BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING & RECOVERY
STATE OF CALIFORNIA

In the Matter of the Statement of Issues for Denial of a Minor Waste Tire Facility Permit: FREEDOM TIRE, INC., TPID Number 1639531, Respondent.	Agency Case No.: 2012-000113-DEN OAH No.: 2012080647

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 April 23, 2013.

IT IS SO ORDERED _____.

DEPARTMENT OF RESOURCES
RECYCLING & RECOVERY

By Carol Martin

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PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter on March 12, 2013, in Los Angeles, California.

Heather L. Hunt, Staff Counsel III and Martha Perez, Staff Counsel, represented Complainant.

Gregory Ashley Haynie, president of Freedom Tire, Inc. (Respondent or Freedom), represented Freedom.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FACTUAL FINDINGS

1. Ms. Hunt signed the Statement of Issues on behalf of the Department of Resources Recycling and Recovery (Department).

2. Among other things, the Department regulates Waste Tire Facilities (WTF) pursuant to its authority granted in Public Resources Code[1] section 42800, et seq. Under the code, a distinction is made between a "used tire" and a "waste tire." The distinction is important because storage of used tires does not require a permit whereas storage of waste tires does. Section 42806.5 defines a "used tire" as a tire

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

that is not mounted on a vehicle but is still suitable for use and is stored by size in a rack or a stack that allows for inspection of each individual tire. Section 42807 defines a "waste tire" as a tire that is "no longer suitable for use as a vehicle tire due to wear, damage, or deviation from the manufacturer's specifications." Under the code, a used tire is considered to be a waste tire if it is not properly "racked and stacked" for inspection. Storage of less than 500 waste tires does not require a permit. Storage of between 500 and 4,999 waste tires requires a "minor" WTF permit. Storage of 5,000 or more waste tires requires a "major" WTF permit. (See section 42808.[2])

3. On December 28, 2011, Respondent filed an application for issuance of a minor WTF for a currently operating business, including storage and sale of used tires, located at 1315 South Claudina Street, Anaheim, California (site) which is owned by Mr. Haynie and his wife, who live in Colorado. The application was denied and this hearing ensued.[3]

4. The parties stipulated to the truth of many of the factual allegations contained in the Statement of Issues, thereby establishing the following:

a. At no time from August 2011 to the present has Respondent been in possession either a major or a minor WTF permit.

b. During an inspection of the site on August 11, 2011, and documented in Waste Tire Survey and Inspection Report number I1-1169238 (Exhibit 5), Department Inspectors Harley Thompson, Vance Tracy, and Frank Simpson observed at least 4,546 waste tires onsite. Respondent contends 637 of those tires were used and not waste,[4] and that the balance of the tires were owned by another company (International Recycling Center, LLC, referred to as IRC) which shared the site with Respondent.

c. During an inspection of the site on October 11, 2011, and documented in Inspection Report I1-1169038 (Exhibit 6), the same inspectors observed at least 2,841 waste tires on site. According to notes in the report, the Inspectors noted that,

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[2] Under California Code of Regulations, title 14 (Regulation), section18420, subdivision (a)(7), a WTF that is a tire dealer may store up to 1,500 waste tires on site for less than 90 days without a permit.

[3] Complainant did not offer in evidence a formal denial by the Department. The Statement of Issues, setting forth the grounds for denial, is dated July 19, 2012.

[4] During his testimony, Mr. Hainey conceded the 637 tires were not properly racked and stacked (he had insufficient space) and thus could not be inspected. He did not dispute the validity of describing them as waste tires.

while both Freedom and IRC were located at the site, "Their operations appeared to [the Department] staff to be commingled. There was no clear demarcation between [Freedom and IRC]." Respondent contends that 778 of the tires noted were used, not waste, and IRC owned the remaining tires.

d. During the October 11, 2011 inspection, the inspectors observed waste tires stored while still on their rims, a violation of Regulation 17354, subdivision (g), and also observed waste tires stored in two areas (northwest corner of the site and between two trailers backed up against the loading dock) which were less than 40 feet from potentially flammable material which is a violation of Regulation 17354, subdivisions (a) and (b). Respondent contends it was not the owner of these tires.

e. On December 21, 2011, the Department served Cleanup and Abatement Order number 2011-011001-CAO (Exhibit 7) (Order) on Respondent. The Order required Respondent and IRC to stop commingling their businesses and to create a permanent demarcation at the site to designate the separate businesses. The order included very specific instructions on how to accomplish this, including painting a demarcation line or erecting a fence between the businesses; labeling all sea containers, trucks or trailers on site as belonging to, delivering to, or picking up from, the specific business entity; maintaining separate and distinct business records for each entity; and removing enough waste tires so that Freedom stored no more than 1500 and IRC stored no more than 499, the removal to be accomplished in the manner specified in the Order.

f. During an inspection of the site on February 21, 2012, documented in Inspection Report number I11168931 (Exhibit 8), Inspectors Harley Thompson and Elizabeth Randolph observed at least 2,251 waste tires. Respondent contends these tires were not waste tires.

g. At no time between the service of the abatement Order and the present has Respondent submitted a comprehensive trip log (CTL) receipt showing the removal of waste tires from the site.[5] Respondent denied the tires were waste.

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[5] According to the Department's public website (http://www.calrecycle.ca.gov/tires/forms/manifest/#Purpose), "The CTL form is a triplicate form used for waste/used tire pickup or delivery transactions. It is completed by the hauler for each transaction performed. The generator or end use facility reviews the information provided by the hauler to determine completeness and accuracy of the form, and then initials the CTL receipt. The original (top) copy of the CTL form contains 3 tear-off receipts to be left with the generator or end use facility for 3 years at their place of business. The second copy of the form is retained by the hauler for 3 years at the hauler's place of business. The last copy is submitted to CalRecycle within 14 days after the initial use of the form. The collected information is analyzed followed by the necessary follow-up and enforcement activities."

h. On or about July 16, 2012, Keith Cambridge, Supervisor of the Department's Hauler Unit, performed an audit of CTL receipts documenting the delivery to and pick-up from the site of waste or used tires. The audit showed that from March 2, 2012, through May 17, 2012, 18 loads of waste or used tires were hauled to or picked up from the site by eight different unregistered tire haulers, each with a load greater than nine tires. Respondent contends that each of the loads consisted of used tires, not waste tires. However, under Code section 42954, whether the tires are waste or used, the hauler must be registered unless the load is fewer than 10 tires.

5. Respondent took steps to comply with the Order, including painting a line of demarcation between Freedom and IRC. On April 18, 2012, Board inspector Randy Styner performed a site inspection (Exhibit J) and Freedom was found to be "in compliance."

6. The essence of Respondent's defense was that the waste tires belonged to IRC and that, at most, Respondent's violations, if any, merely involved the failure to properly demarcate Freedom's business from that of IRC. However, the testimony of the investigators showed the problems were much more serious. The only name that appeared anywhere on the site was Freedom's. There was no way to even tell that any business other than Freedom operated out of the site. The clerical staff, whom Mr. Haynie claimed were IRC employees, dealt with the inspectors and gave them all sorts of paperwork belonging to Freedom when requested. Mr. Haynie, who is the only person who testified at the hearing on Respondent's behalf, is an absentee owner and had no personal knowledge of the events that transpired during the site visits. He had the opportunity to call his site manager as a witness to rebut the inspectors' testimony, but chose not to do so.[6] Although Freedom came "into compliance" with the Order as of April 18, 2012, Mr. Haynie had no explanation for Freedom's failure to use registered haulers in violation of law after that date.

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 the other party, who has the burden of proof of any affirmative defenses. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156.)

2. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact

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[6] Evidence Code section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

(a) The board, after holding a hearing in accordance with the procedures set forth in Sections 11503 to 11519, inclusive, of the Government Code, may revoke, suspend, or deny a waste tire facility permit for a period of up to three years, if the board determines any of the following:

(1) The permit was obtained by a material misrepresentation or failure to disclose relevant factual information.

(2) The operator of the waste tire facility, during the previous three years, has been issued a final order for, failed to comply with, or has been convicted of, any of the following:

(A) One or more violations of this chapter or the regulations adopted pursuant to this chapter.

(B) One or more violations 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.

(D) Any order, direction, or penalty issued by the board relating to the safe storage or processing of waste tires.

(b) If the board 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 board 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.

(c) If the board determines that a violation specified in paragraph (2) of subdivision (a) has resulted in significant harm to human health or the environment, the board 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 greater.

6. Code section 42953 provides, "Any person who gives, contracts, or arranges with another person to transport waste or used tires shall utilize only a person holding a valid waste and used tire hauler registration from the board, unless the hauler is exempt as specified in Section 42954."

7. Respondent's operation of an unpermitted WTF and its continued use of non-registered hauler's, as set forth in Findings 4 and 6, are violations of the Department's laws, rules and regulations, within the meaning of Code section 42843, subdivision (a), thereby subjecting its application for a minor WTF permit to denial.

8. Although Respondent ultimately complied with the abatement Order, it continued to use non-registered haulers, a violation of Code section 42953 (Finding

5), thereby diminishing the vitiating effect of its compliance. As set forth in Legal Conclusion 5, the Board may deny the application for a period up to three years. The statute does not specify a start date for the three year period. It could be from the date of the application (December 21, 2011), the date of the denial, which is deemed to be the date of the Statement of Issues--July 19, 2012, per Finding 3, footnote 3, or even the effective date of this Decision. As neither Complainant nor Respondent have any control over the calendar of the Office of Administrative Hearings or the date the Proposed Decision is sent to the Department, it would be unfair to either party to begin counting the three year period from the effective date of this Decision. Under the circumstances of this case, the period should commence as of the date of the denial of the application.[7]

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application of Freedom Tire, Inc. for a minor waste tire facility permit is denied. Freedom Tire, Inc. may re-apply for the permit on or after July 19, 2015.

Date: 4-11-13

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

[7] Cf. Government Code section 11522 which permits a party to petition for reinstatement of a revoked license within one year of "the effective date of the decision [of revocation] or from the date of the denial of a of a similar petition." (Emphasis added.)