



AmericanCoatings
ASSOCIATIONSM

November 4, 2024

SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations
Department of Resources Recycling and Recovery, Regulations Unit
1001 "I" St., MS-24B
Sacramento, CA 95814

Submitted via calrecycle.commentinput.com

RE: ACA's Comments on SB 54 Plastic Pollution and Packaging Producer Responsibility Act Proposed Regulations

To Whom It May Concern:

The American Coatings Association (ACA) submits the following comments to California Department of Resources Recycling and Recovery (CalRecycle) regarding the proposed regulations for SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act. ACA is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory, and judicial issues, and provides forums for the advancement and promotion of the industry. ACA represents approximately 96% of the paint and coatings products manufactured in the United States, including architectural, industrial and specialty coatings.

The \$32 Billion paint and coatings industry manufactures a wide variety of coatings products for consumers, businesses, and manufacturing establishments alike. With the exception of powder coatings, most paint and coatings products are in liquid form and utilize containers in a range of sizes. The sizes range from small containers of less than a liter or pint to large containers that hold several hundred gallons. These containers are typically either metal, plastic, or a hybrid of metal and plastic. With the increasing number of packaging laws across the country, ACA members will be required to evaluate the packaging being used for paint and coatings products to ensure compliance with these laws. Consequently, ACA has a significant interest in assisting our industry in compliance with any regulatory requirements.

Currently, California is one of five states that have passed extended producer responsibility (EPR) laws for packaging. These states include Maine, Colorado, Oregon,

and Minnesota. Having multiple states passing their own version of an EPR law results in significant differences within each of these states' EPR laws, which in turn can be extremely problematic and burdensome for industry. Compliance across multiple regulatory regimes can be especially challenging for this industry because many of these companies manufacture products for a nationwide customer base that routinely relies upon interstate transactions where their products are shipped across states lines, thereby requiring these companies to comply with various and different, yet applicable federal and state laws.

To promote compliance, ACA recommends CalRecycle consider the following recommendations and provide clarification to bolster implementation across California.

1. Amend the producer compliance requirements to ensure adequate notice by extending the date and reduce confusion regarding the registration process.

Although the previous draft regulatory text was merely draft regulatory text and not finalized, the registration date for producers had been January 1, 2027. Under the current proposed regulatory text in Section 18980.5 for Producer Compliance, the date for producer registration is now July 1, 2025. This moves up the registration date by almost 18 months to a time that is only seven months away. Furthermore, CalRecycle will need time to review the comments submitted during this open comment period and address any changes in the regulatory text within those seven months. This would leave a very short time window for Producers to be notified of the date and also comply to this earlier registration date.

Additionally, in Section 18980.5(c), the current proposed draft text still retains the date of January 1, 2027, and that after this date, entities that become producers shall register within six months as a participating producer or apply as an Independent Producer under Section 18980.5.1. If this section delineates January 1, 2027, as the threshold date for any new producers to acknowledge, it would seem to serve as the de facto registration requirement date. To ensure fair and adequate notice, ACA recommends that the registration date be amended to require producers to register by January 1, 2027, and that the registration requirement be satisfied by joining a PRO by that date.

Furthermore, the current draft text requires that "...each producer shall register with the Department pursuant...[to] section 18980.10" brings confusion and requires the reader to reference another section to indicate a producer would need to register with a PRO. To reduce any confusion on whether a producer registers with a producer responsibility organization (PRO) or with the Department, ACA recommends that CalRecycle rephrase Section 18980.5 to state that "...a producer shall individually or through a producer responsibility organization submit to the department" the necessary information listed in section 18980.10.

2. Amend the definition of “Offered for sale” to clarify the in-state requirement.

Under Section 18980.1(a)(17)(D) of the proposed draft regulations, the definition of “Offered for sale” states that it is “material that physically existed and was made available for purchase but was discarded in California by the producer without being sold or distributed.” The current wording of this definition implies that even goods or products that existed in another state would be subject this definition if it were discarded by the producer in California, which would mean that the material would have had to have been distributed into the state. To reduce confusion, the term “offered for sale” should be used to reference those materials that were physically within the state of California for the purpose and intent of being sold or distributed within that state.

Understandably, CalRecycle may have concerns about waste streams from other states becoming a burden on the state’s infrastructure; however, a separate definition should be used to address that. Furthermore, by having a definition that is more succinct to mean only a material that physically existed and made available for purchase in California would also capture those materials that the producers would have offered for sale and discarded in California. ACA recommends that CalRecycle amend the definition to clarify the in-state requirement by stating that “Offered for sale” means a “material that physically existed and made available for purchase in California.”

3. Amend the criteria for long-term protection or storage by removing the conditional option of having an express, written five-year warranty with no exclusion for ordinary wear and tear.

Under Section 18980.2.2(a)(3)(A) for the Exclusion of Certain Types of Packaging, it states that the “good must reasonably be expected to remain usable for at least five years after it is sold....with respect to the totality of the circumstances, such as the good’s marketing, evidence of actual average duration of use...” The subparagraph also goes on to states that “This requirement shall be considered satisfied if the good is covered by an express, written five-year warranty with no exclusion for ordinary wear and tear.” Although the second portion is a conditional option that may be used to illustrate the criteria that a good has a lifespan of not les than five years, the conditional option unreasonably shifts the responsibility of a post-consumer purchased good back onto the manufacturer and potentially encourages more packaging to be used unnecessarily.

The lifespan of a coating depends greatly on the type of product. Many latex and oil-based paints are manufactured for an average lifespan of ten to fifteen years.¹ The lifespan of paint once the can is opened not only depends on the type of paint but on the storage

¹ Christin Perry and Samantha Allen, *How Long Does Paint Last?*, FORBES (July 25, 2022), <https://www.forbes.com/home-improvement/painting/how-long-does-paint-last/>.

conditions, which the consumer entirely controls. This conditional option of an express warranty with no exclusion for wear and tear would only serve to enable bad actors to abuse this requirement and gain more goods without a real need for it. This means that more product packaging would be introduced into the waste stream that would not otherwise have occurred if the warranty was not in place. The criteria listed in the first portion of the subparagraph would be more than sufficient to indicate a good's lifespan. The totality of the circumstances along with a good's marketings and evidence of actual average duration and the duration of similar products serve to indicate a product's lifespan. Therefore, ACA recommends that CalRecycle amend the long-term protection or storage criteria to remove the conditional option of an express warranty.

4. Clarify cost control measures with respect to end market viability requirements.

Ensuring viable and responsible end markets is crucial in the implementation of California's extended producer responsibility program. ACA recognizes that CalRecycle put forth amendments under Section 18980.4.3 for End Market Development in the second round of draft regulatory text clarifying cost control measures that ACA had previously raised by adding the term "as necessary to develop responsible end markets..."² This added phrase does help provide some guidance to the PRO on how to better direct funds collected through the EPR program that could improve the recycling infrastructure.

This requirement to provide financial support for viable end markets without clear guidelines to control costs and minimize financial losses could potentially lead to excessively increasing fees while failing to provide viable end markets. As such, ACA also encourages CalRecycle to consider notable thresholds or concrete criteria to further guide these financial decisions to help prevent a significant potential for fraud, waste, and abuse.

5. Clarify which costs are being reimbursed to the Department under the eco-modulated fee and fee schedule.

ACA recognizes that CalRecycle amended the proposed draft regulatory text, under Sec. 18980.6.7(a)(5), to clarify the Department costs that would be reimbursed.³ Although listing out the various costs that would be reimbursed, the proposed regulations fail to address the key issue of transparency that would reduce the potential for fraud, waste, and abuse. While direct costs, such as staff labor hours, travel, and supplies associated

² ACA's letter to CalRecycle regarding the proposed regulations for the Plastic Pollution and Packaging Producer Responsibility Act (SB 54) in May 2024 can be found within the paint.org website at this location [chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://www.paint.org/wp-content/uploads/2024/05/aca-commentCAL-SB-54-May-8-24.pdf](https://www.paint.org/wp-content/uploads/2024/05/aca-commentCAL-SB-54-May-8-24.pdf).

³ *Id.*

with the administration of the EPR Program are reasonable costs to be reimbursed to the Department. ACA believes more transparency would be appropriate, especially general administration costs.

6. Clarify how manufacturers account for a variety of sales and distribution configurations.

In the proposed draft regulatory text, under Sec. 18980.1(17), specifies whether a particular person is considered a “producer” and delineates scenarios for when the brand owner is located within or outside of the state and whether there is distributor or wholesaler obtaining the goods and sells or distributes to the goods. However, there should be clarification on whether goods (from an out of state brand owner) transferred to a distributor located within California for sale outside of California would still be subject to California’s EPR laws.

A separate concern stems from the fact that the Los Angeles/Long Beach shipping port is one of the busiest in the nation and many consumer goods pass through there without being offered for sale in California. Would goods that are simply passing through a distributor in that state also be subject to California EPR laws? Furthermore, subjecting goods to the California EPR laws that would simply be using an in-state distributor without any intent of being sold in California could potentially disincentivize business and local economies dependent on interstate commerce. ACA would like clarification on when a product may only be using an in-state distributor but not being sold in the state of California.

Conclusion

ACA appreciates the opportunity to provide comments to CalRecycle on this issue and looks forward to working cooperatively on this matter.

Sincerely,

/s/

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