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MEMORANDUM

TO: Susan Lapsley, Director
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FROM: Maureen Gorsen, Director
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DATE:

SUBJECT: RE-ADOPTION REQUEST FOR EMERGENCY REGULATIONS

The Department of Toxic Substances Control (DTSC) respectfully requests to re-adopt R-2006-02 Authorized Treatment of Electronic Hazardous Wastes [Office of Administrative Law (OAL) reference number 06-0524-02EE] without any substantive modifications or changes. An explanation of the circumstances necessitating this re-adoption and the status of DTSC's efforts thus far to formally adopt final, permanent regulations that will replace the emergency regulations is provided below. For the previous re-adoption, DTSC had combined the text of three emergency regulation packages (OAL reference numbers: 04-0526-01E, 04-1216-03E, and 05-0401-21E) into one regulatory text document (attachment #1). Please incorporate by reference the following Findings of Emergency for each of those regulation packages, which contain the following information:

- Statements/Findings of Emergencies;
- Authority and Reference Citations;
- Informative Digests;
- Fiscal Impact Statements; and
- Standard Form 399s (i.e., fiscal impact sections).

Emergency Regulation Packages in Effect to Date

In June 2004, DTSC adopted emergency regulations¹ to implement the Electronic Waste Recycling Act of 2003 (Sen. Bill No. 20, Stats. 2003, ch. 526, 2003). The emergency rulemaking amended California Code of Regulations, title 22, division 4.5, sections 66260.10 and 66261.9² and several sections within chapter 23 (commencing with §66273.1). The rulemaking also added section 66260.201 and chapter 11, appendix X, subsection (c).³ These regulations were adopted pursuant to Public Resources Code section 42475.2, subdivision (b), which was included in Senate Bill (SB) 20.

The June 2004 emergency regulations identify the initial types of electronic devices that would be recycled under the program created by the Electronic Waste Recycling Act (EWRA) (i.e., the regulations interpreted and made specific the meaning of "covered electronic device"). This identification is necessary to legally obligate retailers and purchasers of those devices to pay a recycling fee at the time of purchase. The emergency regulations also interpret and make specific the obligations placed on manufacturers of those devices by the EWRA. Finally, authorizations granted by the regulations provide the hazardous waste management incentives necessary to promote establishment of covered electronic waste recycling facilities in California.

Before these emergency regulations could be formally adopted by DTSC as final, permanent regulations, subsequent legislation [Senate Bill No. 50 (Stats. 2004, ch. 863), effective September 29, 2004] revised the definition of "covered electronic device." In December 2004, DTSC adopted amendments⁴ to section 66260.201 and appendix X, subsection (c) which further interpreted and made specific the meaning of "covered electronic device." These amendments were adopted as an emergency rulemaking, as authorized by Public Resources Code section 42475.2, subdivision (b). In April 2005, in response to stakeholder feedback, DTSC amended section 66260.201 again as authorized by Public Resources Code section 42475.2, subdivision (b), and Health and Safety Code section 25214.10.2, which was included in SB 50.⁵

Pursuant to Public Resources Code section 42475.2, subdivision (b), emergency regulations adopted under its authority "remain in effect for a period of two years or until revised by the department..., whichever occurs sooner." The same is true for

¹ OAL Reference Number: 04-0526-01E, OAL Approval Date: 06/07/04

² Further references in this memorandum to regulation sections or chapters are to the California Code of Regulations, title 22, division 4.5, unless otherwise specified.

³ Further referenced in this memorandum as "appendix X, subsection (c)".

⁴ OAL Reference Number: 04-1216-03E, OAL Approval Date: 12/27/04

⁵ OAL Reference Number: 05-0401-21E, OAL Approval Date: 04/11/05

emergency regulations adopted under authority of Health and Safety Code section 25214.10.2. On June 6, 2006, those portions of DTSC's original emergency regulations that had not been further amended would have been in effect pursuant to Public Resource Code section 42475.2, subdivision (b) authority for two years. Consequently, on June 5, 2006, DTSC re-adopted the three previous emergency regulation packages pursuant to Health and Safety Code section 25214.10.2 (R-2006-02).⁶

Pursuant to Health and Safety Code section 25214.10.2, the June 2006 re-adopted emergency regulations are due to expire on June 6, 2008. The purpose of the June 2006 re-adoption was to provide the regulated community with confidence that the original emergency regulations, as amended, would continue to remain in effect beyond June 6, 2006, and until DTSC adopted its permanent regulations. DTSC's May 24, 2006, memorandum to OAL in support of its June 2006 re-adoption explains that the need to reassure the regulated community arises from the ambiguity created by language in Public Resources Code section 42475.2 when a revision is made to some, but not all, of the provisions of the original emergency regulations.

On December 29, 2006, DTSC adopted emergency regulations (R-2006-05)⁷ pursuant to Health and Safety Code section 25214.10.2 to add DVD players to the appendix X, subsection (c) list of electronic devices. These regulations will expire in December 2008.

Health and Safety Code section 25214.10 requires DTSC to adopt regulations to prohibit an electronic device shown on the appendix X, subsection (c) list of electronic devices from being sold or offered for sale in California if the electronic device is prohibited from being sold or offered for sale in the European Union on and after its date of manufacture due to the presence of certain heavy metals. In December 2006, DTSC adopted emergency regulations (R-2006-06)⁸ pursuant to Health and Safety Code section 25214.10.2. These regulations will expire in December 2008.

DTSC's Efforts to Adopt Final Regulations

When DTSC adopted the original emergency regulations, it fully intended to submit the Certificate of Compliance and the rulemaking file to OAL within two years (i.e., prior to June 6, 2006). As noted in DTSC's May 24, 2006, memorandum to OAL, when DTSC re-adopted the original emergency regulations, as amended, in June 2006, it had conducted public workshops, consulted with a variety of interested parties, and made significant progress towards drafting the various documents required by the rulemaking file. Only the economic analysis remained incomplete at that time. DTSC anticipated

⁶ OAL Reference Number: 06-0524-02EE, OAL Approval Date: 06/05/06

⁷ OAL Reference Number: 06-1221-03E, OAL Approval Date: 12/29/06

⁸ OAL Reference Number: 06-1221-02E, OAL Approval Date: 12/29/06

completing the economic analysis and commencing the 45-day public comment period on its final regulations in June 2006, with completion and filing of the final regulation package with OAL before December 2006. After review of the draft economic analysis and consultation with OAL's reference attorney, however, DTSC decided to combine into one economic analysis the separate economic analyses that had been drafted for each of the five (5) emergency packages that were being combined to comprise the final proposed regulations (see footnotes 1, 4, 5, 7 and 8 of this memorandum). This decision extended the time necessary to complete the economic analysis for the final rulemaking.

Since June 2006, DTSC has held public workshops. The purpose of these workshops was to determine how the current emergency regulations were working and to obtain additional stakeholder input for other aspects of the proposed final regulations. Because the last public workshops for the proposed regulations were held in December 2005 and substantial modifications had been made to several sections related to treatment standards for universal waste handlers, DTSC strongly felt that input from the regulated community was necessary to ensure that the proposed regulations address as many issues raised as possible. In addition, as this final regulation package is the first final package public noticed by DTSC on these regulations in five years, DTSC also felt strongly that the affected regulated community needed a brief re-introduction to the content and format of final proposed regulations (i.e., all previous regulations adopted for the electronic hazardous waste program since 2003 had been adopted as emergency regulations and many of the affected regulatory community had only recently become involved in the formal regulation development process). The second round of workshops was held in June and July 2007, and these workshops were well attended and were internet web-cast across the State and beyond. Since these workshops, DTSC has further consulted with a variety of interested parties.

Over the course of the last two years, DTSC has worked diligently to complete the complicated regulations package. This work includes the following:

- Development of regulatory language aligned with U.S. Environmental Protection Agency (USEPA) final regulations for export requirements for certain cathode ray tubes (CRTs) that were published in July 2006.⁹ DTSC has spent considerable

⁹ On June 12, 2002, (67 Fed. Reg. 40508), USEPA proposed to exclude used CRTs and glass removed from CRTs for recycling from the definition of solid waste. The final rule was published on July 28, 2006 (71 Fed. Reg. 42928). Since January 29, 2007 (when the final rule became effective), CRTs that are destined for recycling are excluded by USEPA from regulation as hazardous waste if certain conditions are met. This exclusion does not prohibit DTSC from regulating CRTs as universal waste. [See 71 Fed. Reg. 42928 (July 28, 2006)]

time since then in ensuring that the proposed export regulations related to CRTs are clear and aligned with existing federal regulations.

- Alignment of state regulations with new federal regulations on management standards for universal waste mercury-containing equipment (MCE). To this end, regulations pertaining to various mercury-containing devices are consolidated under “mercury-containing equipment.” This consolidation required the restructuring of the affected chapter of regulations and has resulted in removing duplicative requirements to streamline the requirements for MCE. Since July 2006, DTSC has reviewed the restructured chapter to confirm that all affected sections of existing regulation text related to mercury listings were appropriately amended.
- Consolidation of management standards for CRT material handlers and small quantity and large quantity handlers of universal waste under a single set of standards. Since July 2006, DTSC has provided further opportunities to those affected to comment on the proposed amendments. Unlike federal universal waste regulations, state regulations will not distinguish between small and large quantity universal waste handlers except for notification requirements. This consolidation also required the complete restructuring of the affected chapter of regulations, thus compelling DTSC to ensure that adequate opportunities were available to the regulated community to review and comment on the proposed changes prior to the formal rulemaking public comment opportunities. Specifically, significant modifications were also made to the proposed text of California Code of Regulations, title 22, division 4.5, chapter 23, article 7, which prescribes requirements for entities that treat universal wastes. Substantial changes were made to the initial draft distributed in public workshops in December 2005, and DTSC felt strongly that these affected entities be provided with an adequate opportunity to review the proposed amendments and provide comments and suggestions. To achieve this result, DTSC conducted two additional workshops in 2007 to elicit additional comments, including an open forum where participants could provide written and oral comments. DTSC has also met with affected recyclers to receive their comments and suggestions prior to the formal rulemaking process.
- Since the emergency re-adoption, DTSC has developed a robust electronic hazardous waste compliance and enforcement program, combining both field and headquarters staff in a concerted effort to provide compliance assistance and consistent enforcement protocols. Coordination with field and enforcement staff on the proposed regulations has been an ongoing program element to ensure that the proposed regulations are enforceable and are consistently applied throughout the State. In early 2007 and prior to the public workshops, DTSC enforcement staff reviewed the proposed regulations and provided

detailed comments and regulatory text amendments; extensive work was done to ensure that the regulatory text is clear and can be implemented given the variability in operations at electronic waste handler and recycler facilities located throughout the State.

DTSC anticipates commencing the 45-day public comment period in June 2008. The rulemaking documents for the 45-day public notice have been approved and submitted for review at agency level (California Environmental Protection Agency). DTSC currently anticipates that it will file the Certificate of Compliance and the rulemaking file with OAL by October 2008.

Request for Re-adoption of Emergency Regulation Package Under Existing Statutes

The December 2006 emergency regulations adopted pursuant to Health and Safety Code section 25214.10.2, which added DVD players to the appendix X, subsection (c) list of electronic devices presumed to be hazardous wastes when discarded, creates an ambiguous regulatory scenario similar to that which existed at the time of the June 2006 re-adoption. When viewed in the context of the DVD player amendment, the language of the Health and Safety Code section 25214.10.2 two year statutory time limit is ambiguous. Specifically, this language does not make clear whether the amendment has, in effect, extended the expiration date for the other emergency regulations re-adopted on June 5, 2006, from June 6, 2008 to December 29, 2008. To provide the regulated community with confidence that the emergency regulations re-adopted in June 2006, as amended, will continue to remain in effect beyond June 6, 2008, and until DTSC files the Certificate of Compliance for the emergency regulations, it is necessary to remove this ambiguity. Consequently, DTSC requests OAL approve re-adoption of the emergency regulations pursuant to Health and Safety Code section 25214.10.2.

DTSC interprets Health and Safety Code section 25214.10.2 to authorize the use of a second two-year re-adoption of the three emergency regulations. Health and Safety Code section 25214.10.2 expressly authorizes DTSC to adopt emergency regulations in accordance with chapter 3.5 (commencing with sec.11340) of part 1 of division 3 of title 2 of the Government Code, except as otherwise provided by Health and Safety Code section 25214.10.2. Government Code, title 2, division 3, part 1, chapter 3.5 requires a public agency to: finalize emergency regulations first adopted prior to January 1, 2007 within 120 days of their adoption; or substantially change the original emergency regulations and adopt the changed regulations as new emergency regulations; or, with

the OAL Director's approval pursuant to Government Code section 11346.1, subdivision (h), re-adopt the original emergency regulations.¹⁰

The Government Code does not limit the number of times that the OAL Director may authorize Government Code section 11346.1, subdivision (h) re-adoptions of original emergency regulations first adopted prior to January 1, 2007. The plain language of Health and Safety Code section 25214.10.2 also does not limit the OAL Director's discretion in this regard. In the context of a new and complex hazardous waste regulatory program, such as the one that the State Legislature intended to put into place through its enactment of the EWRA, it is not likely that the State Legislature intended Health and Safety Code section 25214.10.2 to impose such a limit on the OAL Director. If the State Legislature had intended to impose such a limit on the OAL Director, it would have expressly stated its intention in Health and Safety Code section 25214.10.2, or elsewhere in the EWRA. It did not. Consequently, the OAL Director may rely on Government Code section 11346.1, subdivision (h) as authority for approving a second re-adoption of DTSC's original emergency regulations.

Government Code section 11346.1, subdivision (h) re-adoptions extend the 120 day period of time in which a public agency may be allowed to finalize original emergency regulations first adopted prior to January 1, 2007 by another 120 days, provided that the emergency regulation submitted for re-adoption is the "same or substantially equivalent to" the original emergency regulation. The plain language of Health and Safety Code section 25214.10.2, however, extends this subsequent 120 day time period to two years. Specifically, Health and Safety Code section 25214.10.2 states that, "[N]otwithstanding Chapter 3.5...an emergency regulation adopted by the department pursuant to this section...shall remain in effect for a period of two years or until revised by the department, whichever occurs sooner". In the context of Government Code section 11346.1, subdivision (h), it is reasonable to conclude that "revised by," as used in Health and Safety Code section 25214.10.2, relates to the "same or substantially equivalent to" language in Government Code section 11346.1, subdivision (h). Consequently, within this same context, the "[N]otwithstanding Chapter 3.5...an emergency regulation adopted by the department pursuant to this section...shall remain in effect for a period of two years" language in Health and Safety Code section 25214.10.2 may reasonably be interpreted to require that re-adoptions of emergency

¹⁰ Assembly Bill 1302 (Stats. 2006, ch. 713) revised the requirements for adoption and re-adoption of emergency regulations, however, the changes made by this act applicable to emergency regulations do not apply to regulations first submitted to OAL prior to January 1, 2007. Therefore, all references to the Government Code in this and subsequent paragraphs refer to the Government Code as it existed prior to the enactment of AB 1302.

regulations originally adopted pursuant to Health and Safety Code section 25214.10.2 that are the “same or substantially equivalent to” the original emergency regulations remain in effect for two years in lieu of the 120 day time period that Government Code section 11346.1, subdivision (h) would otherwise attach to re-adopted emergency regulations. When viewed in the context of the new and complex regulatory program established by the State Legislature through its enactment of the EWRA, this interpretation makes sense.

If the June 2006 emergency regulations are not re-adopted there will be a gap in the regulatory program that DTSC (covered electronic device identification, manufacturer notification, and recycler authorization and heavy metal restriction regulations) and the California Integrated Waste Management Board (CIWMB) (recycler reimbursement regulations) have put in place to implement the EWRA. This gap would create ambiguities about the legal obligations of manufacturers, consumers, retailers, universal waste handlers and universal waste recyclers of the electronic devices listed in appendix X, subsection (c). In 2007, this universe of impacted persons numbered in the millions (consumers being the largest subset). These uncertainties could lead to the loss of revenues that would otherwise have been collected from the sale of the appendix X, subsection (c) listed electronic devices from June 6, 2008, until DTSC’s final regulations become effective. Such revenues are used to reimburse the universal waste handlers and recyclers of these electronic devices when they become waste. Presently, there are about 609 universal waste handlers who are registered with the CIWMB as “collectors” in the reimbursement system, with 62 of these entities registered as “dual” collectors/recyclers. Total reimbursements between 2005 (inception of the reimbursement system) and 2008 (to date) amount to about \$155,000,000, with about \$65,000,000 of that amount paid to these entities in 2007.

In addition, expiration of the emergency alternative management standards regulations (the Cal. Code Regs., tit. 22, div. 4.5, ch. 23 regulations) adopted on June 5, 2006, without the re-adoption of identical or substantially equivalent regulations will require the electronic waste recycling industry that has developed in response to the adoption of those standards to cease operations until they obtain a hazardous waste facility permit, or risk DTSC enforcement of hazardous waste permitting requirements.

In view of the efforts that DTSC has expended to adopt final regulations and the adverse consequences to the covered electronic waste recycling program that would result from a decision to do otherwise, DTSC respectfully requests that the OAL Director approve DTSC’s re-adoption of the June 2006 emergency regulation package (06-0524-02EE), with the re-adopted regulations to remain in effect for a period of two years.

Ms. Susan Lapsley

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A Notice of Exemption under the California Environmental Quality Act will be filed with the Secretary of State. If you have any questions concerning this request, please contact Ms. Nicole Sotak, Office of Legislative and Regulatory Policy at (916) 327-4508.

Attachments

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