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STATE OF CALIFORNIA
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

In the Matter of: GLOBAL WASTE MANGEMENT, INC. OPERATOR TPID NO. 1613306-01	INFORMAL HEARING No. IH13-015-TIR Agency Case Nos.: 20113-000010-REV and 2013-011151-ADC DECISION OF HEARING OFFICER ON RESPONDENT'S REQUEST FOR SET ASIDE OR STAY OF REVOCATION AND OBJECTION TO INFORMAL HEARING.

FACTUAL AND PROCEDURAL

The parties in this matter are Respondent, Global Waste Management, Inc. ("Respondent") represented by Willie L. Brown, Jr., and Randall Knox, and the Department of Resources Recycling and Recovery ("Department') represented by Heather Hunt and Martha Perez.

Since December 14, 2012, Respondent has been a minor permitted waste tire facility located at 214 Shaw Road, Unit 9, South San Francisco, California 94080. On September 16, 2013, the Department of Resources Recycling and Recovery ("Department") served upon Respondent a Statement of Issues For The Revocation of Minor Waste Tire Facility Permit Administrative Complaint for Waste Tire Storage and Waste Tire Hauler Administrative Penalties ("Statement of Issues"). The Statement of

Issues alleges numerous violations of the Integrated Waste Management Act ("Act"), specifically, the Waste Tire provisions, Public Resources Code ("PRC") §42800, et seq and the Tire Hauler Provisions, PRC §42950. The Statement of Issues seeks revocation of Respondent's waste tire facility permit 1613306 ("Permit") for a period of five years, such revocation to be effective immediately upon the date of service of the Statement of Issues, and assessment of $498,000 in administrative penalties.

On September 30, 2013, Respondent filed and served a request for hearing on the Statement of Issues and a written Request For Set Aside Or Stay of Revocation And Objection To Informal Hearing In Response To Statement of Issues By the California Department of Resources, Recycling and Recovery. ("Request for Set Aside or Stay"). Specifically, Respondent contends that the Department cannot revoke or suspend its Permit in the absence of a determination of an "imminent or substantial endangerment to the public health or safety of the environment" as required by PRC §42844(a). Respondent also objects to this informal hearing procedure and requests that the matter to converted into a formal hearing before the Office of Administrative Hearings. (Respondent's Request For Set Aside Or Stay, p. 8, lines 8-11.)

On October 8, 2013, the Department filed an Opposition to Request for Set Aside or Say of Revocation and Objection to Informal Hearing In Response to Statement of Issues By The California Department of Resources Recycling and Recovery ("Opposition"). The Respondent's Reply To Opposition Request For Set Aside Or Stay of Revocation And Objection TO Informal Hearing ("Reply") was filed on October 10, 2013.

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ISSUES

1. Is the Department required to make a determination that immediate suspension is "necessary to prevent or mitigate an imminent or substantial endangerment to the public health or safety of the environment" before it can revoke Respondent's Permit?
2. Should Respondent's objection to the informal hearing be sustained and its request for a formal hearing before the Office of Administrative Hearings be granted?

LEGAL ANALYSIS

1. The Department Can Revoke Respondent's Permit Immediately Pursuant to PRC §42843 Without An Initial Determination Of An "Imminent or Substantial Endangerment To the Public Health Or Safety Or the Environment.

According to the Statement of Issues, the revocation of Respondent's Permit Is based upon PRC §42843 which authorizes revocation, suspension or denial of a waste tire facility permit ("WTF") for three[1] or five years[2] or longer[3], depending on the circumstances. The Department has elected to revoke Respondent's Permit pursuant

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[1] PRC §42843: (a) The department may revoke, suspend, or deny a waste tire facility permit for a period of up to three years, by serving a statement of issues, by personal service or certified mail, in accordance with Section 42852, if the applicant for, or holder of, the permit, does any of the following:
(1) The applicant misrepresents or fails to disclose material factual information in its application.
(2) The operator of the waste tire facility, at any time during the previous three years, fails to comply with an order regarding compliance subsequent to receiving a notice of violation, for any of the following:
(A) A violation of this chapter or the regulations adopted pursuant to this chapter.
(B) A violation of Chapter 19 (commencing with Section 42950) or the regulations adopted pursuant to that chapter.
(C) The terms or conditions of the operator's waste tire facility permit.

[2] (b) If the department determines that a violation specified in paragraph (2) of subdivision (a) demonstrates a chronic, recurring pattern of noncompliance that poses, or may pose, a significant risk to public health and safety or the environment, or if the violation has not been corrected or reasonable progress toward correction has not been achieved, the department may suspend, revoke, or deny a waste tire facility permit, in accordance with the procedure specified in subdivision (a), for a period of not more than five years.

[3] (c) If the department determines that a violation specified in paragraph (2) of subdivision (a) has resulted in significant harm to human health or the environment the department may suspend, revoke, or deny a waste tire facility permit, in accordance with the procedure specified in subdivision (a), for a period of five years or more.

to PRC §42843(b) which allows revocation for five years if the "operator fails to comply with an order regarding compliance subsequent to receiving a notice of violation" by violating the requirements and enforcement procedures for waste tire storage laws in PRC §42800 et seq., and the waste tire hauler laws set forth in PRC §42950 et seq. Department also elected to make the revocation effective immediately upon service of the Statement of Issues. (Statement of Issues, p. 15, ¶28.)

Respondent contends that "the Department's revocation of Respondent's Permit cannot be effective immediately without a determination of "imminent or substantial endangerment to the public health or safety or the environment" as required by PRC §42844 (a) which provides:

> PRC §42844 (a) The department may immediately suspend any permit issued pursuant to this chapter if the department determines that the action is necessary to prevent or mitigate an imminent or substantial endangerment to the public health or safety or the environment.

(Reply, p. 1, line 26 – p. 2, lines 1-4).

Accordingly, there does not appear to be any dispute that the Department is allowed to revoke Respondent's permit for violating the CAO; the disagreement concerns which statute applies if the revocation is to be effective immediately. Respondent argues that in order to require immediate cessation of its operations, the Department cannot revoke under PRC §42843 but must instead elect to suspend the Permit and make the determinations required by PRC §42844(a). *Id.* The Department contends that it can revoke the Permit pursuant to PRC §42844(b) and make such revocation effective immediately if it chooses to do so. (Opposition, p. 3, lines 15-24.)

PRC §42843 and PRC §42844 provide the Department with two separate statutory grounds to require a waste tire facility operator to cease operations pending a hearing and decision on the merits. PRC §42843(a) provides the basis for a three year revocation for failure to comply with the requirements a previously-issued order of compliance by violating the procedures of the waste tire facility and waste tire hauler

laws, or the terms of the WTF permit. PRC§ 42843(b) allows for a revocation of five years if such a violation represents a "chronic, recurring pattern or noncompliance that poses or that may pose a significant risk to the public health and safety or the environment, or if the violation has not been corrected or reasonable progress towards correction has not been achieved. "

The Clean Up and Abatement Order ("CAO"), dated April 8, 2013, and attached as Exhibit A to Respondent's Reply, alleges several violations of Respondent's Permit and orders that Respondent "remove all waste tires in excess of 4,999 from its facility within 15 days after service of the CAO." CAO, p. 3, lines 10-16. The Statement of Issues alleges that Respondent repeatedly violated the terms of its permit and the CAO issued in this case. Statement of Issues, p. 12, ¶19. Respondent even admits that, at least on one occasion, it violated the terms of the CAO. Respondent's Request For Set Aside or Stay, p. 3, lines 17-19. Of course, the Department will be required to establish the allegations in the Statement of Issues by a preponderance of relevant evidence in order to prevail in its request for a five year revocation. But at this initial stage of the proceedings, the Department was within its discretion to revoke Respondent's permit pursuant of PRC §42843(b).

As for whether the Department could elect to make the revocation immediately upon service of the Statement of Issues, PRC §42843(d) states:

> The department shall notify the applicant for, or the holder of, the permit of the revocation, suspension, or denial of the permit and the effective date of the revocation, suspension, or denial. A revocation or suspension issued pursuant to this section shall remain in effect until the hearing is completed and the director issues a decision.

The statute leaves the effective date of the revocation to the discretion of the Department; it does not require any special finding in cases where the revocation is to be immediate. Furthermore, by its terms it contemplates a pre-hearing revocation because the revocation issued pursuant to this section "shall remain in effect until after the hearing is completed and the Director issues a decision."

By contrast, had there not been any prior order in effect, the Department would not have been able to revoke Respondent's Permit immediately without first complying with the provisions of PRC §42844, which require a determination that immediate suspension is necessary to "prevent or mitigate an imminent or substantial endangerment to the public health or safety or the environment."

Accordingly, the Department was within its discretion to revoke Respondent's permit effective upon service of the Statement of Issues. The Hearing Officer's role is not to second guess the Department in this regard; only to require that the Department establish the allegations in its Statement of Issues at the hearing in this matter.

2. Objection to Informal Hearing.

Due to the passage of AB 1642 (Gordon, 2012), PRC §42852 was amended to change the procedure for administrative hearings for violations of the Act relating to waste tires and tire haulers from requiring formal hearings conducted by the Office of Administrative Hearings, to allow the Department to make a choice to proceed under the informal hearing requirements of Chapter 4.5 of Part 1, Division 3 of Title 2 of the Government Code (commencing with §11400). The Department can also choose to convert the hearing to a formal hearing pursuant to Government Code §11500 et seq.[4]

Respondent does not challenge the Department's ability to use the informal hearing process, but contends that the informal hearing process is inappropriate in this case because of the number of material facts in dispute and the severe amount of penalties sought. In addition, Respondent would like to present mitigating circumstances on the alleged violations and feels that this case "is not a simple matter suited to an informal process". (Respondent's Reply, p. 7, lines 1-12).

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[4]PRC §42852. (a) A hearing required under this chapter shall be conducted by the director in accordance with the informal hearing requirements specified in Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, but the department may initially file a hearing pursuant to, or convert a hearing to be conducted pursuant to, the formal hearing requirements specified in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

PRC §42452 does not require the Director to predicate a decision to proceed informally on the simplicity of a case, the number of disputed facts, or the severity of the requested penalties. Neither does it require consideration of the militating factors contained in Government Code Section 11455.20.

In addition, Respondent will be afforded ample opportunity to present evidence of mitigating circumstances on the alleged violations during the informal hearing process which will be conducted pursuant to the Director's Order On The Applicability Of Administrative Procedure Act Provisions In Tire Program Hearings Conducted Before The Director of the Department of Resources Recycling and Recovery (CalRecycle) ("Director's Order") attached as Exhibit A to the Department's Opposition. The Director's Order incorporates certain discovery and evidential rules set forth in the formal hearing requirements of Government Code sections 11507.6, 11507.7, and 11513 through 11515.

Finally, Respondent states that since the denial of Respondent's Permit was held before an administrative law judge, "this prior action by CalRecycle would represent the appearance of partiality in a hearing conducted informally by the agency itself." (Respondent's Reply, p. 7, lines 15-18.)

Respondent's argument is unpersuasive. The very fact that there has been prior action by the Department on Respondent's Permit does not, in itself, vitiate the possibility of an impartial determination in this matter. The California Supreme Court has stated that having investigatory, prosecutorial and adjudicatory functions within a single administrative agency does not create an acceptable risk of bias. *Cf. Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal. 4th 731, 737 (2009). Respondent would have to show specific evidence indicating that the Director's designated Hearing Officer would be not be impartial or fair, which he has

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not done. *Ibid*, 741; *see also*, Government Code §§11424.40(b).[5] Accordingly, the Department's decision to proceed by informal hearing must stand,

DECISION

Based upon the entire record of this proceeding, and the arguments presented in the briefs submitted, Respondent's request to set aside or stay the revocation of its WTF permit is denied. Respondent's request that this matter be converted into a formal hearing before the Office of Administrative Hearings is also denied. This matter will proceed by informal hearing in accordance with PRC §42852 and the Director's Order.

IT IS SO ORDERED

DATED: October 11, 2013

Tamar Dyson, Senior Staff Counsel
Hearing Officer
Department of Resources Recycling and Recovery

[5]Government Code §11425.40 b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:
(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.
(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.