



ALLAN COMPANY

Dealers in Primary and Secondary Paper Making Fibers

December 12, 2011

VIA EMAIL ONLY

Marshalle Graham / Teri Wion
Materials Management and Local Assistance Division
California Department of Resources Recycling and Recovery
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**RE: PROPOSED REGULATIONS TO
REQUIRE COMMERCIAL BUSINESSES TO RECYCLE**

Dear Mr. Graham and Ms. Wion:

I write on behalf of Allan Company to comment upon the proposed regulation that would require commercial businesses to recycle. Allan Company was founded more than 48 years ago in Baldwin Park, California, and since that time has become one of the premier recycling companies in the nation. The company currently markets approximately 1.2 million tons of recyclable materials annually, sells recyclable materials to hundreds of mills worldwide, and provides recycling programs to over 2,000 commercial accounts, numerous governmental bodies and local jurisdictions, among others.

Allan Company is a longstanding member of the Institute of Scrap Recycling Industries (ISRI) and the Association of California Recycling Industries (ACRI).

Allan Company appreciates the opportunity to comment on the proposed regulation and respectfully provides the comments and recommendations below.

Introduction

As presently drafted, the proposed regulatory text contains a number of provisions that are inconsistent with AB 341 (Chesbro, stats. 2011, ch. 476) and various portions of the

proposed regulatory text (e.g. §§ 18836 and 18837) restrict or enlarge the scope of the statute. It is well settled that a regulation cannot restrict or enlarge the scope of a statute; and in exercising its quasi-legislative powers, an administrative agency may not substitute its judgment for that of the legislature.¹

Headings and Proposed Regulatory Text, Generally

Chapter, section, paragraph, and other headings used in the proposed regulatory text must be revised to conform to the statutory text. It is particularly important because often these elements of the text are used to guide, instruct, and influence the construction and interpretation of the regulation by the reader. Without identifying each and every inconsistency, we provide the following examples to illustrate the point:

- The heading of Chapter 9.4 should be changed from “MANDATORY COMMERCIAL RECYCLING” to “MANDATORY COMMERCIAL RECYCLING [OF COMMERCIAL SOLID WASTE](#)”
- The first sentence of §18835 (Purpose) should be changed as follows: “This Chapter implements the Mandatory Commercial Recycling [of Commercial Solid Waste](#) regulation pursuant to §42649 of the Public Resources Code.”

§ 18837. Definitions.

The definitions found in the proposed regulatory text at §§ 18836(a)(6) and (7) are different from those contained in the statute and existing regulation. Such differences give rise to ambiguities and introduce uncertainty that will likely lead to interpretive inconsistencies and confusion.

¹ 2 Cal. Jur. 3d Administrative Law § 255 citing *Kerr's Catering Service v. Department of Indus. Relations*, 57 Cal. 2d 319, 19 Cal. Rptr. 492, 369 P.2d 20, 44 Lab. Cas. (CCH) P 50466 (1962); *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 41 Cal. Rptr. 3d 482, 179 L.R.R.M. (BNA) 2993 (2d Dist. 2006); *Home Depot, U.S.A., Inc. v. Contractors' State License Bd.*, 41 Cal. App. 4th 1592, 49 Cal. Rptr. 2d 302 (4th Dist. 1996); *Cleveland Chiropractic College v. State Bd. of Chiropractic Examiners*, 11 Cal. App. 3d 25, 89 Cal. Rptr. 572 (2d Dist. 1970); *City and County of San Francisco v. Ballard*, 136 Cal. App. 4th 381, 39 Cal. Rptr. 3d 1 (1st Dist. 2006).

With regard to the definition of “self hauler” or “self hauling” found in subsection (a)(6), we recommend the following change in order to effectuate the intention of AB 341:

(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.

Next, subsection (a)(7) appears to propose a *new* definition for “source separating” or “source separation” that varies from an *existing* definition found at 14 CCR §17402.5(b)(4).² The conflicting definitions—the proposed and the existing—would each be found in different chapters of Division 7, Title 14, and as a result will likely lead to inconsistent construction, interpretation, application, and usage.

Moreover, the existing definition has been in use for many years and is the basis for various parts of the regulatory framework (e.g. LEA Advisory #58³).

The Initial Statement of Reasons provides no justification for the introduction of a new definition in Subsection (a)(7). There appears to be little, if any, need for a new definition that varies from the existing definition, and it is worth noting that although the statute referred to source separating material, a definition was not provided.

For the reasons stated, and in order to minimize the likelihood of confusion for regulators and the regulated community, we recommend that the proposed regulatory text be revised to either include reference to the *existing* definition of “source separated” found at 14 CCR § 17402.5(b)(4) or include the entire *existing* definition in place of the new one.

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. 14 CCR § 17402.5(b)(4).

³ <http://www.calrecycle.ca.gov/LEA/Advisories/58/>

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

Great care was taken in AB 341 to protect the existing right of a business to sell or donate its recyclable materials (i.e. paper, plastic, glass, metal, etc.) to independent recyclers. This market-based element—allowing a business to *sell* or *donate* recyclables—is an essential component of AB 341. Without it, the positive work already being performed by businesses and recyclers would be disrupted. Unfortunately, the proposed regulatory text introduces unrelated subject matter (e.g. compostable material), and disregards this important safeguard and other key provisions of the statute.

By way of example, the proposed regulation at § 18837(e)(1) utterly fails to include the express protections found in AB 341 mentioned above; but instead includes protection for franchises. Left unchanged, the proposed regulation would send the wrong message to the regulated community—that franchises are to be given greater weight than the right of a business to sell or donate its recyclable materials. Such a result is inconsistent with AB 341, and would restrict the statute, disrupt existing commercial recycling transactions, and effectively substitute the judgment of CalRecycle for that of the legislature, all in contravention of existing law.

Moreover, the Initial Statement of Reasons justifies the result in § 18837(e)(1) of the proposed regulatory text as follows (emphasis added):

Subsection (e)(1)

Subsection (e)(1) specifies that a franchise agreement granted or extended by a city, county, or other local government agency cannot be modified or abrogated by section 18837. This is *necessary to assure* franchisees that this *section does not modify or abrogate* a franchise agreement granted by local government. *This offers protection to the franchisee from the threat of unforeseen and disruptive changes to an existing franchise agreement.*

For similar reasons, it is essential that *Subsection (e)(1) likewise protect the existing right of a business to sell or donate its recyclable materials.* It is necessary to include the express protection for the existing right of a business to sell or donate its recyclable materials in order to assure businesses and recyclers that this section does not modify, limit, or abrogate such rights. Mirroring the text of AB 341 with regard to this provision will offer protection to businesses and recyclers from the threat of unforeseen and

disruptive changes to existing business relationships that serve and benefit the statute's intent. The author of AB 341 included this important protection alongside the protection for franchises, and CalRecycle must not leave it out.

The recommended changes found below reflect our effort and intention to bring the proposed regulatory text into conformity with the statute, and we respectfully request that the following changes be made to § 18837 of the proposed regulations:

- (a) On and after July 1, 2012, 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 separate ~~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 ~~Chapter Subsection~~ does not modify, limit, 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) 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, the proposed regulation is inconsistent with scope and intent of AB 341 (Chesbro, Ch. 476, Stats. 2011), improperly restricts or enlarges the scope of the statute, and do not provide clarity to businesses, haulers, recyclers, or local jurisdictions. By bringing the proposed regulation into conformity with AB 341, CalRecycle will fittingly clarify and protect the important role that independent recyclers play in carrying out the purpose and intent of AB 341.

We thank you for your consideration of our comments and recommendations, and we welcome the opportunity to further discuss the proposed regulation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nenad Trifunovic". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Nenad Trifunovic
General Counsel

cc: The Honorable Wesley Chesbro
Mark Murray, Executive Director
Californians Against Waste
Katherine S. Brandenburg
The Flanigan Law Firm
Jeff Johnson, President
Association of California Recycling Industries (ACRI)
Jason A. Young, CEO
Allan Company