

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

SB 289 (Newman)
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SUBJECT

Recycling: batteries and battery-embedded products

DIGEST

This bill requires producers of batteries and battery-embedded products to establish a stewardship program for the collection, transportation, and recycling, and the safe and proper management of batteries or battery-embedded products in California.

EXECUTIVE SUMMARY

The South Bayside Waste Management Authority, or RethinkWaste, is a joint powers authority of 12 public agencies in San Mateo County, and a sponsor of this bill. In 2016, a four-alarm fire broke out in RethinkWaste's Shoreway Environmental Center material recovery facility causing millions of dollars in damage and forcing the facility to shut down for four months. The likely cause was a rechargeable battery that made its way into the plant's recyclable material. The threat of fires and resulting damage from certain batteries, and in particular, Lithium batteries, is widespread, with fires abounding at not only waste facilities, but on airplanes and airports as well as in consumers' homes.¹

Despite laws regulating the disposal of such batteries, many end up in waste facilities and recycling centers. One issue is the lack of accessible options for properly recycling or disposing of these batteries. This bill turns to the extended producer responsibility

¹ See Jillian Mock, *Recycling Plants Are Catching On Fire, And Lithium-Ion Batteries Are To Blame* (February 28, 2020) The Verge, <https://www.theverge.com/2020/2/28/21156477/recycling-plants-fire-batteries-rechargeable-smartphone-lithium-ion>; *Battery Incident Chart* (March 31, 2021) Federal Aviation Administration, https://www.faa.gov/hazmat/resources/lithium_batteries/media/Battery_incident_chart.pdf; Alana Semuels, *When your Amazon Purchase Explodes* (April 30, 2019) The Atlantic, <https://www.theatlantic.com/technology/archive/2019/04/lithium-ion-batteries-a-mazon-are-exploding/587005/>.

model and requires producers of batteries and battery-embedded products to develop, finance, and implement stewardship programs to recover and recycle these batteries. The programs will be overseen and regulated by the California Department of Resources Recycling and Recovery (CalRecycle).

This bill is co-sponsored by California Product Stewardship Council, Californians Against Waste, and RethinkWaste. It is supported by various waste management and sanitation groups and local jurisdictions. It is opposed by various industry groups, including the Rechargeable Battery Association, manufacturing associations, the California Chamber of Commerce, and insurance groups. This bill passed out of the Senate Environmental Quality Committee on a 5 to 2 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Rechargeable Battery Recycling Act of 2006 with the goal of enacting a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of previously used rechargeable batteries. (Pub. Resources Code § 42451 et seq.) The act requires every retailer to have in place a system for the acceptance and collection of used rechargeable batteries for reuse, recycling, or proper disposal. The act does not apply to a retailer for the sale of rechargeable batteries that are contained in or packaged with a battery-operated device. (Pub. Resources Code § 42453.)
- 2) Establishes the Cell Phone Recycling Act of 2004 with the stated goal of enacting a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of used cell phones. The act's further purpose is to establish a program that is convenient for consumers and the public to return, recycle, and ensure the safe and environmentally sound disposal of used cell phones, and providing a system that does not charge when a cell phone is returned. (Pub. Resources Code § 42490 et seq.) The act requires every retailer of cell phones sold in California to have in place a system for the acceptance and collection of used cell phones for reuse, recycling, or proper disposal. (Pub. Resources Code § 42494.)
- 3) Establishes the Electronic Waste Recycling Act of 2003 with the goal of enacting a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of covered electronic devices, and to provide incentives to design electronic devices that are less toxic, more recyclable, and that use recycled materials. (Pub. Resources Code § 42460 et seq.) "Covered device" is defined as a video display device containing a screen greater than four inches, measured diagonally.

- 4) Establishes the Hazardous Waste Control Law with the goal of establishing regulations and incentives which ensure that the generators of hazardous waste employ technology and management practices for the safe handling, treatment, recycling, and destruction of their hazardous wastes prior to disposal. (Health & Saf. Code § 25100 et seq.)
- 5) Establishes the California Integrated Waste Management Act of 1989 in order to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs. (Pub. Resources Code § 40050.)
- 6) Establishes the California Public Records Act and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 6250 et seq.)

This bill:

- 1) Establishes the Battery and Battery-Embedded Product Recycling and Fire Risk Reduction Act of 2021.
- 2) Requires manufacturers of battery or battery-embedded products who sell, offer for sale, or distribute the battery or battery-embedded product in or into the state ("producers") to register with CalRecycle and to provide it a list of batteries or battery-embedded products that they sell or offer for sale in the state no later than April 1, 2022.
- 3) Defines a "battery-embedded product" as a product containing a battery or battery pack that is not designed to be removed from the product by the consumer. It specifically excludes various items, including certain medical devices and "covered electronic devices" regulated pursuant to the Electronic Waste Recycling Act.
- 4) Requires a producer, on or before June 30, 2025, or a stewardship organization on behalf of a group of producers, to develop and submit to CalRecycle a stewardship plan for the collection, transportation, and recycling, and the safe and proper management, of batteries or battery-embedded products in the state in an economically efficient and practical manner. The stewardship plan is required to cover a detailed list of elements and goals.

- 5) Requires a plan to provide for a free and convenient collection system for batteries or battery-embedded products that achieves a collection rate determined by CalRecycle. The system must be balanced geographically and based on population density. It must require a retailer, where feasible, to serve as an authorized collector as part of a stewardship program, as specified. A “retailer” is a person who sells batteries or battery-embedded products in or into the state to a person through any means. A producer or stewardship organization must also include as a collection site any entity that offers in writing to participate in the stewardship program in return for reasonable compensation.
- 6) Requires, through the stewardship plan, a producer or stewardship organization to allow a consumer to drop off, at no charge, batteries or battery-embedded products at a collection site and to provide for the payment to a collection site that accepts batteries or battery-embedded products in an amount determined by the collection site and producer or stewardship organization that is reasonable for accepting, handling, collecting, storing, and transporting batteries or battery-embedded products.
- 7) Provides that the plan must require collection sites to be staffed and operated to ensure that batteries or battery-embedded products are safely collected and handled.
- 8) Provides that the stewardship plan must include a description of how batteries and battery-embedded products will not be landfilled, how all discarded batteries and battery-embedded products will enter a recycling process. It must also include a description of how discarded battery residual materials and battery-embedded product residual materials will be, to the extent economically and technically feasible, recycled.
- 9) Requires producers to first submit the stewardship plan to any applicable state agencies with areas of authority relative to the plan. Each respective state agency is required to make a legal determination of the plan’s compliance with state and federal laws and regulations related to the agency’s respective authority and provide it to the producer, with an explanation for any finding of noncompliance. If there is no response after 90 days, the producer may submit it as consistent with all other applicable laws and regulations.
- 10) Requires producers or stewardship organizations on their behalf to have a plan approved by December 31, 2025, and to fully implement the plan by June 30, 2026.
- 11) Provides that the approved plan is a public record, except that financial, production, or sales data reported to the department by the producer or stewardship organization, is not a public record for purposes of the California

Public Records Act and shall not be open to public inspection. CalRecycle may release financial, production, or sales data in summary form only so the information cannot be attributable to a specific producer or distributor or to any other entity.

- 12) Requires producers or stewardship programs to prepare and submit proposed five-year budgets each year.
- 13) Prohibits a producer or stewardship organization from expending revenue from the stewardship program to pay an administrative civil penalty or to pay costs associated with litigation between the producer or organization and the state.
- 14) Requires a producer or stewardship organization to keep records of its activities and transactions and to annually audit such records. CalRecycle is authorized to conduct its own audit if it determines it is necessary. It is prohibited from disclosing any confidential proprietary information in an audit.
- 15) Requires an annual report to be produced and made publicly available. It must include a report on the activities the producer undertook to prioritize in-state processing facilities over out-of-state processing facilities.
- 16) Requires CalRecycle, on or before July 1, 2026, and on or before July 1 of each year thereafter, to post on its internet website a list of producers that are in compliance with this act, as provided. It must list the reported brands and names of batteries and battery-embedded products for each producer.
- 17) Requires a retailer or distributor to monitor the website to determine if a producer, brand, or battery or battery-embedded product is in compliance with the act for that brand or battery or battery-embedded product. The act prohibits a retailer or distributor from selling, distributing, offering for sale, or importing a battery or battery-embedded product in or into the state unless the producer of the battery or battery-embedded product is listed as in compliance for that brand and battery or battery-embedded product, as provided.
- 18) Prohibits a producer from selling a battery or battery-embedded product in California until CalRecycle determines the producer is in compliance.
- 19) Authorizes CalRecycle to impose an administrative civil penalty on a producer, stewardship organization, manufacturer, distributor, retailer, importer, recycler, or collection site that is in violation of this act, except as provided. The amount of the administrative civil penalty shall not exceed \$10,000 per day, but, if the violation is intentional, knowing, or reckless, it may impose an administrative civil penalty of not more than \$50,000 per day.

- 20) Authorizes CalRecycle, if it makes a finding that a material requirement of the act has not been met and provides a reasonable opportunity to respond to, or rebut, the finding, to take the following actions:
 - a. revoke the stewardship organization's or producer's stewardship plan approval or require the stewardship organization or producer to resubmit the plan;
 - b. remove the producer, along with its brands and batteries or battery-embedded products, from CalRecycle's list of compliant producers; and
 - c. impose additional reporting requirements relating to compliance with the material requirement identified by the department.
- 21) Requires a producer, stewardship organization, manufacturer, distributor, retailer, importer, recycler, or collection site to provide CalRecycle with reasonable and timely access to its facilities and operations, as authorized pursuant to the inspection warrant provisions of the Code of Civil Procedure.
- 22) Provides that the records required by the bill must be maintained and accessible for three years. All reports and records provided to CalRecycle shall be provided under penalty of perjury.
- 23) Authorizes CalRecycle may take disciplinary action against a producer, stewardship organization, manufacturer, distributor, retailer, importer, recycler, or collection site that fails to provide the department with the access required pursuant to this section, including, but not limited to, imposing administrative civil penalties and posting an immediate notice on its website that the producer, along with its brands and batteries or battery-embedded products, is no longer in compliance with this chapter.
- 24) Exempts certain actions taken by a stewardship organization or producer from the Cartwright Act, Business and Professions Code Section 16700 et seq., the Unfair Practices Act, Business and Professions Code Section 17000 et seq., and the Unfair Competition Law, Business and Professions Code Section 17200 et seq.
- 25) Repeals the Rechargeable Battery Recycling Act and the Cell Phone Recycling Act as of June 30, 2025.

COMMENTS

1. Attempts to address the problem of battery waste

As discussed above, batteries contain dangerous materials and can create serious safety concerns. As a result, they cannot be simply thrown out or placed in the recycling bin. According to CalRecycle:

Batteries are considered hazardous waste in California when they are discarded. This includes AAA, AA, C, D, button cell, 9-volt, and all other batteries, both rechargeable and single-use. All batteries must be recycled or taken to a household hazardous waste disposal facility, a universal waste handler (e.g., storage facility or broker), or an authorized recycling facility.

Batteries are considered hazardous because of the metals and/or other toxic or corrosive materials they contain. Batteries are potentially a valuable source of recyclable metal.

According to a report titled Household Universal Waste Generation in California, 507,259,000 batteries were sold in California in 2001. According to the report, only 0.55 percent of these batteries were recycled.²

These abysmal numbers are despite several regulatory schemes intended to address the problem. The Rechargeable Battery Recycling Act was enacted with the goal of establishing a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of previously used rechargeable batteries. (Pub. Resources Code § 42451 et seq.) Most portable electronic devices used by most Californians every day contain such batteries. The act requires every retailer to have in place a system for the acceptance and collection of used rechargeable batteries for reuse, recycling, or proper disposal. However, the act does not apply to retailers that sell such batteries contained within or packaged with a battery-operated device. (Pub. Resources Code § 42453.)

California also established the Cell Phone Recycling Act with the stated goal of enacting a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of used cell phones. The goal was to establish a program convenient for consumers and the public to return, recycle, and ensure the safe and environmentally sound disposal of used cell phones, and to provide a system that does not charge a fee when a cell phone is returned. (Pub. Resources Code § 42490 et seq.) The act requires every retailer of cell phones sold in California to have in place a system for the acceptance and collection of used cell phones for reuse, recycling, or proper disposal. (Pub. Resources Code § 42494.) However, the bill applies only to this one device. Similarly, the Electronic Waste Recycling Act also fosters the proper and legal disposal of “covered electronic devices,” however, this only includes certain video display devices. (Pub. Resources Code § 42460 et seq.)

² Batteries (March 9, 2020) CalRecycle, <https://www.calrecycle.ca.gov/reducewaste/batteries#:~:text=materials%20they%20contain,-Batteries%20are%20potentially%20a%20valuable%20source%20of%20recyclable%20metal,or%20an%20authorized%20recycling%20facility.>

2. Addressing the problem through extended producer responsibility

This bill takes another step at addressing this issue at a more holistic level by establishing an extended producer responsibility model:

Extended Producer Responsibility (EPR), also known as Product Stewardship, is a strategy to place a shared responsibility for end-of-life product management on producers, and other entities involved in the product chain, instead of the general public; while encouraging product design changes that minimize negative impacts on human health and the environment at every stage of the product's lifecycle. This allows the costs of processing and disposal to be incorporated into the total cost of a product. It places primary responsibility on the producer, or brand owner, who makes design and marketing decisions. It also creates a setting for markets to emerge that truly reflect the environmental impacts of a product, and to which producers and consumers respond.³

California has already statutorily established EPR programs in various industries, including paint, carpet, mattresses, pharmaceuticals and sharps, mercury thermostats, and pesticide containers. The author makes the case for extending this to batteries and battery-embedded products:

Because of the hazardous metals and corrosive materials that batteries contain, California classifies batteries as hazardous waste and bans them from solid waste landfills. When improperly discarded, lithium-ion (Li-ion) batteries in particular pose serious fire, health and safety hazards.

Unfortunately, because of a combination of increased consumption and a lack of convenient disposal options, higher levels of toxic batteries are entering the waste stream. Among other negative consequences, this has resulted in an alarming number of material recovery facilities, waste collection trucks, and landfills experiencing fires caused by improperly disposed of Li-ion batteries. These fires endanger the lives of workers and pollute the atmosphere and surrounding areas, while causing expensive damage to city and county waste collection vehicles, equipment and facilities.

SB 289 would require free collection bins for most loose and product-embedded batteries at convenient retail locations across the state, to provide an easily accessed channel for consumers to safely place batteries

³ *Product Stewardship and Extended Producer Responsibility (EPR)* (September 14, 2020) CalRecycle, [https://www.calrecycle.ca.gov/epr#:~:text=Extended%20Producer%20Responsibility%20\(EPR\)%2C,design%20changes%20that%20minimize%20negative](https://www.calrecycle.ca.gov/epr#:~:text=Extended%20Producer%20Responsibility%20(EPR)%2C,design%20changes%20that%20minimize%20negative).

into the bins for proper disposal rather than simply discarding them into the garbage, as is commonplace. SB 289 would also encourage manufacturers to be more responsible for the life cycle of their products by creating a producer-run program. Lastly, the bill would create a consumer outreach and education campaign to encourage the proper disposal of all batteries.

The bill addresses the issues identified with other laws by applying to not only rechargeable batteries or cell phones, but all batteries and battery-embedded products. The bill carves out the “covered devices” regulated by the Electronic Waste Recycling Act, but eventually repeals the Rechargeable Battery Act and the Cell Phone Recycling Act. Battery-embedded products include products containing a battery or battery pack that is not designed to be removed by the consumer. It excludes energy storage systems, certain medical devices, car batteries, and “industrial batteries,” which will be defined by CalRecycle. The Rechargeable Battery Association urges some further clarity here, as well as elsewhere throughout the bill. They specifically seek clarity on what is encompassed by “industrial battery” and point out that the exemption for medical devices is broader here than in a similar stewardship program established in the District of Columbia.⁴ The concern is that the larger these exemptions the smaller the pool of producers that will absorb the costs associated with recovering and recycling batteries and products.

The bill will likely lead to collection bins being found in numerous retail locations throughout the state, addressing the current concerns with the dearth of accessible locations to properly dispose of batteries and battery-embedded products. The author asserts that the lack of convenient disposal options combined with increased consumption has led to higher levels of toxic batteries and products improperly entering the waste stream.

The bill requires producers or a stewardship organization on behalf of a group of producers to submit a stewardship plan laying out how they will accomplish the requirements of the bill and provide for the collection, transportation, and recycling, and the safe and proper management, of batteries or battery-embedded products in the state in an economically efficient and practical manner. The plan must be submitted by June 30, 2025, and fully implemented by June 30, 2026.

The stewardship plan is required to include a thorough set of details ranging from its plan to establish the requisite amount and spread of collection sites, to its outreach campaign, to performance metrics, to a description of how their materials will avoid landfills and properly enter the recycling process. Producers and stewardship organizations are also required to provide CalRecycle a list of batteries and battery-embedded products that it sells or offers for sale in California by April 1, 2022.

⁴ See D.C. Code § 8-771.01.

Local jurisdictions have struggled with the issue and are supportive of this approach to the problem. In a joint letter of support, the Rural County Representatives of California, the League of California Cities, and the California State Association of Counties state:

While the solid waste industry works to avoid the risks posed by lithium-ion batteries, the problem requires a broader solution. Given that local governments are already strained with implementing other aspects of solid waste recycling and disposal programs, we believe that the product manufacturers are best suited to perform the surveys, accounting, and collection responsibilities envisioned in SB 289. SB 289 appropriately requires manufacturers and retailers to take more responsibility for avoiding the inherent risks associated with the improper disposal of the products they create.

However, a broad coalition of industry associations, including manufacturers, insurance companies, and retailers, as well as the Rechargeable Battery Association, oppose the bill. In a joint letter of opposition, they write:

Notwithstanding its title, SB 289 would fail to provide a workable solution to concerns with the initiation of fires in municipal recycling programs or materials recovery facilities. It also would repeal California's successfully-operating Rechargeable Battery Act of 2006 and the Cell Phone Recycling Act of 2004.

In their place, SB 289 would impose a complex, ill-conceived system that would substantially increase the cost of vital products to California consumers, impose huge burdens on California regulatory agencies, and subject the makers of batteries and battery-embedded products, product distributors and retailers to exceedingly complex rules, very substantial fees and potentially draconian fines.

All of the signatories to this letter are sensitive to the fire risks associated with lithium-ion batteries put into recycling and waste streams. But a targeted, thoughtful legislative solution to those concerns would make far more sense than SB 289's flawed, complex, and fundamentally unworkable approach.

3. Oversight and Enforcement

CalRecycle maintains paramount authority over the programs and ultimately reviews the stewardship plans and required annual reports. However, the bill also requires stewardship plans to first be submitted to "any applicable state agencies with areas of authority relative to the stewardship plan." Each agency is then required to review the plan for compliance with state and federal laws and regulations related to their specific

authority. The producers and stewardship organizations are required to reimburse all state agencies with jurisdiction relevant to the program of their reasonable regulatory costs.

In addition to annual reports that must be submitted to and approved by CalRecycle, these entities must keep specified records reflecting their activities and transactions. They must pay for an annual audit of their records. For its part, CalRecycle may conduct its own audit in order to enforce this law. The bill also makes clear that CalRecycle has the authority to secure inspection warrants to inspect the facilities and operations of producers, stewardship organizations, manufacturer, distributors, retailers, importers, recyclers, or collection sites. These entities must also provide CalRecycle, upon their request, with all relevant records necessary to ensure compliance. Records required by the bill must be maintained and made accessible for three years. All reports and records provided to CalRecycle are provided under penalty of perjury, subjecting whoever sends them to potential criminal liability. CalRecycle is authorized to take disciplinary action for failure to comply with these provisions.

The central mechanism for enforcing this bill and ensuring compliance is a list of producers that are in compliance that CalRecycle is required to post on its website. Retailers and distributors are required to monitor this list and are prohibited from selling, distributing, offering for sale, or importing a battery or battery-embedded product unless the producer of it is listed as in compliance with respect to that brand or product, as provided. CalRecycle must remove producers if they are subsequently found out of compliance.

CalRecycle is also authorized to impose administrative penalties on these entities for violations of up to \$10,000 per day, and up to \$50,000 per day for intentional, knowing, or reckless violations. Producers and stewardship organizations are prohibited from using revenues from the stewardship program to pay for these penalties or any costs associated with litigation between it and the state. Concerns have been raised from opposition that these penalties are excessive, especially in light of what they consider ambiguous terms and obligations laid out on the bill. The Rechargeable Battery Association also argues that compliance is required with respect to certain provisions, such as registering batteries and battery-embedded products as of April 1, 2022, but regulations are not to be promulgated until January 1, 2024. It argues civil penalties should not be authorized until more clarity through the regulatory process is provided.

4. The Dormant Commerce Clause

The United States Constitution's commerce clause provides that Congress has paramount authority to regulate commerce with "foreign Nations, and among the several States." (U.S. Const. Art. I, § 8, Cl 3.) However, inherent in this clause is a limitation on the states' ability to engage in conduct that unduly burdens interstate commerce. This latter principle is referred to as the dormant commerce clause:

“It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce.” *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988). This limitation on state power is the so-called “dormant commerce clause.” It “prohibits economic protectionism - that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Id.* at 273-74.⁵

The United States Supreme Court has further explained:

As we have long recognized, the "negative" or "dormant" aspect of the Commerce Clause prohibits States from "advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 93 L. Ed. 865, 69 S. Ct. 657 (1949). A state statute that clearly discriminates against interstate commerce is therefore unconstitutional "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988).⁶

In several sections of the bill, there is reference to a preference for in-state processing facilities over out-of-state facilities. For instance, the bill explicitly states that it is the intent of the Legislature to “prioritize the use of in-state processing facilities over the use of out-of-state processing facilities to the extent economically practical.” In addition, one required element of the annual report is as follows:

A report on activities, which the stewardship organization or producer shall undertake, to prioritize, to the extent economically practical, the use of in-state processing facilities over out-of-state processing facilities. If the stewardship organization or producer decides to use out-of-state processing facilities, the stewardship organization or producer shall provide an explanation of that decision.

Interestingly enough, a significant portion of the dormant commerce clause jurisprudence out of the United States Supreme Court has dealt with issues of waste processing. In *Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978), the Supreme Court held that a New Jersey law prohibiting the importation of most solid or liquid waste originating or collected outside the state violated the commerce clause. In *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources* (1992) 504 U.S. 353, 355, the court

⁵ *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.* (9th Cir. 1992) 952 F.2d 1173, 1177.

⁶ *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources* (1992) 504 U.S. 353, 359.

again struck down a similar law in Michigan that prohibited private landfill operators from accepting solid waste that originated outside the county in which their facilities were located. These cases do not just involve limitations on waste coming into the state.

In *C & A Carbone v. Town of Clarkstown* (1994) 511 U.S. 383, 386, the United States Supreme Court held a local ordinance in a New York town violated the commerce clause. The “flow control ordinance” required all solid waste to be processed at a specific transfer station before leaving the municipality. The court found that the ordinance had the same design and effect as other laws that were struck down. The law hoarded solid waste, and the demand to get rid of it, for the benefit of a preferred processing facility. The flow control ordinance was found to “squelch[] competition in the waste-processing service altogether, leaving no room for investment from outside.”

Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species). A number of amici contend that the flow control ordinance fits into this narrow class. They suggest that as landfill space diminishes and environmental cleanup costs escalate, measures like flow control become necessary to ensure the safe handling and proper treatment of solid waste.

The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests.⁷

While there is no strict requirement in this bill that only in-state facilities be used, there is clearly an intent to advance intra-state interests at the detriment of out-of-state interests.⁸ Producers and stewardship organizations are required to provide additional justification to the state agency in charge, CalRecycle, if in-state facilities are not used, and that state agency has the power to approve or disapprove of that report. The author may wish to consider the potential susceptibility to such a constitutional challenge as the bill moves forward.

⁷ *C & A Carbone v. Town of Clarkstown*, 511 U.S. at 392-393.

⁸ States are granted the ability to discriminate in favor of in-state interests when they are acting as market participants. However, this doctrine is unlikely to apply in these circumstances. See *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.* (9th Cir. 1992) 952 F.2d 1173, 1178.

5. Access to records

The bill also provides that while an approved stewardship plan is a public record, financial, production, or sales data reported to CalRecycle by the producer or stewardship organization is not a public record for purposes of the California Public Records Act and is not open to public inspection. It authorizes CalRecycle to release this data in summary form only, so it cannot be attributable to a specific entity. As this imposes a limitation on the public's right of access to this information, the bill provides the following justification: "In order to ensure that the competitive market in the state for the manufacture and sale of batteries and battery-embedded products is not compromised, it is necessary that financial, production, and sales data and confidential proprietary information collected for the purpose of administering a stewardship program be confidential."

The bill also prohibits CalRecycle from disclosing any confidential proprietary information contained in audits. Producers and stewardship organizations are required to make their annual reports publicly available free of charge, but if the report contains trade secret or confidential information protected under existing law, they need only provide a description of the information and its relevance to the stewardship program omitting any of the trade secret or confidential information.

6. Antitrust immunity

As with most of the EPR schemes provided for in California law, this bill includes express exemptions from various laws regulating anticompetitive behavior and unfair competition and practices. The bill provides that certain activities engaged in by producers and stewardship organizations, including the creation, implementation, management, cost assessments, and structuring of a stewardship plan and the establishment, administration, collection, or disbursement of a charge associated with funding the implementation of this bill are categorically exempt from being considered violations of the Cartwright Act (California's primary antitrust law), the Unfair Practices Act, or the Unfair Competition Law.

The author and sponsors explain the need for these provisions:

Extended Producer Responsibility (EPR), also known as Product Stewardship, is a strategy to place a shared responsibility for end-of-life product management on producers, and other entities involved in the product chain, instead of the general public. As part of this model, producers may come together to form a stewardship organization, which allows them to fulfill their mandated obligations as a collective entity. In order to allow for producers to create a stewardship organization, this legislation includes targeted antitrust immunity. The producers' antitrust immunity is limited to collaboration regarding the creation,

implementation, cost, fees, structure, and management of a stewardship plan. SB 289 will specifically ban producers from coordinating on product prices, output, production, or the geographic region of sale.

Concerns have been raised about the monopolistic possibilities inherent in EPR programs and strong government oversight is critical to ensure this regulatory scheme is operated in an evenhanded manner and results in the ambitious goals it sets out to accomplish. These laws are extremely important to ensuring consumers are protected and free and fair competition is fostered. Mitigating these concerns to an extent, the bill specifically provides that the exemptions do not apply to an agreement that does the following:

- fixes a price of or for batteries or battery-embedded products, except for an agreement related to costs or charges associated with participation in a stewardship plan approved or conditionally approved by the department and otherwise in accordance with this chapter;
- fixes the output or production of batteries or battery-embedded products; or
- restricts the geographic area in which, or customers to whom, batteries or battery-embedded products will be sold.

This language is also similar to that found in the other EPR programs.

SUPPORT

California Product Stewardship Council (co-sponsor)

Californians Against Waste (co-sponsor)

RethinkWaste (co-sponsor)

Alliance of Nurses for Healthy Environments

California Chapters of the Solid Waste Association of North America's Legislative Task Force

California League of Conservation Voters

California Resource Recovery Association

California State Association of Counties

Central Contra Costa Sanitary District

City of Roseville

Clean Water Action

Council of California Goodwill Industries

County of Marin

Del Norte Solid Waste Management Authority

Ecology Action

Friends Committee on Legislation of California

Greeneducation.us

League of California Cities

Los Angeles County Chief Executive Office

Los Angeles County Sanitation Districts
Los Angeles County Solid Waste Management Committee/integrated Waste
Management Task Force
Alameda County Supervisor Nate Miley
Product Stewardship Institute
Public Risk Innovation, Solutions, and Management
Recology
Refill Madness
Republic Services
Resource Recovery Coalition of California
Rural County Representatives of California
San Francisco Department of the Environment
Save Our Shores
Sierra Club California
Solana Center for Environmental Innovation
Upper Valley Waste Management Agency
Zero Waste Company
Zero Waste Sonoma

OPPOSITION

American Property Casualty Insurance Association
Association of Home Appliance Manufacturers
California Chamber of Commerce
California Manufacturers & Technology Association
Consumer Technology Association
National Association of Mutual Insurance Companies
National Electrical Manufacturers Association
Outdoor Power Equipment Institute
Personal Insurance Federation of California
Power Tool Institute
PRBA - the Rechargeable Battery Association
Security Industry Association
The Toy Association

RELATED LEGISLATION

Pending Legislation:

SB 244 (Archuleta, 2021) requires CalRecycle, in consultation with the Department of Toxic Substances Control, to develop guidance for the proper handling and disposal of lithium-ion batteries and requires the Department of Forestry and Fire Protection to develop protocols and training for the detection, safe-handling, and suppression of fires started from discarded lithium-ion batteries in the waste-handling system to be adopted

by solid waste enterprises. The bill also prohibits a person from knowingly disposing of a lithium-ion battery in the garbage or recycling streams, unless the container or receptacle is designated for the collection of batteries for recycling. This bill is currently in the Senate Natural Resources and Water Committee.

AB 735 (Smith, 2021) authorizes the Department of Toxic Substances Control, for purposes of the Rechargeable Battery Recycling Act, to post on its website the estimated amount, by weight, of each type of rechargeable batteries returned for recycling in prior years, in addition to the existing requirement that the information be posted for the previous calendar year. This bill is currently in the Assembly Environmental Safety and Toxic Materials Committee.

Prior Legislation:

AB 1509 (Mullin, 2019) would have established the Lithium-Ion Battery Recycling Program within CalRecycle that requires manufacturers of lithium-ion batteries to provide convenient collection, transportation, and disposal of lithium-ion batteries. This bill died in the Senate Environmental Quality Committee.

SB 212 (Jackson, Ch. 1004, Stats. 2018) established the pharmaceutical and sharps waste stewardship law.

AB 1343 (Huffman, Ch. 420, Stats. 2010) established the architectural paint stewardship program.

AB 2398 (Pérez, Ch. 681, Stats. 2010) established the carpet stewardship law.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 2)
