



September 12, 2016

Mr. Robert Carlson
Department of Resources Recycling and Recovery
1001 I Street
Sacramento, CA 95812

Re: Comments – AB 901 Draft Reporting Regulations

Dear Mr. Carlson:

Recology, Inc. would like to thank you for holding the recent series of workshops and allowing an additional opportunity to comment on the draft reporting regulations regarding AB 901, dated June 24, 2016. While the workshops provided valuable discussion and clarity surrounding some of the major issues at hand, our primary concerns remain with the draft regulations. These concerns include the reporting of source sector information, legislation language such as “to each person,” which would require entities to divulge confidential business information about large-scale customers, and potential unintended liability consequences for reporting entities.

1. Reporting source sector information

The draft regulations currently require certain reporting entities to track and report source sector of materials. We appreciate CalRecycle’s interest in tracking the progress of commercial recycling (AB 341) and commercial organics recycling (AB 1826). However, we caution that source sector information collected will be highly inaccurate for several reasons. Most importantly, a typical collection route includes material from multiple source sectors that are commingled in a single truck prior to arriving at a receiving facility. Also, self-haulers dropping off material at any given facility may not have source sector information at all. For these reasons, we recommend that reporting obligations relating to source sector information be eliminated.

2. Reporting “to each person”

The draft regulations currently require recyclers, composters, transporters, brokers, or exporters who send material to end users in quantities greater than one ton to report material sent “for each destination” (Sections X.7(b)(2) and X.8(b)(2), respectively). Similarly, Sections X.5(A)(2) and X.6(a)(4)(A) require that recyclable/compostable material sent off-site be reported as sent “to each person.” These provisions ask for specific customer information, which directly contravenes AB 901’s provision that reports may exclude proprietary business terms (PRC §41821.5(b)(3)).

We understand CalRecycle is aiming to effectively track the flow of materials through the State, as well as verify that the purported end users are *actual* end users without placing a burden on reporting entities. However, it is more burdensome and potentially harmful for reporting entities to disclose proprietary business information.

Rather than require reporting entities to report large-scale customers by name, we recommend that the regulations allow reporting entities to aggregate information by material type and end use without specifically identifying each destination. For example, composting facilities or other organic material recycling facilities are able to report the total tons of materials, including compost, landscaping mulch, land application material, and biomass fuel that are sent to end users, brokers or other processors. Similarly, recycling facilities would be able to report aggregate tons sold by material type (plastic, glass, metals, paper) to end users, brokers or other processors.

3. Liability and enforcement

The draft regulations currently impose liability on reporting entities for the responsibilities of other reporting entities: Section X.3(b) requires reporting entities to ensure the information they provide is accurate and complete, even when reporting information provided by other reporting entities; Section X.9(b) imposes joint and several liability for violations where more than one reporting entity is responsible; Section X.12(a) requires reporting entities to notify CalRecycle of suspected non-compliance by other reporting entities. We do not think it is reasonable to hold a reporting entity responsible for the actions, inaction, and/or non-compliance of another reporting entity.

In addition, we believe the enforcement provisions of the draft regulations need to provide reporting parties with an opportunity to submit a response before penalties are assessed, as well as the right to an administrative hearing to consider the merits of any penalty assessment. We also note that although the regulations speak of penalties to be multiplied by the number of days in violation, there are, in fact, no penalties listed in Penalty Table I that are imposed on a daily basis. For your consideration, please find attached the proposed language addressing the aforementioned issues.

Recology thanks CalRecycle for the open dialogue and cooperative efforts thus far. We do believe, however, that there remain significant concerns to be worked through via revised draft regulations and additional workshops. We suggest not to move forward with the formal rulemaking process until these issues are resolved. We look forward to continuing to work on these important regulations.

Sincerely,



Eric Potashner
Vice President & Sr. Director of Strategic Affairs

PROPOSED EDITS TO CERTAIN ENFORCEMENT AND LIABILITY PROVISIONS OF AB 901 REGULATIONS

Section X.3 Registration, Reporting and Exemptions.

- (a) All reporting entities shall register with and obtain a DDRS Number [...]
- (b) All registered reporting entities shall file a Report for each reporting period using the Department's electronic reporting system, and ensure that the information provided and any required supporting documentation is accurate, complete, and entered electronically. Notwithstanding the foregoing, reporting entities shall be entitled to rely on, and shall not be liable for any inaccuracies in, any information provided to them by third parties.

Section X.9 Procedure for Imposing Civil Liabilities

- (a) The Department shall impose administrative civil penalties authorized by sections 41821.5 through 41821.8 of the Public Resources Code in accordance with the procedures set forth in this Section.
- ~~(b) In any case in which it is determined that more than one reporting entity is responsible and liable for a violation, each such reporting entity may be held jointly and severally liable for an administrative civil penalty.~~
- ~~(b) For first offenses, t~~he Department will, prior to the issuance of an accusation imposing administrative civil penalties, issue a written notice of violation to the reporting entity alleging with specificity: including; a description and dates of the violation(s), the proposed penalty amount, and the facts considered in determining the violation(s) and penalty amount(s). The reporting entity shall have thirty (30) days during which it may, but shall not be required to, submit a written response to the notice of violation. The Department shall consider any such response in its assessment under subsection (e) –and a compliance deadline to remedy the violation(s).
- (c) ~~If the notice of violation includes the reporting entity's first offense, t~~he Department will include in the notice the actions the reporting entity must take in order to remedy the noticed violations, a compliance deadline for such actions , and of the potential penalties for failure to comply prior to the compliance deadline date. If the reporting entity timely remedies some but not all of the noticed violations, the Department may issue an accusation to assess penalties on the uncured violations, treating them as the reporting party's first offense. If the reporting entity timely remedies all the noticed violations, then no accusation shall be issued and no penalties shall be assessed under the notice of violation, and the subsequent notice of violation shall be treated as the reporting party's first offense, except that this subparagraph (c) shall not apply to such subsequent notice. The Department may, but shall not be required to, treat subsequent violations in accordance with this subparagraph (c).
- (d) Civil penalties may be imposed administratively in accordance with the following:
 - (1) Potential penalties will be calculated based on Penalty Table I and the following:
 - (A) Determine what violation(s) have occurred
 - (B) Determine the number of violations and number of offenses that have occurred.
 - (C) Total potential penalties will be calculated for each violation ~~and multiplied by the number of days the business was in violation. For first offenses, the number of days the violation occurred will begin one day after the Notice of Violation compliance due date.~~

[Penalty Table I]
- (e) Once a potential penalty amount is determined, the department ~~shall~~may take the following factors into consideration in determining the penalty to be requested in the accusations:

- (1) Whether the violations or conditions giving rise to the violation were intentional.
 - (2) Whether the violations demonstrate a chronic pattern of noncompliance with this division, the regulations adopted pursuant to this division.
 - (3) Whether the violations or conditions giving rise to the violation were due to circumstances beyond the reasonable control of the violator or were unavoidable under the circumstances.
 - (4) Whether the violator acted in good faith to comply, including correcting the violations in a timely fashion.
 - (5) Whether the violations were voluntarily and promptly reported to appropriate authorities prior to the commencement of an investigation by the enforcement agency.
 - (6) The circumstances, extent, and gravity of any violation or any condition giving rise to the violation and the various remedies and penalties that are appropriate in the given circumstances.
- (f) The accusation and all accompanying documents may be served on the respondent by the following means:
- (1) Personal service.
 - (2) Substitute service by using the same service procedures as described in section 415.20 of the Code of Civil Procedure.
 - (3) Certified Mail: For respondents who are registered with the department's electronic DDRS system, the mailing address(es) provided at the time of registration will be used. Proof of service of the accusation shall be the certified mail receipts or registered mail receipts proving the accusation and accompanying materials were sent to respondent by certified mail or registered mail. For other respondents that have not provided addresses to the department, certified mail or registered mail pursuant to the procedures indicated in the Administrative Procedure Act at section 11505(c) of the Government Code applies.
- (g) The reporting entity shall have the right to a hearing on the merits of the accusation in accordance with the following procedures:
- (1) Within fifteen (15) days after service upon the respondent of the accusation seeking any administrative civil penalty, respondent may request a hearing by filing a notice of defense pursuant to Government Code Sections 11505 and 11506. The request for hearing may be made by delivering or mailing the notice of defense to the Department. Failure to file a notice of defense within fifteen (15) days of service of the accusation shall constitute a waiver of the respondent's right to a hearing and the Department may proceed upon the accusation without a hearing.
 - (2) The Department shall provide a hearing before the director or his or her designee, who shall act as hearing officer. At any time during the proceeding, before a decision is issued, the Department and the respondent(s) may engage in settlement of the matter.
 - (3) The hearing officer shall consider the notice of violation (if applicable), the accusation, the notice of defense, and all other relevant evidence presented by the Department and the respondent. The hearing officer shall specify relevant procedures to be conducted during the proceeding, which include but are not limited to, informing the parties as to whether the hearing officer will consider witness testimony, and whether there shall be written and/or oral arguments. The hearing officer shall issue a written decision stating the factual and legal basis

for the decision within thirty (30) days of the hearing. If the hearing officer determines that any penalties are owed, the hearing officer shall include in the written decision the date payment of the assessed penalties shall be due and paid.

(3)(4) Except as otherwise specified herein, the hearing shall be governed by the informal administrative hearing procedures in Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, commencing with Section 11400. The hearing shall take place in Sacramento, California unless a location is otherwise specified by the hearing officer. If respondent wishes to request an alternate location, the respondent must make that request in the notice of defense and provide a justification of undue burden.

Section X.12 Complaints Regarding Non-Compliance.

- (a) Using an electronic reporting process established by the Department, reporting entities ~~may~~ shall inform the Department of specific allegations of non-compliance by another reporting entity who fails to provide it with the information required by this article.
- (b) The Department shall establish an electronic process so that affected or involved parties may report specific allegations of non-compliance by a reporting entity. The party reporting the alleged non-compliance shall provide sufficient documentation so the Department may investigate appropriately.