

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 27 of the Environmental Conservation Law of the State of New York (“ECL”) and Parts 211, 215 and 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),¹

ORDER

DEC Case No.
R5-20134024-2075

-by-

STEVEN R. HAESSLY,

Respondent.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) that respondent Steven R. Haessly (“respondent”) violated ECL 19-0105, ECL 27-0703(6), 6 NYCRR 360-13.1(b), 360-1.5(a), 360-1.7(a)(1)(i), 360-1.14(q), 211.1 and 6 NYCRR Part 215, relating to the unpermitted storage and disposal of thousands of waste tires, and the open burning of most of those tires over the course of two days in April 2013. The tires were on property that he owns and at which he resides located at 870 New York State Route 197, Town of Argyle, Washington County, New York (“site”).

Administrative Law Judge (“ALJ”) Richard R. Wissler of the Department’s Office of Hearings and Mediation Services prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

Background

An inspection by Department staff on October 23, 2012 revealed the presence of between 5,000 and 7,000 waste tires situated in various piles at the site (see Default Summary Report at 5, [Finding of Fact (“FOF”) Nos. 5, 6, 7]). The site is approximately thirty (30) acres in size (see id. at 4 [FOF No. 2]). Pursuant to a Notice of Violation issued by Department staff in January 2013, respondent was directed to remove the waste tires from the site by July 31, 2013 (see id. at 5 [FOF No. 9]). On April 7, 2013, an unattended camp fire at the site ignited a brush fire which spread and led to the burning of most of the waste tires on the site (see id. at 5 [FOF No. 10] and 6-7 [FOF No. 18]). The brush fire lasted for two days and spread across approximately four and one-half acres of the site (see Staff Exhibit [“Ex.”] 22). The burning tires produced a large plume of black smoke, and required extensive efforts by local, State and federal agencies to extinguish the fire and address its consequences (see Default Summary Report at 6 [FOF Nos.

¹ The original caption in staff’s complaint referenced alleged violations of ECL article 71. However, staff cited no specific violations of article 71 in any of the causes of action, referring to ECL 71-2103 and ECL 71-2703 with respect to calculating the proposed civil penalty (see Complaint ¶¶ 73-74). Accordingly, the caption has been modified to delete the reference to alleged violations of article 71.

12-17)).

During several site visits and inspections conducted following the fire, staff observed areas containing partially and fully burned tires, significant amounts of ash residue and steel belts and rims, as well as over 1,000 unburned tires (see id. at 7-8 [FOF Nos. 19-21, 24-27]). Department staff informed respondent on several occasions that he was required to remove all of the waste tires from the site, clean up the ash residue, rims and other debris, and complete these activities by July 31, 2013 (see id. at 7 [FOF Nos. 21, 24, and 25]).

On October 7, 2013, Department staff personally served respondent with a notice of hearing and complaint dated October 2, 2013. Respondent failed to answer the complaint within twenty days (see 6 NYCRR 622.4[a]). Staff's papers also provided respondent with notice that a pre-hearing conference would be held on October 29, 2013 at the Department's Region 5 offices. Respondent failed to appear at the pre-hearing conference.

On August 29, 2014, respondent was personally served with a notice of default hearing stating that, at a calendar call at the Department's Region 5 offices scheduled for October 9, 2014, staff intended to move for a default judgment against respondent due to his failure to answer the complaint and to appear for the pre-hearing conference. At the October 9, 2014 calendar call in the Department's Region 5 offices, this matter was called before ALJ Wissler. Staff was represented by Michelle A. Crew, Esq., Regional Attorney for Region 5. No one appeared on behalf of respondent. Pursuant to 6 NYCRR 622.15, Ms. Crew orally moved for a default judgment against respondent based upon his failure to answer the complaint and to appear for the pre-hearing conference. In support of the motion for default judgment, Ms. Crew also examined five Department witnesses, and submitted 29 exhibits and a proposed order.

Discussion

A. Liability

Staff's first cause of action alleges that respondent violated ECL 27-0703(6) and 6 NYCRR 360-13.1(b) by "stockpiling over 1,000 waste tires without a permit" (Ex. 1b, ¶ 66). Pursuant to ECL 27-0703(6), an owner or operator of a solid waste management facility engaged in the storage of 1,000 or more waste tires must either apply for a permit or cease operations and remove and properly dispose of the waste tires. Similarly, 6 NYCRR 360-13.1(b) states 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." The ALJ recommended that I hold respondent in violation of ECL 27-0703(6) and 6 NYCRR 360-13.1(b) (see Default Summary Report at 9, 10). I adopt the ALJ's recommendation with respect to the first cause of action.

Staff's second cause of action alleges that respondent violated 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i) by "discarding, discharging, and/or disposing of waste tires, ash residue from combusted tires, of steel rims and belts, and of other debris" at an unpermitted facility (Ex. 1b, ¶ 68). I adopt the ALJ's recommendation with respect to the second cause of action (see Default Summary Report at 9, 10), and hold that respondent operated an unpermitted solid waste management facility in violation of 6 NYCRR 360-1.7(a)(1)(i), and disposed of solid

waste at a facility not authorized to accept such waste in violation of 6 NYCRR 360-1.5(a).

Staff's third cause of action alleges, in part, that respondent violated ECL 19-0105 (see Ex. 1b, ¶ 70). ECL 19-0105, which is entitled "Declaration of purpose," simply describes the purposes of ECL article 19, and does not contain any specific prohibitions or enforceable requirements. I therefore do not adopt the ALJ's statement that staff made out a prima facie case that respondent violated that statutory provision.

Staff's third cause of action also references violations of 6 NYCRR 215.2 and 211.1 (see Ex. 1b, ¶ 70). Section 215.2 contains a prohibition stating that "no person shall burn, cause, suffer, allow or permit the burning of any materials in an open fire." Section 211.1 states that no person shall "cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property." Staff's fourth cause of action alleges that respondent violated 6 NYCRR 360-1.14(q) by "causing or allowing open burning at a solid waste management facility" (Ex. 1b, ¶ 72). With certain exceptions not applicable to the facts of this case, section 360-1.14(q) prohibits the "open burning at a solid waste management facility."

The tickets that were issued relating to the fire were issued to a Shea M. Ball, who was residing on the site (see Hearing Exs. 23 and 28). The complaint form prepared by the Department's Office of Public Protection references a deposition of Ms. Ball in which she states that she and two friends (Dustin Gilligan and Rob Sexton) "were having a camp fire" on the site (Hearing Ex. 26, at unnumbered page 3). The complaint form states that the fire at the site "was the result of the camp fire not [being] extinguished completely" (see id.). Nothing in the record places respondent at the location of, or indicates that he started or gave permission for, the camp fire that led to the combustion of the waste tires. Staff, in its memorandum of law, contends that Ms. Ball "was apparently a tenant [of respondent's] in some capacity" and that respondent "knew or should have known of the risky conditions and conduct that existed on his property" (Staff Memorandum of Law, at 1, 5). However, the complaint does not allege, and the evidence submitted in support of the default motion, does not sufficiently establish, a landlord/tenant theory of liability for respondent. Moreover, the ALJ did not make any findings that would support respondent's liability under a landlord/tenant theory.

In any event, respondent's liability for the violations set forth in the first and second causes of action, supports Department staff's requested civil penalty as discussed below. Accordingly, I need not reach a determination as to respondent's liability under the third and fourth causes of action.

B. Civil Penalty

Although the complaint requested a civil penalty in the amount of ninety-four thousand three hundred dollars (\$94,300), staff moved at the October 9, 2014 hearing to reduce the total proposed civil penalty, and the ALJ granted staff's motion (see Default Summary Report at 10). Staff now seeks a total civil penalty of seventy-six thousand one hundred dollars (\$76,100), of which fifteen thousand two hundred twenty dollars (\$15,220) would be payable, and sixty

thousand eight hundred eighty dollars (\$60,880) would be suspended (see id.; see also Exs. 16 [penalty calculation analysis for solid waste violations] and 29 [penalty calculation analysis for air violations]) contingent upon respondent's compliance with the remedial relief that staff is requesting.

ECL 71-2703(1)(a) provides that “[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 such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues.” This penalty provision applies to the violations cited in the first and second of staff's causes of action for which I find respondent liable.

Based on the duration of the violations of ECL 27-0703(6) and 6 NYCRR 360-13.1(b) with respect to the unpermitted stockpiling of over 1,000 waste tires at the site, and 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i), with respect to solid waste management facility requirements, staff's penalty request is below the statutory maximum that could be assessed. As noted, Department staff found that the site contained an estimated 5,000 to 7,000 waste tires during an October 23, 2012 inspection. The tires were not removed, notwithstanding a January 24, 2013 notice of violation issued by Department staff to respondent. Further inspections in 2013 and 2014 after the April 7, 2013 fire indicated that tires remained on the site and no cleanup had occurred. From the period of the October 23, 2012 Department staff inspection to the date of staff's complaint (October 2, 2013), the maximum civil penalty for violating the referenced statutory and regulatory provisions in the first and second causes of action would be well into the hundreds of thousands of dollars. Moreover, the circumstance that a significant waste tire fire occurred at the site is a substantial aggravating factor warranting a substantial civil penalty in this matter. Waste tire fires are precisely the harm that the non-compliant waste tire stockpile statute and regulations are designed to prevent.

Department Staff's requested penalty of seventy-six thousand one hundred dollars (\$76,100), of which fifteen thousand two hundred twenty dollars (\$15,220) would be payable, and sixty thousand eight hundred eighty dollars (\$60,880) would be suspended provided that respondent complies with the requested remedial relief, is authorized and appropriate given the serious nature of respondent's solid waste violations and the evidence and testimony submitted. Respondent is hereby directed to pay the non-suspended portion (that is, fifteen thousand two hundred twenty dollars [\$15,220]) within thirty (30) days of the service of this order upon respondent. In the event that respondent fails to comply with the remedial relief set forth in this order, the documentation of the authorized disposal of the waste tires and other solid waste material, or the payment of the non-suspended portion of the civil penalty, respondent shall be immediately responsible for the payment of the suspended portion of the civil penalty.

Staff has also requested that, if respondent fails to comply with the requirements of this order with respect to removal and proper disposal of the waste tires and other solid waste at the site, respondent will be subject to an additional civil penalty of one dollar (\$1.00) for every ten (10) pounds of tires or other solid waste removed from the site by staff or its agent. Even with the imposition of this further civil penalty assessment of one dollar (\$1.00) for every ten (10)

pounds of tires or other solid waste removed from the site by staff or its agent, in addition to the seventy-six thousand one hundred dollar (\$76,100) civil penalty assessed, the total penalty assessment would be below the statutory maximum.

C. Remedial Relief

I also adopt the ALJ's recommendations with respect to the remedial relief, as modified herein. Within ninety (90) days of service of this order upon respondent, he shall retain the services of an authorized waste tire transporter, and remove all of the waste tires remaining on the site. The tires shall be taken to an authorized solid waste management facility.² Within ninety (90) days of service of this order upon respondent, he shall complete the removal of all ash residue from the combustion of the tires on the site, all rims, belts and any and all other solid waste remaining on the site, to an authorized solid waste management facility.³ In each case, respondent shall notify Department staff of the identity of the transporter(s) to be used at least two (2) business days prior to the removal of the waste from the site.

Within five (5) business days of the removal of the waste tires and the other solid waste from the site, respondent shall submit receipts and other documentation to Department staff documenting both the transport of such tires and other solid waste, and the acceptance of the tires and the other solid waste at authorized facilities.

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

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment on the complaint is hereby granted. Respondent Steven R. Haessly is adjudged to be in default and has waived his right to a hearing in this proceeding.
- II. Moreover, based upon record evidence, respondent Steven R. Haessly is adjudged to have violated:
 - A. ECL 27-0703(6) and 6 NYCRR 360-13.1(b) by stockpiling over 1,000 waste tires at a parcel of real property that he owns and at which he resides located at 870 New York State Route 197, Town of Argyle, Washington County, New York ("site"), without a permit issued by the Department; and
 - B. 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i) by discarding, discharging, and/or disposing of waste tires, ash residue from

² Staff requested, and the ALJ recommended, that respondent be directed to dispose of such tires at an "authorized recycling facility" (Ex. 1b, WHEREFORE Clause, ¶ C.i.). Respondent may dispose of such tires at any solid waste management facility that is authorized to accept the tires.

³ Staff requested, and the ALJ recommended, that respondent be directed to dispose of this solid waste at an "authorized recycling facility" (Ex. 1b, WHEREFORE Clause, ¶ C.iii.). Respondent may dispose of such solid waste at any solid waste management facility that is authorized to accept the waste.

combusted tires, steel rims and belts, and other debris at the site.

- III. Within ninety (90) days of the service of this order upon him, respondent Steven R. Haessly shall complete the removal of all waste tires remaining on the site to an authorized solid waste management facility. Respondent shall notify Department staff of the identity of the transporter(s) to be used at least two (2) business days prior to the removal of the waste tires from the site.
- IV. Within five (5) business days of the date of removal of the waste tires from the site, respondent Steven R. Haessly shall submit to Department staff receipts and other documentation with respect to the transport of the waste tires, and their acceptance by an authorized solid waste management facility.
- V. Within ninety (90) days of the service of this order upon him, respondent Steven R. Haessly shall complete the removal of all ash residue from the combustion of the tires on the site, all rims, belts and any and all other solid waste remaining on the site, to an authorized solid waste management facility. Respondent shall notify Department staff of the identity of the transporter(s) to be used at least two (2) business days prior to the removal of the waste from the site.
- VI. Within five (5) business days of the date of removal of all ash residue from the combustion of the tires on the site, all rims, belts and any and all other solid waste from the site, respondent Steven R. Haessly shall submit to Department staff receipts and other documentation with respect to the transport of the ash residue, rims, belts and any and all other solid waste, and the acceptance of these materials by an authorized solid waste management facility.
- VII. Respondent Steven R. Haessly is hereby assessed a civil penalty in the amount of seventy-six thousand one hundred dollars (\$76,100), of which sixty thousand eight hundred eighty dollars (\$60,880) is suspended contingent upon respondent's compliance with the terms and conditions of this order. The non-suspended portion of the penalty, fifteen thousand two hundred twenty dollars (\$15,220), is due and payable within thirty (30) days of the service of this order upon respondent. Payment of the civil penalty shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to:

New York State Department of Environmental
Conservation
Office of the General Counsel – Region 5
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977
Attn: Michelle A. Crew, Esq., Regional Attorney

Should respondent Steven R. Haessly fail to comply to Department staff's satisfaction with the provisions of Paragraphs III, IV, V, or VI of this order, or fail to pay the non-suspended portion of the civil penalty as set forth in Paragraph VII of this order, the suspended portion of the civil penalty shall become immediately due and payable and shall be submitted in the same form and to the same address as the non-suspended portion of the penalty.

- VIII. In the event that respondent Steven R. Haessly fails to comply with the remedial relief set forth in Paragraphs III and V of this order, respondent shall be assessed an additional civil penalty of one dollar (\$1.00) for every ten (10) pounds of tires or other solid waste that Department staff removes from the site. Following receipt of an invoice from Department staff or staff's agent, respondent shall submit payment of this additional civil penalty in the same form and to the same address set forth in Paragraph VII.
- IX. All communications from respondent to the Department concerning this order shall be directed to Michelle A. Crew, Esq., at the address referenced in paragraph VII of this order.
- X. The provisions, terms and conditions of this order shall bind respondent Steven R. Haessly and his agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____/s/
Basil Seggos
Commissioner

Dated: August 23, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 19 and 27 of the Environmental Conservation Law of the State of New York (“ECL”) and Parts 211, 215 and 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

DEFAULT SUMMARY
REPORT

DEC No. R5-20130424-2075

-by-

STEVEN R. HAESSLY,

Respondent.

Procedural History and Background

On October 7, 2013, staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) personally served respondent Steven R. Haessly with a notice of hearing and complaint dated October 2, 2013, containing four causes of action alleging various violations of ECL articles 19 and 27 and 6 NYCRR parts 211, 215 and 360 that occurred at real property he owns located at 870 New York State Route 197, Town of Argyle, Washington County, New York (“site”). The site encompasses approximately 30 acres and is improved by a residence occupied by respondent and, at the time of the incidents alleged in the complaint, by one Shea M. Ball, an adult female. The site contains an area utilized for camping which has been the location of recreational campfires and bonfires. A tributary to Dead Creek, a Class C water body, runs through the northern half of the property.

An inspection by Department staff in October 2012 revealed the presence of between 5,000 and 7,000 waste tires situated in various piles at the site. Pursuant to a Notice of Violation issued by the Department in January 2013, respondent was directed to remove the waste tires from the site by July 31, 2013. On April 7, 2013, a brush fire occurred at the site caused by a campfire at the site which had been left unattended. The brush fire lasted for two days and spread across approximately four and one-half acres of the site. The fire burned the majority of the waste tires at the site. The burning tires produced a large plume of toxic black smoke, impacted local roads and residents, and required the combined efforts of local, state and federal agencies to extinguish the fire and address its aftermath.

Based upon the foregoing events, the complaint articulates four causes of action alleging the following statutory and regulatory violations against respondent:

- a. As to the first cause of action, violations of ECL 27-0703(6) and 6 NYCRR 360-13.1(b) “in stockpiling over 1,000 waste tires without a permit” issued by the Department;

- b. As to the second cause of action, violations of 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i) “in discarding, discharging, and/or disposing of waste tires, ash residue from combusted tires, of steel rims and belts, and of other debris in connection with the noncompliant stockpiling of waste tires;”
- c. As to the third cause of action, violations of ECL 19-0105, 6 NYCRR part 215 and 6 NYCRR 211.1 “in causing or allowing an unattended fire that resulted in the combustion of waste tires on the property;” and
- d. As to the fourth cause of action, a violation of 6 NYCRR 360-1.14(q) “in causing or allowing open burning at a solid waste management facility.”

The complaint seeks an order of the Commissioner:

- (1) Imposing a civil penalty in the amount of \$94,300.00;¹
- (2) Imposing an additional civil penalty of one dollar (\$1.00) for every ten (10) pounds of tires or other solid waste removed from the site by Department staff in the event that respondent fails to comply with the injunctive relief hereinafter requested;
- (3) Ordering the following injunctive relief:
 - (a) Within ninety (90) days of service on respondent of the Commissioner’s Order, Respondent shall complete the removal of all waste tires remaining on the property to an authorized recycling facility. Respondent shall retain the services of an authorized waste tire transporter and shall notify Department staff of the identity of said transporter at least two (2) business days prior to the removal of the waste tires from the property;
 - (b) Within five (5) business days of the date of removal, respondent shall submit receipts to Department staff documenting both the transport of said waste tires, and their acceptance by an authorized recycling facility;
 - (c) Within ninety (90) days of service on respondent of the Commissioner’s Order, respondent shall complete the removal of all ash residue from the combustion of the tires on the property, all rims, belts and any and all other solid waste remaining on the property, to an authorized recycling facility. Respondent shall retain the services of an authorized waste tire transporter and shall notify Department staff of the identity of the transporter at least two (2) business days prior to the removal of the solid waste from the property;
 - (d) Within five (5) business days of the date of removal, respondent shall submit receipts to Department staff documenting both the transport of said solid waste, and the acceptance of said waste by an authorized recycling facility; and

¹ As will be discussed herein, at the default hearing on October 9, 2014, Department staff moved to reduce this amount to \$76,100.00. This motion was granted by the ALJ.

(4) Granting such other and further relief as may be deemed just and proper.

The notice of hearing annexed to and served with the complaint on October 7, 2013, indicated that an answer to the complaint was due within twenty days of service of the complaint and, moreover, that a pre-hearing conference in the matter was scheduled for 11:00 AM, October 29, 2013, at the Department's Region 5 office in Warrensburg. Respondent failed to answer the complaint and failed to appear for the scheduled pre-hearing conference.

On August 29, 2014, respondent was personally served with a notice of default hearing dated August 29, 2014, stating that on October 9, 2014, at 10:00 AM, at the Department's Region 5 office in Warrensburg, the matter would be called before the undersigned Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services ("OHMS"). This notice stated that on October 9, 2014, the Department intended to move for a default judgment against respondent due to his failure to answer the complaint served upon him on October 7, 2013, and his failure to appear for the pre-hearing conference scheduled in the notice of hearing annexed to the complaint. Annexed to the notice of default hearing were two exhibits designated "Exhibit 1" and "Exhibit 2." Exhibit 1 was a copy of the notice of hearing and complaint served on respondent on October 7, 2013. Exhibit 2 was Department staff's proposed Commissioner's order (see 6 NYCRR 622.15[b][3]).

Respondent was advised that he could appear personally or by a representative on October 9, 2014, to present argument in opposition to the motion for default judgment. Respondent was further advised that his failure to appear would constitute a default and a waiver of his right to be heard, and could result in a Commissioner's order being issued against him. The notice further stated that upon making the motion for default judgment, Department staff would be seeking an order of the Commissioner imposing a civil penalty of \$94,300.00 for the violations alleged in the complaint; ordering respondent to pay an additional one dollar for every ten pounds of tires or other solid waste the Department may remove from the site; and ordering that respondent remove solid waste and debris from the site. Respondent did not file a response to the notice.

On October 9, 2014, and pursuant to the notice of August 29, 2014, a calendar call was convened before the undersigned ALJ at the Department's Region 5 office, 232 Golf Course Road, Warrensburg, New York 12885. At that time, respondent's matter was called. Department staff was represented by Michelle A. Crew, Esq., Regional Attorney for Region 5. Respondent did not appear nor did anyone on his behalf.

Pursuant to 6 NYCRR 622.15, Ms. Crew, on behalf of Department staff, orally moved for a default judgment against respondent based upon his failure to answer the complaint dated October 2, 2013, and his failure to appear for the pre-hearing conference scheduled for October 29, 2013, as indicated in the notice of hearing annexed to and served with the complaint. In support of its motion for default, Department staff submitted twenty-nine (29) exhibits, all of which were received into the record. A summary of the exhibits is attached hereto. To introduce the foregoing exhibits and provide further support for its motion for default, Department staff also called five staff witnesses: Kevin Wood, P.E., Environmental Engineer 2, Division of

Materials Management, Region 5; Andrew Frank, Environmental Engineer 1, Spill Response Unit, Region 5; Forest Ranger Michael J. Bodner, Division of Forest Protection and Fire Management, Region 5; Lieutenant Kenneth Bruno, Bureau of Environmental Crimes Investigation, Region 5; and James Coutant, P.E., Regional Air Pollution Control Engineer, Region 5.

Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the action. A failure to timely respond to the motion constitutes a default. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

“(a) A respondent’s failure to file a timely answer ... constitutes a default and a waiver of respondent’s right to a hearing. If [this] occurs the department staff may make a motion to the ALJ for a default judgment.

“(b) The motion for a default judgment may be made orally on the record ... and must contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint ... ;
- (2) proof of the respondent’s failure to appear or failure to file a timely answer; and
- (3) a proposed order.”

As the Commissioner stated in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 3), “[t]he consequences of a default is that the respondent waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint or other accusatory instrument on the issue of liability for the violations charged.” Moreover, the Commissioner has stated, “a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them.” (*id.* at 6.) Accordingly, the following findings of fact are based upon the exhibits submitted into the record, as identified above.

Findings of Fact and Conclusions of Law

1. Respondent Steven R. Haessly (“respondent”) is the owner of a rural parcel of land located at 870 New York State Route 197, Town of Argyle, Washington County, New York 12809 (“site”). (Department Staff Exhibit 1(b), Complaint, paragraphs 1 and 2; Department Staff Exhibits 7 and 9.)

2. The site comprises approximately 30 acres and is improved by a residence. Located in the southwest corner of the site is an area utilized for camping and campfires and recreational bonfires. (Department Staff Exhibits 8(d) and 9; Testimony of Bodner; Testimony of Bruno.)

3. A tributary to Dead Creek, a Class C water body, runs through the northern half of the site. (Department Staff Exhibit 1(b), Complaint, paragraph 4; Department Staff Exhibit 20; Testimony of Frank.)
4. At all times relevant to the instant proceeding, respondent resided in the residence located at the site. Also residing in respondent's residence at the site, at all times relevant to the instant proceeding, was one Shea M. Ball. (Department Staff Exhibit 1b, Complaint, paragraphs 2 and 18; Department Staff Exhibits 23, 25, 26, 27 and 28; Testimony of Bodner; Testimony of Bruno.)
5. On October 23, 2012, Department staff responded to a complaint of illegal waste tire disposal on the site. (Department Staff Exhibit 1b, Complaint, paragraph 7; Department Staff Exhibit 9; Testimony of Wood.)
6. During their inspection on October 23, 2012, Department staff observed several piles of waste tires strewn throughout the property, including a large pile of waste tires that had been dumped over a bank on or near the southwest corner of the property. Department staff also observed other debris and solid waste at the site, particularly waste inner tubes. (Department Staff Exhibits 8(a)-(o) and 9; Testimony of Wood.)
7. At the time of the inspection, Department staff estimated that there were between 5,000 and 7,000 waste tires at the site. (Department Staff Exhibits 8(a)-(o) and 9; Testimony of Wood.)
8. The waste tire piles were located in close proximity to the area of the site utilized for camping and campfires and recreational bonfires. (Department Staff Exhibit 8(d); Testimony of Bodner; Testimony of Bruno.)
9. On January 24, 2013, Department staff sent a Notice of Violation ("NOV") to respondent advising him that the inspection on October 23, 2012, revealed the presence of between 5,000 and 7,000 unpermitted waste tires at the site. The NOV further advised respondent that such storage of waste tires without a permit was a violation of the Department's regulations, specifically, 6 NYCRR 360-13.1(b). To avoid further enforcement action by the Department, respondent was requested to remove and properly dispose of all the waste tires on the site on or before July 31, 2013. The NOV was sent to respondent by certified mail, return receipt requested. A United States Postal Service ("USPS") domestic return receipt indicates that the NOV was received at respondent's residence at the site on February 8, 2013. (Department Staff Exhibit 10(a)-(c); Testimony of Wood.)
10. On April 7, 2013, an unattended campfire at the area of the site utilized for camping and campfires and recreational bonfires ignited a brush fire which, in turn, due to the windy conditions that day, spread and ignited most of the piles of waste tires at the site. (Department Staff Exhibits 8(d), 17, 18, 20, and 21; Testimony of Bodner; Testimony of Frank; Testimony of Bruno.)

11. Department staff and members of the Town of Argyle Fire Department and other neighboring fire departments responded to the scene to combat the fire which was finally suppressed on April 9, 2013. (Department Staff Exhibits 17, 18, 20, and 21; Testimony of Bodner; Testimony of Frank; Testimony of Bruno.)
12. The fire spread over an area of about 4.5 acres and completely burned all but approximately 1,000 of the waste tires on the site. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant; Department Staff Exhibits 12, 13, 15, 16, 20 and 21; Testimony of Bodner; Testimony of Frank; Testimony of Bruno.)
13. The burning tires emitted a heavy black plume of toxic smoke that impacted the air quality of twelve residences all located downwind and within one-half mile of the fire and necessitated the closure of local roads serving those residences. (Department Staff Exhibits 17, 18, 20 and 21; Testimony of Bodner; Testimony of Frank; Testimony of Bruno.)
14. Due to concerns over the potentially toxic impacts of the plume from the fire, Department staff notified the off-hours duty officer for the New York State Department of Health (“DOH”), and the duty officer for the United States Environmental Protection Agency (“USEPA”), who communicated with local residents through the reverse 911 system as to precautions they should take because of the fire. (Department Staff Exhibits 20, 25 and 26; Testimony of Bodner; Testimony of Frank; Testimony of Bruno; Testimony of Coutant.)
15. Efforts to suppress the fire with water caused debris to run off into the nearby tributary of Dead Creek. (Department Staff Exhibits 20 and 21; Testimony of Bodner; Testimony of Frank.)
16. On April 7, 2013, spills staff from the Department’s Division of Environmental Remediation deployed a spills contractor, National Vacuum Corporation, to contain any runoff from the fire and to attempt to limit its impact to the nearby Dead Creek tributary. Department staff also took steps to protect the tributary with a boom, to contain any runoff generated by fire-fighting operations. (Department Staff Exhibit 1(b), Complaint, paragraph 14; Department Staff Exhibits 18, 20, and 21; Testimony of Bodner; Testimony of Frank; Testimony of Bruno.)
17. Multiple responders from the local, state and federal levels of government were involved in fighting the fire and addressing its actual and potential impacts including the Argyle, Hartford, and Fort Edward volunteer fire departments, National Vacuum Corporation, DOH and USEPA, as well as the New York State Office of Fire Prevention and Control, Department spill response staff, Washington County Public Safety, the Washington County Bureau of Fire, the Washington County Attorney, the Washington County Safety Officer, the Argyle Town Supervisor, the Argyle Fire Chief, the Washington County Hazardous Materials Unit, and the Washington County Emergency Services Bureau. (Department Staff Exhibit 1(b), Complaint, paragraphs 14 and 16; Department Staff Exhibits 18, 20, 21 and 26; Testimony of Bodner; Testimony of Frank.)
18. An investigation by the Department’s Division of Law Enforcement (“DLE”) concluded that the fire was caused by an unattended camp fire started by Shea Ball at the site on respondent’s property utilized for camping and campfires and recreational bonfires. On April 7,

2013, a DLE Environmental Conservation Officer (“ECO”) issued tickets to Shea Ball pursuant to ECL 9-0105(1)(a) for setting and leaving a fire unattended and ECL 9-0105(1)(b) for setting a fire that endangers the property of another. (Department Staff Exhibits 23, 25, 26, 27 and 28; Testimony of Bodner; Testimony of Bruno.)

19. On April 17, 2013, Department staff inspected the property as a follow-up to the fire of April 7, 2013. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant; Testimony of Wood.)

20. During their inspection on April 17, 2013, Department staff observed several areas containing fully burned and partially burned tires, significant amounts of ash residue from the combustion of the tires, and steel belts and rims remaining from the burned tires, as well as over 1,000 unburned tires that remained on the site. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant and Exhibit A attached thereto; Testimony of Wood.)

21. At the time of the April 17, 2013 inspection, Department staff spoke with respondent and reminded him of the July 31, 2013, deadline for the removal of all tires from the site, in addition to the need to clean up the ash residue, rims and other debris that resulted from the combustion of the tires. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant and Exhibit B attached thereto; Testimony of Wood.)

22. On April 23, 2013, National Vacuum Corporation submitted an application for payment to the Department, for their services in responding to the fire which was thereafter paid by the Office of the State Comptroller on or about June 10, 2013. (Department Staff 1(b), Complaint, paragraphs 22 and 23.)

23. Except for ash and debris, investigations of the site following the fire indicated that there had been no release of petroleum compounds to the soil nor to the nearby Dead Creek tributary. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant and Exhibit B attached thereto; Department Staff Exhibits 19, 20, 21 and 22; Testimony of Wood.)

24. On June 14, 2013, Department staff again inspected the site and determined that respondent had not removed any waste tires from the property or cleaned up and disposed of any debris that resulted from the tire fire that occurred on April 7, 2013. At that time, respondent was again reminded by Department staff of the July 31, 2013, deadline for cleaning up and disposing of the tires and the debris from the tire fire of April 7, 2013. (Department Staff Exhibits 12 and 13; Testimony of Wood.)

25. On July 23, 2013, Department staff again inspected the property and observed that the condition of the site remained largely unchanged from the condition on the date of the April 17, 2013, inspection. Department staff noted that some tires may have been moved around the property, but that none had left the site. At that time, respondent was again reminded by Department staff of the July 31, 2013, deadline for cleaning up and disposing of the tires and the debris from the tire fire of April 7, 2013. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant and Exhibits C and D annexed thereto; Testimony of Wood.)

26. On August 6, 2013, Department staff inspected the site and determined that respondent had not complied with its direction to remove the tires and other solid waste from the site by July 31, 2013. Numerous piles of tires remained on the site, and there had been little or no cleanup of the ash residue, belts and rims, or other solid waste that was created by the combustion of the tires on the property during the fire of April 7, 2013. (Department Staff Exhibit 11, Affidavit of Mt. Pleasant and Exhibits E and F annexed thereto; Testimony of Wood.)

27. An inspection of the site by Department staff on April 30, 2014, indicated that conditions at the site remained unchanged. (Department Staff Exhibits 14 and 15; Testimony of Wood.)

28. The notice of hearing and complaint in this matter, each dated October 2, 2013, were personally served on respondent on October 7, 2013. (Department Staff Exhibit 1(a), (b) and (c).)

29. The complaint sets forth four causes of action against respondent. The first cause of action alleges respondent violated ECL 27-0703(6) and 6 NYCRR 360-13.1(b) by stockpiling over 1,000 waste tires at the site without a permit issued by the Department. The second cause of action alleges respondent violated 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i) by “discarding, discharging, and/or disposing of waste tires, ash residue from combusted tires, of steel rims and belts, and of other debris in connection with the noncompliant stockpiling of waste tires” at the site. The third cause of action alleges respondent violated “ECL 19-0105, 6 NYCRR Part 215 and 6 NYCRR 211.1” by “causing or allowing an unattended fire that resulted in the combustion of waste tires on the” site. The fourth cause of action alleges respondent violated 6 NYCRR 360-1.14(q) by “causing or allowing open burning at a solid waste management facility.” (Department Staff Exhibit 1(b), Complaint, paragraphs 65 through 72.)

30. The notice of hearing served with the complaint on October 7, 2013, stated that an answer to the complaint had to be filed within twenty days of the receipt of the complaint by respondent and that failure to file an answer to the complaint would constitute a default in the matter. Respondent failed to file an answer to the complaint. (Department Staff Exhibit 1(b) and Hearing Record.)

31. Moreover, the notice of hearing served with the complaint on October 7, 2013, stated that a pre-hearing conference would be held in the matter at 11:00 AM, October 29, 2013, at the Department’s Region 5 office, 232 Golf Course Road, Warrensburg, New York 12885, and that failure to appear at the pre-hearing conference would “result in a default and waiver of Respondent’s right to a hearing.” Respondent failed to appear for the pre-hearing conference. (Department Staff Exhibit 1(b), Notice of Hearing-Default; and Hearing Record.)

32. On August 29, 2014, respondent was personally served with a notice of hearing for a default, dated August 29, 2014. The notice stated that the matter was scheduled for a hearing at a calendar call before the undersigned on October 9, 2014, at the Department’s Region 5 office, 232 Golf Course Road, Warrensburg, New York 12885. The notice further stated that at that time the matter would be called and that Department staff intended to move for a default judgment against respondent for his failure to answer the complaint duly served upon him on October 7, 2013, and for his failure to appear for the pre-hearing conference scheduled in the

notice of hearing. The notice of hearing for default further stated that the Department would be seeking an order of the Commissioner against respondent seeking removal of solid waste and debris from the site, imposing a civil penalty in the amount of \$94,300.00, and requiring respondent to pay an additional one dollar for every ten pounds of waste tires the Department removes from the site should it be necessary for it to enter the site and remove the remaining waste tires. Annexed to the notice of hearing for default was a copy of the notice of hearing and complaint, and a proposed Commissioner's order. Respondent failed to appear for the hearing for default on October 9, 2014. (Department Staff Exhibit 5 and Hearing Record.)

Discussion

The record in this case shows that the unpermitted accumulation of more than 1,000 waste tires and other debris at the site, particularly inner tubes, constituted the operation by respondent of a solid waste management facility without a permit issued by the Department. Accordingly, a prima facie case has been made for the violations of ECL 27-0703(6) and 6 NYCRR 360-13.1(b), requiring a permit for the storage of more than 1,000 waste tires, alleged in the first cause of action of the complaint. In addition, this supports a finding that a prima facie case has been made for the violations, as alleged in the second cause of action of the complaint, that respondent violated 6 NYCRR 360-1.7(a)(1)(i) by operating an unpermitted solid waste management facility, and further violated 6 NYCRR 360-1.5(a) by accepting waste tires and other debris at the site. Moreover, the record demonstrates that the unattended campfire at an area of the site owned by respondent and used for campfires caused the fire that resulted in the combustion of the waste tires at the site. The resulting tire fire caused a large plume of toxic black smoke which was of such a character and duration as to be injurious to neighbors in the immediate vicinity of the site and unreasonably interfered with the comfortable enjoyment of their lives and properties. For the purposes of this default motion, the facts support a finding that a prima facie case has been made, as alleged in the third cause of action of the complaint, that respondent violated the express purpose of the State's Air Pollution Control Act stated in ECL 19-0105, to control or abate air pollution, by suffering and allowing the burning of materials in an open fire in violation of the sole prohibition provided for in 6 NYCRR part 215, specifically 6 NYCRR 215.2, and that in so doing caused a toxic plume of black smoke that was injurious to human health and unreasonably interfered with the comfortable enjoyment of life and property in violation of 6 NYCRR 211.1. Finally, the facts support a finding that a prima facie case has been made, as alleged in the fourth cause of action of the complaint, that respondent violated 6 NYCRR 360-1.14(q) by causing or allowing open burning at a solid waste management facility, albeit the facility was not a permitted facility.

The record shows that respondent was duly served with the notice of hearing and complaint on October 7, 2013. The record further shows that respondent failed to file an answer to the complaint and failed to appear for the pre-hearing conference scheduled in the matter for October 29, 2013. Moreover, the record shows that respondent was duly served with the notice of hearing for default in this matter on August 29, 2014, and that he failed to appear for the hearing scheduled for October 9, 2014. Annexed to the notice of default hearing was a proposed Commissioner's order. This proposed order was received into the record of this proceeding on October 9, 2014, and satisfies the requirements of 6 NYCRR 622.15(b)(3). The Department staff is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Based upon its assessment of the conditions at the site and the totality of the circumstances of this case, Department staff moved at the hearing on default to reduce the total proposed civil penalty it sought in this matter to \$76,100.00. This motion to amend was granted by the ALJ. (Hearing Record.) The \$76,100.00 total civil penalty is comprised of two parts separately addressing the solid waste violations and the air violations. As to the solid waste violations embraced in the first, second and fourth causes of action in the complaint, Department staff is seeking a total civil penalty of \$50,600.00 with \$10,120.00 payable and \$40,480.00 suspended upon remediation of the site including removal of the remaining waste tires and all ash and debris associated with the fire. (Department Staff Exhibit 16.) As to the air violations embraced in the third cause of action in the complaint, Department staff is seeking a total penalty of \$25,500.00 with \$5,100.00 payable and \$20,400.00 suspended upon remediation of the site including removal of the remaining waste tires and all ash and debris associated with the fire. (Department Staff Exhibit 29.) Thus, the civil penalty is a total of \$76,100.00 with \$15,220.00 payable and \$60,880.00 suspended. The civil penalties Department staff seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

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

1. Granting Department staff's motion for default on the complaint as to respondent pursuant to the provisions of 6 NYCRR 622.15;
2.
 - a. Holding respondent in violation of ECL 27-0703(6) and 6 NYCRR 360-13.1(b) as alleged in the first cause of action in the complaint;
 - b. Holding respondent in violation of 6 NYCRR 360-1.5(a) and 6 NYCRR 360-1.7(a)(1)(i) as alleged in the second cause of action in the complaint;
 - c. Holding respondent in violation of ECL 19-0105, 6 NYCRR Part 215 and 6 NYCRR 211.1 as alleged in the third cause of action in the complaint;
 - d. Holding respondent in violation of 6 NYCRR 360-1.14(q) as alleged in the fourth cause of action in the complaint;
3. Directing respondent, within ninety (90) days of service of the Commissioner's order on him, to complete the removal of all waste tires remaining on the property to an authorized recycling facility;
4. Directing respondent, within ninety (90) days of service of the Commissioner's order on him, to complete the removal of all ash residue from the combustion of the tires on the property, all rims, belts and any and all other solid waste remaining on the property, to an authorized recycling facility;

5. Directing respondent, within ninety (90) days of service of the Commissioner's order on him, to pay a civil penalty in the amount seventy-six thousand one hundred dollars (\$76,100.00) of which fifteen thousand two hundred twenty dollars (\$15,220.00) is payable upon receipt of the Commissioner's order and sixty thousand eight hundred eighty dollars (\$60,880.00) is suspended contingent upon compliance with the provisions of Recommendations 3 and 4, above; and
6. Directing such other and further relief as he may deem just and proper.

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
February 12, 2015

DEC v. Steven R. Haessly

Index of Department Staff Exhibits Received

Edirol 010318072356
NYSDEC Region 5, Warrensburg
October 9, 2014

- Exhibit 1(a) to 1(c) Affidavits of Personal Service reflecting service on October 7, 2013, of October 2, 2013, Notice of Hearing and Complaint on Respondent at his address at 870 State Route 197, Argyle, New York (with Notice of Hearing and Complaint).
- Exhibit 2(a) to 2(b) Affidavit of Personal Service on August 20, 2014, of Notice of Default Hearing for September 4, 2014, served on Respondent at his address at 870 State Route 197, Argyle, New York (with Notice of Default Hearing).
- Exhibit 3(a) to 3(c) Affidavit of Service by Certified Mail of Notice of Default Hearing for September 4, 2014, with proof of certified mailing, copy of letter to ALJ, and copy of Notice of Default Hearing – *Unsuccessful service*.
- Exhibit 4(a) to 4(c) Affidavit of Service by Certified Mail of Letter to Respondent cancelling Default Hearing scheduled for September 9, 2014 – *Unsuccessful service*.
- Exhibit 5(a) to 5(b) Affidavit of Personal Service of Notice of Default Hearing for October 9, 2014, with Notice of Default Hearing attached (dated August 29, 2014). Annexed to the Notice are two exhibits numbered 1 and 2: Exhibit 1 is the Notice of Hearing and Complaint dated October 2, 2013, and Exhibit 2 is a proposed Commissioner's order.
- Exhibit 6(a) to 6(b) Affidavit of Service by Certified Mailing of Notice of Rescheduled Default Hearing with proof of certified mailing and copy of Notice of Default Hearing – *Unsuccessful service*.
- Exhibit 7 Certified copy of warranty deed from Washington County clerk's office reflecting Respondent's ownership of property at 870 State Route 197 in Argyle.
- Exhibit 8(a) to 8(o) Photographs of October 23, 2012, site inspection by DEC Inspector Kevin Wood.
- Exhibit 9 Site map of 870 State Route 197, Argyle, NY.
- Exhibit 10(a) to 10(c) January 24, 2013, Notice of Violation (NOV) issued by DEC Inspector Kevin Wood to Respondent via certified mail, with proof of certified mailing.

- Exhibit 11(A) to 11(F) Affidavit of DEC Materials Management Inspector David Mt. Pleasant dated October 6, 2014, with Exhibits.
- Exhibit 12 June 8, 2013, email from DEC Inspector Kevin Wood to Brian Huyck and Michelle Crew.
- Exhibit 13(a) to 13(j) Photographs of June 14, 2013, inspection by DEC Inspector Kevin Wood.
- Exhibit 14 June 3, 2014, email from DEC Inspector Kevin Wood to Michelle Crew.
- Exhibit 15(a) to 15(n) Photographs of April 30, 2014, inspection by DEC Inspector Kevin Wood.
- Exhibit 16 Solid Waste program penalty calculation.
- Exhibit 17 April 7, 2013, photograph of smoke plume by DEC Remediation Engineer Andrew Frank.
- Exhibit 18 Videotape of fire taken on April 7, 2013, and April 8, 2013, by DEC Remediation Engineer Andrew Frank.
- Exhibit 19 April 8, 2013, status email from Andrew Frank to DEC staff summarizing fire site activities.
- Exhibit 20 DEC Spill Report, Spill No. 1300194.
- Exhibit 21 Dispatch form for Spill No. 1300194, Unknown Hazardous Material.
- Exhibit 22 New York State Forest Ranger Wildland Fire Report.
- Exhibit 23 April 7, 2013, Ranger ticket to Shea Ball.
- Exhibit 24 December 20, 2013, email from Ranger Bodner to ECO Dempster regarding status of appearance on tickets issued to Shea Ball.
- Exhibit 25 NYSDEC Division of Law Enforcement (DLE) Significant Incident Report prepared by Lt. John Ellithorpe.
- Exhibit 26 Complaint Form, NYS DEC Office of Public Protection Call for Service #13-004535.
- Exhibit 27 Supporting deposition taken from Shea Ball dated April 7, 2013.
- Exhibit 28 April 7, 2013, DLE ticket issued to Shea Ball.
- Exhibit 29 Air program penalty calculation.