

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter of
the Alleged Violations of Article 27
of the Environmental Conservation Law
of the State of New York

- by -

HELEN AGRAMONTE and PENELOPE AGRAMONTE,

Respondents.

DEC File No. R4-2001-0130-25

DECISION AND ORDER OF THE ACTING COMMISSIONER

JULY 19, 2005

DECISION AND ORDER OF THE ACTING COMMISSIONER

Pursuant to a notice of motion dated June 25, 2002, staff of the New York State Department of Environmental Conservation ("DEC" or "Department") moved for an order without hearing in lieu of complaint as against respondents Helen and Penelope Agramonte. Department staff alleged that respondents violated article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste) of the Environmental Conservation Law ("ECL") and section 360-13.1(b) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by storing without a permit approximately 90,000 waste tires at a site they own in the Town of Wright, Schoharie County ("site"), and that such violation continued from March 1, 2001 to the date of the motion. Department staff sought a Commissioner's order imposing a civil penalty of \$8,000 and directing removal of all solid waste from the site and its proper disposal at a permitted facility.

Department staff's motion was filed with the Office of Hearings and Mediation Services on September 24, 2002, and the matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa. Following the filing of the motion, Department staff continued in its efforts to resolve the matter with respondents but were unsuccessful. By ruling dated October 16, 2003, a copy of which is attached, the ALJ granted the motion on the issue of liability, holding that respondents had violated article 27 of the ECL and 6 NYCRR 360-13.1(b). However, the ALJ determined that a hearing should be convened pursuant to 6 NYCRR 622.12(f) to assess the amount of penalties to be recommended to the Commissioner.

Section 622.12(d) of 6 NYCRR provides that "[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR [Civil Practice Law and Rules] in favor of any party." Upon review of the submissions on the motion, I concur with the ALJ that Department staff established as a matter of law respondents' liability for the violations alleged. Accordingly, I adopt the ALJ's October 16, 2003 ruling as my decision on the issue of respondents' liability.

Penalty Hearing

On December 16, 2003, a hearing was held before ALJ Villa at the Department's Region 4 offices in Schenectady, New York on the issue of penalty. The Department was represented by

Ann Lapinski, Esq., Assistant Regional Attorney. Respondents were represented by Charles Sarris, Esq., of the law firm of Kouray & Kouray, Schenectady, New York. Attached to this order is the hearing report of ALJ Villa on the issue of penalty ("Penalty Hearing Report") which I adopt subject to my comments herein.

Prior to the hearing on penalty, ALJ Villa reminded respondents by letter dated December 2, 2003 to submit any documentation with respect to their financial status to Department staff in preparation for the December 16, 2003 penalty hearing. At the hearing, respondents, although arguing that they lacked the financial resources to pay the proposed penalty or to remove the tires from the site, failed to offer any documentation with respect to their financial status (see Penalty Hearing Report, at 7).

Subsequent Submissions by Respondents and Department Staff

Following the penalty hearing, DEC Commissioner Erin M. Crotty determined that, to ensure a more complete record for her decision and in recognition of the unique circumstances and equities in this matter, respondents would be given another opportunity to furnish financial information for consideration. By letter dated December 27, 2004, the parties were advised that Commissioner Crotty was reopening the record for receipt of such information. Each respondent was provided with a financial disclosure information form to prepare and submit for the record. Respondents, in completing the forms, were to provide supporting documentation including but not limited to federal and state tax returns.

Under cover of letter dated February 1, 2005, each respondent submitted a financial disclosure information form. However, by letter dated February 8, 2005, Department staff noted that respondents' February 1, 2005 submission did not include the requested documentation on respondents' financial status, including but not limited to tax returns. Moreover, respondents in their submission stated that they had sold the site for \$70,000 to a Richard Coker, but provided no documentation with respect to that sale. Each respondent stated on her respective financial disclosure form that, as part of the sales agreement, Mr. Coker would remove the tires from the site.

Department staff requested that an extension be granted to provide respondents with another opportunity to submit the requested documentation including but not limited to tax returns and the deed and contract for sale of the site. An extension was

granted by letter dated February 10, 2005. Respondents subsequently, under cover of a letter dated February 18, 2005, submitted documents relating to the sale of the site to Richard Coker (including but not limited to the deed, note and mortgage) and income tax returns for calendar years 2002 and 2003 for each respondent. One of the documents included in the submissions was a one-page statement (entitled "Affidavit") signed by Richard Coker on August 12, 2004 and which read as follows:

"I, Richard Coker, hereby acknowledge and agree that I purchased approximately 10 (ten) acres and a house on August [unreadable date] 2004 known as 937 Route 146 in the Town of Wright, Schoharie County, New York from Helen and Penelope Agramonte.

"That I am aware that there are many, many used tires on the property and considered this situation in agreeing upon the sale price of \$70,000.00[.]

"I agree to undertake the clean up of the tires at my own expense and indemnify and hold Helen and Penelope Agramonte harmless for any and all loss or liability associated with the presence or cleanup of the tires" (August 2004 Affidavit).

In light of the information that respondents submitted, subsequent extensions were granted to allow Department staff sufficient time to consider the information and to discuss the status of the site with the new owner, Richard Coker.

By letter dated May 27, 2005, Department staff filed its response to respondents' submissions ("response") and, in addition, requested that three documents be added to the record. These documents included: (1) an affidavit sworn to on May 24, 2005 by the site's new owner ("Coker 2005 Affidavit"); (2) a sales flyer which references the original listing price of \$110,000 for the residence on seven acres of the site (the remaining 3 acres of the site on which the tires were located were not included in this listing); and (3) a sale detail report relating to the site from the New York State Office of Real Property ("Sale Detail Report"). Respondents did not object to Department staff's request. Accordingly, the three documents offered by Department staff, together with Department staff's May 27, 2005 response, respondents' submissions of February 1 and 18, 2005, and the correspondence relating to the reopening of the

record and requested extensions¹ shall be included with the record of this proceeding.

Although the initial sale listing for the site did not include the approximately 3 acres on which the waste tires are located, the new owner, Richard Coker, purchased the entire site including acreage where the tires are located (Coker 2005 Affidavit, at ¶ 4; Sale Detail Report). The final purchase price for the entire site was \$70,000 (Sale Detail Report), which was \$40,000 less than the original listing in the sales flyer for the site minus the acreage with the waste tires.

In his affidavit, Mr. Coker states that, notwithstanding limited resources, he has removed approximately 6,000 tires from the property (Coker 2005 Affidavit, at ¶¶ 6-7). He also states that he is willing to provide respondents with access to the site for the removal of the waste tires or is willing "to make arrangements with them for tire removal" (id. at ¶ 8).

Department staff, upon consideration of the limited assets and income of respondents and that respondents did not place the tires on the site,² proposed suspending the penalty that it had requested in its motion for order without hearing, contingent upon respondents' removal of the tires from the site. Department staff maintains, however, that the \$70,000 from the sale of the site should be used to pay for the removal of tires.³ In addition, Department staff requested that the proposed compliance schedule be modified to require respondents to submit monthly receipts documenting tire removal from the site and to extend the time frame for the removal of the tires from 180 days

¹ This correspondence includes letters dated December 27, 2004, February 10, 2005, March 29, 2005, and April 28, 2005 from Assistant Commissioner Louis A. Alexander for the Office of Hearings and Mediation Services, and the letters dated February 8, 2005, March 24, 2005, and April 26, 2005 from Department staff.

² The tires were placed on the site by Richard Agramonte, respondent Helen Agramonte's son and respondent Penelope Agramonte's husband. Mr. Agramonte died in 1993 (Hearing Transcript ["Tr."], at 63-64).

³ Mr. Coker made an initial payment of \$25,000 for the site; with a balloon payment of "whatever remains of the \$45,000 due" on September 9, 2005 (Coker 2005 Affidavit ¶ 4).

to 365 days.

Discussion

Respondents' legal liability, as owners of the site on which the waste tires were stored, has been established. It is unclear why respondents failed to provide any documentation regarding their limited financial circumstances at the penalty hearing conducted before ALJ Villa, notwithstanding the ALJ's reminder to respondents prior to the hearing that such documentation should be offered at the hearing. However, this information has now been received and I have taken it into consideration as well as Department staff's proposed modifications to the penalty and the compliance schedule.

The record demonstrates that both respondents have limited financial resources. Furthermore, as noted, it was Richard Agramonte, Helen Agramonte's son and Penelope Agramonte's husband, who was responsible for bringing the waste tires to the site. Respondent Helen Agramonte is quite elderly and infirm, and resides in a nursing home in St. Johnsville, New York (see, e.g., Tr. at 5, 36, 64; Financial Disclosure Information Form [Helen Agramonte], at Q3 & Q4). Based on the equities in this matter and in the interests of justice, I am exercising my discretion not to impose any penalty, or any other obligation, under this order on Helen Agramonte.

With respect to Penelope Agramonte, the record indicates that she made efforts to have the waste tires removed from the site, using whatever limited funds Helen Agramonte could provide (see Tr. at 78-79). Penelope Agramonte testified that in 1997 she placed her name on the deed for the site, without seeking the advice of counsel, in an effort to assist Helen Agramonte, who was in failing health (see Tr. at 65-66). These and other mitigating factors in the record justify a reduction in the requested civil penalty on respondent Penelope Agramonte, and I hereby reduce the civil penalty to be imposed on respondent Penelope Agramonte from \$8,000 to \$5,000. Furthermore, I suspend the \$5,000 penalty in its entirety contingent upon respondent Penelope Agramonte's removal of the waste tires from the site.

Department's proposed modifications to the compliance schedule regarding requiring monthly receipts and extending the time for the removal of the waste tires from the site are appropriate in this matter and are incorporated in this order.

As noted, among the documents that respondents submitted relating to the sale of the site was the August 2004

Affidavit in which Mr. Coker acknowledged that he was aware that "many, many used tires [were] on the property" and he "considered this situation in agreeing upon the sale price of \$70,000.00." Furthermore, Mr. Coker stated in the affidavit that he agreed to undertake the cleanup of the tires "at my own expense and indemnify and hold Helen and Penelope Agramonte harmless."

Mr. Coker is not a party to this proceeding and, accordingly, the extent of any legal liabilities that he may have as owner of a site on which waste tires have been illegally placed or pursuant to the August 2004 Affidavit, is not addressed in this order. However, in light of his ownership of the site, I direct Department staff to include Mr. Coker, where appropriate, in any discussion with respondent Penelope Agramonte regarding the removal of the waste tires from the site and the development of any waste tire removal plan.

NOW, THEREFORE, having considered this matter, and being duly advised, it is ORDERED that:

- I. Respondents Helen Agramonte and Penelope Agramonte are adjudged to have violated ECL article 27 and 6 NYCRR 360-13.1(b) by storing without a permit approximately 90,000 waste tires at the site they owned in the Town of Wright, Schoharie County, which violation continued from March 1, 2001 to the date of Department staff's motion.
- II. Respondent Penelope Agramonte is assessed a civil penalty in the amount of five thousand dollars (\$5,000) which is suspended contingent upon her compliance with paragraphs III and IV of this order. Should respondent Penelope Agramonte fail to satisfy the conditions set forth in paragraphs III and IV, the suspended amount shall immediately become due and payable. Payment of any penalty that becomes due shall be by cashier's check, certified check or money order drawn to the order of "NYSDEC" and sent by overnight delivery, certified mail or hand-delivery to Ann Lapinski, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Division of Legal Affairs, Region 4, 1150 North Westcott Road, Schenectady, New York, 12306-2014.
- III. Within 365 days after service of this order upon respondent Penelope Agramonte, respondent Penelope Agramonte shall remove all waste tires from the site and have them properly disposed at a permitted

facility, provided however that upon good cause shown by respondent Penelope Agramonte, or to facilitate any arrangement between respondent Penelope Agramonte and the current owner of the site for the removal of the waste tires, Department staff may extend the date by which all waste tires must be removed from the site.

- IV. On the fifteenth day of each month, commencing on August 15, 2005, respondent Penelope Agramonte shall mail to the Department a copy of the receipts documenting (a) the number of tires that were removed from the site during the previous month, and (b) the disposal of the tires at a permitted facility. In the event that no tires were removed from the site during the previous month, she shall provide an explanation to the Department why such tire removal did not occur. In the event that respondent Penelope Agramonte fails to timely mail this information to Department staff, the suspended penalty will become immediately due and payable subject to the discretion of Department staff.
- V. All communications from respondents to the Department concerning this order shall be made to Ann Lapinski, Esq., New York State Department of Environmental Conservation, Division of Legal Affairs, Region 4, 1150 North Westcott Road, Schenectady, New York, 12306-2014.
- VI. The provisions, terms and conditions of this order shall bind respondents, and their successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
July 19, 2005

To: (VIA CERTIFIED MAIL)

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(VIA REGULAR MAIL)

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(VIA CERTIFIED MAIL)

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Richard Coker
Route 146
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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violations of
Article 27 of the Environmental Conservation Law

-by-

HELEN AGRAMONTE
and
PENELOPE AGRAMONTE,

Respondents.

DEC File No. R4-2001-0130-25

HEARING REPORT

-by-

/s/

Maria E. Villa
Administrative Law Judge

November 22, 2004

Summary

On July 8, 2002, Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement action against Respondents, Helen Agramonte and Penelope Agramonte ("Respondents"), alleging a violation of Article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste) of the New York State Environmental Conservation Law ("ECL"), and Section 360-13.1(b) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Department Staff made a motion for order without hearing pursuant to Section 622.12 of 6 NYCRR, alleging that Respondents own property in the Town of Wright, Schoharie County (the "Site"), where Respondents are storing approximately 90,000 waste tires without a permit from the Department to do so.

Department Staff sought an order of the Commissioner assessing a civil penalty of \$8,000. In addition, Department Staff requested that Respondents be ordered to remove all solid waste from the Site and properly dispose of that solid waste at a permitted facility within 180 days of the effective date of the Commissioner's order. Finally, Department Staff requested an order requiring Respondents to provide Department Staff with documentation within thirty days of disposal. The motion was filed with the Office of Hearings and Mediation Services on September 24, 2002, and was assigned to administrative law judge ("ALJ") Maria E. Villa.

Proceedings

In support of the motion, Department Staff submitted the affidavit of George Elston, a solid waste technician (now a Principal Engineering Technician) in the Department's Region 4 office, sworn to June 25, 2002 (the "Elston Affidavit"). Respondents obtained an extension of time to serve a response, and Respondents' affidavits in opposition, sworn to November 5, 2002, were filed on November 6, 2002. Respondents also requested an opportunity to mediate this matter, and Department Staff agreed. The matter was adjourned to allow for mediation and settlement discussions. This effort was unsuccessful, and Department Staff requested a ruling on the motion.

In a ruling dated October 16, 2003, the ALJ granted the motion in part, but determined that because a triable issue of fact existed as to the amount of civil penalties to be imposed, a hearing should be held to determine the appropriate penalty amount. See 6 NYCRR Section 622.12(f).

On December 16, 2003, a hearing was held at the Department's Region 4 office in Schenectady, New York. Pursuant to 6 NYCRR Section 622.14(e), the moving and responsive papers are deemed to be the complaint and the answer, respectively. The Department appeared by Ann Lapinski, Esq., Assistant Regional Attorney. Charles Sarris, Esq., of the law firm of Kouray and Kouray, Schenectady, New York, appeared on behalf of Respondents. Department Staff called George Elston, Principal Engineering Technician, Region 4, as a witness, the same individual who provided an affidavit in support of Department Staff's motion for order without hearing. Penelope Agramonte testified on her own behalf. At the conclusion of the hearing, Respondents were offered the opportunity to make a written submission with respect to cases cited by Department Staff at the hearing. Respondents did not submit anything further.

Findings of Fact

The October 16, 2003 ruling's findings of fact are incorporated herein by reference. The following additional findings are based upon the record of the hearing in this matter:

1. Respondents Helen and Penelope Agramonte are the owners of the Site, located in the Town of Wright, Schoharie County, where approximately 90,000 waste tires are being stored.
2. Respondent Penelope Agramonte made efforts to have the tires removed beginning in 1997.
3. In 2002, Penelope Agramonte entered into an arrangement with a tenant of the residence at the Site to pay for tire disposal in lieu of rent payments. The rent money was given directly to the tire disposal contractor.
4. The tenant also had an option to buy the property within three years, which he declined to exercise. Ultimately, the tenant advised Penelope Agramonte that he was obliged to vacate the premises due to his financial circumstances.
5. The property has an outstanding mortgage of approximately \$28,000. Helen Agramonte pays about \$560 per month in mortgage and taxes from her pension.
6. Department Staff's penalty of \$8,000 was calculated based upon the economic benefit to Respondents as a

result of Respondents' avoidance of the costs of removal of the waste tires at the Site.

Discussion

Department Staff's motion for order without hearing asserted that Respondents violated 6 NYCRR Section 360-13.1(b) because Respondents stored approximately 90,000 tires on the Site without a permit from the Department. Section 360-13.1(b) provides that "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to this Part." According to Department Staff, the violation continued from March 1, 2001 to the date of the motion (June 25, 2002).

As articulated in the October 16, 2003 ruling on the motion for order without hearing, the penalty amount should be based upon a consideration of the factors enumerated in the Commissioner's Civil Penalty Policy, issued June 20, 1990 (the "Policy").¹ The initial penalty calculation should be a computation of the potential statutory maximum for all provable violations, beginning with the day of the first provable violation and continuing to the date of compliance. The penalty assessed should be no less than the amount of economic benefit (the delayed and avoided costs) that accrued to the violator as a result of non-compliance.

The penalty will also include a "gravity component," which serves to increase the previously determined economic benefit amount. The gravity component is included because, in the Department's view, over and above removing the economic benefit of compliance, violators must be deterred. The Policy takes into account the gravity of the violation by providing for an assessment of the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the statutory scheme.

Once a preliminary gravity component is developed, it may be adjusted, based upon several factors, including: (1) the respondent's culpability; (2) the level of cooperation evidenced by the respondent; (3) the respondent's history of any past violations; (4) ability to pay; and (5) other, unique factors to be considered at the Department's discretion.

¹ The Policy's primary purpose is to "articulate the Department's policies for assessing and collecting penalties in a manner that will assist DEC in efficiently and fairly deterring and punishing violations." Policy, at II.

Department Staff took the position that the penalty requested is appropriate, citing to ECL Section 71-2703(1)(a), which provides that any person who violates Articles 3 or 7 of Article 27, or any rule or regulation promulgated pursuant to that Article, is subject to penalties of up to \$5,000 for each violation, and an additional penalty of not more than \$1,000 per day for each day the violation continues. Since the time the motion was made, that provision has been amended to provide for a penalties of up to \$7,500 per violation, and additional penalties of not more than \$1,500 for each day of continuing violation. The penalty amount in this case will be based upon the statutory provision in effect at the time the violations occurred. See, e.g., Matter of Hornburg, Commissioner's Order, at 2-3; 2004 WL 2026417, *1-2 (Aug. 26, 2004) (adopting Chief Administrative Law Judge's ruling; liability imposed based upon regulatory provisions in effect at time of violations).

Relying upon this provision, Department Staff calculated the maximum penalty that could be imposed in this matter to be \$454,000, based upon 450 days of violation, commencing March 1, 2001 and ending May 24, 2002. Exhibit 1C, p. 3, ¶ 10(a). The Elston Affidavit also calculated an economic benefit component as a result of Respondents' non-compliance. This calculation assumes that the cost of tire removal and disposal is at least \$90,000, and that Respondents have avoided the costs of cleanup since March 1, 2001. The Elston Affidavit stated that, using an interest rate of eight percent per year during a one year and four month period,² Respondents avoided cleanup costs of \$8,000, and, as a result, Department Staff sought the imposition of a penalty in that amount. Exhibit 1C, p. 4, ¶ 10(b)(ii).

At the hearing, Department Staff presented its direct case through the testimony of George Elston. Mr. Elston stated that the estimated number of tires was arrived at based upon measurements taken a few years ago by Department Staff. Transcript (hereinafter "Tr."), at 10-11, 51-52. Mr. Elston testified that, based upon invoices provided by Respondents, the disposal fee for the tires that had been removed from the site was about \$1.50 per tire. Exhibit 3; Tr. at 13. According to Mr. Elston, there are different removal prices for different types of tire, depending upon size (for example, disposal of a

² The time period from March 1, 2001 to May 24, 2002 is actually one year and three months (450 days). At the hearing Department Staff indicated that the penalty was calculated from March 1, 2001 to the date of the motion (June 25, 2002), which would be 482 days, or approximately one year and four months. This discrepancy is of no moment, since Department Staff used the shorter period (450 days) in calculating the penalty amount, and thus, Respondents are not disadvantaged by the error.

large off-road tire might cost as much as \$30 to \$35). Id. Mr. Elston testified that a total of 2,862 tires, or about three percent of the tires on-site, were removed from the Site during the past five or six years. Tr. at 17-18.

Department Staff calculated the economic benefit by assuming that the money that would have been spent to remove the tires at the Site instead had been earning interest during the time the violation continued. Tr. at 24, 47. Based upon the total possible penalty of \$454,000, Mr. Elston testified that Department Staff arrived at the \$8,000 figure by assuming an eight percent, non-compounded interest rate³ from the date of the violation to the date of the motion, or for one year and four months. Exhibit 1-C, Tr. at 24-25; 42-43. In response to questions by Respondents' counsel on cross-examination, Mr. Elston used a calculator to figure the penalty, and clarified that the computation was based upon the estimated \$90,000 cost of removal times eight percent interest (\$7,200), multiplied by a year and four months, for an actual total of \$9,300. Tr. at 45. Mr. Elston was unable to explain why Department Staff did not seek the greater of the two penalties. Id.

On cross-examination, counsel for Respondents questioned Mr. Elston concerning other waste tire sites in the Region. Tr. at 26-38. The witness stated that he was not familiar with all of those sites, and Respondents' counsel requested that Department Staff produce persons with knowledge on this point. Tr. at 34-36. Department Staff objected to the request as untimely, and the ALJ reserved. Tr. at 37-38.

Respondents' request to introduce such evidence must be denied. In this case, the penalty sought consists of the amount of economic benefit to the Respondents, and does not even include a gravity component. As noted earlier, the penalty policy states that the economic benefit amount should be the minimum penalty imposed. As Mr. Elston testified, the computations assumed simple, not compound interest, and in fact, the \$8,000 figure is \$1,300 less than the actual calculated economic benefit. Under the circumstances, evidence with respect to the Department's enforcement efforts at other sites in the Region is of limited value, particularly since, as Department Staff points out, penalties have been imposed in other cases where the named Respondents were not the persons responsible for the tire disposal. See Matter of Eagle, Commissioner's Order, at 1; 2003

³ The interest rate Department Staff used in the computation is not excessive. See, e.g., Civil Practice Law and Rules ("CPLR") Section 5004 (setting an interest rate of nine percent for judgments).

WL 1563276, *1 (Mar. 11, 2003)(\$5,500 fine imposed; respondent, who had purchased the property sight unseen at a county land auction, was found to be the owner of property where between 50,000 and 100,000 waste tires were stored); Matter of Radesi, Commissioner's Order, at 2; 1994 WL 115079, *1 (Mar. 9, 1994)(Respondents fined \$40,000, with \$20,000 suspended, for storing 28,000 waste tires disposed of during former owner's tenure). As noted above, Respondents were offered the opportunity following the hearing to comment upon the authority cited by Department Staff, but did not do so.

At the conclusion of Department Staff's direct case, Respondents moved to dismiss, arguing that Department Staff had not met its burden. Tr. at 58. Respondents pointed out that Mr. Elston testified that the number of tires at the Site was a "guesstimate," based upon calculations done by other individuals in the Department. Tr. at 58-59. Department Staff objected, pointing out that liability had already been established, and that counsel's arguments were more in the nature of a closing argument. Tr. at 59-60. Respondents' counsel stated that he would proceed with his direct case. Tr. at 61-62. To the extent that Respondents' motion to dismiss remains outstanding, it must be denied. The penalty amount to be assessed, not Respondents' liability, was the subject of the hearing.

Penelope Agramonte testified next, stating that she and her mother-in-law, Helen Agramonte, are the owners of the Site, that her husband died in 1993, and that Helen Agramonte is eighty-seven, diabetic, and legally blind. Tr. at 63-66. In 1997, Helen Agramonte paid to have tires removed from the Site. Tr. at 78. Penelope Agramonte stated that she placed her name on the deed in 1997, without first seeking the advice of counsel, in an effort to assist Helen Agramonte, who was in failing health and losing her eyesight. Tr. at 65-66.

Penelope Agramonte testified as to her efforts to have the tires removed beginning in 1997, as well as an arrangement she entered into in 2002 with a tenant of the residence at the Site to pay for tire disposal in lieu of rent payments. Tr. at 66-73. The agreement contemplated that the tenant, Mr. Mix, would arrange for \$600 worth of tire disposal each month. Tr. at 73. Mr. Mix also had an option to buy within three years, which he declined to exercise, and at the time of the hearing, Mr. Mix advised Penelope Agramonte that he was obliged to vacate the premises because of his financial difficulties. Tr. at 73-74.

Ms. Agramonte stated that she had never taken any of the rent money from Mr. Mix, and that any such monies had been paid

directly to the tire disposal contractor. Tr. at 74. She testified that there is a mortgage of approximately \$28,000 on the property, and that Helen Agramonte, who was employed as a secretary before she retired, pays about \$560 per month in mortgage and taxes from her pension checks. Tr. at 76. According to the witness, a realtor valued the property at \$85,000 without the presence of the tires, but told Penelope Agramonte that it would be a waste of time to attempt to sell the property in its present condition. Tr. at 77.

Penelope Agramonte testified further that she does not have the money to clean up the tires. Tr. at 79. When asked why she did not allow the property to go into foreclosure for non-payment of taxes, Penelope Agramonte stated that she did not believe that it would be right to do so, and that she felt she could not walk away from the situation. Tr. at 80.

The parties made closing arguments. Department Staff pointed out that the penalty sought had been reduced as much as possible, and noted that Respondents had not provided information concerning their financial circumstances. Respondents argued that, even if a penalty were assessed, the problem of waste tires on the Site would still exist, and questioned the logic of imposing a penalty where Respondents were not responsible for the situation and were not in a position to deal with the problem.

Department Staff asserts that the \$8,000 penalty sought is appropriate, given the statutory maximum penalty that could be assessed (\$454,000), as well as the economic benefit (\$8,000) that Department Staff contends Respondents realized as a result of non-compliance. The violation alleged is significant, particularly in light of the potential harm resulting from the presence of a large number of tires at the site. As noted above, environmental damage may be anticipated in the event of a tire fire, and the tires themselves provide a breeding ground for mosquitos and other vectors which may carry disease. Respondents' arguments concerning the penalty calculation are not persuasive, given that Department Staff seeks the minimum penalty. Moreover, Respondents did not offer documentation concerning their financial inability to pay the penalty assessed. Under the circumstances, the Commissioner's order should assess a penalty of \$8,000.

Conclusion

1. Respondents Helen Agramonte and Penelope Agramonte have violated Article 27 of the ECL and Section 360-13.1(b) of 6 NYCRR. Respondents own property in the Town of

Wright, Schoharie County, and have been storing approximately 90,000 waste tires at the Site, without a permit to do so. This violation has continued from March 1, 2001 to the present.

2. A civil penalty is authorized, pursuant to the provisions of ECL Section 71-2703(1)(a) in effect at the time of the violation. That section provided that any person who violates Articles 3 or 7 of Article 27, or any rule or regulation promulgated pursuant to that Article, is subject to penalties of up to \$5,000 for each violation, and an additional penalty of not more than \$1,000 per day for each day the violation continues.⁴
3. The \$8,000 penalty sought by Department Staff is appropriate given the nature of the violations.

Recommendations

1. The Commissioner should conclude that Respondents violated ECL Article 27 and Section 360-13.1(b) of 6 NYCRR as outlined in Department Staff's motion for order without hearing dated June 25, 2002.
2. A civil penalty of \$8,000 (eight thousand dollars) should be assessed against the Respondents, Helen and Penelope Agramonte.
3. Respondents should be ordered to remove all solid waste from the Site and properly dispose of the solid waste at a permitted facility, within 180 days of the effective date of the Commissioner's order.
4. The Respondents should be required to submit to the Department, within thirty days of proper disposal, documentation of proper disposal at a permitted facility.

To: (VIA CERTIFIED MAIL)

Charles Sarris, Esq.
Kouray and Kouray

⁴

The statute, as amended, provides for penalties of \$7,500 for each violation, and additional penalties of up to \$1,500 per day for each day the violation continues.

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(VIA REGULAR MAIL)

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