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***Via Electronic Mail & Hand-Delivery***

Ms. Cynthia Dunn  
Materials Management and Local Assistance Division  
California Department of Resources Recycling and Recovery  
Post Office Box 4025  
Sacramento, CA 95812-4025  
paint@calrecycle.ca.gov

Re: ACA and PaintCare Comments In Response to April 13, 2012, 15-Day Notice

Dear Ms. Dunn:

**INTRODUCTION**

These comments are submitted on behalf of the American Coatings Association (ACA) and PaintCare<sup>1</sup> in response to the forth 15-Day Notice beginning on April 13, 2012. ACA and PaintCare previously submitted extensive comments to the initially noticed regulations and in response to the second and third 15-Day Notices. In their previous comments, ACA and PaintCare raised substantial issues of authority, consistency, and necessity, and an occasional concern about clarity.

ACA and PaintCare continue to have concerns regarding the Department of Resources Recycling and Recovery's (Cal Recycle) authority and the necessity of the regulations given the underlying statute's clear language. ACA and PaintCare agree with the Office of Administrative Law's (OAL) disapproval of the regulations, particularly OAL's #5 with respect to Cal Recycle's failure to comply with the clarity and reference standards of Government Code section 11349.1.

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<sup>1</sup> 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.

This standard mandates that each regulation adopted complies with the authority and reference standards inherent in the Administrative Procedures Act. As OAL states, “Authority” as defined by Government Code section 11349(b) means “... the provision of law which permits or obligated the agency to adopt, amend, or repeal a regulation,” and “Reference” as defined by Government Code section 11349(e) means “...the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

The regulations, as filed with OAL, merely cite the entire section of Public Resources Code sections 48700-48706, the underlying statute, instead of citing specific authority and reference provisions for the regulations. Unfortunately, Cal Recycle’s revised regulations fail for the same reason. In the revised regulations, CalRecycle now merely cites to sections 40401 and 40502 of the Public Resources Code as well as the statutory citations for nearly all of the regulatory provisions. This appears just as over-inclusive as citing to the underlying statute as was done in the previous version of the regulations. Sections 40401 and 40502 are broad provisions giving Cal Recycle the standard authority, duties, powers and purposes of the former California Integrated Waste Management Board and granting them the general authority to adopt rules and regulations. These provisions are not specific citations to provisions of law that permit or obligate CalRecycle to adopt regulations in this regard, nor are they specific to provisions of law which CalRecycle implements, interprets, or makes specific by adopting these regulations.

In fact, under section 40401, the provisions allow for this authority “except as otherwise specified by statute.” And section 40502 merely points to general authority to adopt rules pursuant to the establishment of the OAL, the primary purpose of which is to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted.

The underlying statute for the paint stewardship program is very specific, yet CalRecycle went well beyond the statute in these regulations, increasing the regulatory burden for the program with unnecessary prescriptive standards without the requisite specific authority. ACA and PaintCare once again identify the concerns that remain with the regulatory provisions that have not been revised despite our repeated comments on such, and with the failure to cite to specific authority or reference provisions.

## **SPECIFIC PROVISIONS**

### **Section 18951. Definitions.**

The term “service provider” is used in three places: (1) definition of “collection” (section 18951(e)); (2) criteria for approval of stewardship plans (section 18953(a)(3)(C)); and (3) annual report compliance criteria (section 18954(a)(3)(C)). The latter two uses are particularly objectionable. The first of the two requires a stewardship plan to describe the best management practices to be followed by “service providers” that are acting as collection points, including any training that the manufacturer or stewardship organization intends to provide to or require of

“service providers” to ensure proper collection and management of post-consumer architectural paint.

As noted below in the comments dealing with section 18953, Cal Recycle lacks authority to expand on the required content of a stewardship plan. A regulation that expands on and exceeds the statutory language is inconsistent with the statute and is also invalid for that reason. The only statutory requirement for a stewardship plan relating to a collection system is the one that requires a plan to address coordination with existing local household hazardous waste collection programs. Nothing inherent in that standard can require a stewardship plan to include a description of best management practices and training provided to “service providers.”

“Service provider” is also used in the section relating to annual report compliance criteria and specifically with the requirement that the program outline include, again, a “description of best management practices followed by service providers, including any training that the manufacturer or stewardship organization provided or required of service providers to ensure proper collection and management of post-consumer paint.” While Public Resources Code section 48705 provides that an annual report shall include a “description of methods used to collect, transport, process post-consumer architectural paint in this state,” nothing in that standard confers authority on Cal Recycle to require a description of best management practices and to provide training to “service providers.”

The definition of service provider is unnecessary because the context in which it is used in the regulations have been proposed without authority and are inconsistent with the statute being implemented.

### **Section 18952. Submittals.**

Subsection (b), section 18952 (Submittals), and section 18953 (Stewardship Plan Approval Criteria) fail to recognize Cal Recycle’s legislative mandate to approve a stewardship plan meeting specified statutory standards. Rather, it seeks to expand what is to be included in a stewardship plan, and, in doing so, creates confusion.

Public Resources Code section 48704 provides 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. While section 48703 requires a description of the “goals” of the plan, nothing authorizes the requirement that it include (B) “activities,” and particularly as “activities” is defined in section 18953. The same is also true for (C) “collection systems,” (E) “market development,” (H) “program performance measurements,” (F) “stakeholder consultation,” and (G) “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-G)) 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.

ACA and Paint Care also objected to subsection (c), section 18952, relating to the submission of annual reports, on the grounds that much of that subsection exceeded the scope of Cal Recycle’s authority, was inconsistent with the statute, and was unnecessary. Similar to the comments made with respect to subsection (b), section 18952, subsection (a), section 18952 (Submittals) and section 18954 (Annual Report Compliance Criteria) also create confusion in that they depart significantly from the statutory provisions relating to the content of 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) “program outline, and (D) description of goals and activities based on the stewardship plan.” 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 include information inconsistent 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.

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.

### **Section 18953. Stewardship Plan Approval Criteria.**

ACA and Paint Care objected to many of the provisions contained in this section on the grounds that it exceeded the scope of Cal Recycle’s authority, was inconsistent with the statute being implemented, and was unnecessary. The essence of ACA and PaintCare’s concerns were that Public Resources Code section 48704 explicitly requires Cal Recycle to approve a stewardship plan that contains the elements set out in Public Resources Code section 48703. Cal Recycle has no authority to expand the requirements of a stewardship plan beyond what is contained in the statute, and to condition approval of a stewardship plan on elements that exceed what is required by the statute renders the regulation inconsistent with the statute.

Cal Recycle continues to exceed the scope of its authority to impose a regulation that is inconsistent with the statute. 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 will “(A) reduce the generation of post-consumer paint; (B) promote the re-use of post-consumer paint; and (D) manage paint containers and undertake market development activities, if a manufacturer or stewardship organization chooses to engage

in these activities.” The regulation requires a description of specific methodologies to be used to achieve goals.

The statute calls for goals to reduce the generation of post-consumer paint, to promote re-use, and for end-of-life management, including recovery and recycling. Nothing in the statute calls for “how” the program will achieve the goals. Certainly, nothing in the statute refers to containers or market development, whether in the context of goals or any other context. While the latter regulation regarding containers and market development has been made discretionary, its inclusion as a requirement raises a question about how Cal Recycle will respond to a stewardship plan that excludes container management and market development. All of those requirements go beyond the statute.

Similarly, paragraph (4) (Collection Systems) also exceeds the scope of the statute. The statute calls for the stewardship plan to coordinate with the existing local household hazard waste collection programs. Paragraph (4) requires the stewardship plan to describe the system that will be used to collect architectural paint, **by type**, the destination of architectural paint, **by type**, a description of best management practices to be followed by “service providers,” including training that is to be provided by paint manufacturers or a stewardship organization to service providers, a description of how consumers of architectural paint will have an opportunity to recycle unwanted paint.

Nothing in the Architectural Paint Recovery Program (Public Resources Code section 48700 and following) contains any inference that a stewardship plan is to address architectural paint “by type.” The statute refers to architectural paint generically. No provision provides a basis for inferring that the Legislature contemplated separate or different stewardship plans based on the type of the paint. This requirement exceeds the scope of Cal Recycle’s authority and is inconsistent with the statute.

While the regulation provides that the stewardship plan shall address coordination with existing local household hazard waste collection programs in paragraph (3)(E), it goes on to require that the manufacturer or stewardship organization must negotiate with the programs. Similarly, Cal Recycle requires a manufacturer or stewardship organization, in paragraph (3)(F), to negotiate with any retailer wanting to participate as a collection point. Both paragraphs (3)(E) and (F) require the stewardship plan to address coordination with possible collection points. Those are the only provisions in paragraph (3) that are authorized by the statute. Certainly, the balance of paragraphs (3)(E) and (F), dictating the method of coordination by requiring negotiations, exceeds Cal Recycle’s authority to approve a plan that describes how it is coordinating with local household hazard waste collection programs. The legislation contemplates the plan describing the coordination; it does not contemplate Cal Recycle dictating how coordination should occur.

A special note should be made with respect to paragraph (7), subsection (a) of section 18953 pertaining to audits. Public Resources Code section 48703 contains no obligation for a stewardship plan to include any information about audits. In fact, audits are appropriate after a program is up and running and have little relevance to the descriptions of a plan to initiate a

stewardship program. While Public Resources Code section 48705, pertaining to annual reports, requires the inclusion of an audit, nothing is contained in Public Resources Code section 48703 describing the content of a stewardship plan. The revisions Cal Recycle made do not address ACA and PaintCare's objection that the requirement to include information about audits in the stewardship plan is legally invalid.

### **Section 18954. Annual Report Compliance Criteria.**

ACA and PaintCare previously raised issues about provisions in this section exceeding the scope of Cal Recycle's authority, being inconsistent with the statute, and being 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.4<sup>th</sup> 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.

Paragraph (2), subsection (a), 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.

Paragraph (3), subsection (a), section 18954, 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; (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 coordinated with existing local household hazard waste collection programs and retailers.

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, paragraph (3)(A), subsection (a), section 18954, Cal Recycle adds to the description of paint the phrase “by type.” It is hard to imagine a clearer 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.

Paragraph (3)(B), subsection (a), section 18954, 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. 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)(3)(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)(3)(B). The truth of the matter is that Cal Recycle is not simply requiring information, it is attempting to mandate how the stewardship plan is operated, ignoring that this is an industry-run program and Cal Recycle has a limited role.

Paragraph (3)(C), subsection (a), section 18954, 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 paragraph (3)(C), subsection (a) does, require a description of training, nor does it require anything with respect to training provided to service providers.

Paragraph (3)(D), subsection (a), section 18954, requires a statement that the manufacturer or stewardship organization coordinate with existing local household hazard waste collection programs and retailers as potential collection points. It is true that the statute requires stewardship plans to address coordination with existing local household hazard waste collection programs. However, nothing in Public Resources Code section 48705 requires the annual report to duplicate this information. Further, nothing in Public Resources Code sections 48703 or 48705 require any coordination with retailers. The only provision in the statute pertaining to retailers is that they may participate as a collection point if they desire. Cal Recycle may not impose coordination with retailers by requiring it to be included in the stewardship plan or in the annual report.

Paragraph (4), subsection (a), section 18954, 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; and (C) the disposition of paint collected, **by type**, and estimated volume, including names and addresses for contracted processors for each.

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 paragraphs 4(A)-(C), subsection (a), section 18954, 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. Paragraph (4)(C), subsection (a), imposes a reporting requirement unrelated to the list of informational elements set out in the statute, section 48705. The statute requires a report on results, total volume of paint sold and recovered; nothing in it relates to disposition.

Paragraph (5), subsection (a), section 18954, 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, paragraph (5) contains many invalid provisions that exceed the scope of Cal Recycle's authority and are inconsistent with the statute.

Paragraph (5), subsection (a), section 18954, requires a list of informational items, (A)-(I), to be included in the annual report. Subsection (a)(5)(B), total program cost, is consistent with the statute, but duplicates the first sentence of this paragraph. Paragraphs (5)(C)-(H), subsection (a), 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, transportation, recycling, incineration, disposal, 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. Paragraphs (5)(C)-(H), subsection (a), requires a report on how surplus funds will be applied, while not included in the statutory list of informational elements, it tracks a provision of the statute relating to the stewardship plan.

Paragraph (6), subsection (a), 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 the regulation 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.

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 subsections (a)(3)(A)-(E), the ISOR states that the information is necessary to ensure that a stewardship program is providing statewide coverage. For subsection (a)(2), 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.

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

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).

Hence, all of the violations in Table 1 shall be struck 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). With respect to Table 2, the same analysis and result apply.

Sincerely,

GENE LIVINGSTON

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