

**BEFORE THE
DEPARTMENT OF RESOURCES, RECYCLING & RECOVERY
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF ACCUSATION AGAINST:

Enviro Recycling Services – Fabian Negrini

Address:

Type of Entity: Revocation of Probationary Certificate

File No.: 2015-006-BCR

OAH No. 2015121021

Certificate No.: CP130144.001

PRECEDENTIAL DECISION No.: 23-12

**Designation of decision as precedential under Government
Code Section 11425.60**

Pursuant to Government Code Section 11425.60, the Department of Resources, Recycling and Recovery hereby designates as precedential its decision, dated September 22, 2017, in the above-referenced action.

This decision is designated precedential effective September 10, 2023,
Sacramento, California.

Dated: September 10, 2023.

As approved by Rachel Machi Wagoner on September 10, 2023,
Department of Resources, Recycling & Recovery.

1 STATE OF CALIFORNIA
2 DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

3 FILED

4 IN THE MATTER OF THE
5 ACCUSATION AGAINST:

OAH Case No. 2015121021

SEP 22 2017

6 Enviro Recycling Services, LLC
7 (CP130144.001),

DRRR Case No. 2015-006-BCR

CalRecycle
Legal Office

8 and

DECISION

9 Fabian Negrini, an individual,

Respondents.

10 The Proposed Decision of the Administrative Law Judge of the Office of Administrative
11 Hearings, which is attached and incorporated by reference, is hereby adopted by the California
12 Department of Resources Recycling and Recovery as its Final Agency Decision in the
13 above-entitled matter.

14 This Final Agency Decision will become effective on 9-21-17.

15 IT IS SO ORDERED.

16 Department of Resources Recycling And Recovery
17 State of California

18 Dated: 9-21-17

19 
20 Scott Smithline, Director
21 California Department of Resources
22 Recycling and Recovery
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BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA

FILED

SEP 22 2017

CalRecycle
Legal Office

In the Matter of the Second Amended
Accusation Against:

Case No. 2015-006-BCR

ENVIRO RECYCLING SERVICES,
LLC, and FABIAN NEGRINI,

OAH No. 2015121021

Respondents.

PROPOSED DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California on May 23-24, 2016. It was consolidated for hearing with Case No. 2015-005-BCR, OAH No. 2015121019, against respondents PNL Recycling, Inc., and Marco Antonio Iezza. A separate proposed decision is being issued in each case. (See Cal. Code Regs., tit. 1, § 1016, subd. (d).)

Jeffrey A. Diamond, Senior Staff Counsel, represented the Department of Resources Recycling and Recovery (Department).

John C. Gugliotta, Esq., represented respondents Enviro Recycling Services, LLC (Enviro), Fabian Negrini (Negrini), PNL Recycling, Inc. (PNL), and Marco Antonio Iezza (Iezza).

During the hearing, the Department filed a "Supplement to the Second Amended Accusation," which was admitted for jurisdictional purposes as Exhibit 16. Respondents were advised they could request more time to prepare their defenses to the new charges, but they did not. (Gov. Code, § 11507.)

The record was held open after the hearing for the submission of closing briefs. Before they were due, the Department filed a "Second Supplement to the Second Amended Accusation" on June 23, 2016. Respondents' closing brief addresses the merits of the new charges, and does not include a request for more time to prepare defenses to them, or a request to reopen the hearing to present more evidence. Therefore, the second supplement is admitted for jurisdictional purposes as Exhibit 18.

The Department's closing brief was marked as Exhibit 20, and respondents' closing brief was marked as Exhibit D. The matter was submitted after oral argument on the closing briefs on October 31, 2016.

SUMMARY

The Department alleges Enviro and Negrini, its operator, submitted fraudulent claims for payment of California Refund Value (CRV) and associated costs on empty beverage containers between January 2013 and April 2014. Negrini admits Enviro did not maintain logs of its purchases of used beverage containers as required, but denies Enviro's claims were fraudulent. A preponderance of the evidence established that Enviro's claims for CRV were fraudulent, warranting revocation of Enviro's certification as a dropoff or collection program, as well as restitution, civil penalties, and a cease and desist order against Enviro and Negrini.

FACTUAL FINDINGS

1. In late 2010, Enviro, a California limited liability company, was certified as a "dropoff or collection program" under the California Beverage Container Recycling and Litter Reduction Act (Act) (Pub. Resources Code, § 14500 et seq.).¹ A "dropoff or collection program" is a "person, association, nonprofit corporation, church, club, or other organization certified by the department, and that accepts or collects empty beverage containers from consumers with the intention to recycle them, or any waste reduction facility that separates beverage containers from the wastestream with the intent to recycle them." (§ 14511.7.)

2. Negrini was Enviro's sole member and operator. Beginning in 2012, she worked together with Iezza, the owner and operator of PNL, which operated a similar, separately certified dropoff or collection program. Negrini and Iezza are brothers-in-law, and operated the programs from two warehouses close to each other in Rancho Cucamonga, California, sharing a truck to pick up empty beverage containers, and a baler to compress them. Each of them was in charge of their respective business, and personally involved in its operations.

3. Enviro and PNL operated by purchasing used beverage containers from customers such as schools and churches, and then redeeming them for CRV. Empty beverage containers of drinks like beer, wine coolers, bottled water, soft drinks, and coffee and tea drinks that are sold or offered for sale in California by a distributor have a CRV of five or ten cents per container. (§§ 14504, 14560.) Enviro and PNL placed collection bins at customer locations, picked them up when full, and paid the customers a fee, which according to Iezza and Negrini approximated the non-CRV "scrap value" of the full bins of containers. (See § 14526 [defining "scrap value"].) A dropoff or collection program may pay scrap

¹ Undesignated statutory references are to the Public Resources Code.

value for containers, but may not pay CRV. (§ 14573.6.) Enviro and PNL also had one customer, Meyer & Associates, that delivered used beverage containers directly to their warehouses. Enviro and PNL sorted the containers by type of material, baled the aluminum and plastic containers, and shipped them to a “processor” authorized by the Department to pay CRV. (See §§ 14518, 14573.5.)

4. The processor weighed each shipment, and was required to inspect it to determine its eligibility for CRV. (See Cal. Code Regs., tit. 14, § 2401.) For an approved shipment, the processor paid Enviro or PNL the shipment’s CRV, plus processing costs, administrative costs, and the material’s scrap value. The processor then claimed reimbursement of the CRV, processing costs, and administrative costs from the California Beverage Container Recycling Fund (Fund), which the Department administers. (See § 14580.) The processor also claimed an amount of its own administrative costs for each shipment.

5. Between January 1, 2013, and April 24, 2014, the Department reimbursed rePlanet, Enviro’s processor, \$1,707,770.32 for CRV claims from Enviro, including 57 claims on aluminum beverage containers and 68 claims on PET (#1 plastic) beverage containers. The Department also paid rePlanet \$42,110.86 in administrative costs based on the claims. Between July 3, 2012, and May 5, 2014, the Department reimbursed RecycleWise, PNL’s processor, \$2,015,465.77 for CRV claims from PNL, including 67 claims on aluminum beverage containers, and 81 claims on PET beverage containers. The Department also paid RecycleWise \$49,823.79 in administrative costs based on the claims.

6. In late April 2014, a Department investigative auditor visited Enviro’s and PNL’s warehouses due to their unusually high volumes of aluminum and PET, and unusually low volumes of glass and HDPE (#2 plastic) compared to other dropoff or collection programs. Among such programs statewide, Enviro and PNL had the largest volumes of CRV claims for aluminum and PET. The auditor asked Negrini and Iezza for the companies’ pickup or donation logs, among other documents. A dropoff or collection program must maintain logs that record: “(A) The date and time of pickup or donation; . . . (B) The name and address of the location of pickup or donation; . . . (C) The material types picked up or donated; . . . (D) An approximation of the weight of each material type picked up or donated; . . . (E) The name and phone number of a contact person at the location of pickup; and (F) Amount of scrap value paid for each material type.” (Cal. Code Regs., tit. 14, § 2615, subd. (a)(1).)

7. Neither Enviro nor PNL had pickup or donation logs. According to Negrini, Enviro did not maintain the logs because he “got busy,” and because he did not understand their importance. According to Iezza, PNL did not maintain the logs because he “just got busy taking care of the business, trying to sign up customers, trying to maintain the customers that PNL had.” A Department representative had advised both of them of the need for logs when Enviro and PNL were first certified as dropoff or collection programs.

8. The Department auditor also asked for lists of Enviro's and PNL's customers, which Negrini and Iezza provided. On both lists, Meyer & Associates stood out, because Enviro and PNL each appeared to be paying that customer \$1,500 twice a week, much more than any other customer. The auditor asked Negrini and Iezza to explain why, and they replied that Meyer & Associates supplied more material than other customers, about 50 percent of their volume. When asked where Meyer & Associates got the material, one of them replied that Steven Meyer, the owner, said it came from Disney, the Honda Center, and other venues in Anaheim, California.

9. Following the site visit, the Department imposed prepayment controls on both companies, under which the Department could audit future CRV claims before a processor paid them. (See § 14552, subd. (a).) The Department also tried to verify the source of material from Meyer & Associates, but could not confirm it came from Disney, the Honda Center, or other venues in Anaheim. Meyer & Associates had no type of certification with the Department, and its address on the Enviro and PNL customer lists was a post office box in a strip mall shopping center. A Department auditor reached Mr. Meyer by telephone, but he was uncooperative, refusing to meet with the auditor or say from where Meyer & Associates obtained its material. Shortly after that call, Mr. Meyer sent an email to Negrini and Iezza on May 5, 2014, ending his business relationship with them, effective immediately:

I received a call from a guy representing the Recycling Division for California and he insisted on getting my customer list or even coming to see where I pick up material. I am not interested in getting involved with these bureaucrats especially when they make demands that is [sic] none of their business. Since I am a material broker I also don't divulge my customer list to you so you can go and poach them from me. In light of these events I have decided to no longer ship you material from my events effective immediately. Luckily for me you are not my only buyers and the demand is big. Good luck and god bless. Sincerely, Steven

10. PNL stopped operating almost immediately. Enviro submitted a few CRV claims while on prepayment control, but did not last long. Its CRV claims in June 2014 for aluminum and PET decreased 83.7 percent and 69.5 percent compared to June 2013, respectively.

11. On September 10, 2015, the Department filed the Second Amended Accusation against Enviro and Negrini, alleging all of Enviro's claims for CRV between January 1, 2013, and April 24, 2014, were fraudulent. The claims involved over 621,000 pounds of aluminum, and over 773,000 pounds of PET. Enviro and Negrini filed a notice of defense on September 23, 2015.

Deliveries from Meyer & Associates

12. Meyer & Associates delivered used beverage containers to Enviro or PNL daily, five days a week, in 18-wheel semi-trucks or similarly large roll-off bins. The

containers were loose and unsorted in plastic bags, and no documentation accompanied the shipments. Negrini or Iezza paid the driver in cash based on the estimated weight of each shipment and type of material in it. They never received or asked for payment receipts, and did not maintain or provide Meyer & Associates with a written breakdown of the estimated weight, types of materials, and scrap prices paid. Enviro and PNL shared the material from Meyer & Associates equally when submitting CRV claims.

13.e Mr. Meyer never visited Enviro's or PNL's warehouses, and Negrini and Iezza never went to any Meyer & Associates facility. Iezza met Mr. Meyer only once in a coffee shop, and gave him an envelope of cash for the first shipment of containers from Meyer & Associates to PNL. Negrini similarly met with Mr. Meyer at coffee shops and other public places.

14.e According to its counsel, the Department still does not know the source of the used beverage containers from Meyer & Associates. Respondents also presented no evidence of that source. Used beverage containers from some sources are ineligible for CRV redemption, even if they bear "CA CRV" or similar labels. For instance, containers imported from out of state are ineligible. (§§ 14595, 14595.5.) Previously redeemed containers, rejected containers, "line breakage" (i.e. pre-consumer material that is recycled or disposed), previously baled containers, and materials that have never had a refund value are also ineligible. (§§ 14595, 14595.5; Cal. Code Regs., tit. 14, §§ 2000, subd. (a)(27.6), (41), 2110, 2401, 2501.)

Pickups from other customers

15.e For other customers such as schools and churches, Enviro and PNL picked up used beverage containers upon request, and paid a "flat fee" depending on the size of the collection bin (e.g., \$300). According to Negrini, Enviro never paid pickup customers in cash; according to Iezza, PNL usually did. Enviro and PNL generated no paperwork associated with the pickups. The companies shared the material equally, and combined it with the material from Meyer & Associates when submitting claims.

Testimony

16.e Negrini admitted he did not create pickup or dropoff logs for Enviro, but denied Enviro's claims were fraudulent. According to him, he began doing business with Meyer & Associates in 2012, but never asked where Mr. Meyer obtained material because he was "not obligated to ask questions," and because Mr. Meyer's customer list was proprietary. He also testified that the Department conducted surveys of Enviro even before imposing prepayment controls, and never told him the material from Meyer & Associates was ineligible for redemption. Furthermore, rePlanet, Enviro's processor, was required to inspect the material being redeemed, and prepared weight tickets and shipping reports verifying the date of delivery, type of material, total weight delivered, and total refund value.

17. Iezza similarly denied PNL's claims were fraudulent, while also admitting he did not create pickup or dropoff logs. According to him, he had enough information to verify the material PNL submitted for CRV was acceptable, and no reason to question Mr. Meyer's statement that the Meyer & Associates containers came from "schools, parks, churches, sporting events, different types of – beaches, beach parties on the beach, something like that, cycling type of races." He and Mr. Meyer spoke before PNL began operating, and Mr. Meyer never said the containers came from out of state. Furthermore, Iezza inspected the material when he received it, and RecycleWise, PNL's processor, was also required to inspect the material being redeemed, just like Enviro's processor.

18. Three Department auditors testified about the Department's investigation of Enviro and PNL. A fourth Department auditor testified that interest on the amounts paid on the Enviro claims totaled \$12,788.06 through May 23, 2016. Negrini and Iezza were the only other witnesses; Mr. Meyer did not testify.

LEGAL CONCLUSIONS

Legal Standards

1. "The department may take disciplinary action against any party responsible for directing, contributing to, participating in, or otherwise influencing the operations of a certified or registered facility or program." (§ 14591.2, subd. (a).) "A responsible party includes, but is not limited to, the certificate holder, registrant, officer, director, or managing employee." (*Ibid.*) Grounds for disciplinary action include "dishonesty, incompetence, negligence, or fraud in performing the functions and duties of a certificate holder or registrant," and "violat[ing] this division [i.e., the Act] or any regulation adopted pursuant to this division . . . ," among others. (§ 14591.2, subd. (b)(2), (3).)

2.e Disciplinary action may include, among other things, revocation of a certificate, restitution, civil penalties, and costs and fees incurred as a result of the civil or administrative action. (§ 14591.2, subd. (c).) The Department may also assess the costs and fees incurred as a result of bringing the disciplinary action (§ 14591.3), and issue an order to cease and desist activity that violates the Act. (§ 14591.6, subd. (a).)

3.e As the party requesting disciplinary action, the Department has the burden of proof. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) This burden requires proof by a preponderance of the evidence (see Evid. Code, § 115), which means "evidence that has more convincing force than that opposed to it." [Citation.] (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) Certification as a dropoff or collection program does not have extensive educational, training, or testing requirements akin to a professional license, for which a higher burden of proof is required. (See §§ 14511.7, 14539.5; Cal. Code Regs., tit. 14, § 2600 et seq.; *Imports Performance v. Dept. of Consumer Affairs* (2011) 201 Cal.App.4th 911, 916-917.) The

Department's fraud allegations also do not require a higher burden of proof. (*Liodas v. Sahadi* (1971) 19 Cal.3d 278, 289-293.)

Causes for Discipline

COUNT ONE – FRAUD

4.e The evidence established that Enviro's redemption of used beverage containers from Meyer & Associates was fraudulent. The huge quantities of those containers, their unknown origin, and Mr. Meyer's reaction to the Department contacting him all suggest the containers were ineligible for CRV. Enviro nonetheless accepted shipments from Meyer & Associates from at least January 2013 through April 2014, paid only cash for them, kept logs of the deliveries, and combined them with other containers for CRV redemption. (See Factual Findings 5-10, 12-15.)

5.e An operator acting honestly would have questioned whether so many containers could really come with such regularity from local schools, parks, venues, and events, and why Meyer & Associates would want only scrap value for them, rather than redeeming them for CRV itself. But there is no evidence Negrini or Iezza ever did, and they produced no evidence the containers came from a legitimate source, despite the evidence suggesting otherwise. The fact that Enviro's processor was required to inspect the shipments before paying CRV does not prove the containers from Meyer & Associates were eligible for CRV, since an ineligible container (e.g., a container from out of state) can have the same "CA CRV" or similar label as an eligible container. (See Cal. Code Regs., tit. 14, § 2401, subd. (d); *Alamo Recycling, LLC v. Anheuser Busch InBev Worldwide, Inc.* (2015) 239 Cal.App.4th 983, 989.)

6.e This evidence suggesting fraud "has more convincing force" than Negrini's denial that Enviro's claims were fraudulent. (*People ex rel. Brown v. Tri-Union Seafoods, LLC, supra*, 171 Cal.App.4th at p. 567.) At a minimum, each Enviro claim for CRV amounted to a false representation that the containers from Meyer & Associates were eligible for CRV, made recklessly and without regard for its truth. "[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." [Citation.] (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; see also *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [a false representation may be "implied by conduct"].) Enviro was prohibited from receiving CRV on such fraudulent claims. (See § 4595.5.)

7.e The Second Amended Accusation goes further and alleges Enviro's redemption of containers from any source was fraudulent, because "[t]he act of filing a claim for program payments, including CRV, without supporting documentation constitutes fraud. (PRC §§ 14591.2 and 14597.)" But sections 14591.2 and 14597 do not say this, and section 14597, subdivision (b), defines a "fraudulent claim" for purposes of the subdivision as "a claim based in part on false information or falsified documents." (§ 14597, subd. (b).)

Enviro's failure to maintain pickup or dropoff logs violated a regulation adopted pursuant to the Act (Cal. Code Regs., tit. 14, § 2615), but was not itself "false information" or a "falsified document[.]" and does not by itself prove fraud. Furthermore, there was no evidence the used beverage containers from Enviro's customers other than Meyer & Associates, primarily schools and churches, came from an ineligible source. Therefore, the evidence did not establish that Enviro's redemption of containers from sources other than Meyer & Associates was fraudulent.

SUPPLEMENTAL COUNT – NON-CERTIFIED RECYCLER

8.e The Supplement to the Second Accusation alleges all material Enviroe purchased from Meyer & Associates was ineligible for redemption because Meyer & Associates was a "non-certified recycler." "Noncertified recycler" means a person, entity, or operation which is not certified by the department and which purchases empty beverage containers from consumers, or from dropoff or collection programs." (§ 14520.6.) A dropoff and collection program may not accept materials from a non-certified recycler. (§14539.5, subd. (b).)e

9.e The evidence proved Meyer & Associates was not certified, but did not establish whether its containers came from "consumers . . . or . . . dropoff or collection programs," as opposed to some other source. (§ 14520.6; see §§ 14508 ["Consumer" means every person who, for his or her use or consumption, purchases a beverage in a beverage container from a dealer. This includes, but is not limited to, a lodging, eating, or drinking establishment, and soft drink vending machines.], 14511.7 [a dropoff or collection program "accepts or collects empty beverage containers from consumers . . ."].) The evidence also did not establish whether Meyer & Associates purchased its containers. Mr. Meyer described himself as a "broker" with "customer[s]" in his email discontinuing business with Enviro and PNL. (Factual Finding 9.) If true, this could mean Meyer & Associates purchased the containers, but could also mean it was acting as a middleman for others, and did not purchase them. Thus, the Department did not prove the containers were ineligible specifically because Meyer & Associates was a "non-certified recycler."

SECOND SUPPLEMENTAL COUNT – NON-CERTIFIED COLLECTION PROGRAM

10.e The Second Supplement to the Second Amended Accusation alleges all material Enviro purchased from Meyer & Associates was also ineligible for redemption because Meyer & Associates was a "non-certified [c]ollection [p]rogram." There was insufficient evidence presented to determine if this post-hearing theory is correct. While Meyer & Associates may have "accept[ed] or collect[ed] empty beverage containers from consumers with the intention to recycle them," which would make it a "dropoff or collection program" if certified by the Department (§ 14511.7), it may also have been just a middleman, or acquired the used beverage containers in some other way. Mr. Meyer's assertion that he picked up containers from local events and venues (see Factual Findings 8, 17) was probably false, and the other evidence in the record does not explain how he really obtained containers.

Level of Discipline

REVOCAION OF CERTIFICATE

11.e Enviro's fraud warrants revocation of its certification as a dropoff or collectione program. (§ 14591.2, subds. (b), (c).) It redeemed huge quantities of ineligible containers from Meyer & Associates, and there were no mitigating circumstances warranting lesser discipline.

RESTITUTION

12.e Disciplinary action may also include "[c]ollection of amounts in restitution ofe any money improperly paid to the certificate holder or registrant from the fund," plus interest. (§§ 14591.2, subd. (c)(5), 14591.4, subd. (a).) Enviro's claims between January 1, 2013, and April 24, 2014, resulted in improper payments to Enviro totaling \$1,707,770.32, plus payment of \$42,110.86 in administrative costs to Enviro's processor, forea total of \$1,749,881.18.e(See Factual Finding 5.) Interest onthese amounts through May 23, 2016, is \$12,788.06.e(Factual Finding 18.)

13.e A restitution order for these amounts is appropriate. Each Enviro claim fore CRV that included containers from Meyer & Associates was fraudulent, and those containers were the vast majority ofEnviro's and PNL's supply. Negrini and Iezza asserted only 50 percent of their containers came from Meyer & Associates (Factual Finding 8), but this is doubtful, since PNL stopped redeeming containers almost immediately after Meyer & Associates stopped delivering them, and Enviro's volumes of aluminum and PET also dropped much more than 50percent. (Factual Finding 10.)e

14.e The fact that some containers in Enviro's claims may have been eligible fore CRV does not justify reducing the restitution order. Even for eligible containers, Enviro violated a regulation adopted pursuant to the Act by not maintaining pickup or dropoff logs, and the Department may alsoorder restitution for those violations.e(Factual Finding 7; § 14591.2, subds. (b)(3), (c)(5).) Furthermore, no reduction is warranted where Enviro failed to maintain the precise type of information about particularpickups, weights, sources, and types of materials that could have allowed estimation of what, if any, parts of Enviro's claims were for eligible containers.

15.e Respondents assert any restitution order should only be against Enviro,e because Enviro, not Negrini, was the certificate holder and received payment on the claims.e But the Department may "collect[] . . . amounts in restitution for money improperly paid to the certificate holder" from any "responsible party," which "includes, but is not limited to, the certificate holder, registrant, officer, director, or managing employee." (§ 14591.2, subds. (a), (c)(5).) Negrini was the sole member of Enviro, and was personally involved in its operations. (Factual Finding 2.) It was his decision to submit the claims for CRV at issue. (See Factual Findings 2, 16.) Therefore, he was a "responsible party" against whom the restitution order should alsoapply, jointly and severally with Enviro, to reflect his role in

the fraudulent claims. Respondents' assertion that the Department must "pierce the corporate veil" to order restitution from Negrini is unpersuasive.

PENALTIES

16.e "Any person who intentionally or negligently violates [the Act] may be assessed a civil penalty by the department pursuant to subdivision (a) of up to five thousand dollars (\$5,000) for each separate violation, or for continuing violations, for each day that violation occurs." (§§ 14591.1, subd. (b), 14591.2, subd. (c)(6).) "In determining the amount of penalties to be imposed . . . , the department shall take into consideration the nature, circumstances, extent and gravity of the violation, the costs associated with bringing the action and, with respect to the violator, the ability to pay, the degree of culpability, compliance history, and any other matters that justice may require." (§ 14591.1, subd. (e).)

17.e The nature, circumstances, extent and gravity of the violations, and degree of culpability all militate in favor of a substantial penalty award. Enviro's fraud resulted in over \$1.7 million in improper payments from the Fund. (See Factual Finding 5.) There were 125 such claims, including 57 for aluminum totaling over 621,000 pounds, and 68 for PET totaling over 773,000 pounds. (Factual Findings 5, 11.) There was no evidence presented of mitigating circumstances.

18.e The Second Amended Accusation assesses a \$625,000 penalty, which equals \$5,000 for each of Enviro's 125 claims. Respondents assert Enviro is unable to pay such a large penalty, but presented no evidence about Enviro's (or Negrini's) financial condition. The Department did not either, but "[t]he Courts of Appeal have held evidence of a defendant's financial status is not essential to the imposition of statutory penalties, and financial inability to pay is a matter to be raised in mitigation. [Citations.]" (*In re Estate of Kraus* (2010) 184 Cal.App.4th 103, 118; see also *People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 734 [in seeking civil penalties, "the People had no obligation to present evidence as to defendants' financial condition"])

19.e Considering the above, the Department's assessment of a \$625,000 penalty is reasonable. The total penalty is about 35 percent of the amount that Enviro obtained improperly from the Fund. The penalty should be a joint and several obligation of Enviro and Negrini, for the same reasons the restitution order should be a joint and several obligation. (See Legal Conclusion 15.) It is subject to recalculation if the Department collects full restitution, "to not more than one hundred dollars (\$100) for each separate violation, or for continuing violations, for each day that violation occurs." (§ 14591.4, subd. (d).)

CEASE AND DESIST ORDER

20.e "When a person is engaged in recycling activity that violates this division, any regulation adopted pursuant to this division, or an order issued under this division, the Department may issue an order to that person to cease and desist from that activity."

(§ 14591.6, subd. (a).) The phrase “is engaged in recycling activity” includes past activity, because unless the context otherwise requires, “[t]he present tense [in the Public Resources Code] includes the past and future tenses” (§§ 5, 11.) Respondents engaged in recycling activity that violated the Act by submitting fraudulent claims of Enviro for CRV. Given the nature and severity of the violations, they should be ordered to cease and desist from operating any other dropoff or collection program, and from submitting any further claims for CRV without prior Department approval. The requests in the Second Amended Accusation for broader cease and desist orders barring respondents from “any and all direct or indirect participation in California’s beverage container recycling program and any other program administered by the Department,” and “any and all direct or indirect transactions involving . . . cancelled CRV beverage containers,” are not tailored as required to the recycling activity at issue. (See § 14591.6, subd. (a).)

COSTS

21. “In any civil or administrative action brought pursuant to [the Act] in which the department prevails, the department may assess against the defendant or respondent any costs and fees, including attorneys’ and experts’ fees, and the cost of the investigation and hearing, which are incurred by the fund, whether paid or payable from the fund, and are a result of bringing the civil or administrative action against the defendant or respondent.” (§ 14591.3.) The Second Amended Accusation demands unspecified costs and fees, but the Department presented no evidence of what its costs and fees were. Therefore, no costs and fees are awarded.

ORDER

Enviro’s certification as a dropoff or collection program is revoked.

Enviro and Negrini shall pay the Department restitution totaling \$1,749,881.18, plus interest of \$12,788.06. They shall also pay the Department a penalty totaling \$625,000. Enviro and Negrini are jointly and severally liable for these amounts. If the Department collects full restitution, the penalty shall be recalculated under Public Resources Code section 14591.4, subdivision (d).

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Enviro and Negrini shall cease and desist from operating any dropoff or collection program, and from submitting any claims for CRV without prior Department approval.

DATED: November 30, 2016

DocuSigned by:
Thomas Heller
CEDEA01421714A4

THOMAS HELLER
Administrative Law Judge
Office of Administrative Hearings