

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2022 OAL Determination NUMBER 2 (OAL MATTER number CTU2022-0502-01)

REQUESTED BY: Leonard Lang

CONCERNING: Petition challenging as underground regulations various provisions within the “Precertification Training Manual for Recycling Center and Processor Applicants (2017)” issued by the Department of Resources Recycling and Recovery, Division of Recycling

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action. OAL’s review is limited to the sole issue of whether the challenged rule meets the definition of “regulation” as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of “regulation,” but was not adopted pursuant to the APA and should have been, it is an “underground regulation” as defined in California Code of Regulations (CCR), title 1, section 250.¹

CHALLENGED RULES

The document issued by the Department of Resources Recycling and Recovery, Division of Recycling, Recycler Education and Examination Unit (CalRecycle) entitled, “Precertification Training Manual for Recycling Center and Processor Applicants” (PTM), dated July 1, 2017, contains the following seven Challenged Rules:

¹ As defined by title 1, section 250(a), an

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

1. Under “Inspection Process” on page 20: “An eligible beverage container has all of the following characteristics: [...] Contamination, if any, has been removed[.]”
2. Under “Ineligible Material – Out-of-State Vehicles” on page 21: “If a customer in a vehicle with out-of-state license plates presents a load of beverage containers for redemption, you should determine if the beverages were purchased in California.”
3. Under “Ineligible Material – Out-of-State Materials” on page 22: “Recycling centers may not accept empty beverage containers that they know, or should have known, were brought in California; regardless of whether or not they carry the CRV message and regardless of whether or not the vehicle in which they are delivered has a California license plate.”
4. Under “Ineligible Material – Previously Baled” on page 22: “Previously baled containers have been baled by a baling machine, and then broken apart. If a consumer presents a load for redemption with pieces of baled material mixed in, you may not pay CRV. It is likely the previously baled material was already presented for CRV payment in the program.”
5. Under “Record Types – Logs” on page 26: “When you use a log, write down what kind of material you have purchased, the basis, the weight (or count), as well as the amount you paid. Your customers will need to print and sign their names. The names must be legible for recordkeeping to be in compliance.”
6. Under “Calculating Shrinkage” on page 27: “If a load is contaminated, the recycling center or consumer should attempt to remove any visible debris.”
7. Under “Fraud Prevention” on page 30, various provisions that include the word “consumer.”

DETERMINATION

OAL determines that Challenged Rule No. 1 meets the definition of a “regulation” that should have been adopted pursuant to the APA but was not, and is therefore an underground regulation. OAL further determines that Challenged Rule Nos. 2 through 7 do not further implement or interpret existing law and, therefore, are not underground regulations.

FACTUAL BACKGROUND

On May 2, 2022, OAL received a petition from Leonard Lang (Petitioner) requesting a determination as to whether the document issued by the Department of Resources Recycling and Recovery, Division of Recycling,

Recycler Education and Examination Unit (CalRecycle) entitled, "Precertification Training Manual for Recycling Center and Processor Applicants" (PTM), dated July 1, 2017, constitutes an underground regulation.

On June 30, 2022, OAL accepted for consideration seven of the eight allegations contained in the petition (Allegation Nos. 4a through 4g). A summary of the petition was published in the California Regulatory Notice Register on July 15, 2022, and solicited comments from the public until August 15, 2022. Petitioner notified OAL of an error in the summary on July 20, 2022, and OAL published a corrected summary in the California Regulatory Notice Register on July 29, 2022. OAL did not receive any comments from the public.

OAL received a response from CalRecycle (Response) on the response due date of August 29, 2022. Petitioner's rebuttal to the Response, if desired, was due no later than September 13, 2022. OAL did not receive a rebuttal from Petitioner.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5, and the rule is not exempt from the APA, it creates an underground regulation as defined in title 1, CCR, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code sec.11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

OAL's authority to issue a determination extends only to the limited question of whether the challenged rules are "regulations" subject to the APA. This analysis will determine (1) whether the challenged rules are "regulations" within the meaning of Government Code section 11342.600, and (2) whether the challenged rules fall within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a "regulation" is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³ The second element used to identify a "regulation" as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

ANALYSIS

The PTM applies to all new and renewal applicants for certification to operate a recycling center or processing facility (Cal. Code Regs., tit. 14, §2010(a).) Thus, OAL finds the seven Challenged Rules within the PTM to apply generally and satisfy the first element of *Tidewater*. The following discussion analyzes each of the Challenged Rules to determine whether the second *Tidewater* element is met and, if so, whether an APA exemption applies.

1. Challenged Rule No. 1

Challenged Rule No. 1 provides:

An eligible beverage container has all of the following characteristics:
[...] Contamination, if any, **has been removed**[.] (PTM, p. 20.) [Emphasis added.]

OAL was unable to locate, and the Response did not cite to, any existing statute or regulation expressly requiring empty beverage containers to be contamination-free as a prerequisite to acceptance for redemption by a recycling center operator. Instead, the Response cited to existing law providing that refund payments will not be made for contamination such as dirt and moisture (Cal. Code Regs., tit. 14, §2500(e)(2)(B), Fig. 9) and that operators have the options of rejecting contaminated beverage containers outright or accepting contaminated empty beverage containers and reducing the per-pound refund value based on the level of contamination (i.e., the estimated added weight of the contaminants) (Cal Code Regs., tit. 14, §2525(e)). Challenged Rule No. 1 is inconsistent with and restricts existing law allowing operators to accept contaminated containers, and therefore satisfies the second element of *Tidewater*. Because there is no express statutory exemption from the APA, OAL finds Challenged Rule No. 1 to be a regulation that should have been adopted pursuant to the APA. Therefore, Challenged Rule No. 1 is an underground regulation.

2. Challenged Rule No. 2

Challenged Rule No. 2 provides:

If a customer in a vehicle with out-of-state license plates presents a load of beverage containers for redemption, you should determine if the beverages were purchased in California. (PTM, p. 21.)

The PTM provision simply advises that recycling center operators “should” determine whether containers delivered in a vehicle with out-of-state license plates are eligible for redemption. In fact, operators must make that determination for every load, regardless of the delivery vehicle’s origin, under existing law. The Public Resources Code provides that a certified recycling center shall not pay any refund value for any empty beverage containers or other containers that they knew, or should have known, were coming from outside California. (Pub. Res. Code, §14538(d)(5).) CalRecycle’s duly adopted regulations in CCR, title 14 further provide that no person certified by CalRecycle to operate any recycling program shall take delivery of any empty beverage container material that they know, or should know, was imported into California. (Cal. Code Regs., tit. 14, §2831.3.) OAL finds this PTM provision to be merely informational in nature and consistent with, rather than a further implementation or expansion of, existing law. Therefore, Challenged Rule No. 2 fails to satisfy the second element of *Tidewater* and is not an underground regulation.

3. Challenged Rule No. 3

Challenged Rule No. 3 provides:

Recycling centers may not accept empty beverage containers that they know, or should have known, were brought into California; regardless of whether or not they carry the CRV message and regardless of whether or not the vehicle in which they are delivered has a California license plate. (PTM, p.22.)

The Public Resources Code provides that a certified recycling center shall not pay any refund value for any empty beverage containers or other containers that they knew, or should have known, were coming from outside California. (Pub. Res. Code, §14538(d)(5).) Additionally, existing CalRecycle regulations state that recyclable material imported into California is ineligible for refund value and other recycling program payments regardless of whether the material is labeled with the CRV message required by Public Resources Code section 14561(a). (Cal. Code Regs., tit. 14, §2831.2.) This PTM provision does not further implement, interpret, or make specific existing law; thus, Challenged Rule No. 3 fails to satisfy the second element of *Tidewater* and is not an underground regulation.

4. Challenged Rule No. 4

Challenged Rule No. 4 provides:

Previously baled containers have been baled by a baling machine, and then broken apart. If a consumer presents a load for redemption with pieces of baled material mixed in, you may not pay CRV. It is likely the previously baled material was already presented for CRV payment in the program. (PTM, p. 22.)

CCR, title 14, section 2501 was duly adopted⁴ by CalRecycle and provides, in relevant part:

(a) Certified recycling centers shall inspect each load of containers, subject to the Act, delivered to the recycling center, for which refund value is claimed, to determine whether the load is eligible for any refund value [...]

(b) In addition to the requirements of section 2110 of these regulations, a load of material shall be deemed not eligible for any refund value if any one of the following conditions exist:

- (1) There are pieces of broken, densified bales or biscuits of aluminum beverage containers within the load. This does not include cans which have merely been flattened.
- (2) Pieces of bales of plastic are found in the load.

OAL finds that the PTM provision above is the only legally tenable interpretation of CCR, title 14, section 2501(b)(1)-(2)⁵. Consumers redeem recyclable material at recycling centers in exchange for CRV, then recycling center operators sell that redeemed material to “processors” (Cal. Code Regs., tit. 14, §2000(a)(35)). Processors are responsible for “cancellation” (i.e., removing the refund value by, *inter alia*, “densification”) of that material. (Cal. Code Regs., tit. 14, §2000(a)(4), (16).) No person may subsequently redeem cancelled material at a recycling center for CRV (Cal. Code Regs., tit. 14, §2110(a)); further, a person who intentionally redeems containers that have already been redeemed or returns redeemed containers to the marketplace for further redemption is guilty of a crime. (Pub. Res. Code §14591(b)(1)(D), (E).) CCR, title 14, section 2501, subsection (a) requires recycling center operators to inspect each delivered load for eligibility, and subsection (b) specifies that loads containing “pieces of broken, densified bales” or “pieces of bales of plastic” are ineligible for redemption. Though the term “previously baled” is not found in CalRecycle’s governing statutes in the Public Resources Code or implementing regulations in CCR, title 14, OAL does not find this PTM provision to be an expansion of existing law. “Pieces of

⁴ “A regulation adopted by an administrative agency pursuant to its delegated rulemaking authority has the force and effect of law.” *California Teachers Assn. v. California Com. On Teacher Credentialing*, (2013) 111 Cal.App.4th 1001, 1008; 4 Cal.Rptr.3d 369, 375.

⁵ Government Code section 11340.9(f) exempts from the rulemaking provisions of the APA “[a] regulation that embodies the only legally tenable interpretation of a provision of law.”

broken, densified bales” and “pieces of bales of plastic” were once part of a bale and therefore were “previously baled,” and recyclable material that was previously baled by a processor is ineligible for redemption. Because this PTM provision does not expand upon existing law, Challenged Rule No. 4 is not an underground regulation.

5. Challenged Rule No. 5

Challenged Rule No. 5 provides:

When you use a log, write down what kind of material you have purchased, the basis, the weight (or count), as well as the amount you paid. Your customers will need to print and sign their names. **The names must be legible for recordkeeping to be in compliance.** (PTM, p. 26.) [Emphasis added.]

The Public Resources Code requires recycling center operators to maintain, *inter alia*, consumer transaction receipts and logs. (Pub. Res. Code, §14538(d)(7).) Duly adopted regulations in CCR, title 14 mandate that operators prepare, maintain, and provide a copy to the consumer of, either a transaction receipt or log that includes the “printed name and signature of the person selling or donating the material” (Cal. Code Regs., tit. 14, §2525(a)(6), (b)) and state that the transaction records “must be legible” (Cal. Code Regs., tit. 14, §2085(c)(1)). Because this PTM provision does not expand upon these existing legal requirements, the second element of *Tidewater* is not satisfied. Therefore, Challenged Rule No. 5 is not an underground regulation.

6. Challenged Rule No. 6

Challenged Rule No. 6 provides:

If a load is contaminated, the recycling center or consumer **should attempt to remove** any visible debris. (PTM, p. 27.) [Emphasis added.]

CalRecycle’s use of the phrase “should attempt” renders this PTM provision optional rather than mandatory. In other words, either the recycling center operator or the consumer is encouraged, but not required, to remove visible debris from loads of recyclable material. OAL therefore finds that Challenged Rule No. 6 does not further implement or interpret existing law and is not an underground regulation.

7. Challenged Rule No. 7

The Petition challenges provisions on page 30 of the PTM as follows:

[Allegation 4g.] Recyclers are not [...] limited to purchasing from consumers. (Petition, p.2.)

Petitioner is correct that recycling centers are required to accept empty beverage containers from not only “consumers,” as defined in Public Resources Code section 14508, but also “dropoff” and “collection” programs. (Pub. Res. Code, §14572(a)(1).) OAL finds that usage of the word “consumer” on page 30 of the PTM does not further implement, interpret, or make specific existing law. Therefore, the second element of *Tidewater* is not satisfied and Challenged Rule No. 7 is not an underground regulation.

CONCLUSION

In accordance with the above analysis, OAL determines that Challenged Rule No. 1 meets the definition of a “regulation” that should have been adopted pursuant to the APA, and is therefore an underground regulation, and that Challenged Rule Nos. 2 through 7 are not underground regulations.

Date: November 14, 2022

_____/s/
Eric Partington
Attorney IV

Copy: Rachel Wagoner, Director, CalRecycle
Kris Chisholm, Senior Staff Counsel, CalRecycle