

Memorandum

To: CalRecycle

From: The Flanigan Firm on behalf of its client, ISRI
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Re: Comments on AB 901 Proposed Reporting Regulations for Disposal,
Diversion & Enforcement

We are writing on behalf of our Client, the West Coast Chapter of the Institute of Scrap Recycling Industries (ISRI). ISRI poses the following questions regarding the AB 901 Regulation Development Draft of Reporting Regulations for Disposal, Diversion & Enforcement for Public Release 6/24/2016:

1. Section x.2 Definitions, subsection (20) reads as follows: “‘Generator’ means a site that is responsible for the initial creation of the mixed solid waste or mixed recyclables and compost material.”

Question: Is a site considered a generator where it source separates its recyclables for sale to a private party, or where the recyclable in question is a valuable metal commodity that has never been mingled with any other recyclable, metal or otherwise, and is never intended to enter the waste stream? For example, expensive precious metal turnings, such as those which result from the crafting of airplane parts, would be collected and kept segregated for the purpose of sale as a valuable commodity to a metal recycler.

Question: The definition of “generator” set forth in the proposed regulation neither appears in the “Definitions” section of the Integrated Waste Management Act of 1989 (the Act) (See Public Resources Code, section 40000, et seq.) nor in the final text of AB 901. What, then, is the statutory authority being used to create the definition?

We pose a similar question regarding the definition of “recycling facility” presented in the same proposed regulation at subsection (33) which neither appears in the “Definitions” section of the the Act nor in the final text of AB 901.

2. Section x.2 Definitions, subsection (32) reads, in pertinent part, as follows: “‘Recycle’ or ‘recycling’ has the same meaning as defined in section 40180 of the Public Resources Code.”

Question: The statutory definition set forth in section 40180 referenced above reads, in pertinent part, as follows: “‘Recycle’ or ‘recycling’ means the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste . . .” (*Emphasis added.*) Conversely, the language of the definition logically

acknowledges, on its face, that there are such materials that would not otherwise become sold waste. We have cited such an example in our first question under paragraph 1, hereinabove. If this is not the Department's understanding, please explain why?

This subject is vital for the scrap recycling industry in that it addresses the question of when a recyclable material becomes a waste for the purposes of the Act, and, of course, the sections being addressed through the proposed regulation (i.e., sections 41821.5 through 41821.8) are part and parcel of the Act.

The seminal California Supreme Court Case on the subject is *Waste Management of the Desert, Inc. v. Palme Springs Recycling Center, Inc.* (1994) 7 Cal 4th 478. It is still the controlling case on the subject. The section entitled "Notes of Decisions" in Deering's California Public Resources Code, annotated, (pages 268-269) explains the court's holding relating to section 40180, the definition of "recycle" or recycling," as follows:

The right of an owner to sell property for value applies to recyclable materials, and this right is not affected by the definitions of "solid waste handling" and "recycling" in the Integrated Waste Management Act of 1989 [cite]. Since the definition of "solid waste handling" includes the processing of solid waste [cite] and the definition of "processing" includes the recycling of solid waste [cite], solid waste handling includes recycling of solid waste. If however, the owner does not discard his or her property, it does not become waste in the first instance. Thus, even if the property might be viewed as feasibly recyclable material, it is not necessarily a recyclable waste. The reference in the definition of "recycling" [cite] to "materials" that would otherwise become solid waste is merely an acknowledgement of the reality that materials are capable of being recycled, but the provisions that define "solid waste handling" refer only to "recycling of solid waste," not the recycling of solid materials. (Emphasis added.)

Question: In light of the above question and comments, the following question must be asked: For purposes of the proposed regulations, is it the department's intention to consider all recyclables, including those separated at their source by a generator and sold for value to a private recycler, as being required to be reported? If so, for what purpose and under what statutory authority?

This is not a final commentary on the proposed regulations by ISRI. We retain the right to comment further on any other sections of the proposed regulations as other drafts of the proposed regulations appear.

Thank you for your consideration. We look forward to your response to our questions.