REQUEST FOR APPROVAL

To:	Caroll Mortensen Director
From:	Howard Levenson Deputy Director, Materials Management and Local Assistance Division
Request Date:	November 15, 2011
Decision Subject:	Adoption of Proposed Product Stewardship for Carpet Regulation
Action By:	November 15, 2011

Summary of Request: Staff requests adoption of the Proposed Product Stewardship for Carpet Regulation, which is needed to implement the carpet stewardship law (Chapter 681, Statutes of 2010 [Perez, AB 2398]).

Recommendation:
Staff recommends adoption of the Proposed Product Stewardship for Carpet Regulation so that it may be forwarded to the Office of Administrative Law (OAL) for approval and publishing. Staff also recommends that the Department file a Notice of Exemption with the State Clearinghouse as provided under the California Environmental Quality Act.

Action:
On the basis of the information, analysis, and findings in this Request for Approval, I hereby adopt the Proposed Product Stewardship for Carpet Regulation and direct staff to forward the regulatory packet to the Office of Administrative Law for approval and publishing. I also direct staff to file a Notice of Exemption with the State Clearinghouse as provided under the California Environmental Quality Act.

Dated: 11/16/2011

for **Caroll Mortensen**
Director

Attachments:

1. Proposed Product Stewardship for Carpet Regulations
2. Overview of Comments, Second 15-day Comment Period
   Other comments can be found at this web address:
   http://www.calrecycle.ca.gov/Laws/Rulemaking/Carpet/default.htm, see:
   - Overview of Comments, 45-day comment period (July 22 – Sept 5, 2011)
   - Overview of Comments, 15-day comment period (Sept 19 – noon Oct 4, 2011)

Background Information:

Assembly Bill 2398 (Chapter 681, Statutes of 2010) established the first mandatory carpet stewardship program in the country. Pursuant to AB 2398, the Department has responsibility to approve or disapprove carpet stewardship plans submitted by manufacturers or their designated product stewardship organization; review annual reports to verify that the objectives of the plan are being met; and provide oversight and enforcement to ensure a level playing field among carpet manufacturers. For manufacturers to be in compliance, they must have an approved plan (or be part of a stewardship organization with an approved plan) and demonstrate achievement of continuous and meaningful improvement in the rates of recycling and other goals included in an approved stewardship plan. Enforcement is addressed through a combination of civil penalties for non-compliance and transparency that allows all stakeholders and the public to evaluate progress. Additionally, carpet manufacturers and/or stewardship organization(s) must pay CalRecycle an administrative fee to cover the cost of its service that may not exceed five percent of the aggregate assessment collected.

To carry out these responsibilities, the Department seeks to promulgate regulations that add clarity and administrative procedures covering: definitions; submittal instructions; stewardship plan approval criteria; criteria for acceptance of annual reports; the establishment of a progressive enforcement approach; records retention; proprietary, confidential or trade secret information; and a process for CalRecycle to accept payment for its services related to oversight and enforcement activities.

CalRecycle has been given authority by the legislature to make regulations whenever there is substantial evidence that regulations are needed to implement, interpret, make specific, or to govern CalRecycle's procedure, to effectuate the purpose of the statute. Therefore, this rulemaking seeks to add clarity and establish the necessary administrative procedures to fulfill CalRecycle's responsibilities under AB 2398.

Rulemaking Timeline:

From January through February 2011, CalRecycle staff conducted research, held scoping meetings, and prepared discussion draft documents in preparation for the formal rulemaking process. A public workshop was held in February 2011 to discuss conceptual regulatory documents and gather stakeholder feedback. The discussion documents and comments received became the basis for the *Proposed Product Stewardship for Carpet Regulation* (see Attachment 1). (Text shown in yellow highlighted double underline (addition) and yellow highlighted ~~double strikeout~~ (deletion) depict proposed changes made after the second 15-day comment period. Text shown in double underline (addition) and ~~double strikeout~~ (deletion) depict proposed changes made after the initial 15-day comment period. Text shown in single underline (addition) and ~~single strikeout~~ (deletion) depict changes made after the 45-day comment period.)

Formal rulemaking activities began in July 2011. A 45-day public comment period for the proposed Product Stewardship for Carpet Regulation ran from July 22, 2011 through September 5, 2011. On September 8, 2011 staff held a public hearing on the proposed regulation. After considering comments received during the 45-day comment period and comments made at the public hearing, staff revised the proposed regulation. On September 19, 2011 CalRecycle initiated a 15-day comment period for the proposed changes, which ended on October 4, 2011.

On September 22, 2011 CalRecycle conducted a public meeting to explain changes made to the revised proposed regulation. On October 7, 2011 CalRecycle conducted a conference call to explain changes under consideration and made further revisions to the proposed regulation. On October 11, 2011 CalRecycle initiated a second 15-day comment period for the proposed changes, which ended on October 26, 2011.

Analysis:

The complete list of all comments submitted by stakeholders about the proposed regulatory language and staff's response to these comments are located on-line at this web address: http://www.calrecycle.ca.gov/Laws/Rulemaking/Carpet/default.htm (see all documents with "Overview of Comments" in the title).

Below are the topics that generated the most discussion during the rulemaking, including both the 45-day and 15-day comment periods.

- **Definitions:**
    - **Diversion:** Several stakeholders asked that the definition of diversion use language directly from AB 2398, which states that the bill's purpose is to reduce or eliminate the amount of postconsumer carpet from **landfill disposal** (emphasis added), not solid waste disposal. Staff agreed that AB 2398 places emphasis on landfill disposal and modified the definition of diversion for purposes of this article, so that it refers to activities that reduce or eliminate the amount of solid waste disposed at landfills in a manner consistent with the state's waste management hierarchy. Also, staff clarified that the definition of diversion does not apply to local jurisdiction programs (which are covered under Part 2, Division 30, of Public Resources Code).
    - **Transformation and Diversion Credit to Local Jurisdictions for Transformation**: Some stakeholders indicated a concern about the status of the current statutory provision that provides a jurisdiction with up to 10 percent diversion credit for solid waste managed through existing transformation facilities. Staff added language for the 15-day comment period so that it is clear the credit is not affected and added a definition of "transformation." Previous versions of the regulation included the actual text of the transformation definition in Section 40201 Public Resources Code. During the 15-day comment period, CalRecycle received a comment that it should include a reference to the Public Resources Code rather than the code's text. CalRecycle made this change in the regulations, but the edit is not substantive. It does mean that should the definition in Section 40201 Public Resources Code change, the change would apply to Article 1 in this Product Stewardship for Carpets regulation as well, so there would still be one common definition.
- **Consumer Convenience:** Some stakeholders indicated concern with the interpretation of "reasonably convenient." Staff incorporated language for the 15-day comment period to

clarify that this refers to opportunities for reasonably convenient carpet recycling in each county, while retaining flexibility on how this is implemented.

- **Carpet As Alternative Fuel (CAAF):** Some stakeholders strongly opposed the inclusion of language equating CAAF to diversion, which they regarded as 'waste-to-energy', and opposed any incentive funds being available for CAAF. These stakeholders contended that subsidizing the use of carpet as fuel is not consistent with the intent of the statute and would in essence incentivize the burning of carpet, which does not have the resource conservation benefits of recycling.

  However, the stated purpose of AB 2398 is to divert carpet from landfill disposal by recycling or otherwise managing the material in a manner consistent with the state's solid waste management hierarchy, which could include the use of carpet as fuel. Thus CalRecycle does not have the authority to eliminate the use of carpet as a fuel for purposes of this article. From a technical perspective, considerable resources go into producing carpet, but not all parts of carpet can be recycled, so CAAF can provide an outlet for using the BTU resources contained in the non-recyclable portions of carpet. In this respect, using CAAF as a fuel may be preferable to landfilling, but more information would be needed to make such a determination. If carpet is used as a fuel in California, such use will have to conform to all existing legal requirements that are designed to provide for environmental protection.

  To further address whether and how incentives for CAAF can be provided, CalRecycle added a sentence specifying that the provision in the stewardship plan regarding providing funds for CAAF must be supported with sufficient documentation that provides evidence of a net environmental benefit over landfilling and that, without an incentive, more materials would be landfilled. Likewise, the annual report is to include information on CAAF, such as the amount of CAAF created, the amount of incentives paid, and analysis of whether an incentive is still needed. This is predicated on the fact that CAAF is defined as a type of diversion and not a type of recycling, and thus is clearly at a lower level in the solid waste management hierarchy.

  Some stakeholders strongly opposed this requirement that additional documentation be provided in order for CAAF to receive an incentive, in part because additional documentation is not required for carpet that is recycled. In contrast, other stakeholders suggested that CAAF should not be eligible for any incentives. While AB 2398 does not refer specifically to CAAF, it does provide for management options other than recycling, as described above. As such, setting different standards for recycling as compared to the use of CAAF is justified under the waste management hierarchy specifically incorporated under PRC Section 42970. Furthermore, similar information will be required during any California Environmental Quality Act (CEQA) analysis of carpet-derived products. However, this particular provision is included to address the possible incentivization of CAAF and allows for CAAF to be eligible for funds, but only if verification of the need and benefit is provided in the stewardship plan or supporting documents. CalRecycle believes this approach is necessary, given the controversy over this topic.

Based on these considerations, CalRecycle is not making additional changes to these provisions and will not approve a plan that allows disproportionate incentives for CAAF or transformation over higher-level solid waste management hierarchy options.

- **Environmental Information:** Some stakeholders commented that Section 18943(a)(12) that requires the submittal of environmental information with the plan should be deleted because it is vague and unnecessary. CalRecycle disagrees. CalRecycle cannot complete its CEQA analysis, which is required for adopting the stewardship plan, without environmental information from the manufacturers/stewardship organization. This provision thus is needed to give notice to the organizations submitting a plan who may not be familiar with CEQA. By including the need to provide environmental information, this requirement provides clearer direction, encourages environmental considerations in the design of the plan, and allows for CalRecycle to assess the plan and make a determination on its approval. During the plan development stages, CalRecycle and the stewardship organization are in regular communication and can discuss the details of what information is needed.

Findings:

CalRecycle staff reviewed comments from the second additional 15-day comment period and found that no substantial changes needed to be made to the proposed regulation.

Staff also evaluated the potential environmental effects of the proposed regulations as required by CEQA and determined that the adoption of the regulation is exempt from CEQA on the ground that there is no possibility that the regulation will have an effect on the environment (the "common sense exemption"). A "project," as the word is utilized in CEQA, is an activity that "has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." CEQA Guidelines, Section 15378(a). The regulation establishes only administrative procedures necessary for CalRecycle to implement AB 2398. The adoption of the regulation will have no direct and no indirect effects on the environment. Staff prepared a Notice of Exemption that will be filed with the State Clearinghouse as required by CEQA. Note that subsequent to the adoption of this regulation, CalRecycle's consideration of carpet stewardship plans prepared by carpet manufacturers or associations, as required by AB 2398, will require separate analysis under CEQA to determine whether an environmental document is required before CalRecycle approves any such plan.

Staff has given careful consideration to all comments received throughout the rulemaking process and recommends the Department adopt the Product Stewardship for Carpet Regulation and direct staff to forward the regulatory package to the Office of Administrative Law (OAL) for approval and publishing. With approval of the regulation at this meeting, staff will prepare and submit the final rulemaking package to OAL in early December. This tight schedule is necessary because the law requires that carpet stewardship plans be approved by March 31, 2012.