STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

ROSE BEUTEL,

Respondent.

RULING ON MOTION FOR ORDER WITHOUT HEARING

VISTA Index No. R620040802-52

January 30, 2006

---

Summary

This ruling is on a motion for order without hearing concerning a facility that the Department of Environmental Conservation Staff (DEC Staff) alleged is a non-compliant waste tire stockpile. DEC Staff further alleged that the owner of the facility, Rose Beutel, violated numerous requirements of the Department's solid waste management facility regulations. A response submitted on behalf of Rose Beutel did not dispute the majority of DEC Staff's allegations. Based upon the motion papers, however, and reinforced by statements in the response, Rose Beutel's current relation to the facility (as an owner, operator or person who has control of the site) is in question. Accordingly, the motion for order without hearing is denied and a hearing will be scheduled. The ruling identifies certain undisputed facts that are deemed established for all purposes in the hearing.

Proceedings

On March 11, 2005, Department Staff moved for an order without hearing against Rose Beutel, Old Main Street Road, Carthage, New York 13619 (Respondent). DEC Staff made the motion pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR 622.12), a section of the Department's enforcement hearing procedures. The motion alleged that Respondent violated numerous provisions of 6 NYCRR part 360 with regard to an alleged non-compliant waste tire stockpile located on County Route 63 in the Town of Hounsfield, Jefferson County, New York (the Site).

DEC Staff's motion papers consisted of a notice of motion for order without hearing, a motion for order without hearing, a brief, a list of exhibits, and affidavits of the following DEC Region 6 employees: Bruce Robinson, Land & Claims Adjuster in the Bureau of Real Property; Gary McCullouch, P.E., Environmental

Engineer II in the Division of Solid and Hazardous Materials; Peter Taylor, P.E., Environmental Engineer III in the Division of Environmental Remediation; and Edward Blackmer, P.E., Environmental Engineer III in the Division of Solid and Hazardous Materials. The motion papers were served by certified mail, return receipt requested, on March 17, 2005. The motion papers were served upon Respondent and upon Ann Beutel, power of attorney for Rose Beutel.

The notice of motion for order without hearing stated that a response to the motion must be filed with the Department's Chief Administrative Law Judge (ALJ) within 20 days of receipt of the motion. The Respondent did not send a response in this manner.

On April 13, 2005, Randall C. Young, Esq., Assistant Regional Attorney, Region 6, Watertown, sent to Chief ALJ James T. McClymonds a copy of the motion papers and an April 7, 2005 letter from Ann M. Beutel to Mr. Young. The letter identified Ann M. Beutel as "POA - Rose Beutel." Mr. Young's letter of April 13, 2005, a copy of which was sent to both Rose Beutel and Ann Beutel, stated that Ann Beutel represented that she holds a power of attorney to act on Rose Beutel's behalf regarding the Site. Neither Rose Beutel nor Ann Beutel sent any correspondence to the DEC Office of Hearings and Mediation Services disagreeing with Mr. Young's statement concerning the power of attorney. I am considering Ann Beutel to be acting as the authorized representative for Rose Beutel in this matter (see, 6 NYCRR 622.4(a)).

Mr. Young's April 13, 2005 letter stated that Ann Beutel called him regarding the motion papers, and that he informed her that a formal written response to the Department was required. The April 13 letter stated that, after the telephone conversation, Mr. Young received Ann Beutel's April 7, 2005 letter. This suggests that the April 7 letter is Respondent's answer to the motion. The April 7 letter, however, states that it "is in response to your second mailing, requesting Rose Beutel's signature on the consent order." The letter goes on to describe Wayne Jahada's activities on the Site and Ann Beutel's efforts to regain control of the Site and clean it up.

The case was assigned to ALJ Susan J. DuBois (the undersigned) on November 17, 2005. On November 18, 2005, I wrote to Mr. Young, inquiring whether the April 7 letter is indeed the response to the motion and requesting a copy of any additional letter that may have responded to the motion. I also asked whether DEC Staff had granted any extension of the deadline to respond to the motion, in response to a request in the April 7

letter for additional time "while this situation with Mr. Jahada plays out." On November 23, 2005, Mr. Young notified me that he had written to Rose Beutel, in care of Ann Beutel, on April 11, 2005 stating that "[b]ecause you have not indicated that you would execute the Order, nothing in this letter extends the time for serving a response to the motion for order without hearing." Mr. Young's November 23 letter also stated that DEC Staff received no written communication from Respondent after the April 7 letter.

Ann Beutel and Rose Beutel were copied on both my letter of November 18, 2005 and Mr. Young's letter of November 23, 2005, and did not submit any correspondence or contact me to identify any other document that would constitute a response to the motion for order without hearing. Thus, Ann Beutel's April 7, 2005 letter is the only response to the motion.

On December 15, 2005, I wrote to Mr. Young concerning an exhibit cited in DEC Staff's brief with regard to Rose Beutel's ownership of the Site. This exhibit, however, was not included with the motion papers (see brief, page 3, citing "Exhibit E"). I requested clarification of this reference, and asked that a copy of Exhibit E be provided to Rose and Ann Beutel and to me if it was inadvertently omitted from the motion papers. On December 23, 2005, Mr. Young sent a letter stating that the reference to Exhibit E "was an error."

## Positions of the parties

### DEC Staff

DEC Staff alleged that the Site is a solid waste management facility and that at least 30,000 waste tires were disposed of at the Site. DEC Staff alleged that over 1,000 waste tires have been stored at the Site for more than 60 days without a permit, order or regulatory exemption and, thus, the Site is a disposal facility under 6 NYCRR 360-13.1(f). DEC Staff alleged that Respondent owned the site from January 4, 1967 to November 29, 2004, and committed the following violations:

A. violation of 6 NYCRR 360-1.9(h), "as supplemented by" 6 NYCRR 360-13.2(h), because the Department has no record of Respondent submitting a contingency plan that details the measures to be undertaken in the event of a fire emergency so as to assure compliance with, among other things, the applicable National Fire Protection Association (NFPA) standards.

B. violation of 6 NYCRR 360-13.1, because the Department has no record of issuing a solid waste management facility permit for the operation of the waste tire storage facility at the Site.

C. violations of 6 NYCRR 360-13.2 by means of violating the 1989 edition of certain NFPA standards, specifically:

1. failure to comply with "Standards for Storage of Rubber Tires," NFPA 231D, 1989 edition, Appendix C ('Guidelines for Outdoor Storage of Scrap Tires'), Provision C-3.2.1(c), which requires an effective fire prevention maintenance program including control of weeds, grass and other combustible materials within the storage area.

2. failure to comply with provision C-4.2.5 of the above NFPA standards, which requires that the distance between storage and grass, weeds and brush should be 50 feet or more.

D. violations of 6 NYCRR 360-13.2 not involving NFPA standards, specifically:

1. the Department has no record of Respondent having submitted a site plan (360-13.2(b)), a monitoring and inspection plan (360-13.2(e)), a closure plan (360-13.2(f)), a contingency plan (360-13.2(h), a storage plan (360-13.2(i)), and a vector control plan (360-13.2(j)).

2. failure to maintain waste tire piles at 50 feet or less in width, in violation of 360-13.2(i)(3).

3. failure to maintain waste tire piles at 10,000 square feet, or less, of surface area, in violation 360-13.2(i)(3).

4. failure to maintain 50-foot separation areas free of obstructions and vegetation at all times, in violation of 360-13.2(i)(4).

E. violations of 6 NYCRR 360-13.3, specifically:

1. owning or operating a waste tire storage facility with more than 1,000 waste tires and failing to remove rims from the waste tires within one week of their receipt at the facility.

2. owning or operating a waste tire storage facility having more than 2,500 tires that does not have an active hydrant or viable fire pond, in violation of 360-13.3(c)(4).

3. owning or operating a waste tire storage facility having more than 2,500 tires that does not have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, in violation of 360-13.3(c)(4).

4. owning or operating a waste tire storage facility having more than 2,500 tires that has potential ignition sources (vegetation, including shrubs and trees) in tire storage areas, in violation of 360-13.3(c)(6).

5. owning or operating a waste tire storage facility having more than 2,500 tires that is not enclosed, at a minimum, in a 6 foot chain link fence or equivalent structure, in violation of 360-13.3(d)(2).

6. the Department has no record of Respondent ever having prepared and filed with the Department quarterly operation reports, in violation of 360-13.3(e)(2).

7. the Department has no record of Respondent ever having prepared and filed with the Department annual reports, in violation of 360-13.3(e)(3).

8. failure to maintain approaches to tire piles at the Site so that it was accessible in all weather conditions.[1]

DEC Staff requested that the Commissioner issue an order finding that Respondent violated the requirements identified above, and that Respondent “has owned and presently operates” a noncompliant waste tire stockpile, as Environmental Conservation Law (ECL) section 27-1901(6) defines that term.

DEC Staff also requested that the Commissioner order Respondent to take certain actions, that are summarized for this report as follows:

immediately stop allowing any waste tires to come onto the Site (Paragraph I);

[1] Although the motion itself does not state what regulatory requirement was violated by this allegation, Mr. Blackmer’s affidavit identifies 6 NYCRR 360-13.2(i)(4) and 360-13.3(c)(1) as requiring access roads and areas around the tire piles to be kept in a condition that allows emergency vehicle access.

cause all waste tires to be removed from the Site pursuant to requirements detailed in the motion (Paragraph II.A);

post with the Department financial security in the amount of $45,000.00 to secure performance of Respondent's obligations under Paragraph I and Subparagraph II.A;

fully cooperate with, and not interfere with, the State in the event that the State should be required to take over abatement of the waste tire stockpiles at the Site;

reimburse the State for certain costs if Respondent fails to comply with the requirements of Paragraph I and Subparagraph II.A;

pay a penalty of the lesser of the maximum civil penalty authorized by the ECL, or the sum of $3,000.00 plus, if Respondent fails to comply with any requirement set forth in Paragraph I and Subparagraph II.A, $2.00 for each waste tire that the State shall have to manage under ECL article 27, title 19;

reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5) for certain expenditures; and

undertake such other and further actions as may be determined appropriate.

The motion also requested that the Commissioner direct DEC Staff to remove the waste tires if Respondent fails to strictly comply with any provision of paragraphs I and II.A of the motion. DEC Staff would be directed to remove the tires by such means as Staff may deem appropriate, to the extent monies may be available from the Waste Tire Management and Recycling Fund and from other sources.

Respondent

Ann Beutel's letter of April 7, 2005 did not address the motion's allegations directly, and did not include any affidavit or other documentary evidence. The letter appeared to be primarily a response to a proposed consent order sent to her by DEC Region 6. The letter stated that Wayne Jahada has had control of the Site since 1996. According to the letter, at the time Mr. Jahada took possession of the Site, he made an agreement

to clean up the tires for the cost of the "scrape" (sic, probably scrap) that was on the property at that time. The letter stated that Mr. Jahada has sold some of the scrap but has not followed through on removing the tires.

Ann Beutel stated that she was making every effort to re-gain control of the property and, if successful, she would hire someone to run the facility to generate income for tire removal. She stated that Mr. Jahada was under investigation by law enforcement agencies.

## Discussion

### Regulatory requirements

General provisions governing solid waste management facilities are set forth in 6 NYCRR subpart 360-1. Additional requirements applicable to waste tire storage facilities are set forth in 6 NYCRR subpart 360-13. Section 360-1.9 identifies the required contents of solid waste management permit applications generally, and section 360-13.2 identifies additional application requirements for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time.

As part of its contingency plan, a waste tire storage facility must comply with all applicable National Fire Protection Association standards, including "Standards for Storage of Rubber Tires," NFPA 231D, 1989 edition (see, 6 NYCRR 360-13.2(h)(6)). These standards require such facilities to have an effective fire prevention maintenance program including control of weeds, grass and other combustible material within the storage area.

Both the relevant NFPA standards and the Department's operational requirements for waste tire storage facilities require a 50-foot separation distance between the stored tires and grass, weeds and brush. The Department's waste tire storage requirements also specify that the 50-foot separation area be kept free of obstructions (6 NYCRR 360-13.2(i)(4)).

### Motions for orders without hearing

With regard to motions for orders without hearing, 6 NYCRR 622.12 provides, in part, as follows:

"(c) Within 20 days of receipt of such motion, the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence. When it appears from affidavits and documentary evidence filed in opposition to the motion, that facts essential to justify opposition may exist but cannot then be stated, the assigned ALJ may deny the motion or order a continuance to permit the submission of such essential facts and make such other orders as may be just.

"(d) 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 determining that the motion should be granted, in whole or in part, the ALJ will prepare a report and submit it to the [C]ommissioner pursuant to section 622.18 of this Part.

"(e) The motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing. If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel and/or directing a conference. The ALJ will thereupon make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing. Upon the issuance of such a ruling, the moving and responsive papers will be deemed the complaint and answer, respectively, and the hearing will proceed pursuant to this rule."

A recent order of the Commissioner of Environmental Conservation adopted the following discussion of how motions for orders without hearing, and the responses to them, are to be evaluated:

> "On a motion for summary judgment pursuant to the CPLR, 'movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law . . . . The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests . . . . "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose' (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988] [citations omitted] [quoting Zuckerman v

City of New York, 49 NY2d 557, 562 (1980)]). Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, 'it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs' in admissible form (id.). Facts appearing in the movant's papers that the opposing party fails to controvert may be deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975])." (Matter of Wilder, Order of the Commissioner, Nov. 4, 2004, adopting ALJ's Ruling/Hearing Report, at 10).

Even in cases where a respondent does not submit any response to DEC Staff's motion for order without hearing, factual allegations for which DEC Staff's affidavits and documentary evidence fail to provide proof cannot be determined as a matter of law based upon the motion papers (Matter of Wilder, Order of the Commissioner, Nov. 4, 2004, ALJ's Ruling/Hearing Report at 10 - 11).

Proof concerning the motion

In the present case, DEC Staff has submitted affidavits, with accompanying maps, photographs and documents, in support of its allegations. Respondent has not submitted any affidavits or documentary evidence, and has only provided the assertions presented in Ann Beutel's April 7, 2005 letter. That letter does not contest DEC Staff's allegations concerning the presence of wastes at the site, the nature of the wastes, or the absence of a permit and related plans and reports. The letter does, however, state that Mr. Jahada has had control of the property since 1996 and that Ann Beutel is "making every effort to re-gain control of the property."

DEC Staff's brief identifies the elements of the alleged violations and cites specific portions of the affidavits in support of Staff's assertions. Most of the allegations are supported by the documents cited in the brief. Respondent's relationship to the Site as an owner or operator, on dates later than November 29, 2004, is in question based upon DEC Staff's motion papers alone, and Ann Beutel's April 7, 2005 letter underlines both this question and its significance for the remedial actions that the motion seeks.

The motion for order without hearing asks the Commissioner to find that Respondent "owned or operated" a waste tire storage facility in violation of certain requirements of 6 NYCRR part 360. The motion papers demonstrate that Respondent was an owner of the Site during the time period from December 30, 1966 to at least the date of Mr. Robinson's affidavit. Whether or not she is the current owner, she was required to comply with the requirements of 6 NYCRR part 360 while she owned the Site and she would be liable for the violations that occurred during her time as owner (Matter of Gerald Eagle, Order of the Commissioner, March 11, 2003). The affidavits and other evidence included with DEC Staff's motion papers do not provide proof that Respondent operated the solid waste management facility. The affidavits and evidence demonstrate facts about ownership of the Site, conditions at the Site, and the absence of certain required documents, but do not demonstrate what role, if any, Respondent had or has in making decisions about how the solid waste management facility would receive or manage waste.

DEC Staff's motion papers do not demonstrate that Rose Beutel currently owns the site. DEC Staff's brief states, at page 3, that, "A deed dated January 4, 1967 recorded at the Jefferson County Clerks's [sic] Office shows that Respondent owned the property from that date to November 29, 2004. [Exhibit A and E.]" Exhibit A is an affidavit by Bruce Robinson, Land and Claims Adjuster, DEC Region 6. Attachment 2 of this affidavit is a deed dated December 30, 1966 and recorded on January 4, 1967, granting to William R. Beutel and his wife Rose M. Beutel a parcel of land that the affidavit identifies as the Site. The affidavit also states that this is the most recent deed filed for the Site in the Jefferson County Clerk's office. Mr. Robinson's affidavit was sworn to and notarized on November 9, with no year identified in the date. Based upon the dates of the other affidavits, however, this date was very likely November 9, 2004.

It is possible that the brief's reference to November 29, 2004 was actually intended to be November 9, 2004. It is also possible that the November date was included in the sentence quoted above because DEC Staff did not have information about ownership of the site on dates later than that of Mr. Robinson's affidavit, at the time when the brief was signed (March 9, 2005). My question to Mr. Young about Exhibit E resulted partly from trying to ascertain whether there was an additional document that reflected a sale of the property by Rose Beutel on November 29, 2004.

The motion for order without hearing asks the Commissioner to issue an order finding that, among other things, "Respondent

owned and operated the Site in the past, when the waste tires were first accumulated there and now operates the Site. Respondent continues to operate the site." This suggests that Respondent no longer owns the Site.

There is no dispute that Rose Beutel was an owner of the Site from the time when she and her husband purchased it until at least the date of Mr. Robinson's affidavit. Based solely upon DEC Staff's papers, however, it is not clear whether she currently owns the site. In addition, although neither Rose Beutel nor Ann Beutel submitted any affidavits or documentary evidence, Ann Beutel (who identified herself as having power of attorney for Rose Beutel) did submit the April 7, 2005 letter. This letter states that Mr. Jahada has had control of the property since 1996 and that Ann Beutel was attempting, as of April 2005, to re-gain control of the property.

The questions of who currently owns the Site and who currently controls the Site are important with regard to provisions of the order that DEC Staff is asking the Commissioner issue. The motion requests that the Commissioner issue an order directing Respondent to stop allowing waste tires to come onto the Site and to cause all waste tires to be removed from the Site. The requested order would also direct Respondent to cooperate with the State and not interfere in the event that the State should be required to take over abatement of the waste tire stockpile at the Site. The proposed penalty includes a $2.00 per tire amount for each waste tire that the State has to manage, if Respondent fails to comply with the removal requirement, among other requirements.

The motion for order without hearing is denied, due to the issue of Respondent's current relation to the Site, as an owner, operator or person who has control of the Site in order to carry out the remedial measures proposed by DEC Staff. This issue also relates to the penalty, in terms of whether the proposed order might assess a penalty based upon compliance with a requirement or requirements with which Respondent may no longer have a legal right to act, even through Ann Beutel.

The motion papers do, however, demonstrate certain facts and Respondent has not disputed these facts. Accordingly, this ruling specifies facts with regard to DEC Staff's allegations concerning the presence and nature of the waste on the Site and the absence of a permit and related plans and reports.

Number of alleged violations

Some of the alleged violations in the complaint involve facts that are similar to those underlying other alleged violations. This raises a question about the number of violations and, consequently, the amount of the maximum penalty that would be authorized. In a recent Supplemental Order involving waste tires, the Commissioner adopted the analysis of a similar question as discussed in the Chief ALJ's Hearing Report on Motion for Order Without Hearing (Matter of Wilder, Supplemental Order of the Commissioner, September 27, 2005). The allegations in the present case will be considered using the same approach as in the Wilder matter.

Briefly, this involves evaluating whether the factual elements that need to be proven to demonstrate violation of one regulatory requirement are the same as, or are completely included within, the group of factual elements that need to be proved to demonstrate violation of the other regulatory requirement. If so, the violation is presumed to be one violation even though two regulatory requirements prohibited the activity that took place.

This was described in the Wilder hearing report as follows: "Where two regulatory provisions are violated by a single transaction or course of conduct, and each provision contains an element not contained in the other, multiple violations are presumed and multiple penalties authorized... Where one regulation contains at least one element that the second does not, but the second regulation contains no element not included in the first, or where two regulations contain identical elements, a single violation is presumed and a single penalty authorized, absent a clear indication of contrary regulatory intent." (Wilder, Hearing Report at 11 [citations omitted].)

In the present case, the allegations numbered 4.A and 4.D.1.iv are presumptively the same, because they allege that the Department has no record of Respondent having submitted a contingency plan as required by 6 NYCRR 360-13.2(h). Allegations 4.A and 4.D.1.iv will be treated as one violation.

The factual elements of the allegation numbered 4.C.2 (failure to maintain 50 feet or more of separation between stored tires and grass, weeds and brush) are completely contained within those of allegation 4.D.4 (failure to maintain 50-foot separation areas free of obstructions and vegetation). Allegations 4.C.2 and 4.D.4 will be treated as one violation.

Ruling: DEC Staff's motion for an order without hearing is denied, as discussed above. The facts specified in the "Findings of Fact" section of this ruling are deemed established for all purposes in this hearing (6 NYCRR 622.12(e)). A hearing will be scheduled concerning the issue of Respondent's current relation to the Site and any terms of the proposed penalty or remedial actions that may be affected by this issue.

## FINDINGS OF FACT

1. The Site of the alleged violations is located along Route 63 in the Town of Hounsfield, Jefferson County, New York, north of Maxon Road and south of Stowell Corners. It is parcel number 90.00-4-21 on the Jefferson County tax map. On December 30, 1966, Rose M. Beutel (Respondent) and her husband William R. Beutel bought the Site. As of November 9, 2004, the deed for this purchase was the most recent deed filed for this parcel in the Jefferson County Clerk's office. (Robinson Affidavit, Ex. A of motion for order without hearing ("Ex. A")).

2. The Site is known as "Watertown Iron and Metal" and is also known as "Finger Lakes Iron and Metal." (Ex. A, paragraph 3).

3. DEC Staff visited the Site on at least the following dates: April 4, 1997, September 24, 2003 and October 28, 2003. Edward Blackmer, P.E., an Environmental Engineer III in the DEC Region 6 Office, drove by the Site on at least two occasions after October 2003 and made visual observations of the Site from the road. (Taylor Affidavit, Ex. C of the motion for order without hearing ("Ex. C"); Blackmer Affidavit, Exhibit D of the motion for order without hearing ("Ex. D")).

4. The Site is the location of a scrap metal salvage yard and large fields that contain piles of solid waste including waste tires. On April 4, 1997, Peter Taylor, P.E., an Environmental Engineer III in the DEC Region 6 Office, visited the Site and estimated that the Site contained thirty thousand (30,000) waste tires at that time. The tires were not covered to prevent them from accumulating water. Mr. Taylor's affidavit describes the tires as "not reduced in size." Vegetation grew next to and among the waste tire piles (Ex. C, paragraphs 3 and 4 and attachments 1 and 2).

5. Mr. Blackmer inspected the Site on September 24, 2003 and October 28, 2003, and took photographs during the latter visit.

As a result of Mr. Blackmer's October 28, 2003 inspection, he estimated that 30,000 tires remained at the Site. As described in Mr. Blackmer's affidavit, the tires were well-worn in appearance, with no apparent care taken to preserve their value as tires that could be used on other vehicles legally. The tires were piled on top of each other and some were cut open, apparently during removal of their rims. The tires were not covered and were left exposed to the elements. Weeds and brush were allowed to grow around and through the tires. The tires are waste tires as defined in 6 NYCRR 360-1.2(b)(183). As of March 10, 2005, the date of Mr. Blackmer's affidavit, tens of thousands of waste tires remained on the Site. (Ex. D, paragraphs 3 and 4 and October 28, 2003 photographs attached with Exhibit D).[2]

6. The Site is a solid waste management facility, and over 1,000 waste tires have been stored at the Site for more than 60 days. The Department, however, has no record of issuing a solid waste management facility permit for the operation of the waste tire storage facility at the Site (Ex. D, paragraph 5(B)(i)).

7. Mr. Blackmer serves as Regional Solid Materials Engineer in Region 6 and has custody of Department records pertaining to solid waste management facilities located in Region 6. One of the files in those records pertains to the waste tire facility located at the Site. Based upon Mr. Blackmer's search of records in this file, the oldest of which go back to March 1997, the Department has no record of Respondent having submitted to the Department any of the following:

(i) a site plan that shows the waste tire facility's boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b),

(ii) a monitoring and inspection plan that addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system, as required by 6 NYCRR 360-13.2(e),

---

[2] Although DEC Staff's brief referred to an attachment 4 of Exhibit D, the copy of Exhibit D received by the Office of Hearings and Mediation Services does not include any pages identified as attachment 4. This copy does, however, include a multi-page attachment 3, consisting of five photographs taken on October 28, 2003 that show features for which the brief cites attachment 4.

(iii) a closure plan that identifies the steps necessary to close the facility, as required by 6 NYCRR 360-13.2(f),

(iv) a contingency plan, as required by 6 NYCRR 360-13.2(h),

(v) a storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i),

(vi) a vector control plan that provides that all waste tires be maintained in a manner that limits mosquito breeding potential and other vectors, as required by 6 NYCRR 360-13.2(j).

8. Based upon Mr. Blackmer's and Mr. Taylor's observations, on several dates the piles of tires were located amidst grass, weeds and brush and in close proximity to trees and bushes. Mr. Blackmer saw no apparent attempt by anyone to control weeds, grass and other combustible materials from being located in the waste tire pile areas. The proximity of the vegetation to the tire piles, and its extension into the areas among the tire piles, makes it easy for a fire to travel from one pile to another by means of the natural cover. (Ex. C, paragraph 4 and some of the photographs attached with Ex. C; Ex. D paragraphs (6)(C) and (6)(I), and second photograph of attachment 3).[3]

9. At the times of Mr. Blackmer's observations, the stored tires were not separated from grass, weeds and brush by a distance of at least 50 feet, and the areas within 50 feet of the tires were not kept free of obstructions. Some tire piles were immediately adjacent to piles of scrap metal that cut off access to the side of the tire pile. (Ex. D, paragraph 6(C) and last two photographs of attachment 3.)[4]

---

[3] DEC Staff's brief cites Exhibit D paragraph (6)(B) in support of the allegations about lack of a fire prevention maintenance program, but that paragraph of Exhibit D discusses the size, as surface area, of the piles. Exhibit D, however, includes evidence in support of DEC Staff's allegation at the cited paragraphs elsewhere in the exhibit, and Exhibit C provides additional evidence in support of this allegation.

[4] The motion and DEC Staff's brief cite Ex. D paragraph 6(B) with regard to this allegation.

10. The tire piles were not limited to the dimensions specified in 6 NYCRR 360-13.2(i)(3). Tire piles on the Site exceeded 10,000 square feet of surface area and were over 50 feet in width. (Ex. D, paragraphs 6(A) and 6(B).)[5]

11. With regard to some of the tires, the wheel rims were not removed from the waste tires within one week of their receipt at the facility. (Ex. D, third and fourth photograph in attachment 3).

12. During Mr. Taylor's inspection in 1997, he observed that there was no fire pond on the Site, nor were there any large capacity fire extinguishers. During Mr. Blackmer's observations at the Site, he never saw an active hydrant or a viable fire pond, nor large capacity fire extinguishers as required by 6 NYCRR 360-13.3(c)(4). (Ex. C, paragraph 4; Ex. D, paragraph 6(F) and 6(G).)

13. There was no fence around the tire piles as of April, 1997, nor was there a fence around the tire piles at the times of Mr. Blackmer's observations of the Site. (Ex. C, paragraph 4; Ex. D, paragraph 6(J)).

14. The file for this Site, in the records of the Department's Region 6 Office, contains documents going back to March 1997 but does not contain any quarterly operating reports or annual reports. (Ex. D, paragraph 5.)

15. The areas around at least some of the piles are not maintained in a manner that would keep them accessible to fire-fighting and emergency response equipment in all weather conditions. Photographs taken by Mr. Taylor in 1997 and by Mr. Blackmer in 2003 show the areas next to tire piles as muddy soil with water-filled wheel ruts. Mr. Taylor described the area near the tire piles in two of his photographs as "churned up mud" that "appeared to be the result of someone attempting to access the pile in a non-road vehicle such as a loader or tractor with large

---

[5] Although no measurements of the tire piles are in the record, Mr. Blackmer's affidavit asserts that, on his visits to the site, he never saw that the tire piles had been kept within the required dimensions. The Respondent did not contest the allegations concerning the size of the piles. The photographs included with both Mr. Taylor's and Mr. Blackmer's affidavits show large piles of tires, with the piles close together, although the dimensions cannot be determined from the photographs.

wheels." (Ex. C, second, third and fourth photographs in attachment 2; Ex. D, paragraph 6(D) and 6(E), and third photograph in attachment 3.)

16. Waste tire stockpiles such as the one on the Site pose significant potential harm to the environment, including being a common breeding ground for mosquitos that can carry disease. Such stockpiles also pose public health and safety hazards due to their potential for fires. Tire fires have occurred at tire facilities in New York State and some of these fires have resulted in evacuation of people from the area, oil releases that can harm water quality, and/or large public expenditures for cleanup. Tire fires are difficult to extinguish and release air and water pollutants, as described in Mr. Taylor's affidavit and not contested by Respondent. (Ex. D, paragraph 8.)

17. Paragraph 9 of Mr. Taylor's affidavit is adopted as the evidence and the finding in support of the proposed remedial actions.

Further proceedings

A hearing will be scheduled concerning the issue of Respondent's current relation to the Site and any terms of the proposed penalty or remedial actions that may be affected by this issue.

The hearing will take place at the DEC Region 6 Office in Watertown, unless a party shows a good reason to have the hearing at another location. I will contact Mr. Young and Ann Beutel to schedule the date and time of the hearing.

If Respondent will be represented by an attorney in this matter, Ann Beutel or the attorney will need to contact me to identify the attorney and his/her mailing address and telephone number. My address, at the DEC Office of Hearings and Mediation Services, is 625 Broadway, Albany, New York 12233-1550 and the telephone number is 518-402-9003.

_____/s/_____
Susan J. DuBois
Administrative Law Judge

January 30, 2006
Albany, New York

TO: Randall C. Young, Esq.
NYS Department of Environmental
Conservation, Region 6
Dulles State Office Building
317 Washington Street
Watertown, New York 13601-3787

Rose Beutel
Old Martin Street Road
Carthage, New York 13619

Ann M. Beutel
POA for Rose Beutel
36880 Old Martin Street Road
Carthage, New York 13619