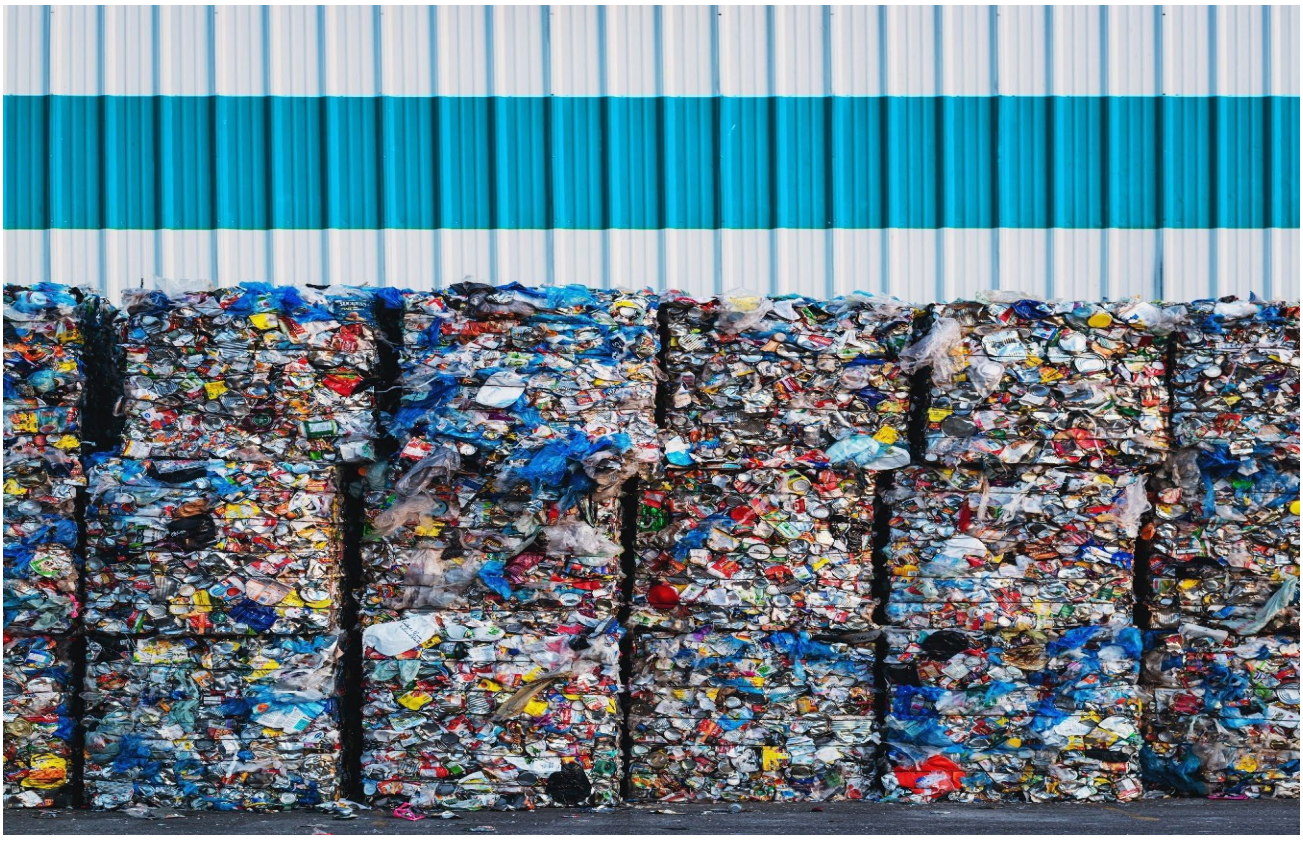
King & Spalding

All Wrapped Up
Extended Producer Responsibility for Packaging

Special Edition – March 24, 2025

In this special edition of *All Wrapped Up*, we discuss BREAKING NEWS in California – an 11th hour decision by Gov. Gavin Newsom to deliver a mulligan to CalRecycle on the SB 54 rulemaking.



A Failure to Launch

The future of packaging EPR in California is increasingly uncertain. On March 7, Gov. Gavin Newsom sent CalRecycle back to the drawing board on the SB 54 rulemaking. After two years in the making, his office announced: "The Governor is directing CalRecycle to restart these regulations to ensure California's bold recycling law can achieve its goal of cutting plastic pollution and is implemented fairly — minimizing costs for small businesses and working families as much as possible." The *Los Angeles Times* broke the story three weeks prior via an article entitled "California banned polystyrene. Has the plastic industry spooked the governor into silence?" The article discussed a potential "behind-the-scenes" battle being waged by plastic manufacturers and producers to derail California SB 54. It spoke of efforts by industry stakeholders to pressure Gov. Newsom to disregard the March 8 rulemaking deadline and to direct CalRecycle to start the rulemaking all over again.[1] Lawmakers and environmental groups have raised concerns that starting over is the first step in a concerted effort by industry to kill SB 54 altogether.

It remains to be seen whether Gov. Newsom's decision is much-ado-about-nothing or a significant and impactful development that will threaten packaging EPR not only in California but everywhere else. Some FAQs:

- ***What should we read into the silence from Gov. Newsom's office?***

  SB 54's prohibition on the sale and distribution of polystyrene food service ware took effect January 1, without a word from his office or CalRecycle.[2] We expected the state to trumpet this historic milestone as part of the rollout of SB 54. The state's silence calls into question whether there was ever any intent to enforce SB 54 as the rulemaking stood at the end of 2024. This was also the second of two January 1 deadlines that CalRecycle missed without any apparent repercussions. Notably, relative to other provisions in SB 54, the polystyrene ban would disproportionately impact small businesses, including local restaurants that have not transitioned to more sustainable food ware, unlike many of the larger restaurant chains that have.

- ***What does the impact of a rulemaking restart have on the statute?***

  There is nothing in this or any other rulemaking that can supersede a statutory mandate. The deadlines in SB 54 for source reduction and recycling rates that apply to plastic covered material remain governing law in California. Any revisions to these deadlines would have to be through new legislation. That noted, a lengthy delay may render it impossible to meet the

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[1] Although CalRecycle had already missed a January 1 deadline to finalize its rulemaking pursuant to a provision in SB 54, *i.e.*, CAL. PUB. RES. CODE § 42060(a), the March 8 deadline is a function of a separate provision in California's pre-existing Government Code, requiring rules to be finalized within one year after being initially proposed. CAL. GOV. CODE § 11346.4(b). By statute, missing this second deadline would require CalRecycle to restart the clock.

[2] *See* CAL. PUB. RES. CODE § 42057(i) (prohibiting the sale and distribution of expanded polystyrene food service ware unless the producer demonstrates that it meets a 25% recycling rate as of January 1, 2025). Several months prior, CalRecycle issued a notification to producers of this upcoming deadline. *See* CalRecycle, *SB 54 Notification Regarding Demonstration of Expanded Polystyrene* (Sept. 11, 2024), https://www2.calrecycle.ca.gov/Docs/Web/128934?utm_medium=email&utm_source=govdelivery.

statutory deadlines, requiring new legislation to adjust them. Notably, CalRecycle declined an offer made by a Senate budget subcommittee on March 20 to pass such legislation, asserting that all of the statutory deadlines remain on track.

- ***What factors inform how long the new rulemaking will take?***

  (1) *The Law*

  There are several statutory deadlines set forth in SB 54 requiring a rulemaking to be completed in advance. Most notably: producers will be prohibited from selling or distributing covered materials unless they are participating in an approved PRO plan by January 1, 2027; the initial source reduction deadline is also January 1, 2027; and the first $500,000,000 environmental mitigation surcharge, which will be based on each producer's market share, will be levied commencing in the 2027 calendar year.

  (2) *Politics*

  In signing SB 54 into law, Gov. Newsom touted the law as "holding polluters responsible and cutting plastics at the source." SB 54 is the most sweeping EPR law in U.S. history, and California is the world's 5th largest economy. All eyes are on California. Failure to implement SB 54 may have serious political implications. Gov. Newsom is also widely considered to be a leading contender for the 2028 Democratic presidential nomination.

  (3) *More Politics*

  SB 54 was the result of a compromise with proponents of a competing ballot measure that would have imposed far more onerous requirements on plastic manufacturers and producers. Failure to timely implement SB 54 may lead to a reintroduction of this ballot measure or to a new ballot measure with even more stringent requirements. To this end, on March 21, a SB 54 Advisory Board member suggested his time was better spent "working on the ballot measure" as opposed to the new rulemaking, prompting a second Board member to ask others to "stop the threats of the ballot measure."

- ***How quickly could we see a final rule adopted?***

  CalRecycle has refused to provide a timeline for the new rulemaking despite somewhat heated interrogations by the SB 54 Advisory Board and the Senate Budget and Fiscal Review Subcommittee on Resources, Environmental Protection and Energy. CalRecycle advised the SB 54 Advisory Boad on March 21 that it had a "nice draft" to work from and will not be starting over. Given all of the work and stakeholder engagement that led up to the current draft, it seems reasonable to assume that much (if not the vast majority) of the current draft's infrastructure will be carried over into the new rulemaking. If CalRecycle can address whatever is driving the impetus for the delay in a single 45-day public notice and comment period, then it remains entirely possible that the rule could be finalized as early as this summer. Although anecdotal, Senator Ben Allen, the bill's sponsor, indicated that he had "privately" heard that the process would take 90 days.

  The timing may also be affected by CAL. GOV. CODE § 11346.3, which requires an agency proposing a major regulation to prepare a standardized regulatory impact assessment to "assess the potential for adverse economic impact on California business enterprises and individuals." CAL. CODE REGS. tit. 1, § 2002 requires the agency to complete this assessment at least 60 or 90 days prior to issuance of the proposed rule. (The period is 60

days if the Department of Finance was provided advanced notice of the rulemaking; the period is 90 days, if not.) Although CalRecycle already went through this exercise for the first rulemaking, it is reasonable to assume that it will need to generate some kind of a revised impact assessment, particularly in view of Gov. Newsom's ostensible concerns with costs. It remains unclear, however, whether this second assessment must comport with one of the time periods set forth in CAL. CODE REGS. tit. 1, § 2002.

- ***Are cost concerns the impetus for the restart?***

Several of the concerns raised by industry relate to the estimated financial impacts of the draft rule. The rule's initial regulatory impact assessment, dated December 2023, estimated that the total cost per household would be $329 annually, which amounts to *less than $1 a day*. Increased costs to producers would be expected to be passed along to consumers, *i.e.*, there would be no costs to producers and still less than $1-a-day per household. Even this $1-a-day projection was expected to be mitigated by estimated increases in personal income and additional health and environmental benefits. In December 2024, industry petitioners warned Gov. Newsom that "the true cost to consumers could be several multiples of that number annually, as well as very significant costs to producers." These petitioners, however, provided no examples of what aspects of the post-December 2023 revisions would actually increase costs to consumers. Gov. Newsom's office has not identified anything specific, either. Nor does an independent review of the post-December 2023 revisions necessarily compel the conclusion that they would increase costs to consumers by "several multitudes." All of this raises a legitimate question of whether the push for the delay is really about costs or about something else entirely.

- ***What might we see in a new rule?***

There may not be much new in the "new" rulemaking, although we expect to see some accommodations made to placate industry stakeholders, perhaps in response to comments submitted on the prior draft rule. We also expect to see some revisions in an effort to reduce costs, whether or not increased costs were the impetus for the restart.

(1) *Paper with less than 20% plastic may no longer be a plastic covered material.*

CalRecycle may consider a scenario outlined in the regulatory impact assessment that was projected to reduce the overall program implementation cost of $36.3 billion to $25.3 billion. This alternative would allow covered materials composed mostly of paper to contain less than 20% plastic by weight without being categorized as plastic covered material. One question presented is whether this alternative would allow PFAS in paper products to escape source reduction and recycling rate targets prior to 2032, which is when the total ban on PFAS in packaging takes effect.[3]

(2) *Material made with less than a certain amount of plastic may no longer be considered a plastic component.*

CalRecycle may revisit what constitutes *de minimis* levels of plastic in plastic components. SB 54 defines "plastic component" to mean any single piece of covered material "made partially or entirely of plastic," but left the definition of "partially" to the rulemaking. After CalRecycle failed to address the issue in the first draft of the rulemaking, several industry stakeholders filed comments seeking a *de minimis* level,

[3] CAL. PUB. RES. CODE § 42061(c) → CAL. PUB. RES. CODE § 42355.51(d)(3)(D) → CAL. PUB. RES. CODE § 42050(b).

i.e., a level of plastic below "partially" that would fall outside the scope of the source reduction and recycling rate targets. In response, CalRecycle included a qualitative *de minimis* threshold: the plastic component must not (a) be an independent component; (b) affect recyclability criteria; (c) have a characteristic that prevents recyclability or compostability; (d) be used in a manner that is inconsistent with the state's goals of reducing waste and increasing recycling and composting; or (e) create health or safety risks or have a significant effect on the environment. The industry stakeholders, however, continued to press for more clarity, seeking a quantitative *de minimis* threshold "that aligns with industry standards at 20% of the total packaging or food service ware weight or, at minimum, 15% consistent with European Union standards for fiber-based materials." CalRecycle declined to adopt a quantitative threshold in the last iteration of the rule and left in the qualitative threshold. This is a complicated issue: a qualitative threshold does not appear to be particularly workable, whereas a quantitative threshold may introduce additional contaminants into the recycling system.

(3) *The SB 54 statutory exclusions may be extended to include all secondary and tertiary packaging*.

CalRecycle may reverse course on its position that the statutory exclusions from covered material do not extend to all secondary and tertiary packaging. SB 54 clearly defines "packaging" as including primary, secondary, and tertiary packaging in CAL. PUB. RES. CODE § 42041(s). SB 54 contains several categorical exclusions in CAL. PUB. RES. CODE § 42041(e)(2), including, but not limited to, "[p]ackaging used for" medical products and products defined as devices or prescription drugs, as specified in the Food, Drug, and Cosmetic Act; medical products and drugs used for animals; infant formula; medical food; and oral nutritional supplements (collectively, the "medical exclusions"). The proposed rule recognized that these exclusions extend to primary packaging, but limited them with respect to secondary and tertiary packaging. Secondary and tertiary packaging for these products was only excluded if "necessary to satisfy health and safety or legal requirements directly related to the good." The life sciences industry rightfully argued that the "proposed limitation ignores the clarity and unambiguity of the relevant portions of the enacting legislation" and that "[t]he text of the law is clear - all packaging for medical products and devices are exempt." Despite repeated comments in response to multiple drafts, CalRecycle refused to remove the limitation.

For reasons that are unclear, the proposed rule did not similarly limit the exclusions for several other products that we would have expected to be addressed in a consistent manner, including, but not limited to, "[p]ackaging used to contain products" regulated by the Federal Insecticide, Fungicide, and Rodenticide Act; "[p]ackaging used to contain" hazardous or flammable products classified by the Occupational Safety and Health Administration Hazard Communication Standard; and "[p]ackaging associated with" paint products. The statute excludes packaging for these products in essentially the same manner as it does for the medical exclusions. CalRecycle elected not to address this inconsistency despite comments raised by CAA during both the second and final rounds of public comment:

> CAA appreciates that CalRecycle made changes to clarify under which circumstances secondary and tertiary packaging from products that are exempted under PRC 42041(e)(2)(A) would be considered covered materials. Nevertheless, it remains unclear why paragraphs (3) and (4) of

subdivision (b) in Section 18980.2 are limited to products listed under PRC 42041(e)(2)(A), and not equally applicable to the secondary and tertiary packaging associated with products excluded/exempted under the following subparagraphs of PRC 42041(e)(2): PRC 42041(e)(2)(B) PRC 42041(e)(2)(C) PRC 42041(e)(2)(D) PRC 42041(e)(2)(E) PRC 42041(e)(2)(F) PRC 42041(e)(2)(G).

Whereas the life sciences industry argued that the medical exclusions should extend to all secondary and tertiary packaging, CAA argued that the proposed limitation on the medical exclusions should extend to all of the other statutory exclusions for packaging. As it stands, producers are left without clarity as to whether or to what extent CalRecycle will attempt to regulate secondary and tertiary packaging for otherwise "categorically" excluded materials.

- ***Will CAA delay the August 31, 2025 data reporting and individual source reduction plan deadline?***

CAA originally requested producers to submit data and individual source reduction plans by August 31, 2025. During a March 11 webinar, CAA indicated that it is still seeking producer data by August 31, but that it may host "consultation sessions" in August and September instead of requiring the submission of individual source reduction plans by August 31. CAA's comprehensive source reduction plan, which is based off the individual plans, must be submitted as part of its PRO plan pursuant to CAL. PUB. RES. CODE § 42051.1(b)(2). The draft rule indicated that the PRO plan will be due April 1, 2026, but this date is now subject to the new rulemaking. The PRO plan submission date will likely not be extended much past April 1, 2026, if at all, without a legislative amendment. By statute, the PRO plan must be implemented by January 1, 2027.

King & Spalding + Extended Producer Responsibility

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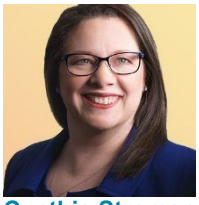

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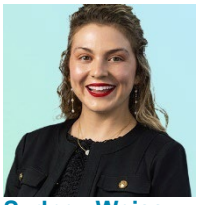

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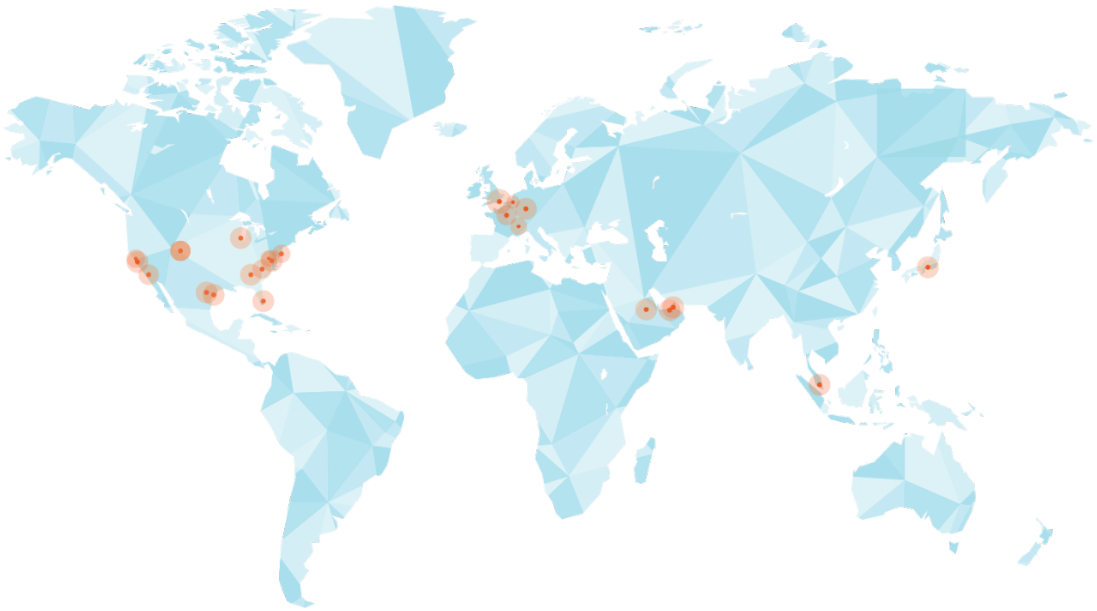

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