



**DATE:** September 3, 2014

**TO:** Alameda County Waste Management Authority Board

**FROM:** Gary Wolff, Executive Director

**BY:** Brian Mathews, Senior Program Manager & Enforcement Officer

**SUBJECT:** Enforcement Update

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### **BACKGROUND**

This memo updates the Authority Board on activities related to the enforcement of Alameda County Waste Management Authority ordinances. The Board has requested an annual update on the prior year's enforcement activities. The memo is in four parts: General Overview, Mandatory Recycling, Reusable Bag, and Facility Fee collection ordinances. The plant debris landfill ban ordinance is implemented in conjunction with the mandatory recycling ordinance.

### **GENERAL OVERVIEW**

At the September 2013 Authority Board meeting, staff presented the first update of on enforcement activities conducted for the implementation of ordinances adopted. Some key reminders from that update are:

- The Authority's ordinances have been adopted when a voluntary approach was deemed insufficient by the Board after a public engagement process.
- Ordinances are an attention getting device to facilitate behavioral migration toward social norms that support one or more social benefits.
- The agency's approach is to emphasize education and technical assistance prior to enforcement, and this approach is reflected in how resources are allocated.
- Authority enforcement efforts take a progressive approach. This means multiple opportunities are given to the regulated party, including coordinated offers of assistance from the City, hauler and the Authority, before monetary penalties are assessed.
- Revenue generation is not an objective of our enforcement program.

### **How Much is Spent on Enforcement?**

The budget for enforcement activities are distributed through four projects: (1250) Waste Prevention -- Reusable Bag Implementation; (2090) Mandatory Recycling Ordinance Implementation; (3220) Disposal Reporting; and (3240) Fee Enforcement. Of the four projects project 3240 – Fee Enforcement is the only project whose budget is 100% dedicated to enforcement activities. The enforcement budget as a percentage of total project costs ranges. The enforcement component is 27% of the disposal reporting project, 29% of the Reusable Bag Implementation project, and 53% of the Mandatory Recycling project. The table below breaks down the total enforcement budget.

<b>Project</b>	<b>Staff Cost</b>	<b>Hard Cost</b>	<b>Total Enforcement Budget</b>	<b>% of Project Budget</b>
3240 - Fee Enforcement	\$212,330	\$180,000	\$392,330	100%
2090 - Mandatory Recycling	\$591,043	\$487,700	\$1,078,743	53%
1250 - Reusable Bag	\$68,050	\$5,000	\$73,050	29%
3220 - Disposal Reporting	\$43,787	\$0	\$43,787	27%
<b>Total</b>	<b>\$915,209</b>	<b>\$672,700</b>	<b>\$1,587,909</b>	

<b>Core Budget</b>	<b>\$11,107,689</b>
<b>% of Core</b>	<b>14.3%</b>
<b>Total Agency</b>	<b>\$29,451,462</b>
<b>% of Total Agency</b>	<b>5.4%</b>

The FY14-15 enforcement budget is up \$0.38 million over the FY 13-14 of 1.2 million. This is due in part to a change in how costs are allocated in FY 14-15. In reporting the FY 13-14 enforcement budget only 75% of the Fee Enforcement project was attributed to the enforcement cost since some accounting and information management is needed to collect fees. However, in reporting FY 14-15 enforcement costs we are attributing 100% of the project costs because the accounting and information management aspects are necessary to understand the enforcement needs of the project. This approach is more transparent and tractable year to year. The enforcement budget has also increased as we begin to implement Phase 2 of the Mandatory Recycling Ordinance. The FTE allocation to enforcement activities is 3.3 full time equivalents distributed across 12 staff. This is 1.2 FTE over FY 13-14 due mainly to the improved cost allocation and 2 intermittent staff hired in FY 14-15.

### **Who Enforces?**

The Executive Director (ED) is the Enforcement Official as specified by the ordinances. In that capacity the ED has final authority and responsibility for implementing the ordinances. The ED

has delegated to Brian Mathews (Senior Program Manager), the role of Lead Enforcement Officer with the responsibility of interpreting the ordinances and maintaining policies and procedures necessary for the fair, equitable and transparent enforcement process. The ED, Brian Mathews and Tom Padia (Principal Program Manager, and leader of the discards management program group) make up the enforcement team with Authority Counsel providing legal review and support for enforcement activities.

Enforcement of the Mandatory Recycling and Reusable Bag ordinances is done in consultation with and coordination with the Primary Enforcement Representative (PER) of each member agency. No citations will issue for either ordinance without the approval of the PER who is designated by the chief executive of each participating member agency.

Enforcement is a partnership between the Authority, member agency staff, franchised haulers, and the regulated community. It requires timely and accurate communications. To facilitate the interactions we need a common understanding of the procedures and practices of enforcement. The Authority provides regular updates to the member agency technical advisory committee and routinely sends to all member agency PER's updates and guidelines of how the ordinances are being interpreted, implemented and enforced. The mandatory and bag ordinances each have their own websites ( [www.recyclingrulesac.org](http://www.recyclingrulesac.org) and [www.reusablebagsac.org](http://www.reusablebagsac.org) ) which provide detailed and up to date frequently asked questions (FAQs) and answers, resources such as signage and handout templates, and staff contacts. A hotline is in place for phone inquiries and email addresses are provided for enforcement staff.

Training and communication are key components to successful ordinance implementation. Agency enforcement staff and contractors have all been certified by the CalEPA Basic Inspector Academy; a two part 40 hour course which familiarizes staff with topic areas such as constitutional protections, environmental law, safety, interview skills, elements of a violation, evidence, note taking and report writing. Each course has a mock inspection, enforcement and trial element. Most member agency staff in the role of PER have also passed the CalEPA course or have equivalent experience. Monthly inspector trainings are conducted in-house by qualified staff, and inspection materials are updated frequently to keep current the understanding of how inspections should be conducted and how inspectors should conduct themselves. Senior program staff has more extensive training including code enforcement and course work on criminal investigations and environmental law.

### **How Do We Enforce?**

The intent of enforcement is to change behavior rather than to punish or generate revenue through fines. This intent is codified by the enforcement policies for each ordinance which require a three step process of Official Notification, Warning, and finally as a last resort, Citation. Implementing these policies requires staff and inspector trainings, inspections, and official communications with regulated parties about enforcement (including legal review). It also requires integrating these enforcement activities with other activities such as outreach

material development, media, website development, technical assistance, hauler-customer-jurisdiction relations, budget and project management, etc.

At each step of the enforcement workflow, education and technical assistance are emphasized and offered from multiple sources, including web based materials, handouts during inspections, brochures included in Official Notifications, hotline assistance and on-site training provided by StopWaste or member agency staff, contractors, or franchised haulers.

## **MANDATORY RECYCLING ORDINANCE**

### **Summary of Ordinance**

The Mandatory Recycling Ordinance (ACWMA Ord. 2012-01) (MRO) was adopted by the Authority Board on January 25<sup>th</sup>, 2012. For most regulated businesses, multifamily property owners, and transfer stations and landfills, the ordinance became effective July 1, 2012 with enforcement starting January 1, 2013. (Note: Pleasanton chose to participate in the countywide ordinance on an 8 month delayed implementation schedule.) Not all member agencies participate in the ordinance; the covered jurisdictions are Unincorporated Alameda County, Alameda, Albany, Berkeley, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City. Dublin, and the portion of the Oro Loma Sanitary district not in either San Leandro or Hayward are not participating. Approximately 90% of the county is covered by the ordinance. Castro Valley Sanitary District initially opted out of the ordinance but has since opted in for all accounts for Phase I and Phase II materials (with a delayed implementation date for Phase II materials via a compliance schedule waiver.)

The MRO was developed to be implemented in two phases with the first phase requiring the separation of traditional high value dry recyclables such as bottles, cans, cardboard and paper from the disposal stream. Phase I requirements applied to commercial properties with 4 cubic yards of service and above and multi-family properties with 5 units or more. Phase II of the ordinance became effective July 1, 2014 with enforcement beginning January 1, 2015 and adds food scraps and compostable paper to the list of materials that must be recycled and expands the ordinance to all commercial accounts regardless of garbage service size.

The ordinance requires multi-family commercial property owners to provide recycling containers adequate to receive all covered materials generated by their tenants and arrange for covered materials collection service and requires the distribution of educational materials on move-in and move-out of tenants.

An alternative compliance path for commercial and multi-family property owners who don't want to separate "covered materials" is to have their waste collected and processed through a High Diversion Mixed Waste Processing Facility (HDMWPF). In July, the Authority tested and certified the Davis Street Transfer Station Dry Mixed Waste Line at their Material Recovery Facility. Through the testing and certification process Waste Management of Alameda County

demonstrated that its facility could process mixed waste and have less than 10% of the residual stream be composed of high value covered materials. The San Leandro facility is the first and only (to our knowledge) facility in the State of California with this certification.

Member agencies opted into Phase II effective July 1, 2014 are Livermore, Albany, Berkeley, Emeryville, Alameda, Piedmont and unincorporated Alameda County. Oakland, San Leandro, Newark, and Fremont have opted into Phase II on a delayed implementation schedule. Hayward, Union City and Pleasanton have opted out of Phase II while certain franchise issues are resolved. The City of Dublin and the parts of Oro Loma Sanitary District not in San Leandro and Hayward will continue to not be covered by the Mandatory Recycling Ordinance unless their governing bodies decide to opt in at some future time.

**Enforcement To Date**

Table 1 summarizes enforcement activity to date under the MRO. The number of inspections is higher than the number of covered accounts because many commercial properties have been inspected twice and also due in part to no access on the first visit which necessitates a repeat visit. While the ordinance prohibits the disposal of covered materials, the initial inspection threshold for a ‘covered material in the garbage violation’ has been set at approximately 25% or more of the contents of a container. This initial practice makes clear to the recipient of an Official Notification that we are not enforcing against petty violations. It also has the effect of “getting the word out” as merchants and chain stores are notified and they realize they need to get on board with their neighboring businesses already in compliance. As Phase II begins in January, the threshold for a covered material violation will be lowered to 10%. The ordinance has a zero tolerance for disposal of recyclable material, however a waiver is available for businesses that generate less than 10% and our countywide objective is less than 10% “good stuff in the garbage”. If a business is sent an Official Notification, they are given 90-120 days to correct the deficiency. If no violation is found upon re-inspection, the frequency of future inspections will be reduced.

**Table 1: Mandatory Ordinance Enforcement Activity to Date**

Activity	Count
Regulated Parties <sup>1</sup>	10,416
Inspections Conducted <sup>2</sup>	16,224
Official Notifications Sent <sup>3,4</sup>	1,889 (18%)
Warnings Sent <sup>5</sup>	272 (2.6%)
<ol style="list-style-type: none"> <li>1. 6001 Multi-Family accounts, 4415 business accounts.</li> <li>2. Inspection conducted is higher than regulated parties due to repeat inspections.</li> <li>3. 18% of the regulated community has been officially notified.</li> <li>4. The majority of notifications sent are for no recycling containers or service. This is considered a 'one-time violation' if corrected.</li> </ol>	

5. 2.6% of the regulated community have violated the ordinance twice

### **Technical Assistance Related to the Ordinance**

The Business Technical Assistance (TA) team provided assistance to every covered commercial account that requested TA from us, unless the member agency or hauler asked that they be referred to them for follow-up. In total, the team reached 714 covered commercial accounts in FY13/14. Of those businesses reached, 282 received first-time site assessments and 169 received follow-up proposals/recommendations. A total of 173 businesses began new recycling and/or organics collection programs. The TA team targeted businesses in two ways: through enforcement referrals such as official notification letters and the Ordinance Help Line, and through proactive targeting coordinated with City staff to reach out to businesses with little or no recycling service. A full report of the FY 2013-2014 Business Technical Assistance project will be available in October, with some highlights from the report below

- Businesses are more responsive to set up a recycling program after receiving a letter of violation than they were in the past, under a voluntary program. In many cases, businesses contact their service providers without assistance or prompting from our Business TA team to initiate new recycling service after receiving an enforcement letter.
- The Customer Relations Management (CRM) system we have developed has allowed Client Representatives to communicate with enforcement staff and be on the same page about where a business is on the enforcement spectrum. Additionally, photos from inspections allowed Client Representatives to have a more engaging and informed conversations with businesses around compliance issues.
- Estimated net change in cost that these 173 businesses realized was \$155,273 in savings, with overall GHG emissions reduction of 12,565 mtCO<sub>2</sub>e.

### **Enforcement Challenges and Lessons Learned**

The enforcement effort relies heavily on data from 6 major and several minor service providers who all track and manage their customer account information differently. Data from the haulers is often incomplete and sometimes out of date, and not formatted for easy electronic transfer. A tremendous amount of coordination is needed with haulers to verify information and do data clean-up. This year efforts were successful in getting the haulers to submit the service level data in a uniform format and an outside data management contractor was hired to assist in preparing the data for transfer and update to the CRM database.

We have developed and deployed (and are continuing to develop and deploy as Phase II begins) a Microsoft Dynamics CRM database which provides inspectors with real time account information and allows them to collect data on tablets and upload pictures of compliance issues for timely processing by enforcement staff. Even with this powerful tool, data management continues to be a challenge moving forward.

Another challenge has been access at multi-family and commercial properties. Inspectors strictly adhere to constitutional privacy protections and only conduct plain view inspections at the point of garbage collection. If access is not immediately available permission is sought from a property manager or responsible party. Frequently property managers are absent and/or security barriers stymie inspector's access to the garbage collection location. Still, nearly 75% of multi-family buildings that we attempted to inspect (and we inspected more than 50% of all multi-family buildings) were inspected successfully in the first round. Of violations found, 98% were for inadequate recycling service.

To overcome the access challenge, the enforcement staff has instituted an administrative compliance review procedure for Multi-Family. Hauler account information is reviewed to determine if recycling service is being provided. If no record of recycling service is evident, the property is sent an Official Notification requiring them to get recycling service or demonstrate through invoice or other records that service is being provided. Future inspections for multi-family buildings will focus on those situations where the property owner or manager does not respond to the notice in a satisfactory manner.

As Phase II rolls out two new challenges are evident early on: 1) the number of covered accounts increases by more than 300%, and 2) not all business accounts will generate more than 10% organics in their garbage containers, even if they do not have separate organics collection. For those jurisdictions which have opted in, the number of covered accounts increases over Phase I covered accounts by 336%. To manage the increase only a small number of cart accounts will be inspected with the remaining going through an admin review. By not inspecting cart accounts, the increase in inspections is somewhat more manageable at a 190% increase over Phase I inspections. Additional agency resources will need to be committed to support the inspection effort. Not all business accounts will need to get organics recycling service because they don't generate significant quantities of organics. The MRO team will target organics inspections to High Organics Generators (HOG's) identified as those businesses that have food handling permits from County or City of Berkeley Environmental Health Departments, California Dept. of Food and Agriculture, or other food permitting regulators like USDA. This will facilitate an innocent until proven guilty approach, and reduce the burden on the regulated community of having to get organics recycling service they may not use very much.

Finally, despite our best efforts, sometimes we got it wrong. The inspector didn't see the recycling container or the database of hauler account information was not up to date for that account, etc. We've sent out Official Notifications erroneously. When an Official Notification has gone out erroneously and is brought to our attention, we ask the customer to provide some form of receipt showing the service is being provided and we rescind the Notification. We also apologize for the error and explain what we are doing to prevent such errors in the future.

In early August members of the project team presented the Mandatory Recycling enforcement program to a standing room only crowd of over 100 attendees of the California Resource Recovery Association meeting in San Jose. As Phase II rolls out, we will likely have the largest locally enforced mandatory recycling program in California.

**REUSABLE BAGS**

**Summary of the Ordinance**

The Reusable Bag Ordinance (ACWMA 2012-02) (RBO) was adopted by the Authority Board on January 25<sup>th</sup>, 2012. The purpose of the ordinance is to reduce the use of single use carryout bags and promote the use of reusable bags at the point of sale in Alameda County. All fifteen member agencies with stormwater management responsibilities, covering the entire County, chose to participate. The ordinance affects approximately 1,288 full-line, self serve retail stores in Alameda County. They include grocery stores, pharmacies, convenience stores that sell milk, bread, soda and snack food, and liquor stores.

**Enforcement To Date**

Much like the MRO, the RBO ordinance implementation relies more heavily on education and outreach than on enforcement. Marketing materials, table top and counter displays at check-out locations, posters, post-cards and other informational material has been critical to informing affected businesses and customers of the change. There was an extensive outreach campaign in 2012, prior to the beginning of enforcement in 2013. Enforcement activities in FY 13-14 are summarized in Table 2.

**Table 2: Bag Ordinance Enforcement Activity to Date**

Activity	Count
Regulated Parties <sup>1</sup>	1,288
Enforcement Inspections Conducted <sup>2</sup>	1,368
Notifications Sent <sup>3</sup>	207 (16%)
Follow-ups <sup>4</sup>	207
<ol style="list-style-type: none"> <li>1. Regulated stores dropped as a result of an inspection which found they did not meet the definition of Store per the ordinance.</li> <li>2. All covered stores were inspected by the end of FY 13-14. Inspections are greater than regulated parties per note number 1.</li> <li>3. Enforcement actions only occur for distributing single use non-reusable bags, or not charging or not itemizing the charge on the customer receipt.</li> <li>4. 207 Stores will be re-inspected in FY 14-15 using MRO inspection resources.</li> </ol>	



### **Enforcement Challenges and Lessons Learned**

The biggest challenge so far is the unintended consequence of some stores migrating to 'thicker plastic' bags which may or may not meet the strict definition of reusable in the ordinance. Because the ordinance relies on a definition of reusable which can only be determined by laboratory testing it can be costly to engage in an enforcement action. Also, lab tests the Authority has conducted have had mixed results with some bags passing and seemingly identical bags failing. The factors which dictate pass/fail sometimes are as minor as which batch of resin was used or other factors of manufacturing which cannot be anticipated or tested for. Some pass and some fail independent testing for strength, or are smaller than specified in the ordinance. On the positive side large corporate stores and chains were compliant from the start and predominately moved from plastic to paper or no bags, reducing the need to inspect these stores.

There are many vendors and varieties of thicker plastic bags and issuing citations against those that fail testing would not address the entire problem. It is most often the small corner market that is buying bags by the case who would suffer from a more deliberate enforcement effort. They are buying bags which are being marketed to them as meeting the requirements of the ordinance, and some do and some don't. The ordinance does not apply to manufacturers and distributors where enforcement could affect more of a change. To enforce based on the strict definition in the ordinance would require a significant increase in the testing budget of the project. Laboratory test results would be the evidence to take enforcement action which would hold up to challenge and to show plastic bags did not meet the reusable standard in the ordinance. In the meantime, we point stores to the website which has a list of compliant bags which are available and have been tested. We call this the 'safe harbor' list of bags.

The Authority Board will be considering the merits of increasing the per bag charge in FY 14-15 and expansion of the ordinance to all retail (including restaurants as some communities have done) or to some subset of all-retail.

### **FACILITY FEE COLLECTION**

The Authority's facility fee of \$4.34 per ton landfilled applied historically only to 'disposed tons' (mostly, conventional waste from residences and businesses) at landfills in Alameda County, or disposed tons hauled by franchised haulers to out of County landfills. [The phrase 'disposed tons' is a term of art created by the CA legislature in 1995 when they created a category of wastes deposited in landfills but not considered as disposed (so-called "beneficial reuse," which includes "alternative daily cover.")] In 2009, the Board expanded the coverage of the fee to all waste (disposed and other) originating in Alameda County and deposited in landfills anywhere in California. This expansion in the coverage of the fee was done to create a more equitable distribution of fee burden across types of waste and landfill locations. However, the fee on

“other waste” (contaminated soils, biosolids, auto shredder fluff, and other wastes categorized as beneficially reused by the landfill operator) was sunset as of January 1, 2013 as part of agreements with the two companies that own landfills in County (Waste Management and Republic Services) in exchange for investments in diversion facilities and assistance in designing a more effective fee system.

The Authority Board adopted the Facility Fee Collection Ordinance (ACWMA Ord. 2009-01) in 2009 in order to provide clear administrative procedures for enforcing collection of the facility fee. Prior to adopting the ordinance, the only means of enforcing the fee was litigation.

Collecting the fees on waste exported from the county continues to be challenging. For the most part, once a hauler has been identified and the obligations of the ordinance are made known to them, the hauler generally complies. In FY 2013-14 Authority Staff collected \$678,279 in out of county fees. That figure is almost twice what was collected in the previous three year period due in part to hiring dedicated (retired) Alameda County Sheriffs staff whose focus is solely on Facility Fee collections, and in part because some of the fee payments represent tonnages disposed in previous years but for which payment was received by the Agency in FY 13-14.

In FY 13-14 the Facility Fee enforcement team began to introduce an on-line fee payment program to facilitate a more user friendly and paperless reporting and payment process. The platform is a web-based program which allows regulated entities to register and report and remit the facility fee payments on line. The program, MyGov, is widely used in city building departments for project permitting and inspection. Those same features have been customized to track Facility Fee payments and enforcement actions.

In FY 13-14, we experienced the first appeal of a citation issued to a regulated party. The amount of the citation was for \$70,983 of which \$66,583 was Facility Fees and the remainder was the fine for non-payment. The regulated party challenged several aspects of the citation including our authority to issue an administrative citation, the regulated party's obligation under the ordinance, and the administrative process. The appeal process called for a review in front of an appeal hearing officer, arranged by Pat Cabrera in her role as hearing administrator (separate by policy from the ED's role as Enforcement Official), and was held at the Authority offices. Brian Mathews, backed up by Authority Counsel and staff Investigator Dean Stavert, represented the Authority at the hearing. The regulated party was represented by an attorney who strongly made the case for dismissal. The appeal hearing officer upheld the citation against the regulated party, who then exercised their right under the appeal process to request Superior Court review of the citation. Authority Counsel was then placed in a leadership role for the collection process. Before the calendared hearing was to occur, however, the regulated party sought to settle. The settlement we agreed to was for the full amount of the citation (fee plus fine).

Although the appeal process was new to us, and resource intensive, it was a positive experience overall that validated our enforcement policies and procedures. One lesson learned from the process resulted in a minor modification to future citation language.

Challenges continue for Facility Fee enforcement which are being addressed through a multi-pronged effort. In January, ED Gary Wolff, along with Board President Don Biddle, Board Member Dan Kalb, and Authority staff Brian Mathews and Tom Padia met with CalRecycle Director Carroll Mortensen and Deputy Director Scott Smithline to discuss difficulties in getting information from some landfills that have refused to provide some information. While specific outcomes were not reached, the parties agreed that the state Disposal Reporting System (DRS) -- a potentially important source of data for enforcement -- has some serious deficiencies.

Enforcement staff continues to develop cooperative relationships with other entities that encounter the same difficulties collecting fees and with those who can assist with their collection. To collect fees from fee evaders, solid evidence is required. Obtaining such evidence is a significant work effort, and there are limitations to how effective our fee enforcement can be under current conditions. Options to strengthen our position include statewide legislation, local legislation, or legal actions to obtain information under current laws. These options have been discussed with the Board previously, and we will continue to consult with the Board as we work to more effectively collect fees in the future. As a final note, reducing fee evasion is not just a revenue issue, it is also essential to be fair to those who do pay fees.

#### **RECOMMENDATION**

None. This report is informational.