

BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA

In the Matter of:

GLOBAL WASTE MANAGEMENT, INC.,
Tire Program Identification No. 1613306-01,
Respondent.

Agency Case No. 2011-000102-DEN

OAH No. 2012041110

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on November 1 and 2, 2012.

The California Department of Resources Recycling and Recovery was represented by Heather L. Hunt, Staff Counsel.

Respondent Global Waste Management, Inc., was represented by Willie L. Brown, Jr., and Randall G. Knox, Attorneys at Law.

The matter was submitted for decision on November 2, 2012.

FACTUAL FINDINGS

1. The California Department of Resources Recycling and Recovery (CalRecycle) seeks to deny respondent Global Waste Management, Inc.'s September 16, 2011 application for a minor waste tire facility (WTF) permit and to preclude respondent from reapplying for a permit for three years. CalRecycle alleges that respondent failed to disclose relevant information when it did not reveal on the application that it shared warehouse space with Bay Tires, and that respondent made a material misrepresentation when it reported on the application that all local permits had been obtained, including a minor use permit (MUP).

2. Eric Klinkovich and Daniel Akhromtsev, respondent's two principals, began as haulers but expanded to waste tire recycling about five years ago. Sometime prior to 2010 they began the process of seeking a WTF permit¹ from CalRecycle. At that time they started

¹ Under the regulatory scheme, a major WTF permit is required if the facility is storing 5000 or more waste tires. A minor WTF permit is required if the facility is storing

working with Reinhard Hohlwein of CalRecycle's Permits and Assistance Branch.² Respondent initially planned to seek a permit for the lot from which it was operating in San Francisco. When it became apparent that bringing that lot up to the standards necessary to obtain a permit would not be cost-effective, in February 2010 respondent moved to its current location: 214 Shaw Road, Unit 9, South San Francisco. Respondent's principals worked closely with Hohlwein. They had contact with him through phone calls and email and they met with him in Sacramento to discuss what information they needed to obtain during the permitting process. During that process, respondent's principals were cooperative with Hohlwein and provided him with all information he requested.

3. From the time they moved in to Unit 9, respondent has shared that space with Bay Tires, a used tire dealer. Respondent initially owned Bay Tires. At some point, respondent sold a portion of that business to Vitali Barkouski, who was responsible for operating an online used tire business. Respondent divested itself of its interest in Bay Tires prior to October 2011.

4. In March 2010, respondent applied to the city of South San Francisco for a minor use permit. The application stated that the facility would be used "for the collection & repackaging of used tires. There will be no processing of the tires & the building will only be used as a transport station."

City staff conducted site inspections of respondent's facility. The staff report subsequently submitted to South San Francisco's zoning administrator recommended approval of the permit. The report indicated that under the city's ordinances the facility was regulated as a "Processing Facility." Staff pointed out that one of the requirements for such a facility was that, "Power driven processing shall be permitted, provided all noise level requirements are met." In this regard, staff noted that, "The proposed facility does not include power driven processing. Tires are sorted, packaged and shipped."

On December 28, 2010, the city issued to respondent a minor use permit "to allow a recycling facility to process (store, package and ship) used tires." One of the conditions attached to the MUP was: "The applicant shall not use power driven processing

between 500 and 4999 tires. No permit is needed if the facility is storing fewer than 500 waste tires. (Pub. Resources Code, § 42808, subds. (b) and (c), and Cal. Code Regs., tit. 14, §18420, subd. (a)(3).)

² Prior to 2007, the permitting process was overseen by CalRecycle's enforcement unit. In that year, a separate "applicant-friendly" Permits and Assistance Branch was separated out from the enforcement unit. The permits branch's charge is to work with applicants to ensure that application packets are complete and provide all necessary information. Once an application is deemed to be complete, the branch writes the permit, which includes both standard and site-specific conditions. The permit package then goes to the enforcement unit for a review that includes ensuring the permit is consistent with local land use and permitting requirements.

unless the Chief Planner/Zoning Administrator reviews and approves noise reports to confirm compliance with the City's noise ordinance."

5. Respondent has operated as a non-permitted WTF since it moved into Unit 9. Over that time, respondent's operations have not changed; it receives waste tires from haulers, bales them and exports them for recycling. Baling consists of placing the waste tires into a power-driven baler, which compresses them and bands them for shipping.³ Respondent has two balers at the facility, both of which were shown on the facility diagram included in the September 16, 2011 WTF application.

6. Since mid-2010, respondent has had two signs hanging outside the front entrance of Unit 9; one for "Global Waste Management" and one for "Bay Tires." On April 5, 2011, an inspector from San Mateo County inspected respondent's WTF on behalf of CalRecycle. On the inspection report the inspector wrote, "Bay Tires also occupies building. They are a separate company that sells the used tires brought in. The two companies are closely affiliated." This inspection report was transmitted to CalRecycle and was scanned into its computerized database, but Hohlwein never saw it. Hohlwein never went to the facility, and at no time during the permitting process did he become aware that respondent shared its warehouse with Bay Tires.

7. On the operation plan that is part of the application package respondent is asked to "Describe on-site processing (e.g., shredding, buffing, milling, baling, product manufacturing, etc.)." Respondent stated that, "tires are baled [sic] as the [sic] arrive at the facility and packed into a cargo container." On the environmental information form respondent described its operation this way: "Receive all types of tires, baile [sic] them and ship out of the country in cargo containers."

8. The facility diagram included with the application shows a layout of the entirety of Unit 9. There are two piles of "scrap tires" shown near the south wall, with two balers alongside one of those piles, an office in the northeast corner, and rows of "used tires for resale" along the north wall and in the northwest corner. Nowhere on this diagram did respondent indicate that the "used tires for resale" belonged to Bay Tires.⁴ Hohlwein believed that all the tires shown on the diagram belong to respondent.

9. Respondent submitted its WTF application for approval on September 16, 2011. Hohlwein notified respondent on October 5, 2011, that the application met the necessary requirements for acceptance and would be processed.

³ A "baled tire" is defined in Public Resources Code section 42801.6 as a "tire that has been compressed and then secured with a binding material for the purpose of reducing its volume."

⁴ See footnote 5, below.

10. On October 25, 2011, two inspectors from CalRecycle went to respondent's facility to conduct a routine inspection. The inspectors took photos of the facility, including one showing the "Global Waste Management" and "Bay Tires" signs outside the front door. The report noted that respondent shared Unit 9 with Bay Tires, that the two companies were separately owned, with Barkouski as owner of Bay Tires, and that respondent was responsible for all waste tires at the facility.⁵

11. On a date not established by the evidence, respondent's application packet went to CalRecycle's enforcement unit, where it was reviewed by Gerri Stryker. One of her tasks was to ensure that a permit issued by CalRecycle would not result in a violation of local permits. Stryker noted that on the WTF application respondent reported its operation included baling tires while the MUP disallowed "power driven processing" unless approved by the city's zoning administrator. She also noted that the city's staff report had said respondent's facility "does not include power driven processing. Tires are sorted, packaged and shipped." Because Stryker deemed baling to be "power driven processing," she believed the MUP did not permit respondent to bale tires. She was concerned that if a WTF permit was issued, respondent would be in violation of the MUP.

12. During the course of her review, Stryker also learned that respondent was sharing Unit 9 with Bay Tires. This concerned her because a WTF permit would be issued for the entire area, and since the area was partially occupied by a non-permitted business, the permittee and the non-permitted business could potentially point fingers at one another if a problem arose. Stryker acknowledged, however, that CalRecycle has granted permits in situations where a permittee shares space with a non-permitted business. In those instances, CalRecycle has required delineation of responsibilities and physical separation between the two businesses.

13. CalRecycle issued the Statement of Issues denying respondent's WTF application on April 2, 2012.

14. On May 11, 2012, respondent requested that the city of South San Francisco approve use of its power-driven baling equipment under the MUP. On May 18, 2012, after determining the balers met the requirements of the noise ordinance, the city's chief planner/zoning administrator approved that request.

⁵ Under the code, a "scrap tire" is defined as "a worn, damaged, or defective tire that is not a repairable tire. (Pub. Resources Code, § 42805.6.) A "used tire" is defined as a tire that is no longer mounted on a vehicle but is still suitable for use as a vehicle tire, that is ready for resale and that "is stored by size in a rack or a stack not more than two rows wide, but not in a pile . . ." (Pub. Resources Code, § 42806.5.) A "waste tire" is defined as "a tire that is no longer mounted on a vehicle and is no longer suitable for use as a vehicle tire due to wear, damage, or deviation from the manufacturer's original specifications." This includes a "scrap tire" and a "used tire" that is not stored in accordance with section 42806.5. (Pub. Resources Code, § 42807.)

Discussion

15. CalRecycle's denial of respondent's WTF application is grounded in the agency's belief that respondent was dishonest on its application, particularly when it allegedly misrepresented that it possessed all local permits necessary to conduct the business.

But there is no evidence respondent either intended or attempted to conceal from CalRecycle that it was sharing Unit 9 with Bay Tires. Nor was there any evidence that respondent intended or attempted to mislead CalRecycle about the scope of its MUP.

BAY TIRES

16. Respondent never sought to hide the fact that it shared Unit 9 with Bay Tires. There were two signs hanging outside the front entrance of Unit 9; one for "Global Waste Management" and one for "Bay Tires." In April 2011, during the time respondent was working with Reinhard Hohlwein in the pre-application process, an inspection conducted on behalf of CalRecycle showed that the space was shared with Bay Tires. The inspection report was scanned into CalRecycle's database, giving the agency at least constructive knowledge of Bay Tires' presence in Unit 9. In October 2011, a month after respondent submitted its WTF application to CalRecycle, inspectors from the agency visited the facility, photographed the two signs hanging outside, and noted in the report that respondent shared Unit 9 with Bay Tires. None of this is consistent with an attempt to conceal from CalRecycle that respondent and Bay Tires were co-tenants in Unit 9.

17. It is true that respondent's principals never advised Hohlwein of Bay Tires' existence during the application process and that no reference to Bay Tires was made in respondent's September 16, 2011 WTF application. But this is not indicative of intent to conceal.

Respondent's principals worked closely with Hohlwein, had regular contact with him and were fully cooperative with him, providing all information he requested. Hohlwein never saw the April 2011 inspection report that contained a reference to respondent's sharing space with Bay Tires and thus had no knowledge of Bay Tires and no reason to ask respondent's principals about it. Had he done so, it is reasonable to assume they would have explained the situation. And while the fact that an entity seeking a WTF permit shares space with another business is relevant factual information from the agency's point of view, this is not necessarily apparent to a permit seeker. A permit seeker cannot be expected to know everything that might be important to the agency.

This last point is especially true in light of the complexity of the WTF application. The WTF application consists of four forms: an application form, an operation plan, an environmental information form and an emergency response plan. Together, these forms require the applicant to disclose a host of detailed information including the facility's name and location, the property owner's name, and the names of the local fire, vector

control/mosquito abatement, and permitting agencies. On the “emergency contact list” the applicant must show the names and telephone numbers of the facility owner, the facility operator, the local fire authority, the environmental health department, the regional water control board, and “any additional numbers that may be needed.” But nowhere in the application packet is the applicant asked whether the facility shares space with another business. And Hohlwein testified he did not know where on the form an applicant would list a co-tenant. (In closing argument, CalRecycle contended that, at the least, the co-tenant should have been listed as an additional emergency contact. Again, this is imposing upon a permit seeker a level of knowledge of the agency’s needs that would seem to go beyond common understanding.)

MINOR USE PERMIT

18. Respondent had a reasonable, good faith belief that the MUP allowed the use of power-driven balers. Respondent had never hidden from the city that it was baling tires. And it had no reason to do so. While their MUP application did not refer to “baling,” only to “packaging” tires, the city’s inspectors knew respondent was using balers; they were present at the time of the city’s inspection. And Akhromtsev credibly testified that the inspectors told him the balers did not need a separate permit because they were “portable.” (The balers are on wheels.) The balers did not become an issue until Gerri Stryker, while reviewing the application packet, saw that the MUP prohibited “power driven processing” without special approval. When Stryker saw this, she consulted with Gerry Beaudin, a South San Francisco planner, who advised her that the baling of tires was not permitted under the MUP.

19. Whether Beaudin’s advice to Stryker was correct is unclear. South San Francisco Chief Planner/Zoning Administrator Susy Kalkin, Beaudin’s boss, testified that while she was unaware that respondent was baling tires in its facility, the MUP did permit respondent to use machinery to move and package tires. Thus there seems to have been some confusion whether baling tires fell under the heading of “power driven processing” or of “using machinery to package tires.” Nevertheless, when in May 2012 respondent sought specific approval under the MUP to bale tires, authorization was quickly granted.

20. There was much discussion at hearing about what constitutes “processing” within the meaning of the Public Resources Code. But that issue is not particularly relevant here. The only real issue is whether respondent attempted to obtain a WTF permit by misrepresenting the material fact of whether or not it held the proper local permits to operate a waste tire facility. At CalRecycle’s request, official notice was taken of the definition of misrepresentation: “The act of making a false or misleading assertion about something, usu. with the intent to deceive.” (Black’s Law Dict. (9th ed. 2009.) That dictionary entry describes various types of misrepresentation, including “innocent misrepresentation”: “A false statement that the speaker or writer does not know is false; a misrepresentation that, though false, was not made fraudulently.” (*Ibid.*) Because it had a reasonable, good faith belief that the MUP allowed the use of power-driven balers, respondent cannot be found to have made anything more than an innocent misrepresentation.

LEGAL CONCLUSIONS

1. Under Public Resources Code section 42843, subdivision (a)(1), a waste tire facility permit may be denied for up to three years if "The permit was obtained by a material misrepresentation or failure to disclose relevant factual information."

2. Respondent did fail to disclose the relevant factual information that it shared warehouse space with another business. But as set forth in Factual Findings 16 and 17, that failure to disclose was not done with the intent to deceive the agency into issuing a permit. And as set forth in Factual Finding 20, respondent's assertion that it had obtained the necessary local permits to operate a WTF was based on the reasonable, good faith belief that the MUP permitted it to bale tires. If respondent made a misrepresentation at all, it was an innocent one.

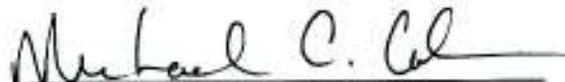
3. Because respondent neither failed to disclose relevant information nor made a material misrepresentation with the intent to deceive CalRecycle into issuing a WTF permit, no cause for denial of that application exists in accordance with Public Resources Code section 42843, subdivision (a)(1).

4. While respondent is entitled to receive a minor WTF permit, CalRecycle may impose conditions on that permit that ensure a delineation of responsibilities between respondent and Bay Tires, a non-permitted business.

ORDER

Respondent Global Waste Management, Inc.'s September 16, 2011 application for a minor waste tire facility is granted, subject to conditions that address the presence in Unit 9 of Bay Tires. CalRecycle shall issue the minor WTF within 30 days of the effective date of this decision.

DATED: November 15, 2012


MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

