

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1994

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
COMPLAINANT,)
)
v.) PCB 94-1
) (Enforcement)
ROBERT D. FOSNOCK, d/b/a)
FOS AUTO AND TRUCK PARTS,)
)
RESPONDENT.)

ROLAND W. BURRIS, ATTORNEY GENERAL AND JAMES MORGAN, ASSISTANT ATTORNEY GENERAL APPEARED ON BEHALF OF THE COMPLAINANT, THE PEOPLE OF THE STATE OF ILLINOIS AND THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and

MR. RICHARD MENO, BY SPECIAL AND LIMITED APPEARANCE, APPEARED ON BEHALF OF THE RESPONDENT, MR. ROBERT D. FOSNOCK.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a complaint for violation of both the Used Tire Management Act (UTMA) provisions of Environmental Protection Act (Act) (415 ILCS 5/53 et seq.), the Act's open dumping provisions (415 ILCS 5/21) and their corresponding regulations. On January 3, 1994, Roland W. Burris, Attorney General of the State of Illinois (Attorney General), brought a three-count complaint on behalf of the Illinois Environmental Protection Agency (Agency) and the People of the State of Illinois against Robert D. Fosnock, doing business as Fos Auto and Truck Parts).

A hearing was held on April 12, 1994 before Board Hearing Officer Deborah Frank. No members of the public attended. No briefs were filed, nor were there any motions relating to discovery, nor were any motions of a dispositive nature filed.

For reasons more fully explained below, on all three counts, the Illinois Pollution Control Board (Board) finds Mr. Fosnock in violation of Section 55(a), (a)(6), (c), (d)(2), (e), (j) of the Used Tire Management provisions of the Environmental Protection Act, Sections 21(a), (d)(1) and (2), (e) and (p)(5) of open dumping provisions of the Environmental Protection Act, and 35 Ill. Adm. Code 848.201(b) and 848.501(a) 848.202(a), (b), and (c), 848.400(b), 848.401(a), and 848.404(a) 848.202(a), (b), and (c), 848.400(b), 848.401(a), and 848.404(a) as alleged.

PROCEDURAL AND FACTUAL BACKGROUND

In attendance at the April 12 hearing on behalf of the complainant were Assistant Attorney General Mr. James Morgan, and two witnesses from the Agency, Mr. John Senjan and Mr. Paul Pursglove, both of whom are employed in the Agency's Used Tire program. Mr. Senjan testified regarding his inspections of Fosnock's property (Tr. at 8) and Mr. Pursglove, Manager of the Agency's Used Tire Management Program, testified regarding the Used Tire Management Program requirements in the State of Illinois and how they relate to the allegations against Mr. Fosnock. (Tr. at 18.)

On behalf of the respondent, attorney Richard Meno entered a special and limited appearance for the purpose of contesting the Board's authority to hold a hearing based upon Fosnock's filing of Chapter 7 bankruptcy proceeding in the Bankruptcy Court for the Central District of Illinois on April 11, 1994. Specifically, Fosnock contends that 11 U.S.C. Section 362, which acts as an automatic stay of certain proceedings, applies in this matter. The hearing officer determined that the automatic stay did not apply due to the "police powers exception" found in Section 362(b)(4) and ruled the hearing would go forward. (Tr. at 6.) Mr. Meno withdrew from the hearing and no other counsel presented a case in Mr. Fosnock's defense, nor did Fosnock argue *pro se*.

This case involves a seven-acre tract of land in Gillespie, Macoupin County, Illinois whereupon Fosnock operates "Fos Auto and Truck Parts" (Fos Auto Site). The Agency first became aware of this site in June of 1991 when the Agency received a complaint that an individual was digging trenches and burying tires on property in Gillespie. (Tr. at 19.) Mr. Pursglove dispatched an Agency inspector to the site to investigate the complaint. (Tr. at 19.) Once on-site, the Agency discovered that Mr. Fosnock had been operating a used tire storage and disposal business for two years. Pursglove testified Fosnock had been hauling used tires onto the site at a rate of five to six hundred tires per week and that Pursglove estimated that he received approximately .75 cents per automobile tire and \$2.50 per truck tire. (Tr. at 24.) As of the April 12, 1994 hearing, the Agency estimates there are 150,000 used tires stored on the Fosnock property. (Tr. at 13.)

The Agency visited this site on at least seven separate occasions: June 20, 1991, July of 1991, December 6, 1991, October 2, 1992, May of 1993, October 24, 1993 and April 11, 1994. During these investigations, the Agency found that there were tires in piles and they were also strewn about the site, and that they were dumped directly on the ground in the midst of the brush, grass, and trees, and that Fosnock had buried some of the tires on-site. The Agency also found the site was cluttered with junk cars. (Tr. at 15.) At one of the more recent site-visits, the

Agency discovered that Fosnock had purchased a tire shredder and was using the tire chips to fill the site's entrance road potholes. (Tr. at 13.) The Agency also observed that the tire pieces did not conform to UTMA standards; they were shredded into six inch pieces rather than two inch pieces. (Tr. at 13.)

Mr. Pursglove also testified that the inspections demonstrated that the site posed a significant public health concern. Inspectors from the Illinois Department of Public Health (IDPH) and the Macoupin County Public Health Department collected specimens of the Asian Tiger Mosquito and confirmed its presence on Fosnock's property. (Complaint at 4; Tr. at 28; Exh.#4.) On July 16, 1991, the Agency issued a "Section 55.3(d)" violation letter pursuant to 415 ILCS 5/55.3(d) of the Used Tire Management Act provisions, indicating that the IDPH considered the site a public health threat (Tr. at 28) and directing Fosnock to take immediate action to control the proliferation of the Asian Tiger Mosquito, and to commence removal of the tires. (Id.; Pet. Exh. #7.) Mr. Pursglove testified this mosquito is a vector that can transmit diseases, some of which are fatal. (Tr. at 28.) In response to the 55.3(d) letter, Fosnock treated the site for mosquitos with the assistance of the Macoupin County Health Department and the IDPH. (Tr. at 30.) The treatment was found to be 85% effective; however, it was to have been repeated periodically, specifically after every rain event. Pursglove testified that he believed Fosnock has periodically treated to control the mosquitos, but he did not indicate whether the treatments occurred after every rain event. (Tr. at 33.)

However, Mr. Fosnock was also directed in the above-referenced 55.3(D) letter to remove the tires from the site and excavate the buried tires. He was required to submit a tire removal and excavation plan within 30 days. (Tr. at 29; Pet. Exh. #7.) In a written response to the 55.3(d) letter, on July 23, 1991, Fosnock merely agreed to construct a metal building in order to operate a tire recycling facility. (Pet. Exh. #8.) Pursglove testified that the Agency sent Fosnock additional correspondence indicating essentially that "under no uncertain terms he must submit, to us, a removal plan by which he must systematically commence and complete the removal of the tires on the property." (Tr. at 31; Pet. Exh. #9) While Fosnock agreed to unearth the buried tires and entered into a tire removal agreement with the Agency in January of 1992, he has not yet removed any tires to date. (Tr. at 31 and 34.) According to Mr. Pursglove, Fosnock has continued to haul tires onto the property from June 1, 1991 to December of 1993, and has never submitted any reports showing proper disposal. (Tr. at 30,34.)

While on the Fos Auto site, and after a records review, the Agency also determined that Fosnock had no tire fire fighting capability and that the local fire department is at least six to seven miles away. (Tr. at 23; Pet. Exh. #5.) When the Agency's

inspectors were on-site, Fosnock could produce none of the UTMA-required records and reports, specifically a contingency plan, financial assurance, daily tire records, and annual tire summaries. (Tr. at 14 and 35.)

As the manager of the Used Tire Management Program, Mr. Pursglove testified that he and other Agency employees held several meetings with Mr. Fosnock from June of 1991 to November of 1992 in an effort to "assist him in operating" his used tire business. (Tr. at 36.) According to Mr. Pursglove, Fosnock wanted to remain in the tire business and to comply with the used tire management regulations; therefore, the Agency "bent over backwards in trying to get Mr. Fosnock to comply with the regulations." (Tr. at 36.) The Agency was particularly interested in Fosnock's staying in business so that the revenue would go toward remediation and cleanup of the site. (Tr. at 37.) As a result of these meetings, Fosnock agreed to take several actions: (1) enter into a tire removal agreement with the Agency that he would remove 2,500 tires per month from the Fos Auto site, which he did submit on January 16, 1992; (2) open a tire recycling facility in Benld, which would be a more accessible location than that in Gillespie; and (3) as of January 1, 1992 cease hauling used tires onto the Fos Auto site. (Tr. at 35-36; Pet. Exh. #11, "Letter from Paul Pursglove to Fosnock, dated December 18, 1991".) Mr. Pursglove testified that while Fosnock did enter into the tire removal agreement in January of 1992, he has not complied with it, nor has he removed any tires. Rather, the uncontroverted evidence indicates that he has continued to haul tires onto the site. (Tr. at 39.)

Moreover, while not a basis for the instant enforcement action, the Fosnock's new tire recycling business location in Benld was not operated in compliance with the used tire management requirements either; Fosnock maintained no annual reports, no daily tire records, no contingency plan, nor financial assurance. (Tr. at 41.) However, based on Fosnock's expressed desire to come into compliance, the Agency allowed Fosnock to return to Gillespie and operate his business on the original, seven-acre site. According to Mr. Pursglove, Fosnock has not yet brought the Fos Auto site into compliance. It still has an uncompleted storage building. Mr. Pursglove further testified that Fosnock's written plan to comply with the UTMA requirements (by bringing new tires onto the site, sorting them, removing and selling the casings from the waste, and disposing of the remaining tires) has yet to come to fruition. (Tr. at 41; Pet. Exh. #12.) Thus, Fosnock's actions have culminated in the instant enforcement action to gain compliance and Fosnock's filing for bankruptcy the day before the Board hearing on the complaint.

ISSUES PRESENTED FOR REVIEW

A. The Respondent's Entry of a Special and Limited Appearance Contesting the Board's Power to Conduct an Enforcement Hearing.

Mr. Meno appeared on the morning of the April 12, 1994 hearing to notify the hearing officer that he was filing a "Suggestion of Filing Bankruptcy Petition and Stay of Proceedings" which was entered as Respondent's Exhibit #1. (Tr. at 3.) This document appears to be a special and limited appearance challenging the Board's authority to conduct the hearing on the complaint. Meno argues that Fosnock filed Chapter 7 bankruptcy proceedings in the Bankruptcy Court of the Central District of Illinois on April 11, 1994 and triggered Section 362(a), the automatic stay provision of the United States Bankruptcy Code. (11 U.S.C. Section 362(a).) Fosnock's position is that his filing for bankruptcy grants an automatic stay from all proceedings pending before state courts and administrative agencies, including the instant action pending before the Board.

In response at the hearing, Mr. Morgan, argued that Section 362(b)(4) provides an exception to the automatic stay specifically for the continuation of actions or proceedings by a governmental unit to enforce a State's police power. (Tr. at 4-5.) Citing In re Lenz Oil Service Inc. 65 B.R. 292 (N.D. Ill. 1986), Mr. Morgan further argued that Illinois' enforcement actions pursuant to the Act have been found to fall within the police powers exception to the automatic stay provision. He argued that it is appropriate for the Pollution Control Board to proceed with the hearing, and that such proceeding is not affected by the federal stay provisions. (Id.)

B. Counts I, II and III: Violations of the Used Tire Management Act, the Environmental Protection Act and the Illinois Administrative Code

The three-count complaint filed by the State of Illinois against Robert Fosnock alleges the following violations of the Used Tire Management Act provisions of the Environmental Protection Act, violation of the open dumping provisions of the Environmental Protection Act and the corresponding regulations of the Illinois Administrative Code.

1. Count I - The Used Tire Management Act Provisions of the Environmental Protection Act and Corresponding Regulations: *Operation of a Tire Disposal Site without Providing Notice to the Agency, Entering into a Tire Removal Agreement and Failure to Submit all Necessary Records and Reports.*

Count I of the complaint alleges that Fosnock violated

Sections 55(a)(6), (c), (d)(2) and (j) which provide:

(a) No person shall:***

(6) Fail to submit required reports, tire removal agreements***.

* * *

(c) On or before January 1, 1990, any person who operates a tire storage site or 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 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.

* * *

(j) No person shall fail to comply with the terms of a tire removal agreement approved by the Agency.

Count I further alleges that Fosnock violated 35 Ill. Adm. Code 848.201(b) and 848.501(a) in failing to give the Agency notice within 30 days of commencing the operation of a tire storage and disposal site, and in failing to submit and operate pursuant to a tire removal agreement.

2. Count II - The Environmental Protection Act and Corresponding Regulations: *Open Dumping and Proliferation of Disease Vectors.*

Count II of the complaint alleges that Fosnock violated Sections 21(a), (d)(1) and (2), (e), and (p)(5) of the Act:

No person shall:

(a) Cause or allow the open dumping of any waste;

* * *

- (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
 - (1) Without a permit granted by the Agency ***; or
 - (2) In violation of any regulations or standards adopted by the Board under this Act; or

* * *

- (e) Dispose***any waste***except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

* * *

- (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.***
 - (5) proliferation of disease vectors.

Count II further alleges that Fosnock violated 35 Ill. Adm. Code Sections 807.201 and 807.230 in failing to comply with the tire removal agreement once it had been approved, by operating a waste disposal unit without a permit, and by allowing the proliferation of disease vectors at the site.

3. Count III - The Used Tire Management Act Provisions of the Environmental Protection Act and Corresponding Regulations: *Open Dumping of Used or Waste Tires*

Count III of the complaint alleges that Fosnock has violated Sections 55(a), and (e) which provide:

- (a) No person shall:
 - (1) Cause or allow the open dumping of any used or waste tire.***
 - (5) Abandon, dump or dispose of any used or waste tires on private or public property except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board.***
- (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.

Count III further alleges that Fosnock violated 35 Ill. Adm Code Sections 848.202(a), (b), and (c), 848.400(b), 848.401(a), and 848.404(a) by causing or allowing open dumping of used tires at a site not permitted by the Agency, by placing tires too close to grass, weeds, brush, and tree limbs and in not maintaining and submitting the required records and reports, i.e., contingency plans, financial assurance, tire removal cost estimates.

C. Remedies Sought by the State of Illinois Against Fosnock.

The Complaint seeks the issuance of a final order finding the respondent in violation. The State of Illinois also requests that we direct the respondent to take all measures necessary to cease and desist from being in violation and from committing further violations. In addition to seeking an award of the State's costs including attorney's fees and expert witness fees, the State also seeks a civil penalty up to \$50,000 for the initial violation of each subsection of the Environmental Protection Act, and additional penalties of \$10,000 per day for each violation. The State asks that we grant any such other relief as we deem appropriate, including attorneys fees and costs.

At hearing, Mr. Morgan urged the Board to impose a penalty in the amount of \$156,250, which, Mr. Pursglove testified, would deprive Mr. Fosnock of the economic benefit of his noncompliance, and would deter others from committing similar violations. (Tr. at 44 and 48.) Mr. Morgan arrived at \$156,250, by multiplying the number of tires on the site (approx. 150,000) by the approximate amount of the disposal fee Mr. Fosnock received (\$1.00 for 125,000 car tires and \$2.50 for 25,000 truck tires). (Tr. at 49.) Mr. Pursglove further testified that the Agency would like a high penalty in this case because the Agency needs to send out a clear message. (Tr. at 44.)

According to Mr. Pursglove, the Agency has been working hard for the past three to four years to establish markets and develop programs to keep tires out of landfills, and to expand disposal and recycling options for used and waste tires. (Tr. at 44-45.) Approximately five million used tires each year reach these markets in Illinois, and the Agency believes that with the addition of the Illinois Power Facility in Baldwin, the State's capacity for consuming and recycling tires as a fuel product will approach 10 to 12 million tires per year. (Tr. at 45.) According to Mr. Pursglove, there are legitimate recycling and disposal options, such as the Archer Daniels Midland facility in Decatur which accepts used tires for 20 cents each. Mr. Fosnock chose only to collect the disposal fee from his customers, and to stop there. (Tr. at 45.) The Agency wants to impress upon those persons operating out of compliance with the Act and the Board's regulations, that they can no longer collect tires, charge for

the service, and indiscriminately openly dump the tires. (Tr. at 44.)

DECISION

A. The Hearing Officer Properly Ruled that the Automatic Stay Provisions of the Bankruptcy Code Do Not Prohibit an Enforcement Proceeding Before the Board.

We find that the hearing officer's decision to go forward with the hearing was a proper ruling which we hereby affirm. When a debtor files for protection from his creditors under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. Section 362(a) provides an automatic stay against many types of actions which may be pending against a debtor. However, such a stay is not an absolute prohibition against the actions of all creditors or governmental agencies. Section 362(b) lists several exceptions to the automatic stay, one of which is the "police power exception" which allows the states to protect the public health and the environment and sue a debtor to prevent or stop a violation of the environmental protection laws, or affix damages for violation of such laws. (See Midatlantic v. New Jersey 474 U.S. 494, 106 S.Ct. 755, 761 (1986); In re Lenz, 65 B.R. 292,293, citing, S.Rep.No.95-989 at 52, 1978 U.S.Code Cong. and Ad. News at 57-87, 5838; H.Rep. No. 95-595 at 343 1978 U.S. Code Cong. and Ad. News at 6299.) "The policy behind this police or regulatory exception to the automatic stay is to prevent the bankruptcy court from becoming a haven for wrongdoers." (In re Lenz, 65 B.R. at 293, citing, Commodity Futures Trading Comm. v. Co Petro Marketing 700 F.2d 1279, 1283 (9th Cir. 1983).)

Therefore, the automatic stay does not apply to the enforcement action which the Attorney General and the Agency have commenced against Fosnock, and it would not be a violation of the stay to hold a hearing, or to enter a judgment in this matter. Our issuing such an order granting the requested injunctive relief or affixing a penalty is not a violation of the automatic stay: the courts have found that to rule otherwise, the police powers exception would be "narrowed into virtual nonexistence." (In re Lenz, 65 B.R. at 294.) The Board can think of no better reason for the State to exercise its environmental police powers than to seek the immediate cessation and clean-up of a site which causes an imminent threat to the public health of Illinois citizens, and the environment, as the one present here.

B. Violations of the Used Tire Management Act, the Environmental Protection Act and the Illinois Administrative Code

The complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. This standard of proof requires that the proposition proved must be "more probably true than not." Once the complainant presents sufficient evidence to make a prima facie case, the burden of going forward shifts to the respondent to

disprove the propositions. (IEPA v. Bliss (August 2, 1984) 59 PCB 191, PCB 83-17.) In enforcement actions brought by the State, the Agency is charged under the Act with enforcing and proving violations of the Act before the Pollution Control Board. (415 ILCS 5/31(a).)

The Board finds that the State of Illinois has proven, by a preponderance of the evidence, that Fosnock has violated each of the sections of the Used Tire Management Act, the Act, and the corresponding regulations set forth in Counts I, II, and III: operating without a permit, open dumping of used tires by placing tires close to grass, weeds, brush, and tree limbs, and operating a non-permitted used tire storage facility in such a manner to cause the proliferation of disease vectors. Fosnock has also violated the Environmental Protection Act and Board regulations by failing to notify the Agency that he had commenced a used tire storage business, failing to enter into and implement a tire removal agreement with the Agency and failing to maintain the required records and reports.

Having found Fosnock to be in violation, the Board must issue an appropriate order under the circumstances. This determination is governed by Section 33(b) and Section 42 of the Environmental Protection Act. Under Section 33(b), the Board has the authority to issue final orders, including orders directing a party to cease and desist from violations, and orders imposing civil penalties in accordance with Section 42. Under Section 33(c) of the Act, when issuing its orders and determinations, the Board may consider: the character and degree of injury, the social and economic value of the pollution source, the location of the pollution, the technical and economic reasonableness of reducing or eliminating the pollution and subsequent compliance.

Section 33(c) specifically requires that we consider: 1) The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; 2) the social and economic value of the pollution source; 3) 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; 4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and 5) any subsequent compliance. (415 ILCS 5/33(c).) In considering Section 33(c) (1)-(4), as discussed more fully below, Mr. Fosnock has created actual and potential harm to human health and the environment by his improper operations. Concerning Section 33(c)(4), compliance with the requirements of the Act and the Board regulations is economically reasonable and technically feasible, as evident from the fact of his agreement with the Agency on a tire removal plan. Finally, in taking into account Section 33(c)(5) the record in this matter demonstrates that Mr. Fosnock operated out of

compliance and has yet to remove any of the used tires which he agreed to in 1992.

In light of these considerations and the clear, unequivocal and un rebutted evidence offered at hearing by the Attorney General demonstrating Mr. Fosnock's gross failure to comply with the used tire storage, disposal and management practices of the Used Tire Management Act, we issue today, a cease and desist order directing that Fosnock immediately cease violating the Act. We also direct that all tires on the site be properly disposed within 30 days of the entry of this order. We also award the State of Illinois a penalty in the amount of \$156,250.00 pursuant to 42(h), which provides the considerations for ascertaining a penalty amount, e.g., the duration and gravity of these violations, the absence of due diligence, and that the penalty will serve to deter further violation and aid in enhancing voluntary compliance. (415 ILCS 5/42(h).)

From June of 1991 to the present, Mr. Fosnock has operated a used tire business totally in violation of those sections of the Environmental Protection Act set forth in Counts I, II and III of the Complaint. He has accumulated 150,000 used tires on-site and having done so, has caused a very serious threat to the human health and the environment.

Mr. Fosnock's blatant and reckless disregard for the management practices of Used Tire Management Act has created an environmental situation that has not only allowed for the proliferation of the Asian Tiger Mosquitos, mosquitos which are potentially fatal disease vectors, but Mr. Fosnock has operated a used tire storage and disposal business wholly without concern for potential tire fires, which in and of itself is a very substantial threat to our environment.¹

We are also disturbed by the blatant disregard and lack of

¹The recent tire fire in East Chicago, Indiana, which started July 16, 1994 and burned until late August, highlights the real concern the Board has for the danger posed by Mr. Fosnock's property in Gillespie. In that incident, a 45,000-ton pile of shredded tires caught fire and the smoke and fumes caused the evacuation of nearby residents on at least three occasions. Tire fires are difficult to extinguish and handle because the petroleum-based rubber burns quite efficiently while the pockets of air in the tire piles provides oxygen. The core of the fire burned at 1300 degrees, which was so hot it melted the vinyl siding of nearby homes. Even after the tire fire is extinguished, the melted tires will have to be landfilled at an estimated cost of \$5 million. (See e.g. Crain Communication, Inc. Business Insurance, "Burning Questions: Fire at Subleased Site Sparks Confusion Over Liability," August 22, 1994; Associated Press, "Smoldering Tire Fire Plagues East Chicago Neighborhood," August 4, 1994; USA Today, "40-Foot Tall Tire Fire Terrorizes Indiana Town," August 3, 1994."); see also In the Matter of Used and Waste Tire Regulations (35 Ill. Adm. Code Part 848; 35 Ill. Adm. Code Part 849), R90-9B, Adopted Rule, (February 6, 1992).

due diligence exhibited toward the law and in attitude exhibited by the respondent in his relationship with the Agency. The Used Tire Management Act assigns the Agency responsibility for ensuring that recycling, storage and disposal of used tires occurs in a manner that is protective of the environment and of the public health. In passing this law, the legislature specifically found that used tires present an imminent threat to public health and safety because of the disease vector problem associated with the mosquitos and the risk presented by tire fires. ((415 ILCS 5/53 ("General Assembly findings"².) The Agency had demonstrated a willingness to work with Mr. Fosnock so that he could operate a recycling business in compliance with the environmental laws and regulations of the State of Illinois. However, on almost every occasion that Mr. Fosnock has entered into an agreement to begin bringing this site into compliance, Mr. Fosnock has failed to act.

Moreover, this recalcitrant behavior is further exacerbated, in our view, by Mr. Fosnock's failure to come forward in this proceeding and offer any explanation for the conditions on his property. Had the issue of whether the automatic stay applies been one that was merely evolving, or had Mr. Fosnock at least presented caselaw to support his position that the hearing should not go forward, we may not have viewed his failure to appear so critically. However, the bankruptcy law in this area appears to be clear. At least since 1986 in the Northern District of Illinois, In re Lenz stands for the proposition that the automatic stay does not apply to enforcement actions brought pursuant to the Illinois Environmental Protection Act. Mr. Fosnock had a responsibility to appear before this tribunal, which he has failed to meet. If he desired to contest the factual presentation of the Agency, he had every opportunity to do so in our forum.

²The findings are as follows:

1. that used and waste tires constitute a growing solid waste problem of considerable magnitude that is exacerbated by the fact that tires do not readily degrade or decompose;
2. that the accumulation of used and waste tires constitutes a fire hazard and a threat to air and water quality;
3. that unmanaged used and waste tire sites encourage open dumping of other types of waste;
4. that used and waste tire accumulations pose a threat to the public health, safety and welfare by providing habitat for a number of disease-spreading mosquitos and other nuisance organisms, and that the transport of used tires has introduced such mosquitos into the State and dispersed them;
5. that State agencies need the ability to remove, or cause the removal of, used and waste tire accumulations as necessary to abate or correct hazards to public health and to protect the environment; and
6. that used and waste tires may also afford a significant and economic opportunity for recycling into new and useful products or as a source of fuel. (415 ILCS 5/53.)

Finally, we are awarding the \$156,250.00 penalty requested by the Attorney General, calculated at a rate of \$1.00 per auto tire and \$2.50 for truck tires, in order to deprive Mr. Fosnock of any economic benefit he may have received based on his record of three years of non-compliance. We are also awarding this amount to send a clear message, as requested by this Agency, that "noncompliance" is not an option. The record shows there are at least six tire recycling facilities operating in compliance in this State (Tr. at 42), and the Agency has demonstrated a more-than-ready willingness to assist a business owner in his or her endeavors to establish and operate a recycling business in compliance with the law, as this case shows. We are convinced that a penalty in this amount for a site of this magnitude will cause other property owners to rethink their position when considering whether to disregard the Used Tire Management Act and the Environmental Protection Act. The record also clearly demonstrates a wilful, knowing and repeated violation of the Environmental Protection Act, and therefore, pursuant to Section 42(f) we also award reasonable attorney's fees and costs.

ORDER

The Board hereby finds the respondent in violation of Section 55(a), (a)(6), (c), (d)(2), (e), (j) of the Used Tire Management provisions of the Environmental Protection Act, Sections 21(a), (d)(1) and (2), (e) and (p)(5) of open dumping provisions of the Environmental Protection Act, and 35 Ill. Adm. Code 848.201(b) and 848.501(a) 848.202(a), (b), and (c), 848.400(b), 848.401(a), and 848.404(a) 848.202(a), (b), and (c), 848.400(b), 848.401(a), and 848.404(a). Accordingly, we award the State of Illinois the following relief:

- (a) Robert Fosnock shall immediately cease and desist from any further violation of the Used Tire Management Act provisions of the Environmental Protection Act, the Environmental Protection Act and the Illinois Administrative Code.
- (b) Within 30 days of receipt of this opinion and order, Robert Fosnock shall have properly disposed of all used tires from the Fos Auto Site property located in Gillespie, Illinois.
- (c) The respondent, shall pay the sum of one hundred and fifty-six thousand and two hundred and fifty dollars (\$156,250.00) within 30 days of the date of this Order. Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road

P.O. Box 19276
Springfield, IL 62794-9276

The certified check or money order shall clearly indicate on its face, the respondent(s) Federal Employer Identification Number or Social Security Number and that payment is directed to the Environmental Protection Trust Fund).

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

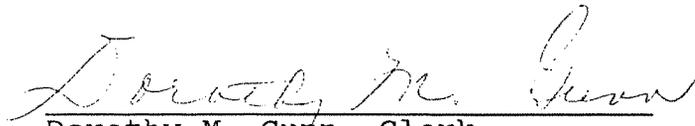
- (d) The respondent shall pay the attorneys fees and costs incurred by the Office of the Illinois Attorney General in its representation of the State of Illinois and the Illinois Environmental Protection Agency. Within 7 days from receipt of this order, the Attorney General shall file an affidavit of fees and costs. Respondent may file a response with the Clerk of the Board within 7 days thereafter. (415 ILCS 5/42(f).)

Failure to comply with this cease and desist order, including the proper disposal of all used tires on the Fos Auto site, may result in sanctions and may constitute further violation, which could subject respondent to an additional civil penalty in the amount of \$50,000, and an additional \$10,000 for each day the violation continues. (415 ILCS 5/42.)

IT IS SO ORDERED.

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 15th day of September, 1994, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board