

## **Designated Approved Collectors and the CEW Recycling Payment System**

### Purpose:

This issue paper is intended to inform continued discussions leading to anticipated changes in regulations relating to the “designated approved collector” provision within California’s covered electronic waste (CEW) program. The following will frame the issue, provide background and context, examine operational realities, assess existing policies and practices, and suggest possible rule modifications. It is marked as “draft” to indicate that its content is not a formally adopted position of CalRecycle.

### Summary:

The regulatory provision that allows for CEW to be recovered by a certain subsection of approved collectors (California local governments and designated approved collectors) with reduced source documentation creates opportunities for more efficient and lower cost operations. Despite this regulatory relief, California local governments have largely withdrawn from direct participation in the CEW recycling program, with less than 35 currently approved local government collectors remaining out of a total of about 90 local government collectors that have participated since program inception in 2005. This compares to a total of fewer than 500 currently active approved collectors out of the approximately 1,300 total historical participants in the CEW program.

Meanwhile, since late 2013, over 1,000 individual “designations” have been issued to a mix of about 200 approved collectors by approximately 300 California local governments to ostensibly provide CEW recovery services on behalf of those California local governments. As of December 2015, just under 380 of those designation remain in effect. On the surface this indicates an embrace of a regulatory provision that extends convenient CEW collection opportunities to more Californians and further achieves the goals of the Electronic Waste Recycling Act of 2003. Beneath the surface, however, is a substantial risk to program integrity due to:

- 1) Inconsistent and/or minimal oversight of CEW collection operations conducted “on behalf of” local governments, and
- 2) Limited ability on the part of the State to validate the eligibility of the accumulated CEW transferred into the recycling system.

While acknowledging the utility of the designated approved collector provision within the CEW recycling program, CalRecycle recognizes that several aspects of its administration must be reformed to maintain fiscal security within the program. Among these are an enhanced understanding and acceptance of local government responsibility, clarified limits and definitions of local operations, improved real-time monitoring of CEW collection activities, and meaningful accountability. These can come about only through revised regulation. CalRecycle expects that the interests of the State, local government, and service providers can be identified and accommodated through this rulemaking effort. However, if this is not possible, then CEW program staff believes the designated approved collector provision should not be permitted to continue.

## Background:

In its first decade of program operation, California has, on average, expended about \$70 million annually in public funds through payments to participating collectors and recyclers to offset the cost of the compliant recovery and recycling of CEW generated by persons located in the state. Because these funds are derived from fees paid by California consumers, it is imperative that the CEW recycling program ensure that only eligible CEW from California sources be claimed for payment.

California, by nature of its geography and international ports, receives shipments of electronic waste, including CEW, from throughout the United States. Accordingly, CEW program rules require source documentation be established in the form of “...collection logs and other information developed, maintained and transferred ... that demonstrates the eligibility, originating generator and/or intermediate handlers of collected CEWs as applicable...” [14 CCR 16880.5(a)(41)]. The default source-identifying information to be maintained in collections log by approved CEW collectors “...is the name and address of the California source and the number of CEWs discarded by the California source...” [14CCR 18660.20(j)(1)(B)].

During initial rulemaking in 2004 to implement the Electronic Waste Recycling Act of 2003 [Public Resources Code (PRC) 42460, et seq], California local government stakeholders successfully argued that cities and counties are compelled to provide household hazardous waste recovery, recycling, and/or disposal services to the residential sector to effectively divert prohibited materials from entering the municipal solid waste stream. These stakeholders further argued that the scope of such services is naturally limited to the sphere of their local obligations and that approved CEW collectors that are California local governments should be relieved from the detailed source-identity requirements of default collection logs. Also cited as reasons for regulatory exception was that the detailed collection log requirements could lead to delays, congestion, and safety concerns at temporary electronic waste collection events, which was one of the primary operational models for local government-administered services at the time.

Statute does in fact specifically and separately identify a “...city, county, or district that collects covered electronic devices...” as a unique subsection within the broader definition of “authorized collector” [PRC 42463(b)(1)], potentially lending support to differential treatment of various categories of collectors through the implementing regulation. Statute further defined another subsection of an authorized collector as a “...person or entity that is required or authorized by a city, county, or district to collect covered electronic devices pursuant to the terms of a contract, license, permit, or other written authorization...” [PRC 42463(b)(2)]

With this in mind, the initial emergency rulemaking (which became effective in late 2004), placed certain default CEW recovery and collection log documentation requirements on participating private collectors. At the same time, it relieved local government collectors and entities acting as the agent of local government of this responsibility. Prior to being superseded in late-2005 as discussed below, 14 CCR 18660.20(j)(1)(B) stated: “Approved collectors that are not California local governments, nor entities acting in the capacity of an agent for a California local government, shall maintain a list of all consumers who transfer CEWs to the approved collector, including the name of the consumer, the address and the number of CEWs transferred.”

While at first seeming to cover the intended allowance sought by local governments, in practice it soon became clear that this approach lacked necessary specifics regarding the authorization relationship between the local government and the entity acting as its agent. It also raised concerns about the potential legal implications associated with what is known as “law of agency.”

With regard to the former, multiple entities would need to possess certainty about who was authorized to act as an agent of a local government, including the local government itself, the approved collector acting as the purported agent, participating recyclers who would need to determine whether transferred source documentation was sufficient, and the State who would be evaluating CEW recycling payment claims with associated documents. For this provision to function within the program, a more affirmative demonstration of agency would be required.

Apart from the practical and operational concerns of the agent provision were the local legal concerns. The principle of “agency” can be summarized in the legal maxim, *qui facit per alium facit per se*, i.e. “whoever acts through another does the act himself.” Because the management of covered electronic waste involves not only the handling of a regulated waste but also the receipt of public funds, some city and county legal counsel rightfully were hesitant to endorse service provider relationships out of concern that there could be consequences for the jurisdiction if the “agent” acted in a noncompliant or harmful manner.

A second round of emergency rulemaking in late-2005 provided the opportunity to modify the local government source documentation requirements and allowances to address these identified issues. A new regulatory construct was established with the intent of moderating some of the legal concerns by removing explicit mention of the term “agent”. Whether this was wise in retrospect is debatable, but at the time the focus of rulemaking endeavored to balance necessary program safeguards with operational opportunities that would fulfill the Electronic Waste Recycling Act’s intention “...to enact a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of covered electronic devices...” [PRC 42461 (a)].

In doing away with explicit use of the term “agent”, the revised regulations created and defined a new class of participant called the “designated approved collector”. A designated approved collector is “...an approved collector, as defined in subsection (a)(2) of this section, that has been designated by a California local government to provide CEW collection services for or on behalf of the local government and who, in the course of providing the services for the local government, would not be subject to the source documentation requirements pursuant to Section 18660.20(j)(1)(B) of this Chapter...” [14 CCR 18660.5(a)(18)].

The revised regulations also established a mechanism to be used by a designated approved collector to demonstrate its status and authorization within the CEW recycling system. This “proof of designation” is defined, in part, as “...a letter or other document that must be secured by a designated approved collector from a California local government that, at a minimum, specifies the following information:

(A) *The beginning and end dates of the designation.*

(B) *The geographic area within which the designated approved collector is providing CEW collection services for the local government and the location(s) at which the collection service is provided.*

*(C) The customer type to be served by the designated approved collector (i.e. residential, commercial, etc).*

*(D) The nature of collections activities to be provided by the designated approved collector (i.e. drop-off receipt, curbside service, illegal disposal clean-up, etc).*

*(E) Contact information for the designating authority..." [14 CCR 18660.5(a)(33)]*

These rule revisions, along with other complementary regulatory changes, appeared to provide the clarity that CEW system stakeholders and participants would need to exercise the intended source documentation allowance. The CEW program has operated under these rules since the final regulations were formalized in December 2006.

However, the new "designation" rules stopped short of mandating specific processes internal to local government decision-making that would result in the issuance of a designation, along with providing consistency and accountability on a statewide basis, instead leaving that to the presumed procedures and oversight of local government officials. Nor were there delineated clear monitoring and accountability expectations, or an explicit connection to the larger scope of local government household hazardous waste responsibilities and reporting. Perhaps most intriguing is whether the designated approved collector construct actually solved the legal concerns of agency.

#### CEW Program Experience:

California's approach to diverting, recovering, and recycling electronic waste, driven by the CEW program enacted pursuant to the Electronic Waste Recycling Act, has been very successful. The artificial value instilled in an otherwise hazardous liability by the CEW recovery and recycling payment rates, coupled with forceful competition among recyclers for material volumes -- competition that has often led to collectors being paid more than the basic recovery rates -- has built an impressive statewide recycling infrastructure. Over the life of the CEW program, this infrastructure has recovered and recycled more than 1.9 billion pounds of unwanted TVs and monitors. And, as noted in the background section of this issue paper, the designated approved collector provision has been employed by many California local governments to provide CEW collection services to their constituencies as intended by the Electronic Waste Recycling Act and associated regulation.

Frequently, however, it is a participating collector with unclear official nexus that is soliciting a local government to secure a designation, rather than a local government proactively and affirmatively selecting and bestowing. This pursuit is understandable, in that operating under a locally-issued designation relieves the collector of perceived burdensome paperwork and, consequently, allows for reduced operating costs. Furthermore, holding a designation may appear to confer some degree of stature to the general public, as the collector operates on behalf of the local government.

As CEW volumes plateau and begin to decline, primarily due to the diminishing supply of readily available California-sourced cathode ray tube (CRT) video displays, more innovative and aggressive collection models are being employed to feed recyclers' demand for pounds. Some of these models involve the use of "handlers" to extend the reach of approved collectors into new, harder to reach, or under-served areas. As has cyclically

occurred in the CEW program, the increase use of handlers is often accompanied by an increase in defective source documentation.

Operating under a designation can be a nearly failsafe means of recovering eligible CEW and affords that collector with options to do so innovatively within the scope of the designation. However, a designation also creates a nearly non-auditable pathway for undocumented accumulations of CEW to enter the recycling payment system. This is not to suggest that most, or even many, designated approved collectors are abusing the privilege, but the CEW program's own analysis and ongoing investigation by the Department of Justice confirm that it does occur.

The most common anomalous circumstances associated with the securing and use of a designation have been:

- 1) the operation of CEW recovery activities outside the geographic scope of the designation,
- 2) the collection of more than small-scale non-residential CEW, which is not eligible to be handled under designation documentation allowances, and
- 3) the "laundering" of undocumented accumulations from unknown sources or origins through designations.

Unfortunately, it is nearly impossible to discern between ill-gotten but otherwise eligible CEW derived from unidentified California sources and fundamentally ineligible CEW from non-California sources, and so there cannot be tolerance for such misbehavior.

The issuance of designations by unauthorized personnel at the local level is also a matter of concern. However it is something that can be and is rectified through program follow-up to validate the legitimacy of the designation. It is an operational nuisance that jeopardizes the integrity of the program, which can be remedied with modest rule changes. In fact, unauthorized designations have been used in alleged fraudulent activities. This becomes even harder to detect since an unauthorized designation is likely not being properly monitored by the local government on whose behalf the dubious designed approved collector is purportedly operating.

The matter of local government oversight, monitoring, and reporting that relates to the activities of designated approved collectors has taken on increased scrutiny with the growing awareness that there is not a common interpretation that a designation constitutes a local household hazardous waste program. The subject is unaddressed in both CEW program regulations and rules governing the household hazardous waste elements contained within the Integrated Waste Management Act and associated Form 303 annual reporting requirements. The CEW program believes that the preferred interpretation places the issuance of a designation squarely within the scope of a local HHW program, but this requires further analysis and clarification, as warranted, through revised regulation.

Up to this point it has been impossible to accurately assign the total amount of CEW collected by designated approved collectors operating solely within the scope of their designations over the life of the CEW program. Limitations in records regulations, data management, the complexity of CEW collection models, and the resources dedicated to discerning prorated sub-volumes within larger CEW transfers between collector and recyclers have prevented this on a push-button, program-wide basis. More recently, improvements to

CalRecycle information systems and significant efforts by program staff to better capture and organize data have made strides that reveal contemporary trends. The latest analysis shows that approximately 26% of the 180 million pounds of CEW claimed in 2014 were recovered and transferred under designations. This compares to only about 4% that was recovered and transferred by approved collectors that are California local governments. These figures are subject to review and revision as the data is further refined.

Looking Ahead:

CalRecycle's CEW program appreciates the utility of the designated approved collector provision. It is the CEW program's preference to maintain and improve the provision for responsible use by responsible parties. As a result of workshop discussions and other interaction with stakeholders, CalRecycle staff will craft and informally publicize proposed revised regulatory language to address identified areas of concern. The CEW program anticipates that multiple iterations and additional workshops will be required, as this topic involves a wide reach of stakeholders.

For reference and discussion, a related attachment available through the stakeholder workshop website shows areas within existing regulations that apply to the concept and use of the designated approved collector provision. These sections are all found in Title 14 of the California Code of Regulations:

- 18660.5 -- Definitions
- 18660.6 -- Applicability and Limitations
- 18660.20 -- Requirements for an Approved Collector

An unofficial web-based version can be found at:

<http://www.calrecycle.ca.gov/Electronics/RegInfo/default.htm>