

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2784 (Ting)
Version: May 19, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

Solid waste: thermoform plastic containers: postconsumer thermoform recycled plastic

DIGEST

The bill establishes minimum recycled content requirements for thermoform plastic containers, as specified.

EXECUTIVE SUMMARY

The United States, including California, has not developed the infrastructure necessary to recycle meaningful volumes of plastic or satisfy the market demand for recycled plastic. In 2020, the Legislature passed, and the Governor signed, AB 793 (Ting, Ch. 115, Stats. 2020), which requires certain beverage manufacturers to include specified levels of recycled plastic in their bottles, with the goal of encouraging beverage manufacturers to develop the necessary infrastructure to meet the required recycled content levels. This bill follows up on AB 793 by requiring food and beverage producers of thermoform plastic containers (such as the “clamshell” containers used to hold berries, and other similar molded plastic containers) to, starting in 2025, include specified levels of plastic recycled from other thermoform containers, with the goal of encouraging users of thermoform containers to develop a separate recycling stream for that type of plastic. This bill also imposes certain reporting requirements on thermoform container food and beverage producers, and provides that thermoform food and beverage producers are exempt from certain antitrust and anti-competitive behavior laws so that they can work together to build the needed recycling infrastructure and streams.

This bill is sponsored by rPlanet Earth and supported by a number of environmental organizations. It is opposed by a number of plastic industry, beverage industry, and food and beverage producer organizations. This bill passed out of the Senate Environmental Quality Committee with a vote of 5 to 2.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the California Beverage Container Recycling and Litter Reduction Act (Bottle Bill), which requires beverage containers sold in this state to have a California redemption value (CRV) of 5 cents for containers that hold fewer than 24 ounces and 10 cents for containers that hold 24 ounces or more and requires a distributor to pay a redemption payment to CalRecycle. (Pub. Res. Code, div. 12.1, §§ 14500 et seq.)
- 2) Establishes the Integrated Waste Management Act of 1989, which establishes a state recycling goal of 75 percent of solid waste to be diverted from landfill disposal through source reduction, recycling, and composting. (Pub. Res. Code, div. 30, pt. 1, §§ 40000 et seq.)
- 3) Establishes the California Beverage Container Recycling and Litter Reduction Act, which sets recycled-content requirements for glass food and beverage containers manufactured in the state and, starting on January 1, 2022, escalating recycled-content requirements for plastic beverage containers subject to the CRV for sale in the state. (Pub. Res. Code, §§ 14547, 14549.)
- 4) Establishes the Rigid Plastic Packaging Container Law, which applies certain recycling-content requirements on specified rigid plastic containers. (Pub. Res. Code, § 42310.)
- 5) Recognizes that “[t]he people have the right of access to information concerning the conduct of the people’s business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny,” and provides in the California Public Records Act (CPRA) that all public agency records are open to public inspection unless otherwise exempt from public disclosure. (Cal. Const., art. I, § 3(b)(1); Gov. Code, tit. 1, div. 7, ch. 3.5, §§ 6250.)
- 6) Creates an exemption to disclosure under the CPRA for trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1060.)
- 7) Defines trade secrets exempt from disclosure as information, including a formula, pattern, compilation, program, device, method, technique, or process that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Gov. Code, § 6254(k); Evid. Code, § 1060; Civ. Code, § 3426.1; Pen. Code, § 499c.)

- 8) Establishes the Cartwright Act, which declares that every trust is unlawful, against public policy, and void. (Bus. & Prof. Code, div. 7, pt. 2, ch. 2, §§ 16700 et seq.)
 - a) A “trust” is any combination of capital, skill, or acts by two or more persons for the purposes of:
 - i. Creating or carrying out restrictions in trade or commerce.
 - ii. Limiting or reducing the production, or increasing the price of, merchandise or any commodity.
 - iii. Preventing competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity.
 - iv. Fixing any standard or figure in a way that creates a set or controlled price to the public for any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in the state.
 - v. Making, entering into, executing, or carrying out contracts or other agreements by which the parties agree not to sell products below a certain price, keep the price of articles at a fixed or graduated figure, establish or settle the price of any article so as to preclude competition, or to pool any interests in a way that affects the price of an article. (Bus. & Prof. Code, § 16720.)

- 9) Establishes the Unfair Practices Act, which is intended to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented, and prohibits the following practices when committed with the purpose of destroying competition or injuring competitors:
 - a) Creating locality discriminations.
 - b) Selling any article at less than the cost, or giving away an article.
 - c) Secretly paying or allowing rebates, refunds, commissions, or unearned discounts, or secretly extending to certain purchasers special services or privileges not extended to all purchasers on like terms and conditions.
 - d) Soliciting any of the above practices.
 - e) Jointly colluding with other manufacturers, wholesalers, distributors, or other vendors or agents to effectuate the above practices. (Bus. & Prof. Code, div. 4, pt. 2, ch. 4, §§ 17000 et seq.)

This bill:

- 1) Defines the following relevant terms:
 - a) “Food or beverage food and beverage producer” is a person who fills thermoform plastic containers, or imports filled thermoform plastic containers, for sale to distributors, dealers, or consumers.
 - b) “Postconsumer thermoform recycled plastic” is plastic produced from the recovery, separation, collection, and reprocessing of a thermoform container

that would otherwise be disposed of or processed as waste after consumer use.

- c) "Thermoform plastic container" is a food or beverage plastic container such as a clamshell, drinking cup, pod, tub, lid, box, tray, egg carton, or other rigid, nonbottle packaging, formed from sheets of extruded resin and used to package items such as fresh produce, baked goods, nuts, deli items and nonbottle beverages. The term does not include:
 - i. A lid or seal made of a different type of plastic.
 - ii. Thermoform containers that are medical devices or products.
 - iii. A refillable container that would ordinarily be returned to the manufacturer to be refilled and resold.
 - iv. A plastic beverage container subject to the California Beverage Container Recycling and Litter Reduction Act.
 - v. A thermoform container of a resin type for which the total amount of the type sold in California is either (1) less than 1,000,000 pounds for a resin type other than expanded polystyrene, or less than 40,000 pounds of expanded polystyrene.
 - vi. A thermoform container that is designed to be, and eligible to be labeled as, compostable.
- 2) Requires that the total of the thermoform containers, as defined, offered for sale, sold, distributed, or imported in or into the state by a food or beverage food and beverage producer must the following average content requirements, averaged across the total number of containers:
- a) Beginning January 1, 2025, no less than 10 percent postconsumer recycled plastic per year.
 - b) Beginning June 1, 2027, either:
 - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or exceeds 50 percent for the year 2026; or
 - ii. No less than 25 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 50 percent for the year 2026.
 - c) Beginning July 1, 2030, either:
 - i. No less than 20 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is equal to or greater than 75 percent for the year 2029; or
 - ii. No less than 30 percent postconsumer thermoform recycled plastic per year, if the recycling rate for each resin type of thermoform container is less than 75 percent for calendar year 2029.
- 3) Requires CalRecycle to determine the recycling rate for each resin type of thermoform container for purposes of the requirements, and to consider reports

submitted by recycling operations, information from food and beverage producers, and any other relevant information received.

- 4) Provides that, beginning January 1, 2025, a food and beverage producer that does not meet the minimum postconsumer thermoform plastic content shall be subject to a penalty, which will begin to be collected annually on March 1, 2026 unless a reduction has been approved. A food and beverage producer assessed penalties may receive a payment plan, subject to approval, and CalRecycle may grant a one-time extension for payment if certain emergencies occur.
- 5) Requires CalRecycle to assess the administrative penalty by calculating the amount in pounds in the aggregate of virgin and postconsumer thermoform recycled plastic used by the food and beverage producer to produce thermoform plastic containers sold or offered for sale in the state; the penalty shall be assessed by calculating the difference between the content of postconsumer recycled plastic the food and beverage producer should have used and the amount actually used, and charging either \$.20 or \$1.00 per pound of the difference, depending on the type of plastic.
- 6) Authorizes CalRecycle to conduct audits and investigations and take enforcement actions as necessary for compliance. CalRecycle must keep confidential all business trade secrets and proprietary information about manufacturing processes and equipment gathered during the course of an audit or investigation, and business trade secrets and proprietary information that meet the definition in Section 3426.1 of the Civil Code are exempt from disclosure under the CPRA.
- 7) Permits CalRecycle to consider granting a reduction of the administrative penalties provided above based on the presence of anomalous market conditions, disruption in or lack of supply of recycled plastic due to unforeseen circumstances or event, or if the recycling rate is 60 percent or higher and there is a lack of supply due to purchases from other industries.
 - a) In order to receive a reduction, a food and beverage producer must submit to CalRecycle a corrective action plan explaining its failure to satisfy the postconsumer recycled plastic requirements and the steps the food and beverage producer will take to meet the requirements next year.
 - b) A corrective action plan approved by CalRecycle will include a compliance deadline and any additional penalties that may be imposed if the food and beverage producer fails to comply.
- 8) Creates the Thermoform Recycling Enhancement Penalty Account in the State Treasury and provides that the penalties described above shall be deposited therein.
- 9) Requires food and beverage producers to annually report to CalRecycle the amount in pounds and by resin type of virgin plastic and postconsumer thermoform recycled plastic used to manufacture the thermoform plastic containers sold or

offered for sale in the state in the previous calendar year; and requires CalRecycle to post the collected information on its website.

- 10) Requires an importer or manufacturer of a thermoform plastic container that first sells the container in or into the state, and that exceeds specified annual sales volumes, to register with, and pay a registration fee to, CalRecycle, and file annual reports relating to the volume of containers it sells into the state and the amount of PCR contained in those containers.
- 11) Requires an entity that purchases at least a specified volume of thermoform plastic containers in the state, to satisfy the above-described PCR content requirements or provide documentation establishing that the portion of the containers not exported out of the state satisfied the above-described PCR content requirements; and maintain records of purchases as required by CalRecycle. If an entity exports a specified volume or more from the state on an annual basis, it must report to CalRecycle the total pounds of exported plastic by resin type.
- 12) Provides that the following acts done pursuant to the thermoform PCR requirements do not violate the Cartwright Act or the Unfair Practices Act:
 - a) Acts taken solely to increase the collection, processing, and recycling of scrap plastic materials by a food and beverage producer that affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
 - b) The formation of a nonprofit organization that may include two or more food and beverage producers and that establishes specifications for different grades or classifications of thermoform plastics, which may affect the scrap value of those grades or classifications, the quantity or quality of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
- 13) Provides that the exemption to the Cartwright and Unfair Practices Acts set forth in item 11) above does not apply to any agreement between two or more food and beverage producers establishing or affecting the price of plastic materials, including, but not limited to, virgin plastic, postconsumer recycled plastic, and thermoform plastic products, or the output or production of thermoform plastic products, or any agreement restricting the geographic area or customers to which thermoform plastic products will be sold.

COMMENTS

1. Author's comment

According to the author:

Since shipping recyclables overseas is no longer a viable option, California must develop its own markets for recycled content materials. Thermoform containers, or clamshells, have a low collection rate and are infrequently recycled. As the state is making strides towards increasing minimum recycled content in plastic bottles, thermoforms must do the same. This bill encourages efficient use of recyclable plastics and moves California towards a closed loop recycling system for PET bottles and PET thermoforms. AB 2784 sets a minimum recycled content standard for thermoform containers used in food and beverage applications in California.

2. The status of plastics recycling

The Senate Environmental Quality Committee's analysis of this bill provides useful background on the state of recycling in the state, the market for recyclable materials, and the nature of the thermoform containers at the heart of this bill:

Solid waste in California continues to pile up. For three decades, CalRecycle has been tasked with reducing disposal of municipal solid waste and promoting recycling in California through the IWMA. Under IWMA, the state has established a statewide 75% reduction, recycling, and composting goal by 2020. Additionally, the state has established a target of a 75% reduction in the level of disposal of organic waste from the 2014 level by 2025.

According to CalRecycle's State of Disposal and Recycling Report for Calendar Year 2020, published in December 2021, approximately 77.4 million tons of material was generated in 2020; with about 52% sent to landfills; 17% exported as recyclables; 12% composted, anaerobically digested or mulched; and 13% either recycled or source reduced. According to the report: "We are falling far short of our 75 percent recycling goal and face clear evidence that an economy driven by resource extraction and single-use disposable products continues to endanger our people and imperil our planet."

Market challenges for recyclable materials lead to more waste. The U.S. has not developed significant markets for recyclable content materials. Approximately 50% of plastic waste collected for recycling in the United States is exported; in 2016, 88% of that material was exported to countries that lack the infrastructure to properly manage it, leading to open disposal or open burning contributing to ocean plastic pollution and toxic air and GHG emissions. In California, approximately one third of recyclable material is exported.

China used to be where many countries sent the bulk of their recyclable waste, but beginning in 2017, the country began significantly restricting the types of materials and levels of contamination that would be accepted. As of January 1, 2021, China enacted a complete ban on the importing of solid waste. The initial restrictions in 2017 left waste-exporting countries such as the U.S. scrambling to find alternative destinations, including Southeast Asian nations like Thailand, Vietnam, and Indonesia, which quickly became overwhelmed by the volume of refuse received. Soon after, those countries began to impose their own bans and restrictions on waste imports. Without a global market to send these “recyclable” materials, the contents of many blue recycling bins are being diverted to landfills.

Thermoforms. Thermoforms include a wide range of plastic packaging created by heating sheets of plastic and then forming into a specific shape in a mold. Common thermoforms include plastic “clamshell” trays used for take-out food, plastic egg cartons, and bakery trays. Most thermoforms are made from polyethylene terephthalate (PET), but can be made from a wide range of plastic resins, including polypropylene (PP), and polystyrene (PS), including expanded polystyrene (EPS). In California, thermoforms have included relatively high quantities of recycled content; however, the source of its PET has been PET bottles, not thermoforms. While providing an important market for recycled bottle plastic, recycling PET bottles into thermoforms means that the bottle is recycled once and then discarded (thermoforms usually end up in landfills). Under AB 793 (Ting, Chapter 115, Statutes of 2020), bottle manufacturers are required to include recycled content to ensure that bottles are recycled back into bottles.

In jurisdictions that accept thermoforms in curbside recycling, only thermoforms made out of PET are usually accepted. The majority of PET thermoforms collected are baled with other PET, primarily bottles, even though bottles and thermoforms generally cannot be recycled together. As a result, recyclers separate the thermoforms from the bottles and the thermoforms are discarded.

The Senate Environmental Quality Committee’s analysis also discusses the myriad negative effects of plastic pollution on our state, including pollution in rivers and oceans, harm to wildlife, damage from extracting the fossil fuels necessary to make plastic, and air pollution from both producing and burning plastic. The analysis is incorporated herein by reference.

3. This bill creates a recycled content requirement for thermoform food and beverage producers

This bill is a reintroduction of AB 478 (Ting, 2021), which passed out of this Committee on a vote of 8 to 2. AB 478 was held in the Senate Appropriations Committee. This bill’s provisions are substantially similar. Two major changes are that this bill’s provisions are more limited as they only apply to a food and beverage producer, and the civil

penalty amount is lower than in AB 478. A food and beverage producer is defined as a person who fills thermoform plastic containers, or imports filled thermoform plastic containers, for sale to distributors, dealers, or consumers. Additionally, the bill does not include the AB 478 provisions related to changing how the “commingled rate” for plastics collected for recycling are calculated.

This bill requires thermoform containers to contain at least 10 percent recycled thermoform content by 2025; either 20 percent or 25 percent depending on the corresponding recycling rate by June 1, 2028; and either 20 percent or 30 percent depending on the corresponding recycling rate by July 1, 2030. The bill authorizes CalRecycle to begin assessing administrative penalties against noncompliant food and beverage producers in 2026; a food and beverage producer may receive a reduction if it provides a corrective action plan to CalRecycle that explains the reason for its noncompliance and how it will improve going forward.

In recognition of the fact that the bill’s targets might not be possible to meet, the bill contains certain safeguards against unfairly penalizing thermoform food and beverage producers. First, CalRecycle has the authority to reduce the administrative penalties against a food and beverage producer who fails to meet the recycled content requirements if the market conditions make compliance overly onerous, including in cases where the recycling rate leads to a lack of available supply. Second, the bill’s recycled content minimum requirements for 2027 and 2030 will be determined by the recycling rate of thermoform plastic in the prior years, as a means of ensuring that the target is tethered to the actual state of the market.

4. Dormant Commerce Clause implications

Section 8 of Article I of the United States Constitution grants the United States Congress the power to regulate interstate commerce.¹ The obverse proposition – that states may not usurp Congress’s express power to regulate interstate commerce – is known as the “Dormant Commerce Clause.”² The Dormant Commerce Clause serves as an absolute bar to regulations that discriminate against interstate commerce, i.e., by favoring in-state businesses or excluding out-of-state businesses.³ But “[s]tate laws that ‘regulat[e] even-handedly [across all in-state and out-of-state businesses] to effectuate a legitimate local public interest...will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.’ ”⁴

The minimum recycled thermoform plastic content requirements set forth in this bill are not intended to be imposed on containers that will be used by out-of-state companies. As such, an out-of-state manufacturer is not obligated under the bill to comply with the

¹ U.S. Const., art. I, § 8, cl. 3.

² See *Gibbons v. Ogden* (1824) 22 U.S. 1.

³ E.g., *Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 354.

⁴ *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.

minimum recycled content requirement; in-state food and beverage producers retain the choice to purchase only plastic that meets the recycled content requirement, or purchasing products with a range of recycled content plastic rates that average out, across the food and beverage producer's total sales for a year, to the minimum plastic requirement for that year.

The bill does pose a registration and reporting requirement on manufacturers, importers, and entities that buy or sell in excess of 100,000 pounds of thermoform plastic containers for all resin types except expanded polystyrene, or 40,000 pounds of expanded polystyrene equivalent, *in or into* the state in any calendar year. The registration and reporting requirement is thus applied equally across in-state and out-of-state businesses and does not favor domestic manufacturers. With respect to the requirement itself, manufacturers selling in or into California must register with CalRecycle and pay a fee to cover reasonable regulatory costs, and on an annual basis report:

- Its thermoform container sales for the prior year.
- The amount in pounds of containers sold into the state.
- The resin type of the containers.
- The amount of postconsumer resin, if any.
- The container volume and resin type/composition for each purchaser.

Manufacturers must also retain records of all sales and information regarding the source of any postconsumer resin so that CalRecycle can verify its source. According to the author, these reports are necessary so that CalRecycle can calculate each food and beverage producer's overall annual average recycled thermoform content to determine whether the minimum content requirement was met. Given that the requirements are minimal and apply equally to effectuate the bill's intent, it is unlikely that the reporting requirement implicates the Dormant Commerce Clause.

A statute may also violate the dormant Commerce Clause, even if it "regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" and the burden imposed on commerce "is clearly excessive in relation to the putative local benefits." (*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142.) As this bill's provisions are intended to address the serious environmental impacts and health issues posed by thermoform plastic containers, this bill would likely not be found to excessively burden interstate commerce in violation of the Dormant Commerce Clause.

5. This bill exempts trade secrets, as defined in statute, from disclosure under the CPRA

The California Constitution and the California Public Records Act (CPRA) recognize that Californians have a right to access information concerning the conduct of the people's business, and therefore grant the public access to a wide range of public

records.⁵ That right is not absolute, however, and the CPRA provides a number of exemptions to public disclosure for documents and information the Legislature has determined that, for policy reasons, the risks of disclosure outweigh the public benefit.

One such policy-based exemption is for trade secrets. The CPRA does not directly exempt trade secrets, but creates the exemption by incorporating the Evidence Code's conditional privilege for trade secrets.⁶ The Evidence Code's privilege, in turn, incorporates identical definitions of "trade secrets" from the Civil Code and the Penal Code,⁷ which identify a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process" that derives "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use," and for which the owner of the trade secret makes efforts that are reasonable under the circumstances to maintain its secrecy.⁸

This bill exempts from disclosure under the CPRA information CalRecycle collects from manufacturers that falls under the statutory definition of trade secrets. This exemption appears consistent with existing protections for trade secrets without being overbroad.

6. This bill exempts food and beverage producers from certain prohibitions on antitrust and anti-competitive behavior to encourage food and beverage producers to collectively develop a thermoform recycling market

The Cartwright Act⁹ is California's antitrust statute, modeled after the federal antitrust laws, the Sherman Act and the Clayton Act.¹⁰ Rather than interpreting the Cartwright Act's antitrust provisions to conflict with the federal laws, courts treat them as complimentary and treat case law on the federal laws as applicable to the state act.¹¹ Both the Cartwright Act and the Sherman Act facially ban all restraints on trade, but have been interpreted to permit such restraints as long as they are "reasonable."¹²

The Unfair Practices Act¹³ is intended "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented."¹⁴ To that end it

⁵ See Cal. Const., art. I, § 3(b)(1); Gov. Code, §§ 6250 et seq.

⁶ Civ. Code, § 6254(k); Evid. Code, § 1060.

⁷ Evid. Code, § 1061; Civ. Code, § 3426.1; Pen. Code, § 499c.

⁸ Civ. Code, § 3426.1(d).

⁹ Bus. & Prof. Code, div. 7, pt. 2, ch. 2, §§ 16700 et seq.

¹⁰ *Corwin v. Los Angeles newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852-853.

¹¹ *Ibid.*

¹² *Id.* at p. 853.

¹³ Bus. & Prof. Code, div. 4, pt. 2, ch. 4, §§ 17000 et seq.

¹⁴ *Id.*, § 17001.

“prohibits specific ‘practices which the Legislature has determined constitute unfair trade practices,’ ”¹⁵ such as selling products below cost and “loss leader” practices.¹⁶

In order to encourage companies to invest in the development of the necessary infrastructure to reach the goals of the bill, it exempts specified conduct from the state’s antitrust and unfair competition laws:

- An action, taken pursuant to the bill’s requirements, taken solely to increase the collection, processing, and recycling of scrap plastic materials by a food and beverage producer that affects scrap values, the quantities of materials being recycled, or the method of invoicing the sale of thermoform plastic containers.
- The formation of a nonprofit organization that may include two or more food and beverage producers and that establishes specifications for different grades or classifications of thermoform plastics, which may affect the scrap value of those grades or classifications, the quantity or quality of materials being recycled, or the method of invoicing the sale of thermoform plastic containers, but does not establish the value of such materials.

The bill limits the scope of the exemption, however, by expressly providing that the exemption does not apply to any agreement between two or more food and beverage producers establishing or affecting the price of plastic materials or any agreement restricting the geographic area or customers to which thermoform plastic products will be sold. In plain terms, the bill authorizes food and beverage producers subject to the bill’s recycled thermoform requirements to engage in otherwise-impermissible anticompetitive or collusive behavior between food and beverage producers, but not price-fixing or territorial restrictions, on the theory relaxing these restrictions will allow food and beverage producers to more efficiently and cost-efficiently develop the necessary infrastructure and upstream materials supply.

7. Arguments in support

Californians Against Waste writes in support:

AB 2784 builds on the AB 793 model and establishes a uniform timeframe and ‘even playing field’ requirements for the increased use of PCR in all types of thermoform food packaging (nonfood thermoform plastic – RPPCs--have had a recycled content obligation in California for more than 25 years), as well as a fair and reasonable ‘penalty’ for packaging that can not safely demonstrate compliance.

To be clear, AB 2784 does not require the use of PCR in all thermoform plastic food packaging – there are some materials and manufacturers that have yet to demonstrate to the FDA that they are ready to incorporate PCR in their

¹⁵ *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.

¹⁶ See Bus. & Prof. Code, §§ 17040-17050.

material/packaging. But that does not and should not leave these manufacturers off the hook for *Producer Responsibility for Recycling*. AB 2784 does set a reasonable set of ‘tiered’ PCR use standards. For those materials and manufacturers unable or unwilling to demonstrate compliance with the standard, there is a simple administrative assessment (penalty) directly linked to the amount a manufacturer falls short of compliance. In this way, the provisions of AB 2784 lead the way in holding all producers of plastic thermoform food packaging sold in California equally accountable for supporting California’s circular economy recycling objectives. (emphasis in original)

8. Arguments in opposition

The bill’s opponents, a coalition of 23 organizations, argue that the proposed goals are infeasible because they: fail to account for market and economic conditions, will not improve the collection or sortation of thermoforms, and do not provide any compliance flexibility for producers. They write:

[...] [T]he following specific issues exist with the amended version of this bill:

- With the passage of SB 343 (Allen) in 2021, these containers will not be allowed to be labeled as recyclable, causing issues with consumers recycling them and in the end prohibiting getting that material back into new thermoforms. This completely counters the intent of AB 2784.
- The definition of “food and beverage producer” is extremely broad and encompasses businesses with no control over the manufacture or distribution of thermoform products such as restaurants, coffee shops, yogurt/ice cream shops, etc.
- The bill is now more narrowly focused on food and beverages, amplifying concerns about the approval and availability of PCR content for such (see below).
- There are also a number of considerations that need to be considered when adding PCR resins to packaging products, including U.S. Food & Drug Administration (FDA) requirements, supply of PCR resins, and product specifications and constraints.
- The administrative penalties for non-compliance are far too high –\$0.20/lb for plastic thermoform resin and \$1.00/lb for expanded polystyrene.
- Creates a producer definition that conflicts with other bills currently being considered in the legislature.

SUPPORT

rPlanet Earth (sponsor)
Californians Against Waste
Monterey Bay Aquarium Foundation
Recyclesmart

OPPOSITION

Agricultural Council of California
American Chemistry Council
American Institute for Packaging and Environment (AMERIPEN)
California Apple Commission
California Blueberry Association
California Blueberry Commission
California Cotton Ginners and Growers Association
California Fisheries and Seafood Institute
California Food Producers
California Fresh Fruit Association
California Grocers Association
California Manufacturers and Technology Association
California Restaurant Association
California Strawberry Commission
Consumer Brands Association
Foodservice Packaging Institute
Plastics Industry Association
Sonoco Products Company
TekniPlex
The Association of Plastic Recyclers
Western Agricultural Processors Association
Western Growers Association
Western Plastics Association

RELATED LEGISLATION

Pending Legislation:

SB 54 (Allen, 2021) establishes a Plastic Pollution Prevention and Packaging Producer Responsibility Act and a comprehensive regulatory scheme for certain single-use packaging and plastic single-use food service ware, as provided. SB 54 is pending in the Assembly Natural Resources Committee.

SB 38 (Wieckowski, 2021) requires distributors of beverage containers in the state to form a beverage container stewardship organization, which would be required to

develop and submit to the department a plan, annual report, and budget for the recovery and recycling of empty beverage containers in the state similar to that described in the Used Mattress Recovery and Recycling Act. SB 38 is pending before the Assembly Committee on Natural Resources.

AB 2026 (Friedman, 2022), requires an e-commerce shipper, as defined, ships purchased products in or into the state to reduce the total weight and number of units of single-use plastic shipping envelopes, cushioning, and void fill by specified dates, as provided. AB 2026 will be heard in this Committee on the same day at this bill.

Prior Legislation:

AB 478 (Ting, 2021), *see* comment 3) above.

AB 842 (Cristina Garcia, 2021) would have enacted the California Circular Economy and Plastic Pollution Reduction Act, which establishes a comprehensive regulatory scheme for producers, retailers, and wholesalers of single-use packaging, as defined, and single-use products, as defined, made partially or entirely of plastic, to be administered by CalRecycle. AB 842 died in the Assembly Natural Resources Committee.

AB 793 (Ting, Ch. 115, Stats. 2020) established a timeframe for minimum recycled content for plastic bottle beverage manufacturers, provides an off-ramp for CalRecycle to determine whether or not the minimum content requirements are appropriate given the market conditions of recycled plastics, and sets flexible penalties for manufactures that do not meet the requirements.

AB 792 (Ting, 2019) established similar recycling-related requirements as AB 793 (Ting, Ch. 115, Stats. 2020) but on a more aggressive timeline. AB 792 was vetoed by Governor Gavin Newsom, who stated in his veto message that late-added amendments to the bill would result in a costly, burdensome process that undermines the worthy intent of the legislation.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 2)

Assembly Floor (Ayes 44, Noes 19)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Natural Resources Committee (Ayes 7, Noes 3)
