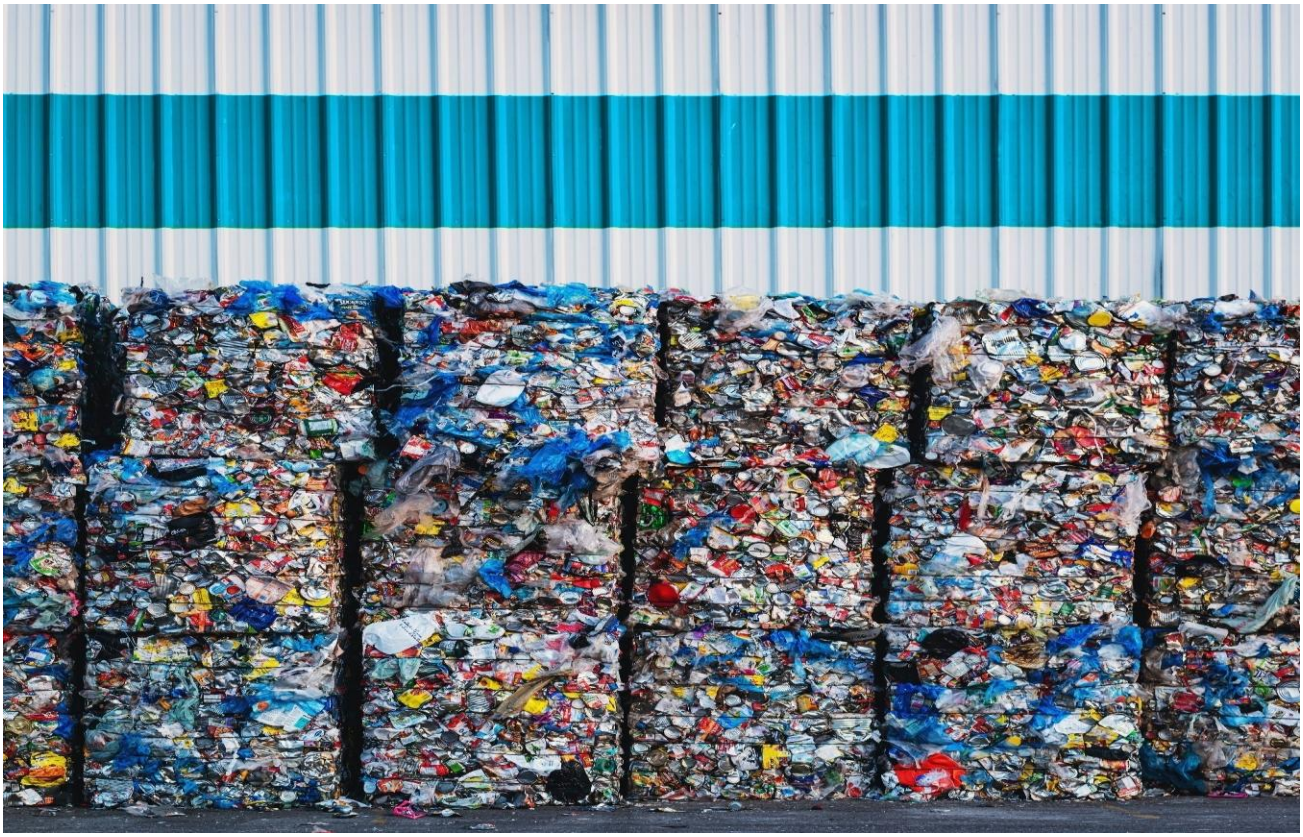
King & Spalding

All Wrapped Up

Extended Producer Responsibility for Packaging

March 2025 Newsletter

In this month's edition of *All Wrapped Up*, we discuss whether the threats to resurrect the California EPR ballot measure have any basis in reality; CAA Colorado's attempts to provide flexibility to producers with respect to postconsumer recycled content requirements; Maine's first draft of its "readily recyclable" materials list; Maryland SB 901's continued momentum; the passage of the first data reporting deadline in U.S. packaging EPR (Oregon); and the potential for EPR in Washington state. We also take a deeper dive – in our *Issue in Focus* section – into how states are grappling with the inclusion of chemical recycling in their definitions of recycling.



March 2025 State-By-State Updates

California

Colorado

Illinois (needs assessment only)

Maine

Maryland (needs assessment only)

Massachusetts (needs assessment only)

Minnesota

Oregon

Washington

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Issue In Focus: Advanced Chemical Recycling

States with packaging EPR laws are grappling with how to define "recycling" and whether and to what extent there should be an accounting for chemical recycling. Mechanical recycling involves separation, sorting, washing, grinding, pelletizing, flaking, and similar physical processes that are used to convert plastics into new products or packaging. Chemical recycling introduces biological, chemical or thermal processes to enhance recycling beyond the physical steps. Many industry stakeholders, including the American Chemistry Council, consider chemical recycling necessary to create a circular economy for plastics. Other stakeholders, including many environmental nonprofits, oppose it, arguing that chemical recycling releases toxic emissions, generates hazardous waste, and contributes to climate change. At present, all six states with packaging EPR laws allow some form of chemical recycling subject to certain conditions.

- **Colorado** expressly allows for the recycling of covered materials "through a method other than mechanical recycling," although recycling is defined to exclude energy recovery or energy generation by means of combustion; use as a fuel; use as an alternative daily cover; and landfill disposal of discarded covered materials. By statute, the PRO must provide the Advisory Council with a list of any recycling end markets that use a method other than mechanical recycling that includes:

  (i) a description of how the method will affect the ability to recycle the covered material into feedstock for the manufacture of new products;

  (ii) a description of how the method will increase the types and amounts of recycled plastic for food and pharmaceutical-grade packaging and applications;

(iii) a description of any applicable state and federal air, water, and waste permitting compliance requirements for the method; and

(iv) an analysis of the environmental impacts of the method compared to the environmental impacts of incineration of solid waste in landfills.

CAA Colorado interpreted the statute in the draft PRO plan to allow for the use of chemical recycling in the production of PCR content, subject to a PCR verification framework. This framework includes an allowance for the mass balance credit method in verifying PCR content, consistent with existing international standards. The mass balance credit method allows producers to claim PCR credit for multiple products generated by the same process. The draft PRO plan is technology agnostic in the sense that it does not prohibit this process from also generating a fuel; the fuel production component, however, cannot be counted toward the PCR calculation. As noted above, this aspect of the draft PRO plan has sparked notable opposition from stakeholders. Colorado is currently engaged in discussions with these stakeholders in determining to what extent it will allow chemical recycling and what that will mean in the state.

- **Oregon** expressly allows for a "method other than mechanical recycling," provided that the material is transferred to a "responsible end market." By statute, the PRO must provide the following information to demonstrate that the material is being transferred to a responsible end market:

  (i) a description of how the proposed method will affect the ability of the material to be recycled into feedstock for the manufacture of new products;

  (ii) a description of how the proposed method will affect the types and amounts of plastic recycled for food and pharmaceutical-grade applications;

  (iii) a description of any applicable air, water and waste permitting compliance requirements; and

  (iv) an analysis of the environmental impacts for the proposed method compared to the environmental impacts of mechanical recycling, incineration and landfill disposal as solid waste.

  This statutory criteria is identical to the criteria discussed above in Colorado's EPR statute, except that Oregon does not expressly exclude energy generation, incineration, combustion, etc. from the definition of "recycling." Oregon DEQ, however, uses more stringent verification factors than CAA Colorado is proposing, which will make it more difficult to use chemical recycling in Oregon to meet recycling targets. Oregon DEQ has expressed its view that the existing international standards upon which CAA Colorado is relying do not, in fact, meet its statutory criteria, even though its statutory criteria is identical to Colorado's. Oregon DEQ, instead, prescribes a relatively more rigorous approach based on principles of regulatory compliance, transparency, environmentally-sound and sustainable practice, and adequate recycling yields, subject to third-party verification and an audit function. The focus also shifts one step further into the recycling process for "plastic that is recycled to produce packaging for food or beverage applications or for production of children's products," perhaps owing to concerns with toxics being introduced into these materials.

- **California** defines recycling to exclude combustion, incineration, energy generation, fuel production, except for anaerobic digestion of source separated organic materials, and "other forms of disposal." Draft regulations that were *not* adopted, purportedly allowed for "technology that employes [sic] . . . chemical processes," provided that an "independently

peer-reviewed scientific study confirms that the technology does not generate a significant amount of hazardous waste." "[S]ignificant hazardous waste," however, was defined as any amount greater than what mechanical recycling generates. This limitation appears to serve as a heavily-negotiated poison pill because, as of today, this technology does not exist. It remains to be seen whether the next iteration of CalRecycle's SB54 rulemaking will adopt a similar approach.

- **Maine** defines recycling to exclude "landfill disposal, incineration or energy recovery or energy generation by means of combusting unwanted products, components and by-products with or without other waste." Maine's EPR law provides an additional limitation on the use of chemical recycling: "[p]lastic separated by polymer is considered recycled if it does not require further processing before entering a pelletization, extrusion or molding operation or, in the case of plastic flakes, does not require further processing before use in a final product." Notably, in 2024, as the EPR program was under development, Maine's solid waste statutes were amended to regulate "chemical plastic processing" as solid waste processing, which increases regulatory scrutiny on what would otherwise constitute chemical *recycling*. "Chemical plastic processing" is defined as "the processing of plastic waste using chemical or molecular methods into basic raw materials, feedstock chemicals, fuel for combustion, waxes or lubricants," but "does not include plastic-to-plastic recycling." "[S]olid waste processing facility" is expressly defined to include "a facility that processes plastic waste through chemical plastic processing." Maine's EPR regulations do not provide any additional clarity, other than to generally require third-party verification of PCR content, which may leave the door open to further discussions as to whether and to what extent chemical recycling can be used to meet Maine's recycling rates and PCR goals. In this regard, MDEP advised in a response to comment that: "[i]f advanced recycling is creating a product rather than leading to energy recovery or generation, then the process meets th[e] definition" of recycling, signaling a clear intention to provide some allowance for it.

- **Maryland** defines recycling to exclude landfilling; combustion; incineration; energy generation; fuel production; or alternative daily cover or other forms of use or disposal within the footprint of a landfill. As Maryland has not yet initiated its rulemaking, it is unclear whether or to what extent chemical recycling can be used to meet Maryland's recycling and PCR targets.

- **Minnesota** defines recycling as the "process of collecting and preparing recyclable materials and reusing the materials in their original form or using them in manufacturing processes that do not cause the destruction of recyclable materials in a manner that precludes further use." Minnesota's recycling performance targets contemplate potential exclusions for "fuel or energy capture," but they are not flushed out in the statute. Nor does "recycling" expressly exclude energy generation, incineration, combustion, etc., which may provide more flexibility to allow for chemical recycling in future rulemaking or PRO plans.

King & Spalding + Extended Producer Responsibility

King & Spalding has a cutting-edge extended producer responsibility practice. We have been at the forefront of these laws long before Maine became the first state to pass a comprehensive EPR packaging law in 2021. Our EPR practice extends beyond paper and plastics to batteries, electronics recycling, and other product stewardship, and our clients include producers as well as service providers. The firm also has one of the deepest environmental teams among the AmLaw top tier firms, providing full-service capability and a global reach. Chambers USA, one of the most preeminent legal ranking organizations, named King & Spalding as the Environmental Law Firm of the Year in 2024.

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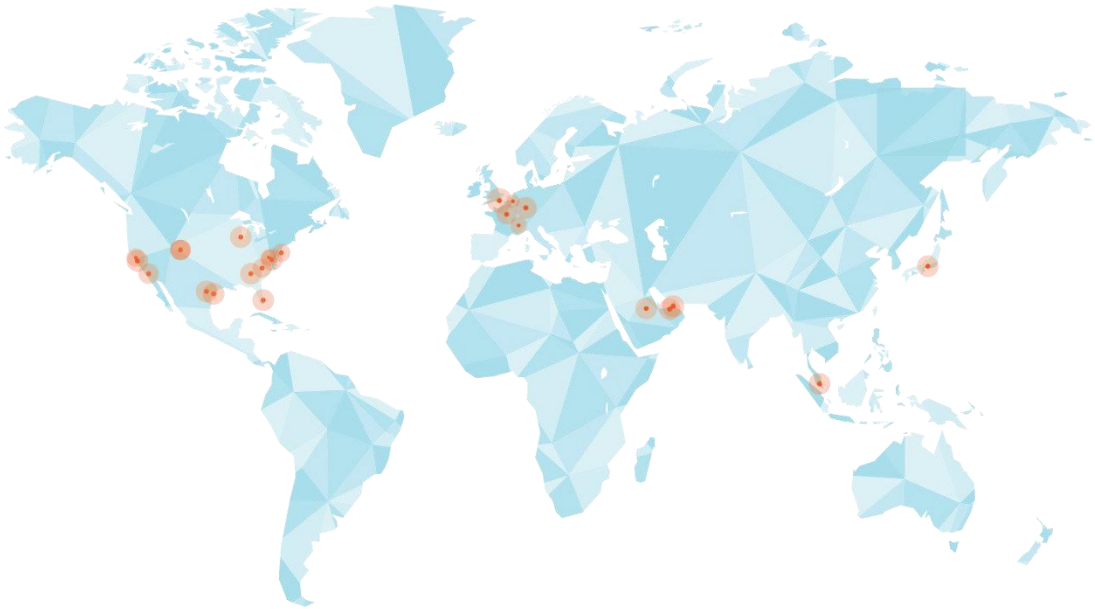

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