

October 21, 2013

Attention: Caroll Mortensen
Department of Resources Recycling and Recovery
1001 I Street
PO Box 4025, MS 13A
Sacramento, CA 95812
Submitted via email: Paint@CalRecycle.ca.gov

SUBJECT: CPSC COMMENTS ON FIRST PAINTCARE ANNUAL REPORT

Dear Director Mortensen:

The California Product Stewardship Council (CPSC) is the preeminent California based organization dedicated to product stewardship research, development, education, and implementation. CPSC has the support of numerous cities, counties, local government associations and business partners in virtually every Senate and Assembly district in California, representing over 64% of the state's population. CPSC takes pride in coordinating closely with others to ensure that California policies follow the [Principles of Product Stewardship](#).

CPSC appreciates the opportunity to comment on the first Annual Report ("Report") on California's paint stewardship program that PaintCare submitted to CalRecycle on October 1, 2013. As arguably the strongest proponents of the enabling legislation, we look forward to continuing to work with PaintCare, CalRecycle and all stakeholders to ensure that this program succeeds in reducing the costs and environmental impacts of managing postconsumer paint in California. On October 10th we held a call to discuss the Report with 45 local government and business partners. This letter and attached detailed comments reflect those expressed on the call and those e-mailed to us.

Almost one year has passed since the start of the PaintCare program, and we are pleased to see that nearly 500 public drop-off sites have so far been established in California, and certainly great progress has been made. As expected, rolling out a statewide program in California will have some issues that need adjustment. We have drafted the attached detailed comments in order as they were identified in the Report to meet the goals and intent of AB 1343.

Overall, the Report lacks important details which are needed to assess the impact of the program, and to evaluate whether the program meets both the statutory and regulatory requirements and as well as what was identified in the Cal Recycle approved Paint Stewardship Plan ("Plan"). Our primary issues of concern include the **lack of information on** the following:

- (1) Collection data and barriers to achieving collection volumes set forth in the Plan**
- (2) Program operations and expenditures of fees collected**
- (3) Consumer convenience**
- (4) Municipal contract barriers causing higher costs**

We are happy to continue working closely with CalRecycle and PaintCare to ensure that California's paint stewardship program is a success. California needs a cost-effective and convenient paint stewardship program as promised in AB 1343, and it is critical that the paint industry implement a robust program that benefits everyone who pays the stewardship fee. The Report needs depth and we look forward to working with PaintCare and the stakeholders to ensure it is updated to meet the goals and intent of AB 1343.

Thank you for the opportunity to comment.

Sincerely,



Heidi Sanborn, Executive Director

Cc: Marjaneh Zarrehparvar, PaintCare
Howard Levenson, CalRecycle
Mary Pitto, ESJPA Program Manager

Attachments:

- 1) CPSC Detailed Comments on PaintCare Annual Report
- 2) CPSC joint letter to PaintCare regarding municipal contract provisions (July 27, 2012)
- 3) PaintCare response to CPSC regarding municipal contract provisions (August 7, 2012)

ATTACHMENT 1
TO CPSC'S COMMENT LETTER DATED 10/21/13
DETAILED COMMENTS ON PAINTCARE ANNUAL REPORT

EXECUTIVE SUMMARY:

- 1) Add details to better understand the program overall, such as the date retailers began to collect the fee, and the date program publicity began to run.
- 2) For year one, the volume of paint collected that is projected in the Plan, adjusted for the 8.5 months of operation, is over 1.9 million gallons. **The actual volume reported is less than 633,000 gallons, about one third of what was anticipated in the Plan.** The Report needs a discussion of the challenges encountered and anticipated steps to improve this collection rate (Title 14, Chapter 11, Article 2, §18954(a)(2)). Challenges which impacted collection and should be addressed include:

- a. **Partnering with Household Hazardous Waste (HHW) Programs:**

- i. The Report (page 3) states that an “effort was made by a coalition of local governments to negotiate contracts with PaintCare through a multi-jurisdiction process,” and that “individual contract negotiations were found to be the most effective to establish partnerships.” We disagree with these statements, as they downplay the significant **municipal contracting delays**, which the Report fails to address. In July 2012 PaintCare released a model municipal contract which contained nine provisions that were unacceptable to almost every local government attorney. Twenty-eight jurisdictions signed onto a joint letter identifying nine of the most “fatal flaws” that the endorsers asked be modified or removed from the model contract before recommending continued discussions of the contract with their respective governing bodies. PaintCare responded in a letter, stating that PaintCare would be “modifying the contract based on individual negotiations,” and that the provisions outlined by the 28 jurisdictions would be individually “addressed with each local government...rather than continuing to modify model contract language.” PaintCare’s **failure to address these common issues in their model contract caused unnecessary delays** in setting up municipal collection sites and getting HHW paint costs covered, **and added costs** for local government attorney and staff time invested in individual negotiations on issues that PaintCare could have easily resolved (e.g., San Francisco has spent nearly \$50,000 on attorney and staff time to date and still doesn’t have a contract). Per the regulations, the Report should address and provide suggested resolution to the municipal contracting problems and the delays these caused in partnering with municipalities.
- ii. The Report (page 3) states that “not every jurisdiction was concerned about reducing its HHW program costs or having paint costs covered by PaintCare.” We disagree with the statements in this section, as we are only aware of one jurisdiction, Orange County, which was initially resistant and is now working with PaintCare. Such claims must either be either

deleted or substantiated by identifying the jurisdictions that were not supportive of the program, not wanting PaintCare to cover their costs, or that expressed other concerns related to the program.

- b. **Retail Storage Space:** The Report should discuss the frequency of pick-ups and the issue of **retail sites reaching their storage capacity** and turning customers away. In September 2013, the City of Stockton conducted a survey of the seven participating retailers in their jurisdiction, and two of the seven stores commented about pick-ups by PaintCare contractors as an obstacle eleven months into the program. This is unacceptable and causing residents to take their paint to the public facilities, many of which still do not have a contract and are thus using their own financial resources to manage paint even though the fee is being collected.
- c. **Nonparticipation of Big Box Stores:** The Report should provide a discussion of the barriers to getting participation of big-box stores (e.g., Home Depot, Lowes), and description of progress and efforts to sign them up as collection sites. Include an estimated timeline, if available, for their participation.
- d. **Public Education About the Program:** The Report should discuss the issues involving the timing of running advertising campaigns **before collection sites were established** in some areas, as well as the problems/complaints reported to PaintCare by consumers, municipalities and retailers, and what measures were identified and implemented by PaintCare to resolve the issues.

SECTION 3. PROGRAM OUTLINE:

- 1) **Methods Used to Collect, Transport & Process Paint – Collection:** The Report should clearly explain the municipal contract indemnification issue, as this is a requirement imposed by PaintCare which has caused complexity and added costs to local governments, haulers and retailers resulting staff time and attorney fees. This requirement also delayed municipal site setup and relief of paint management costs, and impacted the total volume of paint collected by PaintCare in the first year of program operation. This led to collecting 1/3 of the paint projected in the Plan and costs upwards of \$14.72 per gallon. Contracting **delays caused higher costs and lower recovery rates**; more municipal HHW participation in the program could increase collection volume and reduce the cost per gallon. The cost per gallon should drop quickly as the volume increases and this program needs to document both in future reports.
- 2) **Recycling Opportunities for Consumers:**
 - a. The Report should list the number of direct and indirect municipal contracts that are in place, and add an explanation (or sub-bullet in Table 1) of how many jurisdictions actually have active PaintCare collection sites (some jurisdictions have multiple HHW facilities, which is not clear in Table 1). Also, add the number of “temporary events” and locations not counted as permanent sites to the text and the map of California. These details are necessary to determine the service level and convenience of the program in California.
 - b. The Report should **add the total number of gallons collected from each type of site**, “temporary events” and “large volume pickups,” to determine where most consumers are

actually going to recycle their paint.

SECTION 4. DESCRIPTION OF GOALS AND ACTIVITIES:

- 1) **Program Convenience:** The Report is lacking detail on how consumers in rural parts of California have had an opportunity to recycle their paint (§18954(a)(3)(B)). Our understanding is that less than 1 in 4 rural counties have a direct or indirect PaintCare contract to relieve them of paint management costs 11 months into the program. **The Report lacks detail on rural service areas, and does not report on temporary events, which are a major element of some rural programs.** The Report should include a description of the locations and number of temporary events which PaintCare supported. Furthermore, the map (Report, page 9) should show temporary events in addition to permanent sites.
- 2) **Paint Sales & Recovery:** Lacks a description of the program goals and activities based on the Plan (§18954(a)(4)).
 - a. Add comparison of **actual paint sales and collection data** with the figures projected in the Plan.
 - b. Add comparison of paint volumes collected by PaintCare with paint collected by municipal programs statewide, to give a sense of the progress made to date. Include conversion factors used to determine volume, as conversion factors vary with programs throughout the state.
- 3) **Disposition of Paint:**
 - a. **Disposition:** It is not clear what the various disposition methods listed actually mean:
 - i. There is a big **discrepancy** in the description of what constitutes “reprocessed paint” vs. “beneficial use,” and “paint to paint” vs. “beneficial use” in Table 4 (see footnote).
 - ii. There is no **definition of “beneficial use”** (explain and provide examples).
 - b. **Processors:** There is a lack of transparency in where paint goes for processing. In tables 5 and 6, provide the percentage of total **paint sent to each vendor**, or percentage of total paint sent out of state (§18954(a)(4)). This information may explain the high transportation costs (and shed light on the program’s environmental and economic impacts) with long distances to processors out of state.

SECTION 5. FINANCING MECHANISM:

- 1) There is no discussion or evaluation of **how the funding mechanism worked in comparison with the Plan** (§18954(a)(5)). Add a comparison and explanation of the actual costs, collection and funding (financial summary) with the costs, collection and funding outlined in the Plan (budget).
- 2) There is a lack of detail defining or explaining the various cost categories outlined in the Report:
 - a. Define what constitutes “capital costs.”

- b. Explain administrative costs, and show a **breakdown of these costs**, including legal fees billed to the program, salaries, etc. (Were CalRecycle litigation expenses included in legal fees?)
- 3) The \$14.72 **cost per gallon** is significantly higher than what we had hoped to see given the average cost was \$8 per gallon (based on national figures for HHW paint management) before this program started. Explain what portion of this cost per gallon is attributable to one-time startup costs (e.g., purchase of totes, legal fees, etc.), versus ongoing operations. Also, given the total volume of paint is only about 1/3 of the amount projected in the Plan, **explain what efforts will be made to reduce the cost per gallon in subsequent years**.
- 4) Section 18954(a)(5)(G) requires reporting on “% of total program costs, with line items for reuse, transportation, recycling, fuel incineration, and proper disposal.” This is absent from the Report.
 - a. Provide an explanation of the **end-of-life management costs**, including aggregates or estimates for each disposition. If this is not possible, explain why PaintCare’s service contracts were structured in a way that created a situation in which this data cannot be provided per the regulations.
 - b. Provide breakdown of costs included in “**transportation**.”
 - c. Provide breakdown of costs included in “**processing**,” including local government reimbursement for bulking, reuse, etc.
- 5) Explain how **surplus funding** will be used to reduce program costs (§18954(a)(5)(I)).

SECTION 6. EDUCATION & OUTREACH:

- 1) In the Plan there is a retail poster with a table for estimating paint purchases (Plan page 33), but this **source reduction message is missing** from the outreach material in the Report. “Buy right...” to reduce waste is used in all the messaging, but there are no tools provided to help customers do so, such as the table developed in the national Paint Product Stewardship Initiative process that the paint industry helped fund. Explain how education and outreach meets the goal of source reduction first.
- 2) **Local HHW Programs:** Explain PaintCare’s efforts to provide participating stores with local HHW program information, or coordination with the jurisdictions to ensure stores are informed and aware of local HHW programs. The City of Stockton’s retailer survey shows only three out of seven stores knew the local HHW program information to refer customers they could not serve, and two out of seven stores had incidents of illegal dumping. Better coordination with the local HHW programs would help save customers grief and prevent illegal dumping.

SECTION 7. AUDITS: FINANCIAL STATEMENT:

- 1) The financial statement **needs more details on each line item to understand expenditures**. For example, what is included in legal fees, and are the litigation costs part of this figure?

July 27, 2012

Marjaneh Zarrehparvar, Executive Director
PaintCare
1500 Rhode Island Ave, NW
Washington, DC 20005

RE: PaintCare California Municipal Contract Provisions

Dear Marjaneh:

Jurisdictions throughout California have demonstrated a commitment to support Extended Producer Responsibility for management of paint in a pure model that allows for private sector design and operation of the paint management system. As part of that framework, local governments were aware that they would need to negotiate with PaintCare regarding their role in the future producer managed system. While the CalRecycle approved paint stewardship plan outlines a heavy reliance on the existing public infrastructure to collect paint, unfortunately, the proposed municipal contract as revised July 12, 2012 contains a number of major provisions that are unacceptable to many local governments. Our local government members asked CPSC to host a conference call on July 19th where they shared information and outlined a process to respond.

On that call, it was clear that CPSC local government members have sufficient experience with their governing bodies and legal staff to know that some of the proposed provisions of the contract will not be acceptable. Many members are required to provide recommendations to their agency on contract issues related to household hazardous waste management, even before legal review is initiated. In addition, several jurisdictions have already asked and received preliminary legal review with essentially the same response that some of the proposed provisions must be stricken.

Because time is of the essence to get a robust paint collection program started as soon as possible, the group thought it would be most expeditious to provide organized feedback instead of having over 100 separate conversations. To that end, while several local governments have their own separate and specific issues they will need to discuss with PaintCare, below is a list of nine contract issues that the endorsers ask be modified or removed from the model contract before recommending continued discussions of the contract to the respective jurisdictions. The most significant issues of concern are as follows:

1. Indemnification
2. Insurance
3. Worker's Compensation
4. Lobbying
5. Confidentiality
6. Termination
7. Cleanup Liability
8. Audit
9. Title and Risk of Loss



1822 21st Street, Suite #100
Sacramento, CA 95811
916-706-3420

www.CalPSC.org

Jurisdictions are eager to have paint disposal costs paid for by PaintCare as soon as possible and have worked for years, alongside the paint industry, to find common ground for a program that is mutually workable and achieves the goals of increasing paint recovery, reuse and recycling. CPSC is happy to play a role in facilitating resolution of the issues in order for the program to be implemented quickly. Please call me to arrange for either a conference call, webinar, or other means of expediting the communication to resolve this cornerstone issue.

Sincerely

Heidi Sanborn, Executive Director
California Product Stewardship Council

cc: Carol Mortensen, Director, CalRecycle

STATEMENT ON PAINTCARE MODEL CONTRACT

Drafted by Committee 7/19/12

Each jurisdiction has specific concerns on the PaintCare model contract that arise from its own program, circumstances, or contracting regulations. The list below does not necessarily represent all the concerns of each individual jurisdiction. However, we are united in identifying the following provisions in the PaintCare model contract that would prevent us from recommending to our governing bodies that they approve a contract with PaintCare:

- 1. Indemnification** [Sections 6.1, 9.1, 9.2, 9.3]. Jurisdictions should not indemnify PaintCare against all possible claims, including those that may arise after paint has left the Jurisdiction's control. A better approach is represented in the Marion County Oregon contract, where there is mutual indemnification between PaintCare and the Jurisdiction based on which entity is performing a contractual duty at the time the claim arises.
- 2. Insurance** [Sections 10.1-10.10]. The type and amount of insurance and additional insured coverage, if any proof is offered, is a jurisdiction by jurisdiction issue and should be provided not only by Jurisdiction to PaintCare, but also by PaintCare to the Jurisdiction [or in the alternative by all entities serving on PaintCare's behalf]. No waiver of subrogation on the Jurisdiction's insurance should be required that would relieve PaintCare of liability for losses that PaintCare or its contractor had responsibility and control.
- 3. Worker's compensation liability** [Section 15.3]. Jurisdictions cannot accept worker's compensation liability for anyone not in their direct employment. There is no such provision in the Oregon contract.
- 4. Lobbying** [Section 17.2]. The right of Jurisdictions to lobby for changes in the law or regulations cannot be restricted. There is no such provision in the Oregon contract.
- 5. Confidentiality** [Section 19.1]. Secrecy on the contract cannot be imposed since it violates the California Public Records Act. There is no such provision in the Oregon contract.
- 6. Termination** [Section 11.2]. The right to terminate without cause in 60 days [Section 11.2] should not be given solely to PaintCare since it is unfair to a Jurisdiction that has faithfully performed and heavily invested in providing the service. There is no such provision in the Oregon contract.
- 7. Cleanup Liability** [Section 18.5]. The Jurisdiction's responsibility to abate a hazardous waste spill should be limited to activities under Jurisdiction's control, and not include activities under control of PaintCare or its contractors.
- 8. Audit** [Sections 8.1-8.3]. The right to audit and inspect should be mutual not be awarded to PaintCare alone. Since the Jurisdictions retain responsibility for disposition of their paint, and state reporting requirements, a Jurisdiction needs a parallel right to audit and inspect any entities employed by PaintCare to process, recycle or dispose of the Jurisdiction's paint.
- 9. Title and Risk of Loss** [Section 6.1]. Jurisdictions shouldn't be required to retain title and responsibility for paint products that have passed into the control of PaintCare or its contractors. As in

the Oregon contract, the Jurisdictions should be able to transfer title and responsibility, to the greatest extent permitted by law, to any PaintCare contractor at the time of acceptance of paint for transport.

This statement is endorsed by the following:

1. City of Los Angeles; Brian Ahn, Program Manager
2. City of San Diego Household Hazardous Waste Program; Cheryl Lester, Hazardous Materials Supervisor
3. City of Sunnyvale; Mark Bowers, Solid Waste Program Division Manager
4. City of Thousand Oaks; John Brooks, Senior Project Analyst, Environmental Programs
5. County of Alameda Household Hazardous Waste Program; Ariu Levi, Director, Dept. of Env. Health
6. County of Amador; Jim McHargue, Solid Waste Program Manager, Waste Mgmt and Recycling Dept.
7. County of Butte Public Works; Bill Mannel, Waste Management Division Manager
8. County of Kern Waste Management Department, Lyn Beurmann, Supervisor Household Hazardous Waste
9. County of Los Angeles, Carlos Ruiz, Assistant Division Engineer, LA County Public Works
10. County of Mendocino Solid Waste Management Authority; Mike Sweeney, General Manager
11. County of Mono; Tony Dublino, Solid Waste Superintendent
12. County of Monterey Regional Waste Management District; William Merry, Director
13. County of Orange Waste and Recycling; Oscar Garza, Manager
14. County of San Bernardino; Ione Wallace, Interim Deputy Fire Marshall, Fire Department
15. County of San Luis Obispo Integrated Waste Management Authority; Bill Worrell, Director
16. County of San Francisco, Maggie Johnson
17. County of San Joaquin, Kimbra Andrews, Management Analyst
18. County of San Mateo, Waymond Wong, Environmental Health Program Supervisor
19. County of Santa Barbara; Leslie Robinson, Program Specialist Public Works Department
20. County of Santa Clara; Rob D'Arcy, Hazardous Materials Program Manager
21. County of Tehama/Red Bluff Landfill Management Agency; Kristina Miller, Landfill Agency Manager
22. Central Contra Costa County Sanitary District; David Wyatt, HHW Program Supervisor
23. Delta Diablo Sanitation District; Amanda Roa, Environmental Compliance
24. Del Norte Solid Waste Management Authority; Kevin Hendrick, Director
25. Humboldt Waste Management Authority; Brent Whitener, Program Manager
26. Regional Solid Waste Association (JPA) San Diego; Lin Wurbs, General Manager
27. Rural Counties' Environmental Services Joint Powers Authority, Mary Pitto, Program Manager
28. Western Placer Waste Management Authority, Eric Oddo, Environmental Engineering Program Manager



August 7, 2012

Heidi Sanborn, Executive Director
California Product Stewardship Council
1822 21st Street, Suite #100
Sacramento, CA 95811

RE: PaintCare California Architectural Paint Recovery Program Collection Facility and
Waste Paint Management Services Agreement

Dear Heidi:

Thank you for your letter of July 27, 2012 regarding PaintCare's above reference model contract for services under the California Paint Stewardship Program. PaintCare appreciates CPSC's assistance in implementing the Paint Stewardship Program, particularly its facilitation of communication among the numerous municipal governments interested in benefitting from participation in the program. As stated in these communications, PaintCare's California Architectural Paint Recovery Program Collection Facility and Waste Paint Management Services Agreement is a model contract. CPSC members should understand that contract provisions will necessarily change depending on the actual services a municipal government partner will undertake for the program. In addition, as you stated in your letter, contract provisions will change depending on separate and specific demands by individual local governments.

Thus, PaintCare will be modifying the contract based on individual negotiations with municipal governments – several of which are already underway. Any of the provisions you outline as well as any others that may arise will be addressed with each local government. Since contracts will have to be put in place for each and every municipal service provider, rather than continuing to modify model contract language, PaintCare believes individual negotiations are the most efficient and time effective approach in this regard. PaintCare looks forward to continuing to receive specific contract language from each of the municipal governments and anticipates mutually beneficial partnerships for a robust Paint Stewardship Program in California.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Zarreparvar", with a large, stylized flourish at the end.

Marjaneh Zarreparvar
Executive Director

cc: Caroll Mortensen, Director, CalRecycle