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

IN THE MATTER OF THE STATEMENT OF ISSUES AGAINST:

Ware Disposal, Inc – El Modena, Avocado Heights and East Charter/Oak/Foothill/Ramona/Spadra

Address:

Type of Entity: Revocation of Probationary Certificate

File Nos.: IH-11-006, IH-11-007 and IH-11-008

OAH Nos. 2011080020, 2011080021 and 2011080022

Certificate No.:

PRECEDENTIAL DECISION No.: 23-14

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 August 13, 2013, 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.

BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING & RECOVERY
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC. (El Modena), Respondent(s).	Case No.: 1H-11-006 OAH No.: 2011080020
In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC. (Avocado Heights), Respondent(s).	Case No.: 1H-11-007 OAH No.: 2011080021
In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC. (East Charter Oak/Foothill/Ramona/Spadra), Respondent(s).	Case No.: 1H-11-008 OAH No.: 2011080022

DECISION

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

This Decision shall become effective 8 Aug. 2013.

IT IS SO ORDERED 8 Aug. 2013.

DEPARTMENT OF RESOURCES
RECYCLING & RECOVERY

By 

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BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC. (El Modena) Respondent(s).	Case No. 1H-11-006 OAH No. 2011080020
In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC., (Avocado Heights) Respondent(s).	Case No. 1H-11-007 OAH No. 2011080021
In the Matter of the Statement of Issues Against: WARE DISPOSAL, INC., (East Charter Oak/Foothill/Ramona/Spadra) Respondent(s).	Case No. 1H-11-008 OAH No. 2011080022

PROPOSED DECISION

The above-consolidated matters were heard on August 27, 2012, by Erlinda G. Shrenger, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, in Los Angeles, California.

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

A. Patrick Munoz, Attorney at Law, Rutan & Tucker, LLP, represented Ware Disposal, Inc.

Documentary and stipulated evidence was received. The Department's exhibits 1 through 11, 14, and 15, were admitted pursuant to Respondent's stipulation to the admission of those exhibits. The Department withdrew exhibits 12 and 13. Respondent's exhibits A, C, and J through Q were admitted pursuant to the Department's stipulation to the admission of those exhibits. Respondent's exhibit B was marked and admitted. Respondent's exhibits D through I were marked but not admitted, as those exhibits are correspondence regarding the settlement of a California False Claims Act civil lawsuit brought by the California Attorney General's office against Respondent and other defendants.

In addition, the respective legal arguments of the parties made at the hearing are set forth in the Department's motion to strike Respondent's defenses of res judicata/collateral estoppel and a lifetime ban on certification, and supporting declarations, Respondent's opposition to the motion to strike, and supporting declaration, and the Department's reply. On her own motion, the ALJ marked the Department's motion to strike and supporting declarations as Exhibit 16 and its reply as Exhibit 17, and Respondent's opposition and supporting declaration as Exhibit R.

The record was closed and the matter was submitted for decision on August 27, 2012.

FACTUAL FINDINGS

1. The California Beverage Container Recycling and Litter Reduction Act, is codified at Public Resources Code section 14500 et seq. (Act). The implementing regulations are codified at California Code of Regulations, title 14, section 2000 et seq. (Regulations).

2. The Act furthers California's public policy to ensure the efficient and large-scale recycling of beverage containers through financial incentives and convenient return systems, and to encourage increased and more convenient beverage container redemption opportunities for all consumers, with redemption opportunities provided by dealer and shopping center locations, independent and industry recycling centers, curbside programs, and other recycling systems that assure all consumers, in every region of the state, the opportunity to return beverage containers conveniently, efficiently, and economically. (Pub. Resources Code, § 14501, subd. (a).) The Act establishes a beverage container recycling goal of 80 percent. (Pub. Resources Code, § 14501, subd. (d).)

3. The Department is the state agency responsible for administering all aspects of California's recycling program and the California Beverage Container Recycling Fund (Fund), which consists of the redemption payments and other revenues received by the Department under the Act. (Pub. Resources Code, § 14580.) Such administration includes performing inspections, audits and investigations to ensure compliance with the Act and Regulations to prevent fraud on the Fund.

4. The Department is the state agency responsible for reviewing all applications for curbside registration to ensure compliance with the Act and Regulations. (Pub. Resources Code, § 14551.5; Cal. Code Regs., tit. 14, § 2650, subds. (a) and (f).) A curbside program is a recycling program that picks up empty beverage containers from individual and/or multiple family residences and the empty beverage containers are separated from waste materials prior to being picked up; the program is operated by or pursuant to a contract with, or written acknowledgment by, a city, county or other public agency; and the program accepts empty beverage containers from consumers with the intent to recycle them but does not pay the refund value. (Pub. Resources Code, § 14509.5.)

5. Ware Disposal, Inc. (Respondent) is a California corporation that was formed in June 1982 by Ben Ware. Records from the Secretary of State's office established that

Judith Ware is the chief executive and financial officer, and Ben Ware is secretary and the sole director.

6. Madison Materials is a California corporation that was formed by Judith Ware in February 1996. Records from the Secretary of State's office established that the original name of the corporation was Newport Green, Inc., and the corporation's name was changed to Madison Materials in December 2000, with Judith Ware as president and Ben Ware as secretary. Secretary of State filings from 2007, 2008 and 2010, identify Judith Ware as chief executive and financial officer, and Ben Ware as secretary and the sole director.

Respondent's Applications

7. On April 22, 2011, Respondent filed Applications for Curbside Registration for three locations at El Modena, Avocado Heights, and East Charter Oak/Foothill (collectively, original applications). The original applications identified Respondent as the curbside operator, Judith Ware as president of Respondent, Madison Materials as the designated sorter, and Jay Ware as the general manager and contact person for Madison Materials.

8. On May 12, 2011, the Department denied the original applications and notified Respondent of the denial by a Statement of Issues letter. The Department denied the original applications pursuant to Regulations section 2650, subdivision (h)(3), on the grounds that the curbside operator or other individuals identified in the original applications have a history which demonstrates a pattern of operation in conflict with the requirements of the Act. The Department concluded that Respondent had common ownership and control with Madison Materials, such that they should be considered one and the same entity for purposes of Regulations section 2650. The Department also noted that Madison Materials, identified as the processor/sorter, was not a certified entity. As discussed below, in January 2005, the Department had terminated the probationary certificates issued to Madison Materials to operate as a processor and collection program for violations of the Act and Regulations.

9. On February 21, 2012, Respondent filed amended Applications for Curbside Registration for the three locations at El Modena, Avocado Heights, and East Charter Oak/Foothill (collectively, amended applications). The amended applications identified Respondent as the curbside operator, and Judith Ware as president of Respondent. The amended applications substituted Mission Recycling for Madison Materials as the designated sorter. The amended applications identified Anthony Blair as the contact person and facility manager for Mission Recycling.

10. On February 29, 2012, the Department denied the amended applications and notified Respondent of the denial by a Supplemental Statement of Issues letter. The Department denied the amended applications pursuant to Regulations section 2650, subdivision (h)(3), on the grounds that the curbside operator or other individuals identified in the amended applications have a history which demonstrates a pattern of operation in conflict with the requirements of the Act. The Supplemental Statement of Issues incorporated by reference the Department's May 12, 2011 Statement of Issues letter for the original applications.

11. Respondent filed a request for hearing/notice of defense. At this hearing, the parties stipulated that the only applications at issue are the amended applications which substituted Mission Recycling for Madison Materials as the designated sorter.

Madison Materials

12. In 2003, Madison Materials was certified by the Department as both a processor and a collection program. The Department issued probationary certificate number CP0794 to Madison Materials to operate a collection program, and probationary certificate number PR0370 to operate a processing facility at 1035 E. Fourth Street in Santa Ana. Both probationary certificates became effective onFebruary 24, 2003.

13. Madison Materials, as sublessee, subleased the property for the facility at 1035 E. Fourth Street, from Respondent, as sublessor. Respondent, in turn, leased the property from JBW Enterprises, LLC, a limited liability corporation organized in California to own real property, with Judith Ware as the single managing member.

14. In 2004-2005, the Department conducted an investigation of Madison Materials to determine the validity of its claims for California Refund Value (CRV) and other matters regarding Madison Materials' certifications and the operations of its collection program and processing facility. Based on this investigation, the Department determined that Madison Materials had violated provisions of the Act and Regulations on numerous occasions between approximately February 2003, through December 2003.

15. By letter dated January 28, 2005, the Department notified Madison Materials that it was terminating both of its probationary certificates effective the close of business on January 31, 2005. Madison Materials did not appeal the termination of its probationary certificates.[1]

16. The Department terminated Madison Materials' probationary certificates to operate as a processor and collection program due to its violations of the Act and Regulations, disclosed by the 2004-2005 investigation, as follows:

(A) The representatives of Madison Materials (including Judith Ware and Jay Ware) misrepresented the operations of Madison Materials to Department staff during the application process. They described the program as one that would pick up beverage container materials at specific locations on a fixed route which could include sorting beverage containers from construction and demolition debris. The Department relied upon this information in granting certification to Madison Materials. A review of their actual operations subsequent to certification revealed that affiliated and third party trucking

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[1] In order to appeal, Madison Materials was required to submit to the Department a written request for a hearing within 10 calendar days of receipt of notice of the revocation. (Cal. Code Regs., tit. 14, § 2130, subd. (c)(1).) Madison Materials made no such written request to the Department.

companies delivered material that may or may not have contained CRV materials, directly to Madison Materials. This conduct violated section 14591.2, subdivision (b)(1), of the Act.

(B) Madison Materials failed to prepare and maintain required program records associated with collection programs pursuant to Regulations section 2615, subdivision (a). Madison Materials submitted claims that were not supported by the appropriate records as required by section 14553, subdivision (a), of the Act and Regulations section 2090, subdivision (c).

(C) Madison Materials, through its certified collection program and processing facility, paid and claimed CRV on material for which CRV had not been established, on 144 separate occasions, in violation of sections 14539, subdivision (b)(1), 14539.5, subdivision (b), and 14553, subdivision (a), of the Act and Regulations section 2090, subdivision (c). Madison Materials submitted claims against the Fund on bimetal materials, which did not exist. Madison Materials' representatives admitted to this violation.

(D) Madison Materials claimed Refund Value on aluminum beverage container materials for which they had already received Refund Value, in violation of sections 14595.5, subdivision (a)(1)(B), and 14553, subdivision (a), of the Act.

(E) On or about December 16, 2003, Madison Materials' representatives, including Jay Brandon Ware, refused to provide immediate access to the facilities, operations, and records during normal hours of operation in violation of section 14552, subdivision (c), of the Act. During the course of an investigation into claims submitted by Madison Materials against the Fund, Department staff made continued requests for access to records and information that were required to be maintained by Madison Materials as a certified entity. The requests were repeatedly denied or delayed without cause or reasonable excuse.

(F) At the time Madison Materials applied for certification, it did not have a permit or formal acknowledgement from the local government agency to accept municipal solid waste at its facility or to separate beverage containers from mixed municipal waste as required by Regulations section 2055, subdivision (a)(9). The Department's investigation found that Madison Materials' operations included collecting municipal solid waste.

17. The written report of the Department's investigation of Madison Materials was issued in April 2005. (Exh. 10.) The written report, by the Department's auditor Walt Scherer, contained recommendations including, but not limited to, that the Department should revoke the probationary certifications of Madison Materials; that JBW Enterprises, Respondent, Madison Materials, Ben Ware, Judith Ware, and Jay Brandon Ware should not be certified to operate any redemption program under the Act and Regulations; that the Department should deny any application for any entity that is in any way affiliated with JBW Enterprises or any of the responsible parties referred to in the investigation report; and the Department should demand restitution, in the total amount of approximately $1.4 million, for all the claims paid to Madison Materials for which it did not maintain the required records to allow the Department to verify payments from the Fund.

18. On November 14, 2005, the Department filed an Accusation against Madison Materials, Jay Ware, Judith Ware, Ben Ware, and two other individuals, by which it sought to assess civil penalties, collect restitution, and recoup costs, totaling approximately $1.4 million, for fraud and other violations of the Act and Regulations. The Accusation was based on the Department's investigation of Madison Materials. The Department contends the Accusation was merely a vehicle for establishing the exact amount of restitution and penalties.

False Claims Litigation

19. The California False Claims Act (CFCA) is codified at Government Code section 12650 et seq. The CFCA is intended to "supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities." (*American Contract Services v. Allied Mold & Die, Inc.* (2001) 94 Cal.App.4th 854, 858.) The ultimate purpose of the CFCA "is to protect the public fisc." (*Id.*) The remedies under the CFCA are in addition to those remedies set forth in the Act or any other law. (Gov. Code, §12655.) The California Attorney General may bring a civil action against any person who has violated the CFCA. (Gov. Code, § 12652, subd. (a)(1).) Section 12651 enumerates the acts that constitute violations of the CFCA, which include but are not limited to: "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval," and "[k]nowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim." (Gov. Code, § 12651, subd. (a)(1), (2).)

20. (A) In November 2006, the Attorney General, on behalf of the People of the State of California, filed a civil lawsuit under the CFCA against defendants Madison Materials, Respondent, JBW Enterprises, Judith Ware, Jay Brandon Ware, and Ben Ware (collectively, defendants). The case was originally filed in Sacramento Superior Court but venue was changed to Orange County Superior Court shortly thereafter.

(B) The CFCA lawsuit alleged that the defendants violated the CFCA based on the violations of the Act and Regulations disclosed by the Department's 2004-2005 investigation of Madison Materials. The CFCA lawsuit alleged that the defendants violated the CFCA between February 24, 2003, and March 19, 2004, by their conduct of using false records to obtain state certifications as a processor and collection program in order to receive CRV payments and administrative and processing fees, submitting false claims for CRV payment and claiming CRV for ineligible materials, and failing to maintain accurate and complete records of the sources of the CRV beverage containers for which they claimed payment from the Department.

21. The Superior Court sustained the defendants' demurrers to the complaint and first amended complaint, respectively, on statute of limitations grounds. The demurrer to the first amended complaint was sustained without leave to amend on June 28, 2007. A judgment was entered in favor of the defendants and the CFCA lawsuit was dismissed with prejudice on July 26, 2007. The Attorney General's office filed a notice of appeal with the Court of Appeal, Fourth Appellate District, Division Three, on September 21, 2007.

In February 2008, while the appeal was pending, the Attorney General's office on behalf of the People, and the defendants, entered into a Stipulated Dismissal by which they agreed to dismiss the pending appeal and settle the CFCA lawsuit. (Exh. 11.)

22. Section 4 of the Stipulated Dismissal sets forth the Mutual Release of Claims made by each of the parties respectively, with the defendants' release set forth in Section 4.1 and the release by the People set forth in Section 4.2. Sections 4.1 and 4.2 contain similar language that each party "fully release, remise, acquit, and forever discharge" the other party from:

> "any all claims, demands, actions, causes of action, damages, obligations, liabilities, losses and expenses of whatsoever kind or nature arising out of or relating to any acts, omissions, liabilities, transactions, transfers, happenings, violations, promises, facts or circumstances described in the First Amended Complaint (the "Released Claims"), whether or not now known or suspected or claimed, whether in law, arbitration, administrative, equity or otherwise, and whether accrued or hereafter maturing."

23. The release by the People set forth in Section 4.2 was expressly made by "the People, for themselves, their affiliates, departments and subdivisions (including specifically, without limitation, the State of California, the California Department of Justice, the California Attorney General, and the California Department of Conservation)."[2]

24. Section 3 of the Stipulated Dismissal is entitled "No Admission of Liability" and reads:

> "The Parties acknowledge and agree that the fact that these claims are being settled, as well as any matter referenced or contained herein, shall not constitute an admission of liability, wrongdoing, responsibility, or lack of merit in a claim or defense in this or any other proceeding. The Parties each deny that they have any liability to each other as a result of the matters alleged in the First Amended Complaint, and acknowledge that this Stipulation is entered to put an end to the litigation between them, and to avoid incurring ongoing costs associated therewith."

25. Section 7.2 of the Stipulated Dismissal is an Integration clause, which states:

> "This Stipulation constitutes the entire agreement between the parties concerning all matters related hereto and supersedes any prior discussions, agreements or understandings, whether written or oral, and there are no promises, representations or agreements between the parties hereto other than as set forth herein."

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[2] In January 2010, the Division of Recycling, which was within the Department of Conservation, was integrated into the newly created Department of Resources Recycling and Recovery, which is referred to herein as the Department.

26. Pursuant to Section 5 of the Stipulated Dismissal, the defendants agreed to pay the People "an amount totaling five hundred thousand dollars ($500,000.00)" pursuant to the terms set forth in the Stipulated Dismissal. The monies were to be paid to the California Department of Justice Litigation Deposit Fund (DOJ Deposit Fund), which is managed by the Attorney General. The defendants paid a total of $500,000 to the DOJ Deposit Fund.

27. Respondent offered no evidence of rehabilitation to show that it would operate and conduct business in a manner more compliant with the Act and Regulations than Madison Materials.

Parties Contentions

28. At the start of the hearing on August 27, 2012, the ALJ made tentative rulings on two prehearing motions filed by the Department. The Department filed a motion to strike Respondent's affirmative defense that, under the doctrine of collateral estoppel, the Department is precluded from considering the underlying facts of the CFCA lawsuit and its investigation of Madison Materials as a basis to deny Respondent's applications for curbside registration, because of the Stipulated Dismissal, and the affirmative defense that the Department is improperly imposing a life-time ban on Respondent's participation in California's recycling program. The Department also filed a motion in limine to exclude extrinsic evidence regarding the Stipulated Dismissal. The ALJ tentatively granted the motion to strike and ruled that the Stipulated Dismissal does not preclude the Department from relying on the matters found in its 2004-2005 investigation of Madison Materials. The ALJ tentatively granted the motion in limine excluding extrinsic evidence regarding the Stipulated Dismissal.

29. Based on the ALJ's tentative rulings on the Department's motions, and further discussions by counsel and the ALJ at the August 27, 2012, hearing, the parties made the following stipulations and clarifications of the issues presented for hearing:

(A) Respondent stipulated that the factual matters set forth in exhibit 9 (the January 28, 2005 letter notifying Madison Materials of the termination of its probationary certificates) and exhibit 10 (the Department's investigation report regarding Madison Materials) are in the record and form a basis to deny Respondent's amended applications for curbside registration ***but for*** Respondent's argument regarding the Stipulated Dismissal and its statute of limitations argument. In other words, if Respondent's two arguments are not accepted by the ALJ, Respondent stipulates that there is a sufficient factual basis for the ALJ to rule in favor of the Department.

(B) Respondent's statute of limitations argument is the three-pronged argument set forth in its opposition to the Department's motion to strike: (1) the Department may not operate pursuant to underground regulations and has no authority to impose a life-time ban; (2) Regulations section 2030, subdivision (f), provides a five-year statute of limitations; and (3) Regulations section 2030, subdivision (g)(5), provides a two-year statute of limitations.

(C) The Department stipulated that the waste characterization study submitted by Respondent to Burrtec Waste Industries, and referenced in the Supplemental Statement of Issues letter, is withdrawn as a basis for the Department's denial of the amended applications. References to the waste characterization study in exhibits 1, 2, and 3, on the pages designated as exhibits 1b, 2b, and 3b, respectively, were stricken.

LEGAL CONCLUSIONS AND DISCUSSION

1. Cause exists to deny Respondent's appeal and affirm the Department's denial of Respondent's amended applications for a curbside beverage container recycling registration, pursuant to Public Resources Code section 14551.5 and California Code of Regulations, title 14, section 2650, subdivision (h)(3), based on Factual Findings 1-17 and Legal Conclusions 2-11, below.

2. Public Resources Code section 14551.5 provides, in pertinent part:

> (a) The department shall register the operators of curbside programs pursuant to this section.
>
> (b) Each curbside program that receives refund values and administrative fees from certified processors, or that receives refund values from certified recycling centers, shall register with the department for an identification number. No curbside program may receive refund values or administrative fees without a valid identification number.
>
> (c) The director shall adopt, by regulation, a procedure for the registration of curbside programs. This procedure shall include standards and requirements for registration. These regulations shall require that all information be submitted to the department under penalty of perjury. A curbside program shall meet all of the standards and requirements contained in the regulations for registration.

3. California Code of Regulations, title 14, section 2650 governs applications and renewals for curbside registration. The purpose of the Department's registration of curbside programs is to "facilitate the auditing of payments made to curbside programs, and proper payment of refund values, processing payments, supplemental payments, quality glass incentive payments and administrative fees." (Cal. Code Regs., tit. 14, § 2650, subd. (a).) The registration number issued to a curbside program is valid for a maximum of two years. (Cal. Code Regs., tit. 14, § 2650, subd. (b).)

4. All applications for curbside registration shall be reviewed by the Department for compliance with the Act and the Title 14 regulations. (Cal. Code Regs., tit. 14, § 2650, subd. (f).) Section 2650, subdivision (d)(1) - (15), sets forth the categories of information required to be provided by the applicant in order to complete the application. "If the organization is a corporation, the applicant shall provide the corporate number, the Articles

of Incorporation, name and position of all current corporate officers as filed with the Secretary of State, and the agent for service of process." (Cal. Code Regs., tit. 14, § 2650, subd. (d)(3)(C).)

5. Pursuant to California Code of Regulations, title 14, section 2650, subdivision (h)(3), the Department may deny an application for curbside registration if "[t]he curbside operator, the curbside program or other individuals identified in the application have a history which demonstrates a pattern of operation in conflict with the requirements of the Act."

6. In this case, the Department properly denied the amended applications for curbside registration pursuant to Regulations section 2650, subdivision (h)(3). Respondent and its corporate officers/directors, Judith Ware and Ben Ware, have a history which demonstrates a pattern of operation in conflict with the requirements of the Act, based on their involvement in the operations and conduct of Madison Materials that resulted in the termination of Madison Materials' probationary certifications in 2005. (Factual Findings 12-17.)

Respondent's Contentions

7. Respondent's counsel conceded that the conduct and violations disclosed by the Department's investigation of Madison Materials establishes a sufficient basis to deny Respondent's amended applications for curbside registration ***but for*** two arguments proffered by Respondent, discussed in Conclusions 8-10, below.

8. (A) Respondent contends that the Stipulated Dismissal from the CFCA lawsuit precludes the Department from relying on conduct by Madison Materials to deny Respondent's amended applications for curbside registration.

(B) Collateral estoppel, or issue preclusion, prevents relitigation of legal or factual issues actually argued and decided in a prior proceeding. (*Castillo v. City of Los Angeles* (1982) 92 Cal. App.4th 477, 481.) "[C]ollateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding if (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." (*People v. Sims* (1982) 32 Cal.3d 468, 484.)

(C) Collateral estoppel does not apply in this case. The previous proceeding -- the CFCA lawsuit -- did not result in a final judgment on the merits. The judgment in the CFCA lawsuit was entered after the sustaining of a demurrer to the first amended complaint on statute of limitations grounds. There was no finding, on the merits, regarding whether Madison Materials committed the violations alleged in the first amended complaint. In addition, the issues in this administrative hearing and the CFCA lawsuit are not identical. The CFCA lawsuit sought to recover money. The issue in this administrative hearing is whether Respondent should be granted a curbside registration. Although the CFCA lawsuit and this administrative hearing arise from the same factual allegations, the two proceedings

raise completely different issues. The parties argued at length regarding privity, but that requirement does not need to be resolved given that the other two requirements of collateral estoppel are not met.

(D) It is well-established that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public . . . .'" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) "[E]stoppel does not ordinarily affect government action for the public welfare." (*Packer v. Board of Behavioral Science Examiners* (1975) 52 Cal.App.3d 190, 196.) Here, applying an estoppel against the Department would prevent the Department from carrying out its regulatory duties pertaining to the registration of curbside programs and preventing fraud on the Fund, and undermine California's public policy of encouraging efficient and convenient beverage container recycling.

9. (A) Respondent also argues that the plain language of the Stipulated Dismissal, specifically the mutual release language, bars the Department from considering Madison Materials' violations of the Act in denying Respondent's amended applications for curbside registration. Respondent notes that the Department is specifically included in section 4.2. Respondent also contends that it bargained for the release by the State (including the Department) because it wanted to continue its business as a recycling program.

(B) Section 4.2 of the Stipulated Dismissal states that the release is made on behalf of the State of California, and its departments and subdivisions, and specifically the Department. The section 4.2 release applies to the Department but only as to claims for money arising from the conduct of Madison Materials which is the basis of the CFCA lawsuit. The Department is barred from seeking money from the CFCA lawsuit defendants for Madison Materials' conduct. However, the release in section 4.2 does not preclude the Department from considering Madison Materials's conduct in making a decision on Respondent's amended applications for curbside registration. There is no language in the release or anywhere else in the Stipulated Dismissal referencing the Department's regulatory powers and duties. There is no language in the Stipulated Dismissal that the parties agreed that the Department would be precluded from considering the conduct of Madison Materials in any future application for registration or certification under the Act. Section 3 of the Stipulated Dismissal states, in no uncertain terms, that each party entered into the Stipulated Dismissal "to put an end to the litigation between them, and to avoid incurring ongoing costs associated therewith."

(C) Further, the enforcement of section 4.2 against the Department as contended by Respondent, is void as against public policy, because it interferes with the Department's performance of its regulatory duties under the Act and Regulations which further the public policy favoring recycling and protecting the Fund. "Public policy, in the context of a court's refusal to enforce a contract term, may be based on the policy expressed in a statute or the rules of a voluntary regulatory entity, or may be implied from the language of such statute or rule. . . . When the policy of the statute or rule outweighs the interest in enforcement of the contract term, a court will not assist in giving effect to the offending term." (*Cariveau v. Halferty* (2000) 83 Cal.App.4th 126, 132.)

(D) Respondent claims that the language of section 4.2 proves that the Department acquitted and concluded that Madison Materials did not commit the violations alleged in the CFCA lawsuit. This claim is not persuasive. Section 3 of the Stipulated Dismissal specifically provides that the settlement of the lawsuit shall not constitute an admission of liability or wrongdoing, or lack of merit in a claim or defense.

10. (A) Respondent contends the Department's denial of the amended applications imposes a life-time ban against Respondent and its officers from participating in any recycling program under the Act. Respondent argues there is no regulation or statute allowing the Department to impose a life-time ban. In addition, Respondent contends that a five-year period under Regulations section 2030, subdivision (f), and a two-year period under section 2030, subdivision (g)(5), prevent the Department from imposing a life-time ban.

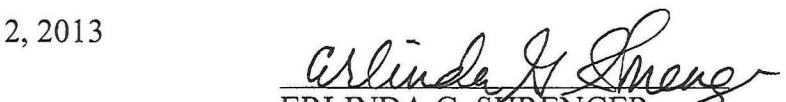
(B) Respondent's arguments are not persuasive. Regulations section 2650 specifically governs applications for curbside registration, which are the applications at issue in this case. Section 2650, subdivision (h)(3), contains no time limitation or other restriction on the history that the Department may consider in determining whether there is a pattern of operation in conflict with the Act. Regulations section 2030, subdivisions (f) and (g)(5), apply to specific situations not applicable in this case. Subdivision (f) applies in situations where one or more certified entities have operated within the past five years at the same location that is the subject of an application for certification of a recycling center or processor. Subdivision (g)(5) provides for denial of an application if "[t]he operator's certification history discloses decertification of a recycling center, processing facility, dropoff or collection program, or community service program within the past two-year period." Further, language similar to section 2650, subdivision (h)(3), is found in section 2030, subdivision (g)(6), which states: "The operator's certification history demonstrates a pattern of operation in conflict with the requirements of [the Act], including all relevant regulations adopted thereunder."

11. Based on the foregoing, the Department's denial of Respondent's amended applications for curbside registration shall be affirmed.

ORDER

Respondent's appeal is denied. The Department's denial of Respondent's amended applications for curbside registration is affirmed.

DATED: July 2, 2013



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings