



1 the taking of additional evidence. The parties submitted opening and rebuttal briefs, including  
2 declarations and exhibits, and oral argument was heard on May 8, 2019.

3  
4 **II. LAW**

5 The Rejection of the Proposed Decision is authorized by Government Code section  
6 11517. Within 100 days of receipt of a proposed decision, “agency may ... [r]eject the proposed  
7 decision, and decide the case upon the record, including the transcript ... with or without taking  
8 additional evidence.” (Cal. Gov. Code § 11517 (c)(2)(E).) “The agency itself shall not decide  
9 any case provided for in this subdivision without affording the parties the opportunity to present  
10 either oral or written argument before the agency itself.” (Cal. Gov. Code § 11517(c)(2)(E)(ii).)  
11 As noted above, the parties were given the opportunity to make both written and oral arguments,  
12 and to present additional evidence, which they availed themselves of.

13 The authority of the agency itself to decide the case after rejecting a proposed decision  
14 includes authority to decide some *but not all* issues in the case. (Cal. Gov. Code §  
15 11517(c)(2)(E)(iii). Here, CalRecycle leaves intact Judge DeCure’s finding that cause exists to  
16 impose a civil penalty on CARE for failing to demonstrate continuous meaningful improvement  
17 during the 2016 reporting period. However, it rejects the penalty amount of \$750 per day for a  
18 total of \$274,500, imposing instead a more substantial penalty of \$5,000 per day for a total of  
19 \$1,830,000.

20 **III. FACTUAL BACKGROUND**

21 CalRecycle is responsible for overseeing the carpet stewardship program and enforcing  
22 its laws (Former Pub. Res. Code, §§42970-42983)<sup>1</sup> and corresponding regulations (Cal. Code  
23 Regs., tit. 14, §§ 18940 et seq.)

24 CARE is a nonprofit corporation pursuant to section 501(c)(3) of Title 26 of the United  
25 States Code, whose stated purpose is to increase the reclamation and stewardship of

26  
27 

---

<sup>1</sup> Certain sections of the Carpet Law were amended, effective January 1, 2018. (Stats. 2017, ch. 794, §§ 1—9.)  
Unless otherwise stated, all further references to the Public Resources Code are to the former code sections  
(effective January 1, 2011 through December 31, 2017), as those were the laws in effect at all times relevant to the  
matters herein.

1 postconsumer carpet. CARE was established in 2002 as a result of a Memorandum of  
2 Understanding (MOU) signed by members of the carpet industry, government representatives,  
3 nongovernmental organizations, and entrepreneurs. Since 2011, CARE has been the exclusive  
4 carpet stewardship organization representing carpet manufacturers authorized to sell carpet in  
5 California.

6  
7 *California's Carpet Stewardship Program*

8 Effective January 1, 2011, the California Legislature adopted Assembly Bill 2398 (Stats.  
9 2010, ch. 681 (Carpet Law)), becoming the first state in the nation to establish a private-sector  
10 designed and managed statewide carpet stewardship program (California Program). (Pub. Res.  
11 Code, §§ 42970-42983.) In enacting the law, the Legislature made the following findings:

- 12 (a) Discarded carpet is one of the 10 most prevalent waste materials in California  
13 landfills, equaling 3.2 percent of waste by volume disposed of in California in 2008.  
14 Because carpet is heavy and bulky, it imposes a significant solid waste management  
15 cost on local governments.
- 16 (b) Numerous products can be manufactured from recycled carpets, including carpet  
17 backing and backing components, carpet fiber, carpet underlayment, plastics and  
18 engineered materials, and erosion control products. Several carpet recycling facilities  
19 currently operate in California, producing products and feedstock for products made  
20 from recycled carpet.
- 21 (c) The United States carpet industry has established a third-party nonprofit organization,  
22 the Carpet America Recovery Effort, also known as CARE, to work with state  
23 governments to increase the amount of recycling and reuse of postconsumer carpet  
24 and reduce the amount of carpet going to landfills.
- 25 (d) CARE represents at least 90 percent of the United States carpet manufactures and 95  
26 percent of the volume of carpet sold in the United States.
- 27 (e) According to CARE, in 2008, the most recent year for which data are available, 5.2  
percent of carpet was diverted from landfills and 4.3 percent was recycled.

1  
2 (f) It is in the interest of the state to establish a program, working to the extent feasible  
3 with the carpet industry and related reclamation entities, to increase the landfill  
4 diversion and recycling of postconsumer carpet generated in California.

5 (AB 2398, Chapter 681, Statutes of 2010.)

6 The purpose of the Carpet Law is to increase the amount of postconsumer carpet that is  
7 diverted from landfills and recycled into secondary products otherwise managed in a manner that  
8 is consistent with the state's hierarchy for waste management practices: (1) source reduction, (2)  
9 recycling and composting, and (3) environmentally safe transformation and environmentally safe  
10 land disposal. (Pub. Res. Code § 42970, in conjunction with § 40051.)

11 CalRecycle is responsible for: approving or disapproving carpet stewardship plans  
12 submitted by manufacturers or their designated carpet stewardship organization; reviewing  
13 annual reports to verify the objectives of the plan are being met; and providing oversight and  
14 enforcement to ensure a level playing field among carpet manufacturers. (Pub. Res. Code, §§  
15 42973-42975, and 42978.) For manufacturers to be in compliance, they must have an approved  
16 plan, individually or as part of a stewardship organization, which: (1) achieves the purposes of  
17 the program; (2) includes goals that increase the recycling of postconsumer carpet, increase the  
18 diversion of postconsumer carpet from landfills, increase the recyclability of carpets, and  
19 incentivize the market growth of secondary products made from postconsumer carpet; (3)  
20 describes proposed measures for managing postconsumer carpet consistent with the state's solid  
21 waste management hierarchy; and, (4) includes a funding mechanism that provides sufficient  
22 funding to carry out the plan and demonstrate "continuous meaningful improvement" in  
23 recycling output rate and other goals included in the approved plan. (Pub. Res. Code, § 42972,  
24 subd. (a).)

25 A carpet stewardship organization is "an organization appointed by one or more  
26 manufacturers to act as an agent on behalf of the manufacturers to design, submit, and administer  
27 a carpet stewardship plan." (Pub. Res. Code § 42971(e)(1)(A).) CARE is the sole carpet  
stewardship organization for the State of California. (Pub. Res. Code § 42971(e)(2).) When the

1 stewardship program first launched in 2011 and continuing through 2013, state law required  
2 consumers be assessed five cents per square yard of all carpet purchased in California to fund  
3 CARE's operation as the carpet stewardship organization. (Pub. Res. Code § 42972.5(a).)

4 Pursuant to Public Resources Code section 42975(a), CARE is required to demonstrate  
5 that it has achieved "continuous meaningful improvement" in the rates of recycling and diversion  
6 of postconsumer carpet subject to the stewardship plan and in meeting the other goals included in  
7 the plan. To demonstrate "continuous meaningful improvement," CARE must submit an annual  
8 report detailing its activities for the reporting period, including: (a) the amount of carpet sold by  
9 square yard and weight in the state; (b) the amount of postconsumer carpet recycled; and, (c) the  
10 amount of postconsumer carpet recovered but not recycled, by weight, and its ultimate  
11 disposition. (Pub. Res. Code § 42976.)

12 CalRecycle shall review the annual report to determine if the carpet stewardship  
13 organization has complied with the law by demonstrating "continuous meaningful improvement"  
14 in the recycling and diversion rates of postconsumer carpet. (Pub. Res. Code § 42973.)

15 In determining compliance, CalRecycle shall consider: (1) the baseline rate of  
16 compliance against which the demonstrated improvement is compared; (2) the goals included in  
17 the CARE MOU; and, (3) information provided in the organization's report to CalRecycle.  
18 (Pub. Res. Code § 42975.)

19  
20 *CARE Compliance History*

21 In March 2011, CARE submitted its stewardship plan (Plan) to CalRecycle. The Plan  
22 (version 1.4) included a primary goal of attaining a recycling output rate of 16 percent by 2016.  
23 Additional goals included: increase the diversion of postconsumer carpet from landfill disposal;  
24 use recycled carpet in secondary materials manufacturing; increase education and outreach;  
25 increase convenient collection; and increase carpet recyclability. On January 17, 2012,  
26 CalRecycle conditionally approved the Plan, and required CARE to resubmit the Plan after one  
27 year to refine their specific goals and establish a baseline from which progress in recycling  
output could be measured. CARE requested and was granted an extension of time to resubmit

1 the Plan. Thereafter, the Department reviewed eight CARE carpet stewardship plans and three  
2 CARE Addendums to CARE's carpet stewardship plans prior to 2016.

3 On December 23, 2013, CARE submitted a revised Plan (version 3.0), which also  
4 included a goal of a recycling output of 16 percent by 2016. In addition, version 3.0 identified a  
5 baseline recycling rate of 12 percent (based on the second quarter of 2012), and a goal of  
6 increasing the recycling rate by one percent per year, until a rate of 16 percent was attained by  
7 2016. On January 21, 2014, CalRecycle approved the Plan, version 3.0. On March 10, 2014,  
8 CARE submitted minor corrections to the approved Plan (versions 3.2 and 3.2.2), which did not  
9 change the Plan in terms of recycling output and other projected recycling goals. CalRecycle  
10 accepted these minor corrections.

11 On July 1, 2014, CARE submitted an Annual Report for the 2013 calendar-year reporting  
12 period. The report listed a 12.2 percent recycling output rate for 2013. In mitigation, CARE  
13 noted that two California recycling processors had closed down during the reporting period.  
14 CARE further noted that three new recycling processors were considering starting operations by  
15 the end of 2013. In September 2014, CalRecycle reviewed the report and determined that the  
16 stewardship program was noncompliant in 2013, as it had not achieved the goals set forth in the  
17 Plan, with the last seven quarters—i.e., from the second quarter of 2012 through the fourth  
18 quarter of 2013—showing “no gain in the recycling rate.” CalRecycle noted that CARE had  
19 only two years of reporting, recent facility closures had impacted market dynamics, and the  
20 available data was insufficient to conclude that CARE would not meet its stewardship goals as  
21 yet. For these reasons, CalRecycle delayed taking administrative action against CARE due to  
22 noncompliance with the Plan.

23 On July 1, 2015, CARE submitted an Annual Report for the 2014 calendar-year reporting  
24 period. The report listed an overall recycled output rate of 12.1 percent during 2014, with a  
25 downward trend to 11 percent reported in the fourth quarter. CARE asserted it increased the  
26 carpet fee assessment and restructured other incentives to encourage recycling. CARE also  
27 attributed the flat recycling rate, in part, on the decline in crude oil price from \$105 per barrel in  
2012, to \$93 per barrel in 2013, to \$71 per barrel in 2014.

1 CalRecycle evaluated the 2014 Annual Report in September 2015 and found that CARE  
2 failed to demonstrate continuous meaningful improvement in the recycle output rate, did not  
3 respond to market changes in a timely manner, did not provide services in all counties,  
4 underutilized its fund surplus, and made insufficient outreach efforts to its stakeholders.  
5 CalRecycle also made several specific recommendations to help CARE improve its recycling  
6 rate, and requested that CARE submit a Plan Amendment and revised budget by November 30,  
7 2015, for CalRecycle's review.

8 On October 9, 2015, CARE submitted for CalRecycle's review an Addendum No. 2 to  
9 the Plan, which proposed establishing grant and loan programs. On October 27, 2015,  
10 CalRecycle approved a limited pilot grant program. On November 30, 2015, CARE submitted  
11 for CalRecycle's review an Addendum No. 3, which proposed to increase carpet assessments and  
12 recycling incentives, and to implement other programmatic changes responsive to CalRecycle's  
13 prior noncompliance finding. On January 26, 2016, CalRecycle approved Addendum No. 3.

14 On July 1, 2016, CARE submitted its Annual Report for the 2015 calendar-year reporting  
15 period. The report listed an overall recycle output rate of 10 percent during 2015 and no  
16 improvement in the diversion rate. CARE asserted it demonstrated "continuous meaningful  
17 improvement in the face of the many dramatic changes within the 12 months of 2015,  
18 particularly in its actions taken in the areas of "recyclability, reuse, convenient collection,  
19 outreach/education and market development." CARE's efforts included: expanding to 23 drop-  
20 off sites in 22 counties, with the expectation of expanding to all counties by July 2017; doubling  
21 its outreach/education budget and launching several communication initiatives targeting  
22 consumers; and adopting changes to improve responsiveness to market changes.

23 In September 2016, CalRecycle evaluated CARE's 2015 Annual Report and found that  
24 CARE failed to demonstrate continuous meaningful improvement in its postconsumer recycling  
25 and diversion rates. Specifically, CalRecycle found: (1) the recycled output and diversion rates  
26 for 2015 were lower than the goals outlined in the Plan; (2) several large population centers  
27 continued to lack convenient access to carpet recycling; (3) CARE's education, marketing, and

1 outreach did not result in increased carpet recycling or diversion; and, (4) CARE was still not  
2 responding to market changes in a timely manner.

3 Based on its findings, CalRecycle initiated an administrative/enforcement action against  
4 CARE by filing an Accustion in CalRecycle Case No. 2017-001-CARPET, and seeking  
5 monetary penalties due to CARE's noncompliance with the stewardship program during 2013,  
6 2014, and 2015.

7 On September 26, 2017, an Administrative Law Judge Tiffany L. King (Judge King)  
8 heard the matter in OAH Case No. 2017045578 (2017 OAH Hearing); on February 13, 2018,  
9 Judge King issued a proposed decision. She found that CalRecycle established by a  
10 preponderance of the evidence that CARE did not comply with the approved Plan in 2013, 2014,  
11 and 2015 because it failed to demonstrate continuous meaningful improvement for each  
12 reporting period. (Pub. Resources Code § 42975(a).)

13 For failing to demonstrate continuous meaningful improvement in the 2013 reporting  
14 period, Judge King imposed a civil penalty of \$500 per day, for a total of \$182,500.

15 For failing to demonstrate continuous meaningful improvement in the 2014 reporting  
16 period, Judge King imposed a civil penalty of \$750 per day, for a total of \$273,750.

17 For failing to demonstrate continuous meaningful improvement in the 2015 reporting  
18 period, Judge King imposed a civil penalty of \$1,500 per day, for a total of \$547,500<sup>2</sup>.

#### 20 **IV. EVIDENTIARY ISSUES**

21 At the 2017 OAH hearing, CARE and CalRecycle stipulated to the admission of Exhibits  
22 1—80. Exhibits 1--80 include CARE's plans and addendums (Exhibit 1—3, 7, 8, 10—12),  
23 CalRecycle staff's Requests for Approvals (RFA) of CARE's annual reports (Exhibits 13—15,  
24 19—21), CARE's Annual Reports (Exhibits 16—18,), CARE's Quarterly Reports (Exhibits  
25

---

26 <sup>2</sup> On April 25, 2018, Director Smithline reduced the 2015 penalty imposed by Judge King pursuant to Government  
27 Code section 11517(c)(2)(B) & (C) to \$1000 per day, for a total of \$365,000. Pursuant to Public Resources Code  
section 42978, a violation must be intentional, knowing or negligent in order to exceed \$1,000 per day, and Judge  
King expressly found that CARE was not negligent during the 2015 reporting period. Although Director Smithline  
reduced the penalty, he expressed strong disagreement with the Judge King's determination of no negligence.

22—38), carpet manufacturer and brand lists (Exhibits 44—65), and public meeting videos and agendas (Exhibits 67—75), a fee assessment study and comments thereon (Exhibits 76—78), and forms related to a Voluntary Product Stewardship program involving CARE (Exhibits 79 and 80).

At the 2019 OAH Hearing, the parties stipulated that, for purposes of clarity and continuity, the exhibits received in evidence should be numbered in the same order as they were numbered in 2017 OAH Hearing. CalRecycle’s Amended Exhibit List for the 2019 OAH Hearing identified Exhibits 1—87; Exhibits 1—80 were the same admitted at the 2017 OAH Hearing (2017 Exhibits), while Exhibits 81—87 were new. However, not all the exhibits identified in CalRecycle’s Amended Exhibit List were offered into evidence at the 2019 OAH Hearing. The following exhibits were offered and admitted into evidence: 5, 6, 8, 11, 12, 14, 15, 17, 17, 18, 20, 79, 81, 82, and 86.

On March 14, 2019, Director Smithline rejected the Proposed Decision and invited the parties to submit argument and evidence in support of their positions. On April 19, 2019, CalRecycle moved to admit all 80 exhibits admitted by stipulation at the 2017 OAH Hearing (Exhibits 1—80), new exhibits unused at the 2019 OAH Hearing (Exhibits 83, 84, 85, and 87), and 8 entirely new pieces of new evidence (Exhibits Nos. 88—95) not previously offered at the 2017 and 2019 OAH hearings.

On April 26, 2019, CARE submitted its Objection to Department’s Exhibit Request, arguing that the 2017 Exhibits were irrelevant to the determination of the 2016 penalties and were unused at the 2019 OAH hearing<sup>3</sup>. CARE further argues that, to the extent that the 2017 Exhibits contain relevant information, that information is repeated in CARE’s 2016 Annual Report (Exhibit 81) and already a part of the record.

In determining the appropriate penalty for CARE’s noncompliance in 2016, CalRecycle must broadly evaluate CARE’s behaviors. California Code of Regulations section 18945

---

<sup>3</sup> Respondent states that “[t]he administrative law judge correctly did not admit any of the unused exhibits into evidence because they were relevant to the 2013, 2014 and 2015 proceeding, and irrelevant to CARE’s performance during 2016”. In fact, Judge DeCure made no determination as to the relevance of the unused exhibits because they were not offered into evidence.

1 requires it to consider the “totality of the circumstances.” (Cal. Code Regs. § 18945.) Section  
2 18945.2(a) further requires CalRecycle to consider a number of factors including “nature,  
3 circumstances, extent, and gravity of the violation(s)”, “[e]vidence that the violation was  
4 intentional, knowing, or negligent”, and “history of violation(s) of the same or similar nature”.  
5 In order to comply with the law’s requirement, CalRecycle must look beyond the 2016 calendar-  
6 year when determining the appropriate penalty for noncompliance.

7 CARE’s previous actions and behaviors, as well as its violation history, are encapsulated  
8 in the 2017 OAH Hearing where it was determined that CARE was noncompliant in 2013, 2014,  
9 and 2015, and penalties were imposed. Therefore, the 2017 Exhibits (Exhibits 1—80) are  
10 relevant to CalRecycle’s penalty factor evaluation. The mere fact that the information included  
11 in those exhibits may be repeated in CARE’s 2016 Annual Report does not render them  
12 irrelevant. The 2017 OAH Hearing Exhibits, Exhibits 1—80, will be admitted into evidence.

13 CalRecycle further seeks to admit Exhibits 83, 84, 85, and 87—the new but unused  
14 exhibits from the 2019 OAH Hearing; CARE did not specifically object to the admission of these  
15 exhibits. Exhibit 83 is the Request for Approval for the 2016 Annual Report. Exhibit 83 is  
16 relevant and will therefore be admitted into evidence. Exhibit 84 is Judge King’s Proposed  
17 Decision from the 2017 OAH Hearing. Exhibit 84 is relevant and will therefore be admitted into  
18 evidence. Exhibit 85 is CalRecycle’s Decision in connection with the 2017 OAH Hearing.  
19 Exhibit 85 is relevant and it will therefore be admitted into evidence. Exhibit 87 is a 2017  
20 CalRecycle update on the state of disposal. The relevance of Exhibit 87 is not clear so it will not  
21 be admitted into evidence.

22 CalRecycle further seeks to admit 8 new pieces of evidence (Exhibits 88-95) (New  
23 Exhibits). The New Exhibits include declarations from Howard Levenson and Clark Williams  
24 (Exhibits 88 and 89), a website regarding a timeline of China’s recycling policies (Exhibit 90),  
25 websites depicting CARE and CRI’s boards of directors (Exhibits 91 and 92), CARE’s plan for  
26 2018-2022 (Exhibit No. 93), and the CARE plan for 2017-2020 (Exhibit No. 95)<sup>4</sup>.

27 \_\_\_\_\_  
<sup>4</sup> CalRecycle also offers the hearing transcript from the 2016 Hearing (Exhibit No. 94). CARE does not oppose its admission, therefore Exhibit Number 94 is admitted into evidence.

1 Declaration of Clark Williams

2 CalRecycle offers into evidence the Declaration of Clark Williams (Exhibit 88). Clark  
3 Williams (Williams) is the Branch Chief of the Statewide Technical and Analytical Resources  
4 Branch and oversees the implementation of California's carpet stewardship program (Program).  
5 His declaration concerns the timing of various Chinese recycling import policies and their  
6 impacts on California recycling exports, comparisons between California's statewide recycling  
7 rate and carpet recycling rates, and factors influencing recycling rates in California.

8 CARE objects to the admission of Williams' declaration on the basis that it includes  
9 inadmissible opinion and that it is speculative in regards to the impacts that wildfires had on the  
10 recycling rate in California during 2016.

11 Williams declaration rebuts testimony offered by Peoples at the 2019 OAH Hearing  
12 regarding China's import policies, comparisons between CARE's carpet recycling rate and the  
13 statewide recycling rate, and the closure of a Midwest carpet recycling facility. It is relevant in  
14 that regard and will be admitted into evidence on that basis. However, CARE is correct that  
15 Williams' testimony regarding the impact of wildfires and drought on the statewide recycling  
16 rate appears to be speculative<sup>5</sup>. Therefore, those portions of his declaration will not be  
17 considered.

18  
19 Declaration of Howard Levenson.

20 CalRecycle offers into evidence the declaration of Howard Levenson (Exhibit 89).  
21 Howard Levenson (Levenson) is the Deputy Director of the Materials Management and Local  
22 Assistance Division. He testified at both the 2017 and 2019 OAH Hearings regarding the  
23 Program and CARE's compliance with it. In his declaration, Levenson states his concern that  
24 Judge DeCure misinterpreted his testimony regarding the statutory roles of CARE and  
25 CalRecycle and offers a clarification. He further states his surprise that Judge DeCure did not  
26 include a discussion of CARE's Voluntary Product Stewardship program (VPS Program) in the

27 \_\_\_\_\_  
<sup>5</sup> Williams' discussion of the impact of wildfires and drought on the statewide recycling rate does not cite to any  
evidence in the record.

1 Proposed Decision’s Statement of Facts. Levenson notes that an express requirement of  
2 participants in the VPS Program is to oppose efforts to enact Extended Producer Responsibility  
3 (EPR)-type legislation or regulations in other states and opines that it indicates CARE’s lack of  
4 commitment to the success of the California Program. Finally, he notes that any penalty  
5 assessed upon CARE will not affect funding for the Program because CARE is statutorily  
6 prohibited from using funds from assessment to pay for penalties.

7 CARE objects to the admission of Levenson’s declaration, arguing that it improperly  
8 expresses opinion rather than facts and that it makes clear CalRecycle’s “desire to link the  
9 political speech of the Carpet and Rug Institute’s Voluntary Product Stewardship program  
10 administered by CARE with CARE.” In other words, CARE characterizes Levenson’s  
11 declaration “as evidence of the Department’s improper punishment of CARE for political  
12 speech.” Finally, CARE expresses its concern that the declaration format prevents any cross-  
13 examination.

14 Levenson’s declaration is duplicative of his testimony at hearing. Although it adds a  
15 small amount of new material—such as Levenson’s opinion that Judge DeCure misunderstood  
16 his testimony and omitted information from his Statement of Facts, it’s not clear such opinion is  
17 admissible. Therefore, CARE’s objection to the Declaration of Howard Levenson is sustained  
18 and Exhibit Number 89 will not be admitted into evidence.

19  
20 Website China Recycling Policy Timeline

21 CalRecycle offers an article titled “From Green Fence to Red Alert: a China Timeline”  
22 for purposes of clarifying the names and times that various Chinese import policies were  
23 implemented (Exhibit 90). There was some confusion at the 2019 OAH Hearing in this regard.  
24 CARE objects to the admission of the timeline on the basis that it is not judicially noticeable and  
25 notes that it contains information beyond timelines and names.

26 Although there was some confusion introduced at the 2019 OAH Hearing regarding the  
27 names and dates of implementation of China’s import policies, that confusion appears to have  
been at least partially resolved as the parties stipulated during their oral argument on May 8,

1 2019 that National Sword was implemented in 2017. Regardless, CalRecycle offers no  
2 authentication of the exhibit or any indication of its reliability. Therefore, it will not be admitted  
3 into evidence.

4  
5 CARE Plans 2017-2021

6 CalRecycle offers CARE's 2017-2021 Plan, noting that it was discussed by Dr. Peoples  
7 in his testimony at the 2019 Hearing. CARE objects to the admission of the 2017-2021 Plan on  
8 the basis of relevance, noting that it addresses future plans for 2017 through 2021 and not  
9 CARE's performance in 2016 which is at issue.

10 The 2017-2021 Plan was discussed by CARE's witness, Bob Peoples, at the 2019  
11 Hearing. It is therefore relevant to that extent and will be admitted into evidence for that  
12 purpose.

13  
14 CARE Plan 2018-2022

15 CalRecycle offers CARE's 2018-2022 Plan, however, it provides no basis for its  
16 admission. CARE, on the other hand, objects to its admission on the basis that it is irrelevant  
17 since it does not address CARE's past performance. Absent any argument from CalRecycle as to  
18 why the 2018-2022 Plan is relevant, CARE's objection must be sustained. CARE's 2018-2022  
19 Plan will not be admitted into evidence.

20  
21 CARE's 2019 Board of Directors and CRI 's 2019 Board of Directors

22 CalRecycle seeks to admit exhibits depicting the Boards of Directors for CARE and  
23 Carpet and Rug Institute (CRI) for 2019, arguing that the exhibits serve to impeach Peoples'  
24 sworn testimony at the 2019 OAH Hearing regarding the relationship between CRI and CARE.

25 Peoples testified as to the relationship between CARE and CRI at both the 2017 and 2019  
26 OAH Hearings. At the 2019 OAH Hearing, he indicated that CARE only administers CRI's  
27 VPS Program, while CRI sets its terms and conditions. Peoples further testified that Joe  
Yarbrough was the only individual that he was aware was on both boards.

1 Comparing the Board lists provided by CalRecycle there does not appear to be any one  
2 individual that serves on both boards. CalRecycle also points to a public comment provided by  
3 Randy Pollack in 2016 in which he stated that “CRI is a strong supporter of CARE, they have  
4 members on the board of CARE.” Neither Exhibits 91 or 92, nor the comments of Pollack in  
5 2016 are inconsistent with Peoples’ prior testimony. Therefore, the exhibits are not admissible  
6 for impeachment purposes.

7 CalRecycle further notes in its Opening Arguments that, although there may not be  
8 overlap among individuals on the boards, there is overlap among carpet Companies. Therefore,  
9 CalRecycle argues, “while it might possibly be legally true that CARE is an independent  
10 nonprofit stewardship organization, the facts support the conclusion that there is a powerful  
11 relationship between the interest of CRI and CARE, and that a very narrow group maintain a  
12 great deal of influence over decisions for both CARE and CRI.”

13 The relationship between CRI and CARE was discussed by Peoples at the 2019 Hearing,  
14 Therefore the Board Lists are relevant in establishing the relationship, or lack thereof, between  
15 the two organizations. On that basis, they are admitted.

16  
17 CARE Request for Judicial Notice

18 CARE requests that the Director take judicial notice of three categories of documents: 1)  
19 a California Department of Finance report identifying residential housing statistics; 2) annual  
20 summaries of wildfire statistics published by the California Department of Forestry for the years  
21 2012 through 2016; and, 3) transcript of the March 24, 2015, workshop on the highlights of the  
22 “CalRecycle State of Recycling and State of Disposal in California in 2013”. CARE argues that  
23 all of the documents are judicially noticeable pursuant to Evidence Code section 452(c) and  
24 452(h).

25 Evidence Code section 452 describes matters that judicial notice may be taken of.  
26 Subdivision (c) allows for judicial notice of “official acts of the legislative, executive, and  
27 judicial departments of the United States and any state of the United States.” Subdivision (h)  
allows judicial notice to be taken of “facts and propositions that are not reasonably subject to

1 dispute and are capable of immediate and accurate determination by resort to sources of  
2 reasonably indisputable accuracy.”

3 CARE argues that the Department of Finance report is judicially noticeable and made  
4 relevant by Williams’ reference to population growth and its effect on CalRecycle’s recycling  
5 efforts. CARE seeks to have the report admitted for rebuttal purposes only. The Department of  
6 Finance report appears to be judicially noticeable as an official act of the executive branch of a  
7 California state agency. It is relevant to CARE’s rebuttal of Williams’ testimony and it will be  
8 admitted into evidence for that purpose.

9 CARE argues that annual wildfire statistics published by the California Department of  
10 Forestry and Fire Protection are judicially noticeable and made relevant by the Williams’  
11 reference to the size and effect of the 2015 and 2016 fires seasons. Although the statistics appear  
12 to be judicially noticeable as an official act of a California state executive agency, the portions of  
13 Williams’ Declaration concerning wildfires appear to be speculative and will not be considered,  
14 eliminating any need for rebuttal. Therefore, the annual wildfire statistics will not be admitted  
15 into evidence.

16 CARE argues that the transcript of the March 24, 2015 recycling workshop is judicially  
17 noticeable. However, the transcript does not appear to be an official act of a state agency, nor  
18 does it appear to be facts and propositions that are not reasonably subject to dispute. CARE  
19 further argues that the transcript is made relevant by Williams’ testimony regarding the size and  
20 effect of the 2015 and 2016 fire seasons. However, as noted above, Williams’ comments on  
21 wildfires will not be considered, eliminating any need for rebuttal. The workshop transcript will  
22 not be admitted into evidence.

23  
24 **V. LEGAL CONCLUSIONS**

25 In his Proposed Decision, Judge DeCure determined that CARE failed to achieve  
26 continuous meaningful improvement and was noncompliant during the 2016 reporting period.  
27 This decision leaves that determination intact. However, it rejects Judge DeCure’s penalty  
analysis and substitutes its own.

1 *Penalty Analysis*

2 Law

3 Carpet Law authorizes CalRecycle to impose administrative civil penalties on any person  
4 who is in violation of any provision of the Carpet Law, including stewardship organizations  
5 (Pub. Res. Code § 42978(a) and Cal. Code Regs. §§18945, 18945.1). Pursuant to Public  
6 Resources Code section 42978(a), a civil penalty up to one thousand dollars (\$1,000) per day  
7 may be administratively imposed by the Department on any person who is in violation of any  
8 provision of this chapter and up to ten thousand dollars (\$10,000) per day if the violation is  
9 intentional, knowing or negligent.

10 Regulations provide that failure to demonstrate to the Department continuous meaningful  
11 improvement in the rates of recycling and diversion of postconsumer material subject to a  
12 stewardship plan and in meeting the other goals included in an organization's stewardship plan is  
13 a violation of Public Resources Code section 42975 and is subject to a penalty of up to five  
14 thousand dollars (\$5,000) per day (Cal. Code Regs. § 18945.1), subject to statutory limitations  
15 (Pub. Res. Code § 42978(a)(2).)

16 California Code of Regulations section 18945 requires the Department to consider the  
17 "totality of the circumstances" when determining the appropriate penalty for statutory violations.  
18 Section 18945.2 clarifies this requirement and provides that CalRecycle consider the following  
19 when determining the appropriate penalty:

- 20 (a) The nature, circumstances, extent, and gravity of the violation(s).  
21 (b) The number and severity of the violation(s)  
22 (c) Evidence that the violation was intentional, knowing or negligent.  
23 (d) The size of the violator.  
24 (e) History of violation(s) of the same or similar nature.  
25 (f) The willfulness of the violator's misconduct.  
26 (g) Whether the violator took good faith measures to comply with this chapter and the  
27 period of time over which these measures were taken.  
(h) Evidence of any financial gain resulting from the violation(s).

1 (i) The economic effect of the penalty on the violator.

2 (j) The deterrent effect that the imposition of the penalty would have on both the violator  
3 and the regulated community.

4 (k) Any other factor that justice may require.

5  
6 Intentional, Knowing, or Negligent

7 Public Resources Code section 4978 limits penalties to \$1,000 per day unless the  
8 violation was intentional, knowing or negligent, in which case penalties of up to \$10,000 per day  
9 may be imposed. Judge DeCure determined that “the evidence did not establish that CARE’s  
10 noncompliance was due to willful, intentional, or negligent conduct or omissions.” We strongly  
11 disagree.

12 2016 represents the fourth year in a row that CARE has failed to achieve continuous  
13 meaningful improvement in the recycling rate—the primary goal of the Plan. In fact, over the  
14 four years that CARE has implemented its Plan, the recycling rate has remained essentially flat,  
15 even dropping at times<sup>6</sup>. Indeed, the 11 percent recycling rate achieved by CARE in 2016 is less  
16 than the 12.2 percent rate it achieved in 2013—its first year of evaluation with the California  
17 Program—and well-short of the 16 percent goal. CARE has failed to achieve, or even make any  
18 substantial progress towards, the primary goal of its Plan.

19 CARE’s fundamental failure to achieve continuous meaningful improvement in the  
20 recycling rate over four years did not occur in a vacuum. CalRecycle has repeatedly advised  
21 CARE to conduct an economic analysis of the cost of carpet recycling in California so that  
22 assessments can be set at a level necessary to achieve the Plan’s goals. Assessments are costs  
23 added to carpet purchases to fund CARE’s operation, and they are one of CARE’s most powerful  
24 tools fund the infrastructure necessary to meet its statutory goals. CARE has set the assessments  
25 at different levels from 2013 to 2016, increasing it over time. However, those increases have not  
26

27 <sup>6</sup> On December 23, 2013, CARE submitted Plan version 3.0 which identified a baseline recycling rate of 12 percent. Since the plan has been implemented, CARE has achieved the following annual recycling rates: 2013—12.2 percent; 2014—12.1 percent; 2015—10 percent; 2016—11 percent.

1 been based upon an economic analysis of the cost of carpet recycling, but rather have been set  
2 based on CARE's proposed budget expenditures. In other words, assessment levels have been  
3 set without knowing whether they were adequate to support the recycling infrastructure  
4 necessary to meet CARE's statutory goals.

5 CalRecycle has repeatedly admonished CARE in both private and public meetings of the  
6 need of an economic analysis to justify assessment levels. CARE has ignored this  
7 admonishment, stating that it cannot create such a study because recyclers refuse to provide the  
8 proprietary information it requires. Indeed, CARE has suggested that CalRecycle conduct the  
9 study if it believes that it is required. However, CalRecycle disagrees that such a study is  
10 impossible for CARE to conduct and notes that CARE has provided no evidence in support of its  
11 claim that recyclers refuse to provide the necessary information. Further, Public Resource Code  
12 section 42972(a)(4) puts the responsibility on CARE, not CalRecycle, to "include a funding  
13 mechanism... that provides sufficient funding to carry out the plan, including the administrative,  
14 operational, and capital costs of the plan, payment of fees ...and incentive payments that will  
15 advance the purposes of this chapter." Arbitrarily setting assessment levels in the absence of an  
16 economic analysis is unreasonable and amounts to a shot in the dark. Unfortunately, CARE's  
17 shot in the dark has repeatedly and consistently missed its target and has failed to achieve  
18 continuous meaningful improvement in the recycling rate, the primary goal of the Plan, for four  
19 consecutive years.

20 If CARE had been acting reasonably, it would have recognized that the approach it was  
21 taking to achieve continuous meaningful improvement in the recycling rate was not working and  
22 it would have changed course. When a plan repeatedly fails to meet its primary goal, a  
23 reasonable person changes the plan. However, CARE has stubbornly stayed the course,  
24 disregarding CalRecycle's warnings while the recycling rate has suffered. Its actions and  
25 omissions constitute negligence.

26 In addition to CARE's negligence, there are indications that its failure to achieve  
27 continuous meaningful improvement in the recycling rate was willful. This is indicated by  
CARE's involvement in the VPS Program. The VPS Program provides participants monetary

1 incentives for sorting—a carpet recycling activity that involves segregating used carpet into the  
2 various backing and fiber types.

3 The VPS Program expressly runs counter to and undermines the stated goals of the Plan.  
4 VPS Program participants must acknowledge that the purpose of the Program is to “promote and  
5 support voluntary market-driven solutions for the diversion of post-consumer carpet” and must  
6 oppose “efforts to enact Extended Producer Responsibility or EPR legislation or regulations.” A  
7 condition of payment is “supporting the purpose of [the VPS program] rather than supporting  
8 EPR type legislation or regulation...” In other words, participation in the VPS Program is  
9 conditioned on a promise *not to support* EPR programs like the California Program. Such a  
10 prohibition could have negative impacts on carpet recycling in California by preventing sorters  
11 from participating in the California Program.

12 Indeed, participants in the VPS Program may not request payment for post-consumer  
13 carpet originating in EPR jurisdictions, like California. This prohibition has the effect of  
14 potentially reducing the availability of carpet recycling services in California, as it discourages  
15 collectors and sorters from accepting California’s postconsumer carpet. The prohibition runs  
16 expressly counter to the purpose of CARE’s plan, which will “not have the effect of reducing the  
17 level of diversion and recycling of postconsumer carpet...”<sup>7</sup> CARE’s participation in the VPS  
18 Program, when viewed in the context of its continued failure to achieve continuous meaningful  
19 improvement in the recycling rate, constitutes negligence.

20 CARE claims that it merely administers the VPS Program, while its terms and conditions  
21 are set by a different organization, the Carpet and Rug Institute (CRI). However, the VPS Sorter  
22 Agreement (Exhibit 79) and Request for Payment forms (Exhibit 80) are on CARE letterhead  
23 and require participants to provide CARE supporting evidence for claims, to provide CARE  
24 notice of any non-compliance order from a governmental agency, to provide CARE copies of  
25 licenses and permits, and to provide CARE access to their facilities. The forms further contain a  
26 prohibition on disseminating materials using the name of CARE, refers to CARE’s payment  
27

---

<sup>7</sup> Pub. Res. Code § 42973(a)(2)(A).

1 obligations under this Agreement, and provides CARE the authority to terminate the agreement.  
2 There is nothing in the forms that indicates that CRI plays any role in the Program, let alone set  
3 its terms and conditions. While it may be true that CARE only administers the VPS program, its  
4 participation promotes its policies and conditions, which run expressly counter to and actively  
5 undermine the goals of the Plan.

6 CARE further argues that CalRecycle's consideration of CARE's involvement in the  
7 VPS program violates its free speech rights under the First Amendment<sup>8</sup> but fails to articulate  
8 how. Absent that explanation, we note that this enforcement action is based upon CARE's failure  
9 to meet the statutory goals identified in in the Plan and upon the penalty factors it is statutorily  
10 required to consider. It is not an attempt to suppress or punish political speech and CARE has  
11 presented no evidence suggesting otherwise.

12 CARE is legally obligated to achieve continuous meaningful improvement in the  
13 recycling rate and it claims it is making a good faith effort to do so; nonetheless, CARE  
14 participates in and thereby promotes a program which undermines its efforts to improve carpet  
15 recycling rates in California. CARE's participation in the VPS Program constitutes bad faith in  
16 light of its obligations under the Plan and it renders its violation willful.

17 Public Resources Code section 42978(a), provides that the Department may impose an  
18 administrative penalty up to \$10,000 per day if the violation is intentional, knowing or negligent.  
19 CARE's four years of failure to achieve any significant improvement in the recycling rate, let  
20 alone continuous meaningful improvement, its failure to conduct an economic analysis of the  
21 costs of recycling, and its participation in the VPS Program which undermines the goals of the  
22 Plan, render its 2016 violation negligent and willful.

23  
24  
25  
26  
27 

---

<sup>8</sup> In the same section of its Opposition, CARE discusses the anti-SLAPP statute, but acknowledges that it does not  
apply in this proceeding. Therefore, it will not be addressed further here.

1 Penalty Factors- Totality of the Circumstances; Severity of Violation

2 In determining the appropriate penalty, CalRecycle must consider the “totality of the  
3 circumstances” and the severity of the violation<sup>9</sup>. The ‘totality of the circumstances’  
4 requirements means CalRecycle must examine the context in which the violation occurred. In  
5 March 2011, CARE submitted its stewardship plan with a primary goal of attaining a recycling  
6 output rate of 16 percent by 2016. In the time since, not only has CARE failed to achieve its 16  
7 percent goal, it has consistently failed to make continuous meaningful annual improvement in the  
8 recycling rate. The rate has remained essentially flat, even dipping at times. 2016 represents the  
9 fourth year in a row that CARE has failed to achieve continuous meaningful improvement in the  
10 recycling rate.

11 As noted in Judge DeCure’s Finding of Facts, increasing the recycling rate is the primary  
12 goal of the Plan (Pub. Res. Code section 42975(a)(1—2)). Therefore, CARE’s failure to  
13 improve the recycling rate for four consecutive years represents a fundamental failure of the Plan  
14 and its implementation. The nature of the violation is severe. (Cal. Code Regs. § 18945.2(a) &  
15 (b).)

16  
17 Penalty Factor-- History of Violations

18 Judge DeCure notes that this is CalRecycle’s second administrative action against CARE  
19 in two years, “and both times, CalRecycle has established CARE’s failure to demonstrate  
20 continuous meaningful improvement in its reporting periods.” In fact, CalRecycle has  
21 established that CARE has failed to make continuous meaningful improvement for *four*  
22 consecutive years. This constitutes a significant violation history (Cal. Code Regs. §  
23 18945.2(e).) And with each passing year of noncompliance, the violation history becomes more  
24 significant, warranting a progression of the penalty amount. This was recognized by Judge King  
25 when she imposed the following penalties:

26  
27  

---

<sup>9</sup> California Code of Regulations sections 18945 and 18945.1(b), respectively.

1 2013 penalty: \$182,000  
2 2014 penalty: \$273,750  
3 2015 penalty: \$547,500<sup>10</sup>

4 It appeared Judge DeCure would continue to properly increase the penalty as he noted  
5 that CARE's size and violation history "necessitate an enhanced penalty to reasonably serve as a  
6 deterrent and encourage future compliance." However, he then inexplicably reduced the penalty  
7 for 2016 to \$274,500-- approximately the same amount that was imposed in 2014 and little-more  
8 than half of what was imposed by Judge King in 2015. This reduction is not consistent with the  
9 requirements of section 18945.2(e) since CARE's violation history was at it most significant in  
10 2016. The increasing severity of CARE's violation history warrants an increasing penalty.

11 Penalty Factor--Financial Gain

12 CalRecycle argues that there is evidence that CARE enjoyed financial gains stemming  
13 from its 2016 violation. It cites the sole exhibit submitted by CARE at the 2017 OAH Hearing,  
14 an unpublished "Fee Assessment Study" by Bates White, paid for by CRI and analyzing the  
15 impact of assessments on CARE member's carpet sales (Exhibit 78) (Bates Study). The Bates  
16 Study concluded that "additional increases in the assessment fee would further reduce California  
17 carpet shipments significantly." (Id. at 11.)

18 CARE responds that the Bates Study did not commence until 2017, too late to affect any  
19 decisions about 2016. "Moreover, the study was commissioned as an independent study,  
20 meaning that CARE did not have knowledge of its outcome until after the study was completed."  
21 However, CARE's knowledge of the outcome of the Bates Study is not relevant to analyzing  
22 whether the violation led to financial gain. Nor is the fact that the Bates Study did not influence  
23 CARE's decisions in 2016. Section 18945.1(e) requires CalRecycle to examine evidence of  
24 economic gain resulting from the violation, which it has done; it does not require an examination  
25 of the violator's knowledge or intention, let alone demonstration thereof.

26  
27  

---

<sup>10</sup> As previously noted, this amount was ultimately reduced by CalRecycle.

1           The Bates Study concludes that increased assessments would significantly reduce  
2 California carpet shipments. In other words, by avoiding assessment increases, CARE's  
3 membership avoided financial losses in the form of reduced California carpet shipments.  
4 Although CARE did increase assessments over time, those increases were not based on an  
5 economic analysis of the costs of recycling. By foregoing necessary assessment increases,  
6 CARE's membership avoided reduced shipments to California and the associated financial  
7 losses.

8 Penalty Factors— Economic Effect on Violator

9           CARE argues that, under the Bates-White Study analysis, "the proposed \$1.8 million  
10 penalty would also cause an additional \$1.9 million of lost sale<sup>11</sup>, for a \$3.7 million total effect  
11 on the carpet industry." CARE identifies a monetary loss for the industry, but it does not explain  
12 the *economic effect* the penalty will have on CARE or its membership. Although the monetary  
13 amount identified by CARE appears large, size is a relative concept. CARE is a large  
14 organization—it represents all 75 carpet manufacturers distributing carpet in the United States.  
15 Even assuming that CARE's argument that it will lose 1.9 million in sales is true, we cannot  
16 conclude that such a loss will have a significant impact on CARE or its membership. Absent  
17 additional information from CARE, the economic impact of the penalty is not known.  
18 Therefore, this factor cannot mitigate the penalty amount.

19  
20 Penalty Factor-- Size of violator

21           CARE represents all of the carpet manufacturers distributing carpet in the United States.  
22 Its size is large and warrants a substantial penalty.

23  
24 Penalty Factor—Deterrent Effect of Penalty on Violator

25           CARE represents all the members of a multi-billion dollar industry, and any penalty  
26 would be shared by the membership. As noted above, CARE did not provide information on the

27  

---

<sup>11</sup> CARE asserts that it will lose \$1.9 million in sales. However, this assertion is unsupported in CARE's Opposition and it is not clear how CARE arrived at this number.

1 economic impact of the proposed penalty, so it is unknown whether the penalty will actually  
2 have any deterrent effect.

3  
4 Penalty Factor—Other Factors that Justice Requires

5 CARE attributes its failure to achieve continuous meaningful improvement to market  
6 forces beyond its control. Specifically, CARE cites China’s import policies and the closure of a  
7 carpet recycling facility (Shaw) in the Midwest at the end of 2016.

8 At the 2019 OAH Hearing, Peoples testified that China’s National Sword Program  
9 resulted in stopping 95 percent of all exports of recycled material. As a result, more polymer, the  
10 material used for carpet “face fiber” stayed in the United States. That additional material,  
11 Peoples asserted, was now competing with used carpet materials. The result was recyclers being  
12 forced to lower their prices to try to move goods, which decreases the value of polymer  
13 recovered from used carpet, negatively impacting recycling rates.

14 Despite Peoples’ assertion that China’s export policies negatively impacted carpet  
15 recycling in 2016, he provided no supporting data. Indeed, CARE’s 2016 annual report does not  
16 discuss specific impacts of the Chinese policies nor does its Opposition to Department’s Opening  
17 Arguments, submitted here. As CARE is asserting that Chinese export policies hurt its recycling  
18 efforts in 2016, it bears the burden of proof. It has not met its burden.

19 Peoples also discussed negative impacts stemming from the closure of a Midwest  
20 recycler he identified as Shaw Industries and that has subsequently been identified in the parties’  
21 briefs as the Shaw Evergreen Ringgold Plant (Shaw Plant). He stated that the shut down “was a  
22 big factor in the downturn that we saw from ’15 to ’16 in terms of overall impact. There were  
23 others that came on line, ... but we lost a big impact that was going to hopefully carry us toward  
24 that 16 percent goal that we had in our plan.” (2019 OAH Hearing Transcript, p. 131.)

25 CalRecycle argues that CARE knew the Shaw Plant was a newly constructed recycling  
26 facility that was using commercially unproven and experimental technology to process carpet  
27 fiber. CARE should have anticipated that it could not be counted on to provide a ‘big impact’ to  
its recycling rate.

1           Since 2013 CARE has blamed market forces for its failure to achieve continuous  
2 meaningful improvement. That excuse loses force with each passing year it is used. Although  
3 those 'market forces' have taken different forms-- i.e. 2 processor closures in 2013, a decline in  
4 crude oil price in 2014—they have been a consistent feature affecting CARE's ability to come  
5 into compliance. CalRecycle has consistently expressed to CARE the need for it to timely  
6 respond to market changes. We acknowledge that the impacts of market forces on CARE's  
7 compliance are real, but insist that CARE take adequate steps to address them. Here, CARE's  
8 significant reliance on the Shaw Plant was misplaced given that Plant's unproven track record.  
9 CARE's continued failure to meet the challenge of market forces is unreasonable and does not  
10 mitigate the penalty here.

11  
12 Conclusion

13           CARE has failed to achieve continuous meaningful improvement in the 2016 reporting  
14 period and is therefore, subject to penalty. CalRecycle has established that CARE's violation  
15 was intentional, willful or negligent; therefore, it is subject to a penalty up to \$10,000 dollars per  
16 day. However, penalties for failure to achieve continuous meaningful improvement in the  
17 recycling and diversion rates are limited to \$5,000 per day (Cal. Code Regs. section 18945.1.)  
18 Therefore, \$5,000 per day represents the maximum penalty.

19           An examination of the penalty factors warrants an imposition of the maximum penalty of  
20 \$5,000 dollars per day, for a total of \$1,830,000.

