

**State of California
Office of Administrative Law**

**In re:
California Integrated Waste Management
Board**

**Regulatory Action: Title 14
California Code of Regulations**

**Adopt sections: 18453.1
Amend sections: 18449, 18450, 18451,
18453, 18453.1
(renumbered to
18453.3), 18453.2,
18454, 18455, 18456,
18456.1, 18456.2,
18456.3, 18456.4, 18457,
18459, 18459.1,
18459.1.2, 18459.2.1,
18459.3, 18460.1,
18460.1.1, 18460.2,
18461, 18462, 18463,
18464, 18466
Repeal sections: 18456.2.1, 18460.2.1**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2009-0831-01 S

SUMMARY OF REGULATORY ACTION

In this proposed regulatory action, the California Integrated Waste Management Board (Board) adopts, amends, and repeals regulations in Article 8.5, Chapter 6, Division 7, Title 14 of the California Code of Regulations, an Article entitled "Waste Tire Hauler Registration and Manifesting Requirements for Used and Waste Tire Haulers, Retreaders, Used and Waste Tire Generators, and Used and Waste Tire End-Use Facilities." These regulations principally implement, interpret and make specific sections 42950 through 42967 of the Public Resources Code. In this rulemaking, the Board proposes to revise regulatory provisions relating to the following: (1) the registration of used or waste tire haulers, (2) exemptions from the registration requirements, (3) used or waste tire hauler registration denials, suspensions and revocations, (4) the manifest system used to document the movement of used and waste tires from used or waste tire generators to used or waste tire haulers to end-use facilities, (5) the civil penalties that may be imposed by the Board, and (6) program definitions. The rulemaking includes the proposed

adoption, amendment and repeal of a number of forms utilized in this used and waste tire hauler program.

DECISION

On October 13, 2009, the Office of Administrative Law (OAL) notified the Board of the disapproval of this regulatory action. The reasons for the disapproval were the following: (1) failure to comply with the “Clarity” standard of Government Code section 11349.1, (2) failure to comply with the “Consistency” standard of Government Code section 11349.1, (3) failure to comply with the “Necessity” standard of Government Code section 11349.1, (4) failure to meet all of the requirements for “Incorporation by Reference” as set forth in section 20 of title 1 of the California Code of Regulations (CCR), (5) failure to comply with all required Administrative Procedure Act procedures, and (6) a number of the required documents in the rulemaking file were defective.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11364). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Moreover, Public Resources Code section 40502, which sets forth the Board’s general authority to adopt rules and regulations to carry out those provisions of the Public Resources Code under the jurisdiction of the Board, specifically states in subdivision (a): “The [B]oard shall adopt rules and regulations, as necessary to carry out this division in conformity with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.” Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code section 11349.1.

The existing used and waste tire hauler program regulations include the incorporation by reference of a number of program forms. The current proposed regulatory action includes the adoption of three new program forms, the amendment of two existing program forms, and the repeal of four existing program forms. Pursuant to OAL’s regulation on “Incorporation by Reference,” material proposed for incorporation by reference is reviewed for compliance with APA substantive standards and APA procedures. See CCR, title 1, section 20. Consequently, the Board’s forms which are incorporated by reference in this rulemaking are subject to OAL’s review along with the CCR text.

Due to the scope of the “Clarity” and other issues discussed below, OAL reserves the right to conduct a complete APA review for compliance with the substantive standards and procedural

requirements of the APA in the event that the Board resubmits this rulemaking to OAL for review. All APA issues must be resolved prior to OAL approval of any submission.

For purposes of the discussion of issues which follows, the term “used or waste tire hauler” will generally be referred to in abbreviated fashion as “waste tire hauler.” Unless otherwise indicated in the discussion, “waste tire hauler” is used broadly in this discussion to include both the waste tire haulers who are required to register with the Board under Public Resources Code section 42951 and those persons who haul used or waste tires who are exempt from registration under Public Resources Code section 42954. Similarly, the terms “used and waste tire hauler regulations” and “used and waste tire hauler rulemaking” will be referred to in this discussion as the “waste tire hauler regulations” and “waste tire hauler rulemaking” respectively. In addition, for purposes of this discussion, “used or waste tire generator” will generally be referred to in an abbreviated fashion as “waste tire generator.”

A. CLARITY

OAL must review regulations for compliance with the “Clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “Clarity” as meaning “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “Clarity” standard is further defined in section 16 of title 1 of the CCR, OAL’s regulation on “Clarity,” which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or

- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this waste tire hauler rulemaking, numerous provisions of the proposed regulations fail to comply with the “Clarity” standard. Examples of the “Clarity” problems are set forth below. A number of additional “Clarity” concerns (such as citation and cross-reference problems, internal inconsistencies within the proposed regulations, wording problems, and punctuation problems) have been discussed with Board staff.

1. The meaning of “manifest form” – The term “manifest form” is a significant term within these waste tire hauler regulations as many of the regulations (particularly regulation sections 18459 through 18462) set forth various requirements pertaining to the waste tire manifest system and reference “manifest form.” However, there is ambiguity in the regulations as proposed regarding the exact meaning of “manifest form.” Proposed regulation section 18450(a)(10), which is the definition of the term “Comprehensive Trip Log,” appears to establish the term “manifest form” as being the same as the Board’s Comprehensive Trip Log form (the CIWMB 203 form). However, proposed regulation section 18450(a)(20), defining the term “manifest form,” appears to establish a somewhat broader meaning of “manifest form” to include not only the Board’s Comprehensive Trip Log form (the CIWMB 203 form) but also Electronic Data Transfer (EDT) forms, which are other Board-approved paper reporting forms used by waste tire haulers or other responsible parties for reporting the Comprehensive Trip Log information. Within the manifest system regulations, sections 18459 through 18462, it appears that generally the Board is using “manifest form” to have the broader meaning from proposed regulation section 18450(a)(20). However, some of the regulations (for example, proposed regulations 18459.2.1 and 18459.3) appear at times to use the term “manifest form” to have the narrower meaning from proposed regulation section 18450(a)(10). Consequently, there is the potential for confusion by those persons legally required to comply with these regulations since the exact intended meaning of “manifest form” is not clear and a single meaning does not appear to be consistently used throughout the regulatory scheme.

2. Service of process procedures for civil penalties – In regulation section 18464, the Board provides for specified civil penalties which may be imposed administratively on waste tire generators, waste tire haulers, and end-use facilities, as authorized in Public Resources Code section 42962. In regulation section 18466, “Procedure for Imposing Civil Penalties,” the Board sets forth its procedures for administratively imposing those penalties. Section 18466 is being amended in this rulemaking to provide for three alternative methods for service of process of a penalty-related accusation or complaint and accompanying documents. One proposed alternative for service of process, as set forth in section 18466(a)(3), provides for service by: “Certified mail or Registered mail if the letter containing the accusation or complaint and accompanying material is mailed, addressed to the respondent at the latest address provided in the current year’s used and waste tire hauler application (CIWMB form 60) on file with the [Board].”

The proposed language of section 18466(a)(3) is confusing in that the CIWMB 60 form is generally filed only by those waste tire haulers required to register with the Board, and is not

required to be filed by waste tire generators and by end-use facilities; however, waste tire generators and end-use facilities are subject to some of the penalties specified in regulation section 18464 and are therefore subject to these penalty procedures. Reference to service of process by certified or registered mail using an address on a form that is not applicable to some of persons who are subject to penalty assessment could create uncertainty and be confusing to some persons “directly affected” by this regulation. It is not clear exactly what address would be required to be used for certified or registered mail service of process upon a waste tire generator or an end-use facility. Alternatively, if the intention here is to limit certified or registered mail service of process under section 18466(a)(3) to only those waste tire haulers required to file the CIWMB 60, then that meaning needs to be made clear. A secondary clarity problem with the language of section 18466(a)(3) is that the CIWMB 60 provides for the reporting of multiple types of addresses, and it is not clear exactly which address on the form would need to be used for certified or registered mail service of process.

3. Form CIWMB 683 filing requirements – In connection with the manifest system requirements, proposed regulation sections 18460.1(f), 18460.1.1(f), and 18460.2(g) each establish amended requirements for waste tire haulers to report waste tire generators or end-use facilities that do not provide the necessary information to complete the manifest form. (Section 18460.1(f) establishes amended requirements for waste tire haulers with “agricultural purposes” exemptions, section 18460.1.1(f), establishes amended requirements for waste tire haulers with “common carrier” exemptions, and 18460.2.(g) establishes amended requirements for registered waste tire haulers.) In each case, the amendments set forth requirements for submitting a newly-required form, the CIWMB 683, and the regulatory provision reads substantially as follows: “The [type of waste tire hauler] shall submit to the Board a completed CIWMB 683 form with the name, address, and phone number of the used or waste tire generator, or end-use facility that does not provide the required information to the [type of waste tire hauler] so that the Manifest Form can be completed properly.” (The CIWMB 683 was not attached to the final regulation text or otherwise included in the rulemaking file, but the Board staff provided a copy of this form for purposes of OAL’s review.)

Examining the content of the CIWMB 683, it is evident that this form is not specifically tailored to the function of reporting waste tire generators or end-use facilities that do not provide the required manifest information. The form is entitled “Waste Tire Hauler/Storage Complaint Form” and appears to be a general complaint form primarily oriented towards filing complaints regarding waste tire haulers, as evidenced by the central section of the form which is entitled “Hauler/Complaint Information.” While the proposed regulation text specifies that the waste tire hauler shall submit a completed CIWMB 683 with the name, address, and phone number of the waste tire generator or end-use facility that does not provide required information, it is not clear in other respects exactly how this form would need to be filled out to properly notify the Board regarding the waste tire generator or end-use facility. For example, besides the name, address, and phone number, what would need to be filled out (and what would not be filled out) in the “Hauler/Complaint Information” section of the form? What specific information needs to be provided in the “Nature of Complaint” section of the form to properly notify the Board? In the context of the form being a “Waste Tire Hauler/Storage Complaint Form,” there is a definite potential for waste tire haulers not being able to easily understand how to fill out this form and thereby comply with the regulatory requirements. In order to resolve this concern, the Board

will need to provide more specific information in the regulation text regarding the completion of the form or, alternatively, will need to revise the form so that it is more specific to the reporting of waste tire generators and end-use facilities that do not provide required manifest form information.

4. Reporting of changes by registered waste tire haulers on the CIWMB 60 – In this rulemaking, regulation section 18456.3(d) is being amended to modify the requirements for registered waste tire haulers reporting changes in specified information to the Board. The amended language of section 18456.3(d) would read: “Every registered waste tire hauler shall notify the Board on a form CIWMB 60 of any change in the business address, mailing address, vehicle storage address, or phone number. Notice shall be given no more than ten (10) days after the change.” The amendments to this section 18456.3(d) include: (1) requiring that the reporting of changes be on a CIWMB 60 form (rather than just being “in writing,” which has previously been the case), (2) the addition of the requirement for reporting a change of “business address,” and (3) the addition of the requirement for reporting a change of “vehicle storage address.”

In addition to this regulation section 18456.3(d) amendment, the CIWMB 60 form is also being amended in this rulemaking; however, the form after amendment is not fully in conformity with regulation section 18456.3(d) requirements after amendment. For example, the form includes sections for reporting two types of addresses – the “facility address” (which is further identified on the form as the “the location of the business including where vehicles are stored”) and the “mailing address of company.” In contrast, regulation section 18456.3(d) would now require the reporting of changes to three types of addresses – the business address, the mailing address, and the vehicle storage address. Section 18456.3(d) and the CIWMB 60 do not appear to be “in sync” with respect to address reporting, which could cause confusion for persons attempting to comply with the requirements for reporting changes on the form. In fact, it is not exactly clear what the Board means by “business address” in relation to the two other types of addresses. In addition to this problem, the top of the CIWMB 60 has boxes which can be checked for indicating the type of application being filed, including boxes identifying that the application is for certain types of “change” reporting. However, the “change” categories on the top of the CIWMB 60 do not appear to cover and coincide with all of the types of changes identified in regulation section 18456.3(d). Again, section 18456.3(d) and the CIWMB 60 do not appear to be “in sync.” For these reasons, the manner of filling out the CIWMB 60 to report the changes specified in regulation section 18456.3(d) may not be easily understood by those waste tire haulers attempting to comply with the regulatory requirements. The “Clarity” standard has not been satisfied.

5. Retreader compliance with the waste tire manifest system – In regulation section 18459(c), the Board proposes amendments to a regulatory provision that lists the types of persons and entities that must comply with the waste tire manifest system. Within that section, section 18459(c)(9) as proposed would read: “Retreader when hauling any amount of used or waste tires at any one time with a registered vehicle.” In the Final Statement of Reasons for this rulemaking, the changes to Section 18459(c)(9) are described as follows: “This section is deleted from this article for clarification because it refers to ‘retreaders’, which are no longer identified apart from waste tire haulers, waste tire generators, tire dealers, and end-use facilities with regard to these regulations. Retreaders were once identified as a different entity in the tire

industry, but since their roles and responsibilities are completely the same as any other waste tire haulers, waste tire generators, tire dealers, and end-use facilities, a distinction was no longer necessary.” Comparing the language in regulation section 18459(c)(9) with the description in the Final Statement of Reasons, this is a situation where the language of the regulation conflicts with the agency’s description of the effect of the regulation, which is considered a “Clarity” problem under CCR, title 1, section 16(a)(2). The regulation text does not clearly convey what the Final Statement of Reasons indicates to be the agency’s intent.

B. CONSISTENCY

OAL must review regulations for compliance with the “Consistency” standard of the APA. Government Code section 11349, subdivision (d), defines “Consistency” as meaning “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” The following provisions of the Board’s proposed regulations do not comply with the “Consistency” standard.

Proposed regulation sections 18454(a) and 18456.1(a) and surety bond form CIWMB 61 – In connection with the waste tire hauler registration and renewal requirements, regulation sections 18454(a) and 18456.1(a) each reference a form entitled “Waste Tire Hauler Bond” which is numbered “CIWMB 61.” This bond is specifically required pursuant to Public Resources Code section 42955, subdivision (d), which provides that an application for a new or renewed waste tire hauler registration shall include: “A bond in favor of the State of California in the amount of ten thousand dollars (\$10,000). Proof of bond renewal shall be submitted with the application for annual renewal of a waste and used tire hauler registration.” The CIWMB 61 is a “surety bond” as discussed in regulation section 18456.1. In this rulemaking, the Board is in regulation sections 18454(a) and 18456.1(a) proposing amendments to reference a revised version of the CIWMB 61, dated 1/08. The revised CIWMB 61 form, which is included as part of the regulations, appears to be changed from the prior version of the form only in relatively minor respects, such as changing language from “tire haulers” to “used and waste tire haulers,” changing “waste tires” to “used and waste tires,” changing a Public Resources Code citation from “Section 42950(b)” to “Section 42950 et seq.,” and revising a mailing address for providing the Board with a notice of cancellation of the bond.

The “Consistency” standard problem with these CIWMB 61-related changes is that, pursuant to Government Code sections 11110 through 11112, the Attorney General has been given the authority to approve surety bonds and the modification of those bonds, and there is no evidence that this required Attorney General approval was obtained for the amendment of the CIWMB 61 in this rulemaking. Specifically, Government Code section 11110 provides: “The form of all bonds of licensees, permittees, and all persons other than public officers and employees, furnishing bonds to a State department office, board, commission or bureau in pursuance of State law shall be on a form which form has been approved as to conformity with applicable law by the Attorney General.” Furthermore, Government Code section 11112 provides: “The approval, modification, or revocation of the Attorney General shall be by regulation filed with the Secretary of State” These Attorney General requirements apply even when modifications of an existing surety bond form are minor. In connection with this waste tire hauler rulemaking, there is no evidence in the rulemaking record or in the Attorney General’s regulations pertaining

to approved bond forms that the proposed amended CIWMB 61 form has been approved by the Attorney General in compliance with Government Code sections 11110 through 11112. Consequently, OAL cannot find that the proposed CIWMB 61 changes are in harmony with the statutory requirements relating to Attorney General approval of surety bonds and modifications of surety bonds, and the “Consistency” standard has not been satisfied.

C. NECESSITY

OAL must review regulations for compliance with the “Necessity” standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines “Necessity” as meaning: “the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.” The “Necessity” standard is further defined in OAL’s regulation on “Necessity” in section 10 of title 1 of the CCR. The rulemaking record for these waste tire hauler regulations does not present substantial evidence sufficient to meet the “Necessity” standard in two areas, as discussed below.

1. Regulation section 18457 – The Board proposes to make substantial additions and other changes to its existing regulation section 18457 pertaining to “Waste Tire Hauler Registration Denial, Suspension, and Revocation.” These proposed changes are of significance as they would govern the Board’s authority to refuse to issue or renew waste tire hauler registrations and to suspend or revoke those registrations once granted, with an obvious potential significant impact on waste tire hauler businesses. The rulemaking record contains a relatively limited explanation of the proposed changes to section 18457 in the Final Statement of Reasons, which reads as follows:

[Section] 18457(a) – Language is added to allow [the Board] to take disciplinary action against the hauler registration by denying the renewal of a waste tire hauler registration, if the hauler has failed to pay criminal, civil, or administrative penalties. This is consistent with the goal of protecting the public from individuals who are not following the requirements of these regulations. Additional language was added to this section to allow for denial, suspension, and revocation should a hauler violate other areas of the law while performing their services as a waste tire hauler. This information was brought to our attention during the 45-day comment period concerning Worker’s Compensation Fund violations. Adding the additional language will help ensure that used and waste tire haulers conduct their businesses in a legal and professional manner.

[Section] 18457(b) – The term “deny” and “up to 3 years” is added to this section to prevent future violations of these regulations. The time frames are consistent with other disciplinary actions within these regulations.

This explanation is not adequate to comply with the “Necessity” standard. The rulemaking record needs to include a more detailed presentation of Board’s rationale for

the proposed changes. In particular, a more specific and complete explanation is needed for the provision which would allow the Board to refuse to issue or renew a waste tire hauler registration when “[t]he hauler has violated federal, state, or local laws as determined in a final decision by the federal, state, or local agency responsible for enforcing those laws, and the violation(s) is related to health, safety, or environmental concerns of the violator’s waste tire hauler business, including but not limited to, Worker’s Compensation Fund violations.” The reference to “Worker’s Compensation Fund violations” (which possibly is intended to instead be a reference to “Workers’ Compensation Law violations”) is of particular concern as the Board’s authority to deny waste tire hauler registrations because of Workers’ Compensation violations may be questionable. (OAL is withholding judgment on the Board’s authority to deny licenses on the basis of Workers’ Compensation violations until we see a more complete explanation of the rationale for this provision. We reserve the right to raise an “Authority” or “Consistency” issue with regard to this matter upon the resubmittal of this rulemaking action, in the event that this regulatory provision is retained.)

With respect to Section 18457(b), the rulemaking record does not provide an adequate explanation of the necessity for the addition of the “up to three years” time frame for registration denials, suspensions, and revocations, in light of the language of the governing statute, Public Resources Code section 42960, which provides for not only suspensions, revocations, and denials for a period of “up to three years,” but also for certain suspensions, revocations, and denials for a period of “three to five years” and those which are made “permanently.” (The apparent tension between the proposed regulation section 18457(b) time frame of “up to three years” and the Public Resources Code section 42960 time frames also constitutes a “Clarity” concern, in that it is not easy to understand how the regulation would apply in relation to the statute.)

In addition to the “up to three years” concern, the second and third sentences of Section 18457(b), which were added during the 15-day comment period, need to be explained in the rulemaking record. These sentences read: “The Board may deny an application of a new or renewed waste tire hauler registration by issuing a statement of issues in accordance with Government Code section 11504. The denial is effective upon issuance by the Board and can be overturned upon a decision by the Board.”

Further, we note that, in the Board’s explanation of Section 18457(a), the reference to failure to pay “criminal” penalties is not in accord with the final version of the regulation text which deleted the reference to criminal penalties.

We also note that, in the Board’s explanation of Section 18457(a), the following sentence is not fully in accord with the regulation text: “Additional language was added to this section to allow for denial, suspension, and revocation should a hauler violate other areas of the law while performing their services as a waste tire hauler.” In the regulation text as proposed, Section 18457(a) pertains only to refusals to issue or renew waste tire hauler registrations (i.e., denials) and does not cover suspensions and revocations of registrations.

2. Regulation section 18466 – As discussed above under “Clarity,” the Board proposes to amend its regulation section 18466 pertaining to the “Procedure for Imposing Civil Penalties.” The amendments to this regulation would provide for three specific alternative means for service of process of a penalty-related accusation or complaint upon a respondent. The explanation for these changes to section 18466 in the rulemaking record (in the Final Statement of Reasons) reads: “Language is deleted and replaced with detailed information to improve the Board’s ability to serve process (legal documents) on used and waste tire haulers, used and waste tire generators, and end use facilities.” Given the significance of service of process in the context of the imposition of civil penalties, this general statement does not provide “substantial evidence” in support of the specific provisions for service of process being proposed. A better explanation of the rationale for the service of process provisions is needed to satisfy the “Necessity” standard.

D. INCORPORATION BY REFERENCE

In this rulemaking the Board proposes to incorporate by reference three forms (the forms numbered CIWMB 241, CIWMB 682, and CIWMB 683) not previously incorporated by reference in these regulations. In addition to these “new” forms, the Board proposes to amend the incorporation by reference of two existing forms (the forms numbered CIWMB 60 and CIWMB 61) to provide for revised versions of these two forms. Finally, the Board proposes to repeal the incorporation by reference of four existing forms (the forms numbered CIWMB 173, CIWMB 180, CIWMB 647, and CIWMB 648). In connection with these nine forms added, amended or repealed in this rulemaking, a number of legal requirements for “incorporation by reference” have not been satisfied, as discussed below.

Section 20 of title 1 of the CCR, OAL’s regulation pertaining to “Incorporation by Reference,” provides the following:

(a) “Incorporation by reference” means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

(b) Material proposed for “incorporation by reference” shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. Except as otherwise specified in section 11 of these regulations, OAL shall not review material proposed for “incorporation by reference” for compliance with the applicable standards of Government Code section 11349.1 when a California statute or other applicable law specifically requires the adoption or enforcement of the incorporated material by the rulemaking agency.

(c) An agency may “incorporate by reference” only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

(5) The regulation text specifies which portions of the document are being incorporated by reference.

(d) If the document is a formal publication reasonably available from a commonly known or identified source, the agency need not provide six duplicate copies of the document under Government Code section 11343(c).

(e) Where a regulation which incorporates a document by reference is approved by OAL and filed with the Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all provisions of the APA.

Specific problems relating to the forms in this rulemaking are the following:

1. New form CIWMB 241 -- This form is referenced in regulation section 18453(a). The incorporation by reference in that section is missing the date of the form and the statement that the form is "incorporated by reference."
2. New form CIWMB 682 -- This form is referenced in regulation section 18456.4(c). The incorporation by reference in that section is missing the statement that the form is "incorporated by reference."
3. New form CIWMB 683 -- This form is referenced in regulation sections 18460.1(f), 18460.1.1(f), and 18460.2(g). This form needs to be formally incorporated by reference in one of these sections, most likely in section 18460.1(f) since that is the first reference to the form. The incorporation by reference needs to include the full title of the form, the date of the form,

and the statement that the form is “incorporated by reference.” Unlike the other forms being added or amended in this rulemaking, the form CIWMB 683 was not included in the rulemaking file and was not attached to the final regulations. This form will need to be included in the rulemaking file, made available to the public, and added to the forms attached to the final regulations. (See also the discussion of this form CIWMB 683 in the “Clarity” section of this decision.)

4. Amended form CIWMB 60 – This form is initially referenced in regulation section 18454 and the requirements for incorporation by reference in that section have been satisfied (however, see the discussion of the additional Incorporation by Reference “Notice” and “Final Statement of Reasons” requirements below).

5. Amended form CIWMB 61 – This form is initially referenced in regulation section 18454 and the requirements for incorporation by reference in that section have been satisfied (however, see the discussion of the additional Incorporation by Reference “Notice” and “Final Statement of Reasons” requirements below, and also see the “Consistency” section of this decision with regard to the amended CIWMB 61 (a surety bond form) requiring Attorney General approval).

6. Repealed form CIWMB 647 – This form is currently incorporated by reference in regulation section 18450(a)(18), which will be section 18450(a)(20) after renumbering. The incorporation by reference of this form is now being repealed as the form has been superseded. A copy of the CIWMB 647 needs to be attached to the regulations in strikeout format to fully implement the repeal.

7. Repealed form CIWMB 173 – This form is currently incorporated by reference in regulation section 18450(a)(23), which will be section 18450(a)(26) after renumbering. The incorporation by reference of this form is now being repealed as the form will no longer to be used. A copy of the CIWMB 173 needs to be attached to the regulations in strikeout format to fully implement the repeal.

8. Repealed form CIWMB 180 -- This form is currently incorporated by reference in regulation section 18450(a)(24). The incorporation by reference of this form is now being repealed as the form has been superseded. A copy of the CIWMB 180 needs to be attached to the regulations in strikeout format to fully implement the repeal.

9. Repealed form CIWMB 648 – This form is currently incorporated by reference in regulation section 18450(a)(27). The incorporation by reference of this form is now being repealed as the form has been superseded. A copy of the CIWMB 648 needs to be attached to the regulations in strikeout format to fully implement the repeal.

10. Notice requirements for all new and amended forms – Pursuant to the section 20(c)(3) of the “Incorporation by Reference” regulation quoted above, documents being incorporated by reference are required to be identified by title and date in the informative digest of the original 45-day notice, and, if not previously identified in the 45-day notice, are then required to be identified by title and date in a subsequent 15-day notice. Since the informative digest in the original 45-day notice did not include an identification of each of the documents being

incorporated by reference, the Board should identify all of the new and amended forms by title and date in its next 15-day notice (assuming that the Board proceeds with this rulemaking and provides for an additional 15-day notice and comment period).

11. Final Statement of Reasons requirements for all new and amended forms – Pursuant to sections 20(c)(1) and 20(c)(2) of the “Incorporation by Reference” regulation quoted above, the Final Statement of Reasons is required to include specified statements pertaining to (1) the rationale for incorporating a document by reference rather than publishing the document in the CCR, and (2) the availability of the document incorporated by reference. These Final Statement of Reasons requirements need to be met with respect to the new and amended forms in this rulemaking. We note, however, that the Board would not need to meet the requirement of section 20(c)(1) for any new or amended forms that are also being published in the CCR in Appendix A of the Board’s regulations. (The Board has historically both incorporated by reference its waste tire hauler program forms and printed the forms in an “Appendix A” of the regulations.)

E. INCORRECT PROCEDURES AND DEFECTIVE DOCUMENTS

In addition to the problems discussed above relating to the substantive standards of the APA, there are also a number of problems relating to APA procedural requirements, including defective documents required as part of the APA process. Each of these problem areas is discussed below.

1. Final Statement of Reasons – Government Code section 11346.9, subdivision (a), provides that an agency adopting regulations shall prepare and submit to OAL a “Final Statement of Reasons,” which is one of the supporting documents included in the rulemaking file. The Final Statement of Reasons for the waste tire hauler regulations, while evidencing a substantial amount of effort on the part of the Board, does not fully comply with the requirements of the APA in several respects.

First, Government Code section 11346.9, subdivision (a)(1), provides that the Final Statement of Reasons shall include “[a]n update of the information contained in the initial statement of reasons” The Board provides most of the required update in its Final Statement of Reasons under the heading “Specific Purpose and Necessity of the Regulation.” However, this “update” contains a number of inaccurate or other otherwise insufficient discussions of proposed regulatory changes. For example, in relation to proposed regulation section 18454(a), the “update” states: “The date ‘9/02’ is deleted from the reference to form number CIWMB 60 and changed to ‘1/08’, which reflects the new revision date.” In fact, the more accurate and complete description of section 18454(a) is that amended versions of both registration-related forms CIWMB 60 and CIWMB 61 are being incorporated by reference and attached for printing in Appendix A, and that the CIWMB 60 is being revised from a version dated “03/06” [not 09/02] to a version dated “01/08” while the CIWMB 61 is being revised from a version dated “02/02” to a version dated “01/08.” Another example of an “update” problem is the description of proposed regulation section 18459(c)(2) which reads: “Language is added to this section to clarify that a generator must comply with manifesting requirements and to maintain consistency throughout this and other sections of those regulations. Manifesting requirements were addressed in these regulations; however, it was felt that more emphasis needed to be placed in the current

regulations.” This description is inaccurate since in the final version of the regulations no changes were in fact made to the existing language of section 18459(c)(2). Other concerns regarding inaccurate or otherwise insufficient discussions in the “update” portion of the Final Statement of Reasons have been discussed with the Board’s staff.

Second, the “alternatives considered” determination in the Final Statement of Reasons does not meet APA requirements. Government Code section 11346.9(a)(4) provides that the Final Statement of Reasons must include a determination that “no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.” While the Board makes a determination regarding alternatives considered on page 2 of its Final Statement of Reasons, the language of that determination does not conform to the required statutory language.

Third, the Final Statement of Reasons does not satisfy “Incorporation by Reference” requirements for the three new forms (the CIWMB 241, CIWMB 682, and CIWMB 683) and for the two amended forms (the CIWMB 60 and CIWMB 61). Pursuant to OAL’s regulation on “Incorporation by Reference” as set forth in CCR, title 1, section 20 (and quoted above in full and discussed in Section D of this decision), when a document is incorporated by reference, sections 20(c)(1) and 20(c)(2) require specified statements relating to the incorporation of the document in the Final Statement of Reasons. These requirements have not been satisfied in the Final Statement of Reasons for this rulemaking.

2. Updated Informative Digest – Government Code section 11346.9, subdivision (b), provides that an agency adopting regulations shall prepare and submit to OAL with the adopted regulation “an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel’s Digest on legislative bills.” The Updated Informative Digest for these waste tire hauler regulations did not fully comply with the statutory requirements in three respects.

First, the Updated Informative Digest contains little or no summary of the most significant immediately preceding laws and regulations – Public Resources Code sections 42950 through 42967 and the existing waste tire hauler regulations adopted pursuant to those statutes.

Second, the summary of the effect of the proposed regulatory action contains several errors and inaccuracies. For example, in describing the effect, one provision states: “A new one year exemption will be provided for the beneficial use of waste tires during certain materials transportation to accommodate those businesses that do not haul tires to an end use facility but rather, use the waste tires as bumpers or cushions to stabilize or protect the goods or materials being transported.” In fact, proposed regulation section 18453.1 provides that this “beneficial use hauling of used or waste tires” exemption may be issued for a period of “up to five years” (i.e., it is not a one year exemption). Another example is that, in connection with describing regulatory changes relating to new categories of authorized civil penalties, the Updated Informative Digest refers to adding “five new items” to the Penalty table and further states: “The

Penalty table will include new language to accommodate certain waste tire hauler offenses which were previously excluded.” In fact, four new penalty categories appear to have been added to Penalty Table I and some of the new penalty categories relate to waste tire generator and end-use facility offenses (i.e., the new penalties are not exclusively related to waste tire hauler offenses).

Third, the summary of the effect of the proposed regulatory actions is incomplete. For example, the Updated Informative Digest does not adequately summarize the effect of the changes to manifest system regulations (regulation sections 18459 through 18462). Other examples are that the summary of the effect does not mention the changes relating to the procedures for imposing civil penalties as contained in regulation section 18466 or the addition of a new form (the CIWMB 682) for notifying the Board of the use of a temporary registration certificate in regulation section 18456.4. While the Updated Informative Digest is generally not required to be a lengthy document since the governing statute specifically provides for a “clear and concise summary,” it should attempt to briefly summarize all of the substantive effects of the proposed regulations in a manner similar to a Legislative Counsel Digest.

3. Final Regulation Text Underline and Strikeout – OAL’s regulation pertaining to “Final Text: Underline and Strikeout,” as set forth in CCR, title 1, section 8, describes the required format for the rulemaking agency-certified final regulation text submitted to OAL for filing with the Secretary of State. Section 8(b) provides: “The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations.”

In connection with the final regulation text submitted to OAL for review and filing with the Secretary of State in this waste tire hauler rulemaking, the Board generally did utilize a single underline and strikeout format to show additions to and deletions from the existing CCR text. However, a number of errors were made in showing the existing regulation text and in showing the underline and strikeout of the changes being made in the final regulation text. OAL has discussed these minor inaccuracies with the Board’s staff.

4. Noticing of Regulation Text Changes in Underline and Strikeout – Government Code section 11346.2, subdivision (a)(3), provides that in originally-proposed regulation text (for the 45-day notice and comment period) the rulemaking agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations. In connection with further changes to regulation text in a subsequent 15-day notice and comment period, Government Code section 11346.8, subdivision (c), provides that the additional changes shall be “clearly indicated,” and OAL’s regulation on “Clearly Indicated Changes” at CCR, title 1, section 46 sets forth various methods for clearly indicating the additional changes. One of those methods is to use double underline and double strikeout.

In this waste tire hauler rulemaking, the Board generally noticed the regulation text changes properly, using single underline and single strikeout to show changes during the 45-day notice and comment period and using double underline and double strikeout during the subsequent 15-day notice and comment period. The final regulation text submitted to OAL for review did

contain some changes to the regulation text that had previously been noticed to the public. In most instances, where the final regulation text included language and other changes that had not previously been noticed in a manner satisfying underline and strikeout requirements, the changes were nonsubstantial in nature and not of concern. However, in a few instances substantial changes were included in the final regulation text that had not previously been properly noticed in underline and strikeout, as follows:

Regulation section 18456.3(d) – The phrase “business address” was added in the final regulation text without having been previously noticed in underline and strikeout.

Regulation section 18457(b) – The word “deny” and the phrase “up to 3 years” were added to the regulations during the 15-day notice and comment period but were incorrectly shown in single underline rather than being properly shown in double underline, which was the Board’s designated method for showing 15-day notice additions. Similarly, the following two sentences were added during the 15-day notice and comment period and were incorrectly shown in single underline rather than in double underline: “The Board may deny an application of a new or renewed waste tire hauler registration by issuing a statement of issues in accordance with Government Code section 11504. The denial is effective upon issuance by the Board and can be overturned upon a decision of the Board.”

Regulation section 18459.1(d) – The phrase “or mailing address or vehicle storage address” was added in the final regulation text without having been previously noticed in underline and strikeout.

To remedy these deficiencies, these changes should be clearly indicated (as if the changes were new) in the Board’s next notice of modified regulation text, assuming that the Board proceeds with this rulemaking and provides for an additional 15-day notice and comment period.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6225.

Date: October 20, 2009



Bradley J. Norris
Senior Staff Counsel

FOR: SUSAN LAPSLEY
Director

Original: Mark Leary
Copy: Cathy Blair