

SB 54 Informal Rulemaking Workshop

SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations

June 29, 2023

Department of Resources Recycling and Recovery

**SB 54 Regulation Implementation Team, Packaging EPR Section,
Knowledge Integration Section**

Regulations Unit, Legal Affairs Office

**Topic: Independent Producer, Small
Producer/Retailer/Wholesaler**

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Overview and Purpose of Workshop

The Department of Resources Recycling and Recovery (CalRecycle) has scheduled a workshop on [June 29, 2023](#), from 10:00AM to 4:00PM, in the Byron Sher Auditorium, located on 2nd Floor, 1001 I Street, Sacramento, CA 95814, to consult with the public, the regulated community, and other interested persons to solicit feedback on some of the requirements outlined in [SB 54 \(Allen, Chapter 75, Statutes of 2022\)](#).

The topic of this discussion document will be on independent producers, small producers, small retailers, and small wholesalers. This topic is split into two parts:

- **Part 1** will be an informational session, providing background information on the requirements discussed in this document.
- **Part 2** will discuss several regulation concepts to solicit feedback to help prepare for the draft regulatory text.

The purpose of this document is to provide interested parties with an overall outline of what is going to be discussed and the type of feedback CalRecycle plans on soliciting in advance of the workshop. All requests for feedback or informational items to share with will be specified in a gray textbox.

This document and corresponding section of the workshop will not address the following topics:

- Needs Assessment*
- Recyclability
- Recycling Rates
- Compostability
- Responsible End Markets*
- Covered Material Category Determination
- Source Reduction*
- Enforcement
- PRO Plan*
- Budgets*
- Document submittals*
- Annual reports*

The topics above marked with (*) are topics that were covered in previous workshops, and others will be addressed at a subsequent workshop. Workshop information can be found on the SB 54 [webpage](#) under *Events*.

Part I. Background and Informational Items

A producer shall not sell, offer for sale, import, or distribute covered materials in the state unless the producer is approved to participate in the plan of a Producer

Responsibility Organization (PRO) that is approved by the department for the source reduction, collection, processing, and recycling of covered material to meet the requirements of this chapter. However, a producer is not required to join a PRO or participate in the PRO's plan and may comply individually with SB 54, provided they meet specific requirements.

Retailers and wholesalers that are not producers as defined, must also meet specific requirements of SB 54. Producers, retailers, and wholesalers that are considered "small" may be exempt from the requirements of SB 54, provided they meet certain qualifying criteria.

Abbreviations and Acronym List

- CalRecycle: California Department of Resources Recycling and Recovery
- Department: California Department of Resources Recycling and Recovery
- PRO: Producer Responsibility Organization
- PRC: Public Resources Code (California Statute)

Relevant Definitions

Listed below are the existing statutory definitions relevant to the June rulemaking workshop. CalRecycle may further refine these definitions in regulations.

Producer – PRC 42041(w)

- (1) "Producer" means 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.
- (2) If there is no person in the state who is the producer for purposes of paragraph (1), the producer of the covered material is 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. For purposes of this subdivision, a licensee is a 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.
- (3) If there is no person in the state who is the producer for purposes of paragraph (1) or (2), the producer of the covered material is the person who sells, offers for sale, or distributes the product that uses the covered material in or into the state.
- (4) "Producer" does not include a person who produces, harvests, and packages an agricultural commodity on the site where the agricultural commodity was grown or raised.
- (5) For purposes of this chapter, the sale of covered materials shall be deemed to occur in the state if the covered materials are delivered to the purchaser in the state.

Producer Responsibility Organization or PRO – PRC 42041(x)

"Producer responsibility organization" or "PRO" means an organization that is exempt from taxation under Section 501(c)(3) of the federal Internal Revenue Code of 1986 and is formed for the purpose of implementing a plan to meet the requirements of this chapter.

Producer Responsibility Plan or Plan – PRC 42041(y)

"Producer responsibility plan" or "plan," unless context requires otherwise, means the plan produced by a PRO, or by a producer that chooses to assume responsibility to comply with this chapter individually, and submitted to the advisory board and department pursuant to Section 42051.1.

Retailer or Wholesaler – PRC 42041(ae)

- (1) "Retailer" or "wholesaler" means the person or entity who sells covered material in the state to purchasers or offers to purchasers the covered material in the state through any means, including, but not limited to, any of the following:
 - (A) Remote offering, including sales outlets or catalogs.
 - (B) Electronically through the internet.
 - (C) Telephone.
 - (D) Mail.
 - (E) Direct sales
- (2) A person who sells covered material as a third-party seller using an online marketplace as described in paragraph (3) shall be considered the retailer or wholesaler for purposes of such transactions. The owner or operator of the online marketplace shall not be considered the retailer or wholesaler for such sales.
- (3) For purposes of this subdivision, "online marketplace" means a consumer-directed, electronically accessed platform in which all of the following are true:
 - (A) The platform includes features that enable third-party sellers to sell consumer products directly to consumers in the state without the owner or operator of the platform involved in the transaction other than by providing order processing, payment, storage, shipping, or delivery services.
 - (B) Third-party sellers use the features described in subparagraph (A) to sell directly to consumers in the state, with title to the consumer product passing from the third-party sellers directly to consumers and not being held by the owner or operator of the online marketplace at any point during the transaction, including upon receipt of the order and throughout the order fulfillment process.
 - (C) Except as provided by subparagraph (E), the owner or operator of the platform does not directly or indirectly control the covered material used in packaging and shipping of a consumer product in this state.
 - (D) The person or entity operating the platform has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

- (E) Third-party sellers agree, pursuant to the platform's terms and conditions or other enforceable agreement, that they will not use the platform to offer for sale, sell, or distribute into the state covered material that does not meet the requirements of this chapter.

Overview of Independent Producers

Pursuant to PRC 42051(b)(2), a producer is not required to participate in a PRO and the PRO's plan if the producer is able to demonstrate to CalRecycle several criteria, such as demonstrating reaching specific recycling rates and source reduction goals. In addition to the recycling rate and source reduction goals, an independent product must also:

- Develop and implement a producer responsibility plan that meets all applicable requirements, including a source reduction plan that meets all of the applicable requirements of a PRO source reduction plan.
- Fully cover costs based on the producer's share of covered material.
- Annually report sales, recycling, composting and source reduction data to CalRecycle.

Overview of Small Producers, Retailers, and Wholesalers

The term small producer, small retailers, and small wholesalers is introduced in PRC Section 42060(a)(5), which requires CalRecycle to develop a process to exempt these entities based on size, revenue, number of retail locations, and market shares. Producers shall comply with the requirements of SB 54, either by joining with a PRO or comply individually. Retailers and wholesalers who are not by definition, producers, will be required to register with the department and meet reporting requirements pursuant to 42060(a)(2).

PRC Section 42060(a)(5)(B) states that CalRecycle shall exempt producers, retailers, or wholesalers with gross sales of less than \$1,000,000 in the state, in the most recent calendar year. However, if an exemption on a small producer, small retailer, or small wholesale hinders the ability of a type of covered material or covered material category from complying with SB 54, then CalRecycle may determine that an exemption will not be granted.

Part II. Workshop of Regulation Concepts

Regulation Concepts:

The rulemaking process is for implementing, interpreting, or making specific statutes the department administers or enforces. Generally, the rulemaking process must follow the requirements of the Administrative Procedures Act, commencing with Government Code section 11340. Currently, CalRecycle is in the period of public participation prior to the publication of the Notice of Proposed Regulatory Action. This means CalRecycle is

informally seeking feedback on proposed regulatory concepts for consideration when drafting proposed regulations to implement, interpret, or make specific provisions of SB 54 necessary for the Department's implementation of its provisions.

CalRecycle would like to solicit initial feedback on regulatory concepts pertaining to independent producers and small producers, small retailers, and small wholesalers. The regulation concepts discussed in this workshop include:

- IP Item 1 – Definition of Independent Producer
- IP Item 2 – Application for Individual Compliance
- SPRW Item 1 – Definition of Small Producer, Small Retailer, and Small Wholesaler
- SPRW Item 2 – Exemptions for Small Producer, Small Retailer, and Small Wholesaler

We welcome written feedback and suggestions on the proposed concepts. Guidance for providing written feedback is specified on page 11.

IP Item 1: Definition of Independent Producer

Statute Sections: PRC 42051(b)(2)

(A) Notwithstanding paragraph (1), a producer may comply with this chapter individually without participating in a PRO's plan if the producer can demonstrate to the department, and the department determines at its sole discretion, that the producer meets all of the following criteria or can demonstrate 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:

(i) From the 2013 calendar year to the 2022 calendar year, inclusive, the producer achieved a net 5 percent or greater source reduction of its covered materials through shifting to refill, reuse, or elimination.

(ii) From the 2013 calendar year to the 2022 calendar year, inclusive, the producer achieved a net 8 percent or greater source reduction of its covered materials through optimization, concentration, rightsizing, bulking, shifting to a nonplastic packaging, or lightweighting, or increasing the number of consumer uses.

(iii) Seventy-five percent of the producer's covered material sold, offered for sale, distributed, or imported into the state is in a covered material category that meets a 30-percent recycling rate as of January 1, 2023.

(B) A producer who chooses to comply with this chapter individually shall assume individual responsibility for complying with this chapter, including, but not limited to, all of the following:

(i) Develop and implement a plan that meets all of the applicable requirements of a producer responsibility plan, including, but not limited to,

the review, update, and approval process. The plan shall include a producer source reduction plan that meets all of the applicable requirements of a PRO source reduction plan prepared in accordance with subdivision (d) of Section 42057, including, but not limited to, the review, update, and approval process.

(ii) Fully cover the costs associated with implementing this chapter to the same extent as any other producer participating in a PRO based on the producer's share of covered material.

(iii) Annually report sales, recycling, composting, and source reduction data to the department pursuant to Sections 42052 and 42057 in a manner determined by the department.

Regulation Concept:

Producers that choose to comply individually with SB 54 requirements are not specifically defined. CalRecycle seeking to define these entities in order to establish specific requirements for demonstrating compliance. CalRecycle proposes to call these entities *Independent Producers* and shall be defined as follows:

“Independent Producer” means a producer as defined in PRC Section 42041(w) that chooses to comply with the requirements of this chapter independently from an approved Producer Responsibility Organization.

Request:

CalRecycle is seeking feedback on the proposed concept to call these entities an *Independent Producer* and define them using the proposed definition.

IP Item 2: Application for Individual Compliance

Statute Sections: PRC Section 42051(b)(2)

Please refer to IP Item 1 for statute section.

Regulation Concept:

CalRecycle proposes promulgating regulations to require an independent producer to apply for individual compliance through an application process in order to demonstrate how it meets those requirements of PRC Section 42051(b)(2) and provide additional information, such as financial assurance information (at minimum).

At the minimum, the application shall include the following:

- Producer information (name, address, types of covered materials represented, etc.)

- Financial Assurance Information (demonstration of adequate financial responsibility and financial controls in place, etc.)
- Requirements specified in PRC 42051(b):
 - A. How the independent producer, prior to January 1, 2027, can demonstrate a recycling rate of 65 percent for three consecutive years.
 - B. How the independent producer, on or after January 1, 2027, can demonstrate a recycling rate of 70 percent annually.
 - C. How the independent producer, from the 2013 calendar year to the 2022 calendar year, inclusive, the producer achieved a net 5 percent or greater source reduction of its covered materials through shifting to refill, reuse, or elimination.
 - D. How the independent producer, from the 2013 calendar year to the 2022 calendar year, inclusive, the producer achieved a net 8 percent or greater source reduction of its covered materials through optimization, concentration, right-sizing, bulking, shifting to a nonplastic packaging, or lightweighting, or increasing the number of consumer uses.
 - E. How the independent producer demonstrates seventy-five percent of the producer's covered material sold, offered for sale, distributed, or imported into the state is in a covered material category that meets a 30-percent recycling rate as of January 1, 2023

An independent producer whose application is accepted or approved will be regulated separately from the PRO for compliance with this chapter.

An independent producer whose application is rejected will be considered out of compliance with the requirements of this chapter unless it joins the approved PRO.

Request:

CalRecycle is seeking feedback on the proposed concept to develop an application for individual compliance along with the required information.

SPRW Item 1: Definition of Small Producer/Retailer/Wholesaler

Statute Sections: PRC Section 42060(a)(5)

(5) The department shall establish a process to exempt from the requirements of this chapter, except for the requirements of subdivision (b) of Section 42050, small producers, small retailers, and small wholesalers based on size, revenue, number of retail locations, and market share, as follows:

(A) Subject to subparagraph (B), the department shall exempt producers, retailers, or wholesalers that, in the most recent calendar year, had gross sales of less than one million dollars (\$1,000,000) in the state.

(B) If the department determines that exempting a particular small producer, small retailer, or small wholesaler pursuant to subparagraph (A) would hinder the ability of a type of covered material or covered material

category from complying with the requirements of this chapter, the department may determine that the particular small producer, small retailer, or small wholesaler will not be exempted from the requirements of this chapter.

Regulation Concept:

SB 54 makes reference to small producers, retailers and wholesalers but does not specifically define these entities. CalRecycle proposes to promulgate regulations to define these terms in order to develop specific requirements for compliance to regulate these entities [pursuant to PRC Section 42050(b)] and potentially exempt them from the rest of the requirements of this chapter. CalRecycle proposes the following definitions:

- 1) Small Producer: “Small producer” means a producer as defined in PRC Section 42041(w) that in the most recent calendar year, had gross sales of less than one million dollars (\$1,000,000) in the state.
- 2) Small Retailer: “Small retailer” means a retailer as defined in PRC Section 42041(ae) that in the most recent calendar year, had gross sales of less than one million dollars (\$1,000,000) in the state.
- 3) Small Wholesaler: “Small wholesaler” means a wholesaler as defined in PRC Section 42041(ae) that in the most recent calendar year, had gross sales of less than one million dollars (\$1,000,000) in the state.

Request:

CalRecycle is seeking feedback on the proposed concept to define the terms small producer, small retailer, and small wholesaler.

SPRW Item 2: Exemptions for Small Producer, Small Retailer, and Small Wholesaler

Statute Sections: PRC Section 42060(a)(5)

Please refer to SPRW Item 1 for statute section.

Regulation Concept:

PRC Section 42060 requires CalRecycle to establish a process to exempt these entities from the requirements of this chapter based on size, revenue, number of retail locations, and market share. CalRecycle will promulgate regulations to develop a process for these entities to apply for an exemption from SB 54 requirements [except from PRC Section 42050(b)].

The exemption process includes the following:

- The entity applying for a specific exemption based will require the specific entity applying for the exemption to demonstrate the following:

- 1) The small producer, small retailer, or small wholesaler meets the definition of small producer, small retailer, or small wholesaler based on the proposed definitions specified in Item 3.
- 2) The small producer, small retailer or small wholesaler shall demonstrate that in the recent calendar year, had gross sales of less than one million dollars (\$1,000,000) in the state. The small retailer shall meet this requirement by providing documentation including but not limited to, financial records, or any additional documentation requested by the Department.
 - An exemption implemented pursuant to this subdivision shall be valid up to one year after the Department makes a determination.
 - An exemption may be extended for an additional year, provided the exempt entity demonstrates to the Department that the requirements are still being met.
 - An exempt entity that no longer meets the requirements to be considered exempt shall meet the requirements of SB 54.
 - Pursuant to PRC Section 42060(a)(5)(B), CalRecycle may deny an application for an exemption if exempting a particular small producer, small retailer, or small wholesaler pursuant to subparagraph (A) would hinder the ability of a type of covered material or covered material category from complying with the requirements of this chapter.

Request:

CalRecycle is seeking feedback on the proposed concept that develops an application process for small producers/retailers/wholesales to be exempt from SB 54 requirements along with the specific criteria for meeting this exemption.

Process for Submitting Written Feedback

CalRecycle has developed a process for requesting written feedback or questions from interested parties. While this process is not a specific requirement, CalRecycle requests all written feedback and questions to be submitted using the specified format below, for the purposes of maintaining consistency in the way in which the information is received, and to aid with expedited review and processing. All written feedback can be submitted to packaging@calrecycle.ca.gov with the subject line: *SB 54 Plastic Pollution Prevention and Packaging Producer Responsibility Act Regulations*. Written feedback can be provided prior to the workshop and after. CalRecycle requests all feedback specific to the June 29, 2023, Workshop is submitted no later than **July 13, 2023**. Preferred formats include e-mail, .docx and PDF.

Requested Feedback on Specific Regulation Concepts:

When providing feedback or asking questions on a specific regulation concept, please include (1) the Item Number [e.g., Item 1, Item 2], including the specific title, (2) feedback or questions related to that regulation concept. For example, when providing feedback on *Item 1 – Definition of Independent Producer*, the preferred format would be:

Item 1 – Definition of Independent Producer
Specific feedback related to this item...

This process can be repeated for each regulation concept an interested party wants to address. All feedback and questions can be included in the same email or document.

Questions or Feedback for Specific Public Resources Code (PRC) Sections:

When providing feedback or asking questions on a specific section in the statute, please include (1) the full section number, including any subsections associated with it, (2) feedback or questions related to that section. For example:

PRC 42051.1(b)(3)
Specific feedback or question related to this section...

This process can be repeated for each section an interested party wants to address. All feedback and questions can be included in the same email or document.

General Questions or Comments:

When asking general questions or providing general comments on topics related to this workshop that do not focus on a specific regulation concept or specific PRC section, please list each question and comment in numerical order:

Question 1: *General question on this discussion document*
Question 2: *General question on this discussion document*
Comment 1: *General comment on this discussion document*