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FAX TRANSMITTAL FORM

DATE: December 14, 1993

TO: Janet E. Bowman

FIRM: Fla. Dept. of Environmental Protection

CITY, STATE: Tallahassee, FL.

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December 14, 1993

Mrs. Ellen Mills Gibbs
Ellen Mills Gibbs, P.A.
224 S.E. Ninth Street
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VIA FAX 305-463-0662

Re: Mediation Statement of Florida Tire Recycling, Inc.

Dear Mrs. Gibbs:

Please accept my apology for the tardiness of this Mediation Statement. Up to last Friday, in an attempt to conserve client resources, we were still concentrating 100% of our efforts upon resolution of this matter through direct negotiations. Those negotiations have not achieved success. We have, however, made some progress. The particulars concerning negotiations appear in Section II of this statement. The actual stumbling block to resolution of this matter is a conceptual problem. DEP must recognize that, because of its own past maladministration of the Waste Tire Act of 1989, it owes this permittee an equitable fresh start and certain guarantees of no future harassment. Florida Tire Recycling has been unable to find a person within DEP who has the perspective to discern the true picture revealed by the mosaic of regulatory missteps involved, do the right thing, and move away from shibboleths. This is all that inhibits amicable, proper and just resolution of this dispute. Unfortunately this obstacle looms before our client as if it now stood at the base of the Himalayas.

I. General Background:

As described by DEP, it seeks extraordinary relief against Florida Tire Recycling. It seeks the death penalty. Florida Tire Recycling agrees with the following general statements of DEP:

(1) The site is currently in excess of its authorized storage limits. However, this is only because of DEP's intentional and wrongful refusal to permit Florida Tire Recycling to amend its permit to make its storage be "authorized."

(2) Florida Tire Recycling has not complied with DEP's request for greater financial assurance. This is true. DEP's requests have been excessive, unlawful and *ultra vires*. This unlawful imposition has been a source of major disruption. It has caused an adversary relationship between DEP and this Permittee.

(2) The configuration of the tires on the site is not in compliance with DEP's current rules governing the site. However, the configuration was once in lawful status and Florida Tire Recycling has consistently been addressing and rectifying this single issue of non-compliance. DEP, however, has interfered with, blocked, and hindered Florida Tire Recycling at every turn in its attempts to do so. This single issue is not sufficient for DEP to obtain the relief it seeks in Court.

Had DEP exhibited good faith and prudence in the administration of the regulatory statute involved, Florida Tire Recycling believes that it would today be in full compliance. DEP, after maladministering the original Waste Tire Act of 1988, has corporately determined that Florida Tire Recycling should taste its "cold steel", at the taxpayer's expense, and without due regard to other legislative policy considerations.

The genesis of the current dispute lies in the old statutory definition of Waste Tire.

When Florida Tire Recycling first obtained its permit in August of 1989 it was doing so under a new act and new DEP regulations. Much of the dispute between Florida Tire Recycling and DEP arises out of the language of the original Waste Tire Act and the Regulations which were originally adopted to implement it. Until May of 1993, the Waste Tire Act did not fully regulate processed tires. A waste tire was defined as a <u>whole tire</u>. In this anomaly resides the origins of the DEP/Fla Tire dispute. Because DEP insisted, <u>before it was the law</u>, that it would regulate whole tires on Florida Tire Recycling's site it has continuously and erroneously characterized Florida Tire Recycling as being in noncompliance with the act. As a consequence, it has brutally applied its permitting regulations to refuse to allow Florida Tire Recycling to be in compliance. It is veritably a *Catch-22* situation in which the agency has from the outset refused to remove its jackboot from Florida Tire's supine neck. Florida Tire Recycling believes that it is, on account of the State's misbehavior in this matter, entitled to an equitable grace period in which to restore its operations and come into compliance.

The statutory / regulatory background.

After July 1, 1989, the maintenance of a waste tire site was prohibited, unless such site was an integral part of a permitted waste tire processing facility. The foregoing prohibition was contained in Florida's Waste Management Act, Ch. 88-130, §41(3)(a), Laws of Florida, effective October 1, 1988. Florida Tire was in the business of tire processing, recycling and storage prior to the effective date of the Waste Management Act of 1988. Florida Tire timely sought and was granted a waste tire processing facility permit. Florida Tire additionally maintained a waste tire site which was an integral part of said processing facility. The waste tire site and permitted processing facility are located in St. Lucie County, Florida.

Pursuant to Florida's Waste Management Act, Ch. 88-130, Laws of Florida, the legislature mandated that DEP adopt rules to carry out the provisions of §§41-43 of said Act. The rules were to provide for: "(a) ... the administration of a waste tire processing facility permit, which [was not] to exceed $250, annually; and (c) [the setting of] standards for waste tire processing facilities and associated waste tire sites ... .", *inter alia*. See, Ch. 88-130, §41(4)(a) and (c), Laws of Florida, codified as §403.717(4)(a) and (c), Fla. Stat. (1988).

Waste Tires defined.

Pursuant to §41(1)(d) of the same Waste Management Act, a waste tire was defined as "a whole tire that is no longer suitable for its original intended purpose because of wear, damage, or defect." Section 41(1)(c) defined a "tire" to be "a continuous solid or pneumatic rubber covering encircling the wheel of a motor vehicle." The term motor vehicle was defined in §41(1)(b) not to include farm tractors and trailers. Processed tires were not encompassed within the definition of waste tire site, as defined in §403.717(1)(e), Fla. Stat. (1989), because processed tires were waste tires which had been cut or shredded ... or otherwise altered so that they were no longer whole tires." See, definition at Rule 17-711.200(5), F.A.C.(1989).

No statutory provision for requiring a bond or letter of credit.

The Waste Management Act (Ch. 88-130, Laws of Florida) made no provision for and delegated no authority to DEP to set standards for financial assurance or proof of financial responsibility for waste tire sites. Nevertheless, DEP illegally and in an *ultra vires* fashion took upon itself to attempt to establish such standards by the provisions of Rule 17-711.510(2), F.A.C. (1989), *inter alia*.

DEP knew it was acting illegally and subsequently sought amendment to the Waste Tire Act to correct these errors.

Recognizing the illegality of its past rules and/or the unlawful delegation of legislative authority to the agency, DEP sponsored curative amendments to the Waste Management Act, effective in May 1993. DEP waited for the passage of this legislation before it mounted its assault against Florida Tire Recycling in the Courts. Now, and for the first time, DEP has the lawful authority to pass reasonable regulations relating to financial assurance standards for waste tire processing facilities and their associated waste tire sites. See, Ch. 93-207, §26, Laws of Florida, amending §403.717(4)(d), Fla. Stat. (1993).

No new rules yet enacted under the 1993 amendments.

However, DEP has not yet implemented such revised legislation by legal and appropriate rule making and, at present it has no lawful authority to administer and require financial assurances from a permittee for a waste tire processing facility and associated waste tire site.

In addition to being illegal, as outside the scope of the enabling legislation or an unlawful delegation of excessive authority to the agency, the financial responsibility rule at issue [17-711.510(2), F.A.C. (1989)] is vague and ambiguous and impossible of being complied with in theory, in fact and in the reality of DEP's maladministration of the same. As a result, DEP is currently proposing an amendment to its original renegade rule. This is as it should be, since the 1993 Act now provides DEP with the authority and duty to enact such a rule. The illegal original rule (as compared to the legal proposed rule) is a material element of DEP's complaint against Florida Tire in this proceeding.

DEP's has actively pursued its wrongdoing as to Florida Tire Recycling.

In addition to enacting rules which were beyond its legal authority and which were impossible of performance by a permittee such as Florida Tire, DEP has engaged in other specific and unlawful activities directed at Florida Tire and other entities with which Florida Tire has or had advantageous contractual or business relations.

On February 9, 1990 DEP erroneously advised Florida Tire that it was in non-compliance with its permit, because it had not made an annual cost estimate of "closure costs" in accordance with DEP's illegal

Rule 17-711.510(2), F.A.C. (1989). Further, DEP alleged that Florida Tire had exceeded its storage limit for waste tires by 500%. DEP also alleged that Florida Tire was not in compliance with Rule 17-711-540(2)(b), F.A.C. (1989), which set maximum dimensions for outdoor waste or processed tire piles. Only the last allegation was legally correct. Florida Tire immediately set about correcting DEP's only legitimate complaint and was certified as having corrected the same at least by April 5, 1991.

DEP refused to let Florida Tire Recycling comply with the Act.

Upon achieving actual compliance, in April of 1991, with all of DEP's legal rules, Florida Tire attempted to address DEP's allegation that Florida Tire was exceeding its storage limit on two separate bases: (1) Florida Tire suggested to DEP that the proper interpretation of the applicable rule [17-711.530(2), F.A.C. (1989)] was that Florida Tire was entitled to store up to 30 times the daily processing through-put of the processing equipment that Florida Tire was actually using from time to time; (2) Florida Tire additionally requested that it be allowed to amend its permit to have the stated storage limit (which was inaccurate, even in accordance with DEP's interpretation of its rule) increased to the proper amount.

DEP notified Florida Tire that it would never get a permit.

On March 16, 1990 DEP advised Florida Tire that DEP would not ever grant Florida Tire an amendment of its permit to increase the storage limit unless Florida Tire first stopped accepting new tires and/or reduced its storage of all tires on its site to those amounts which DEP considered to be within DEP's erroneous interpretation of the permitted storage limits both as to quantity and types of tires included. Consistently, since this time and to the present, Florida Tire has been advised and assured by DEP that any application for a permit modification or to cause DEP to correct its error would be a futile act.

More Storage Limit disputes.

DEP's interpretation of Florida Tire's storage limit was and is erroneous. DEP made a mistake in its original calculation of the stated number in the permit issued to Florida Tire. **Exhibit F to Florida Tire's application of May 24, 1989 accurately advised DEP that the maximum daily through-put of Florida Tire's then existing equipment was 150 tons/day.** Under DEP's own erroneous interpretation of its rule, the formula of "30 times daily through-put of the equipment used" should have caused Florida Tire's storage limit to be then stated as 4,500 tons of whole tires (i.e. waste

tires) and not the 1,500 ton/day figure which DEP had erroneously calculated and recorded in the permit. It is inappropriate, under the circumstances, for DEP to use this dispute against Florida Tire.

DEP's interpretation of Florida Tire's lawful storage limit was and is legally erroneous, because the storage limit was not legislatively intended to be, nor is it practical that it be, a fixed limit pegged or tied only to actual processing amounts at the time of permit application, as opposed to either actual processing capacity at the time of application or as that capacity may change from time to time, subject to limitations already provided by other standards enacted by DEP.

DEP's current interpretation of a fixed storage limit, when processing capacity and other factors are variables, is irrational. DEP's own regulations, in part, and the Waste Management Act, *in toto*, confirm that the actual goal of the Waste Tire legislation was to direct the stream of waste tires to processing facilities where those tires would then be stored, processed and preferably recycled thereafter. But if not, the Act provided that such processed tires should be properly disposed of in a landfill or solid waste disposal facility. Each of the factors noted (i.e., storage, processing, recycling, or proper disposal) was and is a variable in the legislative formula and objectives for managing Florida's solid waste stream (of which waste tires are a part) and attempting to achieve the ultimate goal of recycling. The tying of processing equipment through-put capacity to the storage limit was to insure that there would never be more than a thirty day supply of unprocessed waste tires (i.e., not ready for either recycling or disposal) stored at a waste tire site, as that supply related to the dynamic factor of the processing facility's processing equipment then in use. When read *in pari materia* with the remaining DEP Waste Tire Rules, this was the correct interpretation of Rule 17-711.530(2), F.A.C. (1989) and in practical application it would have worked in the real waste stream world.

Under DEP's erroneous interpretation of its rule and its original calculation of storage limits, Florida Tire's storage limits were locked in place and pegged to a processing number which Florida Tire was clearly capable of lawfully surpassing, based upon the processing capacity of its then extant equipment. Such an interpretation was not consistent with commercial reality nor was it consistent with the overall theme of DEP's own regulations which required annual reporting with respect to the fluctuations of processing, storage and disposal.

DEP acted in bad faith in refusing to correct Florida Tire's permit

Even if DEP's interpretation of Rule 17-711.530(2), F.A.C. (1989) was correct, DEP nevertheless acted in bad faith in not allowing Florida Tire to eliminate any mathematical or numerical error or deficiency in its permit with respect to this subject. DEP's stated policy of refusing to modify or amend a permit, until the applicant surrenders on all points of controversy between the agency and the permittee is not warranted nor justifiable in the law. It is a despicable and arrogant practice which the law should punish. DEP can, literally, by the stroke of a pen cure what is its major complaint in this action. Such an action on DEP's part would not cause any harm to the environment or health, safety and welfare of the public. To the contrary, it would enable Florida Tire to process, recycle and lawfully dispose of its stored waste tires.

DEP sought Closure Estimate/Financial Assurance illegally.

By its demands of February 9, 1990 DEP additionally accused Florida Tire of being delinquent with respect to its closure estimate (originally provided with its application in May of 1989). Florida Tire was not delinquent. DEP further advised Florida Tire that it was required to increase its previously accepted proof of financial responsibility to the State. This demand upon Florida Tire was legally inaccurate and the rule invoked was void.

The State had accepted Florida Tire's estimated closure costs and that estimate was not yet required to be updated. An annual update on closure costs was not due to be performed until May 1990 (a period of one year from the accepted estimate, provided with Florida Tire's application). Similarly, Florida Tire's annual report was not due at the time of DEP's demand. Florida Tire's annual report was not due until March 1, 1990. In March of 1990 the annual report only required Florida Tire's most recent (and still valid) closure estimate of May 1989. See, Rule 17-711.530(4)(g), F.A.C. (1989). Nevertheless, DEP unlawfully demanded that Florida Tire change its financial arrangements with the State. Florida Tire Recycling was punished and sanctioned illegally by DEP on account of its failure to "submit."

DEP unlawfully demands Processed Tires be included in Closure Cost Estimate.

By its unlawful written demands of February 9, 1990, and subsequently, DEP further advised Florida Tire that it was required, in connection with its annual closure estimate update, to include therein the cost of processing, removing or disposing of processed

tires. Rule 17-711.510(2), F.A.C. (1989) was precisely to the contrary. It specifically stated that the estimate

> "shall estimate the costs of disposing of and removing or disposing of all waste tires on site before closure of the facility, and must update such estimates annually."

The operative term "waste tires" did not include "processed tires." The Waste Management Act of 1988 and the Rules were absolutely clear and unambiguous on this issue. DEP refused to acknowledge this fact and wrongfully insisted that Florida Tire base its closure cost and proof of financial responsibility on a calculation that was clearly erroneous under the statute and the Rules. The vast majority of the tire products stored on the Florida Tire site at this time were processed tires and agricultural tires (the latter were not encompassed within the Waste Management Act). DEP has refused to accept Florida Tire Recycling's estimates on account of this conceptual disagreement. As a result, it has had no "estimate."

DEP retaliates and embarks upon long term harassment of Florida Tire Recycling.

As retaliation for Florida Tires' correct interpretation of the Act and the Rules, DEP refused to grant Florida Tire a modified permit with proper storage limits. Further, DEP ultimately embarked upon a long term course of sanctions and economic coercion against Florida Tire including proposed penalty assessments for alleged violations of §403.717, Fla. Stat. (1991).

DEP deviates from Rules for Determining Quantities.

To further confuse matters, DEP advised Florida Tire, in February and March 1990, that Florida Tire should or DEP might use different methods of measuring the quantities of tires on the Florida Tire site than those specified in Rule 17-711.200(6), F.A.C. (1989). This Rule provided that the permittee should "assume that there are 100 tires per ton and 10 tires per cubic yard." The statements in DEP's mediation statement are not calculated in accordance with this formula.

Florida Tire Recycling files annual report late and offers to pay fine, but DEP refuses to accept Florida Tire's offer to be in compliance.

As a result of all of the confusion, thus created, and on account of its own inexperience in being regulated, Florida Tire did not

timely file its annual reports for the partial year 1989, and the full years 1990, and 1991. These reports were filed in June of 1992 and Florida Tire immediately offered to pay the required penalty of approximately $300.00. However, DEP has refused to accept Florida Tire's acknowledgement of Florida Tire's own errors, which pale by comparison to DEP's errors in this matter. DEP made such refusal with the specific intent of being able, at a later time, to overcharge or throw-the-book-at Florida Tire in this action. However, in order to do so DEP had to first seek legislative changes to cure the errors in the Waste Management Act of 1988. These changes related directly to DEP's past erroneous positions as against Florida Tire. These changes are discussed more fully below.

DEP arbitrarily decides it wants a new letter of credit.

On December 13, 1990 DEP told Florida Tire in writing that the letter of credit which DEP had previously accepted as proof of financial responsibility, under DEP's illegal rule, was now deemed unacceptable as to form. This letter also told Florida Tire that it had failed to submit to timely submit to DEP an annual update of its closure estimate. Both of these statements were legally inaccurate under the Rules and the Waste Management Act. DEP's own misinterpretations of the Act and its Rules played a part in misleading Florida Tire and created an adversary atmosphere, for which DEP is primarily culpable.

Florida Tire receives Official Warning and seeks counsel.

Ultimately, on April 21, 1992, DEP sent to Florida Tire a warning letter advising that Florida Tire faced civil fines and penalties based upon: (1) failure to file its annual reports; (2) failure to update its cost of closure estimate; (3) failure to increase its "proof of financial responsibility", and (4) exceeding its storage limits. At this point, Florida Tire sought legal counsel to attempt to get matters straightened out.

Counsel attempts to work cooperatively with DEP

Florida Tire's legal counsel immediately sought to bring Florida Tire into compliance with those matters which could be immediately addressed. Florida tire provided its annual reports and offered to pay fines with respect thereto. DEP refused to accept these fines. Additionally, Florida Tire hired surveyors to determine the quantity of waste tires stored on the site and otherwise, Florida Tire undertook exhaustive attempts to find a mechanism to comply with DEP's illegal rule on proof of financial responsibility.

DEP responds with a campaign of bureaucratic slander and oppression

In the meantime, DEP proceeded to slander and injure Florida Tire and interfere with its advantageous contractual and business relations by denying the permit application of a tire collector which listed Florida Tire as a waste processing facility to which that collector was sending its tires. Additionally, upon information and belief, DEP staff and other state employees advised persons connected with the solid waste stream for waste tires that they should not deal with Florida Tire because DEP was considering enforcement action against it. Subsequently, DEP staff advised the press that it was going to bring an enforcement action against Florida Tire. Consequently, Florida Tire was unable to secure capital and financing which were necessary to comply with DEP's regulations, the most material of which were still at the time illegal.

DEP policy indecision adversely impacts Florida Tire.

In addition to the above listed interferences and what would constitute torts, were one not the king, DEP injured Florida Tire by ill-advised regulatory policy relating to recycling credits and landfills. DEP, by administrative policy, first encouraged Florida Tire to establish disposal arrangements with landfills. Thereafter, DEP and other regulators swiftly changed the regulatory incentives to discourage the disposal arrangements which Florida Tire had made in reliance upon DEP's previously established policy. At that point, Florida Tire had to find new sources of disposal. While Florida Tire was attempting to re-adjust to this sudden regulatory induced market change, and bear the financial dislocation caused thereby, DEP began its strongest, tortious, and most vindictive push against Florida Tire, making it virtually impossible for Florida Tire to have the required stability to raise capital or borrow money in order to do that which was necessary to conduct its business in an orderly and lawful manner. Currently, DEP continues to undermine Florida Tire and other waste processing facilities by unfairly subsidizing solid waste disposal facilities for their processing of waste tires, even though this defeats the stated legislative goal of encouraging recycling by first directing the waste stream through an intermediate processing facility. These policies and interferences are proportionally related to the increase in waste tire and processed tire volumes now stored at the Florida Tire site.

In spite of these burdens imposed upon Florida Tire by DEP, as it has experimented its way through the Waste Management Act of 1988, Florida Tire continued to attempt to meet DEP's ever-changing demands and policies. DEP, however, has intentionally or foolishly

made it impossible for Florida Tire to comply and seeks to put it out of business. Concurrently, DEP seeks in this action to waste the tax dollars of the people of Florida saying all the while, "Florida Tire was unable or unwilling to meet the requirements of the Act." In fact, the opposite and the converse is true.

Specific wrongdoing of DEP since May of 1992 .

DEP made it impossible for Florida Tire to comply, even after Florida Tire sought to do everything commercially feasible and within its power to do so. Since May of 1992, DEP has made it impossible for Florida Tire to comply by:

A. libeling and slandering Florida Tire, as described above;

B. continuing to deny Florida Tire the amendment of its permit to correct the errors in the stated storage limits and by continuing to insist on its own misinterpretation of its rule relating thereto;

C. failing to approve Florida Tire's updated estimate of the costs of closure, submitted to DEP in July 1990;

D. insisting that it (DEP) be allowed to calculate the quantity of tires on the site, in a manner different than the basis for computation established by its own rule;

E. refusing to approve the forms of financial instruments tendered for approval by Florida Tire, when DEP's illegal rule did not provide sufficient guidance to any person attempting to comply;

F. refusing to accept reasonable proposals of Florida Tire for establishing proof of financial responsibility under DEP's illegal rule, in spite of the fact that the rule as written was vague and ambiguous enough to have allowed DEP to accept any reasonable proposal;

G. insisting that Florida Tire was bound by DEP rules relating to proof of financial responsibility specifically applicable to other portions of the Waste Management Act, i.e., landfills. DEP knew or should have known that these rules were not applicable to Florida Tire, as a waste tire processing facility, and it knew that there was no enabling legislation delegating to DEP the authority to make such rules;

H. refusing to recognize that processed and agricultural tires on Florida Tire's site were not within the purview of DEP's illegal financial responsibility rule, even if the rule, as written, were legal;

I. refusing to recognize that it was commercially impractical for Florida Tire to prove financial responsibility by the methods upon which DEP stubbornly insisted even though there were other reasonable alternatives;

J. attempting to assess fines against Florida Tire for violations of illegal rules or for matters, such as storage limits, which were correctable but which DEP would not allow Florida Tire to correct;

K. allowing itself to be lobbied by industry competitors of Florida Tire to take destructive actions against it so that those competitors can take Florida Tires collection contracts when it is put out of business by DEP for their benefit;

L. misleading Florida Tire and its counsel to believe that there was a method by which DEP would make reasonable accommodations with Florida Tire to finally put to rest the controversies which had built up and as are described;

M. refusing to grant Florida Tire other permits which would have alleviated the circumstances concerning which DEP now makes complaint;

N. making pretextual and bad faith allegations concerning mosquitos and any alleged increased danger on account thereof, all in an attempt to horrify this Court and prejudice it against Florida Tire;

O. making pretextual allegations against Florida Tire concerning the configuration of its property when the same has been well known to DEP from the beginning;

P. continuing to insist that Florida Tire first come into compliance with each and every demand of DEP, no matter how outrageous or illegal, before DEP will allow Florida Tire the latitude to cure any legitimate complaint of DEP, without continued regulatory harassment;

Q. failing to give Florida Tire a reasonable opportunity (the reasonableness of which must be judged in light of all of the past damage inflicted upon Florida Tire by DEP itself) to

comply with the new and corrective legislation which DEP sponsored in order to "prove that it was right."

The new legislation addresses almost every point of contention between Florida Tire Recycling and DEP.

In the 1993 legislative session, DEP sponsored legislation, intended to correct (from DEP's perspective) most of the problems which Florida Tire has raised with DEP over the past four years. The legislation, contained in Ch.93-207, Laws of Florida, corrected the following points of dispute:

A. The issue of whether or not a processed tire should be included within the estimate for closure costs. This dispute was resolved by changing the definition of "waste tire", to wit.,

Section 26. Section 403.717, Florida Statutes, 1992 Supplement, is amended to read:

403.717. Waste tire and lead-acid battery requirements.

(1). For purposes of this section and ss. 403.718, 403.7185, and 403.719: ...

(d) "Waste tire" means a ~~whole~~ tire that has been removed from a motor vehicle and has not been retreaded or regrooved. "Waste tire" includes, but is not limited to, used tires, and processed tires ~~is no longer suitable for its original intended purpose because of wear, damage, or defect~~.

B. The issue of whether or not DEP had sufficient legal authority to require proof of financial responsibility. This dispute was resolved by enlarging the DEP's enumerated powers for rule making in §403.717(4), Fla. Stat. (1992), to wit,

(d) ~~(c)~~ Set standards, including financial assurance standards, for waste tire processing facilities, and associated waste tire sites, waste tire collection centers, waste tire collectors, and ~~set standards~~ for the storage of waste tires and processed tires, including storage indoors;

Immediately, and without warning or reasonable opportunity to adjust or adapt, DEP has now launched its final assault against Florida Tire. DEP has not yet adopted new and legal rules to enforce these provisions. It has purported, in this litigation, that its former and renegade rules now apply. However, Florida Tire respectfully suggests that the law and equity do not permit the same.

Florida Tire is a legitimate business into which the stockholders and others have invested substantial assets. The actions and misadministration of DEP has severely and adversely impacted this business. At all times Florida Tire has been willing and able to comply with the lawful requirements of Ch. 403.417 and 403.418, Florida Statues and other applicable regulations. However, the actions of DEP have caused that to be difficult and in some instances impossible.

Section II - Status of Negotiations

As discussed above, Florida Tire Recycling, from the beginning of its dealings with DEP with respect to alleged violations at its facility, has acknowledged those shortcomings where it believed there was merit to the allegations. It has always been and continues to be the objective of Florida Tire to develop a plan and schedule with the department whereby its operations could be rendered satisfactory to the department while retaining the economic viability of the company.

Recycling is one of the objectives of the Waste Management Act

The tire recycling business is in its infancy and is the result of a legislatively-declared objective to achieve the recycling and reuse of tires in the marketplace rather than the abandonment of tires in the environment. Florida Tire responded to that legislative objective by establishing a business to recycle tires. That required Florida Tire to establish a collection network, obtain contracts with business operations generating waste tires, establish collection centers and processing facilities to shred tires into a size which will be marketable, maintain a sufficient inventory of shredded tire material, and develop markets for the purchase of the shredded tire material. All of this has occurred without assistance from the state in any regard. In fact, the state has taken certain actions which inhibit the private sector in this field. Neither the private sector nor the state had any practical experience in this business. Consequently, Florida Tire has been an experiment and a test case. It is clear from that experience that the state's regulations have not adequately reflected the realities of the

emerging tire recycling business. At the same time, it was not possible for Florida Tire to anticipate some of things it needed to do in order to be in a position to develop markets for the sale of shredded material; i.e., the amount of material needed to be stored as product inventory.

Florida Tire Recycling's efforts to settle

With regard to more recent efforts to settle, we had to take the matter to the secretary of the agency in order to get the staff to attempt a settlement, short of closing down Florida Tire's facility.

At the time DEP filed its lawsuit Florida Tire was engaged in good faith negotiations with DEP. The lawsuit was filed without warning. Nevertheless, during the settlement negotiations which have occurred since the Department filed its lawsuit in August, Florida Tire has continued to demonstrate its good faith by proceeding with: (a) continued tire material reduction; (b) working with the Department to calculate in a manner acceptable to Florida Tire and the Department the amount of tire material on the site; (c) undertaking the design of the surface water management system; (d) undertaking the evaluation of possible wetlands on the site; (e) acquiring advice and cost estimates of the firefighting and water supply system proposed by the Department; (f) acquiring information about Class D security personnel required by the Department; (g) acquiring information of the cost of fencing and lighting which will be required by the Department; (h) purchasing two trucks for firefighting purposes; (i) providing the Department with its proprietary financial information so that the Department can understand the financial limits within which Florida Tire must operate in response to the Department's demands; and (ii) commencing construction of the access road system required by the Department.

With regard to settlement, Florida Tire has proposed to agree to the following terms, many of which are in excess of any provisions authorized by the Waste Management Act and applicable Rules:

(a) to the entry of a temporary injunction;

(b) to apply to DEP for a management and storage of surface water permit and for a water resource permit;

(c) to the construction of a perimeter roadway and central access roadway with a lime rock bearing ratio of at least 40, and which will support the firefighting vehicles used by the St. Lucie County/Fort Pierce fire district.

(d) to minimize the probability of ignition of tire material by making the tire storage area a no-smoking area, segregating and storing all flammable and combustible liquids in appropriate containers and configurations, providing spark arresters on all internal combustion equipment, and prohibiting the cutting (other than shredding or chopping of tires), welding, heating devices and open fires in the waste tire storage area;

(e) to provide security personnel during nonbusiness hours holding a Class D security license;

(f) to install lighting along the range line road boundary of the site;

(g) to provide an enclosed operations area for security personnel with fixed and portable telephones.

(h) to provide a water supply and delivery system which would provide 1,000 gpm after the first 30 minutes and 2,000 gpm capability for the next 3 hours after the first 60 minutes.

(i) to provide a method to integrate the fire department motorized fire pumps into the water delivery system at the site;

(j) to provide a motor vehicle for a first attack in case of a fire; such vehicle would at least carry 700 gallons of water and deliver extinguishing agent at the rate of 300 gpm;

(k) to establish a training program for company personnel to make a first response effort in the event of a fire;

(l) to compile a resource list of at least five front-end loaders, five ten-wheel dump trucks and five bulldozers which might be deployed to the site within four hours of notification of the supplier;

(m) to prepare a fire plan acceptable to the St. Lucie County-Fort Pierce fire district that describes in detail the firefighting resources available to fight a fire at the site;

(n) to reconfigure within six months the whole and shredded tires on the site in configurations which conform to the

Department's rules with regard to width, length and height of piles, separation of piles and fire lanes. This would be done in the sequence required by DEP;

(o) to remove an average of at least 25 tons of shredded tire material for each day that tires are received at the site plus an amount equal to the tire material tonnage brought on to the site each of those days;

(p) to establish a financial responsibility trust fund with the Department as the sole beneficiary. The existing $18,000 Letter of Credit plus an additional $50,000 would be initially put into the trust fund. Five percent of the monthly tipping revenues generated at the Port St. Lucie site would be put into the trust fund each month, provided, however, that no less than $4,000 a month would be deposited into the trust fund.

(q) to record the weight of each truckload of waste tires brought onto the site and record the name and waste tire collector registration number of the collector who delivered the waste tires to the site. The Department would essentially do the same thing with regard to waste tires shipped from the site.

(r) to provide the Department each month with a report detailing the progress of Florida Tire in complying with the terms of the stipulation;

(s) to submit to the Department an application to modify its current waste-processing permit to bring the permit into conformance with the ultimate facility operation which will result from the reconfiguration efforts under the stipulation.

There are several key issues on which agreement has not been reached:

1. <u>The amount of tire material to be removed from the site on an average daily basis</u>. The Department is demanding that 100 tons more than is received each day be removed on average. Florida Tire believes that it can only afford to do 25 tons more than it receives each day since their ability to remove tire material and dispose of it is a function of the costs of removal and Florida Tire's revenue stream which comes from the fees collected from persons who bring them tires for shredding.

2. Permit renewal/modification. Before Florida Tire can make the substantial financial commitments (and take on the added debt associated with those added costs, which are required to do the things which DEP is demanding of it, Florida Tire must have a firm belief that the Department will treat its permit renewal or modification application fairly if that application meets DEP's site configuration and operation requirements and if Florida Tire is in compliance with the stipulation. Based upon its past experience with the Department, Florida Tire is concerned that it will spend very large sums of money resulting from DEP's requirements under the stipulation only to find the Department poised to deny its renewal or modification application in 1994, thereby putting it out of business.

3. Lakeland facility permit. Florida Tire has stated from the outset of settlement discussions that the processing facility license for its Lakeland facility is an essential part of the tire removal plan which it has proposed. The plan assumes that tires currently being brought from the Lakeland area to Port St. Lucie for shredding and then shipped back to Lakeland for disposal will be shred... in Lakeland, thereby reducing the amount of material brought to Port St. Lucie, reducing transportation costs, and expediting the shredding and disposal of tire material.

4. Civil Penalties and Costs. Florida Tire cannot afford to make the financial commitments necessary to meet DEP's demands and then have DEP obtain a judgment for civil penalties and costs of a magnitude which would put Florida Tire out of business. A number of the requirements which the Department is demanding of Florida Tire with regard to modifications of its physical facility or operational procedures are not required of others who receive facility processing permits from DEP. Rather, they relate to closed facilities with abandoned tires. Consequently, the costs associated with such extraordinary requirements are viewed by Florida Tire as penalties.

Attached is a summary of the costs of various key demands by DEP. During the first 12 months, these add up to additional costs of $690,800 over the costs which Florida Tire proposed to incur in its November 4, 1993 Proposal for Compliance. It is not possible for Florida Tire to incur all of these additional costs and remain in

business. For example, lighting the entire site and fencing three sides of it would cost approximately $276,500. Meanwhile, the surface water management system, which will include a retention pond for drainage as well as firefighting purposes is estimated to cost $142,800. Florida Tire has agreed to construct that system. The Class D security personnel which Florida Tire has agreed to provide will cost approximately $17,500 annually.

The Department has stated on several occasions that it is not its intent to put Florida Tire out of business. However, unless the Department is willing to compromise on some of the issues described above, it will not be possible for Florida Tire to remain in business given the magnitude of those costs and the revenue sources available to Florida Tire.

Sincerely,

David J. Beuttenmuller

/djb
Enclosure
#42720

IMPACT OF ADDITIONAL COSTS
REQUIRED BY THE FDEP PROPOSED STIPULATION
(11-6-93)

Some of the additional requirements developed by the DEPARTMENT in the proposed stipulation will create new and substantial financial demands on the Company beyond those contemplated in FTR's Proposal for Compliance, dated November 4, 1993.

These new cost are: (1) one time initial capital costs; (2) ongoing operational costs. Some of the Department's new requirements are so expensive as to be neither cost effective nor within the ability of FTR to accomplish and remain viable. For these and where possible the Company has presented alternatives as shown below.

The exhibit below demonstrates: (1) the financial impact of the Department's Stipulation requirements; (2) the costs of FTR's alternative; (3) the effect of these additional costs on FTR's ability to continue operating in the tire recycling industry.

I. INITIAL CAPITAL COSTS

	FDEP	FTR
DRAINAGE:		
Engineering for site drainage, SFWMD and DEP permit process and fees.	$17,300	$17,300
Construct access roads around the perimeter and through the site. Develop a site drainage system. Excavate a retention lake as part of a drainage system and for use as an on site water source for fire protection.	$125,500	$125,500
LIGHTING:		
1. Total perimeter lighting.	$270,000	$ N/A
2. Light only the Range Line Road perimeter.	$ N/A	$ 5,000
FIRE RESPONSE:		
A second fire truck equipped for initial response but without foam equipment.	$ 20,000	$ 20,000

	FDEP	FTR
FENCING		
Perimeter fencing at Range Line Road with 100' returns along both the north and south boundaries.	$ 6,500	$ N/A
Subtotal:	$439,300	$167,800
II. ONGOING OPERATIONAL COSTS		
SECURITY		
Class D guard-service 7 days per week during non business hours.	$ 17,500	$ 17,500
REMOVAL OF STORED SHRED MATERIAL		
1. 100 tons per day at $12.00 per ton X 5 days per week X 52 weeks.	$312,000	$ N/A
2. 25 tons per day at $12.00 per ton X 5 days per week x 52 weeks.	$ N/A	$ 78,000
Subtotal:	$329,500	$ 95,500
Total for the first 12 months:	$768,800	$262,300

According to FTR's response to the new costs for the proposed DEP stipulation, the Company will commit to raise, perhaps through borrowings, an additional $167,800 dollars beyond the + $150,000 contemplated in FTR's original proposal in order to accomplish the capital improvements. Similarly, FTR will dedicate an additional $17,500 of annual revenue toward additional operational costs.

However, it is clear from this presentation that if FTR were to follow precisely the additional cost events presented by the Department in the Stipulation, it would be necessary for the Company to raise not an additional $167,800 but $439,300. Moreover, due to the large amount of material which the Department requires to be removed (100 tons per day beyond the daily collection and disposal amount), it would be necessary for the Company to underwrite an additional $251,500 of annual operational costs. Clearly an examination of the "Additional Costs Resulting From Stabilization and Compliance" table presented in FTR's November 4, 1993 Proposal reveals the Department's requirements are dramatically beyond the Company's ability to accomplish. These requirement would in effect cause the Company to "go out of business".