

REQUEST FOR APPROVAL

To: Scott Smithline
Director

From: Howard Levenson
Deputy Director, Materials Management and Local Assistance Division

Request Date: August 6, 2015

Decision Subject: Proposed Regulations Implementing Civil Liabilities

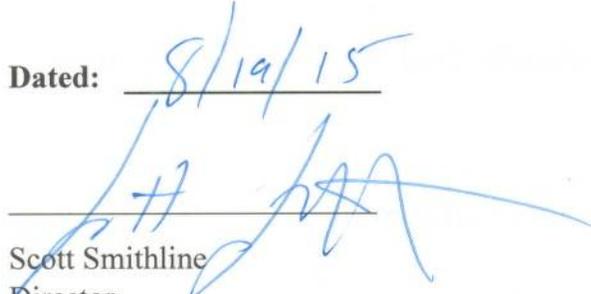
Action By: August 20, 2015

Summary of Request: This Request for Approval seeks authorization to file proposed emergency regulations with the Office of Administrative Law (OAL) that would implement a civil liability facet to the covered electronic waste (CEW) recycling payment system. Public Resources Code (PRC) section 42474 vests the Department of Resources Recycling and Recovery (CalRecycle) with the authority to administratively impose civil penalties. The proposed new regulations would establish a process that allows CalRecycle the ability to exercise its authority and impose civil penalties. To complement this, CalRecycle also is proposing to revise one provision in the existing regulation, section 18660.7, to explicitly incorporate persons who make false statements or representations in the information or documentation he/she provides to an approved collector or approved recycler in the program. The regulations aim to protect the integrity of the CEW program and promote compliance with the CEW program's rules and regulations by acting as a deterrent to discourage non-compliant behavior, as well as providing an incentive for industry compliance. The regulations are intended to promote a level playing field between program participants and foster fair business practices. The proposed regulations would be adopted under emergency authority established by PRC section 42475.2. CalRecycle intends to pursue permanent regulations regarding the imposition of civil liabilities that would be finalized within two years.

Recommendation: Staff recommends approving the proposed new regulations related to the administration of civil liabilities under the Electronic Waste Recycling Act in general and the CEW recycling payment system in particular; and the proposed revised regulation providing a legal nexus between persons that are not approved collectors and/or recyclers yet provide documents to the program and program participants. Upon approval of this request, staff will immediately make the necessary filings with the Office of Administrative Law to enact the proposed regulations.

Director Action: On the basis of the information, analysis, and findings in this Request for Approval, I hereby approve the staff recommendation to approve the civil liabilities regulations and, in doing so, fulfill CalRecycle's obligations pursuant to PRC § 42475; and I further direct staff to file the proposed regulations with the Office of Administrative Law.

Dated: 8/19/15



Scott Smithline
Director

Attachments:

1. Proposed Regulatory Language Implementing Civil Liabilities: 14 CCR § 18660.44, § 18660.45 and § 18660.46, and Proposed Regulation Revision: 14 CCR § 18660.7(f)
2. Authorizing Statutes: PRC § 42474(a), (c), and (d); PRC § 42475.2

Background:

The Electronic Waste Recycling Act of 2003 (PRC § 42460, *et seq.*) established a funding mechanism to provide for convenient collection opportunities and waste processing capabilities for certain electronic products discarded in California. Covered electronic devices (CED) include video display devices with screen sizes greater than four inches that have been determined by the Department of Toxic Substances Control (DTSC) to be hazardous when discarded. When CED is discarded, it becomes CEW. Approved collectors and approved recyclers may recover, process/recycle, and claim for payment CEW that is documented as having been discarded by a California source and managed compliant with applicable law.

The program is funded through a fee paid by consumers of CEDs at the time of retail purchase. Collected fees are remitted by retailers to the State Board of Equalization and deposited into the Electronic Waste Recycling and Recovery Account. Subsequently, payments are made to approved CEW collectors and approved recyclers to offset the cost of appropriate waste recovery, processing and recycling activities. CalRecycle administers the CEW payment system. In the ten years since the CEW program began operation, more than 1.8 billion pounds of CEW have been collected, processed, and claimed, representing over 770 million dollars in public funds.

Over the past few years, CalRecycle staff has concentrated on adjustments to payment claims as one of the tools to safeguard compliance with the program's rules and regulations. The average annual disallowance rate has been 5%. Through CalRecycle staff's own payment claim analysis and review of associated documentation, staff has observed that false documentation continues to be submitted in claims for payment filed with the Department. The use of false documentation or information undermines the integrity of the program. Given the need to maintain the integrity of

the CEW program and foster compliance, CalRecycle staff is proposing to implement civil liabilities which would offer CalRecycle an additional tool to use in this respect.

CalRecycle was granted statutory authority to administratively impose civil penalties in 2012, as codified in PRC section 42474 (d): “Civil liabilities (penalties) in an amount of up to twenty-five thousand dollars (\$25,000) per violation may be administratively imposed by the Department of Resource Recycling and Recovery against a person, including an authorized collector or covered electronic waste recycler, that makes a false statement or representation in any document filed, submitted, maintained, or used for purposes of compliance” with the Electronic Waste Recycling Act and associated regulations, including those related to the CEW program.

Additionally, PRC sections 42474 (a) and (c) authorize CalRecycle to impose liabilities for the failure to pay the covered electronic waste recycling fee, as well as for manufacturer noncompliance with applicable rules and regulations.

The development of the civil liability rules was approached in two stages: 1) research and evaluation of other similar programs that impose administrative civil penalties to understand how they are authorized, structured, and administered; and 2) drafting and revising the proposed regulations based on feedback from staff and public comments.

CalRecycle staff analyzed various statutes and regulations administered by other programs and agencies such as CalRecycle’s Beverage Container, Tire, and Solid Waste Facility Permitting programs, as well as State Water Resources Control Board programs and DTSC programs to evaluate different aspects of a civil penalty approach: scope (e.g., false statement, failure to comply with regulatory requirements and release of hazardous substances), classification of violations, determination of penalty amount, procedures to impose the penalties and timeline. The main challenge was to integrate and adapt the various concepts researched to the needs and specificities of the CEW program and its participants and affiliates. For example, in assessing penalties, the matrix approach used by several programs, which is defined by the extent of deviation and potential harm, was modified to a categorical approach based on frequency of violations, severity, and intent. Also, the concept of “notice of violation” was integrated as a warning mechanism that may be issued prior to the imposition of penalties.

CalRecycle staff also conducted a public workshop on the proposed regulations on July 14, 2015. Stakeholder comments and staff’s response are summarized in “Stakeholder Comments / Staff Response” further below.

Details of Proposed Regulations:

PRC section 42474(d) states that CalRecycle may administratively impose civil liability (penalties) on a person “... that makes a false statement or representation in any document filed, submitted, maintained or used for purposes of compliance...” with the Electronic Waste Recycling Act (Act) and associated regulations, including those related to the CEW program. The proposed regulations establish a framework to implement civil liability for the failure to pay the CEW recycling fee, manufacturer non-compliance, and false statements or representation. Moreover, the addition of 14 CCR § 18660.7(f) is consistent with the authority granted to CalRecycle in the statute.

The regulations aim to protect the integrity of the CEW program and promote compliance with the CEW program's rules and regulations by acting as a deterrent to discourage non-compliant behavior, as well as providing an incentive for industry compliance. The regulations are intended to promote a level playing field between program participants and foster fair business practices.

The proposed regulatory language and revisions can be found as **Attachment 1** to this request for approval. **Attachment 2** contains the applicable authorizing statutes. Staff requests approval to proceed with the proposed regulatory language. The following sections summarize the proposed regulations with respect to: 1) liability; 2) penalty determinations; and 3) procedures.

Liability:

CalRecycle staff proposes that the imposition of penalties for making false statements or representations be focused on approved collectors and approved recyclers, but not be limited to approved participants in the CEW program. Other actors participate in the CEW system by providing documentation or information to the program. Therefore penalties could also be imposed against the following persons/entities, which include but are not limited to: handlers, transporters, end-use destinations/downstream users, or manufacturers.

CalRecycle's intent is to expressly incorporate these other actors by revising existing Electronic Waste Recycling regulation 14 CCR § 18660.7(f) to include the following: "any person, including but not limited to a handler, who provides documentation or information to an approved collector or an approved recycler pursuant to this chapter (8.2.) shall not make a false statement or representation in the information or documentation provided."

The proposed regulations also seek to hold responsible multiple individuals/entities jointly and severally liable in instances where more than one entity or person is involved in a situation where violation(s) were committed.

Penalty Determination:

CalRecycle staff proposes to assess penalties in the following range: "Minor" (\$500-\$4,000), "Moderate" (\$4,000-\$15,000) and "Major" (\$15,000-\$25,000). The assessment will look at frequency and severity of violations as well as intent. When imposing administrative civil penalties, CalRecycle may also take into consideration additional factors such as the nature and extent of a violation, potential economic benefit, history of non-compliance, ability to pay, and the deterrent effect.

Procedures:

CalRecycle staff proposes two steps to implement civil penalties: (1) notice of violation ("NOV"), and (2) the accusation.

The NOV may be issued prior to the imposition of penalties and is intended as a warning mechanism that provides an opportunity for violators to take corrective actions. CalRecycle has the discretion to refrain from issuing an accusation, especially in instances where the violation is addressed and there are no other subsequent violations.

CalRecycle may decide to issue an accusation seeking penalties. The accusation can be issued following the issuance of a NOV or may be issued without prior warning if warranted.

If an accusation is issued, the respondent(s) will be entitled to an informal administrative hearing held in front of a hearing officer. The respondent(s) must request a hearing by filing a Notice of Defense within 15 days of service of the accusation. The final determination shall be issued by the hearing officer within 30 days of the hearing. The proposed regulations would also allow for CalRecycle and the respondent(s) to engage in a settlement at any time before a decision is issued.

Stakeholder Comments / Staff Response:

CalRecycle staff hosted a stakeholder workshop on the topic of assessing civil liabilities on July 14, 2015 and sought written comments by July 31, 2015. In general, stakeholders favored the issuance of NOVs and/or imposition of penalties as it provides a good deterrent to discourage non-compliant behavior and protects fair business practices. The following summarizes major comments and provides CalRecycle staff's response.

- 1) **Recycler Responsibility:** Several stakeholders expressed concerns that the responsibility would fall on the recycler for accepting material and associated records from collectors and/or handlers that contains false documentation.

Response: Staff explained that the assigning of responsibility will be determined on a case by case basis that would assess the totality of circumstances.

- 2) **Penalty Provisions:** Several commenters suggested to clarify the "Minor" penalty and feared that clerical errors could fall under "unintentional" violations. Comments were also received on the same subject. One comment expressed concerns that penalties might be assessed for something that was not intentional highlighting that inaccuracies in recording consumer information could happen occasionally. Furthermore, it called for defining all violations for which penalties could be imposed. Another comment expressed support for adopting a schedule to assess civil penalties but emphasized that the three-tiered system needs to be more specific and hence proposed incorporating a point system to identify the severity of various violations.

Response: In response to these comments, CalRecycle staff has modified the "Minor" category to include first-time violations where the gravity of the violation is severe (instead of "first-time or multiple unintentional violations"). The "Moderate" category penalty was also revised to include subsequent or multiple violations and penalties for this category could be assessed without prior issuance of notice. The "Major" category includes violations that indicate a pattern and practice of noncompliance or intentional violations. CalRecycle staff believes these changes bring more clarity to distinguish between the three types of violations and provide a more specific assessment.

- 3) **Site of Hearings:** Another commenter asked if the hearings will be held only in Sacramento and called for the possibility to conduct hearings in Southern California, especially if it involves small participants.

Response: CalRecycle staff added another provision to the proposed rules, specifying that the hearing will take place in Sacramento unless otherwise determined by the hearing officer.

The Respondent can request an alternate location by providing a justification of undue burden when filing the Notice of Defense.

- 4) Public Record: Several commenters asked if the NOV's and/or Accusations could be made public.

Response: CalRecycle staff has been looking into this option and believes that once filed, the Accusations and the hearing officer's final decisions could be posted on the CalRecycle website. The NOV's will not be published as those are intended to serve as warnings and an opportunity to take corrective action by the violator(s).

- 5) Retroactive Penalties: One comment received inquired if the new penalties would be applied retroactively.

Response: Staff believes CalRecycle has the authority to retroactively assess civil liabilities for the past three years, which is the statute of limitations for fraud, given that it had the authority to impose civil penalties since the statute was enacted in June 2012.

- 6) Emergency Regulations: Another comment received did not favor the adoption of regulations under emergency rulemaking stating that there was "no emergency" and that stakeholders would not be able to comment on for a period of up to two years.

Response: Per PRC section 42475.2, CalRecycle has the authority to adopt regulations to implement and enforce the Electronic Waste Recycling Act on an emergency basis, as necessary for the immediate preservation of the public peace, health, safety, and general welfare. The proposed regulations implementing civil liabilities are intended to be established under the emergency authority to protect both the environment as well as the integrity of public funds. CalRecycle aimed to involve stakeholders in the civil liabilities regulatory development and hosted a dedicated stakeholder workshop seeking comments.

- 7) Hearing Process: Another comment requested that the hearings be conducted as formal hearings pursuant to Government Code (GC) section 11500 to provide for protections and guarantees, instead of using the proposed informal hearing specified in GC 11400. The stakeholder argued that the informal hearing is an inappropriate venue given that the civil penalties could exceed the capitalization of the business and that these hearings are never heard by the Director.

Response: CalRecycle staff believes the standards in an informal hearing are not different from a formal hearing and therefore the informal hearing provides the same protections and guarantees. Also, the hearing officer is a third-party neutral who would have no involvement with the CEW program regarding the matter. Furthermore, the violator's ability to pay is one of the factors that CalRecycle might consider when imposing a civil penalty.