

THE FLANIGAN LAW FIRM



December 12, 2011

VIA Electronic Mail

Marshalle Graham
Materials Management and Local
Assistance Division
California Department of Resources
Recycling and Recovery
P.O. Box 4025
Sacramento, CA 95812-4025

Re: Proposed Mandatory Commercial Recycling Regulations

Dear Mr. Graham:

I am writing on behalf of my client, the West Coast Chapter of the Institute of Scrap Recycling Industries (ISRI) concerning CalRecycle's proposed Mandatory Commercial Recycling regulations. ISRI is a trade association representing approximately, 18,000 companies nationwide, of which ten percent are located in California. ISRI's members are the principal processors, brokers, and consumers of scrap commodities. They are experts in the handling, processing, and/or recycling of recyclable commodities.

ISRI agrees that the proposed draft regulations are necessary in order to clarify certain provisions of AB 341 (Chesbro, stats. 2011, ch. 476). However, ISRI is greatly concerned that the proposed draft regulations do not provide the clarity and consistency along with maintaining the intent of AB 341 and existing regulations. We further believe that without proper clarity, local jurisdictions and the businesses that will be regulated under the referenced regulations will not have a clear and consistent understanding as to how businesses may divert their non-discarded recyclable material (i.e. that "which has been separated or kept separate from the solid waste stream, at the point of generation...") to independent recycling services rather than to haulers that transport commercial solid waste, thus creating an economic hardship for both the regulated community and the independent recyclers.

Furthermore, AB 341 declares that it is the "intent of the Legislature to encourage the development of the additional solid waste processing and composting capacity that is needed to meet state objectives..."¹ AB 341 clearly states that it is the "policy goal of the state that not less than 75% of the solid waste generated by source reduced, recycled, or composted by the year 2020..." but does not provide statutory authority to mandate that a business must divert their compostable materials from the solid waste stream. It is important for local jurisdictions to have

¹ Public Resources Code section 40004(b).

a clear understanding of the intent of AB 341 (i.e. The 75% goal is just that, a goal and not a mandate). As you can see, the Legislature created two completely different avenues with the passage of AB 341. In order to be consistent with statutory authority, we recommend that any reference to compostable materials in the proposed regulations be omitted.

Title of Chapter 9.4.

In order to be consistent with AB 341, the title of Chapter 9.4 of the proposed regulations must use the same title as found in Chapter 12.8 (commencing with Section 42649) of the Public Resources Code which is “Mandatory Recycling of Commercial Solid Waste.”

§ 18835. Purpose.

For reasons stated above, we recommend the language describing the purpose of the regulations be changed in order to be consistent with AB 341 as follows:

This Chapter implements the Mandatory ~~Commercial~~ Recycling of Commercial Solid Waste regulation pursuant to §42649 of the Public Resources Code. The purpose of this regulation is to reduce greenhouse gas emissions by diverting commercial solid waste to recycling efforts and to expand the opportunity for additional recycling services and recycling manufacturing facilities in California.

§ 18836. Definitions.

The Initial Statement of Reasons explains that the regulations are necessary in order to clarify a number of technical and administrative terms from the Public Resources Code that appear in the proposed regulations in order to ensure regulatory consistency and clarity. We agree that such is necessary. However, the definitions in subsections 18836(6) and (7) are inconsistent with existing statutory and regulatory language. In particular, subsection (a)(7) creates a new definition of “source separating” which will be inconsistent with the existing definition which is found in Title 14, Division 7, Chapter 3, Article 6.0, Section 17402.5(4).² Furthermore, there appears to be no necessity for the inconsistency in language. We recommend that either the existing definition of “source separated” found in Article 6.0 as noted above be referenced in the regulations or included in its entirety in the proposed regulations.³

² "Source Separated" means materials, including commingled recyclables, that have been separated or kept separate from the solid waste stream, at the point of generation, for the purpose of additional sorting or processing those materials for recycling or reuse in order to return them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace. (Title 14, Division 7, Chapter 3, Article 6.0, Section 17402.5(4).).

³ According to Government Code, section 11349.1, all proposed regulations must pass muster regarding several standards, including clarity, consistency, necessity, and authority. (See also section 11349.) All four of these referenced standards apply in this case. As for the deviation from the statutory language referenced, there is no defensible argument in the statement of reasons as to why the statutory language has been changed in the regulation, which relates to all four standards mentioned herein. Additionally, there is no valid argument of necessity as to why some definitions are being changed that appear in the current, long standing regulations. These issues are being

Additionally, in order to be consistent with the intent of AB 341, we recommend subsection (a)(6) be amended as follows:

(a)(6) “Self Hauler” or “Self Hauling” means a business that ~~transports~~ hauls its own commercial solid waste and/or ~~recyclables~~ recyclable materials rather than contracting ~~with a hauler~~ for that service.

§ 18837. Mandatory Recycling of Commercial Solid Waste by Businesses.

The Initial Statement of Reasons stresses throughout the importance of making sure that the regulations provide clarity for the business community when deciding how each business that generates more than four cubic yards of commercial solid waste per week or is a multifamily residential dwelling of five units or more will comply with AB 341. The proposed regulations are also designed to provide a clear mechanism for local governments to oversee that the business community is complying with the law. Unfortunately, the draft regulation is misleading the business community and local jurisdictions as to what type of recycling service a business may chose. Furthermore, the draft regulations pertaining to section 18837 are inconsistent with AB 341. It is important to note that AB 341 was carefully and thoughtfully drafted to make sure that the existing rights of a business to sell or donate its recyclable materials (i.e. paper, plastics, glass, metals, etc.) to independent recyclers was maintained and that local jurisdictions would have a clear understanding that a franchise agreement between a local jurisdiction and a waste hauler only pertains to solid waste and does not pertain to source separated recyclable materials as defined under the current regulations.⁴

The Initial Statement of Reasons specifies that section (a) and subsection (a)(1) provide different methods businesses may use in order to meet the requirements of AB 341. It further states that a business may “arrange for the pick-up of recyclables (e.g. by independent recyclers).” Furthermore, AB 341 specifically states that a commercial waste generator may “subscribe to a basic level of recycling services that includes collection, self-hauling, or other arrangements for the pickup of the recyclable materials” (Emphasis added.). However, section (a) and subsection (a)(1) as drafted changes the wording of the actions as outlined in AB 341 thus creating a lack of clarity and consistency between AB 341 and the regulations.

Again, in order to be consistent with the language in AB 341, along with the intent of the author to maintain the right of a business to sell or donate its recyclable materials, subsection (e) must include a new subsection that states “This Subsection does not modify or abrogate in any manner the existing right of a business to sell or donate its recyclable materials.” Without the inclusion of the aforementioned sentence, the draft regulations will mislead the business community and local jurisdictions and remove the intent of Public Resources Code section 42649.5(b).

raised herein to preserve ISRI’s right to challenge the proposed changes during the review by the Office of Administrative Law and beyond.

⁴ Title 14, Division 7, Chapter 3, Article 6.0, Section 17402.5(4). (As set forth in footnote 1 above.)

With this in mind, ISRI recommends the following amendments be made to section 18837 of the proposed regulations:

- (a) On and after July 1, 2012, in order to meet the requirements of Mandatory Recycling of Commercial Solid Waste pursuant to §42649 of the Public Resources Code, a business shall take at least one of the following actions ~~in order to reuse, recycle, compost, or otherwise divert commercial solid waste from disposal:~~
- (1) Source separating recyclable ~~and/or compostable~~ materials from the solid waste ~~they are discarding~~ and ~~either self-hauling, subscribing~~ subscribe to a ~~hauler, and/or basic level of recycling service that includes collection, self-hauling, or other arrangements~~ ~~otherwise arranging~~ for the pick-up of the recyclable ~~and/or compostable~~ materials ~~separately from the solid waste to divert them from disposal.~~
- (2) Subscribing to a service that includes mixed waste processing alone or in combination with other programs, activities or processes that divert recyclable and/or compostable materials from disposal, and yielding diversion results comparable to source separation.
- (b) To comply with §18837(a), property owners of commercial or multi-family complexes may require tenants to source separate their recyclable materials. Tenants must source separate their recyclable materials if required to by property owners of commercial or multi-family complexes.
- (c) Each business shall be responsible for ensuring and demonstrating its compliance with the requirements of this Section. The activities undertaken by each business pursuant to §18837(a) shall be consistent with local requirements, including, but not limited to, a local ordinance, policy, contract or agreement applicable to the collection, handling or recycling of solid waste.
- (d) Except as expressly set forth in §18837(e)(3), this Section does not limit the authority of a jurisdiction to adopt, implement, or enforce a recycling program that is more stringent or comprehensive than the requirements of this Section. Businesses located in such a jurisdiction must comply with any local requirements that have been enacted.
- (e) This Subsection does not modify or abrogate in any manner any of the following:
- (1) A franchise granted or extended by a city, county, city and county, or other local government agency;
- (2) A contract, license, or permit to collect solid waste granted or extended by a city, county, or other local government agency as of the effective date of this regulation; ~~or~~

(3) The existing right of a business to sell or donate its recyclable materials; or

- (4) (4) The existing provisions of §41783 of the Public Resources Code related to transformation that allow jurisdictions to reduce their per-capita disposal rate by no more than 10 percent. Materials sent to transformation facilities must meet the requirements of §41783(a)(2) of the Public Resources Code regarding front-end methods or programs to remove all recyclable materials from the waste stream prior to transformation to the maximum extent possible.

Conclusion

In summary, ISRI believes that the proposed regulations are inconsistent, in pertinent part, with the language and intent of AB 341 (Chesbro, Ch. 476, Stats. 2011) and do not provide clarity to the commercial waste generators, haulers, recyclers, and local jurisdictions. We do not believe it is the intent of CalRecycle to mislead the regulated community into believing that it will no longer be able to contract with independent recyclers for the purpose of picking up its source separated recyclable materials. We further believe that our suggested amendments to the proposed regulations will rectify any inconsistency and lack of clarity that is currently found in the proposed regulations.

Thank you for your consideration to our concerns.

Sincerely,



Katherine S. Brandenburg
Legislative Advocate

cc: The Honorable Wesley Chesbro
Ms. Elizabeth MacMillan, Principal Consultant
Assembly Natural Resources Committee
Mr. Mark Murray, Executive Director
Californians Against Waste