
From: GomesL@gtlaw.com
Sent: Wednesday, December 21, 2011 12:46 PM
To: Paint Product Stewardship
Subject: Comments in Response to 2nd 15-Day Notice re APRP Regulations
Attachments: 442135271_v_1_ACA Comments to Dec. 7th 15-Day Notice.PDF

Dear Ms. Dunn:

Attached are comments submitted on behalf of American Coatings Association and PaintCare in response to Cal Recycle's 2nd 15-Day Notice regarding the Architectural Paint Recovery Program Regulations. A hard copy is also being hand-delivered to your office today.

Should you have any questions, please contact Gene Livingston at (916) 442-1111, or via e-mail at livingstong@gtlaw.com.

Thank you.

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December 21, 2011

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 December 7, 2011, 15-Day Notice

Dear Ms. Dunn:

INTRODUCTION

These comments are submitted on behalf of the American Coatings Association (ACA) and PaintCare¹ in response to the second 15-Day Notice beginning on December 7, 2011. ACA and PaintCare previously submitted extensive comments to the initially noticed regulations and in response to the first 15-Day Notice. In their previous comments, ACA and PaintCare raised substantial issues of authority, consistency, and necessity, and an occasional concern about clarity.

Cal Recycle has addressed, in the revised regulation that is the subject of the second 15-Day Notice, some of the issues ACA and PaintCare previously raised. To provide a roadmap to Cal Recycle, the Office of Administrative Law, and any other reviewing body, including a court, ACA and PaintCare, in these comments, are addressing the issues they previously raised, whether the provisions giving rise to the issues were revised in the current version of the

¹ 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.

regulations or not. These comments set out the previous concerns and indicate whether the revisions resolved the concerns or not, and they identify concerns that remain with those regulatory provisions that were not revised.

SPECIFIC PROVISIONS

Section 18951. Definitions.

Previously, ACA and PaintCare objected to three definitions set out in section 18951: “operational costs,” “service provider,” and “significant or material change.” The objections were based on grounds of consistency, necessity, and clarity. ACA and PaintCare’s objections to all but “service provider” have been addressed in the revised regulations.

The definition of “operational costs” was revised to be consistent with the underlying statute and with other provisions in the regulation. The context in which the term “significant or material change” is used in the body of the regulation was revised to address the concerns of authority, consistency, and necessity.

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.

Initially, section 18952 required paint manufacturers to register and provide substantial information in subsection (a). Subsection (b) set out requirements for submission of a stewardship plan, and subsection (c) set out requirements for submission of annual reports.

ACA and PaintCare objected to much of subsection (a) of section 18952 on the grounds that it exceeded Cal Recycle's authority, was inconsistent with the structure of the law, and was unnecessary. Nothing in the statute contemplated registration; it requires only the submission of a stewardship plan and annual reports.

In the revised regulation, Cal Recycle has eliminated the obligation for a paint manufacturer or stewardship organization to register and has eliminated the inconsistent and unnecessary requirements for the submission of information relating to paint manufacturers participating in a stewardship organization. The issues raised with respect to this subsection have been addressed in the revised regulation.

ACA and PaintCare objected to many of the provisions in subsection (b) of section 18952 on the grounds that it exceeded the scope of Cal Recycle's authority, was inconsistent with the statute, was unnecessary, and portions lacked clarity. In the revised regulation, Cal Recycle has eliminated the requirement that stewardship plans be submitted "under the penalty of perjury," removing that objection.

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. Cal Recycle eliminated a number of requirements that exceed the scope of its authority; it did not eliminate all of them.

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 PaintCare raised clarity concerns about the phrase in the first sentence of subsection (b) of section 18952 that stewardship plans should be submitted electronically “according to instructions provided by the Department.” The scope of those instructions are ambiguous. Cal Recycle will address the scope of what is meant by those instruction in its Final Statement of Reasons. As long as the FSOR does not include as instructions additional informational requirements, it should be sufficient to address the clarity issue.

Cal Recycle has added detailed provisions for the process that will follow in determining whether a stewardship plan is complete and its process for approving, conditionally approving, or disapproving a stewardship plan. Those provisions appear to be consistent with the authority that the Legislature granted to Cal Recycle to approve stewardship plans.

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. Cal Recycle has eliminated the requirement that annual reports be submitted “under the penalty of perjury,” removing that objection.

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. Cal Recycle did eliminate some of the requirements for annual reports and make others discretionary, however, it retained several requirements that exceed the clear intent of the Legislature.

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.

Once again, Cal Recycle has added new language setting out the process for determining whether an annual report is in compliance, noncompliance, or conditional compliance. Those

provisions appear to be consistent with the legislative authority granted to Cal Recycle to approve annual reports.

This subsection also contains the requirement that the annual report should be submitted electronically to the Department according to directions provided by the Department. The ACA and PaintCare understand that this ambiguous provision will be clarified in the FSOR.

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 has made substantial revisions to this section, addressing some of the previous concerns. For example, Cal Recycle modified paragraph (3)(D), a subsection of section 18953, by making it clear that the stewardship plan is to describe a statewide collection plan and not county by county. The statute deals with a statewide stewardship plan; accordingly, the change renders this provision consistent with the statute being implemented. In addition, Cal Recycle has addressed ACA and Paint Care's concerns about the prohibition in paragraph (5), subsection (a) of section 18953 that prohibits a manufacturer or stewardship organization from advertising a collection point that is not under contract. Cal Recycle has added, "This provision does not apply to referrals to collection points based on publicly available information." That resolves the clarity issue that existed with the previous language.

However, 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. Unfortunately, the revisions addressed too few of the concerns.

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.4th 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.

Section 18958. Service Payments to Department of Resources Recycling and Recovery.

Cal Recycle may not delegate to itself the authority to set an administrative fee without complying with the APA. This regulation, to the extent it contemplates the imposition of a fee without future compliance with the APA, lacks clarity. Moreover, necessity must be demonstrated in the rulemaking record, not just for a fee, but for the specific fee. The absence of a specific fee in this regulation raises a clarity issue, and nothing in the rulemaking record sets out the facts supporting the need for a specific fee amount. A specific fee imposed by Cal Recycle, without complying with the APA, would be invalid as an underground regulation. See, for example, Office of Administrative Law's 1986 Determination 1.

Cal Recycle should either strike all of section 18958, or propose a specific fee. If it proposes a specific fee, it needs to demonstrate the need for the specific amount in the record of the rulemaking proceeding.

Sincerely,

[ORIGINAL SIGNED]

GENE LIVINGSTON

GL:lg