

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

AB 2440 (Irwin)
Version: June 8, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

Responsible Battery Recycling Act of 2022

DIGEST

This bill requires producers of batteries and battery-embedded products to establish a stewardship program for the collection, transportation, 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 model and requires producers of batteries and battery-embedded products to develop, finance, and implement stewardship programs to recover and recycle these batteries.

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-amazon-are-exploding/587005/>.

The programs will be overseen and regulated by the California Department of Resources Recycling and Recovery (CalRecycle).

This bill is substantially similar to SB 289 (Newman, 2021), which passed this Committee on a vote of 9 to 2. The bill is sponsored by California Product Stewardship Council, Californians Against Waste, and RethinkWaste and supported by numerous environmental organizations, waste management entities, and other organizations and governmental entities. The bill is opposed by associations representing retailers, the technology industry, and manufacturers of home appliances. This bill passed out of the Senate Environmental Quality Committee on a vote of 5 to 2.

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 Responsible Battery Recycling Act of 2022.
- 2) Requires manufacturers of covered battery or covered battery-embedded products (covered 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 covered products that they sell or offer for sale in the state no later than 180 days after the effective date of the Act.
- 3) Defines a "covered battery-embedded product" as a product containing a battery or battery pack that is not designed to be easily removed from the product by the consumer with household tools or tools provided by the manufacturer. It specifically excludes various items, including certain medical devices, covered electronic devices regulated pursuant to the Electronic Waste Recycling Act, and an energy storage system as defined.
- 4) Requires a producer, within nine months of the effective date of regulations adopted by CalRecycle, 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 covered 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. It establishes a minimum number of collection sites

per county. It must require a retailer, with five or more locations in the state, to serve as an authorized collector as part of a stewardship program, as specified. A “retailer” is a person who sells covered batteries or covered 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, as provided.

- 6) Requires, through the stewardship plan, a producer or stewardship organization to allow a consumer to drop off, at no charge, covered products at a collection site and to provide for the payment to a collection site that accepts covered products, as provided.
- 7) Provides that the stewardship plan must include a description of how covered products will not be landfilled, how all discarded covered products will enter a recycling process. It must also include a description of how discarded residual covered materials will be, to the extent economically and technically feasible, recycled.
- 8) 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.
- 9) Requires producers or stewardship programs to prepare and submit proposed two-year budgets each year.
- 10) 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.
- 11) Requires CalRecycle, on or before July 1, 2027, 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 covered products for each producer.
- 12) Requires a retailer or distributor to monitor the website to determine if a producer, brand, or covered 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 covered 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 covered product, as provided.

- 13) Prohibits a producer from selling a covered product in California until CalRecycle determines the producer is in compliance.
- 14) 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.
- 15) 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 covered products, from CalRecycle's list of compliant producers; and
 - c) impose additional compliance reporting requirements.
- 16) 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.
- 17) 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.
- 18) Authorizes CalRecycle to 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.
- 19) 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.

- 20) Provides that the Act preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency on or after January 1, 2023, regarding stewardship programs for covered products.
- 21) Authorizes a stewardship organization or producer, if another state implements a covered battery or covered battery-embedded products recycling program consistent with the requirements of this chapter, to collaborate with that state to conserve resources necessary to efficiently manage and implement the stewardship organization's or producer's stewardship program in this state.
- 22) Makes the Act inoperative on September 30, 2026, and repeals the Act as of January 1, 2027.

COMMENTS

1. Stated need for the bill

The author writes:

Many Californians don't realize that all batteries are hazardous waste; and that throwing batteries, and products embedded with batteries, in curbside waste bins poses a threat to recycling facilities and human life. With more of our everyday items running off of batteries, it is imperative that we take swift action to stamp out the risk of devastating fires at our waste facilities and safely allow recovery of the valuable minerals inside batteries. AB 2440 will establish a comprehensive program to address this crisis and protect our communities from battery fires.

2. Regulation of batteries and product stewardship programs

The Senate Environmental Quality Committee's analysis of this bill provides useful background on product stewardship programs or extended producer responsibility (EPR), which is at the heart of this bill:

Product stewardship (stewardship). Product stewardship, also known as Extended Producer Responsibility (EPR), is a strategy to place a shared responsibility for end-of-life product management on the producers, and all entities involved in the product chain, instead of the general public. Product stewardship encourages product design changes that minimize the negative impact on human health and the environment at every stage of the product's lifecycle. This allows the costs of treatment 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. CalRecycle has developed a product stewardship framework and checklists to guide statutory proposals that would allow CalRecycle and other stakeholders to implement product stewardship programs.

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:

Fires caused by batteries, particularly within our waste facilities, are becoming more common and present serious safety threats to Californians. Lithium-ion (Li-ion) batteries present additional challenges as these rechargeable batteries, although convenient in their ability to store high amounts of energy in small units, can easily overheat and explode. Data from Resource Recycling Systems estimates that 75% to 92% of Li-ion batteries are discarded improperly and in a recent examination of the workflow of a single material recovery facility (MRF) in California, 11 loose Li-ion batteries were found in the waste stream on average each hour. With batteries becoming more prevalent in everyday products, it is essential that the Legislature take steps to protect Californians from threats posed by improperly discarded batteries.

Fires caused by Li-ion batteries can be deadly and catastrophic. In 2016, a Li-ion battery ignited a fire inside Rethink Waste's MRF in San Carlos. Thankfully, no lives were lost, but the resulting blaze forced the facility to close for 90 days and caused nearly \$8.5 million in damaged. Since the fire, Rethink Waste has only been able to secure full insurance coverage through a combination of separate policies with seven companies, resulting in seven times the premium costs. If another fire occurs, Rethink Waste may be unable to secure insurance moving forward, and the prohibitive cost of self-insuring may force the facility to close permanently.

Mishandling used batteries can cause lethal fires which result in injury, service disruption, monetary impacts, the need to engage emergency response teams, ruin the recycling potential of other materials, and lead to increased carbon dioxide, particulate matter, or dioxin emissions. AB 2440 would create a collection and recycling program to more efficiently and effectively collect used batteries and ensure they do not wreak havoc on our waste stream. A more efficient, end-to-end system for batteries offers an opportunity to both keep Californians safe from fires and to recycle and reuse of the valuable and finite minerals inside the batteries, which will reduce toxic environmental impact while supporting economic growth.

3. This bill establishes the Responsible Battery Recycling Act of 2022

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 covered products in the state in an economically efficient and practical manner. The plan must be submitted to the department within 9 months of the effective date of the regulations adopted by the department to implement the Act and approved by CalRecycle within 18 months of that date.

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 how to properly enter the recycling process. Producers and stewardship organizations are also required to provide CalRecycle a list of products that it sells or offers for sale in California within 180 days of the effective date of the Act.

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 covered 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.

According to the author's office, discussions with stakeholders are continuing on a number of fronts, including establishing equity between brick-and-mortar and online retailers and setting limits on the size of battery embedded products retailers are required to take back.

4. The Dormant Commerce Clause

Section 8 of Article I of the United States Constitution grants the United States Congress the power to regulate interstate commerce.² The obverse proposition – that states may not usurp Congress’s express power to regulate interstate commerce – is known as the “Dormant Commerce Clause.”³ 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.⁴ 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.’ ”⁵

SB 289 included references to a preference for in-state processing facilities over out-of-state facilities, which this Committee noted could leave the bill susceptible to a constitutional challenge. This bill does not include any references to in-state processing facilities. This bill’s provisions apply equally to producers who sell, offer for sale, or distribute the battery or battery-embedded product in or into the state. As such, the bill does not favor in-state businesses over out-of-state businesses.

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 dangers posed by covered products, this bill would likely not be found to excessively burden interstate commerce in violation of the Dormant Commerce Clause.

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.”

² U.S. Const., art. I, § 8, cl. 3.

³ See *Gibbons v. Ogden* (1824) 22 U.S. 1.

⁴ E.g., *Dean Milk Co. v. Madison* (1951) 340 U.S. 349, 354.

⁵ *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.

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.

Concerns have been raised about the monopolistic possibilities inherent in stewardship 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, covered 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 stewardship programs.

7. Statements in support

The California Professional Firefighters write in support:

Rechargeable batteries in cell phones and other devices have become a staple of modern life and as such millions of rechargeable batteries are sold in California every year. While these devices are convenient for the consumer and may reduce the waste of disposable batteries, these items still present their own hazards,

particularly when it comes time to dispose of them. Batteries are classified by the state as hazardous waste and they cannot be disposed of in landfills due to the toxic metals and other materials contained in them, and yet each year increasing numbers of these batteries make their way into the waste stream and landfill disposal sites. The presence of these batteries in landfills presents extreme dangers not only to the environment but also to human life, as they can cause devastating fires that are difficult to suppress and expose firefighters and other responders to extremely toxic smoke and other materials.

AB 2440 will address the issues of rechargeable battery disposal by establishing a battery collection and recycling program financed and implemented by the manufacturers of loose and embedded batteries throughout the state. These recycling programs will be free and easily accessed by consumers, and will collect both loose and embedded batteries of all common types for household uses. These measures are necessary for the wellbeing of our communities and firefighters throughout the state [...]

8. Statements in opposition

The California Retailers Association (CRA) writes in opposition:

CRA supports the creation of a circular economy for single-use and rechargeable batteries. Many of our retailers already participate in Call2Recycle's recycling drop-off program for rechargeable batteries. We appreciate your bill's inclusion of single-use batteries within the rechargeable batteries program, as customers often fail to distinguish between battery types. Importantly, this bill also places the responsibility for all program costs on the producers of batteries.

CRA continues to oppose the inclusion of battery-embedded products as part of any retailer take-back program. The potential universe of items included in this class is unknown but certainly would represent an unprecedented expansion of current take-back programs. In contrast to prior legislation, AB 2440 contemplates a weight limit for these products, but volume of takeback is just one consideration. Safety and compliance issues will be extremely problematic for a program involving battery-embedded products. This program will overlap substantially with items that would be considered electronic waste (E-Waste) or household hazardous waste (HHW), and on top of its own compliance challenges could also create significant regulatory risks under these other programs. [...]

SUPPORT

RehinkWaste (sponsor)

California Product Stewardship Council (sponsor)

Californians Against Waste (sponsor)

Active San Gabriel Valley

Alameda County

California Professional Firefighters
California Resource Recovery Association
California State Association of Counties (CSAC)
California Waste Haulers Council
Central Contra Costa Sanitary District
City of Roseville
City of Thousand Oaks
Clean Water Action
County of San Diego
CR&R Environmental Services
Delta Diablo
Environmental Working Group
Los Angeles County Sanitation Districts
Los Angeles County Solid Waste Management Committee/Integrated Waste Management Task Force
Marin Household Hazardous Waste Facility
Monterey Regional Waste Management District
Napa Recycling & Waste Services
RecycleSmart
Republic Services - Western Region
Republic Services Inc.
Resource Recovery Coalition of California
Rural County Representatives of California (RCRC)
Santa Clara County Recycling and Waste Reduction Commission
Sea Hugger
StopWaste
Western Placer Waste Management Authority (WPWMA)
Zero Waste Company
Zero Waste Sonoma

OPPOSITION

Association of Home Appliance Manufacturers
California Retailers Association
Consumer Technology Association

RELATED LEGISLATION

Pending Legislation: SB 1215 (Newman, 2022) is substantially similar to this bill. SB 1215 is pending in the Assembly Natural Resources Committee.

Prior Legislation: SB 289 (Newman, 2021) would have enacted the Battery and Battery-Embedded Product Recycling and Fire Risk Reduction Act of 2021, which would have required the producers of batteries and battery-embedded products to establish a

stewardship program for those products, with full implementation on or before June 30, 2025. SB 289 bill was held on the suspense file in the Senate Appropriations Committee.

SB 244 (Archuleta, 2021) would have required CalRecycle, in consultation with DTSC, to develop guidance for the proper handling and disposal of lithium-ion batteries and would have required 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. SB 244 was vetoed by the Governor.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 2)

Assembly Floor (Ayes 58, Noes 7)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Natural Resources Committee (Ayes 9, Noes 0)

Assembly Environmental Safety and Toxic Materials Committee (Ayes 7, Noes 1)
