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 RECONSIDERATION

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 Force (no submissions).

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

RULING ON MOTION FOR RECONSIDERATION

By letter dated December 5, 2005, staff of the Department of Environmental Conservation ("Department") moves for reconsideration of certain portions of my December 1, 2005 ruling on motion for order without hearing ("Ruling"). In the alternative, staff requests that the Commissioner grant leave to appeal from the ruling.[1] Respondents filed no response to staff's motion.

Reconsideration is appropriate only where the decision maker overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at an earlier decision (see Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; Foley v Roche, 68 AD2d 558 [1st Dept 1979]; CPLR 2221[a]; see also Matter of Village of Elbridge, Commissioner's Ruling on Motion for Reconsideration, Sept. 26, 1995, at 1; Matter of Kingston Oil Supply Co., Commissioner's Ruling on Motions for ALJ's Recusal and Reconsideration, Jan. 20, 1995, at 3-4). Reconsideration is not an opportunity to reargue points that were already considered and rejected, to present arguments that could have been made in the first instance but were not, or to assume a different position inconsistent with that taken on the original motion (Elbridge, at 1; Mayer, 192 AD2d at 865; Foley, 68 AD2d at 567-568). Motions for reconsideration are addressed to the discretion of the original decision maker (see Mayer, 192 AD2d at 865; Foley, 68 AD2d at 567).

In the December 1, 2005 ruling, I held that Department staff demonstrated its entitlement to judgment as a matter of law on the issue of the liability of respondents Pasquale Izzo, Michael Izzo, and Ernest Force (collectively "respondents") for the first and second causes of action alleged in the June 1, 2000 verified amended complaint. On the motion, staff established that (1) beginning in December 1987, respondents violated 6 NYCRR former 360.2(b) and 6 NYCRR 360-1.7(a)(1) by owning or operating a solid waste management facility without a Part 360 permit, and (2) since at least October 2, 1990, respondents violated 6 NYCRR 360-13.1(b) by engaging in the storage of 1,000 or more waste

[1] This ruling only considers Department staff's motion for reconsideration, which is addressed to the Chief Administrative Law Judge. As provided for later, this ruling and the December 1, 2005 ruling will be forwarded to the Commissioner for consideration of staff's motion for leave to appeal, which is addressed solely to the Commissioner.

tires at a time without a permit. I also held that as a result of the violations established, Department staff was entitled to a determination that respondents owned or operated a "noncompliant waste tire stockpile" as that term is defined by Environmental Conservation Law ("ECL") § 27-1901(6).

Accordingly, I granted staff's motion on the issue of liability. Because issues of fact were raised, however, relevant to certain aspects of penalty and other remedial relief, I otherwise denied the motion and directed that a hearing be convened to assess the amount of penalties and appropriate remedial relief (see 6 NYCRR 622.12[f]).

On its motion for reconsideration, Department staff argues that certain issues concerning penalty and the remedial relief sought by the Department could have been determined on the prior motion. I agree that respondents failed to raise triable issues of fact concerning most of the penalty phase issues. However, I essentially reserved decision on all issues related to the penalty phase of the proceeding, due to the existence of some triable factual issues relevant to the penalty phase. This approach does not constitute error. As is clear from the Department's enforcement proceeding regulations, a bifurcation of the liability phase and penalty phase on a motion for order without hearing is contemplated when fact issues solely related to the penalty phase are raised (see 6 NYCRR 622.12[f]). My prior ruling is consistent with this regulation.

Nevertheless, because Department staff's motion for reconsideration suggests that the prior ruling identified triable issues not so identified, I conclude that it is "practicable" at this stage to clarify those penalty phase issues that are established as a matter of law, and specify those issues that will be subject to adjudication (6 NYCRR 622.12[e]; see also Elbridge, at 1 [reconsideration may be used to clarify underlying decision]). I also conclude that such clarification will help to narrow the issues for the Commissioner when considering staff's request for leave to appeal from my ruling. Accordingly, I grant staff's motion for reconsideration. For the reasons that follow, upon reconsideration, I modify the prior ruling in part and otherwise adhere to my prior determination.

Department staff argues that the ruling erred in holding that triable issues of fact were presented on the issue of respondents Pasquale and Michael Izzo's (the "Izzo respondents") obligation to remediate the site. Specifically, staff contends it was error to conclude that issues of fact were raised concerning whether the waste tires on the surface of

respondents' site must be removed and disposed of properly. Respondents did not raise any triable issues of fact concerning staff's request that tires on the surface of the site be removed by the Izzo respondent, and no such issue was found. Thus, that issue will not be a subject of the penalty phase hearing. Moreover, no triable issues were raised concerning the Izzo respondents' ownership of the site and their corresponding joint and several obligation to remove the tires from the surface of the site.

Similarly, based upon the determination of the Izzo respondents' joint and several liability for the ECL violations alleged in the complaint, Department staff made a prima facie showing of its entitlement to a determination prohibiting the Izzo respondents from accepting any more waste tires at the site (see ECL 71-2703[1][a]; Matter of Wilder, ALJ Ruling/Hearing Report, at 17-18, adopted by Commissioner's Order, Nov. 4, 2004), and no triable issue was raised in opposition. Staff also demonstrated its entitlement to summary judgment on its request that the Izzo respondents be directed to refrain from interfering with the Department in the event the State must assume the removal and disposition of the surface tires, to reimburse the State the full amount of any expenditures incurred by the State for such abatement,[2] and to post financial security to secure performance of respondents' remedial obligations.

With respect to the penalty-phase fact issues I previously determined to be triable, I adhere to my prior ruling. As to the shredded tires buried at the site, the ruling holds that triable issues of fact exist concerning the need for their removal. That determination was based, in part, upon prior ALJ rulings in this case holding that triable issues were raised concerning the necessity of removing the buried tires (see Ruling, at 17 [citing ALJ Ruling on Motion, Feb. 26, 2001, at 4; ALJs' Ruling on Motion, Oct. 1, 2001, at 4-5]). Those rulings were not appealed to the Commissioner and, thus, constituted "law of the case" for the February 11, 2005 motion for order without hearing (see People v Evans, 94 NY2d 499, 501-505 [2000]; Kreuger

[2] With respect to the Izzo respondents' obligation to reimburse the State for abatement costs, staff seeks to withdraw that request for relief on this motion for reconsideration. The withdrawal is a new matter that could have been raised on the original motion, and is not an appropriate matter for consideration on this motion for reconsideration. Staff remain free, however, to withdraw the request for relief during any subsequent proceedings.

v Kreuger, 78 AD2d 692, 693 [2d Dept 1980] [earlier determination that issues of fact required a hearing obliged subsequent judge, under doctrine of law of the case, to hold the previously ordered hearing and to resolve the disputed factual issues]; see also Matter of Bath Petroleum Storage, Inc., ALJ Ruling on Motion to Clarify Affirmative Defenses, Jan. 27, 2005, at 9 [applying law of the case doctrine]). Those rulings were further supported by new evidence submitted by respondent Force in opposition to the February 2005 motion. Thus, under the law of the case doctrine, the hearing previously ordered must be held, and respondents permitted to make their record.

Nothing in staff's motion for reconsideration persuades me that the application of the law of the case doctrine in the prior ruling was error. As an initial matter, staff could have, but did not, argue on the prior motion for order without hearing that Supreme Court, Suffolk County's 1990 order alone serves as a basis to order removal of the buried shredded tires. Thus, this argument should not be considered for the first time on this motion for reconsideration. In any event, although Supreme Court recited the existence of tire piles towering 20 feet high above the surface of the ground, and extending some thirty feet below the ground, the court does not reference the existence of shredded tires buried at the site (see Town of Smithtown v Force, Sup Ct, Suffolk County, Oct. 2, 1990, Cannavo, J., Index No. 90-15859, at 2). Thus, is it not clear that the court's order directed removal of the buried shredded tires that are the subject of the present proceeding. Moreover, if the court order had directed removal of the shredded buried tires at issue here, that order would have been available to staff in opposition to the motions decided by the ALJs in 2001. Yet, no evidence exists that the 1990 court order was raised or considered on those motions.

Second, Department staff argues that enactment of the Waste Tire Management and Recycling Act of 2003 (ECL art 27, title 19 ["2003 Act"]) has resulted in the requirement that all waste tires be removed from noncompliant waste tire stockpile sites without regard to whether those tires present an environmental, public safety, or health threat. In essence, staff argues that the ALJs' 2001 rulings were overruled by the 2003 Act. However, I do not read the 2003 Act's abatement provisions as having the effect staff argues. Prior to the 2003 Act's adoption, the Department was and remains authorized to require the taking of such remedial measures "as may be necessary or appropriate" to address violations of ECL article 27 (ECL 71-2727[1]; see Matter of New York Pub. Interest Research Group, Inc. v Town of Islip, 71 NY2d 292, 306 [1988]). This specific

authority is in addition to the general authority of the Department to prevent and abate all water, land and air pollution (see, e.g., ECL 3-0301[1][i]). Although the remedial powers of the Department are broad, they are not unlimited, constrained as they are by the "necessary or appropriate" limitation.

Similarly, the abatement provisions of the 2003 Act are not without qualification. The 2003 Act defines "abatement" as the removal of a "sufficient" number of waste tires from a noncompliant waste tire stockpile and restoration of the site to a condition that is "in substantial compliance" with the rules and regulations administered by the Department (ECL 27-1901[1]). The quoted language does not establish an unequivocal requirement that all waste tires must be removed, regardless of the environmental, public safety or health threat posed by the tires. Moreover, staff does not cite to a provision of the Department's regulations governing waste tire storage facilities that prohibits the burial of waste tires (see 6 NYCRR subpart 360-13). Both subpart 360-13 and the 2003 Act itself contemplate the burial of waste tires, albeit subject to the Department's approval and only as a last resort (see ECL 27-1911[2]; 6 NYCRR 360-13.2[i][7]).

Accordingly, the Department's abatement powers are not unqualified, and a respondent may seek to challenge the "necessity or appropriateness" of the abatement plan sought to be imposed by staff, and establish that respondent's alternative is in "substantial compliance" with the Department's regulations. Of course, whether a respondent succeeds in proving its case by a preponderance of the evidence after a hearing is another matter. Nevertheless, having raised a triable issue of fact relevant to the remediation requested by staff, respondents are entitled to make their record, even if they ultimately do not prevail on the merits.

Nothing in the administrative case law cited by staff compels the conclusion that the Department's proposed remediation cannot be challenged. In those cases where respondents defaulted or otherwise failed to oppose motions for orders without hearing, the issue of appropriate remediation would not have been joined (see, e.g., Matter of Parent, Jr., Commissioner's Order, Oct. 5, 2005 [motion for default judgment]; Matter of Wilder, Commissioner's Order, Nov. 4, 2004 [unopposed motion for order without hearing]). In those matters where the respondents did appear, respondents apparently did not oppose the remedial relief sought by staff (see, e.g., Matter of Eagle, Commissioner's Order, March 11, 2003; Matter of Doran, Commissioner's Order, Sept. 12, 2002). Moreover, in Eagle and Doran, the ALJs

expressly held, and the Commissioner agreed, that the need for the requested remediation was demonstrated by the risk of fire and risk to public health posed by the waste tires (see Eagle, ALJ Hearing Report, at 7; Doran, ALJs' Hearing Report, at 13). These cases do not stand for the proposition that removal of all waste tires, without regard to the environmental, public health, or safety threat posed by such tires, is required as a matter of law, or that respondents are precluded from raising issues of fact concerning the necessity or appropriateness of the remedial measures sought by staff.

Finally, equally unpersuasive is staff's argument that the question whether the buried shredded tires pose a public health, safety, or environmental threat arose in this proceeding in the context of a negotiated settlement and, accordingly, was somehow withdrawn upon the failure of the agreement. Review of the prior rulings clearly indicates that the threat posed by the buried shredded tires was a litigated issue that the parties did not resolve. Indeed, it was Department staff that raised triable issues of fact concerning the necessity of the buried tires' removal.

With respect to the penalty to be imposed on the Izzo respondents, I adhere to my prior determination. Although staff's stipulation to waive any penalty attributable to violations occurring before October 2, 1990 is a new matter not reviewable on this reconsideration motion, staff is not precluded from waiving that portion of the penalty in subsequent proceedings. With respect to respondent Force, my prior determinations also remain undisturbed. Although respondent Force is jointly and severally liable with the Izzo respondents for the violations established in the December 2005 ruling, fact issues remain concerning respondent Force's ability to comply with remedial obligations staff seeks to impose, and the appropriate level of penalties to be assessed. Again, staff's stipulation to the accuracy of respondent Force's showing of financial inability to pay is not appropriately considered for the first time on this motion for reconsideration.

On a procedural note, to the extent staff's motion for reconsideration can be read as seeking a partial order from the Commissioner at this stage of the proceeding, ordinarily, both the liability and penalty phases are completed by the ALJ before a hearing report is forwarded to the Commissioner for issuance of an order (see 6 NYCRR 622.12[d], [f]). Nothing in staff's February 2005 motion sought or justified a deviation from this procedure.

CONCLUSIONS OF LAW

In addition to conclusions of law 1 through 9 in the December 1, 2005 ruling, the legal issues that can be determined on this motion (see 6 NYCRR 622.12[e]) are as follows:

10. Department staff established its entitlement to a determination prohibiting the Izzo respondents from accepting any more waste tires at the site. Respondents failed to raise a triable issue of fact on this point.

11. Department staff established its entitlement to a determination that the Izzo respondents are jointly and severally responsible for the proper removal and disposal of the waste tires from the surface of the site.

12. Department staff established its entitlement to summary judgment on its request that the Izzo respondents be directed to refrain from interfering with the Department in the event the State must assume abatement of the surface tires, to reimburse the State the full amount of any expenditures incurred by the State to abate the tires on the surface, and to post financial security to secure performance of respondents' remedial obligations in an amount to be determined during the penalty phase hearing.

13. The obligations referred in paragraphs 10 through 12 above should be imposed in the Commissioner's order issued at the conclusion of the penalty phase hearing.

14. The factual issues to be examined during the penalty phase hearing will be limited to the earliest date of the violations alleged in the first and second causes of action, the severity of the environmental, public health and safety threat posed by the shredded tires buried at the site, the necessity of removing shredded tires buried at the site, respondent Force's ability to comply with remediation obligations, and the appropriate penalty and amount of financial security to be imposed upon respondents.

RULING

Department staff's motion for reconsideration is granted and, upon reconsideration, the December 1, 2005 ruling is modified as provided for herein. Both rulings, together with the submissions of the parties and the hearing file, are hereby forwarded to the Commissioner, so that she may rule on Department staff's motion for leave to appeal.

Once I receive a statement of readiness from Department staff, I will convene the penalty phase hearing.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: March 28, 2006
Albany, New York

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