

BEFORE THE  
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CARPET AMERICA RECOVERY  
EFFORT,

Respondent.

Case No. 2018-001-CARPET

OAH No. 2018090439

**PROPOSED DECISION**

Administrative Law Judge John E. DeCure, Office of Administrative Hearings (OAH), State of California, heard this matter on January 28, 2019, in Sacramento, California.

Ty D. Moore, Staff Attorney, and Elliot W. Block, Chief Counsel, represented complainant Department of Resources Recycling and Recovery (CalRecycle).

Attorneys Steven G. Churchwell and Karl A. Schweikert, of Churchwell White LLP, represented respondent Carpet America Recovery Effort (CARE or respondent).

Evidence was received and argument was heard. The record was closed, and the matter was submitted for decision on January 28, 2019.

CARE is a national nonprofit corporation, and has served as the carpet stewardship organization for the California Carpet Stewardship Program since 2011. CalRecycle seeks civil penalties in the amount of \$1,830,000 against CARE based on allegations the organization was not in compliance with the carpet recycling laws and regulations for the reporting period of 2016. The Accusation alleged that CARE did not demonstrate meaningful continuous improvement in its recycle output rate or other goals included in the carpet stewardship plan for 2016, and that therefore, cause exists to impose civil penalties for that reporting period. The Accusation further contended that CARE's lack of meaningful continuous improvement during 2016 demonstrated a willful and/or negligent failure, subjecting CARE to increased penalties of up to \$5,000 per day.

## FACTUAL FINDINGS

1. On August 13, 2018, CalRecycle made and filed the Accusation by and through Ty Moore in his official capacity as its attorney. CalRecycle is responsible for overseeing the carpet stewardship program and enforcing its laws (Former Pub. Resource Code, §§42970-42983)<sup>1</sup> and corresponding regulations (Cal. Code Regs., tit. 14, §§ 18940 et seq.).

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.

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<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.

(a) 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.

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

(c) 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.

(d) 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.)

### *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. (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.

4. The purpose of the Carpet Law is to increase the amount of postconsumer carpet diverted from landfills and recycled into secondary products otherwise managed in a manner 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, in conjunction with § 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. Resource 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 "continuous meaningful improvement" in recycling output rate and other goals included in the approved plan. (Pub. Resource 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. Resource Code, § 42971, subd. (e)(2).) At all relevant times, CARE represented an estimated 75 to 80 manufacturers who sell carpet in California. When the stewardship program first launched in 2011 and continuing through 2013, state law required consumers be assessed five cents per square yard of all carpet purchased in California to fund CARE’s operation as the carpet stewardship organization. (Pub. Resource Code, § 42972.5, subd. (a).)

7. Pursuant to Public Resource Code section 42975, subdivision (a), CARE is required to demonstrate that it has achieved “continuous meaningful improvement” in the rates of recycling and diversion of postconsumer carpet subject to the stewardship plan and in meeting the other goals included in the plan. To demonstrate “continuous meaningful improvement,” 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. Resource Code, § 42976.)

8. CalRecycle shall review the annual report to determine if the carpet stewardship organization has complied with the law by demonstrating “continuous meaningful improvement” in the recycling and diversion rates of postconsumer carpet. (Pub. Resource Code, § 42973.)

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

#### *CARE’s Stewardship Plan and Annual Reports*

#### BACKGROUND HISTORY AND INFORMATION:

10. In March 2011, CARE submitted its stewardship plan (Plan) to CalRecycle. The Plan (version 1.4) included a primary goal of attaining recycling output rate of 16 percent by 2016. Additional goals included: increase the diversion of postconsumer carpet from landfill disposal; use recycled carpet in secondary materials manufacturing; increase education and outreach; increase convenient collection; and increase carpet recyclability. On January 17, 2012, CalRecycle conditionally approved the Plan, and required CARE to resubmit the Plan after one 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 the Plan. Thereafter, the Department reviewed eight CARE carpet stewardship plans and three CARE Addendums to CARE’s carpet stewardship plans prior to 2016.

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

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

13. On July 1 2015, CARE submitted its Annual Report for the calendar-year 2014 reporting period. The report listed an overall recycled output rate of 12.1 percent during 2014, with a downward trend to 11 percent reported in the fourth quarter. CARE asserted it increased the carpet fee assessment and restructured other incentives to encourage recycling. CARE also 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.<sup>2</sup>

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

15. On October 9, 2015, CARE submitted for CalRecycle’s review an Addendum No. 2 to the Plan, which proposed establishing grant and loan programs. On October 27, 2015, CalRecycle approved a limited pilot grant program. On November 30, 2015, CARE

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<sup>2</sup> At an administrative hearing on September 26, 2017, Robert Peoples, Ph.D., CARE’s Executive Director and a principal contributor to its annual reports, testified that the drop in crude oil prices ultimately resulted in the cost of new carpet material falling below the cost of recycled carpet material in 2015.

submitted for CalRecycle's review an Addendum No. 3, which proposed to increase carpet assessments and recycling incentives, and to implement other programmatic changes responsive to CalRecycle's prior noncompliance findings. On January 26, 2016, CalRecycle approved Addendum No. 3.

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

17. In September 2016, CalRecycle evaluated CARE's 2015 Annual Report and found that CARE failed to demonstrate continuous meaningful improvement in its postconsumer recycling and diversion rates. Specifically, CalRecycle found: (1) the recycled output and diversion rates for 2015 were lower than the goals outlined in the Plan; (2) several large population centers continued to lack convenient access to carpet recycling; (3) CARE's education, marketing, and outreach did not result in increased carpet recycling or diversion; and, (4) CARE was still not responding to market changes in a timely manner.

18. Based on its findings, CalRecycle initiated an administrative/enforcement action against CARE by filing an Accusation in CalRecycle Case No. 2017-001-CARPET, and seeking monetary penalties due to CARE's alleged noncompliance with the stewardship program during 2013, 2014, and 2015. On September 26, 2017, an OAH administrative law judge (ALJ) heard the matter in OAH Case No. 2017045578; and on February 13, 2018, the ALJ issued a proposed decision. On April 25, 2018, CalRecycle modified and adopted the ALJ's proposed decision and ordered CARE to pay penalties in the amount of \$821,250.<sup>3</sup>

#### 2016 ANNUAL REPORT:

19. The instant case involves CARE's Annual Report for the calendar year 2016, which it submitted to CalRecycle on June 30, 2017. CARE reported that its recycling rate "increased slightly in 2016, from 10 [percent] in 2015 to 11 [percent]." CARE attributed the flat recycling rate, in part, to the decline in global crude oil prices, the continuing market shift in 2016 from more expensive nylon carpet to less expensive polyethylene terephthalate

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<sup>3</sup> The matter is currently on appeal. At hearing, the parties stipulated that for purposes of clarity and continuity, the exhibits received in evidence in the instant case should be numbered in the same order as they were numbered in the previous administrative action. For example, CalRecycle's first exhibit in order at hearing was not marked as Exhibit 1, but was instead marked as Exhibit 5 since in the prior matter it was marked as Exhibit 5.

(PET) carpet, and the shutdown of two Tier-1 processors in 2016 (which reduced demand for post-consumer carpet (PCC)). CARE noted a four percent increase in the gross collection of PCC from 2015 to 2016, and an increase of CARE-enabled PCC drop-off sites from 23 sites in 22 counties in 2015, to 33 sites in 33 counties in 2016. CARE cited to various improvements in market development and growth, and an increase in its education and outreach budget in 2016.

20. On September 21, 2017, CalRecycle concluded its evaluation of CARE's 2016 annual report and determined that CARE was noncompliant with the carpet stewardship plan because its 11 percent recycling rate did not demonstrate "continuous meaningful improvement" over the 10.1 percent recycling rate CARE achieved in 2015. Among other things, CalRecycle noted that: the percent of gross collections converted to recycled output – or "yield" – was 35.1 percent of gross collections in 2016, down from the high of 41.1 percent achieved in 2013; reuse increased by 51 percent in 2016, but represented only 0.27 percent of the carpet discarded during the year; the reported diversion decreased from 73 million pounds (21 percent of discards) in 2015, to 61 million pounds (18 percent of discards) in 2016; and 25 counties still have no CARE drop-off sites. While noting CARE's reports on its educational outreach activities, CalRecycle found CARE was unclear regarding how it was measuring the effectiveness of those activities.

*Testimony of Howard Levenson*

21. Howard Levenson has been the Deputy Director of CalRecycle's Materials Management and Local Assistance Division for approximately 12 years. He described the "Extended Producer Responsibility" (EPR) program, which places more responsibility on manufacturers to manage the end-of-life phase of their products. Under the EPA program model, manufacturers are expected to design effective recycling programs based on their substantial knowledge of the industry.

22. CARE's recycling program is funded by an assessment levied by California manufacturers of five cents per yard of carpet; these funds go to CARE, which has a duty to spend these funds appropriately to administer its plan. CARE has discretion to increase the assessment and increased it to 10 cents per yard in 2015, then increased it again, to 20 cents per square yard in 2016. Mr. Levenson is concerned that CARE has not performed studies regarding how high the assessment should be in order for CARE to meet its 16 percent recycling goal. Instead, CARE has created its own budget and set its own assessment levels. CalRecycle has asked CARE to undertake such a cost analysis for several years now, but CARE has not done so.

23. CalRecycle's role with CARE is to receive CARE's plan, post it on the internet for public comment, and determine whether it is complete and acceptable in terms of meeting the stated recycling goals. CalRecycle may approve, conditionally approve, or reject a plan, and must oversee any approved or conditionally approved plans to ensure future compliance. The plan's steward must primarily develop and carry out the plan's components and achieve the plan's stated goals. Those goals must be plainly articulated in

the plan. The steward also has a fiduciary duty to its manufacturers to use all funds responsibly.

24. CARE has submitted multiple plans, with addendums, since 2011. Mr. Levenson opined that this is because their goals were not being met. Their stated recycling goal of 16 percent has not changed through the years, although CARE has the discretion to amend it. The primary thrust of its Plan is to create monetary incentives, in that processors and recyclers receive subsidies to ensure a higher rate of recycling. These incentives represent a percentage of CARE's operating budget, but CARE has not revealed that percentage to CalRecycle. In the past, most recycling programs involved the state in the collection of assessments from the industry, and the distribution of those funds in a manner designed to stimulate recycling; this is known as the "command and control" model. CARE had the discretion to select the incentive-based model it currently employs. Mr. Levenson could not recall whether CalRecycle has suggested to CARE that they employ a different model. He believes a contractual model, in which CARE enters into contracts with collectors, may work to increase recycling rates. But ultimately, CARE is responsible for ensuring its Plan is properly incentivized and effective in meeting recycling goals.

25. Mr. Levenson summarized CalRecycle's viewpoint as "skeptical" regarding whether CARE can reach its 16 percent recycling goal using the incentive structure they have employed, because the cost of recycling the plastic material found in carpet varies based on the international price of oil. He opined that this uncertainty makes it difficult for such an incentive structure to succeed. He has met several times with Robert Peoples, Ph.D., CARE's Executive Director, and has noted that Dr. Peoples' earlier sense of relative optimism about CARE meeting this goal has now become more pessimistic due to the closing of a major carpet recycling facility in the Midwest. Another problem for CARE is that it would have difficulty conducting studies regarding the viability of its incentive program, because it does not have access to the economic data kept by the companies involved. As a result, CalRecycle has repeatedly encouraged CARE to work closely together with the state to try to find a better method of stimulating recycling. Mr. Levenson opined that CARE's lack of in-depth analysis of the incentivizing portion of its Plan fails to justify that approach and shows a "lack of commitment" toward CARE meeting its objectives.

26. On cross-examination, Mr. Levenson conceded that for several years CalRecycle approved CARE's evolving Plan and addendums when it could have disapproved of them, but he asserted that CARE had the discretion to make changes to its approaches without CalRecycle's permission. He also noted that California's overall statewide recycling rate has fallen from 50 percent in 2014, to 47 percent in 2015, and to 44 percent in 2016, as set forth in CalRecycle's "State of Disposal and Recycling in California 2017 Update" report. Mr. Levenson considered this as a factor in his assessment of CARE's failure to meet its recycling goals.

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*Testimony of Clark Williams*

27. Clark Williams has been employed by CalRecycle for approximately 18 years, and is a Branch Chief in charge of several programs. He has led the Carpet Recycling Program since 2010. He has reviewed and considered all of CARE's yearly plans and addenda, and he was responsible for making the findings that CARE has not met its goals and objectives. He explained that California's statewide decline in its recycling rate has been affected by a change in the export markets overseas, which caused a decline in the value of paper and plastic recycled materials, and made recycling a less lucrative pursuit. This made CARE's recycling rate more closely connected with the costs of domestic recycling and processing. CalRecycle holds regular monthly meetings, and quarterly and annual reviews, with CARE regarding its performance, and has raised the issue of whether CARE's incentive-based approach to increasing recycling is sufficient to make recycling a viable business endeavor for potential recyclers. In Mr. Williams' opinion, CARE has consistently failed to present evidence which would support its current approach.

28. In sum, Mr. Williams found that CARE failed to meet the Plan's 16 percent recycling goal and failed to demonstrate "continuous meaningful improvement" in its recycling and diversion rates, pursuant to Public Resources Code section 42975, subdivision (a), in relation to this goal and other goals stated in the Plan. CARE's 2016 Annual Report did not report on several factors important to its Plan, including improvements to accessibility to recycling and processing facilities, the ease by which carpets could be separated into component parts for recycling, "best practices" for recycling, or how subsidy funds are spent and invested. Although CARE reported that it now has 33 recycling drop-off recycling sites compared with 23 in 2015, it still does not have drop-off recycling sites in 25 other counties; this falls well short of the Plan's goal of having drop-off sites available in every county.

*CARE's Evidence*

29. Dr. Peoples holds a Ph.D. in physical organic chemistry from Perdue University, and previously worked for the Monsanto Company, researching the sustainability of one of the company's carpet products. He testified that he has had an ongoing collaborative experience with CalRecycle regarding the Plan, and considers the issue of meeting the Plan's goals to be a "complex challenge" that is rarely "black and white" in terms of how CARE can best meet those goals. CARE's cannot rely on statutory or regulatory guidance because none exists, so it must constantly "sort through" these difficult issues. In 2016, China's "National Sword" program effectively halted approximately 95 percent of exported recyclable materials leaving the United States, causing the price of polymers to drop, and overall, causing a substantial decline in California's statewide recycling rates and affecting CARE's recycling efforts. Another substantial factor affecting CARE involved Georgia-based Shaw Industries, one of the world's large carpet manufacturers, which had invested millions of dollars in the development of a carpet-recycling plant. However, the recycling technology Shaw Industries employed was not effective and the plant was shut down. Dr. Peoples opined that if these negative recycling-

market factors, and California's overall drop in recycling, are weighed against CARE's 2016 results, CARE actually performed well in 2016.

30. Dr. Peoples further noted that since 2016, CARE has submitted a new recycling goal to CalRecycle of approximately 24 percent. Although this is a substantially higher figure than what CARE has achieved to date, CARE intended to establish "in good faith" that it was making every effort to "try to make this [plan] work" more effectively over the course of the next five years. Thus, he considered this future benchmark to be a "stretch goal."

#### *Discussion*

31. CalRecycle bears the burden of proving that CARE failed to show continuous meaningful improvement in its recycling output and landfill diversion rates, a standard set forth by Public Resources Code section 42975, subdivision (a), in relation to CARE meeting its primary yearly recycling goal of 16 percent and other goals set forth in its Plan. Because the Carpet Law does not further define what would constitute sufficient "continuous meaningful improvement," that question can only be answered by considering the specific improvement goals CARE's Plan set forth, then determining what progress and results CARE achieved.

32. The parameters of success for a steward's approved plan under the Carpet Law are that it: achieves the purposes of the recycling program; includes goals that increase postconsumer carpet recycling, diversion of postconsumer carpet from landfills, recyclability of carpets, and incentivize the market growth of secondary products made from postconsumer carpet; describes proposed measures for managing postconsumer carpet consistent with the state's waste management hierarchy; and includes a funding mechanism sufficient to carry out the plan and demonstrate "continuous meaningful improvement" in recycling output rate and other goals in the plan. (Pub. Resource Code, § 42972, subd. (a).)

33. The evidence, which was essentially undisputed at hearing, established that in 2016, CARE's overall recycling rate merely "increased slightly" from 10.1 percent in 2015 to 11 percent in 2016. This 11 percent rate is lower than the 12 percent rate CARE achieved in 2013 and 2014. Diversion of recyclable materials from landfills decreased from 73 million pounds in 2015 to 61 million pounds in 2016, a three percent drop. Despite CARE adding more recycling drop-off sites in 2016, 25 counties in California still had no CARE drop-off sites. Although CARE credibly cited reasons purportedly beyond its control for some of these results, a straightforward evaluation of these figures leads to the conclusion CARE did not achieve continuous meaningful improvement.

34. CalRecycle met its burden by establishing, by a preponderance of the evidence, that CARE was non-compliant with the Plan in 2016. Thus, CARE's failure to show continuous meaningful improvement during this period raises an issue as to what penalties should be levied.

PENALTIES:

35. The Carpet Law establishes various levels of civil penalties, depending upon the circumstances and other factors. CalRecycle is authorized to impose administrative civil penalties, up to \$1,000 per day, on any person or carpet stewardship organization which violates any provision of the Carpet Law. (Pub. Resource Code, § 42978, subd. (a)(1); Cal. Code Regs., tit. 14, §§ 18945, 18945.1.) Failure to achieve continuous meaningful improvement during the reporting period is considered a "Level 2" violation under California Code of Regulations, title 14, section 18945.1, subdivision (b)(2), for which a penalty of up to \$5,000 per day may be assessed. "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).)

36. In the Accusation, CalRecycle seeks a penalty of \$5,000 per day, for 366 days in the (leap) year 2016, totaling \$1,830,000. CalRecycle contends that several factors establish a basis for this level of penalties, including that: 1) the violation is a Level 2 violation; 2) the violations are yearlong and, therefore, significant; 3) CARE is a large-sized violator; 4) CARE has a prior three-year history of violations (in 2013, 2014, and 2015); 5) CARE committed willful and/or negligent violations by chronically underperforming, insisting on a 16 percent recycling goal, resisting CalRecycle recommended changes, failing to take reasonable measures to ensure success, failing to take "good faith efforts" to comply, and failing to increase the assessment; and 6) a "strong monetary penalty might send a message to stakeholders and prospective customers" that CARE's members need to do more to meet its recycling obligations.

37. In determining the appropriate penalty, CalRecycle must consider the "totality of the circumstances." (Cal. Code Regs., tit. 14, § 18945.) Section 18945.2 requires CalRecycle to consider all of 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.

38. As set forth in Finding 33, CARE's failure to achieve continuous meaningful improvement during the reporting period is considered a Level 2 violation under California Code of Regulations, title 14, section 18945.1, for which a penalty of "up to \$5,000 per day" may be assessed.

39. Considering the relevant factors, CARE's violations were based on underperformance in reaching the Plan's stated goals, and continues a recent history of similar noncompliance. CARE is sizable in that it represents all 75 of California's carpet manufacturers. At hearing, CalRecycle's witnesses established legitimate disagreements with some of the methods CARE employed to reach the Plan's goals – particularly CARE's use of an incentive program in the apparent absence of specific justification for how that program was designed and implemented – and both Mr. Levenson and Mr. Williams indicated a sense of frustration with CARE's lack of success. However, the evidence did not establish that CARE's noncompliance was due to willful, intentional, or negligent conduct or omissions; nor was there any evidence that CARE's violations led to financial gain. Dr. Peoples was a serious-minded, responsible witness who was respectful of CalRecycle's authority and mindful of CARE's shortcomings. He took time to explain CARE's 2016 failures in the larger context of statewide and global recycling, rather than excuse them. Notably, CalRecycle did not disagree with those assessments. Every witness who testified exhibited a spirit of cooperation. There was nothing egregious about CARE's failure to meet goals, and nothing to indicate CARE failed to act in "good faith;" instead, CalRecycle has made its recommendations, while CARE's mounting history of missing its goals has added urgency to CalRecycle's concern that not enough of its recommendations have been implemented.

40. CalRecycle recommended a "strong monetary penalty" of nearly two million dollars, asserting that such a fine might send a message to CARE and its members. Yet the evidence, and the factors analyzed in Finding 39, did not support the imposition of a maximum-level penalty. In fact, several of those factors serve to mitigate CARE's noncompliance. CalRecycle's contention that a maximum penalty will act as a deterrent is merely speculative. This is CalRecycle's second administrative action against CARE in two years, and both times, CalRecycle has established CARE's failure to demonstrate continuous meaningful improvement in its reporting periods. In short, CalRecycle has put CARE on notice that continued noncompliance will result in formalized litigation and serious financial consequences.

41. A massive penalty adds an element of financial punishment that, in light of all the evidence, is unjustified. Even so, the penalty imposed must be sufficient to create a deterrent effect on CARE and the regulated community, but not be so severe as to hamper CARE's future ability to come into compliance. CARE's size and that of the community it represents, as well as its history of violation of the Plan, necessitate an enhanced penalty to

reasonably serve as a deterrent and encourage future compliance. Yet, a huge increase in penalties is not called for. Considering the factors in California Code of Regulations, title 14, section 18945.1, a civil penalty of \$750 per day, for a total of \$274,500 is appropriate.

## LEGAL CONCLUSIONS

1. CalRecycle has the burden of proving, by a preponderance of the evidence, the violations alleged in the Accusation. (Evid. Code, §§ 115, 500.) CalRecycle met its burden, as set forth in Findings 10 through 28. CARE bears the burden of proving any evidence in mitigation. (*Ibid.*) CARE met its burden in regard to mitigation, as set forth in Findings 29 and 30.

### *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) Include goals that, to the extent feasible based on available technology and information, increase the recycling of postconsumer carpet, increase the diversion of postconsumer carpets from landfills, increase the recyclability of carpets, and incentivize the market growth of secondary products made from postconsumer carpet. The goals established in the plan shall, at a minimum, be equal to the goals established in the CARE MOU, if it has been adopted at the time the plan is submitted to the department.

(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, 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 as described in paragraph (1) . . . .

[¶] . . . [¶]

(c)(1) The funding mechanism required pursuant to paragraph (4) of subdivision (a) shall establish and provide for, on and after January 1, 2013, a carpet stewardship assessment per unit of carpet sold in the state in an amount that cumulatively will adequately fund the plan and be consistent with the purposes of the chapter. The assessment shall be remitted to the carpet stewardship organization on a quarterly basis and the carpet stewardship organization may expend the assessment only to carry out the plan.

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

(a) In order to achieve compliance with this chapter, a carpet stewardship organization shall, on or before July 1, 2013, and annually thereafter, demonstrate to the department that it has achieved continuous meaningful improvement in the rates of recycling and diversion of postconsumer carpet subject to its stewardship plan and in meeting 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.

(2) The goals included in the CARE MOU.

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

4. Public Resource Code section 42976 states:

On or before July 1, 2013, and each year thereafter, 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. CalRecycle is authorized by Public Resource Code section 42978, subdivision (a)(1), and California Code of Regulations, title 14, section 18945, to impose civil penalties on violators of the Carpet Law. California Code of Regulations, title 14, section 18945.1, sets forth a base penalty table with corresponding severity levels, and includes amounts of possible civil penalties to be levied depending on the circumstances.

6. As set forth in Findings 10 through 28, cause exists to impose a civil penalty on CARE for failing to demonstrate continuous meaningful improvement during the 2016 reporting period, pursuant to Public Resource Code section 42975. As set forth in Findings 35 through 41, a civil penalty of \$750 per day, for a total of \$274,500, is appropriate.

7. Pursuant to Public Resource 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 collected assessments to pay the civil penalties issued herein.

ORDER

CARE shall pay a total of \$274,500 in civil penalties to CalRecycle within 60 days after the effective date of the decision in this matter, or pursuant to a repayment schedule entirely within CalRecycle's discretion to establish. CARE is prohibited from using assessments collected pursuant to the Plan to satisfy these civil penalties.

DATED: February 25, 2019

DocuSigned by:

*John DeCure*

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JOHN E. DeCURE  
Administrative Law Judge  
Office of Administrative Hearings

BEFORE THE  
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CARPET AMERICA RECOVERY  
EFFORT (CARE),

Respondent.

Case No. 2018-001-CARPET

OAH No. 2018090439

**ORDER OF DECISION**

**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Resources Recycling and Recovery as its Decision in the above-entitled matter.

This Decision shall become effective on \_\_\_\_\_.

IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_.

By: \_\_\_\_\_

