

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF FINAL RULEMAKING

Paint Stewardship Program

The Director of the Department of Energy and Environment (DOEE or Department), in accordance with the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq.* (2013 Repl.)); the Paint Stewardship Act of 2014, effective March 11, 2015 (D.C. Law 20-205; D.C. Official Code §§ 8-233.01 *et seq.* (2016 Supp.)); and Mayor’s Order 2015-229, dated October 7, 2015, hereby gives notice of amendments to Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR) by adopting a new Chapter 40 (Paint Stewardship) to establish the standards for the District’s Paint Stewardship Program.

The primary purpose of the proposed regulations is to implement the Paint Stewardship Act of 2014, which creates a producer responsibility program for postconsumer paint management, by establishing requirements for submission of a paint stewardship plan, annual reporting, collection of postconsumer paint, and paint stewardship program fees.

The Department published a Notice of Proposed Rulemaking on January 29, 2016, at 63 DCR 1083. The comment period closed on February 29, 2016, and the Department considered all the comments received. A summary of comments and responses is available online at <http://doee.dc.gov>. In response to comments, the Department has made non-substantive revisions that clarify the original intent of the rules and reduce the administrative burden of the rules by removing the requirements to: 1) submit a five-year projected budget with the first paint stewardship plan, 2) submit an amended plan based on specific Department findings, and 3) include total capital costs in the annual report.

These rules were adopted as final on March 28, 2016, and will become effective upon publication of this notice in the *D.C. Register*.

Title 20 DCMR, ENVIRONMENT, is amended by adding a new Chapter 40 as follows:

CHAPTER 40 PAINT STEWARDSHIP

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- 4000 PURPOSE**

4000.1 The purpose of this chapter is to implement the Paint Stewardship Act of 2014 (D.C. Law 20-205; D.C. Official Code §§ 8-233.01 *et seq.*) to create a producer responsibility program for paint in the District.

4001 PRODUCER PAINT STEWARDSHIP PLAN

4001.1 By April 1, 2016, a producer of paint sold at retail in the District, or a representative organization in which the producer is a member, shall submit a paint stewardship plan for the establishment of a paint stewardship program to the Department for approval that, in addition to the requirements outlined in the Act, includes:

- (a) A program budget; and
- (b) A policy regarding financial reserves.

4001.2 A producer of paint sold at retail in the District, or a representative organization in which the producer is a member, shall submit a modified paint stewardship plan if, at any time:

- (a) The producer or representative organization makes a change to the paint stewardship assessment that was approved by the Department as part of the paint stewardship plan;
- (b) The producer or representative organization makes a change to the types of postconsumer paint that will be collected by the stewardship organization under the paint stewardship plan; or
- (c) The producer or representative organization makes a change to the goals that were approved by the Department as part of the paint stewardship plan.

4002 ANNUAL REPORTING REQUIREMENTS

4002.1 On or before October 1, 2017, and annually thereafter, a producer or representative organization shall submit to the Department a paint stewardship program report for the previous calendar year that, in addition to the requirements outlined in the Act, includes:

- (a) A description of how each consumer of paint in the District had an opportunity to recycle and properly manage their postconsumer paint, including the number, location, and type of collection points located in the District;
- (b) A description of best management practices followed by collection points that shall include any training that the manufacturer or stewardship

organization provided or required of collection points to ensure proper collection and management of postconsumer paint;

- (c) A description of the disposition of postconsumer paint collected, by type and by estimated volume, including:
 - (1) The name and corporate address of each processor that manages the postconsumer paint under the program; and
 - (2) The name and corporate address of each transporter of postconsumer paint that is collected under the program;
- (d) A description of the total cost of implementing the program that includes the following:
 - (1) The assessment amount per container;
 - (2) The total volume of paint sold in the District during the preceding reporting period;
 - (3) The total cost of the program;
 - (4) The cost per gallon of the program during the prior year;
 - (5) The total cost of educational information provided to consumers and as a percentage of the total program cost;
 - (6) The total cost of transportation and processing and as a percentage of the total program cost;
 - (7) The total cost of program administration and as a percentage of the total program cost; and
 - (8) The total amount of surplus funding, if any;
- (e) A description of the methodology used to calculate the volume of paint sold and collected in §§ 4002.1(d)(2) and (d)(4), indicating any changes from prior years in the methodology;
- (f) An operating budget for the program for the next calendar year;
- (g) A description of the coordination of the paint stewardship program with existing local household hazardous waste collection programs; and
- (h) A description of qualitative goals and activities based on the paint stewardship plan achievement during the reporting period, any

adjustments to goals stated in the approved paint stewardship plan that may be made for the upcoming reporting period and accompanying rationale for those changes.

4003 COLLECTION OF POSTCONSUMER PAINT

4003.1 Postconsumer paint may be accepted at any collection location if all of the following conditions are met:

- (a) The collection location operates pursuant to a contract with a producer or representative organization that has submitted a paint stewardship plan approved by the Department, pursuant to the Act;
- (b) The collection location manages the postconsumer paint in accordance with District and federal laws and regulations;
- (c) Oil-based paint received at the collection location is non-RCRA hazardous waste, or otherwise exempt, or is not otherwise regulated under District and federal laws and regulations and received from either:
 - (1) A household; or
 - (2) A conditionally exempt small quantity generator; and
- (d) Oil-based paint received at the collection location is in liquid form and in its original packaging, or is in a closed container that is properly labeled.

4004 ENFORCEMENT

4004.1 Violation of any of the requirements of this chapter or the Paint Stewardship Act of 2014 (D.C. Law 20-205; D.C. Official Code §§ 8-233.01 *et seq.*), shall subject a person to the penalties set forth in this section.

4004.2 The Department may enforce a violation of this chapter by issuing one or more of the following:

- (a) Notice of violation; or
- (b) Notice of infraction.

4004.3 The Department may issue a notice of infraction without first issuing a notice of violation or threatened violation.

4004.4 Sanctions, including civil fines and penalties, may be imposed pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985, (D.C. Law 6-42; D.C. Official Code §§ 2-1801 *et seq.*).

4004.5 The Department may also initiate a civil action in the Superior Court of the District of Columbia to secure a temporary restraining order, preliminary injunction, or other relief necessary for enforcement of this chapter.

4004.6 Each instance or day of a violation of each provision of this chapter shall be a separate violation.

4005 ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW

4005.1 A person adversely affected by an enforcement action of the Department shall exhaust administrative remedies by timely filing an administrative appeal with, and requesting a hearing before, the Office of Administrative Hearings (OAH), established pursuant to the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code §§ 2-1831.01 *et seq.*), or OAH's successor.

4005.2 The appeal to OAH shall be filed in writing within fifteen (15) calendar days of service, or twenty (20) calendar days if service is made by United States mail.

4005.3 The Department may toll a period for filing an administrative appeal with OAH if it does so explicitly in writing before the period expires.

4005.4 OAH shall:

(a) Resolve a notice of infraction by:

(1) Affirming, modifying, or setting aside the Department's action complained of, in whole or in part;

(2) Remanding for Department action or further proceedings, consistent with OAH's order; or

(3) Providing such other relief as the governing statutes, regulations, and rules support;

(b) Act with the same jurisdiction, power, and authority as the Department may have for the matter currently before OAH; and

(c) Render a final decision that shall constitute a final agency action subject to judicial review.

4005.5 The filing of an administrative appeal shall not in itself stay enforcement of an action, except that a person may request a stay according to the rules of OAH.

4005.6 The burden of production in an appeal of an action of the Department shall be allocated to the person who appeals the action, except that it shall be allocated:

- (a) To the party who asserts an affirmative defense; and
- (b) To the party who asserts an exception to the requirements or prohibitions of a statute or rule.

4005.7 The final OAH decision on an administrative appeal shall thereafter constitute the final, reviewable action of the Department, and shall be subject to the applicable statutes and rules of judicial review for OAH final orders.

4005.8 Nothing in this chapter shall be interpreted to:

- (a) Provide that a filing of a petition for judicial review stays enforcement of an action; or
- (b) Prohibit a person from requesting a stay of the OAH proceedings according to the rules of the court.

4006 FEES

4006.1 On or before December 31, 2016, a producer or representative organization shall pay an initial fee of fifty thousand dollars (\$50,000) for submission of a proposed paint stewardship plan.

4006.2 On or before December 31, 2017 and annually thereafter, a producer or representative organization implementing a paint stewardship plan shall pay a fee of twenty six thousand dollars (\$26,000).

4006.3 Beginning in 2019, fees charged by the Department may be adjusted annually based on the change in the Consumer Price Index value published by the U.S. Department of Labor for all-urban consumers.

4099 DEFINITIONS

4099.1 When used in this chapter, the following terms shall have the meanings ascribed (some of the definitions were codified in the Act, indicated as [Statutory], and are reprinted below for regulatory efficiency):

Act - the Paint Stewardship Act of 2014, effective March 11, 2015 (D.C. Law 20-205; D.C. Official Code §§ 8-233.01 *et seq.*).

Conditionally Exempt Small Quantity Generator – a generator defined by the RCRA regulations in 40 C.F.R. Part 261, promulgated by the United States Environmental Protection Agency.

Distributor - a company that has a contractual relationship with one or more producers to market and sell paint to retailers in the District. [Statutory]

Environmentally sound management practices - procedures for the collection, storage, transportation, reuse, recycling, and disposal of paint, to be implemented by the producer, representative organization, or their contracted partners to ensure compliance with applicable federal and District laws and regulations and to protect human health and the environment. These procedures shall address adequate record keeping, tracking, and documenting the fate of materials, and adequate environmental liability coverage for professional services and for the contractors working on behalf of the producer or representative organization. [Statutory]

Household – a residential dwelling, including single and multiple residences.

Paint - interior and exterior architectural coatings sold in containers of five (5) gallons or less and does not mean industrial, original equipment, or specialty coatings. [Statutory]

Paint stewardship assessment - the amount added to the purchase price of paint sold in the District necessary to cover the paint stewardship program's cost of collecting, transporting, and processing the postconsumer paint District-wide. [Statutory]

Person – an individual, firm, partnership, company, corporation, nonprofit corporation, trust, association, organization, or any other private or governmental entity.

Postconsumer paint - paint not used and no longer wanted by a purchaser. [Statutory]

Producer - a manufacturer of paint who sells, offers for sale, or distributes that paint in the District under the producer's own name or brand. The term "producer" does not include a retailer that adds tint, colorant, or other additives to paint at the retail location. [Statutory]

RCRA - Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

Recycling - a process by which discarded products, components, and by-products are transformed into new usable or marketable materials in a manner in which the original products may lose their identity but does not include energy recovery or energy generation by means of incineration or combustion of discarded products, components, and by-products with or without other waste products. [Statutory]

Representative organization - a nonprofit organization created by producers to implement a paint stewardship plan required by D.C. Official Code § 8-233.02. [Statutory]

Retailer - a person or entity that offers paint for sale at retail in the District. [Statutory]

Reuse - the return of a product into the economic stream for use in the same kind of application as originally intended, without a change in the product's identity. [Statutory]

Sell or sale - any transfer of title for consideration including remote sales conducted through sales outlets, catalogs, or electronic means. [Statutory]