ILLINOIS POLLUTION CONTROL BOARD
June 17, 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-31
	)	(Enforcement - Land - Tires)
JOHNNIE MAE HENDRICKS,	)	
	)	
Respondent.	)	

AMY JACKSON, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT.

INTERIM OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on the complaint of the Attorney General filed on August 12, 1996, on behalf of the People of the State of Illinois (Complainant). The complaint alleges violations of the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.*, and the Illinois Administrative Code through improper operation of a used and waste tire disposal, treatment, or storage facility. Respondent Johnnie Mae Hendricks did not respond to the complaint.

For the reasons stated below, the Board finds Ms. Hendricks in violation of the Act and the Board's regulations as alleged in counts I through IX of the complaint[1] and imposes a penalty of $39,000.

BACKGROUND

The site at issue, commonly known as the Earp Property, is located in Macoupin County, Illinois. Ms. Hendricks became the site's owner in 1990 and sold the property in March, 1997, to Alton Entertainment. Tr. at 11-12.[2] Alton Entertainment is not a party to this action. The site is alleged to have contained at least 30,000 used or waste tires, most of which were destroyed in a fire in 1996.

The alleged violations are based upon matters observed during Illinois Environmental Protection Agency (Agency) inspections of the site in 1990 and 1995. The ten-count complaint alleges numerous violations of the Act and the Board's regulations, including

[1] Under count V of the complaint, the Board finds violations of only three of the four cited provisions.

[2] The transcript of the hearing held on September 9, 1997, in this matter will be cited as "Tr. at ___."

improperly disposing of more than 50 used or waste tires on property which is not a sanitary landfill, failing to submit required reports to the Agency, operating a waste storage or disposal operation without an Agency permit, causing or allowing the open dumping of used or waste tires, litter, the open burning of used or waste tires, and causing, threatening or allowing air and water pollution. The time period covered by the complaint spans from Ms. Hendricks' acquisition of the property in 1990 to its sale in March of 1997.

The site was originally owned by J.T. Earp, Ms. Hendricks' father, who operated a salvage yard there. Tr. at 40. Mr. Earp placed the tires on the property. Tr. at 39, 43. Ms. Hendricks became the owner of the property in 1990. Tr. at 11. Also in 1990, the Agency inspected the Earp site and issued Ms. Hendricks an administrative warning notice for open dumping of tires. Tr. at 14. The inspection report indicated approximately 50,000 tires at the site. Tr. at 14.

On April 7, 1995, Agency inspector John S. Senjan conducted a follow-up inspection of the Earp site. Tr. at 13. He also noted approximately 50,000 tires, which were in various states of decay and could not be reused. Tr. at 17-19. He also noted that no precautions had been taken to minimize the risk of fire at the site. For instance, there was no fence around the site, and no earthen berms. Tr. at 20, 23-24. There were overhanging branches and brush within 50 feet of the tires. Tr. at 22-23.

On April 9, 1996, a fire in a rubbish pile at the Earp site spread to the tires. Tr. at 25-26. The resulting tire fire was visible from up to 15 miles away, and was photographed by Mr. Senjan from that distance. Tr. at 27, Exh. 2. The tire smoke was very thick and black, and typically contained carcinogens and lead. Tr. at 33, 35. By the time firefighters arrived, the fire had engulfed the tires and was too hot to put out. Tr. at 30. Firefighters attempted to control the fire with water, but the water was ineffective; ultimately, Mr. Senjan and a representative of Macoupin County Emergency Response, decided to let the fire burn itself out. Tr. at 30. Some of the water applied to the fire went through the tires and ran off into a small creek which led to the Staunton reservoir, the water supply for the city of Staunton. Tr. at 31-32. Mr. Senjan inspected the creek, but found no visible contamination. Exh. 2.

Mr. Senjan was present at the site during the fire on April 9, and returned on April 10 and again on April 16th or 17th. Tr. at 28-29, 34. He revised his estimate of the number of tires present at the site to 30,000 to 40,000, and estimated that 99% of the tires had been consumed in the fire. Tr. at 29. Although the fire was primarily burnt out by the second day, there were still smoldering hot spots up to seven days later. Tr. at 34. After the fire had burned itself out, there were a number of steel wheel rims left. Members of the Hendricks household collected the rims and sold them for scrap. Tr. at 37-38.

The Earp site was never issued a permit for waste disposal by the Agency. Tr. at 20. The Agency has never received a contingency plan or any reports or documentation from Ms. Hendricks regarding the tires disposed at the site. Tr. at 21.

Complainant seeks entry of a cease and desist order against further violations by Ms. Hendricks, and the imposition of a civil penalty of not less than $5,000. Complainant also requests attorneys fees and costs.

CONSIDERATION OF ALLEGED VIOLATIONS

Ms. Hendricks did not answer the complaint; nor did she attend the hearing on this matter, held September 9, 1997, in Springfield, Illinois. Tr. at 3. Pursuant to 35 Ill. Adm. Code 103.220:

> Failure of a party to appear on the date set for hearing or to proceed as ordered by the Board shall constitute a default. The Board shall thereafter enter such order as appropriate, as limited by the pleadings and based upon the evidence introduced at the hearing.

Complainant introduced evidence in support of the allegations in the complaint at the September 9, 1997, hearing. Based upon the evidence introduced, the Board finds complainant has established violations with respect to nine of the ten counts of the complaint, and accordingly finds that Ms. Hendricks has violated the Act and the Board's regulations as alleged in counts I through IX of the complaint.[3] The individual counts of the complaint and the evidence supporting them are discussed below.

Count I: Improper Tire Storage

Count I alleges that Ms. Hendricks caused or allowed the disposal and storage of approximately 50,000 used and waste tires on private property which is not an Agency permitted sanitary landfill, in violation of Sections 55(a)(5) and (e) of the Act (415 ILCS 5/55(a)(5) and (e) (1996)) and 35 Ill. Adm. Code 848.202(b)(6). Section 55 of the Act provides in relevant part:

> a. No person shall:
>
> * * *
>
> 5. Abandon, dump or dispose of any used or waste tire on private or public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board.
>
> * * *

[3] Under count V, the Board finds violations of only three of the four cited provisions.

e. No person shall cause or allow the storage, disposal, treatment or processing of any used or waste tire in violation of any regulation or standard adopted by the Board.

35 Ill. Adm. Code 848.202(b) provides in relevant part:

> At sites at which more than 50 used or waste tires are located the owner or operator shall comply with the following requirements:
>
> * * *
>
> 6) USED OR WASTE TIRES SHALL NOT BE ABANDONED, DUMPED OR DISPOSED ON PRIVATE OR PUBLIC PROPERTY IN ILLINOIS, EXCEPT IN A LANDFILL PERMITTED BY THE AGENCY PURSUANT TO 35 ILL. ADM. CODE 807 or 811.

Mr. Senjan testified that 30,000 to 40,000 tires had been disposed at the site, and that the site was not a sanitary landfill. Tr. at 20, 29. The Board accordingly finds that Ms. Hendricks has violated Sections 55(a)(5) and (e) of the Act and 35 Ill. Adm. Code 848.202(b)(6).

Count II: Reporting Violations

Count II of the complaint alleges that Ms. Hendricks failed to file the required reports and information regarding the site, in violation of Sections 55(a)(6), (c), and (d) of the Act (415 ILCS 5/55(a)(6), (c), and (d) (1996)). Those provisions of Section 55 provide in relevant part:

a. No person shall:

* * *

6. Fail to submit required reports, tire removal agreements, or Board regulations [sic].

* * *

c. On or before January 1, 1990, any person who operates a tire storage site or a tire disposal site which contains more than 50 used or waste tires shall give notice of such activity to the Agency. Any person engaging in such activity for the first time after January 1, 1990, shall give

notice to the Agency within 30 days after the date of commencement of the activity. * * *

d. Beginning January 1, 1992, no person shall cause or allow the operation of:

* * *

2. a tire disposal site, unless the owner or operator (i) has received approval from the Agency after filing a tire removal agreement pursuant to Section 55.45, or (ii) has entered into a written agreement to participate in a consensual removal action under Section 55.3.

Mr. Senjan testified that the tires at the Earp site could not be reused. Tr. at 19. From this testimony the Board finds that the Earp site was a tire disposal site. Mr. Senjan also testified that the Agency never received notice from Ms. Hendricks as required by Section 55(c), nor did it receive a tire removal agreement or written agreement to participate in a consensual removal action, as required under Section 55(d). Tr. at 21. The Board thus finds Ms. Hendricks in violation of Sections 55(a)(6), (c), and (d).

Count III: Management Standard Violations

Count III of the complaint alleges respondent violated Section 55(e) of the Act and 35 Ill. Adm. Code 848.202(c)(1), (2), and (3) and (d)(1), (2), and (3). Section 55(e) is quoted above in the Board's discussion of count I. 35 Ill. Adm. Code 848.202 provides in relevant part:

c) In addition to the requirements set forth in subsection (b), the owner or operator shall comply with the following requirements at sites at which more than 500 used or waste tires are located.

1) A contingency plan which meets the requirements of Section 848.203 shall be maintained.

2) The recordkeeping and reporting requirements of Subpart C shall be met.

3) Used or waste tires shall not be placed on or accumulated in any pile unless the pile is separated from grass, weeds, brush, overhanging tree limbs and similar vegetative growth by no less than 50 feet.

* * *

d) In addition to the requirements set forth in subsections (b) and (c), the owner or operator shall comply with the following requirements at sites at which more than 10,000 used or waste tires are located.

1) The area of the site where used or waste tires are stored shall be completely surrounded by fencing in good repair which is not less than 6 feet in height.

2) Entrance to the area where used or waste tires are located shall be controlled at all times by an attendant, locked entrance, television monitors, controlled roadway access or other equivalent mechanisms.

3) The area of the site where used or waste tires are stored shall be completely surrounded by an earthen berm or other structure not less than 2 feet in height, and capable of containing runoff resulting from tire fires, accessible by fire fighting equipment; except that the owner or operator shall provide a means for access through or over the berm or other structure.

Mr. Senjan testified that Ms. Hendricks failed to maintain a contingency plan and failed to keep the records and report to the Agency. Tr. at 21-22. The Board accordingly finds Ms. Hendricks in violation of Section 848.202(c). The photographs in Exhibits 1 and 2 show neither the fence required by Section 848.202(d)(1) nor any of the control mechanisms required by Section 848.202(d)(2). Mr. Senjan also testified that the tires were in piles located within 50 feet of the surrounding brush and vegetation. Tr. at 23. The Board finds Ms. Hendricks in violation of Section 848.202(d). By violating these regulations, Ms. Hendricks has also violated Section 55(e) of the Act.

Count IV: Contingency Plan

Count IV of the complaint alleges respondent failed to have a tire fire contingency plan which met the requirements of 35 Ill. Adm. Code 848.203, in violation of that section and Section 55(e) of the Act. Section 848.203(a) provides:

> If an owner or operator of a tire storage site or tire disposal site is required by Section 848.202 to have a contingency plan under

> this Section, the owner or operator must meet the contingency plan requirements of this Section.

In Count III, the Board found that Ms. Hendricks did not have a contingency plan. Thus, Ms. Hendricks has not complied with Section 848.203 or, consequently, with Section 55(e) of the Act.

Count V: Operating Without a Permit

Count V alleges that respondent operated a waste storage, waste treatment, or waste disposal facility without the required Agency permits in violation of Sections 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (1996)) and 35 Ill. Adm. Code 807.201 and 807.202. Count V also alleges that respondent conducted waste storage, waste treatment, or waste disposal activities at a facility other than an Agency permitted sanitary landfill, in violation of 21(e) of the Act (415 ILCS 5/21(e) (1996)). Section 21 of the Act provides in relevant part:

> No person shall:
>
> * * *
>
> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> 1. without a permit granted by the Agency . . . .
>
> * * *
>
> e. Dispose, treat, store or abandon any waste . . . except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

35 Ill. Adm. Code 807.201 provides:

> Subject to such exemption as expressly provided in Section 21(e) of the [Act] as to the requirement of obtaining a permit, no person shall cause or allow the development of any new solid waste management site or cause or allow the modification of an existing solid waste management site without a Development Permit issued by the Agency.

35 Ill. Adm. Code 807.202 provides in relevant part:

> b) Existing Solid Waste Management Sites.

> 1) Subject to such exemption as expressly provided in Section 21(e) of the [Act] as to the requirement of obtaining a permit, no person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations.

The tires disposed at the Earp site fall within the definition of "waste" found in the Act.[4] Thus, the Earp site was a waste disposal site, and was required to have an operating permit under Section 21(d)(1) of the Act and 35 Ill. Adm. Code 807.202(b)(1). Mr. Senjan testified that the Agency had not issued a permit for the Earp site. Tr. at 20, 43. The Board therefore finds Ms. Hendricks in violation of Sections 21(d)(1) and 807.202(b)(1) and, consequently, in violation of Section 21(e).

The evidence indicates that the tires were already in place at the Earp site prior to Ms. Hendricks' ownership of the property. Tr. at 39. There is no evidence in the record regarding modification of the site during Ms. Hendricks' ownership. The Board accordingly cannot find that 35 Ill. Adm. Code 807.201 is applicable in this case.

Count VI: Open Dumping Violations

Count VI alleges that respondent, since at least 1990, caused or allowed the consolidation and accumulation of used and waste tires at the facility which does not meet the requirements of a sanitary landfill in violation of Sections 21(a) and 55(a)(1) of the Act (415 ILCS 5/21(a) and 55(a)(1) (1996)). Section 21(a) provides:

> No person shall:
>
> a. Cause or allow the open dumping of any waste.

Section 55(a)(1) provides:

> a. No person shall:
>
> 1. Cause or allow the open dumping of any used or waste tire.

"Open dumping" is defined in Section 3.24 of the Act (415 ILCS 5/3.24 (1996)) as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill."

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[4] "Waste" is defined, with certain exceptions not relevant here, as "any . . . discarded material." 415 ILCS 5/3.53 (1996).

It is abundantly clear from the photographs in Exhibit 1 that waste tires have been consolidated on the property; Mr. Senjan testified that the tires were present since Ms. Hendricks acquired the property in 1990. Tr. at 39. The Earp site is not a sanitary landfill. Tr. at 20. The Board finds that Ms. Hendricks has violated Sections 21(a) and 55(a)(1) of the Act by allowing open dumping of waste tires at the Earp site.

Count VII: Litter Violations

Count VII alleges that since respondent caused or allowed the open dumping of tires at the facility, litter resulted in violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (1996)). Section 21(p)(1) provides:

> No person shall:
>
> * * *
>
> p. In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> 1. litter[.]

"Litter" is not defined in the Act, but the Board has interpreted litter to include refuse of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly. County of Will v. Hunter (May 7, 1998), AC 98-8. Once again, the photographs in Exhibit 1 show that refuse (the waste tires) of an unsightly nature was improperly disposed at the Earp site. The Board thus finds that Ms. Hendricks has violated Section 21(p)(1).

Count VIII: Open Burning Violations

Count VIII alleges respondent caused or allowed open burning of used and waste tires in violation of Sections 9(c), 21(p)(3), and 55(a)(2) of the Act (415 ILCS 5/9(c), 21(p)(3), 55(a)(2) (1996)). Section 9(c) provides:

> No person shall:
>
> * * *
>
> c. Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose ad approved by the Agency

> pursuant to regulations adopted by the Board under this Act . . . .

Section 21(p)(3) provides:

> No person shall:
>
> p. In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> * * *
>
> 3. open burning[.]

Section 55(a)(2) provides:

> a. No person shall:
>
> * * *
>
> 2. Cause or allow the open burning of any used or waste tire.

"Open burning" is defined in the Act as "the combustion of any matter in the open or in an open dump." 415 ILCS 5/3.23 (1996). On April 9, 1996,, a fire occurred at the Earp site which consumed approximately 99% of the tires. Tr. at 26, 29; Exh. 2. The fire was not contained. Tr. at 34. The Board has already found under count VI above that the Earp site was an open dump. The Board therefore finds that Ms. Hendricks has violated Sections 9(c), 21(p)(3) and 55(a)(2) of the Act.

Count IX: Air Pollution

Count IX alleges a violation of Section 9(a) of the Act (415 ILCS 5/9(a) (1996)). Section 9(a) provides in relevant part:

> No person shall:
>
> a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State to as to cause or tend to cause air pollution in Illinois. . . .

"Air pollution" is defined in the Act as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.02 (1996). A contaminant is defined in the Act as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.06 (1996).

Mr. Senjan testified that when tires burn, the smoke emitted can contain carcinogens. Tr. at 35. It is apparent from the photographs in Exhibit 2 that vast amounts of contaminants were emitted into the atmosphere. The smoke plume from the fire was visible (and photographed by Mr. Senjan) from a distance of at least 15 miles. Tr. at 27; Exh. 2.

The Board finds that Ms. Hendricks has allowed the discharge of contaminants into the atmosphere so as to cause air pollution in Illinois, in violation of Section 9(a) of the Act.

Count X: Water Pollution

Count X alleges a violation of Section 12(a) of the Act (415 ILCS 5/12(a) (1996)). Section 12(a) provides in relevant part:

> No person shall:
>
> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois . . . .

Under Section 3.55 of the Act (415 ILCS 5/3.55 (1996)),

> "WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

The complaint alleges, and Complainant argues, that Ms. Hendricks caused or allowed water pollution as a result of water used to fight the tire fire finding its way into a creek which flows into the Staunton reservoir, the water source for the city of Staunton. The record, however, is devoid of any evidence establishing the effects of the fire runoff on the waters of the State. Mr. Senjan's inspection did not reveal any contamination, and although samples were taken, Exh. 2, test results were not introduced into evidence. Without such evidence, the Board cannot find that the runoff has rendered waters of the State harmful, detrimental or injurious. Jerry Russell Bliss, Inc. v. Illinois Environmental Protection Agency, 138

Ill.App.3d 699, 704, 485 N.E.2d 1154, 1157 (5th Dist. 1985). Accordingly, the Board does not find a violation of Section 12(a) of the Act.

PENALTY

Having found violations, the Board must next determine whether a penalty should be assessed, and if so the magnitude of the penalty. In determining the appropriate response to a finding of violation, the Board is required to consider the factors set forth in Sections 33(c) of the Act upon which the parties have introduced evidence, but may consider any matters of record in mitigation or aggravation of any penalty. 415 ILCS 5/33(c), 42(h); see also Ford v. Environmental Protection Agency, 9 Ill.App.3d 711, 720-21, 292 N.E.2d 540, 546 (3rd Dist. 1973); People v. Kershaw (April 20, 1994), PCB 92-164, slip op. at 14; IEPA v. Barry (May 10, 1990), PCB 88-71, slip op. at 62-63.

Complainant has not sought individual penalties for the various violations alleged in the complaint; rather, Complainant has sought imposition of a single penalty based on the aggregation of violations. Complainant asks the Board to order Ms. Hendricks to cease and desist from further violations and impose a civil penalty in the amount of no less than $5,000. Comp. Br. at 15. Complainant also requests attorneys fees and costs in an amount to be supported by an affidavit. Comp. Br. at 15.

Section 33(c) Factors

In making its orders and determinations, the Board is required under Section 33(c) of the Act to take into consideration all of the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits, including but not limited to:

i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

ii. the social and economic value of the pollution source;

iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

v. any subsequent compliance. 415 ILCS 5/33(c).

Character of Injury or Interference with Protection of Health, Welfare and Property

The fire which burned at least 30,000 tires, and the resulting air pollution it caused, interfered with protection of the health, general welfare, and physical property of the people. Respondent had no measures in place to reduce the threat of harm from the fire, including no berm to prevent runoff. Tr. at 32. The location of the tires to the surrounding brush and vegetation caused the destruction of trees during the fire. Tr. at 35-36. The fire could not be extinguished with water and burned for at least seven days. Tr. 26, 34.

The Board finds that there has been a substantial interference with the protection of health, safety and welfare. The danger of allowing the accumulation of waste tires without adequate safeguards is amply illustrated in this case, where not only did the tires catch fire, but the fire could not be extinguished. As a result, it was impossible for authorities to prevent or control the dispersal of contaminants into the air. This factor militates in favor of, and weighs in aggravation of, a penalty.

Social and Economic Value

There is no social or economic value to an unauthorized and unpermitted accumulation of waste tires. The Board finds that this is an aggravating factor and that it supports imposition of a penalty.

Suitability or Unsuitability of Pollution Source

The occurrence of the fire at the Earp site and the inability of the local fire departments to douse it graphically illustrate the unsuitability of the Earp site for waste tire disposal. The Board finds this is an aggravating factor which supports imposition of a penalty.

Technical Practicability and Economic Reasonableness of Reducing Pollution

Ms. Hendricks submitted no evidence to establish that it was technically impracticable or economically unreasonable for her to comply with the Act and Board regulations regarding waste tires. Based on its own expertise, the Board believes that compliance with the applicable statutes and regulations was both practicable and reasonable. The Board finds that this factor supports imposition of a penalty.

Subsequent Compliance

Because the fire destroyed substantially all of the tires, and because Ms. Hendricks no longer owns the Earp site, the issue of subsequent compliance is now moot. This factor weighs neither in aggravation nor mitigation of the penalty to be imposed.

Other Relevant Factors

Beyond the factors listed in Section 33(c), the Board is authorized under Section 42(h) of the Act to consider any matters of record in mitigation or aggravation of a penalty. In this case, the Board finds that two additional factors—the economic benefit to the violator from noncompliance and the amount of penalty necessary to deter violations or aid in achieving voluntary compliance—significantly impact the determination of an appropriate penalty.

Economic Benefits from Noncompliance

Ms. Hendricks economically benefited by neither removing the tires after she received an administrative warning notice in 1990, nor undertaking the minimum safety measures required under the waste tire regulations, *i.e.*, installing a fence and berms, clearing brush, and installing security measures. Tr. at 19. The subsequent fire which destroyed most of the tires saved Ms. Hendricks the expense of having to properly remove and dispose of the tires. Also, Ms. Hendricks profited from the sale of the tire rims. Tr. at 37. Moreover, Ms. Hendricks sold the property in 1997, for presumably more money than if the land had still contained the tires. Tr. at 12.

A person ought not be allowed to benefit economically from violation of environmental laws and regulations. The Board accordingly finds that this factor weighs in aggravation of the penalty to be imposed.

Amount of Penalty which will Deter Further Violations

Due to the fire and her sale of the Earp site property, Ms. Hendricks is no longer in violation of the Act and regulations regarding waste tires. Thus, deterrence of continuing or future violations by Ms. Hendricks is not a significant concern in this case. (It is likewise unnecessary to order Ms. Hendricks to cease and desist from violations.) Under Section 42(h) of the Act, however, the Board may consider the amount of a monetary penalty which will serve to aid in enhancing voluntary compliance with the Act "by the violator and other persons similarly subject to the Act." 415 ILCS 5/42(h)(4) (emphasis added). We thus consider the precedential effect of this case and the message it sends to others in a similar position to Ms. Hendricks.

Compliance with the Act and waste tire regulations, obviously, costs money. By not complying with the Act, and allowing the tires to burn, Ms. Hendricks saved the costs of compliance. Such a course of conduct must be discouraged. Unless a violator such as Ms. Hendricks is assessed a substantial penalty, there will be an incentive for other similarly situated parties to avoid compliance, or even to purposefully burn tires,[5] because it would be more economical to pay a fine after the fact than to pay the costs of compliance. Thus, any penalty assessed must be substantial enough to ensure that this incentive for noncompliance is

[5] There is no evidence or suggestion that the fire at the Earp site was anything but accidental. We cannot assume, however, that this will hold true for all tire fires.

removed. The Board therefore finds that this factor weighs in severe aggravation of the penalty to be imposed.

PENALTY AMOUNT

Where a violator has realized an economic benefit from noncompliance, that benefit is a useful starting point for determining an appropriate penalty. See People v. ESG Watts, Inc. (February 5, 1998), PCB 96-233, slip op. at 14. Unfortunately, there is insufficient evidence to quantify most of the benefits realized by Ms. Hendricks. With regard, at least, to the savings from not complying, however, the Board can draw upon its experience in other cases to calculate an approximate amount.

In People v. Cyber America Corp. (March 5, 1998), PCB 97-8, the Board was presented with a case by the Agency seeking to recoup expenditures for cleanup of waste tires from a site in Fulton County. The Cyber America site contained approximately 500,000 tires, and the Agency expended $326,153.74 removing the tires. Cyber America, slip op. at 4, 5. In this case, where the Earp site contained at least 30,000 tires, we can estimate the cost of removal as being at least $19,500. We consider this a very conservative estimate since due to the number of tires in the Cyber America case there were no doubt economies of scale involved, which would not have been available to Ms. Hendricks.

To fine Ms. Hendricks only the amount she would have had to pay had she complied, however, merely places her in the position in which she would have been had she complied, and thus provides no deterrent factor. In light of this and the other aggravating factors discussed above, the Board concludes that an additional penalty should be assessed. In other cases, the Board has found that penalizing a violator two dollars for each dollar saved by noncompliance removes the economic incentive for noncompliance. People v. ESG Watts, Inc. (February 5, 1998), PCB 96-233, slip op. at 14. The Board believes that it is appropriate to apply this multiplier here.

Based on the foregoing analysis, the Board finds that an appropriate penalty for the violations found here is $39,000.

COSTS AND FEES

Complainant has requested attorney fees and costs in accordance with Section 42(f) of the Act (415 ILCS 5/42(f) (1996)), which provides in relevant part:

> Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act.

Complainant requests award of attorneys fees and costs, in an amount to be supported by an affidavit attesting to the time spent in preparation and prosecution of this case. Complainant proposes to submit the affidavit as a supplementation of the record. Comp. Br. at 15.

The Board finds from the record that Ms. Hendricks was aware since at least 1990 that she was in violation of the Act and waste tire regulations, yet took no action to come into compliance. Accordingly the Board finds that the majority of violations found against Ms. Hendricks today were knowing violations, and that an award of attorney fees is therefore appropriate.

Complainant's attorneys must file an affidavit of fees and costs with the Board on or before July 2, 1998. The Board will award fees and costs in a separate order.

ORDER

The Board finds that Ms. Hendricks has knowingly violated the Illinois Environmental Protection Act and the Board's regulations at 35 Ill. Adm. Code as described in the foregoing opinion. In view thereof, the Board hereby orders Ms. Hendricks to pay a civil penalty of $39,000. Ms. Hendricks must pay this penalty within 30 days of the date of this order. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Illinois Environmental Protection Trust Fund, and must be sent by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield Illinois 62794-9276

The certified check or money order must clearly indicate on its face this case name and docket number. Any penalty not paid within the time prescribed will accrue interest at the rate set forth in section (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003(a)(1996)), as now or hereafter amended, from the date payment is due until the date payment is received. If the time for payment is stayed during the pendency of an appeal, interest will not accrue during such stay.

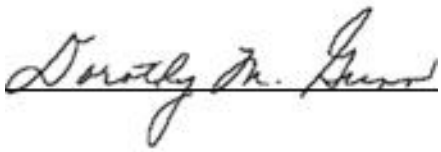
Attorneys for Complainant must file an affidavit in support of their request for fees and costs by July 2, 1998.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

Chairman C.A. Manning and Board Member R.C. Flemal concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim opinion and order was adopted on the 17th day of June 1998, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board