

**BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

CARPET AMERICA RECOVERY EFFORT (CARE), Respondent

Agency Case No. 2022-001-CARPET

OAH No. 2022060462

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 21 and 22, 2023, from Sacramento, California.

Staff Attorney Ty D. Moore represented complainant Department of Resources Recycling and Recovery (CalRecycle).

Attorneys Steven G. Churchwell and Karl A. Schweikert represented respondent Carpet America Recovery Effort (CARE).

Evidence was received on February 21 and 22, 2023. The record remained open to allow the parties to file written closing briefs. All post-hearing brief were timely filed, the record was closed, and the matter was submitted for decision on May 4, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 10, 2022, CalRecycle made and filed the Accusation through Ty Moore in his official capacity as its attorney. CalRecycle is responsible for overseeing the carpet stewardship program and enforcing its laws (Pub. Resources Code, §§ 42970–42983) and corresponding regulations (Cal. Code Regs., tit. 14, §§ 18940 et seq.). Through the Accusation, CalRecycle is seeking a combined penalty of \$1,538,365 due to respondent's failure to meet goals set forth in statute and under its approved stewardship plan. On May 20, 2022, respondent filed a Notice of Defense to the Accusation and this hearing followed.

Background

2. CARE is a nonprofit corporation pursuant to Section 501(c)(3) of Title 26 of the United States Code, whose stated purpose is to increase the reclamation and stewardship of postconsumer carpet. CARE was established in 2002 as a result of a Memorandum of Understanding (MOU) signed by members of the carpet industry, government representatives, nongovernmental organizations, and entrepreneurs. Since 2011, CARE has been the exclusive carpet stewardship organization representing carpet manufacturers authorized to sell carpet in California.

CALIFORNIA'S CARPET STEWARDSHIP PROGRAM

3. Effective January 1, 2011, the California Legislature adopted Assembly Bill 2398 (Stats. 2010, ch. 681) (Carpet Law), becoming the first state in the nation to establish a private sector designed and managed statewide carpet stewardship

program. (Former Pub. Resources Code, §§ 42970–42983.) In enacting the law, the Legislature made the following findings:

(a) Discarded carpet is one of the 10 most prevalent waste materials in California landfills, equaling 3.2 percent of waste by volume disposed of in California in 2008. Because carpet is heavy and bulky, it imposes a significant solid waste management cost on local governments.

(b) Numerous products can be manufactured from recycled carpets, including carpet backing and backing components, carpet fiber, carpet underlayment, plastics and engineered materials, and erosion control products. Several carpet recycling facilities currently operate in California, producing products and feedstock for products made from recycled carpet.

(c) The United States carpet industry has established a third-party nonprofit organization, the Carpet America Recovery Effort, also known as CARE, to work with state governments to increase the amount of recycling and reuse of postconsumer carpet and reduce the amount of carpet going to landfills.

(d) CARE represents at least 90 percent of United States carpet manufacturers and 95 percent of the volume of carpet sold in the United States.

(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.

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

(Assem. Bill No. 2398 (2009–2010 Reg. Sess.) Chapter 681.)

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

5. CalRecycle is responsible for: approving or disapproving carpet stewardship plans submitted by manufacturers or their designated carpet stewardship organization; reviewing annual reports to verify the objectives of the plan are being met; and providing oversight and enforcement to ensure a level playing field among carpet manufacturers. (Pub. Resources Code, §§ 42973–42975, and 42978.) For manufacturers to be in compliance, they must have an approved plan, individually or as part of a stewardship organization, which: (1) achieves the purposes of the program; (2) includes goals that increase the recycling of postconsumer carpet, increase the diversion of postconsumer carpet from landfills, increase the recyclability of carpets,

and incentivize the market growth of secondary products made from postconsumer carpet; (3) describes proposed measures for managing postconsumer carpet consistent with the state's solid waste management hierarchy; and, (4) includes a funding mechanism that provides sufficient funding to carry out the plan and demonstrate "that it has achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to its stewardship plan and the other goals included in the organization's plan." (Pub. Resources Code, § 42972, subd. (a).)

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

7. Pursuant to Public Resources Code, section 42975, subdivision (a), CARE is required to demonstrate that it has achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to its stewardship plan and the other goals. CARE must submit an annual report detailing its activities for the reporting period, including: (a) the amount of carpet sold by square yard and weight in the state; (b) the amount of postconsumer carpet recycled; and (c) the amount of postconsumer carpet recovered but not recycled, by weight, and its ultimate disposition. (Pub. Resources Code, § 42976.)

CARE's Stewardship Plan and Annual Reports

8. In August 2018, CARE submitted its Carpet Stewardship Plan 2018 through 2022 (Plan) to CalRecycle, which CalRecycle ultimately approved. The Plan (version 97) included several performance goals, including the following:

- Goal 3: Increase the reuse of postconsumer carpet with annual year goals of 1 million pounds for 2018, 1.2 million pounds for 2019, 1.5 million pounds for 2020, and 1.8 million pounds for 2021;
- Goal 4: Increase the weight of postconsumer carpet that is recycled with annual year end goals of 52 million pounds for 2018, 69 million pounds for 2019, 81 million pounds for 2021, and 84 million pounds for 2022;
- Goal 6, part 1: Increase the collection convenience for recycling of postconsumer carpet, with the performance goal of establishing one site per 500,000 persons for any county with a population over 500,000 by the end of 2021, including a minimum of one site per county with a population over 50,000 by July 1, 2019, except for counties unwilling to participate;
- Goals 6, part 2: Increase the collection of postconsumer carpet for recycling, based on the total estimated pounds of gross collections;
- Statutory Goal: Achieving a recycling rate of 24 percent by January 1, 2020, as required by California Stewardship Laws; and
- Goal 8: Achieve a 24 percent recycling rate for postconsumer carpet by January 1, 2020, and any other rate established by the Department, with yearend performance goals of 17 percent for 2018, 24 percent for 2019, 26 percent for 2020, 26 percent for 2021, and 27 percent for 2022.

9. Within the Performance Goals and Activities section of the Plan, it specifies:

Progress toward performance goals are reported annually within the Programs and report to CalRecycle and

compared to baseline year and prior calendar year measurements, respectively, as established in previous annual reports. Per CalRecycle guidance, the baseline year is defined as the first 12 months of the Program implementation period, or July 1, 2011 to June 30, 2012.

2019 ANNUAL REPORT

10. On September 1, 2020, CARE submitted its California Carpet Stewardship Program 2019 Annual Report (2019 Report), reporting its performance for 2019. The 2019 Report listed 716,819 pounds in postconsumer carpet reuse, which was below the Plan goal of 1.2 million pounds. It also listed 58 million pounds in postconsumer recycled carpet output for 2019, which was less than the Plan goal of 69 million pounds. The 2019 Report specified that there were no carpet recycling drop off sites in Madera, Nevada, Sonoma, and Sutter Counties, all of which had populations in 2019 of over 50,000. These counties had to have at least one drop off site pursuant to the Plan. The reported collection of postconsumer carpet for recycling decreased to 82.1 million pounds in 2019, as compared to 93.5 million pounds reported the previous year. The 2019 Report also reflects that CARE had an average recycling rate of 19.1 percent and failed to reach both the statutory and Plan recycling rate goal of 24 percent by the end of the 2019 calendar year (i.e., by January 1, 2020).

11. CalRecycle evaluated the 2019 Report to determine whether it demonstrated that CARE achieved the amount and rates of recycling and reduction and disposal of postconsumer carpet and other goals in its Plan. During the March 16, 2021 CalRecycle public meeting, the Department Statewide Technical and Analytical Resources (STAR) Branch presented a Request for Approval noting that CARE had failed to achieve several of its goals in 2019, and that by doing so CARE violated the

statutory requirements set forth under Public Resources Code section 42975. Based on that violation, it was subject to per diem penalties during the time CARE failed to meet its duty until the deficiencies were corrected and it met the performance criteria set forth in statutes and its approved Plan.

2020 ANNUAL REPORT

12. On September 1, 2021, CARE submitted its California Carpet Stewardship Program 2020 Annual Report (2020 Report), reporting its 2020 performance. The 2020 Report listed 764,941 pounds in postconsumer carpet reuse, which fell below the Plan goal of 1.5 million pounds. It also listed 52,614,941 pounds in postconsumer recycled carpet output, which was below the Plan goal of 81 million pounds. The 2020 Report reflects that CARE increased the number of counties with public drop-off sites, but four counties requiring drop-off sites still did not have them by the end of the year. The 2020 Report also specifies that the reported collection of postconsumer carpet for recycling decreased to 77.4 million pounds in 2020, from 82.1 million reported the previous year. The 2020 Report also reflects that CARE had an average recycling rate of 20.9 percent and failed to reach the statutory recycling rate goal of 24 percent by January 1, 2020, and the year end 2020 Plan goal of 26 percent.

13. CalRecycle also evaluated the 2020 Report to assess compliance with the Plan and statutory goals for recycling, reduction, and disposal of postconsumer carpet. During the January 18, 2022 CalRecycle public meeting, STAR presented a Request for Approval noting that CARE violated the statutory requirements set forth under Public Resources Code section 42975 as it had again failed to achieve several of its goals in 2020. It was subject to per diem penalties during the time CARE failed to meet its duty until the deficiencies are corrected.

Civil Penalties

14. CalRecycle is authorized to impose administrative civil penalties, up to \$5,000 per day, on any person or carpet stewardship organization which violates any provision of the Carpet Law. (Pub. Resources Code, § 42978, subd. (a)(1); Cal. Code Regs., tit. 14, §§ 18945, 18945.1.) “Intentional, knowing, or negligent” violations are subject to an administrative penalty of up to \$10,000 per day. (Pub. Resources Code, § 42978, subd. (a)(2).) A carpet stewardship organization that fails to demonstrate that it has achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to its stewardship plan and the other goals included in the organization’s plan, is subject to an administrative penalty of up to \$5,000 per day. (Pub. Resources Code, § 42975; Cal. Code Regs., tit. 14, § 18945.1.)

15. Here, CARE failed to meet its plan goals for one day in 2019 (December 31, 2019) and 366 days in 2020 (the entire year). Therefore, CARE was out of compliance for 367 days, for a maximum penalty exposure of \$1,835,000.

16. In determining the appropriate penalty, CalRecycle must consider the “totality of the circumstances.” (Cal. Code Regs., tit. 14, § 18945.) Specifically, section 18945.2 requires CalRecycle to consider the following:

- (a) The nature, circumstances, extent, and gravity of the violation(s);
- (b) The number and severity of the violation(s);
- (c) Evidence that the violation was intentional, knowing, or negligent;
- (d) The size of the violator;

- (e) History of violation(s) of the same or similar nature;
- (f) The willfulness of the violator's misconduct;
- (g) Whether the violator took good faith measures to comply with this chapter and the period of time over which these measures were taken;
- (h) Evidence of any financial gain resulting from the violation(s);
- (i) The economic effect of the penalty on the violator;
- (j) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community;
- (k) Any other facts that justice may require.

17. CalRecycle is seeking a civil penalty of \$5,000 for CARE's noncompliance on December 31, 2019. The Accusation specifies that CalRecycle is also seeking "a penalty of \$4,201/day for each of the 366 days in 2020 [that CARE was out of compliance], for a total of \$1,533,365."¹

18. CARE does not contest liability in this case nor the \$5,000 proposed penalty for 2019. However, CARE does contest the amount of the civil penalty sought for 2020. CARE contends that CalRecycle failed to adequately consider the factors

¹ A \$4,201 penalty for a 366-day period is actually \$1,537,566.

specified in Public Resources Code section 42978, particularly in light of the effects of the COVID-19 pandemic. Therefore, the only issue for determination in this matter is whether the \$4,201 per day in civil penalties CalRecycle seeks for the year 2020, or a lesser penalty, is appropriate.

Analysis

19. At hearing, the parties presented both oral and documentary evidence with respect to the purpose of the California's Carpet Stewardship Program, CARE's Plan, performance history, and efforts to work with CalRecycle in refining and meeting Plan goals.

20. CARE contended CalRecycle's \$4,201 per day civil penalty is excessive for several reasons. CARE established that CalRecycle essentially reached this amount by giving CARE a \$799 reduction from the maximum penalty of \$5,000 for the things it did well. CARE argued there is no statutory basis or rationale to "work down" from the maximum penalty of \$5,000, rather than starting from, for instance, at the midpoint of \$2,500 and increasing or reducing the amount based on aggravating and mitigating factors.

21. CARE established that CalRecycle utilized CARE's prior year performance as a baseline for some performance measurements, as opposed to the first 12 months of the Program implementation period, or July 1, 2011 to June 30, 2012, as specified in the Plan. CARE argued that CalRecycle should not be permitted to determine civil penalties based on a misapplied "moving target" baseline, rather than the baseline specifically described in the Plan that was ultimately approved by CalRecycle.

22. CARE argued that CalRecycle failed to give proper weight to the governor's declaration of a statewide emergency and shelter in place order. The 2020

Report specifically describes how the COVID-19 Pandemic affected carpet recycling in California. This includes a 17 percent reduction in carpet sales, which CARE contends negatively affects all performance goals, and particularly the collection of postconsumer carpet for recycling and reuse. In fact, in March 2020, CARE provided CalRecycle with a COVID-19 Action Plan it prepared to “insure preservation of the California carpet recycling infrastructure” during the pandemic. The action plan includes six specific actions CARE will implement under its approved plan and requests that CalRecycle take certain steps “to ensure our recycling enterprise member can weather this uncertain time and remain viable.” CARE argues that this plan, in addition to their 2020 Report, demonstrates not only the impact of the COVID-19 pandemic, but their attempt to proactively address its effects.

23. CARE argued that the nature, circumstances, extent, and gravity of their violations warrant a reduction in the penalty given that the effects of an unexpected worldwide pandemic that could not have been anticipated when its Plan was developed. CARE asserted that CalRecycle failed to give these circumstances sufficient weight when determining its civil penalty for plan year 2020.

24. Conversely, CalRecycle argued that there is no guidance or requirement in statutes or regulations requiring that it “work up” or “work down” from a certain amount within the permissible penalty range when determining the appropriate civil penalties. CalRecycle emphasized that, irrespective of the civil penalty starting point, the civil penalties requested are appropriate based on CARE’s performance, Plan goals, and the criteria for consideration specified in California Code of Regulations, section 18945.2.

25. CalRecycle also argued that it gave CARE credit for implementation of its emergency COVID-19 Action Plan and that the effects of the COVID-19 pandemic were

considered as part of its analysis of CARE's performance data. CalRecycle also noted that the governor's shelter-in-place order did not state or imply the state compliance laws were no longer enforceable as a result of the order. CalRecycle also argued that although carpet sales reportedly fell by 17 percent during the pandemic, CARE's Plan does not include a sales goal and that CARE failed to establish a sufficient nexus between a drop in carpet sales and its failure to meet plan goals.

26. CalRecycle acknowledged that it relied upon or referenced CARE's performance during the prior year as baseline data when assessing some components of CARE's compliance with Plan and statutory goals for recycling, reduction, and disposal of postconsumer carpet. However, CalRecycle noted that most of CARE's goals do not measure performance relative to the baseline CARE established, or have a strong relationship to baseline data. CalRecycle added that looking each year at the previous year's data is a necessary component in evaluating progress in achieving plan goals.

27. The evidence and arguments have been considered. When all the regulatory factors are considered, CalRecycle's requested penalty of \$4,201 per day for each day of the year 2020 is disproportionate and unreasonable in light of the surrounding circumstances, particularly the COVID-19 pandemic. A civil penalty in the amount of \$5,000 per day for December 31, 2019 and \$2,000 per day for 366 days in the year 2020, for a total of \$737,000, is a more appropriate and reasonable deterrent based on the totality of the circumstances.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. CalRecycle has the burden of proving, by a preponderance of the evidence, the violations alleged in the Accusation. (Evid. Code, §§ 115, 500.) CARE bears the burden of proving any evidence in mitigation by a preponderance of the evidence. (*Ibid.*)

Applicable Statutes

2. Public Resources Code section 42972 provides, in pertinent part:

(a) On or before September 30, 2011, a manufacturer of carpets sold in this state shall, individually or through a carpet stewardship organization, submit a carpet stewardship plan to the department that will do all of the following:

(1) Achieve the purposes of this chapter, as described in Section 42970, and meet the requirements of Section 42975.

(2) Achieve a 24-percent recycling rate for postconsumer carpet by January 1, 2020, and any other recycling rate established by the department pursuant to Section 42972.2. The carpet stewardship plan shall include quantifiable five-year goals and annual goals for how the recycling rate will

be achieved and how the carpet stewardship organization or manufacturer plans to do the following:

(A) Increase the weight of postconsumer carpet that is recycled and reduce the disposal of postconsumer carpet.

(B) Increase the collection convenience for the recycling of postconsumer carpet and increase the collection of postconsumer carpet for recycling.

(C) Expand and incentivize markets for products made from postconsumer carpet.

(D) Increase processor capacity, including processor capacity in California.

(E) Increase the recyclability of carpet.

(3) Describe proposed measures that will enable the management of postconsumer carpet in a manner consistent with the state's solid waste management hierarchy, including, but not limited to, source reduction, source separation and processing to segregate and recover recyclable materials, and environmentally safe management of materials that cannot feasibly be recycled.

(4) Include a funding mechanism, consistent with subdivision (c), that provides sufficient funding to carry out the plan, including the administrative, operational, and capital costs of the plan, the requirements of Section

42972.7, payment of fees pursuant to Section 42977, and incentive payments that will advance the purposes of this chapter

(5) Include education and outreach efforts to consumers, commercial building owners, carpet installation contractors, and retailers to promote their participation in achieving the purposes of the carpet stewardship plan

[¶] ... [¶]

3. Public Resources Code section 42975, subdivision (a), provides:

(a) In order to achieve compliance with this chapter, a carpet stewardship organization shall, on or before September 1 of each year, demonstrate to the department that it has achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to its stewardship plan and the other goals included in the organization's plan pursuant to paragraph (2) of subdivision (a) of Section 42972. In determining compliance, the department shall consider all of the following:

(1) The baseline rate of compliance against which the demonstrated improvement is compared, including progress in achieving the goals outlined in subparagraphs (A) to (E), inclusive, of paragraph (2) of subdivision (a) of Section 42972.

(2) The quantifiable five-year goals and annual goals included in the carpet stewardship plan pursuant to paragraph (2) of subdivision (a) of Section 42972.

(3) Information provided in the organization's report to the department pursuant to Section 42976.

4. Public Resources Code section 42976 states:

On or before September 1 of each year, a manufacturer of carpet sold in the state shall, individually or through a carpet stewardship organization, submit to the department a report describing its activities to achieve the purposes of this chapter, as described in Section 42970, and to comply with Section 42975. At a minimum, the report shall include all of the following:

(a) The amount of carpet sold by square yards and weight, in the state during the reporting period. A carpet stewardship organization with more than one manufacturer may use average weight.

(b) The amount of postconsumer carpet recycled, by weight, during the reporting period.

(c) The amount of postconsumer carpet recovered but not recycled, by weight, and its ultimate disposition.

(d) The total cost of implementing the carpet stewardship plan.

(e) An evaluation of the effectiveness of the carpet stewardship plan, and anticipated steps, if needed, to improve performance.

(f) Examples of educational materials that were provided to consumers during the reporting period.

Cause to Impose Penalty

5. Pursuant to Public Resources Code section 42978, subdivision (a)(1), and California Code of Regulations, title 14, section 18945, CalRecycle is authorized to impose a civil penalty on any person or entity who violates the Carpet Law. California Code of Regulations, title 14, section 18945.1 sets forth the amount of possible civil penalties and penalty schedule.

6. As set forth above, CARE does not dispute that cause exists to impose a civil penalty for 2019. CARE failed to demonstrate that it achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to the Plan during the final day of the 2019 reporting period, December 31, 2019, pursuant to Public Resources Code section 42975. CARE also does not dispute that a civil penalty of \$5,000 per day, for a total of \$5,000 for the year 2019, is appropriate. Accordingly, cause exist to issue a civil penalty against CARE for 2019 in the amount of \$5,000.

7. As set forth in Finding 18, CARE does not dispute that cause exists to impose a civil penalty for 2020. CARE failed to demonstrate that it achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to the Plan during the 366 days of the 2020 reporting period, pursuant to Public Resources Code section 42975. As set forth in Finding 27, a civil penalty of \$2,000 per day for the 366 days in 2020, for a total of \$732,000, is appropriate.

Accordingly, cause exist to issue a civil penalty against CARE for the year 2020 in that amount.

8. Pursuant to Public Resources Code section 42972, subdivision (c)(1), CARE is prohibited from expending assessments collected pursuant to the Plan for any purpose other than carrying out the Plan. Accordingly, CARE is prohibited from using Carpet Program assessment funds to pay the civil penalties issued herein.

ORDER

CARE shall pay a total of \$737,000 in civil penalties to CalRecycle within 60 days after the effective date of the decision in this matter. CARE is prohibited from using Carpet Program assessment funds collected pursuant to the Plan to pay said civil penalties.

DATE: May 25, 2023

Ed Washington

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings