RURAL COUNTY REPRESENTATIVES OF CALIFORNIA

November 4, 2024

Zoe Heller
Director, Department of Resources
Recycling and Recovery
1001 I Street
Sacramento, CA 95814

RE: SB 54 Rulemaking 15-Day Comment Period (Second Draft) Comments

Dear Director Heller:

On behalf of the Rural County Representatives of California (RCRC), we are pleased to provide comments on CalRecycle's revised draft SB 54 regulations (Second Draft) released for a 15-day comment period on October 14, 2024.

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I. Introduction – Support for changes included in the Second Draft

RCRC is an association of forty rural California counties, including all 19 California counties that qualify as "rural counties" under Public Resources Code Section 42649.8(h). Local governments are the backbone of solid waste management and recycling. Cities and counties are charged with diverting 50 percent of solid waste from landfill disposal through source reduction, recycling, and composting. The RCRC Board of Directors is comprised of elected supervisors from each member county. RCRC was extensively engaged in the Senate Bill 54 (Chapter 75, Statutes of 2022) development process and strongly advocated for its passage because of the paradigm shift it will have on waste management.

RCRC provided extensive comments on the draft SB 54 regulations released earlier this year. In those comments, we raised several very serious concerns about uncertainty as to when program responsibilities begin, ambiguities about the producer responsibility organization's (PRO) reimbursement and dispute resolution process, and serious consequences associated with subjecting local governments to enforcement under the process contained in SB 54.

RCRC appreciates that several of the concerns we raised in our previous comments have been addressed in the Second Draft. We believe many of the changes contained in the Second Draft will clarify regulatory obligations and simplify program implementation; however, some of those changes raise new questions and complications that must be addressed. Unfortunately, the Second Draft also contains new content that raises significant concerns that must be addressed in a Third Draft. Finally, we remain deeply concerned that some issues remain unresolved and pose serious challenges that may undermine SB 54's intent

In this section, we briefly acknowledge our appreciation for some of the changes included in the Second Draft that address concerns raised in our previous comments.

a. Compliance date for collection of recyclable and compostable materials provides greater clarity and better comports with intent of SB 54.

The previous draft of SB 54 regulations (First Draft) created a great deal of uncertainty as to when local governments and recycling service providers are expected to begin collecting covered materials determined by CalRecycle to be recyclable or compostable. RCRC expressed concerns that local governments cannot afford, and were never expected, to float SB 54 implementation costs until CalRecycle approves the PRO plan and the PRO is ready to provide reimbursements. We appreciate the Second Draft has been substantially revised to clarify that the obligation begins on the date CalRecycle first approves a PRO's stewardship plan. (Proposed Section 18980.11(a)). We believe this provides the temporal clarity local governments and recycling service providers need while avoiding imposing obligations on those entities before the producers are able to begin reimbursing costs incurred.

b. Delayed compliance date for collection of new materials added to recyclable and compostable materials list provides time to implement program changes.

Under SB 54, CalRecycle may add new materials to the list of recyclable and compostable covered products that local governments and recycling service providers must collect. RCRC appreciates that CalRecycle has clarified that this obligation to collect newly added materials does not begin until one year after those materials are added to CalRecycle's list. (Proposed Sections 18980.2.5(g) and 18980.11(c)). This will give local governments and recycling service providers one year to determine how to add these materials to their programs and seek funding or reimbursement from the PRO for any required capital improvements. We also appreciate that local governments and recycling service providers may be able to obtain an extension in certain circumstances.

c. Presumption that covered material is considered included in a jurisdiction's collection and recycling program is helpful, but refinements must reflect real possibility that responsible end markets may not immediately exist for all covered materials.

While SB 54 requires local governments and recycling service providers to include in their collection programs all materials determined by CalRecycle to be recyclable or compostable, it fails to provide any guidance on what exactly that obligation entails. RCRC appreciates new provisions added to the Second Draft establish a presumption that covered materials are included in a local jurisdiction's or recycling service provider's collection program if the entity collects the covered material and directs it to a responsible end market by transferring it to an intermediate supply chain entity. (Proposed Section 18980.11(b)).

This addition clarifies that nothing is required of local governments or recycling service providers beyond collecting the material and directing it to an end market. Neither SB 54 nor the Second Draft purport to include any additional obligations on local governments or recycling service providers beyond collection. At the same time, we are concerned that there may not be sufficient demand for all covered materials at responsible end markets. In that case, intermediate supply chain entities may be unavailable or unwilling to take possession of certain covered materials. If producers fail to create adequate market demand for covered materials, local governments and recycling service providers should not be penalized for being unable to find an intermediate supply chain entity willing to take those materials to a responsible end market.

As currently structured, the Second Draft subjects local governments to substantial penalties for failure to collect and direct covered materials to a responsible end market by transferring them to an intermediate supply chain entity. These penalties apply "regardless of the reason" for that failure. Local governments and recycling service

providers should be able to plead affirmative defenses, including that there is inadequate market demand for a particular material, that the PRO has failed to make timely or full reimbursements for costs incurred, etc.

d. Elimination of the obligation for alternative collection programs to report on the number of covered materials collected will significantly reduce administrative costs and challenges.

RCRC expressed serious concern that the First Draft would have required reporting entities to submit painfully granular information about what is recovered in non-curbside collection programs, including take-back, dropoff, and alternative collection programs. In particular, the First Draft would have required collection of information on the number of individual plastic components collected and recycled by each of those programs. We appreciate that the Second Draft eliminates the burdensome requirement to report on the number of individual plastic components collected in alternative collection programs. These changes to Proposed Section 18980.6.8(a)(2) will significantly reduce administrative costs and challenges for local governments and recycling service providers that may ultimately run those programs.

e. Refinements to resolve ambiguities in the definition of "intermediate supply chain entity" are helpful, but other changes included in the Second Draft significantly increase reporting complexity and expense.

RCRC raised concerns about the First Draft's definition of "intermediate supply chain entity." We appreciate that the Second Draft clarifies that the term applies to those entities that receive materials after they have been collected. (Proposed Section 18980.1(a)(11)) This means that the hauler itself is not an intermediate supply chain entity, but that the processing facility to which it takes it materials is.

While we appreciate and support this change, we are deeply concerned that other changes to the Second Draft require maintenance of a chain of custody for covered materials that begins at the point of collection and ends at the responsible end market. This level of specificity will be extremely difficult to achieve and maintain. It also ignores the way in which recycled commodity streams may be separated and commingled such that a particular bale of material that reaches an end market may contain materials from many jurisdictions or haulers. It will be extremely difficult to correctly maintain that information or the proportion of material that may come from each hauler.

II. Second Draft improperly restricts scope of local costs eligible for reimbursement and creates a reimbursable state mandate

While the Second Draft attempts to provide clarity as to what types of local government and recycling service provider costs are reimbursable by the PRO, RCRC is concerned that the Second Draft appears to improperly restrict the scope of local

costs eligible for reimbursement beyond what is allowed under SB 54. SB 54 is clear in that the Legislature intended to "ensure that local jurisdictions will be made financially whole for any new costs incurred associated with the implementation of this chapter and its implementing regulations."[1] Furthermore, SB 54 intended for this new framework to "shift the burden of costs to collect, process, and recycle materials from the local jurisdictions to the producers of plastic products."[2]

RCRC objects to language in proposed Section 18980.8(g)(2) that limits the scope of costs reimbursable by the PRO or independent producer. That section includes an exhaustive list of costs that are reimbursable, so the PRO could decline to reimburse any costs that it argues are outside of the scope of those three categories, potentially including legitimate claims for educational expenses or covered material collection and recycling activities. SB 54 is quite expansive in terms of the types of local costs that are reimbursable by the PRO or independent producer.

A PRO or independent producer could reject claims to pay for local educational campaigns under the argument that educational campaigns would ordinarily exist anyway even in the absence of SB 54. Even if a local agency's educational materials are focused on SB 54 implementation, the PRO may be able to argue that the publication was similar in nature to others that had previously been published by the agency and so is no different in nature than ordinarily expected costs.

Even more concerning, a PRO or independent producer could try to avoid costs for collecting and getting covered materials to market simply because the local jurisdiction previously voluntarily collected those materials before SB 54 was signed into law. This ignores the fact that while a local agency previously had the ability to include or exclude any materials from its collection program, SB 54 removes any local discretion and compels the entity to include in its program all covered materials CalRecycle determines are recyclable or compostable. Any bale of covered materials collected under SB 54 is a ***NEW*** cost and is in furtherance of helping producers achieve SB 54's mandates, so any expenses incurred in collecting, processing, or transporting those materials are eligible for reimbursement under SB 54.

The Second Draft's effort to narrow the costs of reimbursable expenses to exclude costs that are of the same nature as those that would ordinarily exist fails to recognize that SB 54 itself removed discretion and converted all those voluntary collection efforts into mandates.

Because of its narrow construction, the Second Draft creates a reimbursable state mandate, as SB 54 and CalRecycle require local governments to provide a higher level of service and the implementing regulations preclude recovery of those costs from the

[1] Public Resources Code Section 42040(b)(2)
[2] Id.

PRO and independent producers. To the extent that a PRO or independent producer rejects local reimbursement claims, it is reasonable to assume local governments will seek to recover those SB 54 implementation costs through the Commission on State Mandates, thereby significantly increasing state costs.

To address these concerns and avoid the implications they create, we strongly suggest amending 18980.8(g)(2) as follows:

(2) The following costs are reimbursable***, including, but not limited to***:

Alternatively, the proposed Section 18980.8(g)(2) could simply reference local implementation costs, including but not limited to those referenced in Public Resources Code Sections 42051.1(j)(1)(B) or 42053(d)(1).

III. Dispute resolution process must be revised to protect local governments and preserve existing rights to pursue civil litigation

Local governments and ratepayers have long shouldered all the costs of managing and recycling waste, which is why SB 54's transformative approach is so appealing. In response to the First Draft, RCRC and other stakeholders raised two important and interrelated questions – how will the reimbursement process work and how will disputes regarding reimbursement be resolved? Since that time, we and other stakeholders have engaged in informal discussions with the Circular Action Alliance about those topics, but those questions largely remain unanswered as the PRO works to figure out how to structure the program.

While we appreciate that the Second Draft establishes some minimum expectations for what dispute resolution pathways must be available in the PRO's plan, we are deeply concerned with the way the Second Draft is structured and the signal it sends to the PRO.

We appreciate that CalRecycle is concerned about the costs local jurisdictions and recycling service providers will bear in the dispute resolution process. At the same time, RCRC is concerned that the Second Draft merely requires the PRO's dispute resolution process to avoid *unnecessarily burdening* local jurisdictions and recycling service providers. We are concerned that the dispute resolution process (especially one focused on arbitration) will impose significant costs that will likely chill legitimate attempts to seek cost recovery. *Rather than requiring the PRO's dispute resolution process to avoid unnecessarily burdening local jurisdictions and recycling service providers, the process should instead affirmatively* ***minimize*** *burdens on those entities*.

a. Dispute resolution should be available if the Producer Responsibility Organization (PRO) or Independent Producer unreasonably delays determinations as to whether a particular cost is reimbursable.

The Second Draft requires the PRO's plan to include a dispute resolution process that may be initiated by the local jurisdiction or recycling service provider after the PRO or independent producer makes a determination of whether it will reimburse costs incurred by the local jurisdiction or recycling service provider. As drafted, the regulations would not allow a local jurisdiction or recycling service provider to initiate mediation or other forms of dispute resolution in the event the PRO or independent producer unreasonably delays determinations as to whether a given cost is reimbursable. *Dispute resolution should not only be available after the PRO or independent producer has decided to pay or not pay a claim – it should also be available if the PRO or independent producer unreasonably delays that decision.*

b. The PRO and independent producer obligations to determine and pay costs incurred must continue to be enforceable in a civil action.

The Second Draft requires the PRO plan's dispute resolution process to provide a pathway for the local jurisdiction or recycling service provider to request mediation, which would proceed to binding arbitration to resolve any remaining differences. The Second Draft makes no mention of other forms of dispute resolution that shall be available. Equally troubling, the Second Draft is silent on whether CalRecycle intends for this process to replace the parties' existing recourse to civil litigation. At a minimum, CalRecycle must make clear that the dispute resolution process outlined in the regulations does not interfere with the parties' right to enforce through civil litigation the PRO's obligations to determine and pay costs incurred.

RCRC strongly opposes any requirement for local jurisdictions to be compelled to use binding arbitration to resolve disputes with the PRO. We appreciate that the Second Draft does not require the PRO to ONLY offer mediation/binding arbitration to resolve disputes, but we fear the way this process is highlighted and the failure to require inclusion of other forms of dispute resolution may lead to the PRO only including this singular mechanism. Standalone mediation should be available, as should non-binding arbitration and civil litigation.

While we believe mediation can be a useful dispute resolution tool, binding arbitration must not be compelled to resolve any remaining differences. Arbitration is often criticized as being expensive, unwieldly, and prejudicial to less-resourced parties. Compelled arbitration is often exploited by large businesses to chill litigation from aggrieved parties who lack the resources or technical expertise to engage in that process. Simply speaking, the costs and complexity of binding arbitration will strongly disincentivize local jurisdictions and recycling service providers from seeking to resolve legitimate disputes with the PRO. We are also concerned that binding arbitration is not reviewable in civil courts.

RCRC does not object to the use of binding arbitration in those circumstances where the PRO and local jurisdiction or recycling service provider have mutually agreed

upon that course of action. However, binding arbitration should not be the sole remedy available and must not infringe upon existing rights to civil litigation to enforce the PRO's obligation to determine and reimburse local jurisdictions and recycling service providers. *Local jurisdictions and recycling service providers must retain the ability to resolve disputes with the PRO through civil litigation, including any disputes that may remain after mediation.*

c. *The PRO should be responsible for paying for costs incurred by jurisdictions and recycling service providers in the dispute resolution process.*

The Second Draft provides that arbitration fees shall be borne by the parties as decided by the arbitrator.[3] However, the regulations are silent on cost recovery for other forms of dispute resolution. Considering that the proposed regulations provide the PRO with significant leverage to reject claims and offer inadequate reimbursement,[4] *RCRC strongly suggests that dispute resolution costs shall be borne by the PRO or independent producer unless otherwise agreed by the parties*.

To address the concerns raised in this section, RCRC suggests the following modifications to Section 18980.8 of the Second Draft:

(h) Pursuant to paragraph (2) of subdivision (g) of section 42051.1 of the Public Resources Code, the plan shall include a dispute resolution process concerning costs incurred by local jurisdictions and recycling service providers.

(1) The process must allow a local jurisdiction or recycling service provider to initiate the process after the PRO or Independent Producer has made a determination of whether it will reimburse particular costs that the local jurisdiction or recycling service provider incurred or will incur*, or if the PRO or Independent Producer unreasonably delays making such a determination*.

(2) The advisory board, when reviewing any plan submitted to it, shall review the process and consider whether to suggest changes to ensure that the PRO or Independent Producer covers costs related to the Act.

(3) The process must ~~avoid unnecessary~~ *minimize* burden*s* on local jurisdictions and recycling service providers.

[3] Given the unsuitability of arbitration for these purposes and the chilling impact it will have (and has long had) on the ability for under-resourced parties to successfully pursue legitimate claims, we hope that CalRecycle did not intend for arbitration to be the sole remedy available to resolve disputes.

[4] The enforcement remedies against local jurisdictions and recycling service providers shall accrue for each day a covered material is not included in a collection program, *regardless of the reason*. We continue to fear that this clause gives the PRO enormous leverage against local jurisdictions and recycling service providers, who must continue to collect covered materials even after the PRO has refused to reimburse local jurisdictions or recycling service providers or arbitrarily offers inadequate reimbursement for those costs.

(4) *The obligations of a PRO or independent producer to determine and pay the costs incurred by local jurisdictions, recycling service providers, alternative collection systems, and others under Section 42051.1 are enforceable in a civil action between the affected entity and the PRO or independent producer. As an alternative to civil litigation, the dispute resolution* ~~The~~ process must provide ~~the~~ *an* option for the local jurisdiction or recycling service provider to require the dispute to be submitted to mediation and, if no agreement is reached through mediation, binding *or non-binding* arbitration *at the election of the local jurisdiction or recycling service provider*. The PRO or Independent Producer shall include in the plan the express terms of the agreement that will govern mediations and *binding* arbitrations *elected by a local jurisdiction or recycling service provider*, subject to the following restrictions:

(A) Unless all entities involved in the dispute agree otherwise, the mediation and arbitration shall be administered by JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.).

(B) Arbitration, if any, shall be conducted under JAMS' "Streamlined Arbitration Rules & Procedures" (June 1, 2021), which are hereby incorporated by reference, unless the parties agree to other rules and procedures. Notwithstanding the foregoing, the arbitration must comply with Code of Civil Procedure sections 1280 through 1294.4.

(C) Mediators and arbitrators or arbitration panels shall be agreed upon by the parties or shall be selected according to a process agreed upon by the parties. If the parties are unable to reach an agreement, then each party shall select one arbitrator, and the selected arbitrators shall then select a third arbitrator, who shall act as chair to the arbitration panel.

(D) The decision of the arbitrator or arbitration panel shall be binding.

~~(E) Arbitration fees shall be apportioned to each party as decided by the arbitrator.~~

(F) The arbitrator or arbitration panel must be empowered to determine the reasonable costs, if any, for which the PRO or Independent Producer must reimburse the local jurisdiction or recycling service provider pursuant to subdivision (g) of section 42051.1 of the Public Resources Code. The arbitrator or panel shall apply that provision as follows:

(i) The determination shall be made in light of all provisions of the Act relevant to reimbursing such costs, including paragraph (1) of subdivision (a) of section 42060, paragraph (1) of subdivision (j) of section 42051.1, subdivision (l) of section 42051.1 of the Public Resources Code, and all provisions affecting the costs that local jurisdictions and recycling service providers may incur.

(ii) Cost determinations shall be subject to the limitations provided in subdivision (b).

(5) Notwithstanding the foregoing, the parties to any dispute may resolve the dispute in any manner mutually agreed upon, such as through mediation and ~~mandatory~~ *binding or non-binding* arbitration under rules other than those provided in a producer responsibility plan.

(6) Nothing in this subdivision shall be construed to limit the ability of a local jurisdiction or recycling service provider to enforce the obligations of a PRO or independent producer under Section 42051.1 through a civil action in a court of competent jurisdiction, or to otherwise seek judicial review of any determination made by a PRO or independent producer, unless the local jurisdiction or recycling service provider has voluntarily elected to submit the dispute to binding arbitration.

(7) Unless otherwise agreed by the parties, dispute resolution costs shall be borne by the PRO or independent producer.

IV. Enforcement provisions jeopardize SB 54's intent that local governments be fully reimbursed for implementation costs and subject local governments to penalties for failure to collect a covered material even if the PRO or independent producer fails to reimburse local governments for the costs of collection.

RCRC remains deeply concerned that the Second Draft's enforcement provisions continue to subject local governments to penalties in inappropriate situations. This will undermine the ability for local governments and recycling service providers to obtain reimbursement from the PRO for implementation costs. At a minimum, the Second Draft should be modified to enable local jurisdictions and recycling service providers to offer defenses for why certain covered materials were not included in local collection programs. This will promote fairness and equity and avoid inappropriately shifting bargaining power to the PRO.

a. *Second Draft should be modified to delete the clause that a local government is subject to enforcement "regardless of the reason" for failure to include a covered material in its collection program.*

As currently drafted, local jurisdictions are subject to penalties for failure to include any covered material category in their collection programs *regardless of the reason* (emphasis added). (Proposed Section 18980.13(j)(2)) The clause "regardless of the reasons" will have far reaching consequences, inequitably turns a blind eye to legitimate reasons for failure to include a covered material, and inhibits the ability of local agencies and recycling service providers to secure full cost recovery.

The Second Draft imposes strict liability of up to $50,000/day and precludes local governments and recycling service providers from being able to offer legitimate affirmative defenses as to why a specific material was not included in its program. The regulations would expose local jurisdictions to penalties of up to $1.5 million/month for failure to collect covered materials even when the PRO or independent producer refuses to reimburse the local jurisdiction for implementation costs or where it offers to pay for a mere fraction of those costs. Even in this egregious case, the regulations appear to preclude local jurisdictions from offering evidence of the PRO's (or independent producer's) actions or bad faith.

Beyond this situation, there may be fires, natural disasters, work stoppages, power outages, and other causes that CalRecycle must take into consideration.[5] These occurrences at either the local jurisdiction's (or recycling service provider's) facility could preclude acceptance of covered materials at that facility.

Similarly, there may be temporary or permanent disruptions in end markets that require the local jurisdiction or recycling service provider to find alternate markets for the material. It should be noted that the Second Draft's definition of "collection" infers that the local jurisdiction or recycling service provider can find an intermediate supply chain entity that will send covered materials to a responsible end market. It is not clear that end markets exist for all covered materials nor that intermediate supply chain entities will be willing to take those materials to get them to a non-existent end market. The Second Draft exposes local governments and recycling service providers to penalties for the absence of an end market for covered materials. The Second Draft's failure to provide local governments and recycling service providers an opportunities to claim these legitimate defenses flies in the face of SB 54's intent to shift responsibility to the producers of covered materials.

b. Second Draft must be refined to clarify that penalties shall not accrue while a local jurisdiction is in the process of applying for an exemption pursuant to Section 18980.11.1.

The Second Draft modifies the circumstances in which penalties shall not accrue against local jurisdictions; however, it is not clear what effect those changes have or whether they fully address concerns about what happens while a local jurisdiction is in the process of seeking an exemption from collecting covered materials.

The Second Draft continues to state that penalties do not accrue where CalRecycle has granted an exemption or extension to the local jurisdiction or recycling service provider. Unfortunately, this does not provide relief to those entities while ***seeking***

[5] It should be noted that these types of situations are to be taken into consideration when CalRecycle evaluates whether a jurisdiction has made a good faith effort to implement its source reduction and recycling element pursuant to PRC 41825(e).

an exemption. Local agencies and recycling service providers that *are seeking* exemptions or extensions should not be subject to penalties *during the process* outlined in 14 CCR 18980.11. That process (which RCRC suggests shortening) envisions at least a 90-day period for the PRO or independent producer to review an application before it may even be considered by CalRecycle. It would be inequitable to subject a local agency or recycling service provider to penalties when they are making a good faith effort to seek an exemption from CalRecycle.

Unless modified, proposed Section 18980.13(j) would expose a local jurisdiction to more than $4.5 million in penalties for failure to include something in its collection program while the PRO or independent producer reviews the jurisdiction's exemption application. This does not count accrual of penalties while CalRecycle reviews the application. While the Second Draft no longer conditions the penalty exemption upon CalRecycle's granting of an extension or exemption, it now merely references the sections related to exemptions without specifying that penalties shall not accrue during the pendency of that application process.

Proposed Section 18980.13(j)(2) should be modified to specify that penalties shall not accrue while a local jurisdiction or recycling service provider is seeking an exemption or extension pursuant to 14 CCR 18980.11.

To address the concerns outlined in subdivisions (a) and (b), it is imperative that CalRecycle modify proposed Section 18980.13(j)(2) as follows:

> *(i) For violations of section 42060.5 of the Public Resources Code by a local jurisdiction:*
> *(1) The number of violations shall be the number of covered material categories contained ~~on the list published pursuant to~~ lists identified in subdivision (a) of section 42060.5~~(a)~~ of the Public Resources Code that are not included in their collection and recycling programs.*
> *(2) Penalties for each violation shall accrue on each day any covered material category is not included~~, regardless of the reason,~~ in their collection and recycling programs, except ~~in the case that the Department has granted an extension or exemption from the requirements pursuant to 42060.5(b) of the Public Resources Code~~ during the process ~~as~~ described in sections 18980.11.1 and 18980.11.2, upon approval of an exemption or extension, or unless the local jurisdiction is otherwise not required to include the covered material category in its collection and recycling programs under section 42060.5 of the Public Resources Code*.

c. RCRC maintains the Second Draft's enforcement scheme for local jurisdictions is unsupported by SB 54's statutory construction and can be better accomplished through other enforcement pathways.

RCRC maintains that the proposed enforcement process, as applied to local jurisdictions and recycling service providers, is unsupported by SB 54's statutory construction and can be better accomplished through other enforcement pathways.

CalRecycle's proposed regulations are predicated on the assumption that the term "any entity" in PRC 42081(a)(1) broadens the scope of its enforcement authority; however, that term should be defined in context of the other provisions included in Article 5 of SB 54. PRC 42081 seeks to interpret and implement PRC 42080 and does not vest CalRecycle with additional authority to determine what constitutes a violation of SB 54 beyond the scope of PRC 42080.

PRC 420809[6] establishes what constitutes a violation of SB 54 and provides that failure to comply with the requirements of SB 54 will subject a PRO, producer, wholesaler, or retailer to penalties for those violations or revocation of an approved plan. PRC 42081[7] in turn:

- Sets the amount of penalties;
- Provides that they shall not accrue against a PRO or producer until 30 days after notification of the violation;
- Allows a producer or PRO to submit a corrective action plan to CalRecycle for approval detailing how and when it will come into compliance with SB 54; and,
- Sets forth various factors CalRecycle shall consider when determining the penalty amount, including whether the violation was beyond the reasonable control of the producer or PRO, the size and economic condition of the producer or PRO, etc.

PRC 42083 and 42084 also allow CalRecycle to impose additional requirements on a PRO or producer for failure to meet various requirements of SB 54.

Neither PRC 42080 nor PRC 42081 contemplate penalties against local governments or recycling service providers. Sections 18980.13 and 18980.13.2 of the proposed regulations inappropriately subject local jurisdictions and recycling service providers to even more severe consequences for violations of SB 54 than apply to the PRO and producers. It is difficult to imagine the Legislature providing a more lenient compliance pathway for a producer or PRO than that which would be available to a local government, given that the law intended to shift the burden of solid waste recycling AWAY from local governments and onto producers who introduce packaging into the

[6] "(a) Failure to comply with the requirements of this chapter, including, but not limited to, failure by a PRO to implement and satisfy the requirements of its plan, shall subject a PRO, producer, wholesaler, or retailer to penalties for violations as set forth in this article or revocation of an approved plan. The department may conduct investigations, including by inspecting operations, facilities, and records of producers and PROs and by performing audits of producers and PROs, to determine whether entities are complying with the requirements of this chapter."

[7] It is important to note the construction of this section: The statute clearly provides that failure to comply with the requirements of this chapter shall subject a PRO, producer, wholesaler, or retailer to penalties for violations as set forth in the article. The clause "including, but not limited to, failure by a PRO to implement and satisfy the requirements of its plan" does not alter the scope of the entities that are subject to penalties under the enforcement chapter (PRO, producers, wholesalers, and retailers), it merely illustrates the types of things that may constitute a violation.

marketplace. Yet CalRecycle's broad reading to PRC 42081 to allow for imposition of penalties on local jurisdictions and recycling service providers does just that, by allowing producers and the PRO to develop a corrective action plan and avoid accrual of penalties for 30 days after notice of a violation. These are far more lenient enforcement processes than the inflexible approach the proposed regulation sets forth to deal with violations by local governments and recycling service providers, which seek to impose penalties regardless of the reason for the failure to include a covered material in the collection and recycling program.

Local jurisdictions are subject to AB 939's diversion requirements and must develop source reduction and recycling elements outlining how they will achieve the state's solid waste and recycling requirements. Under the AB 939 framework, CalRecycle is required to regularly review jurisdictions and determine whether they have made a good faith effort to implement their source reduction and recycling element. Considering that the PRO is responsible for reimbursing local governments for SB 54 implementation costs, failure to include all compostable and recyclable covered materials in local collection and recycling programs is a strong indication that the local jurisdiction has not made a good faith effort to implement its diversion programs. This existing process is ideal, as it affords a more wholistic review of the jurisdiction and considers whether certain extraneous factors impacted the jurisdiction's compliance, including whether the PRO failed to reimburse the jurisdiction for its implementation costs. Finally, local jurisdictions will be able to hold the recycling service providers accountable under their contractual agreements with those entities.

V. Modifications to the definition of "ratepayer" are too narrow and fail to contemplate the complexity of mechanisms through which local solid and organic waste collection and recycling services are funded.

RCRC is concerned that the Second Draft's new definition of "ratepayer" is prejudicially restrictive and fails to contemplate the number of different mechanisms through which local solid and organic waste collection and recycling services are funded. The Second Draft defines "ratepayer" to include any person who pays user fees for recycling, composting, or solid waste collection and handling services provided by a local jurisdiction and/or a recycling service provider. (Proposed Section 18980.1(a)(19)). The First Draft was much broader and included those who pay excise taxes, parcel taxes, property taxes, and solid waste facility gate fees and tipping fees.

The revised definition of ratepayer contained in the Second Draft is prejudicial to residents living in areas without curbside solid waste collection services and to those who reside in jurisdiction like Kern County. In Kern County, solid waste collection is funded by annual service charges placed on the local property tax bill. It is not clear whether these annual property tax assessments would fall under the Second Draft's definition of "user fees." Furthermore, some residents do not have curbside collection of trash and recyclables. In some areas, solid waste and recyclables are taken by the individual to

solid waste or transfer facilities where the costs of solid waste management and recycling are recovered through gate fees or tipping fees. By deleting "gate fees and tipping fees" from the definition, it is not clear whether the Second Draft's new definition would consider residents living in these areas "ratepayers."

To address these issues, we strongly suggest broadening the definition of "ratepayer" to prevent excluding large groups of the state's residents.

VI. Restrictions on disposal of covered material preclude the use of compost for its intended purpose as compost.

RCRC is deeply concerned that new additions in the Second Draft effectively preclude the use of compost for its intended purpose as a soil amendment. As drafted, Proposed Section 18980.3.5(d) deems the land application of recycled organic product to constitute disposal. Compost is a recycled organic product produced from organic waste and compostable materials. The finished product is intended to be land applied to improve soil health, water retention, and carbon sequestration.

California has spent a great deal of time and effort to promote and mandate the procurement of compost; however, the Second Draft would undermine all those efforts by deeming land application of compost to constitute disposal. The Second Draft also appears to prohibit the beneficial reuse of overs produced by compost facilities.

To address these concerns, RCRC suggests modifying Proposed Section 18980.3.5 as follows:

> For the purposes of this chapter, ~~covered material sent to one of the following facilities, operations~~, *any amount of material, such as covered material, ~~derivative material, recycled organic product~~*, ~~or~~ used ~~for one~~ in any of the following activities in or outside of the state~~,~~ shall be ~~deemed to constitute disposal of covered material:~~ *considered disposed*.
>
> ….
>
> *(e) Nothing in this section shall preclude the land application of finished compost or the beneficial use of overs from compost operations consistent with existing law.*

VII. Responsible end market criteria for recycled organic products are unrealistic, unworkable, and likely preclude any existing compost facilities in California from being considered a responsible end market.

RCRC is concerned that the responsible end market requirements for recycled organic products contained in Proposed Section 18980.4(a)(4)(B) are unworkable and will preclude any existing compost facilities in California from being considered responsible end markets.

The Second Draft requires recycled organic products to contain no covered materials or derivative materials that have not been biologically decomposed and prohibits the disposal or transfer of any quantities of undecomposed material. These terms are not defined and are not consistent with existing compost facility operations. No facility is able to fully convert 100% of compostable material into a recycled organic product. This prohibition on disposal also fails to recognize there will always be some small quantity of overs. It would be infeasible to expect a facility to reprocess all residuals and fines *ad infinitum*. These overs have traditionally been used for beneficial purposes and nothing in SB 54 appears to contemplate any changes to that authority or restrict such uses. Together, these requirements will simply exclude all facilities from the definition of "responsible end market."

RCRC suggest modifications to Proposed Section 18980.4(a)(4)(B) to address these concerns.

VIII. Substantive changes to local government/recycling service provider exemption process are helpful, but the application timeframe remains unreasonable.

RCRC previously expressed concerns about the local government/recycling service provider process articulated in the First Draft, including that the proposal improperly conflated different exemptions, contained ways in which the process could be delayed by the PRO, and objections to the timeframes proposed for notification of the PRO and submission to CalRecycle. We are pleased that the exemption process included in the Second Draft is much improved with respect to the first two concerns; however, we have lingering concerns that the timeframes involved are unnecessarily lengthy and cumbersome.

a. 90-day timeframe for PRO/independent producer review is unnecessarily lengthy.

The Second Draft requires a local jurisdiction or recycling service provider seeking an exemption to provide 90 days for the PRO or independent producer to review the application before it can be submitted to CalRecycle. (Proposed Section 18980.11.1(d)) We appreciate that the Second Draft presumes that a PRO or independent producer does not object to the application if it fails to notify the applicant within that 90-day period. At the same time, we remain concerned that the 90-day period is far longer than necessary for the PRO or independent producer to review an application. We previously suggested providing 14 days for the PRO or independent producer to review the application and maintain that a 14-day (or 30-day) review period would be much more appropriate.

b. Second Draft fails to establish a timeframe for CalRecycle's consideration and approval of an exemption request.

While proposed Section 18980.11.1(d) provides 90 days for a PRO or independent producer to review a local jurisdiction's/recycling service provider's exemption application, proposed Section 18980.11(e) provides no timeframe for CalRecycle's review and action on an application. It is unclear whether CalRecycle expects each application to be reviewed within one week, one month, or a longer period. This becomes even more important when considering that it is unclear whether local jurisdictions and recycling service providers will be subject to penalties for failure to collect covered materials while an exemption application is pending review by CalRecycle or the PRO/independent producer.

c. RCRC supports the Second Draft's implication that extension requests are deemed approved upon submission by a local government or recycling service provider.

Under proposed Section 18980.11.1(b), exemption and extension applications are treated differently. While the subdivision clearly states that exemptions become effective upon approval by CalRecycle and exempt the applicant from the collection requirement for a two year period, it notes that extensions merely delay application of the collection obligation for two years. The implication created by this regulatory construction is that a local government or recycling service provider's extension application becomes effective upon submission to (and does not require formal approval by) CalRecycle. This distinction is important and RCRC strongly supports the implied automatic approval for extensions. Automatic approval of extensions will save considerable time and resources for CalRecycle and provide much greater regulatory certainty for local jurisdictions and recycling service providers (and should ease very serious concerns about enforcement actions in the early stages of program implementation or after adding new covered material to CalRecycle's list).

To address our concerns about the review period, we suggest the following changes to proposed Section 18910.11.1(d):

*(d) No exemption application or renewal request shall be submitted to the Department until after the local jurisdiction or recycling service provider has provided all PROs and Independent Producers the application or advance notice of the renewal request. All PROs and Independent Producers shall have ~~90~~ **14** days to review an application, and ~~30~~ **7** days to review a notice of a renewal request. During the review period:*
(1) Each PRO and Independent Producer may submit comments to the applicant concerning the assertion that collection is impracticable and the relevant conditions, circumstances, and challenges.
(2) Each PRO and Independent Producer shall notify the applicant in writing whether they object to the extension sought. If a PRO or Independent Producer provides no such notice, they will be deemed not to object.

*(3) The parties may agree to extend the ~~90-~~ **14** or ~~30-day~~ **7-day** period or come to an agreement concerning the collection and recycling or composting of the covered materials or covered material categories at issue*

Alternatively, RCRC would support reducing the 90-day PRO/independent producer review period to a 30-day period and the 30-day period to review renewals to a 14-day period.

IX. New affirmative obligation to begin tracking chain of custody at the point of collection is unrealistic and should be changed to align with the definition of "intermediate supply chain entity."

The Second Draft affirmatively and unambiguously requires maintenance of chain of custody information for all materials from the point of collection to the responsible end market. RCRC is concerned that this expectation is unrealistic and will impose far greater implementation and accounting challenges than the public benefit conferred. (Proposed Sections 18980.4(a)(2) and 18980.4.2(b))

Covered materials are collected, managed, and processed in many different ways depending on the manner of collection, size of the jurisdiction, commodity involved, etc. In some cases, an individual bale of recyclable materials will move intact from the point of collection to the end market. In many other cases, recovered recyclable materials will be transferred to a processing facility that will segregate the material types and forms into individual bales. Those processing facilities may serve multiple jurisdictions, and so it is often the case that loads of materials coming into a facility will either be aggregated, segregated, or both irrespective of where those materials originated. As such, it will be difficult to accurately track chain of custody information in the granularity required by the Second Draft.

Given the difficulty of collecting this information (and risks of errors), it is unclear just what benefit would be provided by knowing that a given bale of material came from two or five or eight different listed haulers serving a number of different jurisdictions.

Furthermore, this granularity is inconsistent with the Second Draft's changes to the definition of "intermediate supply chain entity", which focuses on the first point at which those materials are processed, rather than collected.

We strongly suggest better aligning the chain of custody requirements with the new "intermediate supply chain entity" definition, as suggested in the following changes to proposed Sections 18980.4(a)(2)(A) and 18980.4.2(b):

18980.4(a)(2)(A) Maintains records establishing the full chain of custody, from the person that ~~collected~~ ***first processed the*** covered materials ***after collection*** to the end market, of all covered materials accepted by the end market for at least the past three years. Such records shall document, at a minimum, every person that took possession of the discarded

covered materials ***from the first point of*** ~~and the collection,~~ processing~~,~~ or recycling ~~activities conducted by such persons with respect to the material~~. Notwithstanding the foregoing, a PRO or Independent Producer may, in a plan or plan amendment, propose an alternative manner for establishing transparency with respect to the intermediate supply chain entities that handle the material accepted by responsible end markets. The Department shall approve the proposal if it determines that the proposed approach will provide the same or greater degree of transparency, including availability of information concerning compliance with the Act's requirements related to responsible end markets, as otherwise provided herein.

18980.4.2(b) While ~~investigating or~~ auditing a responsible end market, a PRO or Independent Producer ~~may~~ shall employ randomized material tracking for recycling pathways that accept covered material. ~~Material tracking may include, without limitation, bale tracking and tracking of intermediate products~~. For purposes of this article, material tracking means the tracking of materials from ***the first person involved in processing those materials*** ~~collection~~ to the final acceptance of the material at a responsible end market. Material tracking shall identify the following information:
(1) All entities, including intermediate supply chain entities and end markets, that take custody of or direct the handling or processing of the material ***after they have been collected***.
(2) Processing steps conducted on the material prior to acceptance at the end market.

X. Conclusion

RCRC appreciates your consideration of these comments. We look forward to continuing to work with CalRecycle on the development and implementation of SB 54. If you have any questions, please contact me at jkennedy@rcrcnet.org.

Sincerely,

JOHN KENNEDY
Senior Policy Advocate