

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

AB 2026 (Friedman)
Version: June 23, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

Recycling: plastic packaging

DIGEST

This bill requires an e-commerce shipper that 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 and expanded and extruded polystyrene it uses to ship or transport products by no less than an unspecified percentage by January 1, 2030.

EXECUTIVE SUMMARY

The United States Environmental Protection Agency estimates that 14.5 million tons of plastic containers and packaging were generated in the country in 2018. While some plastic packaging is technically recyclable, markets for this material are scarce and it is not accepted in curbside recycling programs. According to the author, plastic packaging and film make up more than 10 percent of residual waste from material recovery facilities in California because consumers continue to throw these materials into their recycling bins in the hopes they will be recycled into new products. This bill seeks to address this issue by requiring e-commerce shippers to reduce the total weight and number of units of single-use plastic shipping envelopes, cushioning, and void fill and expanded and extruded polystyrene it uses by January 1, 2030.

This bill is sponsored by CALPIRG, Environment California, and Oceana. It is supported by numerous environmental advocacy organizations. The bill is opposed by EPS Industry Alliance and Tekni-Plex Inc. The bill passed the Senate Environmental Quality Committee on a vote of 5 to 1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires the State Water Resources Control Board and regional boards to develop a program that requires plastic manufacturing, handling, and transportation facilities to implement best management practices to control discharges of preproduction plastic pellets. (Wat. Code § 13367 et. seq.)
- 2) Requires that local jurisdictions divert at least 50 percent of solid waste from landfill disposal and establishes a statewide goal that 75 percent of solid waste be diverted from landfill disposal by 2020. (Pub. Res. Code §§ 41780 & 41780.01.)
- 3) Requires local jurisdictions to prepare, adopt, and submit to the Department of Resources Recycling and Recovery (CalRecycle) a source reduction and recycling element that includes a program for the management of solid waste generated within the jurisdiction. (Pub. Res. Code §§ 41000 et. seq.)
- 4) Prohibits a state food service facility from dispensing prepared food using a type of food service packaging unless the packaging is on a specified list maintained by CalRecycle and has been determined to be reusable, recyclable, or compostable. (Pub. Res. Code § 42370 et. seq.)

This bill:

- 1) Requires an e-commerce shipper that ships purchased products in or into the state to reduce the total weight and number of units of the e-commerce plastic packaging and expanded and extruded polystyrene it uses to ship or transport products in or into the state by no less than an unspecified percentage by January 1, 2030.
 - a) This reduction is to be measured against the total weight and number of units of e-commerce plastic packaging the e-commerce shipper shipped or transported in or into the state during the 2023 calendar year.
 - b) The reduction requirements on e-commerce plastic packaging does not apply to primary packaging, as defined.
- 2) Defines e-commerce shipper as a business that meets all of the following:
 - c) either (i) sells goods over the internet, which includes business-to-business sales, direct sales to consumers, and sales through a third-party seller or an online marketplace, or (ii) Provides e-commerce fulfillment services to package and ship goods by mail or parcel delivery in or into the state, either on behalf of itself or a third-party seller;
 - d) has annual gross sales greater than fifteen million dollars (\$15,000,000) in or into the state; and
 - e) has more than 100 full-time equivalent employees.

- 3) Provides that an e-commerce shipper does not include an online marketplace that satisfies all of the following:
 - a) is an online or mobile application providing user services and facilitating sales solely from third-party sellers to third-party buyers;
 - b) does not own any of the inventory for sale on the online marketplace;
 - c) does not ship or control the distribution, packaging, or transport of any products on the online marketplace;
 - d) facilitates and permits direct, unhindered communication between the third-party buyer and the third-party seller;
 - e) conspicuously displays the third-party seller's location; and
 - f) does not determine the price for the product offered on the online marketplace.

- 4) Provides an e-commerce shipper does not include a public or privately operated motor carrier, as defined in Section 13102 of Title 49 of the United States Code, that only transports a parcel that has been placed into packaging prior to the motor carrier's taking possession of the parcel and is not opened until after the motor carrier has delivered the parcel.

- 5) Provides these provisions do not apply to single-use plastic shipping envelopes, cushioning, and void fill and expanded or extruded polystyrene:
 - a) that is used as primary packaging for raw, uncooked, or butchered meat, fish, poultry, or seafood sold for the purpose of cooking or preparing;
 - b) that is necessary to prevent the contamination or extends the shelf life of fresh produce;
 - c) that is used as packaging for a product regulated as a drug, medical device, or dietary supplement by the United States Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 301 et seq.), Section 3.2(e) of Title 21 of the Code of Federal Regulations, or the federal Dietary Supplement Health and Education Act of 1994 (Public Law 103-417); or
 - d) that is used as packaging for a product regulated as a drug, biologic, parasiticide, medical device, or diagnostic used to treat, or administered to, animals under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 301 et seq.), by the United States Department of Agriculture under the federal Virus-Serum-Toxin Act (21 U.S.C. Sec. 151 et seq.), or by the United States Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136 et seq.).

- 6) Authorizes an action to enforce these provisions to be brought by the Attorney General upon a complaint from the department, or brought by a county counsel, or city attorney from a city or city and county with a full-time city prosecutor, upon a complaint by a local agency, resident located within the jurisdiction, CalRecycle, or the Statewide Commission on Recycling Markets and Curbside Recycling.

- a) Authorizes an entity above to bring an action to impose civil liability in an amount not to exceed \$50,000 per day for a violation of these provisions.
 - b) Requires civil penalties collected to be paid to the office of the Attorney General, county counsel, or city attorney, whichever office brought the action.
 - c) Requires penalties collected by the Attorney General to be deposited into the Plastic Packaging Reduction Penalty Account, which the bill creates in the State Treasury.
 - d) Moneys in the account may be expended by the Attorney General, upon appropriation by the Legislature, to enforce these provisions.
 - e) Authorizes the Attorney General, county counsel, or city attorney to seek all costs and attorney's fees incurred by the prosecuting entity as well as the costs incurred by the department or a local agency in investigating the matter.
- 7) Defines various terms for these purposes.
- a) "Primary packaging" means material or materials that most closely encompass the product or sales unit, are the last piece of packaging the consumer opens, or are substantially similar to the product's packaging in a retail store.
 - b) "Reusable" satisfies all of the following: (i) designed for reuse in the same or similar application, or for another purposeful packaging use in a supply chain, (ii) highly durable to function properly in its original condition for multiple trips and its lifetime is measured in years, and (iii) repeatedly recovered, inspected, and repaired, if necessary, and reissued into the supply chain for reuse.
 - c) "Shipping envelope" means packaging used for the containment, protection, handling, or delivery of smaller goods by a manufacturer or retailer for the user or consumer. A plastic shipping envelope includes, but is not limited to, plastic mailers, envelope mailers, lightweight plastic mailers, padded plastic mailers, poly mailers, poly bubble mailers, plastic shipping mailers, and paper mailers with plastic lining.
 - d) "Single-use plastic" means material that is wholly or partially made of plastic and is any of the following: (i) intended for a single use; (ii) Regularly discarded, recycled, or otherwise disposed of after a single use; or (iii) Not reusable.
 - e) "Void fill" means a filler material used to close up the free space in a shipping container and prevent excessive movement. Plastic void fill includes, but is not limited to, sealed air and expanded or extruded polystyrene.
- 8) Makes various findings and declarations of the Legislature.

COMMENTS

1. Stated need for the bill

The author writes:

As an online retail consumer, I have been appalled at the amount of plastic packaging that accompanies my orders. No one wants these materials. We can't put them in our recycling bins, and they are overflowing curbside trash bins and taken to landfills at a huge expense to local governments. We know we can do better here in California because alternatives to single-use plastic packaging already exist and are being implemented elsewhere. AB 2026 will reduce the unnecessary and unacceptable amount of single-use plastic used in the e-commerce marketplace by reducing the amount of shipping envelopes, bubble wrap, air pillows and other shipment packaging that contains plastic and molded foam packaging made from expanded polystyrene – for shipments in and into California.

2. The status of plastics recycling

The Senate Environmental Quality Committee's analysis of this bill provides useful background on plastic pollution, its effects on oceans, and environmental justice issues:

The cost of plastic pollution. According to a 2021 report published by the United Nations Environment Programme (UNEP), "Neglected – Environmental Justice Impacts of Marine Litter and Plastic Pollution," 99 percent of plastics are produced from petrochemicals, which are sourced from fossil fuels. Between 1950 and 2015, 8.3 billion metric tons of new plastic have been produced, less than 10% of which has been recycled. Most plastic is hard to recycle. About 80 percent (4.9 billion metric tons) of this plastic is accumulating in landfills and the natural environment. Plastic pollution winds up in rivers, waterways and oceans, aggregating pollutants, harming wildlife, and impacting communities that depend on the ocean for their sustenance and livelihoods. In 2017, the world's plastic production reached 348 million metric tons, a 20% increase in five years and a 20,000% (200-fold) increase since 2015.

Costs to the ocean and marine life. Plastics are estimated to comprise 60-80% of all marine debris and 90% of all floating debris. According to the California Coastal Commission (Commission), the primary source of marine debris is urban runoff (i.e., litter). By 2050, by weight there will be more plastic than fish in the ocean if we keep producing (and failing to properly manage) plastics at predicted rates, according to *The New Plastics Economy: Rethinking the Future of Plastics*, a January 2016 report by the World Economic Forum.

Most plastic marine debris exists as small plastic particles due to excessive UV radiation exposure and subsequent photo-degradation. These plastic pieces are confused with small fish, plankton, or krill and ingested by birds and marine animals. Over 600 marine animal species have been negatively affected by ingesting plastic worldwide. Scientists at the Australian Research Council Centre of Excellence for Coral Reef Studies at James Cook University have found that corals are also ingesting small plastic particles, which remain in their small stomach cavities and impede their ability to consume and digest normal food.

In addition to the physical impacts of plastic pollution, hydrophobic chemicals present in the ocean in trace amounts (e.g., from contaminated runoff and oil and chemical spills) have an affinity for, and can bind to, plastic particles where they enter and accumulate in the food chain.

Once in the marine environment, litter is not just an eyesore, but can damage habitats, harm wildlife through entanglement and ingestion, and have negative economic impacts on coastal communities.

Environmental justice considerations. Plastic production and use disproportionately impacts disadvantaged communities through the world. Oil extraction and refining result in habitat destruction, polluted runoff, waste, and oil spills that directly impact indigenous and disadvantaged communities. Refineries emit toxic air contaminants, including benzene, formaldehyde, hydrogen sulfide, sulfur dioxide, and sulfuric acid. In the Los Angeles area, more than 580,000 people live within five blocks of an active oil or gas well. Every step in the production of plastic, from extraction to manufacturing, impacts air and water quality and human health.

Ocean plastic pollution doesn't only threaten ocean ecosystems, it also impacts the people that rely on them. Plastic debris on beaches and snorkeling spots discourages tourism to those areas, damaging local economies. Globally, 820 million people rely on fishing for income. Plastics not only impact the quality of the fish, but also causes lower yields.

The Senate Environmental Quality Committee's analysis also discusses the myriad negative effects of plastic pollution on our state, including pollution in the food chain, damage from extracting the fossil fuels necessary to make plastic, and marine debris that damages the environment, tourism, and other economic activities in the state. The analysis is incorporated herein by reference.

3. This bill intends to reduce the harmful environmental and economic impacts of plastic pollution by requiring e-commerce shippers to reduce plastic packaging and expanded and extruded polystyrene used by them in an unspecified amount by January 1, 2030

This bill requires an e-commerce shipper that 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 and expanded and extruded polystyrene it uses to ship or transport products by no less than an unspecified percentage by January 1, 2030. This reduction is to be measured against the total weight and number of units of e-commerce plastic packaging the e-commerce shipper shipped or transported in or into the state during the 2023 calendar year.

The author and sponsor have stated that stakeholder conversations are ongoing and the specific reduction percentage is one of the issues that is being currently negotiated and discussed.

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 bill’s provisions apply equally to an e-commerce shipper that ships in the state or into the state and therefore does not favor in-state businesses over out-of-state businesses. As such it does not appear to violate the Dormant Commerce Clause under the discrimination test.

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," if 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 economic impacts posed by single-use plastics and expanded or extruded polystyrene used in e-commerce shipping, this bill would likely not be found to excessively burden interstate commerce in violation of the Dormant Commerce Clause.

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.

5. Enforcement mechanism in the bill may be inappropriate

The bill provides that an action to enforce these provisions is to be brought by the Attorney General upon a complaint from the department, or brought by a county counsel, or city attorney from a city or city and county with a full-time city prosecutor, upon a complaint by a local agency, resident located within the jurisdiction, the department, or the Statewide Commission on Recycling Markets and Curbside Recycling, and imposes liability in an amount not to exceed \$50,000 per day for a violation of this chapter. When the bill was introduced it contained a ban, and this enforcement mechanism may have been prudent. However, this enforcement mechanism may no longer makes sense for a target reduction requirement.

As the Senate Environmental Quality Committee analysis pointed out, it will be impossible for someone to know whether an e-commerce shipper has met the required reduction goal or who is subject to the bill's provisions as the definition of e-commerce shipper is detailed and very fact specific. Generally, bills that require a specified reduction or establish minimum recycled content requirements have an enforcement mechanism that:⁵

- requires reporting to a specified state entity regarding efforts to reach the source reduction or content requirement goal;
- authorizes audits and inspections to assess compliance by that state entity;
- requires that single state entity to assess the penalty as opposed to multiple entities, which sometimes is an administrative penalty as opposed to a civil penalty; and
- allows for a corrective action plan before the assessment of a penalty.

Many times these bills also provide that any confidential information or information considered a trade secret obtained by the enforcing state entity is not discussable.

In light of the issues raised here, the author and sponsor should consider whether the enforcement mechanism in this bill continues to make sense since it was changed from a ban to a reduction requirement.

6. Statements in support

Oceana, CALPIRG, and Environment California, sponsors of the bill, write in support:

A substantial contributor to the plastics crisis is single-use plastic packaging associated with e-commerce purchases, generating nearly 2.9 billion pounds of plastic packaging worldwide – and 601.3 million pounds in the United States – in 2020 alone. Sales in the e-commerce marketplace have skyrocketed as consumers turn to online orders for more of their retail purchases. California leads the country

⁵ See AB 2784 (Ting, 2020, as amended May 19, 2022); SB 54 (Allen, 2021, as amended Jun. 16, 2022).

in online shopping, with more than half of California residents reporting making more purchases online. [...]

Practical alternatives to single-use plastic film and expanded polystyrene packaging are available. Amazon India innovated and quickly took steps to reduce its plastic packaging use in India, announcing that it would use paper cushions to replace plastic dunnage like air pillows and bubble wraps in outer boxes across all its fulfillment centers. On June 29, 2020, Amazon India announced it had achieved a 100% successful transition away from single-use plastics less than a year after their declaration to act. According to recent news accounts, Amazon plans to eliminate single use plastic packaging in Germany, one of the company's largest markets. Amazon's actions in India and Germany to address its single-use plastics problem demonstrates that it can also take similar actions in other countries when it makes plastic reduction a priority.[...]

AB 2026 is a significant step to reduce the unnecessary and unacceptable amount of single-use plastic used as packaging for shipments from on-line purchases in California.

7. Statements in opposition

A coalition of organizations representing various industries and businesses writes in opposition unless amended. The coalition states they offered amendments to the author to "create an industry-paid for Circular Economy recycling program" that would set recycling rates for packaging materials, mandate the use of recycled plastics in new packaging, and require industry funding to develop necessary infrastructure to collect and process materials, and imposes fines for violations.

The coalition writes:

[...] Manufacturers and retailers need packaging options to ensure the products they ship arrive unbroken. Some products require a higher level of protection that only certain packaging like expanded polystyrene can provide. Without material options, breakage rates are likely to increase. The e-commerce packaging banned under this bill is the lightest, most effective and resource efficient packaging material available. Efficient packaging means less fuel to move products or reship them, less raw input to make packaging and remake broken products, and less water, energy and greenhouse gas emissions associated with the manufacture, use, transportation and end-of-life management of the material.

The environmental impact from making a product far exceeds the input from the packaging. On average, 10% of e-commerce packages arrive damaged or otherwise returned. UPS and FedEx ship approximately 8.6 billion packages

annually. A 10% damage/return rate results in 860 million reships which means more products to landfill, more fuels used to transport packages and more resources needed to reproduce the same product and make additional packaging materials to reship them. Packaging engineers select materials to minimize product damage and maximize efficient use of all resources. Removing options by way of a material ban will result in increased product damage during shipping and increase the overall environmental impact from e-commerce.

SUPPORT

CALPIRG (sponsor)
Environment California (sponsor)
Oceana (sponsor)
1000 Grandmothers for Future Generations
350 Bay Area
350 Bay Area Action
350 Humboldt
350 Silicon Valley
350 Southland Legislative Alliance
350 Ventura County Climate Hub
7th Generation Advisors
Active San Gabriel Valley
Ban Sup (single Use Plastic)
Ban Sup Refill
Bay Area Youth Lobbying Initiative
California Environmental Voters (formerly Clcv)
California Institute for Biodiversity
California Interfaith Power & Light
California Product Stewardship Council
California Wildlife Center
Californians Against Waste
Center for Food Safety; the
Chop Wood Carry Water CA Newsletter
City and County of San Francisco
City of Pleasanton
Climate Reality Project, San Fernando Valley
Climate Reality Project, Silicon Valley
Defenders of Wildlife
East Bay Municipal Utility District
Ecology Center
Ethos
Feminists in Action

Fillgood

Friends Committee on Legislation of California

Greenpeace USA

Greentown Los Altos

Habits of Waste

Heal the Bay

Indivisible Alta Pasadena

Indivisible California Green Team

Indivisible South Bay LA

Interfaith Solidarity Network

League to Save Lake Tahoe

Lemon Frog Shop Vintage Bazaar

Marine Mammal Care Center LA

Mountain Lion Foundation

Napa Climate Now

National Stewardship Action Council

Natural Resources Defense Council (NRDC)

Northern California Recycling Association

Ocean Conservancy

Pacific Marine Mammal Center

Plastic Oceans International

Plastic Pollution Coalition

Sacramento Area Congregations Together

Sailors for The Sea

San Diego 350

San Diego Coastkeeper

Save Our Shores

Save the Albatross Coalition

Semco

Shark Stewards

Sierra Club California

Surfrider Foundation

Sustainable St. Helena

The 5 Gyres Institute

The Center for Oceanic Awareness, Research, and Education

The Climate Center

The Democrats of Rossmoor

The Last Plastic Straw

The Nature Conservancy

The Nela Climate Collective

The Plot

The Refill Shoppe
Urban Ecology
Wholly H2o
Wildcoast
Wishtoyo Chumash Foundation
Wrench & Rodent Seabasstropub
Zero Waste USA

OPPOSITION

Air Conditioning, Heating and Refrigeration Institute
American Apparel & Footwear Association
American Chemistry Council
American Cleaning Institute
American Institute for Packaging and Environment (AMERIPEN)
Association of Home Appliance Manufacturers
Auto Care Association
California Business Roundtable
California Chamber of Commerce
California League of Food Producers
California Manufacturers & Technology Association
California Retailers Association
CAWA
Civil Justice Association of California
Consumer Technology Association
EPS Industry Alliance
Flexible Packaging Association
National Federation of Independent Business (NFIB)
National Marine Manufacturers Association
Personal Care Products Council
Plastics Industry Association
Pregis
Prezero Us, Inc.
Tekni-plex Industries
The Toy 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.

Prior Legislation:

AB 1371 (Friedman, 2021) prohibited online retailers from using single-use plastic packaging that consists of shipping envelopes, cushioning, or void fill to package or transport the products commencing January 1, 2023, for large online retailers and January 1, 2025, for small online retailers; prohibited manufacturers, retailers, producers, and other distributors from using expanded polystyrene packaging to package or transport products; and imposed various requirements to online retailers for the collection of plastic film and expanded polystyrene packaging. AB 1371 died on the Assembly Floor.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 1)

Assembly Floor (Ayes 41, Noes 26)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 2)

Assembly Natural Resources Committee (Ayes 8, Noes 3)
