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REQUESTBY:

[*1] Mr. William H. Young
Director
Department of Environmental Quality

OPINIONBY:

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OPINION:

[132] FIRST QUESTION PRESENTED**

Do land and facilities used for preparation for and construction **[**133]** of a livestock control fence consisting of used motor vehicle tires constitute a "disposal site" as defined by *ORS 459.005(4)*?

ANSWER GIVEN

Probably. The commission may make the determination in a contested case proceeding.

SECOND QUESTION PRESENTED

Do land and facilities used to receive and collect used tires from the public for use as raw material for the production of salable products from the used tires, constitute a "disposal site" as defined in *ORS 459.005(4)*?

ANSWER GIVEN

Yes.

THIRD QUESTION PRESENTED

Do land and facilities used to collect used cardboard, glass containers, metal cans and newspapers from the public, and to make salable products from these materials, constitute a "disposal site" as defined in *ORS 459.005(4)*?

ANSWER GIVEN

Yes.

FOURTH QUESTION PRESENTED

Do land and facilities used to receive loads of mixed used materials, such as cardboard, glass containers and metal cans, to sort the materials to extract the materials having economic value **[*2]** for sale, and to ship the residue to a permanent disposal site constitute a "disposal site" as defined by *ORS 459.005(4)*?

ANSWER GIVEN

Yes.

FIFTH QUESTION PRESENTED

Does the burden belong to the Department of Environmental Quality (department) and Environmental Quality Commission (commission) or to the operator of a site such as described in questions 1 to 4, to prove that a material received by the operator at the site is or is not solid waste?

ANSWER GIVEN

The department and commission, in order to exercise their regulatory authority over solid waste, must be prepared to prove that the material in question is solid waste and that the site in question is a disposal site. However, any person relying upon an exclusion from a definition relating to solid waste has the burden of proving qualification for the exclusion.

SIXTH QUESTION PRESENTED

Do the department and commission have authority to prohibit landfills from receiving materials which are readily recyclable or reusable, on the ground that landfilling is not the best [**134] available management practice for those materials?

ANSWER GIVEN

Yes.

DISCUSSION

We are first asked whether land and facilities used for preparation [*3] for and construction of a livestock control fence from used motor vehicle tires constitute a "disposal site" as defined by *ORS 459.005(4)*.

ORS 459.205 requires that a permit be obtained from the department before a disposal site may be established. "Disposal site" is defined by *ORS 459.005(4)*, which provides:

"Disposal site' means land and facilities used for the *disposal, handling or transfer of or resource recovery from solid wastes*, including but not limited to dumps, landfills, sludge lagoons, sludge treatment facilities, disposal sites for septic tank pumping or cesspool cleaning service, transfer stations, *resource recovery facilities*, incinerators for solid waste delivered by the public or by a solid waste collection service, and composting plants; but the term does not include a facility subject to the permit requirements of *ORS 468.740*; a landfill site which is used by the owner or person in control of the premises to dispose of soil, rock, concrete or other similar nondecomposable material, unless the site is used by the public either directly or through a solid waste collection service; or a site licensed pursuant to *ORS 481.345*." (Emphasis added.)

The definition [*4] includes land and facilities used for the disposal, handling or transfer of solid waste or for resource recovery from solid waste. Resource recovery is the process of obtaining useful material or energy from solid waste. *ORS 459.005(9)*.

The definition of the term "solid waste" is not an easy task. *ORS 459.005(11)* provides:

"Solid Waste' means all putrescible and nonputrescible wastes, *including but not limited to* garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; *discarded or abandoned vehicles or parts thereof*, discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals and other wastes; *but the term does not include:*

"(a) Hazardous wastes as defined in *ORS 459.410*.

"(b) *Materials used for fertilizer or for other productive purposes* or which are salvageable as such materials are used on land in *agricultural operations* and the growing or harvesting of crops *and the raising of fowls or animals*." (Emphasis added.)

"Solid waste" is a subcategory of "waste." "Waste," [*5] as defined at *ORS 459.005(14)*, consists of "useless or discarded material." (Emphasis added.) All materials categorized as "solid waste," as defined in *ORS 459.005(11)*, must necessarily be "useless or discarded." *39 Op Atty Gen 772 (1979)*.

Though the phrase "useless or discarded" is used to define the term "waste," it is nowhere itself defined. In *Springfield Education Assn. v. Springfield School District No. 19*, *290 Or 217, 621 P2d 547 (1980)*, the court described three classes of statutory terms and discussed the authority of agencies to interpret terms of each class. The three classes are:

"1.) Terms of precise meaning, whether of common or technical parlance, requiring only factfinding by the agency and judicial review for substantial evidence;

[**135] "2.) Inexact terms which require agency interpretation and judicial review for consistency with legislative policy; and

"3.) Terms of delegation which require legislative policy determination by the agency and judicial review of whether that policy is within the delegation." *Id. at 223.*

We believe that the term "useless" is at least of the second class, and possibly of the third. The term "discarded" is probably [*6] of the first class, but possibly of the second. In discussing the second class of terms the court said:

". . . Where the applicability of the term is not certain, its meaning is not a question of lexicography, but rather a question of the policy which is incorporated in the legislative choice of that word. The processes of administrative application of such terms and judicial review must be performed to effectuate the complete legislative policy judgment which such terms represent." *Id. at 226.*

In discussing the third class of terms the court said:

". . . The task of the agency administering such a statute is to complete the general policy decision by specifically applying it at retail to various individual fact situations. . . .

". . . .

". . . The discretionary function of the agency is to make the choice and the review function of the court is to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute. . . ." *Id. at 228-229.*

Though the breadth of permissible agency interpretation and the scope of judicial review varies from class to class, under *Springfield*, the touchstone remains the policy behind the legislation. [*7] The legislature has sought to explain the policies behind *ORS 459.005 - 459.285* in *ORS 459.015*. The commission is in a far better position to assess and apply these policies than are we. As an aid to the commission in defining the term "solid waste," however, we make the following observations.

Generally, the term "waste" includes manufactured articles which are useless for the original purpose for which they were made and are fit only for either: (1) remanufacture into something else; or (2) some other use which differs substantially from their original use for which they are no longer fit. *Studner v. United States, 300 F Supp 1394 (Cust Ct 1969)*. There is of course a third category, of articles which are useless for their original *and any other* purpose.

In *Studner*, a customs case, the defendant was involved in the importation of used print rollers. The print rollers were to be used not for their original purpose, but rather as bases for a variety of objects including lamps, trophies and smoking stands. Before being imported, one end of the rollers was straight cut. Before use as bases for these objects, another straight cut was usually required. The defendant [*8] sought to have the print rollers classified as "waste" in order that their import would be subject to a lower tariff than if they were classified as wholly or partially manufactured goods.

The Customs Court held that the blocks were "waste" and should not have been taken out of that classification merely because they could be used for another purpose without remanufacture. In coming to this conclusion, the court stated:

"In the instant case, the print blocks were incapable of use for their original purpose and were 'waste' as far as their use [**136] in printing was concerned. They would have been considered 'waste' if another use had been found for them that involved remanufacture. The use to which they are in fact put differs substantially from their original use. . . . It would be illogical to hold that 'old waste', such as this merchandise, has been taken out of the classification, waste, merely because it can be used for another purpose without remanufacture." *Id. 1398.*

We believe that it is with reference to the prior owner, not the operator of the alleged disposal site, that uselessness is probably determined. In *Kirksey v. City of Wichita, 103 Kan 761, 175 [*9] P 974 (1918)*, the court stated that:

"The words 'rejected' and 'waste,' as used in connection with garbage material, carry practically the same implication, indicating material that has *lost its value for the purposes for which it was handled by the owner* and been cast aside." (Emphasis added.)

We recommend that in order for a material item to be classified as "useless and discarded," it be established that:

1. The item has lost its value for the purposes for which it was intended by the prior owner; and
2. It is fit only (if for anything) for:
 - a. remanufacture into something else; or
 - b. some other use which differs substantially from its original use.

Thus, in order to classify material as "solid waste," it must be:

1. "Useless or discarded"; and
2. Included within the list of items set forth at the beginning of *ORS 459.005(11)*, or a like item; and
3. Not fall within the exceptions specified in *ORS 459.005(11)(a)* or (b).

Applying these tests to the tires in question, we find on the facts presented to us that the tires are "waste." They probably do not have value as recappable tires and are therefore "useless" for their originally intended purpose, that is, [*10] as vehicle tires, and in any event they have been "discarded" for that or any similar use. Use as a livestock control fence is certainly substantially different from the original use.

The second test is whether they are "solid waste" as defined in *ORS 459.005(11)*. In our opinion, a tire is a vehicle part, essential to its operation to the same extent as an engine, transmission or axle, and thus specifically within the definition when discarded or abandoned. Even if held to be not a "part" but an "accessory," if there is a difference, the statute covers items "including but not limited to" discarded vehicle parts. The word "including" in a statute is a word of enlargement, or of illustrative application, as well as of limitation. *Premier Products Co. v. Cameron*, 240 Or 123, 400 P2d 227 (1965). Thus under the rule of *ejusdem generis*, the definition extends to discarded tires which are clearly of the same type or general class as any other discarded vehicle part. See *State v. Brantley*, 201 Or 637, 271 P2d 668 (1954); *Skinner v. Keeley*, 47 Or App 751, 615 P2d 382 (1980).

The third test is applicability or nonapplicability of the exceptions set forth in *ORS 459.005(11)(a)* [*11] or (b). The only possibly applicable exception is use of the tires for "productive purposes . . . in . . . the raising of fowls or animals." *ORS 459.005(11)(b)*. An exception from a statutory definition is generally to [**137] be narrowly construed. *Jensen v. Garvison*, 241 F Supp 523 (D Or 1965); *Aaker v. Kaiser Co.*, 74 F Supp 55 (D Or 1947). It would be a very broad construction of *ORS 459.005(11)(b)* to interpret it to exclude discarded or abandoned vehicles or parts thereof (or any of the other listed wastes) if used as livestock fencing. The commission may conclude that such a use would be inconsistent with the policies behind *ORS 459.005* to *459.285*.

The term "productive purposes" in this context appears to be an inexact term, the second category in *Springfield Education Assn v. Springfield School District No. 19*, *supra*, which requires agency interpretation consistent with legislative policy. As the statute is worded, the legislative policy appears to have been to exempt waste materials which produce crops or livestock, (*i.e.*, are used as fertilizer, feed or the like) from the category of "solid wastes." Within the context of the statute, the term "productive" [*12] does not seem to include the use of tires for a fence to confine livestock. Tires therefore probably ought not to be exempt from solid waste classification when used for this purpose.

Inexact terms may be defined by the agency within the scope of a contested case proceeding. Prior rulemaking is not required. *Springfield Education Assn.*, *supra*, 290 Or at 226. It is therefore appropriate for the agency to interpret the statute in such a contested case proceeding, to determine the meaning the legislature intended for the term "productive" and to determine whether livestock fencing was intended to be included as a "productive" use.

If, however, after examining the available evidence as to legislative intent, the agency determines that the legislature may have intended or did intend to delegate to the agency authority to make its own determination as to what is a productive use, the agency may under *ORS 183.355(5)* nevertheless do so in the contested case proceeding without delay for rulemaking.

ORS 183.355(5) provides that:

". . . if an agency, in disposing of a contested case, announces in its decision the adoption of general policy applicable to such case and subsequent [*13] cases of like nature the agency may rely upon such decision in disposition of later cases."

This clearly contemplates that contested cases need not be held up because of a conclusion, in a borderline case, that the legislature has placed policy-making discretion in the agency which should be exercised by rule. A rule should always be adopted first, if it comes to the attention of the agency that such a delegation to it has been made. This is not always possible, however. It is recommended, although not statutorily required, that such a policy decision made in the course of a contested case hearing be followed up by adoption of a confirming rule.

It may not be necessary in the particular case to determine whether use as livestock fencing is or is not a "productive purpose" within the legislative intent, or whether the legislature intended to delegate responsibility to the agency to decide the question. It is represented to us that in the particular case as many as 200,000 tires, for which disposal fees have been received, are involved; and that the use as **[**138]** "livestock fencing" is merely a subterfuge. If the agency so finds on the basis of the evidence, it would be unnecessary **[*14]** for it to determine the scope of the term "productive purpose."

Should the commission conclude that the used tires are within the definition of "solid waste," it follows that the land and facilities used for their disposal, handling or transfer, or for recovery of resources from them, would be a "disposal site" unless the site falls within the exceptions listed in *ORS 459.005(4)*. The exceptions, however, are not applicable under the facts involved in this question.

The fact that tire disposal fees are sometimes collected by individuals apparently is not determinative in answering the first question. The same answer would probably be reached whether or not a fee is collected for the disposal of the used tires. A disposal charge, at most, is a further indication that the materials are useless or discarded and are solid waste.

We do not reach, in this opinion, the question of applicability of the statute to land and facilities used for disposal, handling and transfer of "trade in" tires. The former owner may or may not have received a "trade in" allowance on the price of new tires purchased. A tire may be reusable, perhaps after repair, or it may be recappable, and thus not "useless" **[*15]** because still fit for its original or a similar purpose. Other tires may be useless as tires, and therefore "useless." The status of many of the tires may not have been determined by the owner. In such a context, it seems likely that it would be held to be the agency's responsibility to adopt rules consistent with the legislative policy to determine whether or when such tires are to be deemed to be or to become useless, and thus solid waste. That is to say, the term "useless" in such a context is a term of delegation under *Springfield Education Assn v. Springfield School District No. 19, supra*. Of course, once the tires are factually determined to have been rejected for any future use as tires, they are "discarded" and outside any such delegation of discretionary rulemaking power.

The above discussion is, for the most part, applicable to the second question presented as well. It asks whether land and facilities used by a firm to receive and collect used tires for use as raw material for the production of salable products constitute a "disposal site." We conclude that they do because they are used for disposal, handling, transfer of and recovery of resources from tires no **[*16]** longer fit for vehicle use. The exceptions in *ORS 459.005(11)(a)* and (b) are clearly inapplicable.

The third and fourth questions presented can be handled similarly. The third question asks whether land and facilities used to collect used cardboard, glass containers, metal cans and newspapers from the public and to make salable products from these materials is a "disposal site." The fourth question presented asks whether land and facilities used to receive similar loads of mixed used materials, to sort the materials, extracting those of value for sale and shipping the residue to a permanent disposal site is itself a "disposal site." We believe both are disposal sites.

[139]** We note that such groups and firms sometimes pay the public for these materials, in recognition of their salvage value. This does not necessarily mean that the materials are not essentially useless to or discarded by the disposers. The materials may still be classified as solid waste.

Our answers to questions three and four are not intended to cover the case in which reusable and repairable clothes, appliances, furniture and other items are solicited and received. In such cases most of the material **[*17]** is still intended to be used for its original purposes, and much of it can again be used for its original purposes. The donor's intention may be to discard, or it may be no more to discard than in the case of a donation of money. Some and perhaps much of the material will in fact be useless. We suggest that as applied to this situation the term "discarded" would again be a term of delegation, in the third category under *Springfield Education Association*.

The answers to the first four questions are not different if the receivers of the solid waste merely accumulate it in anticipation of eventually finding a use or market for it.

Fifth, we are asked whether the department and the commission or the operator of an alleged disposal site has the burden of proving the character of alleged solid waste received by the operator at the site. The general rule is that the burden of proof rests on the party who has the affirmative of the issue. *Gibson v. Gibson*, 216 Or 622, 340 P2d 190 (1959). The burden falls on the party that would be unsuccessful if no evidence at all were presented. *Pacific Portland Cement Co. v. Food Machinery and Chemical Corp.*, 178 F2d 541 (9th Cir 1949). [*18] Generally, this is the plaintiff. *McCaffrey v. Glendale Acres, Inc.*, 250 Or 140, 440 P2d 219 (1968), held, in accordance with the general rule, that a party has the burden of proof as to those issues as to which it has the affirmative, although plaintiff has the burden of proof as to all the elements of its claim or cause of action.

The department and commission, constituting a regulatory agency of the state, can only exercise such authority as is granted to them by law. *Morse v. Oregon Division of State Lands*, 34 Or App 853, 856-857, 581 P2d 520 (1978) *aff'd* 285 Or 197, 590 P2d 709 (1979). Thus, to regulate, the agency must be prepared to demonstrate such authority, including proof that the subjects sought to be regulated come within the definitions in the laws authorizing regulation by the agency.

Persons seeking to avail themselves of exclusions from legal definitions, however, are in a better position to prove affirmatively the facts allegedly qualifying them for the exclusion than is the regulatory agency to prove the negative of such facts, especially when these facts are uniquely within the knowledge of such persons seeking to so qualify. Therefore, the law [*19] places the burden of proof on the persons seeking qualification under the exclusion from the definition.

Sixth, we are asked whether the department and commission have authority to prohibit landfills from receiving materials which are readily [**140] recyclable or reusable on the ground that landfilling is not the best available management practice for these materials. *ORS 459.015* declares as state policy the establishment of a comprehensive statewide program for solid waste management which will promote means of preventing or reducing at the source, materials which otherwise would constitute solid waste; and application of resource recovery systems which preserve and enhance the quality of air, water and land resources. *ORS 459.015(9)*, (10); *see ORS 459.057* (presenting an example of the implementation of such policies).

The commission is required to adopt reasonable and necessary solid waste management rules governing the accumulation, storage, collection, transportation and disposal of solid wastes. *ORS 459.045*. Landfills are specifically included in the statutory definition of "disposal sites" in *ORS 459.005(4)*, and disposal sites are subject to regulation by department [*20] permits. *ORS 459.205*.

We conclude that the commission, by rule consistent with legislatively declared state policy, and the department, by permit regulation pursuant to commission rules, may prohibit landfills from receiving materials that are readily recyclable or reusable on the ground that landfilling is not the best available management practice for those materials. Any such rule must contain clear standards as to what materials landfills may not receive, in order that the rule may be effectively implemented.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Solid Wastes Disposal Standards Transportation Law Carrier Duties & Liabilities Hazardous Materials Transportation Law Private Vehicles Safety Standards Tires