

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

IN THE MATTER OF THE FIRST AMENDED ACCUSATION AGAINST:

**Carpet America Recovery Effort,
Respondent**

Agency Case No.: 2022-01-CARPET

OAH No.: 2022060462

DECISION

I. INTRODUCTION

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

Ty D. Moore, Staff Attorney, 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 and argument was heard. The record was closed and submitted for decision on May 4, 2023.

Judge Washington issued his Proposed Decision on May 25, 2023 (Proposed Decision). He found that cause existed to impose a civil penalty on CARE for failing to demonstrate that it achieved the amount and rates of recycling and a reduction in disposal of postconsumer carpet subject to the California Carpet Stewardship Plan 2018 through 2022 (Plan) during the final day of the 2019 reporting period, December 31, 2019, pursuant to Public Resources Code section 42975, and for failing 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. Judge Washington proposed a penalty of \$5,000 for December 31, 2019, and a penalty of \$2,000 per day for 366 days of 2020, for a total penalty of \$732,000.

On June 16, 2023, CalRecycle Director Rachel Machi Wagoner issued a rejection of Judge Washington's Proposed Decision (Rejection) as to the penalties only, electing to decide the penalties upon the record, without additional evidence, instead. The parties submitted opening briefs and rebuttal briefs on or before September 11, 2023, without presenting additional evidence.

Rejection of Proposed Decision

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

"The authority of the agency itself to decide the case after rejecting a proposed decision includes authority to decide some but not all issues in the case." (Gov. Code § 11517(c)(2)(E)(iii).) Here, CalRecycle leaves intact Judge Washington's finding that cause exists to impose a civil penalty on CARE for December 31, 2019, and each day of the 2022 year. CalRecycle rejects the proposed penalty amount of \$2,000 per day for the 2020 year.

II. FACTUAL BACKGROUND

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 (carpet program) and enforcing its laws (Pub. Res. Code, §§ 42970–42983) and corresponding regulations (Cal. Code Regs., tit. 14, §§ 18940 et seq.). Through the Accusation, CalRecycle seeks a combined penalty of \$1,538,365 due to respondent's failure to meet goals set forth in statute and under its Plan. On May 20, 2022, respondent filed a Notice of Defense to the Accusation and this hearing followed.

The Carpet Stewardship Program

CalRecycle is responsible for overseeing the carpet program and enforcing its laws (Pub. Res. Code, §§ 42970-42983) and corresponding regulations (Cal. Code Regs., tit. 14, §§ 18940 et seq.)

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.

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 (California Program). (Pub. Res. 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 the United States carpet manufactures 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.

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

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. Res. Code § 42970, in conjunction with § 40051.)

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. Res. 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) achieves a 24 percent recycling rate by January 1, 2020, and any other recycling rate established by CalRecycle, and includes goals that (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 recycling and increase the collection of postconsumer carpet for recycling, (C) expand and incentivize markets for products made from postconsumer carpet, (D) increase processor capacity, (E) increase the recyclability of carpet ; (3) describes proposed measures for managing postconsumer carpet consistent with the state's solid waste management hierarchy; (4) includes a funding mechanism that provides sufficient funding to carry out the plan; (5) includes education and outreach efforts; (6) includes a process by which the financial activities of the organization or individual manufacturer that are related to implementation of the plan will be subject to an independent audit; and, (7) includes a contingency plan in the event that the plan expires without approval of a new plan or in the event the plan is revoked. (Pub. Res. Code, § 42972, subd. (a).)

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 Public Resources Code section 42975 in 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; (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; and (f) examples of educational materials that were provided to consumers during the reporting period. (Pub. Res. Code, § 42976.)

Factual Findings Not Rejected by CalRecycle

The following factual findings made by Judge Washington were not rejected by CalRecycle and remain intact.

In August 2018, CARE submitted its Plan 2018 through 2022 to CalRecycle, which CalRecycle ultimately approved. The Plan (version 97) included several performance goals (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;
- Goal 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.

2019 ANNUAL REPORT

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).

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, CalRecycle's 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 8 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

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.

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.

CARE does not contest liability in this case.

III. CIVIL PENALTIES

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. Res. 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. Res. 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. Res. Code, § 42975; Cal. Code Regs., tit. 14, § 18945.1.)

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 faced a maximum penalty exposure of \$1,835,000. CalRecycle is seeking a civil penalty of \$5,000 for CARE’s noncompliance on December 31, 2019, and a civil penalty of \$4,201 per day for each of the 366 days in 2020. Note, that CalRecycle seeks \$1,533,365 for 2020, even though a \$4,201 penalty for 366 days totals \$1,537,566.

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; and (k) Any other facts that justice may require.

CARE does not contest the imposition of \$5,000 for December 31, 2019. However, CARE does contest the amount of civil penalty sought for 2020. CARE contends that CalRecycle failed to adequately consider the factors specified in Public Resources Code section 42978, particularly in light of the COVID-19 pandemic. The only issue for determination in this matter is whether the \$4,201 per day penalty sought by CalRecycle is appropriate.

Penalty Analysis

Number and severity of violation

While section 18945.2 of Title 14 of the California Code of Regulations requires CalRecycle to consider every enumerated factor in assessing its civil penalties, section 18945 of Title 14 of the California Code of Regulations is clear that CalRecycle must look at the **totality** of the circumstances. This means that CalRecycle must look at the whole picture surrounding the nature of the violation. Each factor set forth in 18945.2 of Title 14 of the California Code of Regulations is not determinative on its own, but rather parts of a whole to be taken into consideration by CalRecycle.

CARE did meet and even exceed some of the goals set forth in its Plan in 2020. However, CARE failed to comply with four out of eight of the goals stated in its Plan, and the statutory recycling rate of 24 percent. This cannot be overlooked when taking into account the totality of the circumstances. CARE argues that CalRecycle should have started with a penalty amount of \$2,500 per day – half of the maximum \$5,000 per day penalty– and then applied the specific factors in section 18945.2 of Title 14 of the California Code of Regulations to move the penalty up or down. Notwithstanding the fact that there

is no requirement for CalRecycle to start at any specific point of the penalty scale in calculating penalties, the fact alone that CARE failed in half of the goals stated in its Plan and the recycling rate required in statute is cause for CalRecycle to not calculate penalties at a rate less than \$2,500 per day unless significant mitigating factors exist to do so.

Penalty Factor – intentional, knowing or negligent

CalRecycle has not asserted that CARE's actions were intentional, knowing, or negligent.

Penalty Factor – Size of Violator

CARE is a large entity.

Clark Williams, witness for complainant, testified that CARE is comprised of all the mills that make and sell carpet into California.

In its 2019 Report, CARE reported sales of 80.6 million square yards of carpet in California. (Exhibit 2.) In its 2020 Report, CARE reports sales of 66.7 million square yards of carpet. (Exhibit 4.)

Penalty Factor – History of Violations

CARE's history of violations is extensive and significant. Since the inception of the carpet program in 2011, CARE has been found to have failed to meet the carpet program's requirements and goals in 2013, 2014, 2015, and 2016.¹ (Exhibits 9-13.)

Penalty Factor - Willfulness

CalRecycle does not allege intentional failings by CARE.

However, it should be noted that CARE is aware of its history of violations, and CARE is ultimately responsible for its performance under the Plan.

Dr. Robert Peoples, witness for respondent, testified that CARE is a voluntary participant in the carpet program. Mr. Williams, witness for complainant, testified that CalRecycle does not control how CARE interacts with its recyclers or entities within the Plan, and that CalRecycle does not direct CARE to interact with any partner or processor or prohibit them from doing so. CARE makes its own choices as to how to shape or adjust its operating procedure to achieve its goals.

For example, Mr. Williams testified that CalRecycle has discussed with CARE the availability of operating in a different way, namely under a "contract model," while Dr. Peoples testified that CARE operates under "market-driven" approach.

Mr. Williams, testified that other recycling programs operate under a "contract model," in which the stewardship organization issues a request for services, receives bids, and awards contracts for those services. Under the contract model, the stewardship can terminate its contract with an entity that is not meeting performance targets written in the contract. Mr. Williams further testified that this approach is used by other extended producer responsibility programs, such California's mattress program.

Penalty Factor – Good Faith Measures

¹ CARE's prior California Carpet Stewardship Plan expired in 2016.

CARE has shown good faith measures to comply with the statute for the period of time over which the measurements were taken. CARE implemented a COVID-19 response plan, including providing increased subsidies to eligible recyclers in 2020. (Exhibit 6.)

CARE demonstrated performance increases, in some of the areas where it failed to meet its goals including expanding the availability of public drop-off sites by increasing the number of drop-off sites from 73 to 83 and into 54 counties.

Penalty Factor – Financial Gain

CARE members continued to sell carpet in 2019 and 2020. (Exhibits 2 and 4.) Dr. Peoples testified that fees from the purchase of new carpet are placed into a fund. CARE is entrusted with that fund, in order to disburse subsidies to enable carpet recyclers.

According to Dr. Peoples testimony and as documented in its Plan and annual reports, CARE offers subsidies and grants to recyclers. Dr. Peoples further testified that CARE paid a “cash infusion” of one month’s average subsidies to all eligible recyclers in the program in April of 2020.

Ultimately, little to no evidence was presented as specific proof that CARE gained financially because of its failure to meet its goals.

Penalty Factor – Economic Effect of the Penalty on the Violator

CARE represents all the members of a multibillion-dollar industry; any penalty would likely be shared by the membership.

Penalty Factor – Deterrent Effect on Violator and the Regulated Community

As stated above, CARE is comprised of all the mills that make and sell carpet in California, a multibillion-dollar industry; any penalty would likely be shared by the membership. As such, a low penalty would likely have little effect on deterring CARE from failing to meet its goals in the future. Moreover, CARE has already been ordered to pay penalties of \$1,000 per day, or less, on four previous occasions, for failing to achieve the goals set forth by the carpet program, and yet continues to fail to meet its goals.

Penalty Factor – Any Other Factor That Requires Justice

CARE contends that the penalty amounts should be as low as \$1,000 per day for the 2020 year primarily because of external hardships caused by wildfires and COVID-19 pandemic.

Kirby Garrett, witness for complainant, testified that CalRecycle took the effects of the wildfires and the COVID-19 pandemic into consideration when CalRecycle calculated the penalty amount sought in the Accusation.

CARE has the burden of proof of showing the impact of the wildfires and the COVID-19 pandemic on its ability to meet the requirements set forth by the carpet program laws and the goals laid out in its Plan. (Evid. Code § 500.)

In its 2020 Report, CARE made broad assertions such as, “[t]he COVID-19 global pandemic...catastrophically affected global markets...,” (Exhibit 4, A839), “the COVID-19 pandemic changed the intended course of the year,” (Exhibit 4, A883.) and “[d]espite macroeconomic challenges

in the global markets, including the COVID-19 global pandemic,” (Exhibit 4, A839.) but has provided little to no numerical data demonstrating the direct effect of the COVID-19 pandemic on CARE’s ability to meet its goals.

Dr. Peoples testified that “a massive drop in carpet sales in 2020,” because of the COVID-19 pandemic resulted in “a massive drop in the available feedstock for the recyclers...” (Trans., 174, 2-23.) CARE demonstrated in its 2020 Annual Report that a massive drop in sales did, in fact, occur. However, CARE provided little to no evidence of the direct effect a drop in carpet sales had on the availability of feedstock or on CARE’s ability to meet its goals.

Dr. Peoples testified, and Mr. Williams confirmed through his testimony, that power issues existed at the Aquafil-Woodland landfill. CARE alleges that these issues, caused by wildfires, affected the Aquafil-Woodland landfill’s ability to come “on line” and ultimately for CARE to utilize the Aquafil-Woodland landfill as a means of achieving its goals. However, when pressed, Dr. Peoples admitted that he did not know if there were other issues preventing the Aquafil-Woodland landfill from coming “on line,” and that he had never seen a will-serve letter documenting Pacific Gas and Electric’s commitment to provide power to the Aquafil-Woodland landfill by any given date. Dr. Peoples testified that at most he may have an email from Aquafil-Woodland landfill that Pacific Gas and Electric had promised to provide power by “such and such” a date.


Conclusion

Upon careful consideration of the totality of the circumstances, including the penalty factors, as described above, the penalty of \$1,538,365 sought by CalRecycle is warranted.

IV. Decision and Order

CARE shall pay a total of \$1,538,365 in civil penalties to CalRecycle within 60 days after the service date of the decision in this matter. CARE is prohibited from using assessments collected pursuant to any California Carpet Stewardship Plan to satisfy these civil penalties.

September 15, 2023



Rachel Machi Wagoner, Director
Department of Resources Recycling and Recovery

PROOF OF SERVICE

I, Ivette De Alba, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to this action. My place of employment and business is as in the letterhead.

On September 15, 2023, I served the attached entitled documents: **DECISION, In the Matter of the Accusation Against Carpet America Recovery Effort; Agency Case No. 2022-001-CARPET; OAH No. 2022060462**; to the address(s) set out below each name:

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 First Class Mail. In a sealed envelope, with postage thereon fully prepaid, in the United States mail.

 Certified Mail - in a sealed envelope, return receipt requested with Postage thereon fully prepaid, in the United States mail.

 X **Electronically** – Sent to the email addresses listed above

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on the 15th day of September 2023.

Ivette De Alba
(Signature)