

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 27 of the  
New York State Environmental Conservation Law (ECL) and  
Title 6 of the Official Compilation of Codes, Rules and  
Regulations of the State of New York (NYCRR),

- by -

**ORDER**  
DEC File No.  
R4-2019-1224-90

**JAMES COOPER**  
**d/b/a COOPER'S USED AUTO PARTS,**

Respondent.

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This administrative enforcement proceeding concerns alleged violations of ECL article 27, and 6 NYCRR 360.9(a)(1) and subparts 361-6, 361-7 and 363-2, at a used auto parts business owned by respondent James Cooper d/b/a Cooper's Used Auto Parts. The business is located at 20 Chain Mountain Way, Averill Park, New York (site).

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by service of a notice of motion for order without hearing, in lieu of complaint, dated September 18, 2020, which respondent received on October 14, 2020. In its papers, Department staff sets forth the three causes of action, alleging that respondent James Cooper d/b/a Cooper's Used Auto Parts:

1. Operated a noncompliant waste tire stockpile at the site without a Department-issued permit or beneficial use determination, and thereby violated 6 NYCRR 360.9(a)(1) and 361-6.4;
2. Operated a vehicle dismantling facility without the required Department-issued facility registration, and thereby violated 6 NYCRR 361-7.3(a)(2); and
3. Disposed and stored non-exempt solid waste mixed with tree debris and construction and demolition (C&D) debris at the site without a Department issued registration or permit, and thereby violated 6 NYCRR 360.9(a)(1) and 363-2.1(g).

Based upon these alleged violations, Department staff requests that I:

1. Hold respondent in violation of 6 NYCRR 360.9(a)(1), 361-6.4, 361-7.3(a)(2), and 363-2.1(g);
2. Assess a civil penalty of thirty-five thousand seven hundred dollars (\$35,700);

3. Direct respondent to immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose;
4. Direct respondent to remove all waste tires and fragments thereof from the site to an authorized waste tire management facility and submit receipts to DEC staff demonstrating proper transport and disposal of the tires and fragments within ninety (90) days of the effective date of this order;
5. Direct respondent to submit a completed Part 360 registration form for a vehicle dismantler or, in the alternative, remove all end-of-life vehicles and scrap metal from the site for recycling within sixty (60) days of the effective date of this order;
6. Direct respondent to remove all surficial C&D debris that does not consist of uncontaminated concrete, asphalt, rocks, brick and soil within ninety (90) days of the effective date of this order; and
  - within 15 days of completing the removal of the unauthorized C&D debris, contact Department staff to schedule a site inspection (C&D removal inspection) and submit receipts to staff demonstrating proper disposal of the C&D debris at a facility authorized to receive it; and
  - within 30 days of staff's C& D removal inspection, cover the entire disposal area with 12 inches of uncontaminated soil, which must be seeded and stabilized to promote the establishment of vegetation and prevent erosion of the soil cover; and
7. Direct respondent to fully cooperate with the State and refrain from any activities that would impede or interfere with the State, its employees, contractors or agents, in the event that the State should be required to assume the responsibility for abatement of the waste tire stockpiles at the site or any of the other site restoration work required by my order.

Respondent did not file or serve a response to staff's motion papers. Accordingly, Department staff's motion is an unopposed motion for order without hearing (*see* 6 NYCRR 622.12). The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who prepared the attached summary report. I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

### **Liability**

As set forth in Department staff's supporting papers, inspections of the site that Department staff conducted on June 14, 2018 and July 25, 2019 revealed the presence of: approximately 10,000 to 15,000 waste tires and fragments thereof, less than 50 end-of-life vehicles, and non-exempt solid waste commingled with tree debris and C&D debris, (*see* Summary Report at 3 [Findings of Fact Nos. 5, 7-9]; Affidavit of Brian Maglienti sworn to August 26, 2020 [Maglienti Aff.] at unnumbered pages 2-3, ¶¶ 9-12, 17-21). The ALJ concluded

that Department staff made a prima facie showing on each of staff's causes of action and that pursuant to ECL 27-1901(6), the site also constituted a noncompliant waste tire stockpile (*see* Summary Report at 4-6).

I concur with the ALJ's determination that Department staff is entitled to a finding of liability on each cause of action.<sup>1</sup>

### **Penalty**

Department staff has requested a civil penalty in the amount of thirty-five thousand seven hundred dollars (\$35,700). Pursuant to ECL 71-2703, "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues." In addition to ECL 71-2703, the ALJ considered the Department's Civil Penalty Policy (DEE-1) dated June 20, 1990 and the Department's Solid Waste Enforcement Policy OGC-8 dated December 9, 2015. The ALJ concluded that a total penalty of thirty-five thousand seven hundred dollars (\$35,700) would be supported and appropriate (*see* Summary Report at 6-7).

I have given consideration to the number of violations and their duration and severity, respondent's lack of cooperation in addressing Department staff's efforts to secure compliance or resolve the violations (*see* Affirmation of Stephen Repsher, Esq. dated September 18, 2020 [Repsher Aff.], ¶¶ 29-30; Maglienti Aff., ¶¶ 15-23, 30). The civil penalty that Department staff seeks is consistent with ECL 71-2703, which is applicable to the violations established here, and Department guidance.

Based on the record before me, I conclude that the staff's requested civil penalty of thirty-five thousand seven hundred dollars (\$35,700) is supported and appropriate. I hereby impose a civil penalty in the amount that staff has requested and the ALJ has recommended, and direct that respondent submit payment of that amount to the Department within sixty (60) days of the service of this order upon him. Upon good cause shown by respondent, Department staff may in its discretion extend the time period for the payment of the civil penalty.

### **Corrective Action**

Department staff has requested that respondent be directed to immediately stop allowing waste tires to come onto the site in any manner or for any purpose. Staff requested respondent be directed to undertake additional corrective action as noted by items 3-6 on page 2 of this order.

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<sup>1</sup> As to the third cause of action, Department staff cited two regulatory provisions – 6 NYCRR 360.9(a)(1) and 363-2.1(g). The ALJ concluded that the facts in the record did not demonstrate a violation of 6 NYCRR 363-2.1(g). The ALJ however determined that staff made a prima facie showing that respondent is operating a facility for the disposal of unauthorized and non-exempt waste in violation of 6 NYCRR 360.9(a)(1), and this showing supports a finding of liability pursuant to the third cause of action (*see* Summary Report at 5-6).

I agree with the ALJ that staff's requested corrective action including but not limited to prohibiting waste tires from coming onto the site, removing specified C& D debris, removing waste tires and tire fragments, providing appropriate documentation regarding all waste removal, and either registering as a vehicle dismantler or removing end-of-life vehicles and scrap metal from the site for recycling, is supported by the record.

Staff also requested that I direct respondent to fully cooperate with the State and refrain from any activities that would impede or interfere with the State, its employees, contractors or agents in the event that the State should be required to assume the responsibility for abatement of the waste tire stockpiles at the site or any of the other site restoration work required by my order. I am including this language in the order to indicate to respondent his responsibilities in this regard.

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

- I. Department staff's motion for order without hearing, pursuant to 6 NYCRR 622.12, is granted.
- II. Based on record evidence, respondent James Cooper d/b/a Cooper's Used Auto Parts is adjudged to have violated the following:
  - A. 6 NYCRR 360.9(a)(1) and 361-6.4, by operating a noncompliant waste tire stockpile at 20 Chain Mountain Way, Averill Park, New York (site) without a Department issued permit or beneficial use determination;
  - B. 6 NYCRR 361-7.3(a)(2), by operating a vehicle dismantling facility at the site without the required Department-issued facility registration; and
  - C. 6 NYCRR 360-9(a)(1), by disposing and storing non-exempt solid waste mixed with tree debris and construction and demolition (C&D) debris at the site without a Department-issued registration or permit.
- III. Respondent James Cooper d/b/a Cooper's Used Auto Parts is assessed a civil penalty in the amount of thirty-five thousand seven hundred dollars (\$35,700) for the violations referenced in paragraph II of this order.

Within sixty (60) days of service of this order on respondent James Cooper d/b/a Cooper's Used Auto Parts, respondent shall pay the civil penalty in the amount of thirty-five thousand seven hundred dollars (\$35,700) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The payment of the civil penalty shall be submitted to the Department in accordance with paragraph VIII of this order. Upon good cause shown by respondent, Department staff in its discretion may extend the time period for the payment of the civil penalty.

- IV. Immediately on the service of this order on respondent James Cooper d/b/a Cooper's Used Auto Parts, respondent shall stop allowing any waste tires to come onto the site in any manner or method or for any purpose.
- V. Within sixty (60) days of service of this order on respondent James Cooper d/b/a Cooper's Used Auto Parts, respondent shall submit a completed Part 360 registration form for a vehicle dismantler; or in the alternative, remove all end-of-life vehicles and scrap metal from the site for recycling.
- VI. Within ninety (90) days of service of this order on respondent James Cooper d/b/a Cooper's Used Auto Parts, respondent shall remove all waste tires and any fragments thereof from the site and take the waste tires and fragments to an authorized waste tire management facility. Respondent shall submit receipts demonstrating proper transport and disposal of the waste tires and fragments to the Department.
- VII. Within ninety (90) days of service of this order on respondent James Cooper d/b/a Cooper's Used Auto Parts, respondent shall remove all surficial C&D debris that does not consist of uncontaminated concrete, asphalt, rocks, brick and soil; and
- A. within fifteen (15) days of completing the removal of the unauthorized C&D debris, respondent shall contact Department staff to schedule a site inspection and submit receipts to staff demonstrating proper disposal of the C&D debris at a facility authorized to receive it; and
  - B. within thirty (30) days of staff's inspection, respondent shall cover the entire disposal area with 12 inches of uncontaminated soil, which must be seeded and stabilized to promote the establishment of the vegetation and prevent erosion of the soil cover.
- VIII. Respondent James Cooper d/b/a Cooper's Used Auto Parts shall submit the civil penalty payment, registration, receipts and all other submissions to:
- Stephen Repsher, Esq.  
Assistant Regional Attorney  
NYSDEC Region 4  
1130 North Westcott Road  
Rotterdam, New York 12306.
- IX. Respondent James Cooper d/b/a Cooper's Used Auto Parts is directed to fully cooperate with the State and refrain from any activities that would impede or interfere with the State, its employees, contractors or agents in the event that the State should be required to assume the responsibility for abatement of the waste tire stockpiles at the site or with respect to any of the other site restoration work required by this order.

- X. The provisions, terms and conditions of this order shall bind respondent James Cooper d/b/a Cooper's Used Auto Parts and his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: /s/  
Basil Seggos  
Commissioner

Dated: Albany, New York  
February 22, 2021

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION**

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In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR),

- by -

**SUMMARY REPORT**

DEC File No.  
R4-2019-1224-90<sup>1</sup>

**JAMES COOPER  
d/b/a COOPER'S USED AUTO PARTS,**

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Respondent.

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Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Stephen Repsher, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent

**PROCEEDINGS**

By notice of motion for order without hearing in lieu of complaint dated September 18, 2020, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent James Cooper d/b/a Cooper's Used Auto Parts (respondent) for alleged violations of ECL article 27, 6 NYCRR 360.9(a)(1), 361-6.4, 361-7.3(a)(2) and 363-2.1(g) at respondent's used auto parts business located at 20 Chain Mountain Way, Averill Park, New York (site). Staff served the notice of motion with supporting papers on respondent by personal service on October 14, 2020.

Department staff alleges respondent violated the following:

1. 6 NYCRR 360.9(a)(1) and 361-6.4 for operating a noncompliant waste tire stockpile at the site without a Department issued permit or beneficial use determination (BUD);

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<sup>1</sup> The notice of motion and motion, which commenced this proceeding, use DEC File No. R4-2019-1224-90, but the supporting documents use DEC File No. R4-2020-1224-90. Because the matter was commenced using the 2019 file number, that number will be used in this report and the Commissioner's order.

2. 6 NYCRR 361-7.3(a)(2) for operating a vehicle dismantling facility at the site which receives no more than twenty-five (25) end-of-life vehicles per year and stores no more than fifty (50) end-of-life vehicles at any one time without a Department issued facility registration; and
3. 6 NYCRR 360.9(a)(1) and 363-2.1(g) for disposing and storing non-exempt solid waste mixed with tree debris at the site without a registration or permit.

Staff's papers consist of a notice of motion, motion for order without hearing (Motion) and the affirmation of Stephen Repsher, Esq. (Repsher Aff.), all dated September 18, 2020, and the affidavit of Brian Maglienti, P.E. II (Maglienti Aff.), sworn to August 26, 2020, attaching three exhibits (*see* Appendix A attached hereto). Respondent has not responded to staff's motion papers, although a response was due by November 3, 2020 (*see* 6 NYCRR 622.12[c]).

Staff requests that the Commissioner issue an order: (i) finding that respondent violated the regulations as set forth above; (ii) imposing a civil penalty of thirty-five thousand seven hundred dollars (\$35,700) on respondent; (iii) directing respondent to immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose; (iv) directing respondent to remove all waste tires and non-exempt C&D debris from the site to authorized facilities and submit receipts demonstrating proper transport and disposal of the waste within ninety (90) days of the effective date of the Commissioner's order; (v) directing respondent to submit a completed Part 360 registration form for a vehicle dismantler or remove all end-of-life vehicles and scrap metal from the site for recycling within sixty (60) days of the effective date of the Commissioner's order; (vi) directing respondent to fully cooperate with the State and refrain from any activities that would impede or interfere with the State, its employees, contractors or agents, in the event that the State should be required to assume the responsibility for abatement of the waste tire stockpiles at the site or any of the other site restoration work ordered by the Commissioner; and (viii) granting such other and further relief as may be deemed just and proper (*see* Repsher Aff., Wherefore Clause).

## FINDINGS OF FACT

The following facts are found based upon the pleadings and papers submitted with and in support of staff's motion for order without hearing:

1. Respondent James Cooper (respondent) is the owner and operator of Cooper's Used Auto Parts located at 20 Chain Mountain Way, Averill Park (Town of Poestenkill), New York (site). The site is identified as Tax Map Parcel No. 136.-9-33 on the Rensselaer County Tax Maps. (*See* Repsher Aff. ¶ 2; Maglienti Affidavit ¶ 8, Exhibits A and B.)
2. Respondent James Cooper conducts business at the site under the assumed name, Cooper's Used Auto Parts. (*See* Repsher Aff. ¶ 2; Maglienti Aff. ¶ 8.)
3. Brian Maglienti is employed in the Department's Region 4 office as a Professional Engineer II in the Division of Materials Management. (*See* Maglienti Aff. ¶ 1.)

4. As part of his duties, Mr. Maglienti inspects solid waste management facilities for compliance with solid waste regulations. (*See* Maglienti Aff. ¶ 4.)
5. On June 14, 2018, Mr. Maglienti inspected the site and observed more than 1,000 waste tires present at the site. In addition, he observed tree debris and C&D debris mixed together with other non-exempt waste. (*See* Maglienti Aff. ¶¶ 9-12; Exhibit A.)
6. At the conclusion of the June 14, 2018 inspection, Mr. Maglienti informed respondent that all materials, other than brush or stumps, needed to be removed if the site were to remain exempt from regulation under 6 NYCRR parts 360 and 361. Respondent indicated at that time that the non-exempt waste would be removed from the site. Mr. Maglienti also advised respondent that storage of more than 1,000 waste tires required a permit from the Department. (*See* Maglienti Aff. ¶¶ 15-16.)
7. On July 25, 2019, Mr. Maglienti conducted a second inspection of the site and observed that the conditions were unchanged from the June 14, 2018 inspection. (*See* Maglienti Aff. ¶ 17.)
8. During the July 25, 2019 inspection, Mr. Maglienti observed the following:
  - a. Ten to fifteen thousand waste tires and fragments thereof were located at the site;
  - b. Non-exempt wastes remained mixed with tree debris; and
  - c. Scrap metal, car parts and end-of-life vehicles scattered throughout the site, some of which were sorted to be sold for scrap. (*See* Maglienti Aff. ¶¶ 18-20, Exhibit B.)
9. Mr. Maglienti estimated that respondent stored less than 50 end-of-life vehicles and received no more than 25 end-of-life vehicles at the site in any given year. (*See* Maglienti Aff. ¶ 21, Exhibit B.)
10. On September 20, 2019, Mr. Maglienti sent a notice of violation to respondent together with a copy of the inspection report from the July 25, 2019 inspection. (*See* Maglienti Aff. ¶ 22, Exhibit B.)
11. The notice of violation informed respondent that the following violations had been observed during the July 25, 2019 inspection:
  - a. Storage of more than 1,000 waste tires on the ground at the site without a permit, in violation of 6 NYCRR 361-6.4;
  - b. Disposal at the site of unauthorized and non-exempt mixture of tree debris, concrete, brick, asphalt pavement, fill material, dimensional timbers and other C&D debris, in violation of 6 NYCRR 360.9(a)(1); and
  - c. Operation of a non-exempt unregistered vehicle dismantling facility, in violation of 6 NYCRR 361-7. (*See* Maglienti Aff. ¶ 23, Exhibit B.)

12. On January 16, 2020, Department staff offered to settle the matter by sending respondent a cover letter, order on consent and access agreement. Respondent did not respond to staff's offer. (*See Maglienti Aff.* ¶ 28, Exhibit C.)
13. As shown by the affidavit of service of Environmental Conservation Officer Zachary Crain (Crain Aff.), sworn to December 16, 2020, respondent was served personally on October 14, 2020 with Department staff's motion papers. (*See Crain Aff.*)
14. Respondent failed to file a response to Department staff's motion for order without hearing.

## DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law" (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report).

CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*see Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003).

Respondent has not submitted any response to Department staff's motion and, therefore, has failed to provide any material fact that would require a hearing. On an unopposed motion for order without hearing, the issue is whether Department staff has established its entitlement to summary judgment on the violations alleged in the motion (*see Matter of Edelstein*, Order of the Commissioner, July 18, 2014, at 2; *see also Matter of Hunt*, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2).

Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with the affidavit of an environmental engineer who inspected respondent's facility and described the violations of the solid waste regulations. Based on review of the affirmation, affidavit and the exhibits attached thereto, I conclude that Department staff's proof presents a prima facie showing on each cause of action, as discussed below.

### First Cause of Action

Staff alleges that respondent stored ten to fifteen thousand waste tires or fragments thereof at the site without a permit or a BUD issued by the Department. Pursuant to 6 NYCRR 360.2(b)(309), a "waste tire handling and recovery facility means a facility that stores, handles

and/or processes waste tires.” Subpart 361-6 of 6 NYCRR sets forth the requirements for waste tire handling and recovery facilities. Respondent’s storage of more than 1,000 waste tires is not exempt from regulation and does not qualify to be a registered facility (*see* 6 NYCRR 361-6.2 and 361-6.3). Pursuant to subpart 361-6, a “waste tire handling and recovery facility that is not an exempt facility or subject to the registration provisions of section 361-6.3 of this Subpart must obtain a permit” (6 NYCRR 361-6.4).

I conclude that Department staff has made a prima facie showing that respondent is storing more than one thousand waste tires without a permit or a BUD to do so (*see* Findings of Fact Nos. 5, 8 and 11) in violation of 6 NYCRR 360.9(a)(1) and 361-6.4. Moreover, the site also meets the statutory definition of a noncompliant waste tire stockpile - a site, facility or parcel of property where more than 1,000 waste tires are accumulated, stored or buried in a manner that the Department determines violates any order, law or regulation related to waste tires, waste tire storage facilities or solid waste (*see* ECL 27-1901[6]). Accordingly, staff’s motion for an order without hearing on the first cause of action is granted.

### Second Cause of Action

Staff alleges that respondent is operating a vehicle dismantling facility at the site by storing less than fifty end-of-life vehicles and receiving less than twenty-five end-of-life vehicles per year without a Department issued facility registration. A “vehicle dismantling facility means a facility that decommissions, dismantles, and recycles end of life vehicles” (6 NYCRR 360.2[b][305]). Department staff has made a prima facie showing that respondent is storing less than fifty end-of-life vehicles, receiving less than twenty-five end-of-life vehicles per year and that scrap metal, car parts and end-of-life vehicles are scattered throughout the site, some of which were sorted to be sold for scrap (*see* Findings of Fact Nos. 8-9).

Pursuant to subpart 361-7, vehicle dismantling facilities that receive no more than 25 end-of-life vehicles per year and store no more than 50 end-of-life vehicles on-site at any one time are subject to the registration provisions of 6 NYCRR 360.15 and 361-7.5 (*see* 6 NYCRR 361-7.3[a][2]). I conclude that Department staff has made a prima facie showing that respondent is operating a vehicle dismantling facility without a registration in violation of 6 NYCRR 361-7.3(a)(2). Therefore, staff’s motion for an order without hearing on the second cause of action is granted.

### Third Cause of Action

Staff alleges that respondent stored and disposed of non-exempt solid waste at the site without a permit. Staff’s proof demonstrates that tree debris, C&D debris, fill materials, dimensional timbers and other solid waste were mixed together and disposed at the site without a permit. More specifically, staff alleges that exempt waste is commingled with non-exempt waste at the site which renders all the waste non-exempt, and therefore requires a permit.

Certain facilities are exempt from the landfill regulations found in 6 NYCRR subpart 363-2. Exempt facilities include tree debris disposal facilities and facilities that accept for disposal recognizable, uncontaminated concrete or concrete products (including those that have

embedded steel or fiberglass reinforcing rods), asphalt pavement, brick, glass, rock, and general fill from construction and demolition activities (exempt C&D debris). Both exemptions are subject to certain conditions including: no fee is obtained by the facility for acceptance of the waste and waste can only be accepted during daylight hours (*see* 6 NYCRR 363-2.1[g] and [h]). Tree debris means “waste consisting of tree and shrub parts, including branches, stumps, and trunks, as well as other similar woody vegetation. Tree debris does not include pallets or dimensional lumber and other similar wood material used in construction” (*see* 6 NYCRR 360.2[b][283]). Exempt C&D debris does not include dimensional lumber, other C&D debris, unrecognizable fill materials or other solid waste (*see* 6 NYCRR 363-2.1[h]). Department staff’s proof demonstrates that dimensional timbers and other waste are commingled with exempt tree and C&D debris.

I conclude that Department staff has made a prima facie showing that respondent is operating a facility for the disposal of unauthorized and non-exempt waste in violation of 6 NYCRR 360.9(a)(1). Staff also alleges that the facts proven constitute a violation of 6 NYCRR 363-2.1(g), the provision that exempts tree debris from regulation provided the facility meets all the conditions of that paragraph. I disagree. The facts do not demonstrate that respondent violated any of the required conditions for an exempt tree debris disposal facility (*see* 6 NYCRR 363-2.1[g][1]-[4]). The facts demonstrate that respondent commingled non-exempt waste with tree debris, and therefore such debris does not meet the regulatory definition of tree debris and, in total, is non-exempt waste requiring a permit. Accordingly, staff’s motion for an order without hearing on the third cause of action alleging violation of 6 NYCRR 360.9(a)(1) is granted.

### Penalty

Department staff requests that respondent be assessed a civil penalty of thirty-five thousand seven hundred dollars (\$35,700). Pursuant to ECL 71-2703, “[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues.”

Department staff’s proof demonstrates that the violations proven on the first and third causes of action have been continuing since June 14, 2018 and those proven on the second cause of action have been continuing since July 25, 2019. As of September 18, 2020, the date of staff’s notice of motion, there were 827 days of violation on the first and third causes of action and 421 days of violation on the second cause of action. Applying a penalty of \$7,500 for the first day of violation and \$1,500 for each day the violations continued results in a maximum statutory penalty accumulated as of September 18, 2020 of \$3,130,500 ( $[\$7,500 \times 3] + [2 \times \$1,500 \times 826 \text{ days}] + [\$1,500 \times 420 \text{ days}]$ ).

In support of the requested penalty, staff discussed several factors consistent with the Department’s Civil Penalty Policy (DEE-1), including the importance of the violations to the overall statutory scheme, the continuation of the violations, and the potential harm caused by the

violations. Staff also applied the Solid Waste Enforcement Policy (OGC-8, December 9, 2015) to arrive at base penalties of: (1) \$9,000 on the first cause of action (\$7,500 + \$1,500); (2) \$7,500 on the second cause of action; and (3) \$9,000 on the third cause of action (\$7,500 + \$1,500), for a total base penalty of \$25,500. For the gravity component staff considered harm to the environment, importance to the program, size of the operation, prior warnings or violations and size of the company to arrive at a gravity component penalty of \$17,850, which according to staff's use of a civil penalty worksheet is the recommended penalty for a settled matter (*see Maglienti Aff.* ¶¶ 24-27).

Department staff also discussed the amount of penalty that staff offered in settlement and attached the proposed order on consent in support of that discussion. It may be appropriate for staff to discuss the attempts made by staff to bring respondent into compliance or discuss penalty amounts that specific enforcement policies or penalty guidance recommend for settled penalties, but I do not consider staff's statements regarding the settlement offer or the order on consent in determining whether staff supported the requested penalty. Instead, Department staff must make a prima facie showing that staff's requested penalty is supported and appropriate by applying the penalty calculation factors provided in DEE-1 and any program specific enforcement policy or penalty guidance to the facts of each matter.

As discussed above, staff's papers provide a rational basis for the requested penalty. Although it is not expressly stated by staff, the base penalty of \$25,500 added to the gravity component penalty of \$17,850 equals a total penalty of \$43,350, which would have been supported on this record due to the continuing nature of the violations and lack of cooperation by respondent.<sup>2</sup> Accordingly, I conclude that a total civil penalty of \$35,700 is supported and appropriate.

### Corrective Action

Department staff requests as part of the relief in this matter that respondent be directed to:

1. Immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose;
2. Within 90 days of the effective date of the Commissioner's order, remove all waste tires and any fragments thereof from the site to an authorized waste tire management facility and submit receipts demonstrating proper transport and disposal to the Department;
3. Within 60 days of the effective date of the Commissioner's order, submit a completed Part 360 registration form for a vehicle dismantler; or in the alternative, remove all end-of-life vehicles and scrap metal from the site for recycling;
4. Within 90 days of the effective date of the Commissioner's order, remove all surficial C&D debris that does not consist of uncontaminated concrete, asphalt, rocks, brick and soil; and

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<sup>2</sup> Staff mentions in its September 20, 2019 notice of violation that a property adjacent to the site was the subject of a 2002 Order on Consent #R4-2002-0227045 for unauthorized storage of waste tires and unauthorized disposal of C&D debris. Staff, however, does not identify the respondent in the 2002 matter (*see Maglienti Aff. Exhibit B, Notice of Violation, p. 2*).

- (a) within 15 days of completing the removal of the unauthorized C&D debris, contact Department staff to schedule a site inspection and submit receipts to staff demonstrating proper disposal of the C&D debris at a facility authorized to receive it; and
  - (b) within 30 days of staff's inspection, cover the entire disposal area with 12 inches of uncontaminated soil, which must be seeded and stabilized to promote the establishment of vegetation and prevent erosion of the soil cover; and
5. Fully cooperate with the State and refrain from any activities that would impede or interfere with the State, its employees, contractors or agents, in the event that the State should be required to assume responsibility for abatement of the waste tire stockpiles at the site or any of the other site restoration work ordered by the Commissioner.

I conclude that Department staff's request for corrective action is supported by the record in this matter and appropriate to address the continuing violations of the ECL and regulations.

### **CONCLUSIONS OF LAW**

1. By operating a noncompliant waste tire stockpile without a Department issued permit or a BUD to do so, respondent violated 6 NYCRR 360.9(a)(1) and 361-6.4.
2. By operating a vehicle dismantling facility at the site, which receives no more than twenty-five (25) end-of-life vehicles per year and stores no more than fifty (50) end-of-life vehicles at any one time, without a Department issued facility registration, respondent violated 6 NYCRR 361-7.3(a)(2).
3. By operating a facility for the disposal and storage of unauthorized and non-exempt waste mixed with tree debris, respondent violated 6 NYCRR 360.9(a)(1).

### **RECOMMENDATIONS**

Based on the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for order without hearing, on staff's first, second and third causes of action, as discussed above, pursuant to 6 NYCRR 622.12.
2. Holding that respondent James Cooper d/b/a Cooper's Used Auto Parts violated the following:
  - a. 6 NYCRR 360.9(a)(1) and 361-6.4 by operating a noncompliant waste tire stockpile at the site without a Department issued permit or beneficial use determination;
  - b. 6 NYCRR 361-7.3(a)(2) by operating a vehicle dismantling facility at the site, which receives no more than twenty-five (25) end-of-life vehicles per year and stores no more than fifty (50) end-of-life vehicles at any one time, without a Department issued facility registration; and

- c. 6 NYCRR 360-9(a)(1) by disposing and storing non-exempt solid waste mixed with tree debris at the site without a Department issued registration or permit.
3. Directing respondent James Cooper d/b/a Cooper's Used Auto Parts to pay a civil penalty of thirty-five thousand seven hundred dollars (\$35,700) within sixty (60) days of service of the Commissioner's order on respondent.
4. Directing respondent James Cooper d/b/a Cooper's Used Auto Parts to immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose.
5. Directing respondent James Cooper d/b/a Cooper's Used Auto Parts to perform the following:
  - a. Within ninety (90) days of service of the Commissioner's order on respondent, respondent shall remove all waste tires and any fragments thereof from the site to an authorized waste tire management facility and submit receipts to the Department demonstrating proper transport and disposal of the waste tires and fragments at an authorized facility;
  - b. Within sixty (60) days of service of the Commissioner's order on respondent, respondent shall submit a completed Part 360 registration form for a vehicle dismantler; or in the alternative, remove all end-of-life vehicles and scrap metal from the site for recycling;
  - c. Within ninety (90) days of service of the Commissioner's order on respondent, respondent shall remove all surficial C&D debris that does not consist of uncontaminated concrete, asphalt, rocks, brick and soil; and
    - (i) within fifteen (15) days of completing the removal of the unauthorized C&D debris, respondent shall contact Department staff to schedule a site inspection and submit receipts to staff demonstrating proper disposal of the C&D debris at a facility authorized to receive it; and
    - (ii) within thirty (30) days of staff's inspection, respondent shall cover the entire disposal area with 12 inches of uncontaminated soil, which must be seeded and stabilized to promote the establishment of the vegetation and prevent erosion of the soil cover.
6. Directing respondent to fully cooperate with the Department, provide all necessary access, and refrain from any activities that interfere with the Department, its employees, contractors, or agents in the event that the Department should take over abatement of the waste tire stockpiles, or any other site restoration work ordered by the Commissioner at the site.

7. Directing respondent James Cooper d/b/a Cooper's Used Auto Parts to submit the penalty payment, registration, receipts and all other submissions to the following:

Stephen Repsher, Esq.  
Assistant Regional Attorney  
NYSDEC Region 4  
1130 North Westcott Road  
Rotterdam, New York 12306

8. Directing such other and further relief as may be deemed just, proper and equitable under the circumstances.

/s/  
Michael S. Caruso  
Administrative Law Judge

Dated: February 1, 2021  
Albany, New York

## APPENDIX A

*Matter of James Cooper d/b/a Cooper's Used Auto Parts*  
DEC File No. R4-2019-1224-90  
Motion for Order Without Hearing

1. Notice of Motion for an Order Without Hearing, dated September 18, 2020
2. Motion for Order Without Hearing, dated September 18, 2020
3. Affirmation of Stephen Repsher in Support of Motion for Order Without Hearing, dated September 18, 2020<sup>3</sup>
4. Affidavit of Brian Maglienti, P.E. II, in Support of Motion for Order Without Hearing, sworn to August 26, 2020, attaching the following exhibits:
  - A. Continuation sheet from 6 NYCRR Part 360 inspection report, dated June 14, 2018, with the following six photographs attached:

Photo #1 Photograph of waste tire pile in wooded area  
Photo #2 Photograph of waste tire piles  
Photo #3 Photograph of dimension timber mixed with other debris  
Photo #4 Photograph of mixture of tree debris, C&D debris and dimensional timbers  
Photo #5 Photograph of waste tire piles  
Aerial photograph of site
  - B. Notice of Violation, dated September 20, 2019; Solid Waste Management Facility Inspection Report, dated July 25, 2019, with the following attached:

Attachment 1 Aerial photograph of site demonstrating the location of six waste tire piles and listing the estimated waste tires in each location  
Attachment 2 Photograph of dimensional timbers  
Attachment 3 Photograph of C&D debris and tree debris
  - C. Cover letter, dated January 16, 2020, from Stephen Repsher to James Cooper, with order on consent and agreement for access and removal of waste tires attached
5. Affidavit of Service of Environmental Conservation Officer Zachary Crain, sworn to December 16, 2020

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<sup>3</sup> The affirmation states that it attached the 2019 Rensselaer County Tax Roll as Exhibit A, but no exhibit was attached.