CalRecycle

DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

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MEMORANDUM

RE: **PROPOSED DECISION IN THE MATTER OF THE ADMINISTRATIVE COMPLAINT FOR WASTE TIRE STORAGE ADMINISTRATIVE PENALTIES AGAINST JOHN C. GRAY**
CALRECYCLE NO.: 2006-010944-ADC
OAH NO.: 2010010543

Pursuant to Public Resources Code sections 42852 and 42853, the Proposed Decision issued on September 7, 2010, by the Honorable Marilyn A. Woollard, in the above-referenced matter, is deemed to be the Final Decision in this matter.

September 9, 2010

Elliot Block
CHIEF COUNSEL
Department of Resources Recycling and Recovery

ORIGINAL PRINTED ON 100% POST-CONSUMER CONTENT, PROCESSED CHLORINE FREE PAPER

BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA

In the Matter of the Administrative Complaint for Waste Tire Storage Administrative Penalties Against: JOHN C. GRAY, OWNER and OPERATOR APN Number: 0469-261-04-0000 TPID Number: 1364016 Respondent.	CIWMB No. 2006-010944-ADC OAH No. 2010010543

PROPOSED DECISION

This matter convened before Marilyn A. Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on August 6, 2010, in Sacramento, California.

Heather Hunt, Senior Staff Counsel, represented complainant, the California Department of Resources Recycling and Recovery (Cal Recycle), formerly the California Integrated Waste Management Board (CIWMB).

Respondent John C. Gray appeared and represented himself.

Oral and documentary evidence was received and the parties presented oral closing arguments. The record was then closed and the matter was submitted for decision on August 6, 2010.

FACTUAL FINDINGS

1. On December 8, 2009, Wendy Breckon, CIWMB Senior Staff Counsel, in her official capacity only, made and signed an Administrative Complaint for Waste Tire Storage and Administrative Penalties (Complaint) against respondent pursuant to Public Resources Code section 42850, et seq.[1] Complainant charged that respondent was in violation of the regulations pertaining to Waste Tires, California Code of Regulations (CCR), title 14, section 18420, subdivision (a), and section 42845

[1] Unless otherwise indicated, all statutory references are to the California Public Resources Code.

because: (1) he failed to acquire a facility permit for a waste tire facility; and (2) failed to comply with the May 17, 2006 Clean Up and Abatement Order regarding his property in San Bernardino County, described in Assessor's Parcel Number 0469-261-04-0000 (respondent's property). Complainant requested $16,000 in administrative penalties for respondent's conduct of negligently or intentionally violating laws and regulations relating to waste tires. Respondent was advised of his right to a hearing.

2. Respondent timely filed a Request for Hearing pursuant to Government Code sections 11504 and 11509 and provided his address as 1135 Orlo Drive, Susanville, California 96130.

3. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq. On May 6, 2010, the original hearing was continued at the request of Cal Recycle, which served an Amended Notice of Hearing on respondent at his Susanville address.

Investigation and Enforcement

4. *Testimony of Mr. Lee:* Horace James Lee Jr. is Cal Recycle's Deputy Director, Special Waste Division. Mr. Lee testified that Cal Recycle has oversight over waste tire facilities with 500 or more tires. Anyone who stores more than 499 tires must obtain a permit from Cal Recycle to ensure that the tires are stored and maintained in a manner that is not a threat to the public health. Oversight over waste tires is necessary to prevent their improper disposal and storage. Improperly stored tires harbor rodents and mosquitoes that can be dangerous to the public health, for example, by creating breeding grounds for carriers of West Nile virus. Historically, uncontrolled burning of waste tires has caused noxious smoke and produced an ash containing pyrolitic oil, a hazardous waste that contaminates water and soil. Costs arising out of these fires spurred enactment of the legislation regulating handling of waste tires. Finally, the improper accumulation of waste tires creates an attractive nuisance that fosters illegal dumping of other waste products.

In enforcing these laws, Cal Recycle may take action against either, or both, the original owner and the current owner of the property where waste tires are stored. In addition to waste tire facilities, Cal Recycle has oversight over waste tire generators (tire stores), haulers, and end use facilities. After mandatory certification by Cal Recycle, tire haulers are authorized to pick up waste tires and transport them to approved end use facilities. In doing so, haulers must keep and maintain appropriate records and manifests of their activities.

5. Integrated waste management specialist Vance Tracy has been employed with CIWMCB/Cal Recycle since 1991. As part of his duties, Mr. Tracy has inspected and photographed respondent's property on at least the following five

occasions: June 5, 2003, January 30, 2006, June 12, 2006, June 27, 2006, and August 3, 2010. Mr. Tracy contemporaneously prepared inspection reports for each of these dates except June 12, 2006, when he only took photographs.

6. *June 5, 2003 Inspection*: When he first inspected respondent's property in June 2003, Mr. Tracy observed it to be an open unfenced desert lot visible from Highway 66. There were three wooden sheds on the property. Mr. Tracy saw numerous tires in the sheds which were open and from which tires scattered onto the ground. There was nothing to indicate that the tires were there for the purpose of resale; i.e., they were not "racked and stacked" in conformity with regulations. Photographs taken that day demonstrated the danger of the unregulated waste tire facility: the tires spilled out of the sheds on to the ground and were exposed to the elements. The sheds were falling apart and wood debris was mixed in with the tires, creating a fire hazard. There was other flammable debris outside where additional waste had been dumped, possibly by others. Mr. Tracy estimated there were approximately 1,200 tires on the property. There was no permit for this waste tire facility.

Mr. Tracy went to San Bernardino County's Treasury and Tax Assessor Office, where he verified that the property was currently owned by respondent pursuant to a December 27, 1989 Grant Deed from James Hale.

As indicated in his June 5, 2003 State Inspection Report, Mr. Tracy determined that respondent's property was "an unpermitted minor waste tire facility." Respondent was ordered as follows: "The owner must have the tires removed from the property by a registered waste tire hauler and taken to an authorized location. Authorized location means a location that is permitted as a major or minor waste tire facility or one that has been granted exclusion by the Board. . ." The report identified violations of the Public Resource Code and regulations pertaining to fire prevention, facility access and security, vector control measures, and storage of waste tires, including permit requirements.

7. Mr. Tracy acknowledged that, over the next three years, respondent could not be located to serve him with this report and accompanying Letter of Violation. Cal Recycle stipulated that respondent did not receive the 2003 Inspection Report. Mr. Lee testified that, because there were persistent difficulties in finding and serving respondent, CIWMB ultimately dismissed the Complaint. Respondent provided a copy of an OAH Order (OAH Case No. N2006090793) vacating the hearing against respondent after CIWMB withdrew its accusation.

8. *January 30, 2006 Inspection*: Mr. Tracy re-inspected respondent's property on January 30, 2006, to determine the status of the site. As indicated in his Waste Tire Survey and Inspection Report dated January 30, 2006, Mr. Tracy was particularly interested in determining "the number of waste tires on the site for notice by publication of a clean up and abatement order. The property is totally unsecured

and not posted, giving implied access." There were no significant changes in the conditions at respondent's lot. Photographs on this date show open wooden sheds with tires spilling out on the ground, mingled with cloth and other wooden and potentially flammable materials. Holes in the wooden sheds are visible and pieces of wood can be seen among the tires inside the sheds.

9. *Clean Up and Abatement Order*: On May 17, 2006, Deputy Director Lee issued a Cleanup and Abatement Order (Order) to respondent John C. Gray, property owner, doing business as John C. Gray Waste Tire Facility (WTS), at his property located at the southwest corner of U.S. Highway 66 and Columbine Street, Oro Grande, California 92368, Assessor Parcel Number 0469-261-04-0000.

The Order asserted that: (1) respondent has stored in excess of 500 waste tires on this property without obtaining a Minor Waste Tire Facility Permit (Permit) as required by section 42834 and CCR, title 14, section 18420; (2) on August 13, 2003, CIWMB sent respondent a Letter of Violation to his address at 117 Chapel Street, Alhambra, California 91722, which required respondent to remove the tires by October 13, 2003; (3) the letter was returned by the U.S. Postal Service, noting delivery was attempted but the person was not known; (4) on January 30, 2006, CIWMB inspected this property again and determined that more than 500 waste tires still remained on site and that the operator had not acquired a Permit for the site.

Respondent was ordered to: (1) cease accepting any waste tires at the site, and (2) remove all waste tires by June 15, 2006. Respondent was advised that CIWMB "must approve the destinations of the tires to ensure that a registered waste tire hauler legally transports them to an approved facility." He was also advised that: (1) the tires must be removed "by a registered waste tire hauler," (2) "destination receipts and waste tire manifest forms CIWMB 647 and trip log forms CIWMB 648 must accompany each load," and (3) copies of the "manifest forms must be submitted to CIWMB on or before June 30, 2006." Respondent was advised that failure to comply may result in additional penalties, that an action in superior court for civil penalties could ensue, and that CIWMB or its agents "may subsequently enter your property for the purposes of abatement or remediation without your consent" and that he would be responsible for the costs of such cleanup pursuant to section 42847.

10 *Personal Service of Order*: On May 31, 2006, registered process server John Abbott signed a declaration under penalty of perjury attesting that he personally served the Order on respondent on May 30, 2006 at 687-045 Hickory Way, Spaulding, California 96130 (Residence).

11. *Actual Knowledge of Order*: On June 9, 2006, a woman who identified herself as Edy Owen called and spoke to Mr. Tracy. Ms. Owen advised she was calling on respondent's behalf to inform Mr. Tracy what respondent was doing with the tires. As indicated in Mr. Tracy's testimony and contemporaneously recorded phone log, Ms. Owen told Mr. Tracy that "they had received the cleanup and

abatement order and wanted to let me know that the waste tires were cleaned up." Ms. Owen stated that the tires had been picked up off the ground and boarded up in the sheds. Mr. Tracy advised her that respondent needed to remove all the tires from the property to comply with the Order, and informed her of the nearest authorized tire processing location.

Approximately ten minutes later, respondent called Mr. Tracy from Oregon. He advised that all the tires had been taken to a landfill by his employees. He did not remember the location of the landfill; however, after Mr. Tracy mentioned Victorville, respondent stated this was the one. When he was told about Ms. Owen's statement that the tires had been boarded up in the sheds and remained on site, respondent complained about California regulations and government. Mr. Tracy explained that, if they transported the tires, respondent and/or his employees needed to be registered and bonded as haulers, and prepare and maintain manifests for delivery to Cal Recycle to ensure the tires were not illegally dumped. Respondent stated he would not obtain a bond because the property was not worth it which was why he was not paying taxes on it. Mr. Tracy advised that an administrative complaint for penalties would be filed if respondent did not comply with the Order. He also told respondent that he could obtain a permit and gave him the name and location of the nearest authorized end user that could accept the waste tires.

12. *June 12, 2006 Inspection*: On June 12, 2006, three days before the effective date of the Order, Mr. Tracy visited the site again to verify what respondent told him. Photographs he took that day show tires in the wooden sheds, which had large holes in the walls.

13. *June 27, 2006 Re-inspection*: After the June 15, 2006 compliance date, Mr. Tracy re-inspected respondent's property and estimated that approximately 1,078 tires remained on the property, largely in wooden sheds that were open to the elements. Mr. Tracy checked with the Victorville landfill which did not corroborate respondent's statement that his employees had taken tires to this site. Photographs document tires housed with flammable materials.

14. On October 26, 2006, Mr. Tracy initiated a telephone call to respondent in an effort to obtain a current address to serve the Complaint. Mr. Tracy and respondent had a lengthy conversation. Respondent provide an Oregon address and stated that he had been served with legal papers for a man named "Joe Santini of Lake Elsinore" when the papers were left on his porch in Susanville. Respondent stated his understanding of the Order was that he could "clean up OR abate." Mr. Tracy told respondent he needed to have the tires "removed from the premises by a registered waste tire hauler and taken to an authorized location. . ."

15. *August 3, 2010 Inspection*: Mr. Tracy inspected respondent's site on August 3, 2010 to assess his compliance with the Order. As indicated in his Inspection Report, the vast majority of waste tires had been removed from the

property; only a few tires remained and were mingled with debris. Respondent never provided any evidence that he used a registered hauler to remove the tires to an authorized end user. A neighbor informed Mr. Tracy that, four or five months earlier, someone came to the site with a U-Haul trailer and a non-English speaking work crew who loaded the tires from two of the sheds into the truck and left. Mr. Tracy's photographs of this date depict the inside of empty sheds and several waste tires scattered among flammable debris.

16. *Respondent's Testimony*: Respondent testified that he is not a "bad hombre." He has worked to clean up his property and has disposed of all the tires. After he purchased this property from Mr. Hale in 1989, respondent initially stored all the tires in the sheds. He was traveling and not living in this area. He had no idea that the sheds had been broken into and the tires scattered until 2006. Respondent did not have much money, so in 2006, he and some friends put all the tires back into the sheds. It was the best he could do given his money situation. When he did this, respondent even picked up tires that were not on his property. He tried to be responsible.

Respondent testified that the process server did not serve the Order on him; instead, he left papers for a different person, Joe Santini. Respondent also believed that the case was over after he received the order dismissing the previous action. Respondent agreed that he called Mr. Tracy in 2006 as reflected in the phone logs. Respondent testified that he thought the entire case had been withdrawn when he received the January 2007 Order OAH Case No. N2006090793.

Respondent later spoke to his friend Richard Cotter who worked in Arizona. Mr. Cotter said his employer Blaine Walker could remove the tires. In January 2010, respondent paid $500 to have Mr. Walker remove the tires. Respondent testified that he believes Arizona allows tires to be taken to landfills. In respondent's mind, he was not trying to intentionally evade the Order. Instead, he showed some responsibility by removing the tires from his property.

17. Richard Cotter testified that he has known respondent for over 10 years. Respondent asked Mr. Cotter if he knew anyone who could legally haul tires. Mr. Cotter said his employer Blaine Walker could. Respondent then came to Arizona to arrange the deal. Respondent paid Mr. Walker $500 to pick up the tires. When the truck full of tires returned to Arizona, Mr. Cotter helped take the tires to a landfill in Golden Valley, Arizona. Mr. Cotter had no idea if Mr. Walker was registered to haul tires in either California or in Arizona.

18. Respondent was personally served with the Order on May 30, 2006. Respondent's assertion that he was personally served with papers for Mr. Santini instead of the Clean Up and Abatement Order is not credible. The process server verified personal service of the Order under penalty of perjury. Further, by his admissions to Mr. Tracy, respondent demonstrated that he had actual knowledge of

the Order by no later than June 9, 2006. Respondent did not credibly explain why he called Mr. Tracy in June 2006 if he had not been served with the Order. He agreed he had personal knowledge that he was required to remove the tires from his property when he spoke to Mr. Tracy on June 9, 2006. Respondent never asserted that he had not been served with the Order until after the compliance deadline during his October 2006 conversation with Mr. Tracy.

19. Respondent failed to remove the tires by June 15, 2006 as required by the Order. In 2006, respondent was told repeatedly by Mr. Tracy that he was required to use licensed and bonded haulers to remove the tires and that they must be taken to approved facilities. When he had the tires removed in January 2010, respondent did so without using a licensed hauler and without any of the safeguards designed to prevent illegal dumping of waste tires. The weight of the evidence establishes that respondent knowingly and intentionally violated the Order. Respondent's assertion that he believed the entire case had been withdrawn is not persuasive and does not excuse his deliberate failure to comply with the Order, whose compliance deadline had passed by the time the order in Case No. N2006090793 was issued.

20. *Administrative Penalty*: As explained by Mr. Tracy, the $16,000 penalty requested in the Complaint is derived from the regulation's penalty table. (CCR, tit. 14, § 18429, subd. (a)). It consists of $6,000 for violating the Order for 12 days (from June 16 through June 27, 2006) at $500 per violation, and a $10,000 penalty for knowingly violating the Order.

21. Respondent testified that he cannot work because he has health problems and that he lives on limited income of $760 a month from Social Security. He is on Medicare. He has no other regular sources of income and his house payment and regular bills take much of his income. Respondent agreed that he has property in Golden Valley, Arizona and that he has a 50 percent partnership interest in some other properties in California and Arizona.

LEGAL CONCLUSIONS

1. In administrative proceedings, as in civil actions, the party asserting the affirmative generally has the burden of proof by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051- 1052.) Once the party bearing the burden of proof has made a prima facie case, the burden shifts to respondent, who has the burden of proof of any affirmative defenses. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156.)

In this case, Cal Recycle bears the burden of establishing by a preponderance of the evidence the essential elements of its Complaint: i.e., that respondent operated a waste tire facility without a permit as required by 14 CCR section 18420, subdivision (a), and that he negligently and/or intentionally failed to comply with the

Clean Up and Abatement Order by June 15, 2006, and provide proof of proper disposal by June 30, 2006, in violation of section 42845. As explained below, Cal Recycle has met its burden.

2. California Code of Regulations, title 14, section 18420, subdivision (a)(3), provides that "the operator of a waste tire facility shall acquire a waste tire facility permit in accordance with the requirements of this Chapter and PRC section 42808, unless any of the following conditions exist:. . . (3) The facility is storing fewer than 500 waste tires." "Operator" is defined by section 42804 as "the person responsible for the overall operation of a waste tire facility."

3. Pursuant to section 42845, subdivision (a), "any person who stores, stockpiles, or accumulates waste tires at a location for which a waste tire facility permit is required pursuant to this chapter, or in violation of the terms and conditions of the permit, the provisions of this chapter, or the regulations adopted under this chapter, shall, upon order of the board, clean up those waste tires or abate the effects thereof, or, in the case of threatened pollution or nuisance, take other necessary remedial action."

4. Section 42850, subdivision (a), provides that "any person who negligently violates any provision of this chapter, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, is liable for a civil penalty of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000), for each violation of a separate provision or, for continuing violations, for each day that the violation continues." Liability may be imposed in either a civil action or pursuant to an administrative complaint. (§ 42850, subd. (b).)

5. Section 42850.1 subdivision (b)(1), provides that "any person who intentionally violates any provision of this chapter, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, is liable for a civil penalty not to exceed ten thousand dollars ($10,000), for each violation of a separate provision or, for continuing violations, for each day that the violation continues. Liability may be imposed in either a civil action or pursuant to an administrative complaint. (§ 42850.1, subd. (b)(2).)

6. The administrative hearing procedure is set forth in section 42852, subdivision (b). In pertinent part, this section provides:

> In making a determination, the hearing officer shall take into consideration the nature, circumstances, extent, and gravity of the violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the proposed civil penalty, and the prophylactic effect that imposition

of the proposed penalty will have on both the violator and on the regulated community as a whole.

7. The penalty schedule for administrative complaints against unpermitted waste tire facilities is set forth in 14 CCR section 18429, subdivision (a). The administrative penalty requested by Cal Recycle is consistent with this schedule.

8. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent has never had a permit to store waste tires. Respondent stored over 500 tires on his property for a significant time period, including after he became aware of the Clean Up and Abatement Order. Respondent did not comply with the Order. Despite respondent's knowledge of the Order, these tires remained illegally on his property until approximately January 2010. Respondent was repeatedly informed that only registered haulers could be used to remove the tires and that they could only be taken to authorized facilities. With this knowledge, respondent arranged for the tires to be illegally hauled to Arizona. While respondent portrays his clean up efforts as examples that he is responsible, the evidence supports a conclusion that the tires were illegally dumped in another state.

9. The factors set forth in section 42852, subdivision (b), have been considered. They do not weigh in respondent's favor. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent acted as an unpermitted waste tire facility; he was served with the Clean Up and Abatement Order and had actual knowledge of the Order. Respondent failed to comply with the Order as required by June 15, 2006. When he removed the tires from his property nearly four years later, he did so without using a licensed hauler to insure that illegal dumping did not occur. Respondent's violation was knowing and intentional. The administrative penalty in the total amount of $16,000 is affirmed. Respondent may discuss a reasonable payment plan with Cal Recycle.

ORDER

Respondent's appeal is DENIED. Within sixty (60) days of the effective date of this decision, respondent shall pay Cal Recycle the administrative penalty of $16,000, or enter into an installment payment plan with Cal Recycle.

DATED: September 7, 2010

MARILYN S. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

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State of California
Department of General Services

September 07, 2010

California Integrated Waste Management Board
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Subject: John C. Gray
OAH number 2010010543
Agency number. 2006-010944-ADC

Enclosed are the following:

- ☒ The original Proposed Decision
- ☐ An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.
- ☐ The original Decision.
- ☒ Exhibits numbered: EXHIBITS WILL BE FORTHCOMING. Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.
- ☐ Email copy of the Proposed Decision to:
- ☐ The above referenced case was resolved prior to conclusion of the hearing.

MW:cw

Encl.

Transmittal Form
OAH 60 (Rev. 04/09)