

BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING & RECOVERY
STATE OF CALIFORNIA

In the Matter of:

MELVIN HARRIS AND JUDY HARRIS,
Operator, dba BRANDT ROAD WASTE
TIRE SITE,

TPID No. 1528927,

Respondent.

Agency Case No.: 2010-010985-ADC

OAH No.: 2011080456

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 6/5/2013.

IT IS SO ORDERED _____

DEPARTMENT OF RESOURCES
RECYCLING & RECOVERY

By Carol Mats

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PROPOSED DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on March 4, 2013, in Los Angeles, California.

Heather L. Hunt, Staff Counsel III, and Martha Perez, Staff Counsel, represented the Department of Resources Recycling & Recovery (Complainant).

Melvin Harris (Respondent M. Harris) and Judy Harris (Respondent J. Harris) represented themselves as operators of Brandt Road Waste Tire Site.

The parties submitted the matter for decision on March 4, 2013.

STATEMENT OF THE CASE

Complainant seeks administrative penalties for negligent and intentional violations of the Public Resources Code and pertinent regulations relating to waste tire facilities. Respondents, operators of a waste tire facility, concede the majority of the violations, but argue that they relied on the representations of others and did not intend to violate the laws and regulations at issue.

FACTUAL FINDINGS

1. Complainant filed the Administrative Complaint. Respondents requested an administrative hearing on or about June 13, 2011. On or about February 13, 2013, Complainant filed the Amended Administrative Complaint. The allegations in the Amended pleading were deemed controverted by Respondents, pursuant to Government Code section 11507.

2. From June 19, 2009, through the present, Respondents have allowed waste tires to be illegally stored at Brandt Road Waste Tire Site, located at 7408 Brandt Road, in Buttonwillow, California (hereafter, "the site"). Respondents are tenants of the site.

3. On September 8, 2009, the Kern County Environmental Health Services Department (Kern County) sought Complainant's enforcement of waste tire facility laws and regulations at the site, based on Kern County's inspections on June 19, and July 23, 2009. Kern County Inspector Joe Espericueta (Espericueta) inspected the site on these two days in 2009.

4. Espericueta issued two inspection reports that contained his signature and the signature of Respondent M. Harris. The June 19, 2009 report set forth a number of violations of law and regulations and documented a tire count of 3,000 tires at the site. The violations set forth in the June 2009 report related to the site's water supply, fire equipment, the maintenance of an impermeable barrier, storage units, and rim removal. The report noted that the site was a minor waste tire facility and did not have a minor waste tire facility permit.¹ Respondents did not contest Espericueta's June 2009 report findings at the time the report was issued.

5. The July 23, 2009 report set forth the same violations of law and regulations, as the June report, further noting violations relating to the site's recordkeeping. Espericueta documented a tire count of 3,000 tires and set a compliance deadline of August 24, 2009, to correct the violations. Respondents did not contest Espericueta's July 2009 report findings at the time the report was issued.

6. Espericueta reinspected the site on August 24, 2009, the compliance deadline. Respondents took no action to correct the violations in the June and July 2009 reports.

7. On August 24, 2009, Espericueta documented the tire count as 2,000 tires, and noted that a fire had burned approximately 1,200 tires on August 4, 2009. He again documented violations relating to failing to have a minor waste tire facility permit, recordkeeping, fire equipment, water supply, maintaining an impermeable barrier, having an

¹ According to the inspection report, a minor waste tire facility is one that stores between 500 and 4,999 tires.

approved vector plan, storage units, and rim removal. Respondents did not contest Espericueta's August 2009 report findings at the time the report was issued.

8. On December 8, 2009, Vance Tracy (Tracy), Complainant's Inspector of the waste tire enforcement division, inspected the site. According to Tracy, he observed approximately 6,170 waste tires on the site. At hearing, Tracy explained that he estimated the number of waste tires using what he called the "indirect method," a "volumetric process." Tracy explained that he used a measuring wheel to measure the tire pile area, took note of the type of tires in the pile, and derived the tires' general dimensions to determine the approximate number of waste tires. Tracy asserted that Complainant regularly uses this method and that it is 80 percent accurate. Tracy took photographs of the tire piles at the site on December 8, 2009.

9. Respondents disputed the estimated number of tires (6,170), asserting that, at most, there were approximately 1,400 tires. Respondents provided no evidence, other than Respondent M. Harris' testimony, to support their estimate of 1,400 tires, and it is appropriate to consider that they have a motive to estimate a lesser quantity of tires. (Evid. Code, § 780, subd. (f).) Tracy testified persuasively regarding his estimate; Respondents stored approximately 6,170 tires at the site during Tracy's inspections.

10. Tracy's inspection found the following violations, set forth in his inspection report, dated December 8, 2009: no impermeable barrier to prevent rain water from accumulating in tires; waste tires stored in an outdoor area exceeding 5,000 square feet; waste tires stored within 40 feet of potentially flammable material, including wood and hazardous liquids; tires stored on the ground without adequate drainage; and no protection existed on site to prevent pyrolytic oil run-off or migration of pyrolytic oil into the groundwater. Tracy identified the site as a major waste tire facility without a permit. Tracy further documented that a fire had burned approximately 1,700 tires on August 24, 2009. Respondents did not contest Tracy's December 2009 report findings at the time the report was issued. Respondents took no action to correct the violations set forth in Tracy's December 2009 report.

11. Complainant issued a Cleanup and Abatement Order (CAO or "the order") to Respondents and the landowners of the site in March 2010; the CAO was served on Respondents and the site owners on April 3, 2010. The CAO required Respondents to immediately cease and desist from storing over 499 waste tires on the site, immediately cease and desist from creating illegal waste tire facilities, and to remove the waste tires from the site within 30 days from service of the CAO. The CAO required Respondents to enlist a state-registered waste tire hauler, complete comprehensive trip logs documenting each load of waste tires hauled, and submit each log to Complainant within 45 days of service of the CAO. The CAO informed Respondents that if they failed to comply with the order, Complainant could petition the superior court for injunctive relief to enforce the CAO, and that Respondents could be liable for civil penalties of not less than \$500 and up to \$10,000 per day for each violation. The CAO explained that Respondents' liability for civil penalties could be imposed in a civil or administrative action. The CAO further informed

Respondents that their failure to remove the waste tires could result in Complainant expending funds to perform abatement or remedial work and for Complainant to seek reimbursement for those costs. The CAO provided Respondents 10 days from the date of service of the order to file a petition with Complainant raising substantial issues appropriate for review. Respondents filed no such petition.

12. Complainant's enforcement actions serve to protect public safety, control vector breeding, and prevent tire fires. By their waste tire storage at the site, Respondents violated Public Resources Code sections 42824 and 42825, and California Code of Regulations, title 14, sections 17351, 17353, subdivision (a), 17354, and 18420.

13. Respondents had 30 days to comply with the CAO. Respondents failed to correct the violations set forth in the CAO.

14. On July 13, 2010, Tracy again inspected the site; however, in his report, he noted that he inspected the site from "outside site." Tracy documented observing approximately 6,170 waste tires on the site and noted that all of the violations noted in the December 2009 report remained outstanding. Respondents did not contest Tracy's report, dated July 13, 2010, at the time the report was issued; Respondents took no action to correct the violations set forth in that report.

15. Tracy inspected the site on March 22, 2012, and again documented that the site remained the same and all of the initially found violations in the December 2009 report remained outstanding. Respondents did not contest Tracy's report, dated March 22, 2012, at the time the report was issued; Respondents took no action to correct the violations set forth in that report.

16. On November 5, 2012, Tracy inspected the site. He estimated seeing 6,170 waste tires on the site, and documented that the site remained unchanged, including the existence of all violations initially identified in the December 2009 report. Respondents did not contest Tracy's report, dated November 5, 2012, at the time the report was issued; Respondents took no action to correct the violations set forth in that report.

17. Respondent M. Harris testified that he initially intended on using the site to work with railroad ties. However, on a date undetermined by the evidence, Respondent M. Harris was asked to store tires on the site instead. Respondents M. Harris and J. Harris explained that a man named Stephen Hansen (Hansen) came to them and asked them to store waste tires on the site and that he would arrange for their removal, but he never did. Respondents explained that Hansen told them not to remove the waste tires until he returned and they followed his instructions despite Complainant's inspection reports and the CAO. Respondents failed to offer any evidence, other than their testimony, to explain who Hansen was and in what capacity he was acting. Respondent's testimony failed to establish with any certainty who Hansen's existence or identity, the capacity in which he acted, and what, if anything, was represented Respondents about the site. No person claiming to be Hansen

testified. Respondents had no written agreement with anyone with regard to their waste tire storage facility.

18. Respondent M. Harris asserted that Hansen or others told him that he could give, but not sell, waste tires to the public. He complied with this directive. He was told he could give away up to nine tires at a time, but to not give away more than nine at any one time. He complied with this directive. At all relevant time in this matter, Respondent M. Harris gave away waste tires as people came by and asked for them. Respondent M. Harris also picked up old tires off the highway and added those tires to the existing piles at the site.

19. Respondent M. Harris asserted that he would have removed the waste tires if Hansen had not told him to leave them alone until his return. Respondent M. Harris believed Hansen would clarify any problems with Complainant upon Hansen's return. Respondent M. Harris also asserted that he did not get a waste tire facility permit because Hansen told Respondents that he would obtain the required permit. Respondents stated that they did not make any monetary profit from the waste tires.

20. Respondent M. Harris admitted that he is not good with documents. He asserted that he is inexperienced at official transactions that require permits and compliance with state regulations. He trusted Hansen and followed Hansen's directions, due largely to his inexperience and trusting nature.

21. According to Respondent M. Harris, Respondents' income consists of his Social Security payments and his part-time work at a local sewer plant. Respondents' evidence of their income was based solely on Respondent M. Harris' testimony and unsupported by any documentary evidence. There was no evidence establishing Respondents' monetary savings. Other than Respondent M. Harris' testimony regarding Respondents' income, there was no evidence to establish that an order enforcing the penalties Complainant seeks herein would pose a financial hardship to Respondents.

22. Complainant argued that Respondents failed to comply with the CAO between May 3, 2010 (the deadline to comply with the CAO), and November 5, 2012 (the last inspection date by Tracy), a total of 918 days. The calculation of 918 days as the total number of days within the period between May 3, 2010, and November 5, 2012, is accurate. Complainant set a penalty rate of \$1,000 per day, and argued that Respondent's violations and failure to comply with the CAO resulted in a penalty totaling \$918,000.

23. Respondents conceded that Complainant was "legally correct," but argued that Hansen took advantage of Respondent M. Harris. Respondent M. Harris asserted that he knows it is his responsibility to remove the tires from the site and that he will do so, but asked that the penalties not be assessed against Respondents.

24. At hearing, Respondents were respectful of Complainant and the instant proceedings. Respondent M. Harris testified in a forthright manner and with a respectful demeanor.

LEGAL CONCLUSIONS

1. Public Resources Code section 42824 provides that, "[o]n and after September 1, 1994, it is unlawful . . . to accept waste tires at a major waste tire facility unless the operator has obtained a major waste tire facility permit."

2. Public Resources Code section 42825 states:

(a) Any person who accepts waste tires at a major waste tire facility that has not been issued a permit or an authorization to operate from [Complainant], or who knowingly directs, transports, or abandons waste tires to or at a major waste tire facility that has not been issued a permit or an authorization to operate from [Complainant] shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) or more than ten thousand dollars (\$10,000) for each day of violation, by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment.

(b) For purposes of subdivision (a), "each day of violation" means each day on which a violation continues. In any case where a person has accepted waste tires at a major waste tire facility, or knowingly directed or transported waste tires to a major waste tire facility, that has not been issued a permit, in violation of subdivision (a), each day that the waste tires remain at the facility and the person has knowledge thereof is a separate additional violation, unless the person has filed a report with [Complainant] disclosing the violation and is in compliance with any order regarding the waste tires issued by the board, a hearing officer, or a court of competent jurisdiction.

3. Public Resources Code section 42850 provides in part:

(a) 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.

(b) Liability under this section may be imposed in a civil action or liability may be imposed administratively pursuant to this article.

4. Public Resources Code section 42850.1 states:

(a) 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, shall, upon conviction, be punished by a fine

not to exceed ten thousand dollars (\$10,000) for each day of violation, by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment.

(b)(1) 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.

(b)(2) Liability under this subdivision may be imposed in a civil action or may be imposed administratively pursuant to this article.

5. Public Resources Code section 42852, subdivision (a), provides that, "[i]n making a decision regarding a . . . penalty, the director [of the Department of Resources Recycling & Recovery] 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."

6. California Code of Regulations, title 14, section 18465, states:

In assessing the amount of civil penalty, factors to be considered shall include, but are not limited to, the following:

- (1) The nature, circumstances, extent, and gravity of the violation.
- (2) Evidence that the violation was willful or negligent.
- (3) The good or bad faith exhibited by the party.
- (4) History of violation of the same or similar nature.
- (5) The extent to which the party has cooperated with the Board in remediating the violation.
- (6) The extent that the party has mitigated or attempted to mitigate any damage or injury caused by his or her violation.
- (7) Evidence of any financial gain resulting from the violation.
- (8) Such other matters as justice may require.

7. Throughout the time at issue in this matter, Respondents did not apply for or possess the necessary waste tire facility permit. Respondents violated Public Resources Code sections 42824 and 42825.

8. Respondents violated California Code of Regulations, title 14, sections 17351, 17353, subdivision (a), 17354, and 18420. Respondents failed to take any action to remove the waste tires, despite receiving notice of their violations. Respondents were made aware that their waste tire storage facility violated rules regulating waste tire storage and required correction by Espericueta's inspection reports of June 19, 2009, July 23, 2009, and August 24, 2009. Respondents were thereafter made aware that their waste tire storage facility violated state laws and regulations and required correction by Tracy's inspection report of December 8, 2009, the CAO issued on April 3, 2010, and Tracy's additional inspection reports of July 13, 2010, March 22, 2012, and November 5, 2012. Taking no action to correct the violations despite repeated notice establishes that Respondent's violations were negligent and intentional. Even if Respondents' truthfully relied on the representations of Hansen, it would have been reasonable and prudent for Respondents to have communicated with Complainant to explain their position and their reliance on Hansen. Respondents could have attempted to come to some understanding with regard to the time to comply. They did not. Respondents' violations are therefore deemed negligent and intentional, in violation of Public Resources Code sections 42850 and 42850.1, and Respondents are liable for the penalties provided for in those same provisions.

9. Cause exists to sustain the Amended Administrative Complaint of the Department of Resources Recycling & Recovery against Respondents Melvin Harris and Judy Harris, Operators, doing business as Brandt Road Waste Tire Site, as set forth in Factual Findings 1-24, and Legal Conclusions 1-4, 7, and 8.

10. When considering the proposed penalty, the criteria in Public Resources Code section 42852 must also be considered. Respondents' violations are moderately severe, as the quantity of waste tires was significant. Saliently, Respondents made no efforts to prevent, abate, or clean up the conditions posing a threat to the public health, safety, and environment. Imposing the proposed penalty will have the necessary effect of compelling abatement, requiring consequences for ignoring the inspection reports, and providing a prophylactic effect on the regulated community as a whole. There was insufficient evidence to establish that Respondents have an inability to pay the proposed penalty.

11. In addition to the criteria in Public Resources Code section 42852, the proposed penalty is further assessed with the criteria in California Code of Regulations, title 14, section 18465. The evidence established that Respondents' violations were willful and negligent. Respondents' failure to address the violations within each of the inspection reports shows no good faith efforts by Respondents. Respondents failed to cooperate with Complainant to remediate the violations. Two criteria are favorable to Respondents. It is noted that Respondents have no history of similar violations and there was no evidence that they gained financially from the site. These last two points, however, when contrasted with

the other criteria in Legal Conclusions 10 and 11, fail to establish cause to reduce the proposed penalty.

12. The penalty of \$1,000 per day is reasonable and authorized by Public Resources Code sections 42850 and 42850.1. The calculation of 918 days as the number of days within the period between May 3, 2010, and November 5, 2012 is accurate. Thus, the proposed penalty of \$918,000 is appropriate and warranted. There is no cause to reduce the proposed penalty.

13. Cause exists to impose the penalty of \$918,000 against Respondents M. Harris and J. Harris, Operators, doing business as Brandt Road Waste Tire Site, for intentional and negligent violations of Public Resources Code sections 42850 and 42850.1, as set forth in Factual Findings 1-24, and Legal Conclusions 1-12.

ORDER

The Department of Resources Recycling & Recovery's Amended Administrative Complaint for Waste Tire Storage Administrative Penalties is sustained.

Respondents Melvin Harris and Judy Harris, Operators, doing business as Brandt Road Waste Tire Site, shall pay an administrative penalty of \$918,000 to the Department of Resources Recycling & Recovery. The Department of Resources Recycling & Recovery shall determine the manner of payment and the time within which Respondents must satisfy payment in total.

Dated: March 29, 2013



DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings