

# California's Transformational Single-Use Packaging EPR Law Moves Toward Implementation

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Governor Gavin Newsom signed [SB 54](#) on June 30, 2022, creating an extended producer responsibility (EPR) program and imposing some related prohibitions for certain single-use packaging and plastic single-use food service ware in California.

This law imposes significant recycling and EPR requirements for "producers" of single-use packaging and food service items sold or otherwise distributed in California.

## General Requirements

- SB 54 prohibits a "producer" of "covered material" from selling, offering for sale, importing, or distributing "covered materials" in the state unless the "producer" is part of a producer responsibility organization (PRO), or assumes responsibility, on an individual basis, to comply with the law's requirements.
- "Producers" of "covered material" selling or distributing their products in the state are responsible for achieving the source reduction, recyclability or composability, and recycling rates for their products.
- To meet these mandates, "producers" must form and join a PRO, which, upon approval of CalRecycle, will develop an implementation plan to carry out SB 54's requirements. Alternatively, "producers" may assume responsibility for compliance obligations individually.
- "Producers" who take the independent route must assume responsibility for complying with the law's requirements. Such "producers" should confer with legal counsel knowledgeable about their specific operations in the state to develop a pathway to full compliance.
- The prohibition goes into effect on January 1, 2027, or upon the Department of Resources Recycling and Recovery's (CalRecycle) approval of an implementation plan submitted by a PRO, whichever happens first.
- The PRO is responsible for the remittance of CalRecycle's implementation costs, and a \$500 million annual surcharge which will be collected from producer participants and plastic resin manufacturers who sell plastic resin to the producers for use in covered material and paid to the California Department of Tax and Fee Administration. The funding is to be expended to minimize the environmental, environmental justice, and public health impacts of plastics, in accordance with Public Resources Code Sections 42064(j) and (k).

## Covered Materials Defined

### Plastic single-use food service ware

- The law defines “plastic single-use food service ware” as including, but not limited to, “plastic-coated paper or plastic-coated paperboard, paper or paperboard with plastic intentionally added during the manufacturing process, and multilayer flexible material.” Beverage containers subject to the California Beverage Container Recycling and Litter Reduction Act are not subject to this law. The following items specifically include: Trays, plates, bowls, clamshells, lids, cups, utensils, stirrers, hinged or lidded containers, straws, wraps or wrappers, and bags sold to food service establishments.

### Single-use packaging

- The “packaging” covered by the bill includes “single-use packaging that is routinely recycled, disposed of, or discarded after its contents have been used or unpackaged, and typically not refilled or otherwise reused by the producer.” While reduction of plastic packaging is emphasized, the law is not limited to plastic packaging.
- The bill defines “packaging” as “any separable and distinct material component used for the containment, protection, handling, delivery, or presentation of goods by the producer for the user or consumer, ranging from raw materials to processed goods.” Primary, secondary, and tertiary packaging are all in-scope, as well as transport packaging and certain packaging components.

### Plastics

- Defined as: “a synthetic or semisynthetic material chemically synthesized by the polymerization of organic substances that can be shaped into various rigid and flexible forms, including coatings and adhesives.” “Plastic” includes, without limitation, polyethylene terephthalate (PET), high density polyethylene (HDPE), polyvinyl chloride (PVC), low density polyethylene (LDPE), polypropylene (PP), polystyrene (PS), polylactic acid (PLA), and aliphatic biopolyesters, such as polyhydroxyalkanoate (PHA) and polyhydroxybutyrate (PHB). “Plastic” does not include natural rubber or naturally occurring polymers such as proteins or starches.”

## Recycling Rate Requirements

**EPS food service items.** The law prohibits the sale, distribution, or importation of expanded polystyrene food service ware unless the producer can demonstrate that all expanded polystyrene used in the state meets the following recycling rates:

- At least 25% by January 1, 2025
- At least 30% by January 1, 2028
- At least 50% by January 1, 2030
- At least 65% by January 1, 2032

**Plastic covered material.** The law requires all plastic covered material in California to be recycled at the following levels:

- At least 30% on and after January 1, 2028
- At least 40% on and after January 1, 2030.
- At least 65% on and after January 1, 2032.

## Source Reduction Requirements

By 2032, a PRO must approve and implement a plan to achieve a 25-percent reduction by weight and 25 percent reduction by plastic component source. This reduction target applies to all covered materials.

- At least 10 percent of the plastic-covered material shall be source reduced by shifting to a refillable or reusable packaging/food service ware, or through eliminating the plastic component.
- The remaining source reduction of plastic-covered materials shall be achieved through concentration, right-sizing, lightweighting, or shifting to bulk or large format packaging that allows consumers to refill home or commercial reusable containers, or shifting from a plastic-covered material to a non-plastic-covered material.
- Eight percent or less of the plastic-covered material shall be source reduced through an alternative compliance formula.
- The source reduction requirements will be met through enforceable agreements between the PRO and participant producers.

## Producers Defined

The law defines a “producer” as “a person who manufactures a product that uses covered material and who owns or is the licensee of the brand or trademark under which the product is used in a commercial enterprise, sold, offered for sale, or distributed in the state.” If there is no “producer” in California within the scope of this definition, then “the owner or, if the owner is not in the state, the exclusive licensee of a brand or trademark under which the covered product using the covered material is used in a commercial enterprise, sold, offered for sale, or distributed in the state” is deemed to be the “producer.” The law defines a licensee as “person holding the exclusive right to use a trademark or brand in the state in connection with the manufacture, sale, or distribution of the product packaged in or made from the covered material.”

## Exemptions

Among other exemptions, the law does not apply to covered material for which the producer demonstrates to the Department that the covered material meets all of the following criteria:

- The covered material is not collected through a residential recycling collection service;
- The covered material does not undergo separation from other materials at a commingled recycling processing facility;
- The covered material is “recycled at a responsible end market”; and
- The material has demonstrated a recycling rate of 65 percent for three consecutive years prior to January 1, 2027, and on and after that date demonstrates a recycling rate at or over 70 percent annually, as demonstrated to CalRecycle every two years.

## CalRecycle Responsibilities and Authorities

### 1. Needs Assessment

Before the PRO develops the producer responsibility plan, CalRecycle, in collaboration with the PRO and local jurisdictions, must first prepare an initial statewide needs assessment to identify the investments and steps needed to achieve SB 54’s mandates. The needs assessment will evaluate specific considerations related to covered material and covered material categories. The PRO must

submit its needs assessment to the Advisory Board for review and developed through a public process, including a public meeting, where there will be opportunities for input. The results will inform the PRO budget and plan.

## **2. Establishment of the PRO Advisory Board**

Before the PRO develops the producer responsibility plan, CalRecycle, in collaboration with the PRO and local jurisdictions, must first prepare an initial statewide needs assessment to identify the investments and steps needed to achieve SB 54's mandates. The needs assessment will evaluate specific considerations related to covered material and covered material categories. The PRO must submit its needs assessment to the Advisory Board for review and developed through a public process, including a public meeting, where there will be opportunities for input. The results will inform the PRO budget and plan.

## **3. Rulemakings**

CalRecycle must provide a set list of covered material categories by July 1, 2024, and adopt any necessary regulations to implement and enforce SB 54 by January 1, 2025. Informal rulemaking workshops will continuously occur from 2023 to 2024 until CalRecycle promulgates any final regulations.

## **4. PRO Plan Approvals**

The PRO must submit any plan or plan amendment to the Advisory Board for review and comment before submission to CalRecycle. CalRecycle must review any plan or plan amendment submitted by the PRO for approval, conditional approval, or rejection.

## **5. Enforcement**

CalRecycle is authorized to impose administrative civil penalties on any entity's noncompliance with SB 54's requirements, with a maximum penalty of \$50,000 per day per violation. All enforcement penalties imposed and collected by CalRecycle are deposited into the circular economy penalty account to be appropriated to further the Act.

CalRecycle may take enforcement actions against entities who fail to provide accurate and timely mandated information to the PRO or who otherwise materially violate the Act's requirements. Enforcement action may be taken against the PRO for failing to incorporate CalRecycle's changes into the producer responsibility plan, plan amendment, annual report, or failure to comply with the Act's requirements.

# **PRO Responsibilities and Authorities**

## **1. Enforcement**

The approved PRO must develop a producer responsibility plan to comply with SB 54's requirements. The plan must include all actions and investments to be implemented for compliance, a source reduction plan, technologies to be utilized, and objective and measurable criteria to describe how the PRO will implement SB 54's requirements. The plan must consider the CalRecycle's needs assessment and will inform the PRO's budget.

The PRO plan should also include producer participant fee calculations, fee structure, and fee schedule.

The PRO must submit the proposed plan to CalRecycle and the Advisory Board for review. The PRO must consider comments from the Advisory Board and the public and ensure the plan is revised to

meet any CalRecycle compliance conditions for approval. Any amendment to the plan must be approved through the same review process. Once approved, a producer responsibility plan is valid for five years. The PRO must submit an annual report and budget to CalRecycle on the status of the plan's implementation.

## **2. Fee Allocation**

The PRO is required to establish a fee to be paid by producer participants, in an amount sufficient to cover the PRO budget and the cost of the plan's implementation, and the financial responsibilities imposed on the PRO under SB 54, including:

- a. **CalRecycle Administrative Fees:** The PRO is responsible for paying a California circular economy administration fee set by CalRecycle every three months to cover the full cost of implementing SB 54's requirements.
- b. **Environmental Mitigation Surcharge:** In addition, every year starting January 1, 2027, the PRO must remit \$500 million per year to the California Department of Tax and Fee Administration to be deposited into the California Plastic Pollution Mitigation Fund. The PRO is required to collect this payment through an environmental mitigation surcharge on its participants producers. 40% of the California Plastic Mitigation Fund will be allocated to state agencies for environmental mitigation efforts and 60% will be allocated to state agencies to fund environmental justice and public health impacts projects related to plastics' effects.

Significantly, the PRO may collect up to \$150 million of the \$500 million remittance from plastic resin manufacturers who sell plastic-covered material to participant producers. As part of this effort, the PRO may require participant producers to identify the plastic resin manufacturers who supply the raw material for plastic-covered material. There are otherwise no guidelines as to how the PRO may identify plastic resin manufacturers associated with covered material, or allocate financial responsibility among them, other than the implied condition that any resin manufacturer (whether U.S.-based or foreign) that is an upstream supplier to a producer who supplies plastic into the California market is potentially within the PROs reach.

Notably, even if the PRO does not collect the \$150 million from resin manufacturers, the PRO is still liable for the entire \$500 million payment. This means that participant producers could be responsible for a shortfall in payments by resin manufacturers. In effect, this provision creates a burden-shifting mechanism by which the statute creates at least indirect pressure on the resin manufacturers to contribute because, in the absence of their contribution, the tax applied to the resin manufacturers' downstream customers will increase commensurately.

The PRO will develop the fee schedule for each producer during its first two years of operation based on: (1) estimated implementation, operation, environmental mitigation, and CalRecycle reimbursement costs; and (2) the costs to ensure each participant producer's covered material categories meets SB 54's requirements, their covered materials' commodity value, and costs incurred by the PRO to assist participant producers in meeting SB 54's requirements.

The PRO may also adjust fees for producer participants by imposing "malus" fees or credits for applicable criteria, such as actions taken by the producer to accelerate source reduction or the presence of hazardous materials in the products.

## **3. Reporting and Auditing Requirements**

The PRO and "producers" who assume independent responsibility for compliance individually must annually submit a report to CalRecycle disclosing the total amount of covered material manufactured,

sold, distributed, or imported into the state and the total amount of covered material recycled on behalf of each producer participant. This data is intended to remain confidential and not distributed publicly or among other producers.

The PRO must maintain minutes, books, and records documenting its activities. Such material must be available for a mandatory annual independent public account audit.

With the PRO application now open and the RFPs for the Needs Assessment studies to be released between late 2023 and early 2024, all “producers” should closely track CalRecycle’s EPR activities and upcoming deadlines. To receive future updates from CalRecycle on the EPR’s rulemaking process and related issues, “producers” can sign up for the [SB 54: Plastic Pollution Prevention and Packaging Producer Responsibility Act \(Packaging EPR\) listserv](#).

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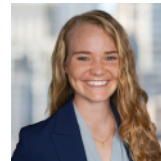
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