

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Petitioner,)
)
vs.) Case No. 10-5691EF
)
KENNETH STEVEN LANDERS, d/b/a)
TRACKSIDE TIRES,)
)
Respondent.)
_____)

FINAL ORDER

The final hearing in this case was held on September 20, 2010, by video teleconference at sites in Tallahassee and Jacksonville, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Matthew Smith-Kennedy, Esquire
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

For Respondent: Kenneth Steven Landers, pro se
3707 Main Street, North
Jacksonville, Florida 32205

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether the Respondent, Kenneth Landers, violated state regulations related to the operation of a waste tire site, as charged by the Department of Environmental Protection ("Department"), and, if so, whether he should pay the administrative penalties and investigative costs and undertake the corrective actions that are demanded by the Department.

PRELIMINARY STATEMENT

On May 18, 2010, the Department issued a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment ("NOV") which included seven counts against Respondent for the violation of laws related to waste tires. Respondent requested an administrative hearing to contest the charges, and the Department referred the matter to DOAH to conduct an evidentiary hearing and issue a final order.

At the final hearing, the Department presented the testimony of Brian Durden. The Department's Exhibit A was admitted into evidence. Petitioner testified on his own behalf and presented the testimony of Rebecca Gooding. Petitioner had no exhibits that were admitted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH. The Department submitted a proposed final order. Petitioner did not file a post-hearing submittal.

FINDINGS OF FACT

1. The Department is the state agency charged with the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapter 403, Florida Statutes, and Florida Administrative Code Title 62.

2. Respondent is a person doing business as Trackside Tires on property located at Zero 23rd Street East, Jacksonville, Duval County, Florida ("the property"). Respondent leases the property from its owner. Respondent sells used tires and recycles waste tires.

3. Respondent is responsible for the day-to-day operation of the facility, including compliance with environmental regulations.

4. Under Florida Administrative Code Chapter 62-711, the Department regulates waste tires. No person may maintain a waste tire site except as part of a permitted waste tire processing facility. Fla. Admin. Code R. 62-711.400(1).

5. A "waste tire" is defined in Florida Administrative Code Rule 62-701.200(126) as a tire that has been removed from a motor vehicle and includes used tires.

6. A "waste tire site" is defined in Rule 62-701.200(131) as a site at which 1,500 or more waste tires are accumulated. Respondent did not dispute that he had accumulated over 1,500 tires on the property.

7. On July 29, 2009, Brian Durden of the Department's solid waste staff visited the property. He observed and measured a waste tire pile on the property which was 210 feet by 40 feet and averaged 6 feet in height. Using a method for estimating the number of tires in a pile by its cubic volume, and adding an estimate for the number of tires in four truck trailers on the property, Durden estimated that there were over 23,000 waste tires on the property.

8. On July 29, 2009, the property was a waste tire site.

9. In order to operate a waste tire site, a permit must be obtained from the Department. Respondent does not have a permit to operate a waste tire site.

10. Respondent was previously cited by the Department for operating four other unpermitted waste tire sites, which was resolved by consent order in 2009. The consent order required Respondent to clean up the four sites and to pay penalties and costs.

11. Respondent stated that he took many of the tires from the four sites and stored them in a warehouse, but was then forced to bring about 10,000 used tires to the property that is

the subject of this proceeding because he lost the lease on the warehouse.

12. On the day of the hearing, September 20, 2010, Respondent stated that he still had approximately 1,800 tires on the property that he could sell for reuse and other tires in trailers. He agreed with Durden's estimate that there are over 5,000 tires still on the property.

13. In August 2009, the Department issued a warning letter to Respondent. The Department issued the NOV on May 8, 2010.

14. Respondent contends that he is attempting to obtain a permit from the Department to operate a waste tire site. However, to date he has been mostly involved in "processing" tires at his property and has not made substantial progress in obtaining a permit.

CONCLUSIONS OF LAW

15. The Department may institute an administrative proceeding to establish liability for the violation of the laws that the Department administers. See § 403.121(2), Fla. Stat. (2010).

16. The Department has the burden of proving by a preponderance of the evidence that Respondent is liable for the violations charged in the NOV. See § 403.121(2)(d), Fla. Stat.

17. The Department begins its Proposed Final Order with a description of "unconstested" findings of fact. However, for

some of these proposed findings of fact, there is no stipulation, admission, or supporting facts in the record. The Department's burden to prove a particular charge contained in the NOV is not met simply because Respondent did not present evidence to refute the charge at the final hearing.

18. Count I of the NOV charges Respondent with storing and disposing of waste tires on the property without a permit or other authorization from the Department. The Department proved that Respondent is liable under Count I.

19. Section 403.121(3)(e), Florida Statutes, provides that, for solid waste violations, the Department shall assess a penalty of \$2,000 for the unpermitted or unauthorized disposal or storage of solid waste. Waste tires are a form of solid waste. Therefore, Respondent must pay a penalty of \$2,000 for the violation charged in Count I.

20. Section 403.121(3)(e) also provides that, if the solid waste is Class I or Class III waste, an additional \$1,000 penalty shall be imposed. The Department demands the imposition of this additional penalty based on an allegation that waste tires are a Class I waste, but presented no evidence in support of the allegation. Florida Administrative Code Rule 62-701.200(13) defines "Class I waste" as solid waste that is not hazardous waste and is not prohibited from disposal in a lined landfill under Rule 62-701.300. The latter rule does not

expressly prohibit the disposal of waste tires in a lined landfill. Therefore, it is concluded that Respondent is liable for the additional \$1,000 penalty.

21. Count II of the NOV charges Respondent with failing to demonstrate financial assurance, issued in favor of the State of Florida, in the amount of the estimated cost of closing the waste tires site. No evidence was presented on this charge and, therefore, the Department failed to prove that Respondent is liable under Count II.

22. Count III of the NOV charges Respondent with failing to maintain fire protection at the property. No evidence was presented on this charge and, therefore, the Department failed to prove that Respondent is liable under Count III.

23. Count IV of the NOV charges Respondent with failing to demonstrate that the owner of the property is aware of and approves the waste tire operation on the property. No evidence was presented on this charge and, therefore, the Department failed to prove that Respondent is liable under Count IV.

24. Count V of the NOV charges the Respondent with failing to spray the waste tire pile for insects or rodents and, in general, not providing adequate mosquito control at the property. No evidence was presented on this charge and, therefore, the Department failed to prove that Respondent is liable under Count V.

25. Count VI of the NOV charges Respondent with maintaining a waste tire pile larger than permitted by law. Florida Administrative Code Rule 62-711.540(2)(a) provides that a waste tire pile cannot exceed 50 feet in width. The Department proved that Respondent is liable under Count VI.

26. Section 403.121(5), Florida Statutes, provides that, for failure to comply with any Department regulatory statute or rule requirement not specifically identified in Section 403.121, the Department shall assess a penalty of \$500. There is no specific penalty stated in the statute for maintaining a waste tire pile greater than allowed by rule. Therefore, Respondent must pay a penalty of \$500 for the violation charged in Count VI.

27. Evidence may be received in mitigation and the Administrative Law Judge may reduce a penalty up to 50 percent for mitigating factors. See § 403.121(10), Fla. Stat. Respondent did not present evidence that justified a reduction of the penalties. His assertion that he is a small businessman and cannot afford to pay the penalties is not a sufficient basis for reducing the penalty, but has been taken into account in setting the deadline for payment of the penalties assessed herein.

Investigative Costs

28. Count VII of the NOV seeks recovery of the Department's investigative costs incurred in this enforcement matter of "no less than \$500." The record demonstrates that \$500 is a reasonable amount for the Department's enforcement efforts reflected in the record.

29. Because the Department seeks to impose administrative penalties, a final order is issued by the Administrative Law Judge. See § 403.121(2)(d), Fla. Stat.

Corrective Actions

30. The corrective actions demanded in the NOV are restated below, but with modifications to make them consistent with the findings of fact and conclusions of law set forth above.

Disposition

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that

1. Respondent shall forthwith comply with all Department rules regarding storage and disposal of waste tires. Respondent Landers shall correct and redress all violations in the time periods required below and shall comply with all applicable rules in Florida Administrative Code Chapter 62-711.

2. Within 60 days of this Final Order, Respondent shall reduce the amount of waste tires being stored on the property to less than 1,500 or shall obtain a waste tire site permit from the Department in accordance with the requirements of Florida Administrative Code Chapter 62-711.

3. Within 120 days of this Final Order, Respondent shall pay \$3,000 to the Department for the administrative penalties assessed herein. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case Number 09-4141 and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the Department of Environmental Protection, Northeast District, 7825 Baymeadows Way, Suite 200B, Jacksonville, Florida 32256-7590.

4. Within 30 days of this Final Order, Respondent shall pay \$500.00 to the Department for its investigative costs. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon OGC Case number 09-4141 and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the Department of Environmental Protection, Northeast District, 7825 Baymeadows Way, Suite 200B, Jacksonville, Florida 32256-7590.

5. Respondent shall allow authorized representatives of the Department access to the property at reasonable times for the purpose of determining compliance with this Final Order and the rules of the Department.

DONE AND ORDERED this 21st day of October, 2010, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.