accessing the funds in ways that maximize the benefit to disadvantaged communities, BIPOC people and organizations historically impacted by plastic pollution and underrepresented in public policy decision-making.

We also encourage CalRecycle to hold public workshops throughout the state on this topic and dedicate a webpage to helping the public understand the mitigation fund, timeline, and process to access funding. Please also explain how CalRecycle plans to work with other State agencies, including the California Department of Finance, to maximize coordination and positive impact on disadvantaged communities.

Furthermore, disadvantaged, rural, and minority communities should be explicitly included in the SB 54 needs assessment process. Please articulate how disadvantaged communities will be consulted as part of the needs assessment, and reach out to community-based and other organizations to begin dialogue early in the process. Transparency regarding how the needs assessment process is designed and how conclusions are made is essential.

## **Topic #2: Accurately Calculating Expanded Polystyrene Recycling Rate and Prohibiting EPS Foodware Statewide**

Due to EPS's negative impact on our communities, human health, and environment, EPS food service ware has a different timeline and recycling rates compared to other covered materials categories in the statute.

Polystyrene is plastic resin number six and is a low-value plastic that has little or no value on the recycling market, and EPS has even less value. EPS foam is very inexpensive to manufacture and low-cost, but wreaks havoc on the environment. It is lightweight, floats, and does not biodegrade in our lifetimes.

While EPS can hold a rigid shape, it is not very durable and easily crumbles into smaller pieces. Because of its light weight, popularity and potential to break down, EPS is a common form of plastic pollution in the ocean and other bodies of water. Marine mammals can easily mistake

polystyrene for food or nesting materials.<sup>1</sup> If polystyrene microparticles are ingested by animals (or humans), the sequestered chemicals such as PCBs, DDT, pesticides, and flame retardants might be absorbed into the animal's system and taken up the food chain.<sup>2</sup>

## **SB 54 Text**

### **Section 42057 states:**

(i) Producers of expanded polystyrene food service ware shall not sell, offer for sale, distribute, or import in or into the state expanded polystyrene food service ware unless the producer demonstrates to the department that all expanded polystyrene meets the following recycling rates:

- (1) Not less than 25 percent on and after January 1, 2025.
- (2) Not less than 30 percent on and after January 1, 2028.
- (3) Not less than 50 percent on and after January 1, 2030.
- (4) Not less than 65 percent on and after January 1, 2032, and annually thereafter.

## **Draft Regulation Text**

### **§ 18980.6.8. Recordkeeping and Reporting Requirements**

- (a) A PRO shall keep the following records, disaggregated by each participant producer where applicable:
  - (6) Total weight of expanded polystyrene food service ware, by covered material category, sold, distributed, or imported in or into the state.

### **§ 18980.7.7. Independent Producer Recordkeeping and Reporting Requirements**

- (a) An Independent Producer shall keep the following records:
  - (6) Total weight of expanded polystyrene food service ware, by covered material category, sold, distributed, or imported in or into the state.

### **§ 18980.9.1. Annual Report and Program Budget**

- (a) An annual report and program budget shall include information specified in section 42051.3(a)(2) and (a)(3) of the Public Resources Code. For Independent Producers, however, the annual report and budget are not required to address the information specified in section 42051.3(a)(2)(A) and (a)(3)(B).
- (b) The annual report shall additionally include:
  - (2) Pursuant to section 42057(i) of the Public Resources Code, provide the recycling rate for all expanded polystyrene by covered material category.

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<sup>1</sup> Derriak, J. (2002) *The pollution of the marine environment by plastic debris: a review*  
<https://www.sciencedirect.com/science/article/pii/S0025326X02002205>

<sup>2</sup> Farrelly, T et al. (2017) *Polystyrene as Hazardous Household Waste*  
[https://www.researchgate.net/publication/313262843\\_Polystyrene\\_as\\_Hazardous\\_Household\\_Waste](https://www.researchgate.net/publication/313262843_Polystyrene_as_Hazardous_Household_Waste)

Currently, the draft regulatory text is too vague. **We would like to see CalRecycle provide additional clarity regarding how the recycling rate, including the baseline, for EPS will be determined, what data will be used over the years, the process, and how accuracy will be ensured.**

EPS is also frequently used in transport and other packaging related to products to protect those products from damage during transport and handling. There needs to be clarity around whether the regulations only address EPS food service ware or if they also address other forms of EPS packaging as well. If other forms of packaging, such as block EPS, is included in the regulations, how will the PRO and CalRecycle differentiate recycling rates for EPS foodware versus block EPS for transport packaging and other uses?

**Please also clarify what will happen and by when, if recycling rates for EPS are not achieved.** It should also be made explicit that once the January 1, 2025 deadline passes and producers are unable to demonstrate to the department that the polystyrene recycling rate is met, EPS foodware should be banned statewide at that time. Producers should not have the opportunity to come back in 2028 or at a future time attempting to show that they meet the target recycling rate.

There is also concern that there will be an increased focus on the “recycling” of EPS at the cost of communities and the environment. Some facilities process EPS using chemical recycling methods, but as stated in past comments, **chemical recycling and related technologies should not be counted as recycling.**

For example, Agilyx, a polystyrene pyrolysis plant in Tigard, Oregon, is held up by industry as a prime example of commercial-scale “chemical recycling,” but [shut down in April 2024 due to failing operations and economic loss](#).<sup>3</sup> In theory, Agilyx takes waste polystyrene and uses pyrolysis to turn it back into styrene, which is then used to make new polystyrene. In 2018, only around one-tenth of the plastic waste Agilyx processed was turned into styrene. A similar volume of plastic was burned in cement kilns, which are commonly used to burn hazardous waste (and have weaker emissions standards and reporting requirements). This implies that the fuel Agilyx produced was either too contaminated or of too low quality to be turned back into plastic.

### **Topic #3: Prioritizing Effective Source Reduction Through Investments in Refill and Reuse Systems**

**Source reduction through refill and reuse systems should be prioritized as they are the most effective ways of reducing plastic pollution.** As SB 54 and the draft regulations contain critical source reduction mandates, and materials that meet the definition of “reusable” and “refillable” are categorically excluded from the covered materials category, it’s imperative that these

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<sup>3</sup> Beyond Plastics. (2024) *One of the 11 Constructed Chemical Recycling Facilities in the United States Shuts Down*. <https://www.beyondplastics.org/press-releases/oregon-chemical-recycling-facility-closes-3-6-24>

definitions are clear, and these materials are truly reusable and refillable, not used twice and thrown away, exacerbating waste management and pollution issues.

First, it's important to make the distinction that reuse systems and refill systems are significantly different in terms of liability, system logistics, value chains, and more. **Refillable defines a system** where the producer has made the same or similar product accessible for consumers to refill multiple times without the need for additional packaging (for example, I filled up my conditioner bottle at the store the other day). **Returnable packaging within a reuse system** has logistics of collection, return to producer or third party, cleaning, inspection, replenishment of product and return to market (you return packaging and it will be cleaned, reused and reshelved by the producer).

This distinction should be made clear and reflected under the definitions as the onus, the consumer versus the producer, differs between refill and reuse systems as will the implementation, cost, and resources.

### **Proposed Changes to Draft Regulation Text**

#### **§ 18980.1. Definitions**

(34) "Reusable," "refillable," "reuse," and "refill," have the same definition as provided in section 42041(af) of the Public Resources Code. Determinations of whether packaging or food service ware satisfies the requirements of that definition shall be subject to the provisions of this paragraph.

- Add the terms "systems" to both "returnable reuse" and "refill." There is a distinction between a reusable cup and a reusable cup/container system that includes a protocol for how the cups are accessed, utilized, returned, sanitized, and returned to service.
- Consider adding: "Returnable reusable system enables repeated collection, washing, and return of food service ware, thereby ensuring that the product is actually used repeatedly over an extended period of time."

(A) The terms "reuse" and "refill" refer to usage packaging or food service ware **systems** that is **accommodate returnable reusable** or refillable **packaging** pursuant to section 42041(af)(1)(A) through (af)(1)(D) and (af)(2)(A) through (af)(2)(C) of the Public Resources Code, subsequent to the initial use of the packaging or food service ware for its original purpose.

- Recommended text: (A) The terms "return" and "refill" refer to a packaging system or food service ware that is returnable or refillable pursuant to section 42041(a)(1)(A) through (a)(1)(D) and (a)(2)(A) through (C), subsequent to the initial use of the packaging or food service ware for its original purpose.

(B) To be considered **returnable** or refillable, packaging or food service ware must not constitute single-use packaging or food service ware pursuant to paragraph (35) and section 42041(ai)\* of the Public Resources Code. **Returnable reusable packaging is owned by producers or a third party manager and is returned to producers or a third party after each use in a system for reuse. Refillable packaging is part of a system wherein producers have made the same or similar product available and accessible for consumers to refill multiple times without the need for additional single-use packaging.**

CalRecycle may wish to define returnable reusable packaging separately within this section. In this case, we suggest simply using the proposed language above as a definition.

(D) To be considered capable of being conveniently and safely reused or refilled:

- **Although the definition of “safely” can be extrapolated using health codes for reusable foodservice ware, there is a need to further clarify the term “conveniently.” Convenience should be based on equitable access to drop-off locations. Without convenient return points for consumers or other end users, the system will not achieve high rates of return. Without high rates of return, the environmental benefits of reusables may not be realized. We suggest CalRecycle clarify that convenience, for the purposes of reuse/refill under the Act, means the provision of sufficient return/collection points across both public and private locations for reusable/refillable items to achieve high return rates that allow them to meet the threshold of “multiple cycles/uses” (i.e., that allows them to have a net environmental benefit).**

**Additionally, we support comments from reuse and refill experts regarding the requirement that packaging and food service ware be “sufficiently washable” and recommend CalRecycle use the term “cleaned” or “sanitized” in order to better capture the processes that may be used to ensure reusable and refillables can be “safely” reused and refilled. We also recommend the Department consider including a process by which reusable and refillables could be verified by a third party as is done for post consumer recycled content**

(i) For purposes of section 42041(af)(1)(C) of the Public Resources Code, packaging or food service ware must, at a minimum, be sufficiently washable, as set forth in section 18980.1(a)(35)(C) and retain its form and function during reuse and washing by the producer, without posing environmental or public health risks, ~~such as chemical leaching and microplastic shedding.~~

(ii) For purposes of section 42041(af)(2)(C) of the Public Resources Code, packaging or food service ware must, at a minimum, be sufficiently washable, as set forth in section 18980.1(a)(35)(C) and retain its form and function during reuse and washing by the consumer,

without posing environmental or public health risks, ~~such as chemical leaching and microplastic shedding.~~

- We appreciate CalRecycle staff including “microplastic shedding,” but returnable reuse and refillable packaging should not be held to a higher standard than covered materials. Rather, the criteria for microplastic shedding could be included in the eco-modulation section and worked out under the Producer Responsibility Organization plan.

(E) (i) The item is ~~more likely than not~~ to be used on more than one occasion or the item is, on average, used on more than one occasion without being discarded or disposed within five years after commencement of its initial use. ~~For food service ware and food packaging whose usage can be shown to occur, on average, over a period of shorter than five years before it has been subject to at least 780 cycles in a cleaning and sanitization process as set forth in (C)(ii) of paragraph (35), this requirement shall be reduced to such shorter period.~~ Satisfaction of this condition shall be demonstrated according to procedures and methods set forth in the approved PRO plan or Independent Producer plan, which may incorporate the procedures and methods from an approved PRO plan by reference.

- The term “more likely than not to be” is subjective and vague and should be removed.
- The 780 cycle criteria may make sense for reusable food service ware, but is not feasible for packaging and too high of a standard to meet. We recommend removing this sentence.

(ii) The observed average number of uses or refills will result in the item having lower environmental impact than the item’s equivalent single-use counterparts. The PRO plan shall include a procedure, including specific methods, for establishing estimates of the average number of uses or refills for particular products or types of products, and those estimates may be used as the observed average number of uses for purposes of this clause. Independent Producers’ plans may include their own procedure or incorporate one from an approved plan by reference. Environmental impact must consider, at a minimum, the resources used throughout the lifecycle of the product, including, but not limited to, those related to:

- (I) Raw material extraction
- (II) Manufacturing
- (III) Transportation
- (IV) End-of-life management

- We agree that in order to meet the definitions of “returnable reuse” and “refillable,” the food service item or packaging needs to have a net environmental benefit and ultimately “a lower environmental impact than the item’s equivalent single-use counterparts.” Although it currently does not exist, a third-party certification for a returnable reuse system would help ensure high-quality and truly reusable products in the future.

Furthermore, **producers should receive a greater incentive to use returnable packaging because it requires more effort from them and results in greater waste reduction, while it is difficult or impossible to ensure waste reduction will result from refillable packaging**, which rests entirely on the repeated efforts of consumers and requires very little effort on the part of producers. These investments to identify and build out infrastructure should be made by the producers.

Finally, when reusable and refillable products reach the end of their useful life, they will become part of the waste stream. We recommend making these products and associated packaging recyclable or compostable at the end of life, just as single-use packaging is required to be in a manner that does not inhibit the growth of the reusable packaging industry.

#### **TOPIC #4: Prohibiting Chemical Recycling, Advanced Recycling, and Related Technologies**

Chemical recycling and related technologies are ultimately a form of burning plastic and harm our communities and the environment. Uncontrolled pollution from these processes poses significant [health and safety risks](#) for local populations, placing a heavy toxic burden on workers and surrounding communities, the [majority of which](#) are low-income and communities of color.<sup>4</sup>

<sup>5</sup>

The bill author's intent was that pursuant to the proposed California Public Resources Code Section [42041\(aa\)](#) in SB 54, "recycling" is intended to only include technologies that return or maintain plastic materials within the circular economy and does not include technologies such as chemical recycling, advanced recycling, and related technologies.

Statutory construction of the definition of "recycling" in PRC § 42041 (aa) allows for arguments on both sides, but **the strongest arguments rely on the Legislature's intent to exclude chemical recycling from the definition of "recycling."** The legislative history, as evidenced by discussions of the harmful effects of chemical recycling in committee reports shows the Legislature did not intend for producers to use chemical recycling processes to comply with SB 54's recycling targets.

#### **SB 54 Text**

The definition of "disposal" in [PRC § 40192 \(b\)](#), which includes transformation and engineered municipal solid waste conversion ("EMSW conversion"), should apply to the definitions of "recycling" and "recycling rate" in SB 54.

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<sup>4</sup> GAIA. (2022) *Plastics-to-Fuel: A Losing Proposition*  
[https://www.no-burn.org/wp-content/uploads/2022/01/PTF\\_A-losing-proposition\\_Jan-12-2022.pdf](https://www.no-burn.org/wp-content/uploads/2022/01/PTF_A-losing-proposition_Jan-12-2022.pdf)

<sup>5</sup> NRDC. (2022) *Recycling Lies: "Chemical Recycling" of Plastic is Just Greenwashing Incineration*  
<https://www.nrdc.org/sites/default/files/chemical-recycling-greenwashing-incineration-ib.pdf>



## **Draft Regulation Text**

### **18980.3.5. Disposal of Covered Material**

For the purposes of this chapter, covered material sent to one of the following facilities, operations, or used for one of the following activities in or outside of the state, shall be deemed to constitute disposal of covered material:

- (a) Final deposition at a landfill.
- (b) Used as alternative daily cover as specified in section [20690](#) of Title 27 of the California Code of Regulations or intermediate cover as specified in section [20700](#) of Title 27 of the California Code of Regulations.
- (c) Energy generation or fuel production, except for anaerobic digestion of source separated organic materials.
- (d) Other operations, facilities, or activities with processes that result in the final deposition of covered material onto land, into the atmosphere, or into the waters of the state or out of the state, including but not limited to, littering, open burning, or illegal dumping.

The more restrictive definition of “disposal” in PRC § 40192 (b) should be incorporated by reference to the definition of “recycling rate” because principles of statutory construction combined with strong evidence of the Legislature’s intent indicate that it is the most reasonable interpretation of the statute.

SB 54 specifically states that recycling does not include incineration or combustion of plastic waste ([Section 42041\(aa\)\(2\)](#)) and requires the regulations to exclude from recycling the technologies that generate significant hazardous waste ([Section 42041\(aa\)\(5\)](#)). Technologies using pyrolysis, gasification, solvolysis, and similar technologies that involve combustion and incineration, as well as the generation of hazardous waste, are therefore prohibited from being considered “recycling” under SB 54 and should also be clearly reflected in the regulations.

**We urge that CalRecycle specifically state in the regulations that “recycling” is intended to only include technologies that return or maintain plastic materials within the circular economy and does not include technologies such as chemical recycling, advanced recycling, and related technologies.**

### **TOPIC #5: Ensuring Responsible End Markets**

SB 54 has the potential to improve recycling transparency and accountability and to help build back trust in the recycling system. Foundational to this potential is “responsible end markets.”

Please clarify how the criteria for operating as a Responsible End Market for covered material made of plastic – including that REMs operate in ways that benefit the environment and

minimize risk to public health, and worker health and safety – apply to the intermediate supply chain entities that are responsible for recycling plastic into pellets or flake. Would “Responsible End Markets” be able to be characterized as such if they are receiving materials from intermediate supply chain entities that do not meet similar requirements for minimizing environmental impacts and risks to health and safety?

**In addition, counting out-of-state deposition as “recycling” would contravene the purposes of SB 54.** Instead of making producers find responsible end markets for recycled materials, out-of-state dumping that could count as recycling and would allow producers to meet the Act’s recycling thresholds without making environmental progress. This is a perverse result and should be explicitly prohibited by CalRecycle.

Furthermore, with the passage of AB 881, the California legislature indicated that it is imperative that California not export its plastic waste in cases where it is not actually recyclable and may end up as marine pollution. The law requires that the export of mixed plastic waste must meet strict criteria in order to be counted as recycling rather than disposal starting in 2024.<sup>6</sup> This includes the requirement that the export be readily recyclable plastic types or mixtures such as polyethylene (PE), polypropylene (PP) and polyethylene terephthalate (PET) as identified under the Basel Convention. As CalRecycle is responsible for overseeing what is counted as recycled versus disposed of in order to meet the state’s solid waste policy goal under AB 341, it is imperative that California is effectively meeting its goals through source reduction, composting, and recycling rather than exporting the state’s plastic waste problem.<sup>7</sup>

**Verification of responsible end markets, auditing, and reporting will be critical to ensure successful implementation.** In addition to putting the onus on the PRO to verify, audit, and report, a complaint system should be set up to increase transparency so that CalRecycle is informed when violations are made and the standards of “responsible” are not being met. This way, CalRecycle can quickly act when violations are happening. We request that these reports and audits be made publicly available.

## **TOPIC #6: Minimizing Exemptions & Increasing Transparency**

The regulations do not include sufficient detail regarding how CalRecycle will identify products to be exempted, or track exempted products or timelines associated with how long products may be exempted. **The process of CalRecycle to consider and provide a decision on proposed material exemptions should be transparent and subject to public input as well as feedback from the advisory board.**

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<sup>6</sup> Cal. Pub. Res. § 41781.4

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=PRC&sectionNum=41781.4.&article=1.&highlight=true&keyword=plastic%20+export](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PRC&sectionNum=41781.4.&article=1.&highlight=true&keyword=plastic%20+export)

<sup>7</sup> AB 341 (Chesbro, Chapter 476, Statutes of 2011)

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201120120AB341](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB341)

In order for SB 54 to be effective, the regulations must ensure that covered materials are included in its EPR system to the extent practicable. Please consider updating section 18980.2.3. to say that CalRecycle will review and provide a preliminary decision on a material exemption, but that the list of proposed exemptions would be available for public input, such as through a meeting(s) of the Advisory Board.

Exemptions provided by CalRecycle should be judicious and the regulations should specify a high and well-defined threshold above which producers can claim that alternative materials are “not feasible.”

## **TOPIC #7: Ensuring Transparency and Accountability**

### ***Data Transparency***

Overall, it will be imperative to the success of SB 54 implementation to collect comprehensive, reliable, and detailed data when gathering information on the producers of covered materials and estimating the source reduction baseline. Determining an accurate baseline is foundational and critical as it will help decide whether reduction targets are met.

It was the intent of the legislature in drafting SB 54 that CalRecycle have access to the information necessary to establish an accurate and complete baseline from which progress towards source reduction goals can be tracked.

The statutory language in SB 54 empowers CalRecycle to require producers to report data to inform an accurate and complete baseline. [PRC Section 42057\(j\)](#) gives CalRecycle the authority to adopt regulations to implement the source reduction mandates, including reporting requirements, and **we strongly support CalRecycle using that authority to obtain data it needs to accurately establish a baseline.**

However, we are seeking additional clarity about measures to ensure accountability and accurate information from producers such as ground-truthing through audits by CalRecycle, using third-party verified data, and setting up a complaint system. To increase transparency, these reports and audits should be made publicly available (withholding records that CalRecycle and the PRO appropriately identify as trade secrets).

Regarding source reduction, please also clarify how the regulations affect packaging that has already undergone significant or maximum light-weighting. Also, how will the regulations prevent producers from creating a new product that is not yet light-weighted in order to create opportunities to light-weight the product in the future? In order to accurately measure the actual 25% source reduction requirement, the draft regulations must outline how products that have already been source-reduced to the fullest extent possible will be held to additional source reduction rates and how new products entering the marketplace will be assessed.

### ***Producer Responsibility Organization Oversight and Accountability***

A unique and critical piece of implementing this law is CalRecycle's ability to revoke approved plans or approval of the PRO and conduct investigations to determine compliance if the PRO or Independent Producer is not meeting the approved plan/s, and ultimately adopt regulations.

In order to minimize any future risk of disruption to SB 54 implementation, additional details, including the process and timeline for how CalRecycle will provide oversight and accountability if in the unlikely event that the PRO Plan is revoked or if the PRO is not meeting required targets, would be helpful for CalRecycle to provide in the regulations.

**We also have serious concerns about the inclusion of a source reduction adjustment factor in the PRO plan.** We do not believe that SB 54 gives either the CalRecycle or the PRO authority to make adjustments to the source reduction obligation relative to the baseline and thus we recommend removing this entire provision, §18980.8.3, from the regulations. As the source reduction baseline remains static once set (barring updates based on best available data, which we support as detailed in §18980.9) any adjustments could result in bias with respect to the amount of source reduction mandated under PRC §42057.

### ***Need for a Clear Process for Public Comment on the Draft PRO Plans***

The proposed regulations should be updated to better specify the process for public comment. SB 54 requires the following:

- a. Before submitting the plan to the department for approval, the PRO shall submit a proposed plan to the advisory board for review and comment pursuant to subdivision (h) of Section 42070. The advisory board may provide written comments within 60 calendar days. The PRO shall consider the comments, *along with any public comments*, and may incorporate these comments into the plan.
- b. (1) The PRO shall submit the plan to the department with revisions, if any, in response to comments by the advisory board or *public* within 120 calendar days of receipt of the advisory board's comments.

However, the law does not specify where or how public comment may be provided and how the draft plan should be made available to the public. The regulations should outline a clear process for public comment.

The proposed regulations include only the sparsest of guidance which is ill-designed to facilitate public input. They state in various places that "[u]pon submittal of the producer responsibility plan to the advisory board, the PRO shall make the plan available for review and public comment by, at minimum, posting the plan to its internet website." This does not ensure that the public will have adequate input. It does not specify a timeline or what kind of accommodations the PRO

must make for public comment, and it does not ensure that non-written comments may be submitted. **We recommend that CalRecycle include additional criteria to facilitate public comment, including allowing for public comment to or via the advisory board or to CalRecycle.**

## **TOPIC #8: Clarifying & Streamlining Terminology**

There are several definitions under the §18980.1. Definitions section that we recommend further clarification or streamlining:

- **(10) Discrete:** The current definition is ambiguous and confusing, and should be simplified to refer to a specific instance of a covered material, product, or item, differentiating it from its generic name, type, or category. This will prevent misunderstandings and ensure that the regulations promote reuse and refill programs effectively. The definition of "discrete" should be further clarified to ensure that reusable and refillable products are not classified as single-use products.

We recommend CalRecycle better clarify use of the terms "product," "good," and "item" in relation to covered material regulated under the Act as these terms are used interchangeably, are not well-distinguished, add confusion, and may not be necessary to carry out the statutory objectives that focus on packaging and food service ware, especially when "product" is defined to include the covered material that the product uses.

- **(13) Food service ware (B)(ii):** We request the Department clarify that although items described under this section would not be considered "food offered for sale or provided to customers by a food service establishment," the material used to package such food would still be considered packaging under PRC §42041(s).
- **(20) Nonplastic:** We recommend the definition of "nonplastic" be changed to clarify that the Department will use the definition of plastic under §42041(t).
  - "Nonplastic," when used in these regulations to describe a component of covered material or other physical good, means the component or good is not considered plastic as set forth in **paragraph (24) section 42041(t) of the Public Resources Code.**
- **(24) Plastic:** We strongly recommend CalRecycle use the definition of plastic in PRC §42041(t). The proposed regulatory definition of plastic appears to be attempting to further clarify what it means to be a "plastic component" which is unnecessary because both "plastic" and "component" are already defined in statute and the proposed regulations. The proposed definition also creates an additional exemption for plastic single-use packaging not contemplated by the statute for "plastic present in components

. . . that otherwise do not contain plastic as a result of contamination not caused by the producer.”

- **(25) Plastic or Polymers:** We recommend using the same definition in SB 54 rather than creating a second definition of plastic for the purposes of defining compostability as it creates an additional layer of complexity and confusion. If the Department must keep the definition, we recommend incorporating the elements included in the definition of “plastic” under PRC §42041(t) (e.g., that plastics are not chemically synthesized) and removing the term “polymer” as that can create additional confusion.
- **(35) Single Use / Single-use:** Further clarification is needed to ensure that this definition includes only items that are intended for one-time use and are not designed or marketed for reuse or refill. This will prevent misunderstandings and ensure that the regulations promote true single-use products. The regulations should also ensure that single-use products are made from compostable or recyclable materials to promote a circular economy.

### **TOPIC #9: Ensuring Consistent Methodologies are Used to Calculate Post-Consumer Recycled Content, and Not Allow Mass Balance Methodologies.**

While the proposed regulations include criteria for independent third-party validation for post consumer recycled content in section § 18980.3.4, CalRecycle does not provide any guidance around the methodologies it will allow to document recycled content. This is problematic for several reasons.

First, third-party validators should be required to use consistent methodologies to calculate post consumer recycled content to create an even playing field for companies in California. Second, since some third-party certifications are currently allowing companies to count plastic waste which is burned for energy as a form of recycling, it is critical that the agency make clear that this is not allowable in California. Third, it is important that CalRecycle mandate that packaging claiming to contain post consumer recycled content *actually contain recycled content in the physical package*, and disallow the use of misleading “mass balance” and plastic credit schemes.

**Surfrider, NRDC, and many other environmental NGOs as well as major players in the recycling industry (including both the Association of Mission Based Recyclers and the Association of Plastic Recyclers) are opposed to the allowance of mass balance or plastic credits for recycled content claims**, and have submitted comments to the Federal Trade Commission (FTC) urging the agency not to allow such schemes in the pending Green Guides updates. A recent National Institute of Standards and Technology (NIST) report to Congress also found that there are many “unsettled issues, ill- defined terms, and conflicting objectives with regards to the application of

[mass balance] certification to polymers,” underscoring the many problems with such certification systems.

Mass balance and plastic credit schemes are deceptive to the consumer, will further damage the declining amount of trust that consumers have in the current recycling system if consumers purchase a product containing recycled content, they rightly expect that there is actual recycled content in that product, not a hypothetical amount of recycled content that may or may not have been facilitated by the sale of that marketing claim. Even more important, **mass balance and credit schemes are not transparent, can obscure inappropriate and/or misleading accounting by the industry, and could lead to massive greenwashing, even if certified by third-party validators.**

Notably, “mass balance” methodologies and plastic credit schemes are distinct from the weighted averaging that is allowable under the Green Guides, as the Association of Mission Based Recyclers explained in its April, 2023 comments to the FTC:

Currently, the FTC allows companies to use the annual weighted average of recycled material to justify a recycled content claim. This is meant to account for market variations and other supply challenges in the manufacturing process where a company may buy feedstocks from many suppliers and the level of recycled content in each production cycle may vary with each purchase. The intention is that there is recycled content in each product, but that the actual level may fluctuate between production runs but must still meet the stated annual average (i.e. 20% for one week, 40% for another week, to average 30% for the year). This is substantially different from mass balance calculations where there may be no actual recycled content in the product... mass balance accounting is not comparable to this practice of annual averaging and should not be permitted on consumer labels.

**CalRecycle should provide clear guidance in its regulations regarding the allowable methodologies to calculate and document recycled content, and require a chain of custody approach to track recycled content through to the product level as this is the most verifiable approach.** It should not allow third-party validators to use any form of mass balance accounting (especially “free attribution” mass balance), or any kind of plastic credit scheme to document post-consumer recycled content.

We look forward to staying engaged in this important process. Thank you for your consideration.

Sincerely,

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