REQUEST FOR APPROVAL

To: Caroll Mortensen
Director

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

Request Date: February 21, 2012

Decision Subject: Adoption of Proposed Architectural Paint Recovery Program Regulation

Action By: February 21, 2012

Summary of Request:

CalRecycle previously considered adoption of the Architectural Paint Recovery Program Regulation at its January 17, 2012, meeting. Subsequent to that meeting, CalRecycle received feedback from the Office of Administrative Law that necessitated revisions to the fee-related provision of the Carpet Stewardship Program Regulation. CalRecycle determined that similar revisions are needed to the fee-related provision of the Architectural Paint Recovery Program Regulation and, since the Regulation had not yet been submitted to OAL, a third 15-day comment period focused on this provision was warranted. Staff requests adoption of the revised Architectural Paint Recovery Program Regulation; which is needed to implement the paint stewardship law (Chapter 420, Statutes of 2010 [Huffman, AB 1343]).

Recommendation: Staff recommends adoption of the Architectural Paint Recovery Program Regulation (Attachment 1) so that it may be forwarded to the Office of Administrative Law (OAL) for approval and publishing. Staff also recommends that the Department file a Notice of Exemption with the State Clearinghouse as provided under the California Environmental Quality Act.

Action:

On the basis of the information and findings in this Request for Approval, I hereby approve the adoption of the Proposed Architectural Paint Recovery Program Regulation (Attachment 1) and direct staff to prepare and forward the regulatory package to the OAL for approval and publishing. I also direct staff to file a Notice of Exemption with the State Clearinghouse as provided under the California Environmental Quality Act.

Dated: 2/22/2012

for Caroll Mortensen, Director

Attachments: 1. Proposed Architectural Paint Recovery Program Regulation

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Background Information

Assembly Bill (AB) 1343 (Chapter 420, Statutes of 2010) established the Architectural Paint Recovery Program and requires manufacturers of architectural paint to develop and implement a program to collect, transport, and process postconsumer paint to reduce the costs and environmental impacts of the disposal of postconsumer paint in California.

Manufacturers, either individually or through a stewardship organization, are required to submit an architectural paint stewardship plan (plan) to CalRecycle no later than April 1, 2012, and implement the plan by July 1, 2012, or three months after a plan is approved by CalRecycle. The plan is to describe how the manufacturer or stewardship organization intends to carry out its program to reduce the generation, promote the reuse, and manage the end-of-life of postconsumer architectural paint in an environmentally sound fashion, including collection, transportation, processing, and disposal. The plan is also to include goals established by the manufacturer or stewardship organization, describe program funding, and propose an architectural paint stewardship assessment that is sufficient to recover, but not exceed, the cost of the program.

AB 1343 also requires manufacturers to submit annual reports to CalRecycle and outlines a minimum of what must be included, such as the total volume of architectural paint sold and recovered in California; a description of the methods used to collect, transport, and process postconsumer paint; the total cost of implementing the program; an evaluation of how the program's funding method operated; an independent financial audit; and examples of educational materials.

CalRecycle is tasked under AB 1343 with specific oversight and enforcement responsibilities. These include reviewing and approving plans, including approval of the architectural paint stewardship assessment; posting and maintaining a list of compliant manufacturers on CalRecycle's website; adopting a finding of compliance or non-compliance of manufacturers' annual reports; imposing an administrative fee sufficient to cover the department's full costs of administering and enforcing this chapter; and enforcing the chapter.

CalRecycle has been given authority by the legislature to make regulations whenever there is substantial evidence that regulations are needed to implement, interpret, make specific, or to govern CalRecycle's procedure, to effectuate the purpose of the statute. Therefore, this rulemaking seeks to add clarity and establish the necessary administrative procedures to fulfill CalRecycle's responsibilities under AB 1343.

Rulemaking Timeline

From January through March 2011, CalRecycle staff conducted research, held scoping meetings, and prepared discussion draft documents in preparation for the formal rulemaking process. A public workshop was held in March 2011 to discuss conceptual regulatory documents and gather stakeholder feedback. The discussion documents and comments received became the basis for the *Proposed Architectural Paint Recovery Program Regulation* (see Attachment 1). Note: Text shown in green highlighted double strikeout (deletion) and double underline (addition) depict proposed changes presented for the third 15-day comment period, as discussed below. Text shown in yellow highlighted double underline (addition) and yellow highlighted ~~double strikeout~~ (deletion) depict proposed non-substantive changes made after the second 15-day comment period. Text shown in double underline (addition) and ~~double strikeout~~ (deletion) depict proposed changes made after the initial 15-day

comment period. Text shown in single underline (addition) and ~~single strikeout~~ (deletion) depict changes made after the 45-day comment period.

Formal rulemaking activities began in July 2011. A 45-day public comment period for the Proposed Architectural Paint Recovery Program Regulation ran from July 22 through September 5, 2011. CalRecycle staff held a public meeting on the proposed regulation on September 8, 2011. On October 3, 2011, CalRecycle staff held a public meeting to present potential changes to the proposed regulation based on comments received during the 45-day public comment period and the September 8, 2011 public meeting. After considering comments received during the 45-day comment period and comments made at the public meetings, CalRecycle staff revised the proposed Architectural Paint Recovery Program Regulation. A 15-day public comment period ran from October 10 through October 25, 2011. On November 2, 2011, CalRecycle staff held a public meeting to present anticipated changes to the proposed regulation based on comments received during the initial 15-day comment period. A second 15-day public comment period ran from December 7 through December 22, 2011.

After taking into consideration the totality of comments received during the three previous comment periods, the Director of CalRecycle stated her intent to adopt the Proposed Architectural Paint Recovery Program Regulation at CalRecycle's January 17, 2012, public meeting. Subsequently, however, staff determined that amendments should be incorporated to Section 18958 of the regulation prior to submittal to the Office of Administrative Law (OAL), in order to mirror decisions made by the OAL on a similar provision in the Carpet Stewardship rulemaking. Therefore, CalRecycle initiated a third 15-day comment period that ran from February 1 through February 16, 2012, on Section 18958 only.

Summary of Previous Revisions Incorporated as a Result of Comments Received During the 45-Day, First 15-Day, and Second 15-Day Comment Periods

Detailed tables showing comments received during the 45-day, first 15-day, and second 15-day comment periods are available at:
http://www.calrecycle.ca.gov/Laws/Rulemaking/Paint/default.htm, see:

- Overview of Comments, 45-day comment period (July 22 – Sept 5, 2011)
- Overview of Comments, 15-day comment period (Oct 10 – noon Oct 25, 2011)
- Overview of Comments, second 15-day comment period (Dec 7 – noon Dec 22, 2011)

Based on comments received during the 45-day, first 15-day, and second 15-day comment periods, CalRecycle made the following substantive changes to the proposed regulations:

§18951. Definitions.

- Clarified the definition of "operational costs" as those of the manufacturer or stewardship organization running the paint stewardship program.

§18952. Submittals.

- Replaced the term "register" with "submit" to better reflect the department's original intent of a simple process by which a manufacturer or stewardship organization will provide certain contact information to the department; and
- Added provisions for "conditional approval" by CalRecycle of a stewardship plan and annual report.

§18953. Stewardship Plan Approval Criteria.

- Removed "Scope," "Market Development," "Program Performance Measurement," and "Financial Information" subsections and incorporated language from these subsections elsewhere in the regulation;
- Deleted "Solid Waste Management Hierarchy" subsection to eliminate confusion and better align with statutory language;
- Modified language relative to program goals and activities to be less prescriptive yet still ensure that an adequate description is provided by manufacturers and stewardship organizations;
- Modified language to clarify how a manufacture or stewardship organization must demonstrate coordination with retailers and local household hazardous waste collection programs;
- Added various requirements related to audits and financing mechanism necessary to provide adequate oversight over the assessment charged to consumers and to clarify how a manufacturer or stewardship organization must demonstrate compliance with certain reporting requirements;
- Added language for a manufacturer or stewardship organization to provide to the department, upon request, information necessary for approval of the stewardship plan in compliance with the California Environmental Quality Act; and
- Replaced "by county" with "in the state" when requiring a manufacturer or stewardship organization to describe in its plan and annual report how it provided statewide coverage.

§18954. Annual Report Compliance Criteria.

- Removed "Scope" and "Market Development" subsections and incorporated language from these subsections elsewhere in the regulation;
- Modified reporting requirements for better consistency with statute; and
- Added various requirements related to audits and financing mechanism necessary to provide adequate oversight over the assessment charged to consumers and to clarify how a manufacturer or stewardship organization must demonstrate compliance with certain reporting requirements.

§18955. Civil Penalties.

- Removed a violation from the manufacturer and stewardship organization's penalty table as the intent of the penalty may be addressed elsewhere in the regulation; and
- Clarified that, consistent with statute, a penalty may only exceed $1,000 per day if a person intentionally, knowingly, or negligently violates the Article and that for multiple violations the maximum aggregated amounts may not exceed the statutory limits.

§18956. Record Keeping Requirements.

- Reduced certain recordkeeping requirements for manufacturers and retailers.

§18958. Service Payments to Department of Resources Recycling and Recovery

- Removed CalRecycle's ability to revoke a stewardship plan if the annual service payment is not received and the corresponding ability for the department to reinstitute a plan when payment is received.

As noted in the other comments available on the website links noted above, CalRecycle did not agree with a number of comments and thus did not makes changes requested by stakeholders in those instances. These include:

- Inclusion of "administration costs" to the definition of "operational costs;"
- Removal of §18955. Civil Penalties and use of a sales ban alone for enforcement of the chapter;
- Removal of §18956. Record Keeping; and

- Either the complete removal of §18958. Service Payments to Department of Resources Recycling and Recovery or the inclusion of a cap and/or specific administrative fee amount (also see next section for more discussion on this issue).

Summary of Revisions Incorporated as a Result of Comments Received During the Third 15-Day Comment Period

CalRecycle made the following proposed revisions to Section 18958, as part of the third 15-day comment period:

- Changed the basis of payment by a manufacturer or stewardship organization to CalRecycle for its oversight and enforcement services from one "in advance" and based on estimates to one "in arrears" and based on actual costs; and
- Modified the dates to align with CalRecycle's fiscal year cycle of July 1 through June 30.

Attachment 2 summarizes comments received during the third 15-day comment period and presents CalRecycle's responses. No comments were received at the time this Request for Approval was drafted. Staff will provide a verbal update of any comments received during the third comment period at the February 21, 2012, CalRecycle public meeting.

Summary of Remaining Major Concerns with the Proposed Regulation

- Assertions that CalRecycle must identify and include in the regulation a specific dollar amount or to place a cap on the administrative fee that it may charge to manufacturers or stewardship organizations for its costs for administering and enforcing the chapter:

  Statute requires CalRecycle to impose fees in an amount sufficient to cover the department's full costs of administering and enforcing this chapter, including program development or regulatory costs [PRC §48704(e)(2)]. CalRecycle has estimated its costs through the current fiscal year and next two fiscal years, assuming smooth program implementation. These estimates represent roughly 1.1 percent of the total estimated program budget, based on a similar program in Oregon run by PaintCare, the same stewardship organization that intends to submit a plan to CalRecycle, and scaling for California's population. These estimates were also provided directly to PaintCare as a means to assist PaintCare in its preparation of a program budget, and estimates will continue to be provided upon request. CalRecycle is committed to continue to make every effort to keep costs related to administering and enforcing this law to a minimum, and to implement its responsibilities in the most efficient manner possible.

  The administrative fee will be based on actual costs to administer and enforce AB 1343and will be approved by the department by September 30 each year. Actual program costs will be documented and provided to a manufacturer or stewardship organization with the annual invoice. These costs shall include the cost of staff, overhead expenses applicable to staff, contract services, and any other expenses incurred in administering and enforcing the program and in developing this regulation.

  Since statute provides that the fee is to be an amount to cover the department's full costs of administering and enforcing the chapter, there is no need to establish a fee amount in regulation. The fee will simply be a bill for the actual staff time and expenses. Staff costs (salaries, etc.) are not items that the department has the authority to set or change in regulation. Setting a specific

dollar amount in advance of incurring those expenses runs the risk of conflicting with statute, as the department's full costs can't be known in advance. Finally, nothing in statute mentions a cap on department expenses, and it should be noted that a cap was in an earlier version of the legislation but was removed.

- Assertions that CalRecycle cannot mandate reporting requirements above and beyond those specified in statute.

  Statute requires manufacturers to submit a report describing its architectural paint recovery efforts and states that this is the *minimum* of what an annual report shall include. There are only a handful of requirements included in the proposed regulation that are not explicitly specified somewhere in statute. CalRecycle asserts that the additional requirements help create a better understanding of the actual program implementation and program costs incurred to enable the department to determine compliance with statute (e.g., reporting on paint sales and recovery "by type," cost per capita, cost per gallon collected, and stating any revisions of goals). The program and budget initially outlined in a manufacturer or stewardship organization's stewardship plan represent what is anticipated at the beginning of the program, and it is important that annual reports offer a thorough description of what actually occurred during the reporting period. This allows all stakeholders to have a comprehensive and transparent review of a manufacturer or stewardship organization's achievements during that reporting period. It is staff's understanding that the additional requirements described in the regulation would involve reporting of information readily available to a manufacturer or stewardship organization and would not be costly or time-consuming for a manufacturer or stewardship organization to report.

- Assertions of general lack of CalRecycle authority to include requirements not specified in statute:

  Throughout the rulemaking process, manufacturers asserted that CalRecycle does not have the statutory authority to require provisions that are not expressly contained in AB 1343. CalRecycle maintains that it has been given authority by the legislature to make regulations whenever there is substantial evidence that regulations are needed to implement, interpret, make specific, or to govern CalRecycle's procedure when there is ambiguity regarding any requirement under the program, to effectuate the purpose of the statute.

- Assertions that CalRecycle should impose additional requirements on manufacturers:

  Many local governments and environmental organizations asserted that CalRecycle should impose additional requirements on manufacturers relative to goals, baseline, market development, and stakeholder consultation. In some of these cases, CalRecycle staff concurred and proposed modifications accordingly. An example is §18953(a)(7) Education and Outreach. Some stakeholders suggested that a manufacturer or stewardship organization should not be able to advertise a collection point that is not a contracted service provider without the consent of that collection point. Language to this intent was added. In other cases, the department either considered the suggestion already covered in another section of the proposed regulation or beyond the scope of this rulemaking. For example, several stakeholders suggested that CalRecycle require manufacturers and stewardship organizations to cover all of local governments' costs related to paint collection. This would have required CalRecycle to determine, on a case-by-case basis, what costs are appropriate for each party to pay. CalRecycle

determined that the statute does not provide CalRecycle with authority for this; therefore, the language in the Proposed Regulation remains consistent with statute in that all coordination and agreements must be reasonably feasible and mutually agreeable amongst the parties involved. Another example is that some stakeholders wanted manufacturers and stewardship organizations to require collection points in each county and report on collection activities by county. Here, CalRecycle again determined that since the statute did not provide the department authority to require a certain number of collection points in each county, the "by county" references were removed from the proposed regulation; CalRecycle can separately track the collection points by county and provide that information to the public.

Findings

CalRecycle staff has given careful consideration to all comments received throughout the rulemaking process. CalRecycle staff recommends that the department adopt the Proposed Architectural Paint Recovery Program Regulation and direct staff to forward the regulatory package with the OAL for approval and publishing. With approval of the regulation at this meeting, staff will prepare and submit the final rulemaking package to the OAL in late March. This tight schedule is necessary because the law requires that paint stewardship plans be approved by July 1, 2012, or 90 days after they are submitted to the department.