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# **SB 1383: What it is and How it Impacts Every Jurisdiction**

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## **SB1383: What it is and How it Impacts Every Jurisdiction**

SB1383 – Short Lived Climate Pollutants, which establishes organic waste reduction requirements, affects approximately 540 jurisdictions in California. The regulation to enforce SB1383 relies heavily upon local jurisdictions to ensure it is implemented and enforced. To make sure that jurisdictions do their part, CalRecycle, the Department, imposes extensive enforcement, recordkeeping and reporting requirements, which are identified and discussed below. The Department is expected to start enforcing the provisions that relate to jurisdictions. As such, recommendations on how to prepare for the Department's enforcement are also discussed below.

Enforcing against public agencies is nothing new for the Department. The Cities of Maywood (\$21,000), Ridgecrest (\$20,000), McFarland (\$11,330), Gardena (\$70,000), Cerritos (\$82,000), and Arvin (\$5,000) all paid penalties associated with the implementation of the Source Reduction and Recycling Element.

### **1. High Level Overview of Key Jurisdiction Requirements under Chapter 12 of Title 14, Division 7 of the California Code of Regulations, Regarding Short-Lived Climate Pollutants.**

Jurisdictions are required to do the following:

- Adopt an enforcement ordinance(s) or other enforceable mechanisms to mandate that organic waste generators, haulers, and other entities that are subject to the jurisdiction's authority comply with the requirements in Chapter 12, which includes, but is not limited to, organic waste collection services, trash container colors and labels, etc. (Cal. Code Regs., tit. 14, § 18981.2.)
- Provide containers for collection services that comply with the container colors in Article 3. (Cal. Code Regs., tit. 14, § 18984.7, subd. (a).) Jurisdictions must also place labels on containers or lids provided to generators. (Cal. Code Regs., tit. 14, § 18984.8.) The Department has model labels to assist jurisdictions in complying with this requirement. See <https://calrecycle.ca.gov/Recycle/Commercial/Organics/PRTToolkit/>.
- Annually procure a quantity of recovered organic waste products that meets or exceeds its current annual recovered organic waste product procurement target. (Cal. Code Regs., tit. 14, § 18993.1, subd. (a).) Each jurisdiction's recovered organic waste product procurement target is calculated by multiplying the per capita procurement target by the jurisdiction population. (Cal. Code Regs., tit. 14, § 18993.1, subd. (c).) The Department is required to provide notice to each jurisdiction of its annual recovered organic waste product procurement target. (Cal. Code Regs., tit. 14, § 18993.1, subd. (d).) The target is recalculated every five years. (Cal. Code Regs., tit. 14, § 18993.1, subd. (b).) Jurisdictions either have to procure recovered organic waste products for use or giveaway, require through a written agreement that a direct service provider to the jurisdiction procure the recovered organic waste products. (Cal. Code Regs., tit. 14, § 18993.1, subd. (e).)
- Have an inspection and enforcement program that is designed to ensure overall compliance with Chapter 12. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a).)

- Counties, in coordination with jurisdictions and regional agencies, are required to estimate the amount of all organic waste that will be disposed of by the County and jurisdictions. (Cal. Code Regs., tit. 14, § 18992.1, subd. (a).) The Counties are also required to identify the amount of existing organic recycling infrastructure capacity and estimate the amount of new or expanded organic waste recycling facility capacity that will be need to process the estimate amount of organic waste that will be disposed. (Cal. Code Regs., tit. 14, § 18992.1, subd. (a)(3)-(a)(4).) If there is insufficient capacity, the jurisdictions that lack the capacity are required to: (1) submit an implementation schedule that includes timelines and milestones for planning efforts to access capacity; and, (2) identify facilities, operations, and activities that could be used for additional capacity. (Cal. Code Regs., tit. 14, § 18992.1, subd. (d).) Section 18992.3, subdivision (a) provides a schedule for conducting the planning activities.

- Counties, in coordination with jurisdictions and regional agencies, are required to estimate the amount of edible food that will be disposed of by commercial edible food generators, identify existing capacity at food recovery organizations, and identify the amount of new or expanded capacity that is necessary to recover the edible food estimated to be disposed of. (Cal. Code Regs., tit. 14, § 18992.2, subd. (a).) If new or expanded capacity is needed, the County is required to report in accordance with section 18992.3, and notify the jurisdiction(s) that lack sufficient capacity. (Cal. Code Regs., tit. 14, § 18992.2, subd. (d).) Section 18992.3, subdivision (a) provides a schedule for conducting the planning activities.

- Implement an edible food recovery program that includes: (1) education of commercial edible food generators; (2) increasing commercial edible food generator access to food recovery organizations and food recovery services; (3) monitoring commercial edible food generator compliance; and, (4) increase edible food recovery capacity if the jurisdiction does not have sufficient capacity to meet its edible food recovery needs. (Cal. Code Regs., tit. 14, § 18991.1.) Jurisdictions must also develop a list of food recovery organizations and maintain it on the jurisdiction's website. (Cal. Code Regs., tit. 14, § 18985.2, subd. (a).)

- Annually provide to organic waste generators information about the generator's requirements to separate materials into the appropriate containers, and other issues. (Cal. Code Regs., tit. 14, § 18985.1.)

- Procure paper products, and printing and writing paper, consistent with the requirements of Sections 22150-22154 of the Public Contract Code, which requires recycled products.

- Maintain records required for the Implementation Record. (Cal. Code Regs., tit. 14, § 18995.2.) The records must be stored in one central location that can be readily accessed by the Department. (Cal. Code Regs., tit. 14, § 18995.2, subd. (b).) If the Department requests the records they must be provided within 10 business days. (Cal. Code Regs., tit. 14, § 18995.2, subd. (c).) All required records must be included in the Implementation Record within 60-days of the creation of that record. (Cal. Code Regs., tit. 14, § 18995.2, subd. (d).) The records must be retained for five years. (Cal. Code Regs., tit. 14, § 18995.2, subd. (e).)

- Adopt ordinance(s) or enforceable mechanisms to impose penalties as prescribed in section 18997.2. (Cal. Code Regs., tit. 14, § 18997.1, subd. (b).)

- Provide a written procedure for the receipt and investigation of written complaints of alleged violations of Chapter 12. (Cal. Code Regs., tit. 14, § 18995.3, subd. (a).)

- Notify the Department in writing within 10 days of the jurisdiction granting a facility processing a jurisdiction's organic waste a waiver because the facility is unable to process the waste because of unforeseen operational restrictions imposed by a regulatory agency or unforeseen equipment or operational failure that temporarily prevents the facility from processing and recovering organic waste. (Cal. Code Regs., tit. 14, § 18984.13, subd. (a)(2).)

If a jurisdiction implements a performance-based source separated collection service that meets the requirements of Section 18998.1, subdivision (a), the jurisdiction is not subject to several requirements including: (1) collection requirements in Sections 18984.2 and 18984.3; (2) container labeling requirements in Section 18984.8, and waivers in Section 18984.11.; (3) recordkeeping requirements in Sections 18984.4, and 18984.14; (4) organic waste recovery education and outreach requirements in Section 18985.1; (5) recordkeeping requirements in Section 18985.3 except as related to edible food recovery education and outreach performed under Section 18985.2; (6) the regulation of haulers in Article 7; (7) annual reporting requirements in Section 18994.2(c)(1)-(2), (d)-(f) and (k); (8) inspection and enforcement requirements in Sections 18995.1, except for the provisions related to edible food generators and food recovery organizations and services in that section; (9) implementation record and recordkeeping requirements in Section 18995.2(f)(3)-(7) except that Implementation Records requirements in Section 18995.2(f)(11)-(13) shall only be required for inspections and enforcement related to edible food generators and food recovery organizations and services; (10) investigation of complaints of alleged violations requirements in Section 18995.3, except as it pertains to entities subject to the edible food recovery requirements of Article 10; and, (11) enforcement requirements in Section 18995.4, except as it pertains to entities subject to the edible food recovery requirements of Article 10 of Chapter 12. (Cal. Code Regs., tit. 14, § 18998.2.)

## **2. Prohibitions on Jurisdictions.**

A jurisdiction is prohibited from implementing or enforcing an ordinance, policy, procedure, permit condition, or initiative that does any of the following.

- Prohibit, or otherwise unreasonably limit or restrict, the lawful processing and recovery of organic waste.
- Limit a particular solid waste facility, operation, property, or activity from accepting organic waste imported from outside of the jurisdiction for processing or recovery.
- Limit the export of organic waste to a facility, operation, property or activity outside of the jurisdiction that recovers the organic waste.
- Require a generator or a hauler to transport organic waste to a solid waste facility or operation that does not process or recover organic waste.
- Require a generator to use an organic waste collection service or combination of services that do not recover at least the same types of organic waste recovered by a service the generator previously had in place.

(Cal. Code Regs., tit. 14, § 18990.1.)

A jurisdiction is also prohibited from implementing or enforcing an ordinance, policy, or procedure that prohibits the ability of a generator, food recovery organization, or food recovery service to recover edible food that could be recovered for human consumption. (Cal. Code Regs., tit. 14, § 18990.2, subd. (a).)

These prohibitions cannot be enforced in a manner that affects the land use authority of a jurisdiction. (Cal. Code Regs., tit. 14, § 18990.1, subd. (c)(3).)

### **3. Oversight Requirements.**

#### **a. Jurisdiction Oversight Requirements.**

A jurisdiction is required to have an inspection and enforcement program. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a).) Every year a jurisdiction is required conduct compliance reviews of all solid waste collection accounts for commercial businesses if the jurisdiction is using the compliance methods in sections 18984.1, 18984.2, or 18984.3; and, conduct inspections of commercial edible food generators and food recovery organizations and serves; investigate complaints. (Cal. Code Regs., tit. 14, § 18995.1, subds. (a)(1)-(a)(3).) A jurisdiction is also required to conduct a sufficient number of route reviews and inspections of entities identified above. (Cal. Code Regs., tit. 14, § 18995.1, subd. (b).) A jurisdiction is required to generate a written or electronic record for each inspection, route review, and compliance review. (Cal. Code Regs., tit. 14, § 18995.1, subd. (c).)

A jurisdiction is required to set up a procedure for the receipt and investigation of written complaints that meets the requirements stated in section 18995.3. A jurisdiction is required to commence an investigation within 90 days of receiving a complaint if the jurisdiction determines that the allegations, if true, would constitute a violation of Chapter 12. (Cal. Code Regs., tit. 14, § 18995.3, subd. (c).) The jurisdiction may decline to investigate a complaint if, in its judgment, investigation is unwarranted because the allegations are contrary to facts known to the jurisdiction. (*Id.*)

Starting on or after January 1, 2024, a jurisdiction is required to take enforcement actions. (Cal. Code Regs., tit. 14, § 18996.5, subd. (a).) Specifically, the jurisdiction is required to issue a notice of violation requiring compliance within 60 days, and if the respondent does not comply, the jurisdiction is required to impose penalties. (*Id.*) A jurisdiction may expend the compliance due dates if the jurisdiction finds there are extenuating circumstances beyond the control of the respondent. (Cal. Code Regs., tit. 14, § 18996.5, subd. (b).) Extenuating circumstances are defined in the Code of Regulations and includes deficiencies in organic waste recycling capacity infrastructure or edible food recovery capacity if the jurisdiction is under a Corrective Action Plan. (*Id.*)

Jurisdictions must require residential, commercial, and industrial organic waste collection services to meet the requirements and standards in Chapter 12 as a condition of approval of a contract, agreement, or other authorization to collect organic waste. (Cal. Code Regs., tit. 14, § 18988.1, subd. (a).)

Jurisdictions are required to monitor the containers to minimize prohibited container contamination. (Cal. Code Regs., tit. 14, § 18984.5, subd. (a).) The monitoring may be done, depending upon the organic waste collection service the jurisdiction is implementing, through

waste evaluations, route reviews, or sampling of gray containers. (Cal. Code Regs., tit. 14, § 18984.5.)

If an enforcement matter is of "substantial statewide concern" (undefined) and multiple jurisdictions decide that Department enforcement may be more effective at achieving the intent of Chapter 12, the jurisdictions may file a joint enforcement referral. (Cal. Code Regs., tit. 14, § 18996.5, subd. (a).) The enforcement referral may be made for organic waste generator or generators, including a commercial edible food generator or generators, with locations, at minimum, in each of those jurisdictions. (Cal. Code Regs., tit. 14, § 18996.5, subd. (b).) If the Department fails to respond to a joint referral within 90 days of receipt, the joint referral shall be deemed denied. (Cal. Code Regs., tit. 14, § 18996.5, subd. (e)(2).)

A jurisdiction is required to impose penalties that comply with Government Code sections 53069.4 (enacting an ordinance), 25132 (prosecuting violations of county ordinances by bring an action in the name of the people of the state of California), and 36900 (prosecuting violations of city ordinances by bring an action in the name of the people of the state of California.) (Cal. Code Regs., tit. 14, § 18997.2, subd. (a).) The amounts of the base penalty authorized are specified in the Code and range from \$50 to \$500 per violation. (*Id.*)

If the Department receives a complaint about a violation that is within the enforcement authority of a jurisdiction it will refer the complaint to the jurisdiction for investigation under section 18995.3. (Cal. Code Regs., tit. 14, § 18996.8, subd. (a).)

A public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty. (Gov. Code, § 815.6.) But, A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law. (Gov. Code, § 818.2.) A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. (Gov. Code, § 818.6.)

#### **b. CalRecycle Oversight of a Jurisdiction.**

The Department will evaluate a jurisdiction's compliance with Chapter 12. The review is based on the jurisdiction's implementation record, inspections, compliance reviews and route reviews. (Cal. Code Regs., tit. 14, § 18981.2, subds. (a)-(b).) The Department is required to notify the jurisdiction prior to conducting the evaluation and must provide its findings to the jurisdiction in writing. (Cal. Code Regs., tit. 14, § 18981.2, subds. (c)-(d).)

If the Department determines **at any time** that an ordinance or other enforceable mechanisms is inconsistent with or does not meet the requirements of Chapter 12, the Department is required to notify the jurisdiction and provide an explanation of the deficiencies. (Cal. Code Regs., tit. 14, § 18981.2, subd. (e), see also 18996.1, subd. (e).) The jurisdiction has 180 days from the date of notice of deficiencies. (Cal. Code Regs., tit. 14, § 18996.1, subd. (e).) Enforcement is required. The Department does not seem to be limited by any statute of limitations that would normally apply to a challenge to an ordinance brought under Code of Civil Procedures, section 1085 for a writ of mandate. (See e.g., 90-days in Gov. Code, § 65009, 3 years in Code Civ. Pro., § 338(a).) Although the defense of laches may apply. (*Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 601.) The

jurisdiction has 180 days from the notice to correct the deficiencies, and if the jurisdiction does not, the Department **shall** commence enforcement actions as set forth in Section 18996.2, which permits the Department to issue a notice of violation against the jurisdiction. (*Id.*) It is unknown whether the Department will use any discretion with respect to enforcement decisions.

The Department is required to enforce Chapter 12. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a).) The Department enforces Chapter 12 by issuing a notice of violation to the jurisdiction that requires compliance within 90-days of the issuance of the notice. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(1).) The Department may grant an extension for up to a total of 180 days if it finds that additional time is necessary for the jurisdiction to comply. (*Id.*) Additional extensions may be granted if the Department issues a Corrective Action Plan. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2), subd. (a)(3).)

The Department will only issue a Corrective Action Plan if it finds that "additional time is necessary for the jurisdiction to comply and the jurisdiction has made a substantial effort to meet the maximum compliance deadline but extenuating circumstances beyond the control of the jurisdiction make compliance impracticable." (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2).) "Substantial effort" means that a "a jurisdiction has taken all practicable actions to comply." (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2)(B)) Substantial effort does not include circumstances where a jurisdiction's decision-making body has not taken the necessary steps to comply with Chapter 12 including, but not limited to, a failure to provide adequate staff resources, a failure to provide sufficient funding, or failure to adopt the ordinance(s) or similarly enforceable mechanisms. (*Id.*) Because the Department makes the findings has substantial discretion in rendering a decision based largely on an elected bodies' decisions.

The jurisdiction may submit evidence as to whether a Corrective Action Plan is appropriate. (*Id.*) If a violation is not corrected within 90 days, or 180 days if the Department grants an extension, then the jurisdiction is likely to receive a notice of violation. So, a Corrective Action Plan could be a good option if the jurisdiction cannot come into compliance within the deadlines. However, under a Corrective Action Plan it is the Department that that decides the actions a jurisdiction must take to remedy violation and the compliance deadlines. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(3).) So, if a jurisdiction does not comply within 180 days, the jurisdiction could lose its ability and discretion to decide how it will comply with the violation notice. Further, the Department includes the penalties that may be imposed in the Corrective Action Plan. (*Id.*) Compliance with the Corrective Action Plan must be achieved by no more than 24 months from the date of the notice of violation(s). (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(3).) The 90 or 180 days initial compliance period is included in the 24 months.

The Department will conduct a compliance evaluation by reviewing the jurisdiction's implementation record and by conducting inspections, compliance reviews, and route reviews. (Cal. Code Regs., tit. 14, § 18996.1, subds. (a)-(b).) The Department will provide the jurisdiction prior notice of the evaluation and will provide written findings to the jurisdiction. (Cal. Code Regs., tit. 14, § 18996.1, subds. (c)-(d).)

The Department may upon presentation of proper credentials, enter the premises of any entity subject to the Chapter 12 during normal working hours to conduct inspections and investigations in order to examine organic waste recovery activities, edible food recovery activities, and records in order to determine compliance with Chapter 12. (Cal. Code Regs., tit. 14, § 18996.4, subd. (a).)



The Department will take over a jurisdiction's prosecution of an entity if the jurisdiction fails to take enforcement action after the deadlines in a notice to violate has expired. (Cal. Code Regs., tit. 14, § 18996.3, subd. (a).) The Department will take enforcement action against organic waste generators, commercial edible food generators, haulers, and food recovery organizations and services, and non-local entities if the jurisdiction fails to enforce Chapter 12 as determined by section 18996.3 or if the jurisdiction lacks the authority to enforce. (Cal. Code Regs., tit. 14, § 18996.9, subd. (a).) The Department could also take enforcement action against the jurisdiction for a failure to comply with Chapter 12. (Cal. Code Regs., tit. 14, § 18996.3, subd. (c).) If this occurs, it is possible that the Department will find the jurisdiction out of compliance with Chapter 12.

The Department will investigate written complaints alleging violations of Chapter 12. (Cal. Code Regs., tit. 14, § 18996.8, subd. (a).) The complaints may be submitted anonymously. (Cal. Code Regs., tit. 14, § 18996.8, subd. (b).) The Department is required to investigate the complaint within 90 days if the complaint contains all the required information and if the allegations, if true, would constitute a violation of Chapter 12. (Cal. Code Regs., tit. 14, § 18996.8, subd. (c).) However, the Department may decline to investigate if in its judgment the allegations are contrary to the facts known to the Department. (*Id.*)

#### **4. Potential Liabilities for Jurisdictions.**

The penalties for violating Chapter 12 can be severe for jurisdictions. The penalties are imposed administratively. (Cal. Code Regs., tit. 14, § 18997.3, subd. (a).) The penalties are divided into three categories with the following penalty amounts:

- **Minor Violations:** This applies when the violation involves a "minimal deviation" from some aspects of a requirement. The penalties are no less than \$500 and no more than \$4,000 **per violation per day**.
- **Moderation Violations:** This applies when the violation involves a "moderate deviation" from the standards in Chapter 12. The penalties are no less than \$4,000 and no more than \$7,500 **per violation per day**.
- **Major Violations:** This applies when the violation involves a "substantial deviation" from the standards in Chapter 12 **that may also be** knowing, willful or intentional or a chronic violation by a recalcitrant violator as evidenced by a pattern or practice of noncompliance. A major violation includes a jurisdiction's failure to: (1) have an ordinance or similarly enforceable mechanism for organic waste disposal reduction and edible food recovery; (2) have a provision in a contract, agreement, or other authorization that requires a hauler to comply with Chapter 12; (3) have an edible food recovery program; (4) have any Implementation Record; (5) implements or enforces an ordinance, policy, procedure, condition, or initiative that is prohibited under the organic waste and edible food recovery standards (§§ 18990.1 and 18990.2); and, (6) submit the reports required by the organic waste and edible food recovery standards and policies (§§ 18990.1 and 18990.2.) The penalties are no less than \$7,500 and no more than \$10,000 **per violation per day**.

(Cal. Code Regs., tit. 14, § 18997.3, subd. (b).)

The Department will consider the following facts in determining the amount of the penalty for each violation.

- The nature, circumstances, and severity of the violation(s).
- The violator's ability to pay.
- The willfulness of the violator's misconduct.
- Whether the violator took measures to avoid or mitigate violations of this chapter.
- Evidence of any economic benefit resulting from the violation(s).
- The deterrent effect of the penalty on the violator.
- Whether the violation(s) were due to conditions outside the control of the violator.

(Cal. Code Regs., tit. 14, § 18997.3, subd. (c).)

For violations of the procurement requirements in section 18993.1, the penalties are calculated by dividing the jurisdiction's procurement target by 365 days to determine the daily procurement target, then determining the number of days a jurisdiction was in compliance using the daily procurement target, and then subtracting the number of days that the jurisdiction is determined to be in compliance. (Cal. Code Regs., tit. 14, § 18997.3, subd. (d).) The resulting number of days are the days that the jurisdiction is determined to be out of compliance. (*Id.*) The amount of the penalty is calculated considering the factors in subdivision (c) above. (*Id.*) The penalty amount cannot exceed \$10,000 per day. (*Id.*) Public Resources Code, section 42652.6, subdivision (a)(5)(B) establishes a scale of percentages that civil penalties are based upon: 30% of the target for January 1, 2023, 65% of the target for January 1, 2024, and 100% of the target for January 1, 2025.

The aggregate amount of all violations cannot exceed the amount authorized in Public Resources Code, section 42652.6. (Cal. Code Regs., tit. 14, § 18997.3, subd. (e).) Public Resources Code, section 42652.5, subdivision (a)(5)(A) refers to Public Resources Code, section 41850, which limits the amount to \$10,000 per day. (Pub. Res. Code, § 42652.6.)

If a jurisdiction elects to comply with the container requirements by providing a single gray container, and is in violation of the requirements for gray containers because the facility to which it sends organic waste is unable to meet the required annual average mixed waste organic content recovery rate, the jurisdiction is subject to the enforcement process in section 18996.2, which may include a corrective action plan. (Cal. Code Regs., tit. 14, § 18984.3, subd. (c).)

The Department may also commence an action to impose civil penalties by serving an accusation on the jurisdiction and a notice of informing the jurisdiction of its right to a hearing that is conducted in accordance with section 18997.6. (Cal. Code Regs., tit. 14, § 18997.5, subd. (a).) The jurisdiction may file a request for a hearing with the Department within 15 days or the right to a hearing will be deemed waived. (Cal. Code Regs., tit. 14, § 18997.5, subd. (c).)

If the hearing is waived, the Department is required to issue a penalty order in the amount described in the accusation. (Cal. Code Regs., tit. 14, § 18997.5, subd. (f).) The hearing is scheduled by the Department within 30 days of receiving a request for a hearing, and the hearing is held within 90 days of the scheduling date. (Cal. Code Regs., tit. 14, § 18997.5, subds. (d)-(e).) A written decision is issued within 60 days of the conclusion of the hearing. (Cal. Code Regs., tit. 14, § 18997.5, subd. (g).) A penalty order becomes final and effective upon its issuance and the payment is due within 30 days unless the director of the Department orders otherwise. (Cal. Code Regs., tit. 14, § 18997.6, subd. (b).) The hearing is required to be conducted pursuant to the Administrative Procedures Act, Government Code section 11400 et al. (Cal. Code Regs., tit. 14, § 18997.6, subd. (a).) The regulations for the office of administrative hearings is in California Code of Regulations, Title 1, Division 2.

The Department's hearing process must be exhausted before challenging the decision in court by way of a writ of administrative mandamus. That might include appealing the decision and/or reconsideration. Code of Civil Procedure, section 1094.6, subdivision (b) provides that a "petition shall be filed not later than the 90th day following the date on which the decision becomes final." Subdivision (e) defines a decision among other things as "revoking, denying an application for a permit, license, or other entitlement." Subdivision (f) requires the agency to provide notice to the party that the time within which judicial review must be sought is governed by section 1094.6. (*Alford v. County of Los Angeles* (2020) 51 Cal.App.5th 742, 745.) "[T]he 90-day limitations provision of section 1094.6 does not begin to run until the subdivision (f) notice is given." (*Id. citing Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1102.) Rather, the 90-day statute of limitations is tolled until such time as the subdivision (f) notice is given. (*El Dorado Palm Springs, Ltd. v. Rent Review Com.* (1991) 230 Cal.App.3d 335, 346.) Judicial review is generally limited to the evidence in the record of the agency proceedings. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057.)

Every final enforcement order issued by the Department will be displayed on its internet website, if the final enforcement order is a public record that is not exempt from disclosure. (Gov. Code, § 7924.900.)

There are some upcoming enforcement deadlines:

- A jurisdiction is required to enforce the notice provisions of section 18984.5(b), for violations of Chapter 12 occurring on or after January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.4.)
- A jurisdiction is required to conduct inspections of Tier Two (in addition to Tier One) commercial edible food generators for compliance with Article 10 of Chapter 12 beginning January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a)(2).)

Examples of these facilities are: (1) restaurants with 250 or more seats or a total facility size equal to or greater than 5,000 square feet; (2) hotels with an on-site food facility and 200 or more rooms; (3) health facilities with an on-site food facility and 100 or more beds; (4) large venues and events; (5) state agencies with a cafeteria with 250 or more seats or a total cafeteria facility size equal to or greater than 5,000 square feet; and, (6) Local education agencies with an on-site food facility.

- A jurisdiction is required to enforce Chapter 12 pursuant to Sections 18995.4 and 18997.2 in response to violations beginning January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a)(5). This means that for violations occurring after January 1, 2024, the jurisdiction is required to issue a notice of violation requiring compliance within 60 days. If after 60 days, the entity is still not in compliance, the jurisdiction is required to impose penalties. A jurisdiction may be able to delay this deadline if there are extenuating circumstances such as acts of god, delays in obtaining permits and approvals, and if a jurisdiction is under a corrective action plan because of deficiencies in organic waste recycling capacity infrastructure or edible food recovery capacity.

## **5. Ways in Which Jurisdiction May Manage Their Liabilities.**

Under this law, jurisdictions are both the regulator and being regulated. The Department will base its compliance determination in a large part of the records the jurisdiction compiles and retains. Being prepared is the best way to manage risk.

**Recommendation 1:** Ensure that the annual report required by California Code of Regulations, section 18994.2 (attached), and the recordkeeping requirements in sections 18981.2, subdivision (e), 18988.4, 18984.4, 18984.6, 18984.13, 18984.14, 18985.3, 18991.2, 18995.1, subdivision (f), 18995.3 subdivision (e), 18993.2, 18993.4, 18995.3, 18998.4, and 18998.3 and 18998.4 (if the jurisdiction is implementing a performance-based source separated organic waste collection service) are timely and comprehensive. Make sure the annual report and records are unambiguous. Do not leave it up to the Department to interpret the documents and data, or fill in omissions in the annual report. The next report is due August 1, 2023.

**Recommendation 2:** Some of the data requirements are based on reports and information submitted to the jurisdiction by others so it is important to insure that the source of this information is reliable and accurate. Conduct audits to ensure quality control. Any mistakes become your mistakes.

**Recommendation 3:** Start assembling the materials for the annual report on August 2 of each year, and make it a continuous obligation of the reporters for each category of information that is required to be included in the annual report. Also collect all of the documents support required for recordkeeping to comply with the Implementation Record required by section 18995.2 (attached). These include the documents required by sections 18981.2, subdivision (e), 18984.4, 18984.6, 18984.14, 18985.3, subdivision (e), 18988.4, 18991.2, 18993.2, 18993.4, 18995.1, subdivision (f), 18995.3, subdivision (e), and 18998.4 (if the jurisdiction is implementing a performance-based source separated organic waste collection service). CalRecycle has developed a Model Implementation Record Tool and a Model Performance-Based Implementation Record Tool that jurisdictions can use to assist in meeting implementation record and recordkeeping requirements. (See <https://calrecycle.ca.gov/organics/slcp/recordkeeping/>.)

**Recommendation 4:** Assign a person the responsibility to collect the data and documents required by the annual report **for each category** identified in section 18994.2 and to comply with the recordkeeping requirements

**Recommendation 5:** Have a designated central person that maintains all of the data and documents. This should be the person that would respond to an inspection by the Department.

**Recommendation 6:** Review the information as it is gathered so omissions can be quickly identified and questions asked while memories are fresh.

**Recommendation 7:** The Public Record Act applies to the document and data collected. A jurisdiction may want to review the documents and data as they are collected to determine if an exemption applies, for example, regarding confidential and trade secret information (Evid. Code, § 1060 made applicable by Gov. Code, § 7927.705), and attorney-client and attorney work product doctrine (Gov. Code, § 7927.705.) For non-police state or local agencies, “investigatory or security files” are exempt only if compiled “for correctional, law enforcement, or licensing purposes.” (Gov. Code, § 7923.600(a).) Disclosure could constitute a waiver of the exemption. (Gov. Code, § 7921.505.)

**Recommendation 8:** Have a process in place to conduct the waste evaluations, route reviews, and sampling of gray containers as required by section 18984.5. Consider negotiating with the jurisdiction’s solid waste hauler to conduct these reviews.

**Recommendation 9:** Have a written analysis of resource needs and a budget that shows funding for the resource needs particularly for staff resources.

**Recommendation 10:** Analyze purchase records to identify additional procurement opportunities to purchase paper, toilet paper, toilet seat covers, facial tissue, packaging, notepads, etc. that are at least 30 percent, by fiber weight, postconsumer fiber. Consider whether public outreach materials and items given the public can be made from recycled materials. Determine whether the jurisdiction’s annual recovered organic waste product procurement target exceeds the jurisdiction’s total procurement of transportation fuel, electricity, and gas for heating applications from the previous calendar year as determined by the and seek adjustments to the target.

**Recommendation 11:** Consider entering into an written agreement with regional transit providers or solid waste hauler’s refuse fleet that use fuels from renewable gas, a local wastewater treatment facility that co-digests food waste and uses renewable gas for on-site electricity needs, or if a local parks association uses SB 1383-eligible compost or mulch in park and trail maintenance.

**Recommendation 12:** Have written standardized enforcement procedures and policies, and a written process for the intake and processing of public complaints.

**Recommendation 13:** Identify an appeal process for violation notices that are issued by the jurisdiction.

**Recommendation 14:** Have a review process in place for reviewing new ordinances, policies, procedures, permit conditions, or initiatives that may affect the provisions of Chapter 12 to ensure that the jurisdiction is not implementing or enforcing an in a manner that violates sections 18990.1 and 18990.2, subdivision (a).

**Recommendation 15:** Consider utilizing business license information to identify all solid waste collection accounts for commercial businesses if the jurisdiction is using the compliance methods in sections 18984.1, 18984.2, or 18984.3; and, to identify commercial edible food generators and food recovery organizations and serves that the jurisdiction is required to conduct inspections of.

**Recommendation 16:** Consider partnering with other jurisdictions or a regional group to conduct some of the required tasks.

**Recommendation: 17:** Consider including a condition of approval of a contract, agreement, or other authorization for waste haulers to take over some of the recordkeeping requirements.

## **Section 18994.2. Jurisdiction Annual Reporting.**

(a) A jurisdiction shall report the information required in this section to the Department according to the following schedule:

(1) On or before October 1, 2022, a jurisdiction shall report for the period of January 1, 2022 through June 30, 2022.

(2) On or before August 1, 2023, and on or before August 1 each year thereafter, a jurisdiction shall report for the period covering the entire previous calendar year.

(b) Each jurisdiction shall report the following, relative to its implementation of the organic waste collection requirements of Article 3 of this chapter:

(1) The type of organic waste collection service(s) provided by the jurisdiction to its generators.

(2) The total number of generators that receive each type of organic waste collection service provided by the jurisdiction.

(3) If the jurisdiction is implementing an organic waste collection service that requires transport of the contents of containers to a high diversion organic waste processing facility, the jurisdiction shall identify the Recycling and Disposal Reporting System number of each facility that receives organic waste from the jurisdiction.

(4) If the jurisdiction allows placement of compostable plastics in containers pursuant to Section 18984.1 or 18984.2, the jurisdiction shall identify each facility that has notified the jurisdiction that it accepts and recovers that material.

(5) If the jurisdiction allows organic waste to be collected in plastic bags and placed in containers pursuant to Section 18984.1 or 18984.2 the jurisdiction shall identify each facility that has notified the jurisdiction that it can accept and remove plastic bags when it recovers source separated organic waste.

(c) Each jurisdiction shall report the following, relative to its implementation of the contamination monitoring requirements of Article 3 of this chapter:

(1) The number of route reviews conducted for prohibited container contaminants.

(2) The number of times notices, violations, or targeted education materials were issued to generators for prohibited container contaminants.

(3) The results of waste evaluations performed to meet the container contamination minimization requirements and the number of resulting targeted route reviews.

(d) Each jurisdiction shall report the following relative to its implementation of waivers pursuant to Article 3 of this chapter:

(1) The number of days an emergency circumstances waiver as allowed in Section 18984.13 was in effect and the type of waiver issued.

(2) The tons of organic waste that were disposed as a result of waivers identified in Subsection (1), except disaster and emergency waivers granted in Section 18984.13(b).

(3) The number of generators issued a de-minimis waiver.

(4) The number of generators issued a physical space waiver.

(5) A jurisdiction that receives a waiver from the Department pursuant to Section 18984.12 of Article 3 of this chapter shall report the following information for each year the waiver is in effect:

(A) The number of generators waived from the requirement to subscribe to an organic waste collection service.

(e) A jurisdiction shall report the following regarding its implementation of education and outreach required in Article 4 of this chapter:

(1) The number of organic waste generators and edible food generators that received information and the type of education and outreach used.

(f) A jurisdiction shall report the following regarding its implementation of the hauler oversight requirements of Article 7 of this chapter:

(1) The number of haulers approved to collect organic waste in the jurisdiction.

(2) The Recycling and Disposal Reporting System number of each facility that is receiving organic waste from haulers approved by the jurisdiction.

(3) The number of haulers that have had their approval revoked or denied.

(g) A jurisdiction subject to article 8 shall report the following regarding its implementation of the CALGreen Building Standards and Model Water Efficient Landscape Ordinance as required in Article 8 of this chapter:

(1) The number of construction and demolition debris removal activities conducted in compliance with Section 18989.1.

(2) The number of projects subject to Section 18989.2.

(h) A jurisdiction shall report the following regarding its implementation of the edible food recovery requirements of Article 10 of this chapter:

(1) The number of commercial edible food generators located within the jurisdiction.

(2) The number of food recovery services and organizations located and operating within the jurisdiction that contract with or have written agreements with commercial edible food generators for food recovery.

(A) A jurisdiction shall require food recovery organizations and services that are located within the jurisdiction and contract with or have written agreements with



commercial edible food generators pursuant to Section 18991.3 (b) to report the amount of edible food in pounds recovered by the service or organization in the previous calendar year to the jurisdiction.

(3) The jurisdiction shall report on the total pounds of edible food recovered by food recovery organizations and services pursuant to Subdivision (h)(2)(A).

(i) A jurisdiction shall report the following regarding its implementation of the organic waste recycling capacity planning and edible food recovery capacity planning requirements of Article 11 of this chapter:

(1) A county shall report:

(A) The tons estimated to be generated for landfill disposal.

(B) The amount of capacity verifiably available to the county and cities within the county.

(C) The amount of new capacity needed.

(D) The locations identified for new or expanded facilities.

(E) The jurisdictions that are required to submit implementation schedules.

(F) The jurisdictions that did not provide information required by Article 11 of this chapter to the county within 120 days.

(2) Notwithstanding Subdivision (a), the information required by this subdivision shall be reported on the schedule specified in Section 18992.3.

(j) A jurisdiction, as defined in Sections 18993.1, shall report the following regarding its implementation of the procurement requirements of Article 12 of this chapter:

(1) The amount of each recovered organic waste product procured directly by the city, county, or through direct service providers, or both during the prior calendar year.

(2) If the jurisdiction is implementing the procurement requirements of Section 18993.1 through an adjusted recovered organic waste product procurement target pursuant to Section 18993.1(j), the jurisdiction shall include in its report the total amount of transportation fuel, electricity, and gas for heating applications procured during the calendar year prior to the applicable reporting period.

(k) A jurisdiction shall report the following regarding its implementation of the compliance, monitoring, and enforcement requirements specified in Articles 14-16 of this chapter:

(1) The number of commercial businesses that were included in a compliance review performed by the jurisdiction pursuant to Section 18995.1(a)(1). As well as the number of violations found and corrected through compliance reviews if different from the amount reported in Subdivision (k)(5).

(2) The number of route reviews conducted.

(3) The number of inspections conducted by type for commercial edible food generators, food recovery organizations, and commercial businesses.

(4) The number of complaints pursuant to Section 18995.3 that were received and investigated, and the number of Notices of Violation issued based on investigation of those complaints.

(5) The number of Notices of Violation issued, categorized by type of entity subject to this chapter.

(6) The number of penalty orders issued, categorized by type of entity subject to this chapter.

(7) The number of enforcement actions that were resolved, categorized by type of regulated entity.

(l) A jurisdiction shall report any changes to the information described in Sections 18994.1(a)(1) and 18994.1(a)(3).

## **Section 18995.2. Implementation Record and Recordkeeping Requirements.**

- (a) A jurisdiction shall maintain all records required by this chapter in the Implementation Record.
- (b) The Implementation Record shall be stored in one central location, physical or electronic, that can be readily accessed by the Department.
- (c) Upon request by the Department, the jurisdiction shall provide access to the Implementation Record within ten business days.
- (d) All records and information shall be included in the Implementation Record within 60 days of the creation of the record or information.
- (e) All records shall be retained by the jurisdiction for five years.
- (f) At a minimum, the following shall be included in the Implementation Record:
  - (1) A copy of all ordinances or other similarly enforceable mechanisms, contracts, and agreements, as required by this chapter.
  - (2) A written description of the jurisdiction's inspection and enforcement program that it uses to comply with Sections 18995.1 and 18995.4.
  - (3) All organic waste collection service records required by Section 18984.4.
  - (4) All contamination minimization records required by Section 18984.6.
  - (5) All waiver and exemption records required by Section 18984.14.
  - (6) All education and outreach records required by Section 18985.3.
  - (7) All hauler program records required by Section 18988.4.
  - (8) All jurisdiction edible food recovery program records required by Section 18991.2.
  - (9) All recovered organic waste procurement target records required by Section 18993.2.
  - (10) All recycled content paper procurement records required by Section 18993.4.
  - (11) All inspection, route review, and compliance review documents generated pursuant to the requirements of Section 18995.1(d).
  - (12) All records of enforcement actions undertaken pursuant to this chapter.
  - (13) All records of complaints and investigations of complaints required by Section 18995.3 and compliance with the jurisdiction's inspection and enforcement requirements of Sections 18995.1.

(14) All records required by Section 18998.4 if the jurisdiction is implementing a performance-based source separated organic waste collection service under Article 17 of this chapter.

(g) All records maintained in the Implementation Record shall be subject to the requirements and applicable disclosure exemptions of the Public Records Act as set forth in Government Code Section 6250 et seq.