# REQUEST FOR APPROVAL

**To:** Caroll Mortensen
Director

**From:** Howard Levenson
Deputy Director, Materials Management and Local Assistance Division

**Request Date:** May 10, 2012

**Decision Subject:** Adoption of Proposed Architectural Paint Recovery Program Regulation

**Action By:** May 14, 2012

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**Summary of Request:**

CalRecycle previously considered adoption of the Architectural Paint Recovery Program Regulation at its February 21, 2012, meeting. Subsequent to that meeting, CalRecycle received a disapproval notice from the Office of Administrative Law (OAL) that necessitated a fourth 15-day comment period, which closed on April 30, 2012. CalRecycle staff does not propose any additional revisions to the proposed regulations as a result of the fourth 15-day comment period. Staff requests that the department file a Notice of Exemption (NOE) with the State Clearinghouse as provided under the California Environmental Quality Act (CEQA) and adopt the revised Architectural Paint Recovery Program Regulation, both of which are needed to implement the paint stewardship law (Chapter 420, Statutes of 2010 [Huffman, AB 1343]).

**Recommendation:** Staff recommends that the department file a NOE with the State Clearinghouse as provided under CEQA. Staff also recommends adoption of the Architectural Paint Recovery Program Regulation (Attachment 1) so that it may be forwarded to OAL for approval and publishing.

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**Action:**

On the basis of the information and findings in this Request for Approval, I hereby direct staff to file a Notice of Exemption with the State Clearinghouse as provided under the California Environmental Quality Act. I also hereby approve the adoption of the Proposed Architectural Paint Recovery Program Regulation (Attachment 1) and direct staff to prepare and forward the regulatory package to the OAL for approval and publishing.

**Dated:** 5/14/2012

Caroll Mortensen, Director

**Attachments:** 1. Proposed Architectural Paint Recovery Program Regulation
2. Matrix of Comments, Fourth 15-Day Public Comment Period (April 13 - 30, 2012)
3. Office of Administrative Law Decision of Disapproval of Regulatory Action

## Background Information

Assembly Bill (AB) 1343 (Chapter 420, Statutes of 2010) established the Architectural Paint Recovery Program and requires manufacturers of architectural paint to develop and implement a program to collect, transport, and process postconsumer paint to reduce the costs and environmental impacts of the disposal of postconsumer paint in California.

Manufacturers, either individually or through a stewardship organization, are required to submit an architectural paint stewardship plan (plan) to CalRecycle no later than April 1, 2012, and implement the plan by July 1, 2012, or three months after a plan is approved by CalRecycle. The plan is to describe how the manufacturer or stewardship organization intends to carry out its program to reduce the generation, promote the reuse, and manage the end-of-life of postconsumer architectural paint in an environmentally sound fashion, including collection, transportation, processing, and disposal. The plan is also to include goals established by the manufacturer or stewardship organization, describe program funding, and propose an architectural paint stewardship assessment that is sufficient to recover, but not exceed, the cost of the program.

AB 1343 also requires manufacturers to submit annual reports to CalRecycle and outlines a minimum of what must be included, such as the total volume of architectural paint sold and recovered in California; a description of the methods used to collect, transport, and process postconsumer paint; the total cost of implementing the program; an evaluation of how the program's funding method operated; an independent financial audit; and examples of educational materials.

CalRecycle is tasked under AB 1343 with specific oversight and enforcement responsibilities. These include reviewing and approving plans, including approval of the architectural paint stewardship assessment; posting and maintaining a list of compliant manufacturers on CalRecycle's website; adopting a finding of compliance or non-compliance of manufacturers' annual reports; imposing an administrative fee sufficient to cover the department's full costs of administering and enforcing this chapter; and enforcing the chapter.

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 1343.

## Rulemaking Timeline

From January through March 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 March 2011 to discuss conceptual regulatory documents and gather stakeholder feedback. The discussion documents and comments received became the basis for the *Proposed Architectural Paint Recovery Program Regulation* (see Attachment 1)[1].

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[1] Note: Text shown in double-underline (addition) and ~~double-strikeout~~ (deletion) and *italicized* *22-point font* depict proposed changes made after the fourth 15-day comment period, as discussed below. Text shown in

Formal rulemaking activities began in July 2011. A 45-day public comment period for the Proposed Architectural Paint Recovery Program Regulation ran from July 22 through September 5, 2011. CalRecycle staff held a public meeting on the proposed regulation on September 8, 2011. On October 3, 2011, CalRecycle staff held a public meeting to present potential changes to the proposed regulation based on comments received during the 45-day public comment period and the September 8, 2011 public meeting. After considering comments received during the 45-day comment period and comments made at the public meetings, CalRecycle staff revised the proposed Architectural Paint Recovery Program Regulation. A 15-day public comment period ran from October 10 through October 25, 2011. On November 2, 2011, CalRecycle staff held a public meeting to present anticipated changes to the proposed regulation based on comments received during the initial 15-day comment period. A second 15-day public comment period ran from December 7 through December 22, 2011.

On January 17, 2012, CalRecycle staff presented the revised proposed regulation at a public meeting and the Director stated her intent to adopt it. However, subsequent to the public meeting staff determined that amendments should be incorporated to Section 18958 in order to mirror decisions made by the Office of the Administrative Law on a similar provision in the Carpet Stewardship rulemaking. Therefore, staff initiated a third 15-day public comment period that ran from February 1 to February 16, 2012. At the February 21, 2012 CalRecycle public meeting, Chief Deputy Director Leary stated his intent to present this new version of the Proposed Architectural Paint Recovery Program Regulation to Director Mortensen for her approval (note: the Director was not present at this meeting). Chief Deputy Director Leary subsequently approved the Proposed Regulation on the Director's behalf on February 22, 2012, and staff submitted the Proposed Regulation to OAL for review on February 24, 2012.

On April 10, 2012, CalRecycle received a formal notice of disapproval of the proposed regulation for the following reasons:

- The department did not sufficiently notice the public of all of the documents listed in the "documents relied upon" section of the regulatory package;
- Must clarify two sections by changing "should" to "may;
- The department did not respond to three comments listed as "general comments"; and
- The date on one of the statements of mailing was incorrect.

**Summary of Revisions Incorporated after the Fourth 15-Day Comment Period**

CalRecycle initiated a fourth public comment period to address the issues raised by OAL in its disapproval letter.

CalRecycle staff does not propose any additional revisions to the proposed regulations as a result of comments received during the fourth 15-day comment period. However, staff inadvertently failed to modify the "should" in the following sentence Section 18952(c), "The annual report should be submitted electronically to the department according to directions provided by the department" which

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double-underline (addition) and ~~double-strikeout~~ (deletion) and 22-point font depict proposed changes made for the fourth 15-day comment period, as discussed below. Text shown in green highlighted double strikeout (deletion) and double underline (addition) depict proposed changes presented for the third 15-day comment period. Text shown in yellow highlighted double underline (addition) and yellow highlighted ~~double-strikeout~~ (deletion) depict proposed non-substantive 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.

means that its meaning is still unclear. Revising this section to modify the word "should" would require a fifth 15-day comment period. However, the sentence did not require manufacturers or stewardship organizations to make electronic submittals, but rather identified that a manufacturer or stewardship organization may do so at their discretion. Therefore, staff is electing not to include this sentence in the final version submitted to ensure clarity and doing so would not modify any mandatory requirements in the regulations.

Attachment 2 summarizes comments received during the fourth 15-day comment period and presents CalRecycle's responses.

**Summary of Revisions Incorporated as a Result of Comments Received During the 45-Day, First 15-Day, Second 15-Day, and Third 15-Day Comment Periods**

Detailed tables showing comments received during the 45-day, first 15-day, second 15-day, and third 15-day comment periods are available at:
http://www.calrecycle.ca.gov/Laws/Rulemaking/Paint/default.htm, see:

- Overview of Comments, 45-day comment period (July 22 – Sept 5, 2011)
- Overview of Comments, 15-day comment period (Oct 10 – noon Oct 25, 2011)
- Overview of Comments, second 15-day comment period (Dec 7 – noon Dec 22, 2011)
- Overview of Comments, third 15-day comment period (February 1 – noon Feb 16, 2012)

Based on comments received during the 45-day, first 15-day, second 15-day, and third 15-day comment periods, CalRecycle made the following substantive changes to the proposed regulations:

§18951. Definitions.

- Clarified the definition of "operational costs" as those of the manufacturer or stewardship organization running the paint stewardship program.

§18952. Submittals.

- Replaced the term "register" with "submit" to better reflect the department's original intent of a simple process by which a manufacturer or stewardship organization will provide certain contact information to the department; and
- Added provisions for "conditional approval" by CalRecycle of a stewardship plan and annual report.

§18953. Stewardship Plan Approval Criteria.

- Removed "Scope," "Market Development," "Program Performance Measurement," and "Financial Information" subsections and incorporated language from these subsections elsewhere in the regulation;
- Deleted "Solid Waste Management Hierarchy" subsection to eliminate confusion and better align with statutory language;
- Modified language relative to program goals and activities to be less prescriptive yet still ensure that an adequate description is provided by manufacturers and stewardship organizations;
- Modified language to clarify how a manufacture or stewardship organization must demonstrate coordination with retailers and local household hazardous waste collection programs;

- Added various requirements related to audits and financing mechanism necessary to provide adequate oversight over the assessment charged to consumers and to clarify how a manufacturer or stewardship organization must demonstrate compliance with certain reporting requirements;
- Added language for a manufacturer or stewardship organization to provide to the department, upon request, information necessary for approval of the stewardship plan in compliance with the California Environmental Quality Act; and
- Replaced "by county" with "in the state" when requiring a manufacturer or stewardship organization to describe in its plan and annual report how it provided statewide coverage.

§18954. Annual Report Compliance Criteria.

- Removed "Scope" and "Market Development" subsections and incorporated language from these subsections elsewhere in the regulation;
- Modified reporting requirements for better consistency with statute; and
- Added various requirements related to audits and financing mechanism necessary to provide adequate oversight over the assessment charged to consumers and to clarify how a manufacturer or stewardship organization must demonstrate compliance with certain reporting requirements.

§18955. Civil Penalties.

- Removed a violation from the manufacturer and stewardship organization's penalty table as the intent of the penalty may be addressed elsewhere in the regulation; and
- Clarified that, consistent with statute, a penalty may only exceed $1,000 per day if a person intentionally, knowingly, or negligently violates the Article and that for multiple violations the maximum aggregated amounts may not exceed the statutory limits.

§18956. Record Keeping Requirements.

- Reduced certain recordkeeping requirements for manufacturers and retailers.

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

- Removed CalRecycle's ability to revoke a stewardship plan if the annual service payment is not received and the corresponding ability for the department to reinstitute a plan when payment is received;
- Changed the basis of payment by a manufacturer or stewardship organization to CalRecycle for its oversight and enforcement services from one "in advance" and based on estimates to one "in arrears" and based on actual costs; and
- Modified the dates to align with CalRecycle's fiscal year cycle of July 1 through June 30.

As noted in the other comments available on the website links noted above, CalRecycle did not agree with a number of comments and thus did not makes changes requested by stakeholders in those instances. These include:

- Inclusion of "administration costs" to the definition of "operational costs;"
- Removal of §18955. Civil Penalties and use of a sales ban alone for enforcement of the chapter;
- Removal of §18956. Record Keeping; and
- Either the complete removal of §18958. Service Payments to Department of Resources Recycling and Recovery or the inclusion of a cap and/or specific administrative fee amount (also see next section for more discussion on this issue).

**Findings**

CalRecycle staff has given careful consideration to all comments received throughout the rulemaking process. CalRecycle staff recommends that the department file a Notice of Exemption with the State Clearinghouse, adopt the Proposed Architectural Paint Recovery Program Regulation, and direct staff to forward the regulatory package with the OAL for approval and publishing. With approval of the regulation, staff will prepare and submit the final rulemaking package to the OAL in early May. This tight schedule is necessary because the law requires that paint stewardship plans be approved by July 1, 2012, or 90 days after they are submitted to the department.