STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 and 71 of the Environmental Conservation Law ("ECL") and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

PASQUALE IZZO, MICHAEL IZZO, ERNEST FORCE, individually and as Vice President of WINDSOR ASSOCIATES doing business as NEW YORK TIRE RECYCLING and as an officer of NEW YORK TIRE RECYCLING COMPANY, INC. also known as NEW YORK TIRE CORP., and as Vice President of STEPHANIE FORCE WASTE TIRE MANAGEMENT CORP. also known as and doing business as WASTE TIRE MANAGEMENT CORP., and STEPHANIE FORCE, individually and as President of STEPHANIE FORCE WASTE TIRE MANAGEMENT CORP. also known as and doing business as WASTE TIRE MANAGEMENT CORP.,

Respondents.

RULING ON MOTION FOR ORDER WITHOUT HEARING

DEC Case No. 1-1999-11-05-89

Appearances:

-- Charles E. Sullivan, Jr., Esq., for the New York State Department of Environmental Conservation.

-- John T. DiPalma, Esq., for respondent Ernest J. Force.

-- Leonard J. Shore, Esq., for respondents Pasquale Izzo and Michael Izzo (no submissions).

RULING ON MOTION FOR ORDER WITHOUT HEARING

Staff of the Department of Environmental Conservation ("Department") filed a motion for an order without hearing as against respondents Pasquale Izzo, Michael Izzo, and Ernest Force in the above referenced administrative enforcement proceeding.[1] Department staff seeks summary judgment on an amended verified complaint dated June 1, 2000. For the reasons that follow, Department staff's motion is granted on the issue of liability for two of the three causes of action pleaded in the amended complaint. Because triable issues of fact are raised concerning penalty and other remedial relief, however, Department staff's motion is otherwise denied, and a hearing will be convened to resolve the remaining issues.

PROCEEDINGS

This administrative enforcement proceeding was commenced as against respondents Pasquale Izzo and Michael Izzo (collectively the "Izzo respondents") by service of a notice of hearing, pre-hearing conference and complaint, and a verified complaint dated January 5, 2000. By leave of Administrative Law Judge ("ALJ") Susan J. DuBois -- the ALJ originally assigned to the matter -- a verified amended complaint dated June 1, 2000 adding respondents Ernest Force and Stephanie Force (collectively, the "Force respondents") was served on all respondents.

The amended complaint alleged that the Izzo respondents are the owners or operators of a landfill and, thus, a solid waste management facility located on Old Northport Road, Kings Park, Township of Smithtown, Suffolk County ("facility" or "site"). The amended complaint also alleged that respondent Ernest Force, as the primary operator and principal of New York Tire Recycling Company, Inc., also known as New York Tire Corp., and Windsor Associates d/b/a New York Tire Recycling (collectively, "New York Tire"), was the operator of the solid waste management facility at the site and personally liable for violations of the Environmental Conservation Law ("ECL") arising from the operation. Department staff alleged that since 1987, respondents permitted New York Tire to bring waste tires to the subject site. Staff also alleged that the Izzo respondents illegally disposed of construction and demolition ("C&D") debris at the site.

[1] On its motion, Department staff is not seeking judgment as against respondent Stephanie Force.

Accordingly, the amended complaint alleged three causes of action:

(1) that respondents violated 6 NYCRR 360-1.7(a)(1) by operating a solid waste management facility at the site without a permit;

(2) that respondents violated 6 NYCRR 360-13.1(b) by storing 1,000 or more waste tires at the site without a permit; and

(3) that the Izzo respondents violated 6 NYCRR 360-8.6(b) by disposing of clean fill at the site without complying with specific requirements contained in section 360-8.6(b) and without Departmental authorization, approval or permit to bring C&D materials to the site.

The Force respondents filed a joint verified answer dated June 16, 2000, and the Izzo respondents filed a joint answer dated June 20, 2000. A statement of readiness for adjudicatory hearing was issued August 7, 2000. The hearing was adjourned after the parties executed a stipulation dated November 15, 2000 resolving all issues in the matter except the ultimate disposition of approximate 1.5 million shredded tires that were buried on the site. The remaining issue was to be the subject of an administrative hearing or, in the alternative, a motion for a summary order to be made by respondents.

On January 30, 2001, respondents filed a motion seeking, among other things, an order allowing for the shredded tires to remain buried at the site. ALJ DuBois denied the motion (see Matter of Izzo, ALJ Ruling on Motion, Feb. 26, 2001). With respect to the buried tires, the ALJ held that substantial fact issues existed concerning whether the tires could remain buried on the site without posing an environmental or safety hazard (see id. at 4).

On August 13, 2001, respondents renewed their motion based upon an August 2001 investigation report. Respondents' renewed motion was denied (see Matter of Izzo, ALJs Ruling on Motion, Oct. 1, 2001). ALJs P. Nicholas Garlick and Maria E. Villa, who were then assigned to the matter, again concluded that substantial fact issues remained concerning whether the shredded tires could remain buried at the site (see id. at 4-5).

ALJs Garlick and Villa subsequently convened a hearing on December 19, 2001. At that hearing, the parties indicated that they had reached a settlement on the remaining issues, the

terms of which they placed on the record (see Hearing Transcript, Dec. 19, 2001). Department staff indicated that it would draft a consent order embodying the terms of the settlement for signature by the parties (see id. at 14). Staff also indicated that in the event respondents failed to comply with the consent order, staff would request that the matter be restored to the hearing calendar, and that the consent order would serve as the stipulated facts for the hearing (see id.). Although a written consent order was subsequently circulated among the parties, respondents did not execute it.

Department Staff's February 11, 2005 Motion for Order Without Hearing

Alleging that respondents failed to comply with the terms of the November 15, 2000 stipulation and the additional settlement terms placed on the record on December 19, 2001, Department staff filed the present motion for order without hearing, which was forwarded to the undersigned as the presently assigned ALJ. The motion papers consist of a notice of motion for order without hearing, an affidavit of service, a motion for order without hearing, an attorney's brief in support of motion for order without hearing, and attached exhibits A through N.

In its motion, Department staff seeks a determination as to respondents Ernest Force, Pasquale Izzo and Michael Izzo on the first two causes of action in the June 1, 2000 amended complaint. Staff expressly indicates that respondent Stephanie Force is not a subject of this motion, nor does staff seek a determination on the third cause of action in the amended complaint (see Attorney Brief in Support of Motion for Order Without Hearing, Feb. 11, 2005, at 2).

With respect to respondents Ernest Force, Pasquale Izzo, and Michael Izzo (collectively "respondents"), staff specifically seeks a determination that respondents (1) violated 6 NYCRR 360-1.7(a)(1) by operating a solid waste management facility without a permit since at least December 1987, and (2) violated 6 NYCRR 360-13.1(b) by operating a waste tire storage facility on the site without a permit since at least December 31, 1988. Staff also seeks a determination that as a result of the violations alleged, respondents own or operate a "noncompliant waste tire stockpile" as that term is defined under ECL 27-1901(6).

As result of the violations alleged, Department staff requests that the Commissioner order respondents to:

I. Immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage;

II. Remove all tires, whether whole or in portions and whether on rims or not, from the site in strict compliance with the plan and schedule detailed in the motion, such removal to commence within 60 days after the date of service of the Commissioner's order upon respondents;

III. Fully cooperate with the State and refrain from any activities that 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;

IV. Within 45 days of service of the Commissioner's order upon respondents, pay a penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703, or the sum of $250,000, plus $2 for each 20 pounds of waste tires that the State shall have to manage under ECL article 27, title 19, in the event respondents fail to comply with any requirement of the above referenced plan to abate the stockpile;

V. In addition to any other relief the Commissioner may deem necessary and appropriate:

A. Post with the Department within 30 days of service of the Commissioner's order financial security in the amount of $2,000,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above;

B. Fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors or agents in the event that the State should be required to conduct abatement of the waste tire stockpiles at the site; and

C. Reimburse the State for the costs associated with completion of this enforcement action, and any costs associated with overseeing the abatement of the waste tires in issue and with the State's assumption of the responsibility to remove the waste tires should respondent fail to strictly comply with the requirements of Paragraphs I or II above, such costs to be payable within 30 days after notification by the State.

Respondent Ernest Force filed a response to Department staff's motion, consisting of an attorney's affirmation by John T. DiPalma, Esq., dated April 1, 2005, an affirmation in opposition by respondent Ernest Force dated April 1, 2005, and attached exhibits A through E.

To date, no response has been filed by the Izzo respondents.

FINDINGS OF FACT

The findings of fact determinable as a matter of law on this motion and, thus, deemed established for all purposes in the hearing (see 6 NYCRR 622.12[e]), are as follows.

1. Respondents Pasquale Izzo and Michael Izzo are the owners of property located at Old Northport Road, Kings Park, Township of Smithtown, Suffolk County, New York (the "site"). The site is identified as Suffolk County Tax Map Number 0800-4201-26.2.

2. Respondent Ernest Force was the primary operator and a principal of New York Tire Recycling Co., Inc., also known as New York Tire Corp. and Windsor Associates, doing business as New York Tire Recycling. New York Tire Recycling Co., Inc., was recently in business as Stephanie Force Waste Tire Management Corp., also known as and doing business as Waste Tire Management Corp.

3. Beginning in December 1987, and continuing through February 1990, New York Tire Recycling Co., Inc., as lessee of the Izzo respondents, brought approximately 3 million waste tires to the site. Of those 3 million waste tires, approximately 500,000 were sold wholesale for recapping, and approximately 200,000 were shredded, sold and removed from the site. Of the waste tires remaining on the site, 1.5 million were shredded and stored in a partially covered depression on the site. Approximately 800,000 tires were not shredded.

4. Respondent Force was involved in the day-to-day operations at the site. His responsibilities included overseeing the dispatcher, trucks, equipment, and processing.

5. In June 1989, respondents submitted an application for a permit pursuant to 6 NYCRR part 360 to operate a solid waste management facility on the site (see Application [6-30-89], Department's Motion, Exhibit G). The Izzo respondents were listed as the owners of the facility. Windsor Associates, d/b/a

New York Tire Co., was listed as the operator, and respondent Force was listed as the on-site supervisor. The application was deemed incomplete by the Department (see Notice of Incomplete Application [7-17-89], id., Exhibit C). The application was subsequently withdrawn by letter dated July 26, 1991 (see DiPalma Letter [7-26-91], id.). To date, no permit has been issued authorizing operation of a waste tire storage facility on the site.

6. In 1990, Supreme Court, Suffolk County (Cannavo, J.), issued an order granting plaintiff Town of Smithtown a preliminary injunction against respondents, among other defendants (see Town of Smithtown v Force, dated Oct. 2, 1990, Index No. 15859/1990). The court noted that an estimated two million tires were stored at the site (see id. at 2). The court held that respondents allowed a dangerous condition to exist on the site in violation of numerous sections of the town code governing junk yards, the definition of which included the handling of waste tires (see id. at 3, 5). Accordingly, the court ordered, among other things, that respondents remove all tires presently on the site within four months of service of the court's order with notice of entry.

7. In 1993, the Department commenced a proceeding to revoke a waste transporter permit held by respondent Force since September 1992. After a hearing, respondent Force's waste transporter permit was revoked (see Matter of Ernest J. Force, Commissioner's Order, Sept. 30, 1993). During that proceeding, respondent Force stipulated that he failed to comply with ECL article 27 and 6 NYCRR former 360-13 in that he operated the site without a permit and in non-conformance with the operational requirements of 6 NYCRR former 360-13.3 and 13.4 (see id., ALJ Hearing Report, at 7). He also stipulated that 2.1 million tires were left at the site, and that to date, Justice Cannavo's October 2, 1990 order had not been complied with. The Commissioner concluded that respondent Force's involvement in New York Tire Recycling Co., Inc., made him personally liable for the violations cited by Department staff, and that those violations, in addition to other violations committed at another site, warranted revocation of respondent Force's permit (see Commissioner's Order, at 1-2; see also ALJ's Hearing Report, at 8, adopted by the Commissioner).

8. In 1995, the Town of Smithtown declared the site a public nuisance and commenced cleanup of at least 700,000 tires from the site. After the Town's cleanup, approximately 1.5 million shredded tires remained below grade on the site, and no less than 50,000, and potentially as many as 300,000, waste tires

remained on the surface.

9. Department staff commenced the present proceeding as against the Izzo respondents by service of a notice of hearing, pre-hearing conference and complaint, and a verified complaint dated January 5, 2000. By leave of ALJ DuBois, a verified amended complaint dated June 1, 2000 adding respondents Ernest Force and Stephanie Force was served on all respondents. The Force respondents filed a joint verified answer dated June 16, 2000, and the Izzo respondents filed a joint answer dated June 20, 2000.

10. On November 15, 2000, respondents executed a written stipulation with the Department. In that stipulation, respondents agreed, among other things, to dispose of all the unshredded waste tires at the site at a rate of one trailer load per week, to provide advance notice to the Department of each load's intended destination, and to provide the Department with receipts or manifests demonstrating the tires' proper disposal.

11. On December 19, 2001, respondents placed additional and amended settlement terms on the hearing record of this proceeding (see Hearing Transcript [12-19-01], at 10-19). Among the amended terms, the Izzo respondents agreed to break unshredded tires out of the ground and move them to an accessible location, while respondent Force continued to be responsible for removing the tires from the site (see id. at 12-13). Among the new terms, respondents agreed to monitor the temperature of the buried shredded tires in January 2002 and again eight months to a year later (see id. at 10-12).

12. Although some unshredded waste tires were removed from the surface of the site pursuant to the stipulation with the Department, by July 2002, such removal had ceased. As of January 23, 2004, approximately 300,000 waste tires remain on the surface of the site. This is in addition to the 1.5 million shredded tires buried on the site.

13. The unshredded waste tires remaining at the site pose a significant potential threat to public health and safety, and the environment, both as a breeding ground for mosquitoes and, thus, a vector for disease, and as a significant fire threat.

DISCUSSION

Through this motion for order without hearing, Department staff seeks summary judgment as against respondents Ernest Force, Pasquale Izzo and Michael Izzo on the first two

causes of action pleaded in the June 1, 2000 amended verified complaint (see 6 NYCRR 622.12[a] [authorizing motions for order without hearing in addition to a notice of hearing and complaint]). In the November 15, 2000 stipulation, Department staff agreed not to seek penalties from respondents for the violations alleged in the amended complaint so long as respondent fully complied with the stipulation (see Stipulation [11-15-00], at 4; see also Hearing Transcript [12-19-01], at 14). The undisputed evidence on this motion reveals that at least since July 2002, the removal of unshredded tires from the surface of the site has ceased. Accordingly, respondents have failed to fully comply with the November 15, 2000 stipulation and the amended terms placed on the hearing record on December 19, 2001. As a result, Department staff is no longer bound by its agreement not to seek penalties for the causes of action alleged in the amended complaint, and the stipulation does not bar the present motion.

Standards for Motion for Order Without Hearing

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212. Section 622.12(d) provides that a motion for order without hearing "will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." Section 622.12(d) also provides that the motion will be granted "in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established."

Section 622.12(e) provides that the motion must be denied with respect to particular causes of action if any party shows the existence of "substantive disputes of facts sufficient to require a hearing." In such a circumstance, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible, and issue a ruling specifying what facts, if any, will be deemed established for all purposes in the hearing (see 6 NYCRR 622.12[e]).

The existence of a triable issue of fact regarding the amount of civil penalty to be imposed does not bar the granting of a motion (see 6 NYCRR 622.12[f]). If a triable issue of fact is presented only on the issue of penalty, the ALJ must convene a hearing to assess the amount of penalties to be recommended to the Commissioner (see id.).

On a motion for summary judgment pursuant to the CPLR, "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law . . . . The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests . . . . '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988] [citations omitted] [quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)]). Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (id.). Facts appearing in the movant's papers that the opposing party fails to controvert may be deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]).

In this case, I conclude that no triable issues of fact exist concerning respondents' liability on the two causes of action upon which Department staff seek a determination. However, for the following reasons, I conclude that triable issues of fact concerning penalty and remedial relief are presented, necessitating a hearing.

Discussion of Facts

The findings of fact determined above are those that are not in dispute or are incontrovertible based upon the evidence filed with the motion (see 6 NYCRR 622.12[e]). The findings of fact are based upon the agency records and affidavits submitted in support of staff's motion and not controverted by respondents, including observations made during inspections of the site conducted by Department staff at various times. The findings of fact are also established by applying principles of collateral estoppel, or issue preclusion, to those factual issues necessarily raised and decided in the prior civil court proceeding in Town of Smithtown v Force, as well as in the administrative enforcement proceeding against respondent Force in Matter of Ernest J. Force (see Matter of Choi v State of New York, 74 NY2d 933 [1989]; Ryan v New York Telephone Co., 62 NY2d 494 [1984]; Gramatan Home Investors Corp. v Lopez, 46 NY2d 481 [1979]).

Solid Waste Management Facility

Department staff seeks a determination that the site contains a solid waste management facility, specifically, a waste tire storage facility. Under the Environmental Conservation Law ("ECL"), a "solid waste management facility" is defined as:

> "any facility employed beyond the initial solid waste collection process including, but not limited to, transfer stations . . . processing systems, including resource recovery facilities for reducing solid waste volume, sanitary landfills, . . . and facilities for compacting, composting or pyrolization of solid wastes, . . . and other solid waste disposal, reduction, or conversion facilities"

(ECL 27-0701[2]). "Solid waste management" means "the purposeful and systematic transportation, storage, processing, recovery and disposal of solid waste" (ECL 27-0701[3]). "Solid waste" is material that is "discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard, or rejection" (ECL 27-0701[1]). Since August 7, 1989, the ECL has expressly recognized that facilities engaged in the storage of 1,000 or more waste tires are "solid waste management facilities" (see ECL 27-0703[6] [as added by L 1989, ch 88, effective Aug. 7, 1989]).

In addition to the definition provided by ECL 27-0701(2), the Departmental regulations in effect prior to 1989 included, among other things, "storage areas or facilities" and "sanitary landfills" in the definition of "solid waste management facilities" (see 6 NYCRR former 360.1[d][69]). "Landfills" were defined as "a disposal facility or part of a facility where solid waste is placed in or on land, and which is not a land treatment facility, a surface impoundment, or an injection well" (6 NYCRR former 360.1[d][37]). "Storage" meant "the containment of any solid waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such waste" (6 NYCRR former 360.1[d][71]). "Solid waste" was further defined under the regulations (see 6 NYCRR former 360.1[c]).

Effective December 31, 1988, 6 NYCRR part 360 ("Part 360") has expressly included "waste tire storage facilities" within the definition of "solid waste management facilities" (see 6 NYCRR 360-1.2[b][158]; see also 6 NYCRR former 360-1.2[b][145]). "Landfills" remain within the definition of "solid

waste management facilities" (see id.; see also 6 NYCRR 360-1.2[b][95]; 6 NYCRR former 360-1.2[b][88]). "Storage" is defined as "the containment of any solid waste in a manner which does not constitute disposal . . . provided, however, that any accumulation of solid waste for a period in excess of 18 months shall be deemed to constitute disposal" (6 NYCRR 360-1.2[b][164]; see also 6 NYCRR former 360-1.2[b][151] [definition of "storage" similar to former 360.1(d)(71)]).

Also since December 1988, the regulations have included an express definition for waste tires. From 1989 to 1993, the regulations defined "waste tires" as "any tire that has ceased to serve the purpose for which it was initially intended due to factors such as, but not limited to, wear or imperfections, and has been discarded" (see 6 NYCRR former 360-1.2[b][167]).

Effective October 9, 1993, the regulatory definition of "waste tires" was changed to "any solid waste which consists of whole tires or portions of tires" (6 NYCRR 360-1.2[b][183]). "Solid waste" is defined, among other things, as "discarded materials," which, in turn, is defined as materials that are "abandoned by being . . . accumulated [or] stored . . . instead of or before being disposed of" (6 NYCRR 360-1.2[a][1], [2]).

Both the shredded and unshredded used tires on the site constitute "solid waste" as that term is defined under the ECL (see Matter of Hornburg, Commissioner's Order, Aug. 26, 2004, adopting Chief ALJ Ruling/Hearing Report, at 24; Matter of Wilder, Commissioner's Order, Nov. 4, 2004, adopting Chief ALJ Ruling/Hearing Report, at 19). Moreover, the used tires constitute "solid waste" as that term is defined under the regulations in effect during all times relevant to this proceeding. Since at least October 2, 1990, more than 1,000 waste tires have been and are being stored, disposed of, or landfilled on the site and, thus, the site constitutes a waste tire storage facility. Accordingly, Department staff has made a prima facie showing that beginning in December 1987, the site has contained a solid waste management facility under the ECL and Part 360, and that since at least October 2, 1990, the site has contained a waste tire storage facility.

Department staff's prima facie showing is further supported by Justice Cannavo's determination that because the site was used for the storage and shredding of discarded tires, it constituted a "junkyard" used for the "collect[ion], storage or sale of . . . discarded material" (see Town of Smithtown v Force, at 3). Moreover, as to respondent Force, the Commissioner necessarily decided in Matter of Ernest J. Force that the site

contained a solid waste management facility, and that determination is conclusive as to respondent Force under the doctrine of collateral estoppel.

Izzo Respondents' Status as Owners

Department staff alleges that the Izzo respondents own the solid waste management facility on the site. At all relevant times, the regulations defined "owner" as the "person who owns a solid waste management facility or part of one" (6 NYCRR 360-1.2[b][114]; see also 6 NYCRR former 360-1.2[b][105]; 6 NYCRR former 360.1[d][50]). The Izzo respondents' ownership of the underlying parcel is established by a copy of the deed transferring ownership of the parcel to the Izzo respondents in 1981 (see Deed, Motion, Exh M). It is further supported by the determination of Justice Cannavo that the Izzo respondents own the parcel (see Town of Smithtown v Force, at 2), and their admission in their answer.

Accordingly, the Izzo respondents' ownership of the solid waste management facility on the site is established by the evidence of their co-ownership of the underlying parcel (see Matter of Wilder, Ruling/Hearing Report, at 13; Matter of Radesi, ALJ's Hearing Report, at 8, concurred in by Commissioner's Decision and Order, March 9, 1994). The Izzo respondents' ownership of the facility is also established by assertions made on respondents' application for a solid waste management facility permit (see Motion, Exh G). Thus, Department staff has made a prima facie showing that the Izzo respondents own the subject facility.

Respondent Force's Status as Operator

Department staff alleges that respondent Force operated the solid waste management facility on the site (see 6 NYCRR 360-1.2[b][113] [definition of "operator"]; see also 6 NYCRR former 360-1.2[b][104]; 6 NYCRR former 360.1[d][49]). They also allege that respondent Force's control over operations at the site was sufficient to make him personally liable for any violations.

Respondent Force's status as operator of the facility and his personal liability for violations arising from the operation is conclusively established by the Commissioner's order in Matter of Ernest J. Force. In addition, respondent Force's personal liability is established by assertions made by respondent Force's attorney throughout this proceeding. Thus, Department staff has made a prima facie showing that respondent Force was the operator of the solid waste management facility at

the site, and is personally liable for violations arising from that operation. Respondent Force has failed to raise a substantial question of fact requiring a hearing on this issue.

Respondents' Liability

1. First Cause of Action

In the first cause of action in the amended complaint, Department staff alleged that since December 1987, respondents violated 6 NYCRR 360-1.7(a)(1) by owning or operating a solid waste management facility on the site without a Part 360 permit. Effective December 31, 1988, 6 NYCRR 360-1.7(a)(1) provides "no person shall . . . operate a solid waste management facility, or any phase of it, except in accordance with a valid permit to operate that facility issued pursuant to this Part [Part 360]." Prior to December 31, 1988, the operative regulation was 6 NYCRR former 360.2(b), which contained a similar prohibition.[2]

Although respondents submitted an application for a Part 360 permit in 1989, that application was deemed incomplete and was ultimately withdrawn. The Department's records reveal that no Part 360 permit has otherwise been issued for the facility. Accordingly, Department staff has made a prima facie showing that respondents violated the relevant regulatory provisions since December 1987. Nothing in respondent Force's response to the motion raises a triable issue of fact on this issue.

2. Second Cause of Action

In the second cause of action in the amended complaint, Department staff alleged that respondents violated 6 NYCRR 360-

[2] The amended complaint did not cite 6 NYCRR former 360.2(b) as the operative regulation in effect from December 1987 until December 31, 1988. Nevertheless, the amended complaint provided respondents with adequate notice of the factual basis for and the actual nature of the charge. Accordingly, in the absence of any prejudice to respondents, the amended complaint is hereby amended to conform the theory of liability to the proof (see Dauerheim v Lendlease Cars, Inc., 238 AD2d 462, 463 [2d Dept 1997]; Matter of Cerio v New York City Tr. Auth., 288 AD2d 676 [2d Dept 1996]; see also Stern v Stern, 114 AD2d 408, 409 [2d Dept 1985] [pleadings may be amended to conform to the proof even without a motion by the parties]; Helman v Dixon, 71 Misc 2d 1057, 1062 [1972] [and cases cited therein]).

13.1(b) by engaging in the storage of 1,000 or more waste tires at a time without a permit. In its motion, Department staff alleges that this violation has occurred since December 31, 1988, the effective date of 6 NYCRR 360-13.1(b). Section 360-13.1(b) provides that "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to this Part."

As noted above, respondents failed to obtain a Part 360 permit for the facility and no such permit has otherwise been issued. Accordingly, Department staff has made a prima facie showing that respondents violated 6 NYCRR 360-13.1(b). Again, nothing in respondent Force's submissions raises a triable issue of fact on this claim. To the contrary, the Commissioner's determination in Matter of Ernest J. Force that respondent Force operated the facility without a permit in violation of section 360-13 is conclusive on the issue at least until September 30, 1993, the date of the order.

Although Department staff has established respondents' liability for the violation alleged in the second cause of action, the earliest date the violation can be determined to have begun on the present record, however, is October 2, 1990. That is the date Justice Cannavo determined that approximately two million waste tires were stored on the site (see Town of Smithtown v Force, at 2). The submissions on the motion do not provide a sufficiently precise number of tires on the site at any earlier time to allow for a determination of any earlier violation as a matter of law.

Operation of a Noncompliant Waste Tire Stockpile

Department staff seeks a determination that respondents own or operate a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6). ECL 27-1901(6), which was adopted effective September 12, 2003 (see L 2003, ch 62, pt V1, §§ 3, 7), defines "noncompliant waste tire stockpile" as:

> "a facility, including a waste tire storage facility, parcel of property, or site so designated by the department in accordance with this title, where one thousand or more waste tires or mechanically processed waste tires have been accumulated, stored or buried in a manner that the department . . . has determined violates any judicial administrative order, decree, law, regulation, or permit or stipulation relating

> to waste tires, waste tire storage facilities or solid waste."

A noncompliant waste tire stockpile is subject to the abatement provisions of ECL 27-1907.

In this case, respondents own or operate the subject waste tire storage facility. As a consequence of the violations of Departmental regulations determined above, the facility constitutes a noncompliant waste tire stockpile as defined by ECL 27-1901(6). Thus, respondents own or operate a noncompliant waste tire stockpile.

Penalty and Other Relief Requested

Although Department staff has established liability for the two cause of action alleged against respondents, issues of fact exist concerning penalty and other remedial relief that preclude granting staff's motion in its entirety (see 6 NYCRR 622.12[e], [f]). First, issues of fact exist concerning the duration of the violations established, which is relevant to the determination of the maximum penalty allowed by law for the violations established (see DEC Commissioner's Civil Penalty Policy, DEE-1, June 20, 1990, at IV.A ["Civil Penalty Policy"]). As noted above, the earliest violation of 6 NYCRR 360-13.1(b) proven on this motion was October 2, 1990. Department staff failed to make a prima facie showing of a violation of section 360-13.1(b) since December 31, 1988, as alleged, because a sufficiently precise number of waste tires on the site at times prior to October 2, 1990, cannot be determined from the submissions.

Similarly, with respect to the first cause of action, the present record establishes that "beginning in December 1987," respondents owned or operated a solid waste management facility without a permit. A more precise start date for the operation is not established by the present record and, accordingly, the precise duration of the violation cannot be determined.

Second, in his affidavit submitted in opposition to Department staff's motion, respondent Force contends that since 2002, the Izzo respondents have denied him access to the site, thereby preventing him from carrying out remedial activities as agreed to in the stipulations. Respondent Force also submitted temperature monitoring data for the site, showing temperature sensor readings from November 2002 through November 2004. Respondent Force's submissions in response to the motion raise triable fact issues relevant to the penalty assessment against

Force and whether he should be held jointly liable with the Izzo respondents, including Force's culpability, violator cooperation, and his history of non-compliance (see Civil Penalty Policy, at IV.E[1]-[3]).

Third, respondent Force also supplies financial information that raises triable fact issues concerning his ability to pay a penalty (see id. at IV.E[4]).

With respect to the remedial relief sought by Department staff, respondent Force's assertion that he lacks access to the site raises triable factual issues concerning his ability to comply. In addition, because the penalty Department staff seeks is linked to the amount of waste tires a respondent fails to remove from a site, Force's alleged inability to access the site raises questions concerning the propriety of imposing such a penalty structure upon Force.

With respect to the buried shredded tires on the site, in addition to supplying the temperature monitoring data, respondent Force notes the dispute between respondents and Department staff concerning the potential harm to the environment or human health those buried tires pose. As previously determined in these proceedings, triable issues of fact remain on that issue (see ALJ Ruling on Motion, Feb. 26, 2001, at 4; ALJs Ruling on Motion, Oct. 1, 2001, at 4-5), resolution of which is relevant to penalty (see Civil Penalty Policy, at IV.D[2][a] [potential harm and actual damages]), as well as the necessity of removing the buried tires as an element of the remedial relief sought by staff.

CONCLUSIONS OF LAW

In sum, the legal issues that can be determined on this motion (see 6 NYCRR 622.12[e]) are as follows:

1. Beginning in December 1987, the site has contained a solid waste management facility as defined by the ECL and applicable regulations.

2. Since at least October 2, 1990, the site has contained a waste tire storage facility as defined by the ECL and applicable regulations.

3. Respondents Pasquale Izzo and Michael Izzo are the owners of the solid waste management facility on the site.

4. Respondent Ernest Force was the operator of the solid

waste management facility on the site and is personally liable for violations arising from that operation.

5. Beginning in December 1987, respondents Pasquale Izzo, Michael Izzo and Ernest Force violated 6 NYCRR former 360.2(b) and 6 NYCRR 360-1.7(a)(1) by owning or operating a solid waste management facility on the site without a Part 360 permit.

6. Since at least October 2, 1990, respondents Pasquale Izzo, Michael Izzo and Ernest Force violated 6 NYCRR 360-13.1(b) by engaging in the storage of 1,000 or more waste tires at a time without a permit.

7. As a result of the violations established, respondents own or operated a “noncompliant waste tire stockpile” as that term is defined by ECL 27-1901(6).

8. Department staff’s motion can be granted on the issue of liability as against respondents Pasquale Izzo, Michael Izzo, and Ernest Force.

9. Triable issues of fact remain concerning penalties and remedial relief.

RULING

Department staff’s motion is granted on the issue of liability, and otherwise denied. A hearing will be convened to assess the amount of penalties and appropriate remedial relief to be recommended to the Commissioner.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: December 1, 2005
Albany, New York

TO: John T. DiPalma, Esq.
2 Elena Court
West Islip, New York 11795

Leonard J. Shore, Esq.
366 Veterans Memorial Highway
Commack, New York 11725

Charles E. Sullivan, Jr., Esq.
Director, Division of Environmental Enforcement
New York State Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500