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Via Electronic Mail

Ms. Cynthia Dunn
Materials Management and Local Assistance Division
California Department of Resources Recycling and Recovery
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Re: Comments on Proposed Regulations for Architectural Paint Recovery Program

Dear Ms. Dunn:

INTRODUCTION

These comments are submitted on behalf of American Coatings Association (ACA) and PaintCare¹ in response to the Department of Resource Recycling and Recovery's (Cal Recycle) Notice of Modification to Architectural Paint Recovery Program regulations and allowing 15 days for comments. Typically, comments submitted pursuant to a 15-day notice would be limited to the proposed modifications. However, at the invitation of Cal Recycle, and with their assurance that more comprehensive comments would be considered and made a part of the rulemaking record for review by the Office of Administrative Law and courts, these comments raise issues of authority, consistency, and necessity with substantial portions of the regulations, whether modified or not.

At the outset, a few general observations are appropriate. First, these regulations are proposed ostensibly to implement, interpret, and make specific AB 1343, passed in 2010, codified in

¹ ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. PaintCare is a 501(c)(3) non-profit organization incorporated by the American Coatings Association (ACA), a trade association representing all paint manufacturers as well as suppliers and technical professionals in the industry. PaintCare was established to provide a product stewardship organization for the architectural paint industry in order to manage postconsumer architectural paint at its end-of-life.

Public Resources Code Sections 48700 and following, and establishing the Architectural Paint Recovery Program (APRP). The APRP is unlike most regulatory programs. It provides for the architectural paint industry to establish a paint recovery program, including a process to set and collect fees to fund the cost of the program.

Unlike other regulatory programs, including other waste recovery programs, Cal Recycle's role is narrowly defined by the legislation. The reason is simple and clear, no need exists for Cal Recycle to be fully engaged, this is an industry-run program.

Even a summary review of the proposed regulations demonstrates that Cal Recycle misunderstands its role. As a consequence, it has, in many provisions of the regulations, exceeded its authority, greatly expanding the specific provisions of the legislation, and proposed mandates that are simply inconsistent with the intent of the Legislature.

Cal Recycle's attempt to demonstrate necessity for most of the provisions of the regulations falls far short of the statutory standard. The requirement that necessity be demonstrated in the rulemaking record by substantial evidence refers to the specific provisions of the regulation. Moreover, necessity is not demonstrated by simply saying that a regulation is needed to provide clarity. The Administrative Procedure ACT (APA) requires that necessity be demonstrated by the particular way in which the agency chooses to provide clarity, that is, why was the particular provision chosen and how does it implement, interpret, or make specific the Legislature's intent as expressed in the legislative language.

These comments raise, as an additional issue, the lack of clarity within the regulations and with specific provisions.

Issues of authority, consistency, necessity, and clarity for specific provisions of the revised proposed regulations follow.

SPECIFIC PROVISIONS

Section 18951. Definitions.

The Definition of "Operational Costs" In Subsection (f) Is Inconsistent With the Statute.

The definition of "operational costs" fails to implement Public Resources Code section 48702(b)(1). That paragraph requires the architectural paint stewardship plan to demonstrate a funding mechanism to cover the administrative, operational, and capital costs of the APRP.

The proposed regulation, in section 18951(b), defines "administrative fee" consistently with the statute. However, the definition of "operational costs" in subsection (f) of that section is insufficient to differentiate, as the statute does, between an "administrative fee" and "operational costs."

The statute makes clear that the administrative fee is to cover the costs incurred by Cal Recycle in administering and enforcing the Chapter. The statute makes equally clear that the “operational costs” are the expenses incurred by a paint manufacturer or a stewardship organization implementing and carrying out the APRP. Cal Recycle has no role in the operation of the APRP. The operation is the sole responsibility of a paint manufacturer or a stewardship organization. The statute makes that allocation of responsibility explicit.

Hence, to be consistent with the statute, the definition of “operational costs” must make equally clear that it covers expenses of only a paint manufacturer or a stewardship organization. Further, Cal Recycle’s failure to conform the definition to the statute is urged in earlier comments submitted by ACA, and raises the specter that it is intentionally pursuing ambiguity, perhaps to seek recovery of expenses it incurs if it inappropriately seeks to engage in some aspect of the APRP operation.

The Definition of “Operational Costs” In Subsection (f) Lacks Clarity.

The definition of “operational costs” violates the APA, not only because it is inconsistent with the statute and fails to implement distinctions in the statute, it also lacks clarity. The definition of “administrative fee” and “operational costs” should clearly differentiate between the two. The distinction is on the basis of who incurs the expense, Cal Recycle on one hand, or a paint manufacturer or a stewardship organization on the other. The definition of “operational costs” fails to make that differentiation. It leaves open an interpretation of the regulation that “operational costs” could include expenses incurred by Cal Recycle. As such, it lacks clarity.

Recommended Solution

Once again, Cal Recycle is urged to modify the definition in subsection (f) of “operational costs” as follows: “Operational costs’ means costs necessary to cover the cost of implementing a manufacturer or stewardship organization’s paint stewardship program, including, but not limited to collection, transportation, processing, disposal, and education and outreach operations.”

The Definition of “Service Provider” In Subsection (h) Is Unnecessary In That It Is Used In Provisions of the Regulations That Are Inconsistent With the Statute.

The definition of “service provider” should be struck from the regulations. It serves no legitimate purpose. It is used, for example, in sections 18953(a)(4)(C) and 18953(a)(6)(D) of the regulation. Those proposed revisions are contained in the section entitled “Stewardship Plan Approval Criteria.” Subsection (a)(4)(C) requires the plan to describe the collection systems and, specifically, the best management practices in training the service providers. Subsection (a)(6) relates to the financing mechanism and (D) specifically requires a statement in the plan that mutually agreeable and reasonably feasible agreements have been established with service providers.

As noted at the outset, Cal Recycle's role in the APRP is constricted, and that is true with respect to approving stewardship plans. Section 48704(a) of the statute states that, "The department shall approve the plan if it provides for the establishment of a paint stewardship program that meets the requirements of Section 48703."

Section 48703 requires a plan that:

- demonstrates sufficient funding;
- provides for an assessment for each container of architectural paint sold in California;
- provides for surplus funds to be put back into the program;
- addresses coordination of the APRP with existing local household hazardous waste collection programs;
- includes goals;
- includes education and outreach efforts; and,
- allows any retailer to participate on a voluntary basis as a collection point.

Nothing in section 48703 authorizes Cal Recycle to establish additional criteria for approving plans. The language is mandatory, "The department shall approve." The only condition for approval is consistency with section 48703. Cal Recycle may not condition approval on concepts that it might choose to include if it were responsible for operating the APRP. It is not.

Recommended Solution

The definition should be struck.

The Definition In Subsection (i), "Significant or Material Change" Is Internally Inconsistent, of Questionable Legality, and Is Unnecessary.

Subsection (i) of section 18951 defines "significant or material change" as "any modification." That definition inherently includes changes that are not significant or material. It encompasses all changes. As such, the definition is inherently inconsistent.

Moreover, the term "significant or material change" is used in section 18952 relating to submittals. Subsection (b)(3) of that section requires resubmission of the plan if "significant or material changes" are made to it. Nothing in the statute authorizes resubmission of a plan. The structure of the statute is that information subsequent to the plan is provided to Cal Recycle in annual reports.

In addition, the statute contains language indicating that the Legislature did not intend for plans to be resubmitted. Cal Recycle, after approving the plan, is to determine compliance in the out years by reviewing the annual report. Public Resources Code section 48705(b). Also, Public Resources Code section 48703, relating to the requirements of the plan, provides in subsection (d) that the goals set out in the plan may be revised based on information collected for the annual

report. Nothing in the statute contemplates submitting anything after the initial plan other than annual reports to Cal Recycle.

Nothing in the statute is based on revised plans. The structure of the law is clear. Compliance by paint manufacturers is initially determined by being covered by the plan. If they are covered by the plan, they can sell paint. If they are not covered, they cannot sell paint. If a paint manufacturer is not covered by the plan and sells paint, it violates the law and is subject to enforcement by Cal Recycle.

After compliance is initially established by the plan, compliance a year later and annually thereafter is determined by the annual report as noted above. Hence, no purpose exists for the plan. Therefore, resubmitting the plan because of changes is unnecessary. No statutory provision is implemented or interpreted by such a requirement. Therefore, the definition of "significant or material change" is also unnecessary.

Recommended Solution

The cleanest solution is to strike the definition in section 18951(i).

Section 18952. Submittals.

Most of Subsection (a) of Section 18952 Exceeds the Scope of Cal Recycle's Authority, Is Inconsistent With the Structure of the Law, and Is Unnecessary.

Subsection (a) of section 18952 requires a corporate officer, acting on behalf of an architectural paint manufacturer, to register with Cal Recycle and to provide substantial information in the process. Nothing in the statute provides for the registration of corporate officers. Cal Recycle has fabricated this mandate out of thin air. It clearly exceeds the scope of Cal Recycle's authority.

The structure of the law is clear and simple. The Legislature evidences no intent to complicate the APRP with unnecessary regulatory requirements. The structure is that a paint manufacturer, to sell paint to a retailer in California, has to submit a plan or be covered by a stewardship organization that submits a stewardship plan to Cal Recycle. Once that plan is approved, paint manufacturers covered by the plan are in compliance. Cal Recycle is to post on its website the name of a paint manufacturer in compliance. A paint manufacturer or a stewardship organization is to submit an annual report setting out the accomplishments achieved through implementation of the plan. Cal Recycle is to determine whether paint manufacturers are in compliance, that is, can they sell paint in California, based on the annual reports in subsequent years.

Requiring corporate officers of a paint manufacturer or a stewardship organization to register is extraneous to and inconsistent with the structure of the law. In addition, requiring registration serves no purpose. Certainly, nothing in the Initial Statement of Reasons (ISOR) explains why

registration is necessary to implement the statute. In fact, the rationale given for subsection (a), while providing no such explanation, raises even greater examples of Cal Recycle exceeding its authority.

For example, the ISOR states that subsection (a) is necessary because it sets out that a corporate officer must register. That explains what the subsection requires; it provides no enlightenment on why it is necessary. The ISOR states further that the subsection is necessary because it clarifies that the responsibility for submitting a paint stewardship plan is with the person held most responsible for the actions of the organization. No provision in the statute authorizes Cal Recycle to dictate who in an organization must submit a plan.

Cal Recycle, in the ISOR, also states that subsection (a) is necessary to verify the information submitted by a manufacturer or stewardship organization, and it adds in the next part of the ISOR that verification is a follow-up to enforcement-related activities. Once again, Cal Recycle seeks to expand its authority. The enforcement mechanism is explicitly set out in the statute. A paint manufacturer is precluded from selling paint unless it submits a stewardship plan or is covered by a plan submitted by a stewardship organization. No other part of the statute contains any provision that is subject to enforcement.

Cal Recycle is mandated to approve a plan that meets the requirements of section 48703. Public Resources Code section 48704. Cal Recycle is to determine compliance in the out years on the basis of the annual reports. It can impose civil penalties against a paint manufacturer that sells paint without being covered by a stewardship plan. It has no authority to impose a penalty or engage in any other enforcement activity if the plan or report submitted by, for example, a stewardship organization, fails to satisfy the statutory requirement.

Accordingly, the only information that a stewardship organization is obligated to submit under the statute is the name of the participating manufacturers and their covered brand. That information shall be provided in the context of the stewardship plan, not in a separate registration process. Certainly, no necessity has been demonstrated for the additional information contained in section 18952(a)(2) of the regulation.

Recommended Solution

Strike all of subsections(a)(1) and (a)(2)(B) and (C) of section 18952.

Subsection (b) of Section 18952 Exceeds the Scope of Cal Recycle's Authority, Is Inconsistent With the Statute, Is Unnecessary, and Portions Lack Clarity.

Nowhere does the statute require plans to be submitted under penalty of perjury. Such a requirement results in the potential imposition of a criminal penalty if a statement in a stewardship plan is later proved to be false. Cal Recycle lacks the authority to create circumstances that give rise to a criminal penalty. Only the Legislature has that authority.

The provision that “stewardship plans shall be submitted electronically, according to instructions provided by the department” is inherently ambiguous and, for that reason, lacks clarity. It could mean simply to submit a plan to a named person at a specified address, or it could include a broad category of requirements. Requirements, such as, additional information of covered manufacturers, or planned activities, or greater detail could be included in instructions provided by the department. Without specifying the instructions in the regulations or narrowing it to a name and address, the provision is unclear and invalid.

Once again, Cal Recycle has exceeded its authority by including requirements to the content of plans in (b)(1) that goes beyond the statute. A plan should be approved by Cal Recycle if it meets the requirements in section 48703. Those requirements are summarized in the discussion relating to the definition of “service provider.” Accordingly, Cal Recycle has no authority to require plans to contain additional information. Section 48703 provides no authority for Cal Recycle to require plans to include information on (B) “scope” and particularly not as “scope” is defined in section 18953 of the regulation. While section 48703 requires a description of the (C) “goals” of the plan, nothing authorizes the requirement that it include “activities,” and again, particularly as “activities” is defined in section 18953. The same is also true for (D) “collection systems,” (E) “market development,” (H) “program performance measurements,” (I) “stakeholder consultation,” and (J) “audits.” Regulatory requirements for the content of a plan that go beyond the requirements of Public Resources Code 48703 are inconsistent with Public Resources Code 48704 that mandates Cal Recycle to approve a plan that meets the requirements of section 48703.

Nothing in Cal Recycle’s ISOR provides an explanation for why the extraneous parts of subsection (b)(1) are necessary. The ISOR simply states that (b)(2)(A)-(K) (now (b)(1)(A-J)) are necessary to ensure standardization. No attempt is made to demonstrate why specific content beyond that required by Public Resources Code section 48703 is necessary to achieve standardization or why standardization is necessary to implement the APRP.

Similarly, Cal Recycle has exceeded its authority in (b)(2), providing requirements that go beyond the statute. Despite the statute clearly requiring plan approval if it meets the requirements in section 48703, Cal Recycle has now given itself the authority to approve, **disapprove** or **conditionally approve** a stewardship plan if it finds the plan incomplete. Cal Recycle must approve a stewardship plan if it meets the statutory requirements in section 48703. Accordingly, Cal Recycle has no authority to approve, let alone, disapprove or conditionally approve a plan based on its own findings. Furthermore, as stated above, Cal Recycle has no authority to require supplemental information in the plan approval process. A plan that meets the requirements set forth in section 48703 must be approved.

Lastly, as noted above in the discussion on the definition of “significant or material change,” Cal Recycle has no authority to require the submission of changes to the stewardship plan as required in subsection (b)(3). That discussion is applicable here as well.

Recommended Solution

Strike all of subsection (b), except that a plan is to address (A) “contact information,” (C) “goals,” (F) “financial mechanism,” and (G) “education and outreach.”

Most of Subsection (c) of Section 18952 Exceeds the Scope of Cal Recycle’s Authority, Is Inconsistent With the Statute, and Is Unnecessary.

The comments made with respect to subsection (b) are equally applicable to subsection (c). That is true with respect to the requirement that a plan be submitted under penalty of perjury and electronically “according to directions provided by the department.” It is also true with respect to subsection (c)(2) in which Cal Recycle has once again gone well beyond the statute. The statute specifies what should be included in the annual reports.

Public Resources Code section 48705(a) provides that the annual report shall include:

- (1) Total volume of architectural paint sold in the state in the past calendar year.
- (2) Total volume of post-consumer architectural paint recovered in the state in the past calendar year.
- (3) Description of methods used to collect, transport, process post-consumer architectural paint in the state.
- (4) Total cost of implementing the stewardship program.
- (5) Evaluation of the funding mechanism.
- (6) Financial audit.
- (7) Examples of educational materials provided to consumers.

Cal Recycle, in section 18952(c)(2), requires the inclusion in the annual report (B) “executive summary,” (C) “scope,” (D) “program outline description of goals and activities based on the stewardship plan,” and (F) “market development.” Not only are these requirements for inclusion in annual reports extraneous to Public Resources Code section 47805(a), they compound the violations of the law contained in the preceding subsection 18952(b) relating to the content of a plan.

As noted above, Cal Recycle is obligated to approve a plan with statutorily specified content. Cal Recycle seeks to expand the provisions of the statute by requiring a plan to require information inconsistently with the statute. Now, it requires the annual reports to contain the same extraneous information. Cal Recycle cannot require that information for the plan; it cannot require that information in the annual report. It cannot do indirectly what it cannot do directly.

Also, as set out in the section of these comments relating to the criteria for approving annual reports, Cal Recycle goes beyond the specific statutory provisions even in the elements of the annual report called for by the statute. Cal Recycle has exceeded its authority under the statute by given itself the ability to adopt a finding of compliance or non-compliance for an annual report and requiring resubmission of an annual report and/or supplemental information upon a finding of non-compliance. A finding of compliance or non-compliance must be made pursuant to section 48705 and not based on Cal Recycle findings.

Cal Recycle attempts to explain the necessity for subsection 18952(c) on the grounds of standard reporting. Yet, ironically, it does not track the elements for the report as set out in the statute. It is so committed to imposing requirements for the stewardship plan that exceed the statute, that it mimics that structure and ignores the structure of the statute relating to the annual reports. Certainly, no attempt is made in the ISOR to explain why it is necessary for the regulations to ignore the structure of the statute and include elements extraneous to the statute.

Recommended Solution

Strike all of paragraphs (1), (2)(B), (C), (D), (F), and the “activities” portion of (E) and paragraph (3).

Section 18953. Stewardship Plan Approval Criteria.

Exceeds the Scope of Cal Recycle’s Authority, Is Inconsistent With the Statute, and Is Unnecessary.

As noted in the section of these comments relating to section 18952, Submittals, Cal Recycle has exceeded its scope of authority and acted inconsistently with the statute in requiring submissions in a stewardship plan information beyond the statute. The statute explicitly limits what is required by mandating Cal Recycle to approve a plan that meets the requirements of Public Resources Code section 48703. Cal Recycle cannot condition approval of a stewardship plan on the inclusion of additional information. Hence, paragraphs (2) “scope,” (3)(b) the “activities” portion within “program goals and activities,” (4) “collection systems,” (5) “market development,” (8) “program performance measurements,” (9) “stakeholder consultations,” and (10) “audits” of subsection (a), section 18953 are all invalid criteria.

Further, specific elements of the listed criteria for approval of a plan as defined in section 18953 are equally invalid. While paragraph (2) “scope” is an inconsistent extraneous criteria, Cal Recycle attempts to slip paint containers into a stewardship plan when the statute deals solely and exclusively with architectural paint, the product itself, not its containers. While the “activities” portion of paragraph (3) “goals and activities” is extraneous to the statute, Cal Recycle has gone well beyond the statute in dictating what must be set out in the stewardship plan ostensibly as part of the goals. While the statute requires goals, the regulation requires a description of how the goals were derived. In addition, the regulations require a baseline provided by paint manufacturers or a stewardship organization, including within the baseline the

status of household hazardous waste management in California. The regulations also require a methodology for estimating leftover paint for collection and a description of how the program goals will be achieved, not just the goals, but the methodology used to achieve the goals. All of these requirements go beyond the statute.

Contrast the statutory language in Public Resources Code section 48703 relating to goals with the regulation relating to goals:

“(d) The plan shall include goals established by the manufacturer or stewardship organization to reduce the generation of postconsumer paint, to promote the reuse of postconsumer paint, and for the proper end-of-life management of postconsumer paint, including recovery and recycling of postconsumer paint, as practical, based on current household hazardous waste program information. The goals may be revised by the manufacturer or stewardship organization based on the information collected for the annual report.”

It is important to restate that Public Resources Code section 48704 requires Cal Recycle to approve a stewardship plan that meets the requirements of section 48703. Hence, Cal Recycle may not expand what is required for goals beyond the statute.

While the whole of paragraph (4) “collection systems” is extraneous to the statute, Cal Recycle exceeds the statute by mandating that a paint manufacturer or a stewardship organization “must negotiate with any retailer wanting to participate in their paint stewardship program as a collection point to attempt to establish a mutually agreeable and reasonably feasible agreement with the retailer that addresses all operational costs.” The statute simply provides, “any retailer may participate, on a voluntary basis, as a paint collection point pursuant to the paint stewardship program.”

Nothing in the statute contemplates that a paint manufacturer or a stewardship organization is obligated to negotiate a mutually agreeable arrangement to cover the cost of a voluntary retailer. Nothing in the statute confers authority on Cal Recycle to intervene in any way between a paint manufacturer or a stewardship organization and a voluntary retailer. In fact, the statute, as noted above, provides that the retailer, “may participate . . . pursuant to the paint stewardship program.” It is the paint manufacturer or stewardship organization that establishes the stewardship program, not Cal Recycle.

While paragraph (5) “market development” is totally extraneous to the statute, the regulatory provisions related to the paragraph on market development illustrate Cal Recycle’s misunderstanding of the statutory limits on its authority. The regulations provide that a manufacturer or stewardship organization that does not participate in market development is not subject to penalties “for this section.” The clear implication of that statement is that a paint manufacturer or stewardship organization that fails to participate, that is, fails to include in the stewardship plan other provisions of regulatory section 18953, is subject to penalties. If that is Cal Recycle’s intent, it has no such authority. As noted above, the only provision in the statute that gives rise to penalties is the prohibition for a paint manufacturer to sell paint unless it has

submitted a plan or is covered by a plan submitted by a stewardship organization. No penalties may be imposed for submitting a plan that fails to include all of the elements imposed by the regulations.

Paragraph (6) contains in (D) a requirement that is extraneous to the statute. It requires as part of the funding mechanism, that a statement of mutually agreeable arrangement has been made with service providers that addresses all operational costs. The addition of the language in the revised regulation, "relevant to each particular service provider," does not solve the problem. It may address the ambiguity that the language "all operational costs" created before, but it does not address the lack of authority and consistency issues. The statute provides that the plan should demonstrate sufficient funding for the stewardship program to cover administrative, operational, and capital costs. Nothing in the statute requires the plan to address mutually agreeable arrangements with service providers, and as noted several times in the comments, Cal Recycle may not expand the criteria for approving plans beyond those set out in Public Resources Code section 48703.

Paragraph (6)(E) also contains a requirement that is extraneous to the statute and is somewhat nonsensical as well. It requires revenues and expenditures to be allocated in accordance with Generally Acceptable Accounting Principles. Allocations are not made in accordance with Generally Accepted Accounting Principles; revenues and expenditure allocations may be reported in accordance with such principles; they are not made in accordance with those principles. More significant is that the statute addresses only the sufficiency of the funding mechanism, not the allocation of revenues and expenditures; hence, Cal Recycle is attempting to expand the criteria for plan approval.

Paragraph (6)(F) is equally invalid, as are paragraphs (6)(D) and (E). Nothing in the statute confers authority on Cal Recycle to expand the criteria for approving stewardship plans. Yet, that is exactly what this paragraph would do.

While the original version of paragraph (7) tracked closely with the statutory provisions relating to education and outreach, the revised regulation adds a prohibition to the approval criteria. While it is invalid because it expands the statutory provisions relating to education and outreach, it once again reflects Cal Recycle's misunderstanding of its authority to impose penalties. The implication of this provision is that a paint manufacturer or stewardship organization could be penalized for advertising a collection point that is not a service provider. As noted before, penalties may be imposed only for a manufacturer selling paint when that manufacturer is not covered by a stewardship plan. Finally, this added provision is yet another attempt to impose on a paint manufacturer or a stewardship organization the burden of reaching a mutually agreeable arrangement, that is, contracting with service providers, including voluntary retailers. Cal Recycle has no such authority, and this addition to the regulation is inconsistent with Public Resources Code section 48704 that requires Cal Recycle to approve plans that meet the requirements of Public Resources Code section 48703.

While paragraph (10) “audits” is an invalid criteria because it expands the specific provisions of the statute, it illustrates in paragraph (D), again, Cal Recycle’s misunderstanding about its authority to impose penalties. Here, it sets out an optional provision and states that a manufacturer or stewardship organization that fails to report on “non-financial activities” is not subject to penalties for this section. Again, the implication is that failing to include every other criteria mandated by these regulations in a plan is subject to penalties. As noted before, that is not consistent with the structure of the statute.

Cal Recycle’s attempt to demonstrate necessity for the provisions of this section are insufficient. For the most part, Cal Recycle, in the ISOR, simply states that the provisions are necessary because they are necessary and because they are necessary to inform the department. No explanation is given for why the department must be informed, and in particular, when the provisions go beyond the content of a stewardship plan that Cal Recycle is obligated to approve. Other attempts to demonstrate necessity raise authority and consistency issues. For example, with respect to a provision that was removed in the revised regulations, Cal Recycle states, although paint is not a solid waste, those statutes are applicable. They are not. Only Public Resources Code sections 48700 and following are applicable to this program.

Recommended Solution

Strike paragraphs (2), (4), (5), (8), (9), and (10) of subsection (a), section 18953, and the portions of paragraph (3) that exceed the statutory provisions pertaining to goals, paragraphs (D), (E), and (F) of paragraph (6), financing mechanism, and the sentence added in paragraph (7) in the revised regulations.

Section 18954. Annual Report Compliance Criteria.

Annual Report Compliance Criteria Exceeds the Scope of Cal Recycle’s Authority, Is Inconsistent With the Statute, and Is Unnecessary.

This section is intended ostensibly to implement Public Resources Code section 48705 pertaining to annual reports. While the statute requires a paint manufacturer or a stewardship organization to “at a minimum” include certain information in annual reports, that does not give Cal Recycle carte blanche to impose whatever additional elements it may desire. Certainly, Cal Recycle may not require that the annual report contain information that it cannot require to be included in the stewardship plan.

Further, the phrase “at a minimum” is construed the same as “including.” A fundamental rule of statutory construction is that any factors added beyond those listed in the statute are to be of a similar kind and consistent with the Legislature’s intent as articulated in other provisions of the same act. The California Supreme Court said in *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, (2007) 42 Cal.4th 319, 341-342, “The general term or category is ‘restricted to those things that are similar to those which are

enumerated specifically . . . Ordinarily, enumeration of an item in a statute implies that the Legislature intended to exclude others.”

The provisions of section 48705 were summarized in the section of these comments relating to subsection (c), section 18952, Submittals. Cal Recycle’s authority is limited by the statutory list. Two of the seven statutory elements relate to total volume of architectural paint sold and recovered in the state, another relates to the methods used to collect, transport, and process post-consumer paint in the state, two relate to the funding mechanism, another requires an audit, and the last element calls for examples of educational materials provided to consumers.

Subsection (a)(2), section 18954, requires the annual report to include an executive summary that describes “efforts during the report period,” and may include anticipated steps to improve performance and challenges during the reporting period. Nothing in the list of informational elements set out in the statute, section 48705, relates to the content of an executive summary.

Subsection (a)(3) requires the annual report to include a section entitled “Scope” that describes the stewardship plan accepts and manages all applicable paint, and an updated list of participating manufacturers and their contact information. These comments, relating to subsection (b) of section 18952, Submittals, and section 18953, Stewardship Plan Approval Criteria, have pointed out that Cal Recycle cannot require information on scope in a stewardship plan. That is equally applicable to both aspects of scope as defined in subsection (a)(3), section 18954. Cal Recycle cannot indirectly require information in the annual reports that it cannot require in the stewardship plan. Also, nothing in the list of informational elements set out in the statute, section 48705, relates to the content of scope.

Subsection (a)(4) requires the annual report to include a program outline on four topics: (A) a description of methods used to collect, transport, and process paint **by type** in this state; (B) a description of how each consumer of paint had an opportunity to recycle and manage post-consumer paint on a statewide basis, including the number, location, and type of collection points in each county; (C) a description of best management practices followed by service providers, including training provided to or required of service providers to ensure proper collection and management; and, (D) a statement that the manufacturer or stewardship organization negotiated a mutually agreeable arrangement with service providers serving as a collection point.

Cal Recycle seems unable to accept the provisions of the statute. As noted above, section 48705 requires the annual report to set out the methods used to collect, transport, and process used paint. Rather than simply duplicate this language in the regulation, subsection (a)(4)(A), Cal Recycle adds to the description of paint the phrase “by type.” It is hard to imagine a clear example of an inconsistent regulation and one that exceeds the scope of an agency’s authority. Section 48705 requires the annual report to include information on paint recovered in this state, but it is total volume of post-consumer paint. Hence, the inclusion of the phrase “by type” is inconsistent not only with the statutory provision that the regulation largely duplicates, it is inconsistent with the specific reporting provision pertaining to recovered paint. Nothing in the

ISOR explains why this phrase was added to the regulation. Hence, Cal Recycle also fails to demonstrate necessity for it.

Subsection (a)(4)(B) requires a description of how each consumer of paint had an opportunity to recycle and properly manage post-consumer paint on a statewide basis, including the number, location, and type of collection point in each county. Cal Recycle attempted to add this information to the stewardship plan. Just as it has no authority, and its attempt is inconsistent with the statute in section 18953, Stewardship Plan Approval Criteria, it is equally invalid here. Again, as noted before, Cal Recycle cannot impose burdens indirectly that it is precluded from imposing directly. It is precluded from imposing this burden on stewardship plans because of Public Resources Code sections 48703 and 48704. While the statute, 48705, requires a description of the methods used to collect, transport, and process used paint, Cal Recycle has implemented that provision in subsection (a)(4)(A) except for requiring the information to be provided "by type." That statutory provision, fully implemented, is not subject to the extraneous, detailed information required by this subsection, (a)(4)(B). The truth of the matter is that Cal Recycle is not simply requiring information, it is attempting to mandate how the APRP is operated, ignoring that this is an industry-run program and Cal Recycle has a limited role.

Subsection (a)(4)(C) requires the annual report to include a description of best management practices followed by service providers, including any training provided to or required of them. Once again, the regulations required this information to be included in the stewardship plan, and as noted in the section of these comments relating to section 18953, Stewardship Plan Approval Criteria, Cal Recycle lacks the authority to condition approval of the stewardship plan on the inclusion of this information, and attempting to do so is inconsistent with Public Resources Code sections 48703 and 48704. Nor can Cal Recycle require the inclusion of this information indirectly in the annual reports. Also, as noted in other parts of subsection (a), section 18954, nothing in the list of informational elements required by the statute, section 48705, relates to the informational requirements of this subsection. Moreover, as will be discussed below, section 48705 only requires examples of educational materials provided to consumers. It does not, as subsection (a)(4)(C) does, require a description of training, nor does it require anything with respect to training provided to service providers.

Subsection (a)(4)(D) requires the annual report to include a statement that a mutually agreeable arrangement was made with service providers serving as collection points that addresses all operational costs. Cal Recycle has attempted to make such arrangements a condition of approving a stewardship plan. It lacks the authority to do so, and such a provision is inconsistent with the statute, sections 48703 and 48704. It cannot indirectly make that a condition of approving a stewardship plan by requiring it in the annual reports.

Subsection (a)(5) requires annual reports to include a description of goals and activities. Cal Recycle also requires in this subsection a description of adjustments to the goals and the rationale for the change. Finally, this subsection requires: (A) the total volume of paint sold, **by type**, during the reporting period; (B) the total volume of paint recovered, **by type**, during the reporting period; (C) a description of paint collected, **by type**, and estimated volume, including

facility names and addresses for each disposition method; (D) a description of efforts to increase the re-use of post-consumer paint; and, (E) a description of efforts to increase recyclability of post-consumer paint.

Cal Recycle misunderstands the statutory provision relating to revisions of the goals. The statute, section 48705(d), provides that the goals **may** be revised by the manufacturer or stewardship organization based on information collected for the annual report. This provision is permissive. Cal Recycle acts without authority and inconsistently with the statute when it attempts to convert it to a mandate.

Among the requirements of (A)-(E), only (A) and (B) relate to the list of informational elements set out in the statute, section 48705. While the statute requires the annual report to include the total volume of paint sold and recovered, it does not, as Cal Recycle seeks, require the breakout of that information “by type.” As noted above, Cal Recycle lacks the authority to require that, and requiring a breakout by type is inconsistent with the statute requiring only a report of total volume. Subsections (a)(5)(C)-(E) all impose reporting requirements unrelated to the list of informational elements set out in the statute, section 48705. The statute compares the total volume of paint sold and recovered; nothing in it relates to disposition. The statute requires a report on results, total volume of paint sold and recovered; nothing in it relates to efforts to increase re-use and recyclability.

Subsection (a)(6) requires the annual report to include a section on market development, or does it? Subsection (a) states that the annual report must include, among other things, a section on market development, but then, Cal Recycle provides in subsection (a)(6) that a manufacturer or stewardship organization that does not participate in or report on market development will not be subject to penalties. Does that make this provision discretionary? If so, it is not regulatory. Even more disturbing is that this provision is another example of what appears to be Cal Recycle’s belief that it has the authority to impose penalties for failing to include other informational elements required by subsection (a) in annual reports. These comments have addressed the error of this interpretation.

Subsection (a)(7) requires the annual report to include information on the financing mechanism. The first two sentences of this subsection are generally consistent with the statute in that they track the statute, section 48705(a)(4) and (5). These statutory provisions require the annual report to include information on the total cost of implementing the program and the evaluation of how the funding mechanism operated. However, from that point on, this subsection contains many invalid provisions in that they exceed the scope of Cal Recycle’s authority and are inconsistent with the statute.

Subsection (a)(7) requires a list of informational items, (A)-(K), with supporting documents to be included in the annual report. Subsection (a)(7)(B), total program cost, is consistent with the statute, but duplicates the first sentence of this subsection. Subsections (a)(7)(C)-(H) call for a breakdown of the total costs, capital costs, costs per capita, costs per gallon of paint collected, education/outreach costs, end-of-life materials management costs broken out by re-use,

recycling, incineration, and landfill, and program administration costs. The statute only requires total costs, clearly stating the Legislature's intent to keep reporting simple. The detailed breakout is inconsistent with the statute. Subsection (a)(7)(I), evaluation of how the assessment operated, is consistent with the statute, but duplicates the second sentence of this subsection. Subsection (a)(7)(J) requires a report on how surplus funds will be applied, while not included in the statutory list of informational elements, tracks a provision of the statute relating to the stewardship plan. Subsection (a)(7)(K), governance costs, like (C)-(H), requires a breakout of the costs, governance costs, and as such is equally invalid.

Nothing in the statute, section 48705, requires the annual report to contain supporting documents. Requiring supporting documents is not similar to the requirements enumerated in the statute. As a consequence, that requirement is unauthorized and inconsistent.

Subsection (a)(8) requires annual reports to include information about education and outreach. The statute, section 48705, requires examples of educational materials provided to consumers. Unfortunately, Cal Recycle has pushed this subsection well beyond the statute. It requires a description, not just examples. It requires materials provided to retailers, consumers, and contractors, not just consumers. It requires an identification of methods used to evaluate the effectiveness of surveys, promotional activities, and links to websites, not just examples of materials provided to consumers.

Subsection (a)(9) requires an audit. The statute, section 48705(a)(6), requires an independent financial audit. Subsection (a)(9) dictates how the audit is to be conducted, who is to conduct it, and most egregiously of all, provides that Cal Recycle may investigate further to review the findings of the auditors, and to request supplemental information. The Legislature was satisfied with an independent audit, relying on that sole safeguard to provide it with the assurance it needed that the paint industry is operating consistently with its intent. Nothing in the statute suggests that the Legislature intended to set up Cal Recycle as an auditor of the auditor, to review materials other than the audit report.

Cal Recycle's attempt to demonstrate necessity for section 18954 is insufficient. Cal Recycle, at times, simply sets out in its ISOR a statement of what the regulatory provision requires, or that the requirement is needed to inform the department. In other parts of the ISOR, Cal Recycle acknowledges that it is imposing requirements that go beyond the statute. For example, with respect to subsection (a)(3), Cal Recycle states that the requirement to report on "scope" is necessary because the program must accept and manage all post-consumer architectural paint. The same is true for subsections (a)(4)(A)-(E). The ISOR states that the information is necessary to ensure that a stewardship program is providing statewide coverage. For subsection (a)(5), Cal Recycle states that it requires goals to be measured from a baseline. Cal Recycle also states in the ISOR for this subsection, that it is "necessary because the purpose of the paint stewardship program is realized by achieving the goals laid out in a stewardship plan." That statement comes close to being a tautology and provides no real explanation. For subsection (a)(9), Cal Recycle states in the ISOR that the provisions are necessary to assist the department's oversight role.

Recommended Solution

Strike all of subsection (a)(2) and (3), “by type” in (4)(A), all of (4)(B)-(D), the preamble to (5), “by type” in (5)(A) and (B), all of (5)(C)-(E), all of (6), all but the first sentence of (B) of (7), all of (8) except examples of educational materials provided to consumers, and all of (9) except the first sentence of (A).

Section 18955.1. Amount of Civil Penalties and Administrative Penalty Schedule.

Table 1, Subsection (a), Section 18955.1, Is Beyond the Scope of Cal Recycle’s Authority and Is Inconsistent With the Statute.

As raised earlier in these comments, the structure of the statute is that an architectural paint manufacturer is prohibited from selling paint in this state unless it is in compliance with this chapter. Public Resources Code section 48702(b). After the first plan is approved, Cal Recycle is to post on its website the name of manufacturers for which it has approved a plan. Cal Recycle is to update its website no less than once every six months. Public Resources Code section 48702(c). Wholesalers and retailers are to monitor Cal Recycle’s website to determine whether a manufacturer is in compliance. Public Resources Code section 48702(d). A retailer may not sell paint produced by a manufacturer unless the manufacturer is in compliance. Public Resources Code section 48702(b).

Hence, Cal Recycle’s enforcement mechanism is through approving the first plan and determining compliance thereafter through the annual reports. Therefore, the failure to submit a stewardship plan or one containing all of the elements required by Public Resources Code section 48703, results in those manufacturers being prohibited from selling paint and retailers from selling paint produced by those manufacturers. That is the enforcement mechanism, not the imposition of civil penalties. Civil penalties are to be imposed for selling paint produced by manufacturers not in compliance. The same analysis is applicable to the failure to implement a stewardship plan, the failure to pay the administrative fee, the failure to submit an annual report, and the failure to include in the annual report the elements required by Public Resources Code section 48705(a).

Recommended Solution

Strike from Table 1 all of the violations except the first, offering or selling paint produced by a manufacturer not in compliance with this chapter, as provided in Public Resources Code section 48702(b).

Table 2, Subsection (a), Section 18955.1, Is Beyond the Scope of Cal Recycle’s Authority and Is Inconsistent With the Statute.

No need exists to repeat the comments made with respect to Table 1. However, the analysis applies.

Recommended Solution

Strike from Table 2 the second violation.

Section 18956. Recordkeeping Requirements.

This entire section exceeds the scope of Cal Recycle's authority and is inconsistent with the statute. The statute assigns to Cal Recycle an important, but limited, role. Generally, its role is as follows:

- Determine whether a stewardship plan meets the requirements of Public Resources Code section 48703.
- Post on its website, manufacturers covered by an approved stewardship plan; update that list every six months.
- Determine whether a manufacturer not listed on the website can be certified as being in compliance.
- Approve the stewardship assessment.
- Impose fees to cover its administrative and enforcement costs.
- Impose civil penalties.
- Review annual reports and determine compliance or not.

Cal Recycle is to make its determination of compliance on the basis of the stewardship plan, manufacturer's application for a certificate of compliance, and the annual reports, including the independent financial audit. Nothing in the statute authorizes Cal Recycle to undertake a broader role in the operation of this industry-run program. Cal Recycle has no authority to require recordkeeping beyond the materials provided to it in the stewardship plan and annual reports. It has no authority to require that the manufacturers and retailers make records available at any time, and certainly not immediately, or to impose penalties for failure to provide records.

Recommended Solution

Strike all of section 18956.

Section 18957. Proprietary, Confidential, or Trade Secret Information.

This section, by invoking the application of Title 14, CCR, Section 17041 and following, creates an ambiguity and, therefore, a lack of clarity. Public Resources Code section 48704(d) provides that an approved stewardship plan is a public record, "except that financial, production, or sales data reported to the department by a manufacturer or the stewardship organization is not a public record under the California Public Records Act . . . and shall not be open to public inspection." The ambiguity is created specifically by Cal Recycle's current regulations dealing with trade secrets and specifically 14 CCR sections 17044 and 17045. Those regulatory sections require a person submitting data claimed to be a trade secret or confidential or proprietary information to

indicate that at the time of submission. The Public Resources Code section 48704(b) makes clear that financial, production, or sales data is not a public record. Comparing the Public Resources Code provision with the existing regulation raises a question. The question is whether a manufacturer or stewardship organization submitting a stewardship plan containing financial, production, or sales data is obligated to identify that data as proprietary and confidential at the time of submission. Moreover, 14 CCR, section 17046, setting out the procedure that Cal Recycle follows in determining whether information is to be disclosed or not, also raises a question. Is this the process that is to be followed if a request is made by a member of the public for financial, production, or sales data included in a stewardship plan? Public Resources Code section 48704(b) would seem to eliminate the necessity for such a process. Cal Recycle would be obligated under the statute to immediately reject such a request on the grounds that the financial, production, and sales data included in a stewardship plan is not to be disclosed.

Recommended Solution

Cal Recycle needs to clarify how its existing regulation applies to a request for financial, production, or sales data included in a stewardship plan, if the existing regulation is to apply at all.

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

Cal Recycle may not delegate to itself the authority to set an administrative fee without complying with the APA. This regulation, to the extent it contemplates the imposition of a fee without future compliance with the APA, lacks clarity. Moreover, necessity must be demonstrated in the rulemaking record, not just for a fee, but for the specific fee. The absence of a specific fee in this regulation raises a clarity issue, and as a consequence, nothing in the rulemaking record sets out the facts supporting the need for a specific fee amount. A specific fee imposed by Cal Recycle, without complying with the APA, would be invalid as an underground regulation. See, for example, Office of Administrative Law's 1986 Determination 1.

Cal Recycle should either strike all of section 18958, or propose a specific fee. If it proposes a specific fee, it needs to demonstrate the need for the specific amount in the record of the rulemaking proceeding.

Sincerely,


GENE LIVINGSTON

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