STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located on Route 68 in the Town of Lisbon, St. Lawrence County, New York, and Owned or Operated

ORDER

DEC File Number R620040802-51

- by -

WAYNE JAHADA, individually, and WATERTOWN IRON AND METAL, INC.,

Respondents.

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Wayne Jahada, individually, and Watertown Iron and Metal, Inc. ("respondents") to enforce provisions of Environmental Conservation Law ("ECL") article 27 and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The proceeding was commenced pursuant to 6 NYCRR 622.12 by service upon respondents of an amended motion for order without hearing in lieu of notice of hearing and complaint, dated October 26, 2005. The motion was mailed to respondents' attorney by certified mail on October 26, 2005, and received by her office, on behalf of respondents, on October 28, 2005, completing service in accordance with 6 NYCRR 622.3(a)(3).

Department staff's motion, which serves as the complaint in this matter, alleges that respondents are the owners and operators of a solid waste management facility which engages in the receipt and storage of waste tires at a location on State Route 68 in the Town of Lisbon, St. Lawrence County, New York (the "site"). The motion further asserts that respondents' activities at the site violated various provisions of 6 NYCRR part 360, as well as the provisions of Consent Order R620040802-51, executed by both respondents and the Department on February 7, 2005. As a consequence of the violations alleged, Department staff contends that respondents own or operate a noncompliant waste tire stockpile, as that term is defined by ECL 27-1901(6).

Respondents filed a timely response to Department staff's amended motion, essentially denying all of the violations alleged. Respondents also assert three affirmative defenses.

The matter was assigned to Administrative Law Judge ("ALJ") Richard R. Wissler, who prepared the attached hearing report dated June 14, 2006. I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

Respondents have allowed the accumulation of more than 68,000 waste tires at the site and have operated a waste tire storage facility at the site without a valid permit issued by the Department. Respondents' operation of the facility, without the plans required by 6 NYCRR 360-13.2(b), (e), (f), (h), (i), and (j), constitutes separate violations of the operational requirement of 6 NYCRR 360-13.3(a), which requires that all activities at the facility must be performed in accordance with such Department-approved plans (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ Hearing Report, at 3-4). In addition, the failure to comply with the dimensional, quantity and other standards established in 6 NYCRR 360-13.2(h)(6), the applicable National Fire Protection Association ("NFPA") standards incorporated therein, 6 NYCRR 360-13.2(i), and 6 NYCRR 360-13.3 constitutes violations of additional operational requirements applicable to waste tire storage facilities (see id. at 4-8).

With respect to the remaining violations alleged by Department staff, I affirm and adopt the ALJ's analysis and conclusions. As to respondent Wayne Jahada, I agree that the facts establish his individual liability for all violations determined herein, and that respondent Wayne Jahada, individually, and respondent Watertown Iron and Metal, Inc., are jointly and severally liable for the penalty imposed for such violations.

As a result of the violations referenced above and the violations determined in the ALJ's report, respondents' facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6). Accordingly, the abatement measures Department staff seeks to have imposed in this matter are authorized by ECL 27-1907 and were also included in Consent Order R620040802-51.

The penalty recommended by the ALJ is warranted by the circumstances of this case and consistent with the penalty-assessment formula I have adopted in other noncompliant waste tire stockpile cases (see Matter of Parent, Order of the Acting Commissioner, Oct. 5, 2005; Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005).

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

1. Department staff's motion for an order without hearing is granted.

2. The subject site constitutes a waste tire storage facility subject to the provisions of 6 NYCRR subpart 360-13 because more than 1,000 waste tires are stored at the site.

3. The subject site constitutes a "solid waste management facility" as that term is defined by 6 NYCRR 360-1.2(b)(158), because it is a waste tire storage facility.

4. Since September 18, 1998, respondent Watertown Iron and Metal, Inc., was and is the owner of the site and the solid waste management facility located thereon.

5. Since September 18, 1998, respondent Wayne S. Jahada, was and is the President of respondent Watertown Iron and Metal, Inc., and is the facility operator of the site as that term is defined by 6 NYCRR 360-1.2(b)(113).

6. As facility operator of the site, respondent Wayne S. Jahada is personally liable for violations arising from the operation of the solid waste management facility at the site, and is jointly and severally liable with respondent Watertown Iron and Metal, Inc., for the payment of penalties imposed for such violations.

7. Since September 18, 1998, respondents have violated 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) by operating a waste tire storage facility at the site without a valid solid waste management facility permit issued by the Department.

8. Since September 18, 1998, respondents have violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved operation and maintenance manual.

9. Since September 18, 1998, respondents have violated National Fire Protection Association Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition ("NFPA 231D") and, thus, 6 NYCRR 360-13.2(h)(6). In particular, respondents violated:

   a. Provision C-3.2.1(a), which requires "fire lanes to separate tire piles and provide access for effective fire fighting operations," by failing to have such access lanes at and about the site;

b. Provision C-3.2.1(c), which requires “an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area,” by storing waste tires at the site in piles in close proximity to natural cover and trees; and

c. Provision C-4.2.5, which requires that “the distance between storage and grass, weeds, and brush should be 50 feet,” by locating tire piles at the site less than 50 feet from grass, weeds, and bushes.

10. Since September 18, 1998, respondents have violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved:

a. Site plan specifying the waste tire facility’s boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

b. Monitoring and inspection plan addressing such matters as the readiness of fire-fighting equipment and the integrity of the site security system, as required by 6 NYCRR 360-13.2(e);

c. Closure plan identifying the steps necessary to close the facility, as required by 6 NYCRR 360-13.2(f);

d. Contingency plan, as required by 6 NYCRR 360-13.2(h);

e. Storage plan addressing the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i); and

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

11. Since September 18, 1998, respondents have violated the operational requirements established in 6 NYCRR 360-13.2 by failing to maintain:

a. Waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, as required by 6 NYCRR 360-13.2(i)(4);

b. Fifty foot separation areas so that they are free of obstructions and vegetation at all times, as required by 6 NYCRR 360-13.2(i)(4);

c. Fifty foot separation areas in such a manner that emergency vehicles will have adequate access, as required by 6 NYCRR 360-13.2(i)(4);

d. Waste tire piles at 50 feet or less in width, as required by 6 NYCRR 360-13.2(i)(3); and

e. Waste tire piles at 10,000 square feet, or less, of surface area, as required by 6 NYCRR 360-13.2(i)(3).

12. Since September 18, 1998, respondents have violated the operational requirements of 6 NYCRR 360-13.3 by:

a. Failing to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(1);

b. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, as required by 6 NYCRR 360-13.3(c)(4);

c. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have an active hydrant or viable fire pond on the facility, as required by 6 NYCRR 360-13.3(c)(4);

d. Failing to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(5);

e. Owning and operating a waste tire storage facility having more than 2,500 tires that has potential ignition sources stored in tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6);

f. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have the site enclosed, at a minimum, in a 6 foot chain link fence or equivalent structure, as required by 6 NYCRR

360-13.3(d)(2);

g. Failing to file with the Department quarterly operation reports, as required by 6 NYCRR 360-13.3(e)(2);

h. Failing to file with the Department annual operation reports, as required by 6 NYCRR 360-13.3(e)(3); and

i. Storing waste tires for more than one week at the site without removing the rims from the tires, as required by 6 NYCRR 360-13.3(b)(1).

13. Respondents violated the terms of Consent Order R620040802-51 by:

a. Failing to remove, for the period of June 15, 2005, to October 26, 2005 (the date of the amended motion for order without hearing), 20 tons of waste tires every seven days, as required by paragraph I(B)(1)(ii) of the Consent Order;

b. Failing to remove 24,000 or 200 tons of tires from the site, as required by paragraph I(B) of the Consent Order; and

c. Failing to submit weekly reports, as required by paragraph I(B)(1)(iv) of the Consent Order.

14. By virtue of having violated the aforementioned provisions of law and regulation, respondents own and operate a noncompliant waste tire stock pile as that term is defined in ECL 27-1901(6).

15. For the violations determined herein, it is hereby ordered that:

I. Respondent shall 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. As requested by Department Staff in its request for relief, it is hereby further ordered that:

A. Respondents are ordered to pay the suspended penalty of $136,000 pursuant to Consent Order R620040802-51,

representing $2.00 for each of the 68,000 tires remaining on the site as of August 26, 2005.

B. Respondents are ordered to pay an additional penalty of $100,000 for the continuing violations of Consent Order R620040802-51, from June 15, 2005, to October 26, 2005 (the date of the amended motion for order without hearing).

C. No later than 30 days after the date of service of this order upon respondents, respondents shall submit payment of the total assessed penalty of $236,000 to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address: Randall C. Young, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

D. Respondents Watertown Iron and Metal, Inc. and Wayne Jahada, individually, are jointly and severally liable for the payment the aforementioned penalty of $236,000.

III. Respondents are ordered to 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 take over abatement of the waste tires at the site.

IV. Respondents are ordered to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site, including any and all investigation, prosecution, abatement and oversight costs, to the maximum extent authorized by law. Upon complete abatement of the noncompliant waste tires at the site, the State shall notify respondents of the costs so incurred by the State and respondents shall pay these costs within thirty days of receipt of such notification.

V. All communications from respondents to the Department concerning this order shall be made to Randall C. Young, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

VI. The provisions, terms and conditions of this order shall bind respondents and their heirs, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

/s/

By: _____
Denise M. Sheehan,
Commissioner

Dated: November 21, 2006
Albany, New York

TO: (via Certified Mail)
Wayne Jahada
17950 County Route 63
Watertown, New York 13601

Watertown Iron & Metal, Inc.
17991 County Route 63
Watertown, NY 13601

(via Regular Mail)
Randall C. Young, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation
Division of Legal Affairs, Region 6
317 Washington Street
Watertown, New York 13601

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NY 12233-1550

In the Matter

- of -

the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

-by-

WAYNE JAHADA, individually, and
WATERTOWN IRON AND METAL, INC.,

Respondents.

DEC File Number R620040802-51

RULING AND REPORT ON MOTION FOR ORDER WITHOUT HEARING

/s/

Richard R. Wissler
Administrative Law Judge

June 14, 2006

SUMMARY

Staff of the Department of Environmental Conservation (Department Staff) moved for an order without hearing against Wayne Jahada, individually, and Watertown Iron and Metal, Inc. (Respondents) for various violations of the solid waste management facility laws and regulations relating to the receipt, storage and disposition of waste tires at a facility owned and operated by Respondents located on State Route 68 in the Town of Lisbon, St. Lawrence County, New York. For the reasons set forth herein, the motion is granted.

PROCEDURAL HISTORY

Department Staff's Motion for Order Without Hearing

By motion for order without hearing dated October 26, 2005, Department Staff seeks an order of the Commissioner finding Respondents in violation of article 27 of the Environmental Conservation Law (ECL) and of various provisions of the ECL's implementing regulations set forth in part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

In particular, the motion asserts that Respondents are the owners and operators of a solid waste management facility which engages in the receipt, storage and disposition of waste tires at a location on State Route 68 in the Town of Lisbon, St. Lawrence County, New York (the Site). The motion further asserts that Respondents' activities at the Site violated various provisions of 6 NYCRR part 360, as well as the provisions of Consent Order R620040802-51, executed by both Respondents and the Department on February 7, 2005.

With respect to 6 NYCRR part 360, the motion alleges that Respondents have violated:

1. 6 NYCRR 360-1.7(a)(1) for operating a waste tire storage facility at the Site, since at least September 18, 1998, without benefit of a valid solid waste management facility permit issued by the Department.

2. 6 NYCRR 360-13.1, as to Respondent Watertown Iron and Metal, Inc., for failure, since September 1998, to obtain a solid waste management facility permit to operate a waste tire storage facility on the Site.

3. 6 NYCRR 360-13.3(a) for failure, since September 18, 1998, to submit to the Department an operation and maintenance manual for the Site.

4. 6 NYCRR 360-13.3(a) and 6 NYCRR 360-13.2(h)(6) for failure, since September 18, 1998, to comply with NFPA 231D, 1989 edition, entitled *Standards for Storage of Rubber Tires*, Appendix C thereof entitled *Guidelines for Outdoor Storage of Scrap Tires*, and in particular,

   A. Provision C-3.2.1(a), which requires “fire lanes to separate [tire] piles and provide access for effective fire fighting operations,” by failing to have such access lanes at and about the Site;

   B. Provision C-3.2.1(c), which requires “an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area,” by storing waste tires at the Site in piles in close proximity to natural cover and trees; and

   C. Provision C-4.2.5, which requires that “the distance between storage and grass, weeds, and brush should be 50 feet,” by locating tire piles at the Site less than 50 feet from grass, weeds, and bushes.

5. 6 NYCRR 360-13.3(a) and 6 NYCRR 360-13.2 for failure, since September 18, 1998, to submit to the Department a

   A. Site plan specifying the waste tire facility’s boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

   B. Monitoring and inspection plan addressing such matters as the readiness of fire-fighting equipment and the integrity of the Site security system, as required by 6 NYCRR 360-13.2(e);

   C. Closure plan identifying the steps necessary to close the facility, as required by 6 NYCRR 360-13.2(f);

   D. Contingency plan, as required by 6 NYCRR 360-13.2(h);

E. Storage plan addressing the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i); and

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

6. 6 NYCRR 360-13.3(a) and 6 NYCRR 360-13.2 by failing to maintain

A. Waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, as required by 6 NYCRR 360-13.2(i)(4);

B. Fifty foot separation areas so that such areas are free of obstructions and vegetation at all times, as required by 6 NYCRR 360-13.2(i)(4);

C. Fifty foot separation areas in such a manner that emergency vehicles will have adequate access, as required by 6 NYCRR 360-13.2(i)(4);

D. The number of tires at or below the quantity for which it is permitted, as required by 6 NYCRR 360-13.2(i)(5);

E. Waste tire piles at 50 feet or less in width, as required by 6 NYCRR 360-13.2(i)(3); and

F. Waste tire piles at 10,000 square feet, or less, of surface area, as required by 6 NYCRR 360-13.2(i)(3).

7. The operational requirements of 6 NYCRR 360-13.3 by

A. Failing to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(1);

B. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have fully charged large capacity carbon dioxide or dry

chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, as required by 6 NYCRR 360-13.3(c)(4);

C. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have an active hydrant or viable fire pond on the facility, as required by 6 NYCRR 360-13.3(c)(4);

D. Failing to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(5);

E. Owning and operating a waste tire storage facility having more than 2,500 tires that has potential ignition sources stored in tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6);

F. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have the Site enclosed, at a minimum, in a 6 foot chain link fence or equivalent structure, as required by 6 NYCRR 360-13.3(d)(2);

G. Failing to ever prepare and file with the Department quarterly operation reports, as required by 6 NYCRR 360-13.3(e)(2);

H. Failing to ever prepare and file with the Department annual operation reports, as required by 6 NYCRR 360-13.3(e)(3); and

I. Storing waste tires for more than one week at the Site without removing the rims from the tires, as required by 6 NYCRR 360-13.3(b)(1).

With respect to the provisions of Consent Order R620040802-51, executed by both Respondents and the Department on February 7, 2005, the motion alleges that Respondents violated the terms of that Order by

1. Failing to remove, for the period of June 15, 2005, to the date of the present motion, 20 tons of waste tires every seven days, as required by paragraph I(B)(1)(ii) of the Order;

2. Failing to remove 24,000 or 200 tons of tires from the site, as required by paragraph I(B) of the Order; and

3. Failing to submit weekly reports, as required by paragraph I(B)(1)(iv) of the Order.

Department Staff additionally asserts that Respondent Wayne Jahada is individually liable for the aforementioned violations inasmuch as he was, at all relevant times, the corporate officer of Respondent Watertown Iron and Metal, Inc. with authority and responsibility to ensure the corporation's compliance with applicable laws and regulations. Moreover, Respondent Wayne Jahada, as President of Respondent Watertown Iron and Metal, Inc., executed the aforementioned Consent Order R620040802-51.

The affidavits and exhibits annexed to its motion, Department Staff asserts, incontrovertibly demonstrate that

1. Respondents, at all relevant times, have owned and operated the Site and have allowed the accumulation of the more than 68,000 waste tires presently at the Site;

2. The Site is a solid waste management facility;

3. Respondents violated the aforementioned provisions of law and regulation, as well as the provisions of Consent Order R620040802-51; and

4. By virtue of having violated the aforementioned provisions of law and regulation, Respondents own and operate a noncompliant waste tire stock pile as that term is defined in ECL 27-1901(6).

As relief, Department Staff seeks an Order of the Commissioner

1. Ratifying the State's authority to enter the Site and remove all waste tires there as authorized by Consent Order R620040802-51 and title 19 of article 27 and ECL 71-2703;

2. A. Directing Respondents to pay the suspended penalty of $136,000 pursuant to Consent Order R620040802-51, representing $2.00 for each of the 68,000 tires remaining on the Site as of August 26, 2005;

B. Directing Respondents to pay an additional penalty up to the maximum allowed by law pursuant to ECL 71-

2703, but not less than $100,000 for the continuing violations of Consent Order R620040802-51, from June 15, 2005, to the present;

C. Specifying that liability for payment of such penalties is joint and several between Respondents Watertown Iron and Metal, Inc. and Wayne Jahada;

3. Directing Respondents to 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 take over abatement of the waste tire stockpiles at the Site;

4. Directing Respondents to 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 at issue and with the State's assumption of the responsibility to remove the waste tires. Upon complete abatement of the noncompliant waste tires at the Site, the State shall notify Respondents of the costs so incurred by the State and Respondents shall pay said costs within thirty days of receipt of such notification; and

5. Directing such other and further relief as the Commissioner may deem just and proper.

Response to Motion for Order Without Hearing

Respondents timely filed a response to Department Staff's motion essentially denying all of the violations alleged against them. With respect to the alleged violations of Consent Order R620040802-51, however, Respondents did admit to the failure to file weekly reports as required by paragraph (I)(B)(iv) thereof. In addition, Respondents pleaded three affirmative defenses.

As its first affirmative defense, Respondents assert that Department Staff's motion fails to allege any facts or law sufficient to support a claim against Wayne Jahada individually. In support of this affirmative defense, Respondents point out that (a) the Site is owned solely by Respondent Watertown Iron and Metal, Inc.; (b) the aforementioned Consent Order was executed solely against Respondent Watertown Iron and Metal, Inc.; and (c) the relief sought by Department Staff in the present motion lies only with Respondent Watertown Iron and Metal, Inc. Moreover, Respondents assert:

> "No showing has been made that Wayne Jahada acted outside his role as corporate officer. Any alleged failure on Mr. Jahada's part to act was based upon the financial limitations of the corporation, not any particular act or omission of Mr. Jahada. (Response, Paragraph 11.)"

As a second affirmative defense, Respondents assert that assuming, without admitting, that there are 68,000 tires at the Site, 50,000 of those tires were already present at the Site when Respondent Watertown Iron and Metal, Inc. acquired the Site from Leora White in 1998. Those 50,000 tires remain the responsibility of the prior owner, Leora White.

As a third affirmative defense, Respondents plead impossibility. Respondents assert that during the same time they were to remove tires from the Site in Lisbon, as directed by Consent Order R620040802-51, they were compelled to vacate their primary facility in Hounsfield, New York. This required the commitment of all of Respondents' time, resources and financial ability, rendering it impossible to comply with the terms of Consent Order R620040802-51.

Papers and Proofs Submitted

Department Staff

The following papers and proofs were submitted by Department Staff:

A. Notice of Motion for Order Without Hearing, dated September 29, 2005;

B. Motion for Order Without Hearing, dated September 29, 2005;

C. Affidavit of Karen Fiske, sworn to October 11, 2005, with attachments;

D. Amended Motion for Order Without Hearing, dated October 26, 2005, with cover letter to Judy Drabicki, Esq.;

E. Affidavit of Beth Widrick, sworn to November 2, 2005, with attachments;

F. Affidavit of Randall C. Young, Esq., sworn to September 19, 2005;

G. Affidavit of Edward Blackmer, P.E., sworn to September 1, 2004, with attachments;

H. Supplemental Affidavit of Edward Blackmer, P.E., sworn to September 19, 2005, with attachments;

I. Affidavit of Gary McCullouch, P.E., sworn to September 1, 2005, with attachments;

J. Supplemental Affidavit of Gary McCullouch, P.E., sworn to September 19, 2005, with attachments;

K. Affidavit of Peter Taylor, P.E., sworn to on September 2, 2004, with attachments;

L. Affidavit of Environmental Conservation Officer Michael Sherry, sworn to September 8, 2004, with attachments;

M. Copies of Consent Orders R620041208-74 and R-6-2268-98-12;

N. Attorney Brief in Support of Motion for Order Without Hearing by Randall C. Young, Esq., dated September 27, 2005; and

O. Letter of Randall C. Young, Esq., to Hon. James McClymonds, dated November 28, 2005.

Respondents

A. Response to Motion for Order Without Hearing, including Affirmative Defenses, dated November 23, 2005, submitted on behalf of Respondents by Judy Drabicki, Esq., with attachments including Affidavit of Wayne Jahada, sworn to November 23, 2005;

B. Memorandum in Opposition to Motion for Order Without Hearing by Judy Drabicki, Esq., dated November 23, 2005; and

C. Letter of Judy Drabicki, Esq., to Hon. Richard Wissler, dated January 31, 2006, advising she no longer represented Respondents.

FINDINGS OF FACT

From the proofs submitted, the following findings of fact are established:

1. The site which is the subject of this proceeding (Site) is located at 4110 County Route 68 in the Town of Lisbon, St. Lawrence County, New York and is comprised of two parcels of land identified on the St. Lawrence County Tax as parcel numbers 61.003.1.14.1 and 61.003.1.15. It is known locally as White's Scrap Iron and Metal. The Site is also within the geographic boundaries and jurisdiction of the Department's Region 6.

2. Respondent Watertown Iron and Metal, Inc. is a domestic business corporation duly incorporated under the laws of the State of New York.

3. Respondent Wayne S. Jahada is the President of Respondent Watertown Iron and Metal, Inc.

4. On September 17, 1998, by bargain and sale deed of transfer executed pursuant to a purchase agreement and in consideration of a note secured by a mortgage, Respondent Watertown Iron and Metal, Inc. acquired all right, title and interest in the Site from Leora M. White.

5. The aforementioned note and mortgage were executed by Respondent Wayne S. Jahada on behalf of Respondent Watertown Iron and Metal, Inc.

6. At all times subsequent to September 17, 1998, title to the Site has remained in Respondent Watertown Iron and Metal, Inc.

7. On February 7, 2005, Respondent Wayne S. Jahada, as President of Watertown Iron and Metal, Inc., and on its behalf, executed Consent Order R620040802-51, expressly consenting to the Consent Order's issuance and entry, and agreeing to be bound by its provisions, terms and conditions.

8. At Recital 2.A of Consent Order R620040802-51, Respondent Watertown Iron and Metal, Inc. expressly admitted that:

> "From September 18, 1998 to the present [February 7, 2005], Respondent has owned the noncompliant waste tire stockpile located at 4110 State Route 68, Lisbon, St. Lawrence County, New York .... At the time Respondent purchased the property from Leora White, Respondent was aware that the site contained an estimated 50,000 waste tires and became legally responsible for their proper handling and disposal."

9. Subsequent to September 18, 1998, Respondents received and stored additional tires at the Site.

10. During 2003 and 2004 at least 68,000 tires were present at the Site.

11. Paragraph I of Consent Order R620040802-51, entitled "Waste Tire Removal," at subparagraph B.1, provides, in part, as follows:

> "Immediately upon the effective date of this Order [February 7, 2005], Respondent [Watertown Iron and Metal, Inc.] shall:
>
> "B.1. In *strict* accordance with the requirements of this Subparagraph I.B., cause twenty-four thousand waste tires to be removed from the Site in the following manner and schedule:
>
> "i. For purposes of this Subparagraph I.B., 'waste tires' includes, but is not limited to, tires of any size (including passenger, truck, and off-road vehicle tires), whether whole or in portions (including halved, quartered, cut sidewalls, cut tread lengths, tire shreds, tire chips), burned tire remains, and tire rims.
>
> "ii. Starting no later than June 15, 2005, Respondent shall remove and transport to Department-authorized locations ... no less than 20 tons of waste tires for each seven calendar day period until Respondent has

removed **200 tons** of waste tires from the site; the first day of the first such period being the first day removal and transportation shall commence. Respondent shall provide no less than one business day's advance notice to the [Department] of the start of waste tire removal activities ...

"iv. a. Starting the first Monday after the end of the first seven calendar day period, and continuing each subsequent Monday until Respondent has removed no less than 200 tons of waste tires from the Site, Respondent shall submit ... a written report to the Department ...
b. Each such report shall contain the following information pertaining to each seven calendar day period and the following certification:
1. A chart for each of the seven calendar days to which the report pertains [indicating the name and permit number of the transporter, the transporter vehicle's weight before and after loading it with waste tires, the net weight of the tires thus transported, and the name and address of the facility accepting the waste tires].
2. Copies of the certified weight slips pertaining to each vehicle load ...
3. A copy of each agreement with a facility accepting the waste tires ...
4. The following certification that shall appear at the beginning of each such report:

> I, Wayne Jahada, do hereby certify that I reviewed the following report; that based on my knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; that the New York State Department of Environmental Conservation has the right to rely upon the information contained in

this report as being truthful and accurate and to conclude that the report does not omit any material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and that I know that any false statement made in this certification or in this report shall be punishable pursuant to Section 210.45 of the Penal Law, and as may be otherwise authorized by law."

12. Paragraph V of Consent Order R620040802-51, provides as follows:

> "V. Failure, default, and violation of Order
>
> "A. The failure by Respondent to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and shall be deemed to be a violation of both this Order and the ECL.
>
> "B. The failure by Respondent to comply fully and in timely fashion with any provision, term, or condition of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL and shall constitute sufficient grounds for revocation or denial of issuance of any permit, license, certification, or approval issued to, or applied for by, Respondent by the Department."

13. In addition to being the individual who executed the aforementioned note, mortgage and consent order on behalf of Respondent Watertown Iron and Metal, Inc., all other communication between Respondent Watertown Iron and Metal, Inc. and Department Staff has been through Respondent Wayne S. Jahada.

14. In August of 2004, Respondent Wayne S. Jahada advised Department Staff that upon Respondent Watertown Iron and Metal, Inc.'s acquisition of the Site, he had

directed that larger tire piles at the site be moved into smaller windrow style piles. These longer narrower piles are not depicted in scaled areal photographs of the Site taken prior to Respondent Watertown Iron and Metal, Inc.'s acquisition of the Site, but are depicted in scaled areal photographs taken subsequent to its acquisition of the Site.

15. Some time subsequent to his execution of Consent Order R620040802-51 and the filing of this motion, Respondent Wayne S. Jahada met with Department Staff to discuss his compliance with that order. He advised Department Staff that he had not commenced removal of the tires as of the date specified in the order because he had confused that date with another date for removal of other tires from another site controlled by him. At that same meeting Respondent Wayne S. Jahada said he had contacted a landfill facility to arrange for the disposal there of the tires at the Site. Moreover, he advised Department Staff that he had not yet determined whether to transport the tires from the Site to the landfill himself, or to engage a contractor for this purpose.

16. A search was made of the Department's records pertaining to solid waste management facilities in Region 6. One of those files contains all such records pertaining to the Site, beginning with its earliest entry on November 25, 1998. This search was made by the Departmental custodian of those records, the Regional Solid Materials Engineer. This search found no record, entry nor filing of:

    A. A solid waste management facility permit to operate a waste tire storage facility, or any other solid waste management facility, or any renewal thereof, on the Site, as required by ECL 27-0703.6, 6 NYCRR 360-1.7 and 6 NYCRR 360-13.1;

    B. A site plan specifying the Site's boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

    C. A monitoring and inspection plan for the Site addressing such matters as the readiness of fire-fighting equipment and the integrity of the security system, as required by 6 NYCRR 360-13.2(e);

D. A closure plan for the Site identifying the steps necessary to close the Site, as required by 6 NYCRR 360-13.2(f);

E. A contingency plan detailing, among other things, the measures to be undertaken at the Site in the event of a fire emergency including such measures as are necessary to assure compliance with applicable National Fire Protection Association standards, as required by 6 NYCRR 360-13.2(h);

F. A storage plan addressing the receipt and handling of all waste tires and solid waste to, at, and from the Site, as required by 6 NYCRR 360-13.2(i);

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

H. Any quarterly operation report with the Department, as required by 6 NYCRR 360-13.3(e)(2);

I. Any annual report with the Department, as required by 6 NYCRR 360-13.3(e)(3); and

J. An operation and maintenance manual for the Site, as required by 6 NYCRR 360-13.3(a).

17. During an inspection of the Site on July 22, 2004, Department Staff observed the following conditions:

A. Approximately 68,000 tires were present at the Site.

B. The tires were situated in several piles, the largest of which exceeded 10,000 square feet in area and had a width greater than 50 feet.

C. All of the tire piles were uncovered and exposed to the elements. Vegetation in the form of grass, weeds, brush, and trees was growing through, in, and among the tire piles, such as to provide a vegetative interconnection between them.

D. The distances between the tire piles were less than fifty feet, no such distance being greater than twenty-five feet.

E. Vegetation in the form of grass, weeds, brush, and trees, as well as scrap metal, and construction and demolition debris was located in the areas of separation between the piles to such a degree as would restrict and inhibit ingress and egress of emergency vehicles to the tire piles.

F. The Site was not enclosed by a six foot high chain-link or other similar fence.

G. There was no active hydrant or viable fire pond on the Site.

H. There were no large capacity carbon dioxide or dry chemical fire extinguishers on the Site.

I. Discarded propane cylinders, some with valves in place, were piled at the periphery of the tire piles at the Site.

J. Cylinders of oxygen were located outside between buildings at the Site and the tire piles.

K. None of the tire piles was covered with plastic or other impermeable barrier.

L. Respondents provided no records indicating pesticides had been applied to the tire piles.

M. None of the tires observed at the Site had been reduced in size by mechanical means.

18. On February 7, 2005, Respondent Wayne S. Jahada, as President of Watertown Iron and Metal, Inc., and on its behalf, executed Consent Order R6200412-8-74. This Order concerned an unpermitted waste tire facility operated by Respondents on County Route 63, Hounsfield, Jefferson County, at which it was ultimately determined that more than 8,000 waste tires were stored. The Order provided a schedule for the removal of the waste tires.

DISCUSSION

Applicable Standards for Motions For Order Without Hearing

Motions for order without hearing are authorized and governed by the procedural rules articulated in 6 NYCRR 622.12 of the Department's regulations. Pursuant to 6 NYCRR 622.12(d),

> "A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party."

The CPLR provides at Rule 3212(b) that a summary judgment "motion shall be granted if, upon the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Granting judgment "as a matter of law" is a two step process. First, the operative material facts of the matter must have been set forth in the motion in a manner which reasonably precludes their dispute and which establishes, prima facie, the elements of each cause of action or defense articulated. According to CPLR 3212(b), this, at a minimum and in addition to the pleadings and perhaps other proofs such as depositions and admissions, would be shown by a supporting affidavit. Such an affidavit would "be by a person having knowledge of the of the facts; [would] recite all the material facts; and [would] show that there is no defense to the cause of action or that the cause of action or defense has no merit." The second step then follows: With the facts thus sufficiently established, the matter can be resolved purely by the application of the appropriate rule of law.

Moreover, 6 NYCRR 622.12(e) provides that "[t]he 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." This is the analog to CPLR 3212(b) which also provides that a motion for summary judgment, except in certain express instances, "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

With respect to the CPLR, the Court of Appeals has summarized the process by stating "that in order to obtain summary judgment, 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, on the other hand, 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 [quoting Zuckerman v. City of New York, 49 NY2d 557, 562 (1980)]." (Gilbert Frank Corp. v. Federal Ins. Co., 70 NY2d 996, 967 [1988]).

Similarly, this understanding of the summary judgment process under the CPLR has been followed by the Department in its interpretation and application of the provisions of 6 NYCRR 622.12. (See, e.g. Matter of Pasquale Izzo, et al., 2005 WL 3352835, *6-7, [N.Y.Dept.Env.Conserv.], Ruling of Chief Administrative Law Judge (ALJ) McClymonds on Motion for Order Without Hearing; Matter of Amanda J. Bice, 2006 WL 1102815, *8-9, [N.Y.Dept.Env.Conserv.], Order of the Commissioner, adopting the Hearing Report of Chief ALJ McClymonds).

Facts

The findings of fact set forth above are either not in dispute or not controverted by the proofs submitted by the parties. They are based upon (1) eyewitness affidavits by persons with knowledge of the material facts obtained through visits to the Site, (2) photographs and drawings of the Site and of the various conditions observed, (3) copies of local municipal public records, (4) copies of documents maintained by the Department with respect to the Site, and (5) diligent searches of records maintained by the Department, made by persons with custodial authority to keep and maintain such records.

Respondents' Affirmative Defenses

First Affirmative Defense
The Individual Liability of Respondent Wayne S. Jahada

As its first affirmative defense, Respondents assert that Department Staff's motion fails to allege any facts or law sufficient to support a claim against Wayne Jahada individually. In support of this affirmative defense, Respondents point out that (a) the Site is owned solely by Respondent Watertown Iron and Mental, Inc.; (b) the aforementioned Consent Order was executed solely against Respondent Watertown Iron and Metal, Inc.; and (c) the relief sought by Department Staff in the present motion lies only with Respondent Watertown Iron and Metal, Inc. Moreover, Respondents assert:

> "No showing has been made that Wayne Jahada acted outside his role as corporate officer. Any alleged failure on Mr. Jahada's part to act was based upon the financial limitations of the corporation, not any particular act or omission of Mr. Jahada." (Response, Paragraph 11.)

From the discussion that follows, however, it is apparent that this affirmative defense fails, as a review of the present record does not demonstrate the existence of a substantive dispute of fact sufficient to require a hearing.

Whether individual liability for violations of the ECL and its implementing regulations committed by a corporation extends to its corporate officer is a function of the relationship that officer bore to the corporation. If the facts demonstrate that the officer had the power, authority and responsibility to prevent the violation and failed to do so, individual liability attaches. The settled law in this area was summarized by the Commissioner in Matter of Sheldon Galfunt, et al., 1993 WL 267967 *1-2 (Commissioner's Decision and Order, May 5, 1993):

> "It is well established that a corporate officer may be held criminally liable for violations of statutes enacted to protect the public health, safety and welfare, where that officer had the authority and responsibility to prevent the violation (United States v. Park, 95 S.Ct. 1903 [1975]; United States v. Dotterweich, 64 S.Ct. 134 [1943]). The rationale for holding corporate officers criminally responsible is even more persuasive where only civil liability is involved (United States v. Hodges X-Ray, Inc., 759 F.2d 557 [CA 6th Cir, 1985]).
>
> "In cases where the statutory violation does not require any showing of wrongdoing, liability attaches to managerial officers of a corporation where it is shown that, by virtue of the relationship the officer bore to the corporation, he or she had the power to prevent the violation (United States v. Park, supra)."

In determining the scope of the relationship that must exist between the corporation and its officer before individual liability can attach in a Navigation Law spill case, the Third Department held that the "individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated." (State v. Markowitz, 273 AD2d 637,

642 [3rd Dept.], lv denied 95 NY2d 770 [2000]). Thus, by establishing "active wrongful conduct or culpable inaction" on the part the corporate officer, individual liability can be inferred. (273 AD2d at 642.) This principle is equally applicable in the present matter.

As the Findings of Fact show, Respondent Wayne S. Jahada is the President of Respondent Watertown Iron and Metal, Inc. (Finding 3.) On September 17, 1998, by bargain and sale deed of transfer executed pursuant a purchase agreement and in consideration of a note secured by a mortgage, Respondent Watertown Iron and Metal, Inc. acquired all right, title and interest in the Site from Leora M. White. (Finding 4.) The note and mortgage in the transfer were executed by Respondent Wayne S. Jahada on behalf of Respondent Watertown Iron and Metal, Inc. (Finding 5.) At all times subsequent to September 17, 1998, title to the Site has remained in Respondent Watertown Iron and Metal, Inc. (Finding 6.) On February 7, 2005, Respondent Wayne S. Jahada, as President of Watertown Iron and Metal, Inc., and on its behalf, executed Consent Order R620040802-51, expressly consenting to its issuance and entry, and agreeing to be bound by its provisions, terms and conditions. (Finding 7.) At Recital 2.A of Consent Order R620040802-51, Respondent Watertown Iron and Metal, Inc. expressly admitted that at the time it purchased the property from Leora White, it was aware that the site contained an estimated 50,000 waste tires and became legally responsible for their proper handling and disposal. (Finding 8.) Subsequent to September 18, 1998, Respondents received and stored additional tires at the Site such that during 2003 and 2004 at least 68,000 tires were present at the Site. (Findings 9 and 10.) Pursuant to Paragraph I of Consent Order R620040802-51, Respondent Watertown Iron and Metal, Inc. was to remove waste tires from the Site and Respondent Wayne S. Jahada was to file periodic status reports of such removal bearing the following personal certification:

> "I, Wayne Jahada, do hereby certify that I reviewed the following report; that based on my knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; that the New York State Department of Environmental

> Conservation has the right to rely upon the information contained in this report as being truthful and accurate and to conclude that the report does not omit any material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and that I know that any false statement made in this certification or in this report shall be punishable pursuant to Section 210.45 of the Penal Law, and as may be otherwise authorized by law." (Finding 11.)

In addition to being the individual who executed the aforementioned note, mortgage and consent order on behalf of Respondent Watertown Iron and Metal, Inc., all other communication between Respondent Watertown Iron and Metal, Inc. and Department Staff has been through Respondent Wayne S. Jahada. (Finding 13.)

In August of 2004, Respondent Wayne S. Jahada advised Department Staff that upon Respondent Watertown Iron and Metal, Inc.'s acquisition of the Site, he had directed that larger tire piles at the site be moved into smaller windrow style piles. These longer narrower piles are not depicted in scaled areal photographs of the Site taken prior to Respondent Watertown Iron and Metal, Inc.'s acquisition of the Site, but are depicted in scaled areal photographs taken subsequent to its acquisition of the Site. (Finding 14.)

Some time subsequent to his execution of Consent Order R620040802-51 and the filing of this motion, Respondent Wayne S. Jahada met with Department Staff to discuss his compliance with that order. He advised Department Staff that he had not commenced removal of the tires as of the date specified in the order because he had confused that date with another date for removal of other tires from another site controlled by him. At that same meeting Respondent Wayne S. Jahada said he had contacted a landfill facility to arrange for the disposal there of the tires at the Site. Moreover, he advised Department Staff that he had not yet determined whether to transport the tires from the Site to the landfill himself, or to engage a contractor for this purpose. (Finding 15.)

A search of the Department's records indicate that Respondent Wayne S. Jahada never applied for or received a permit to operate a waste tire facility at the Site, never filed the necessary plans and other documents to obtain such a permit, and never filed any of the quarterly or annual reports required of such a facility. (Finding 16.)

During an inspection of the Site on July 22, 2004, Department Staff observed (1) approximately 68,000 tires at the Site in piles in some cases exceeding 10,000 square feet in area and with a width greater than 50 feet; (2) the tire piles were uncovered and exposed to the elements, with vegetation in the form of grass, weeds, brush, and trees was growing through, in, and among the tire piles, such as to provide a vegetative interconnection between them; (3) distances between the tire piles were less than fifty feet, no such distance being greater than twenty-five feet; (4) vegetation, scrap metal, and construction and demolition debris was located in the areas of separation between the piles to such a degree as would restrict and inhibit ingress and egress of emergency vehicles to the tire piles; (5) the Site was not enclosed by a six foot high chain-link or other similar fence; (6) there was no active hydrant or viable fire pond on the Site; (7) there were no large capacity carbon dioxide or dry chemical fire extinguishers on the Site; (8) discarded propane cylinders, some with valves in place were piled at the periphery of the tire piles at the Site; (9) cylinders of oxygen were located outside between buildings at the Site and the tire piles; (10) none of the tire piles was covered with plastic or other impermeable barrier; (11) Respondent Wayne S. Jahada provided no records indicating pesticides had been applied to the tire piles; and none of the tires observed at the Site had been reduced in size by mechanical means. (Finding 17.) On the proofs presented in this matter, it was clearly within the power, authority and responsibility of Respondent Wayne S. Jahada to correct, prevent or abate these conditions at the Site.

The actions of Respondent Wayne S. Jahada in this matter show that he was an operator or facility operator of the Site within the meaning of 6 NYCRR 360-1.2(b)(113) which provides that

> "Operator or facility means the person responsible for the overall operation of a solid waste management facility or a part of a facility with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the Department-approved operating conditions at the facility or on the property on which the facility is located."

Moreover, these facts clearly establish that Respondent Wayne S. Jahada, as President of Respondent Watertown Iron and Metal, Inc. had the power, authority and responsibility to prevent the violations alleged in the motion and failed to do so. Indeed, from these facts, by assuming responsibility for the waste tires, in failing to properly maintain and dispose of them, in failing to apply for a permit to operate a waste tire disposal facility at the Site and file the necessary documentation to secure that permit, and in failing to file and certify the reports required by the Department, it is apparent that Respondent Wayne S. Jahada engaged in "active wrongful conduct or culpable inaction" as a corporate officer of Respondent Watertown Iron and Metal, Inc. (State v. Markowitz, 273 AD2d at 642). Accordingly, Respondent Wayne S. Jahada is individually liable for all of the violations alleged in the Department's motion for order without hearing.

Second Affirmative Defense
The Continuing Responsibility of Leora White

As a second affirmative defense, Respondents assert that assuming, without admitting, that there are 68,000 tires at the Site, 50,000 of those tires were already present at the Site when Respondent Watertown Iron and Metal, Inc., acquired the Site from Leora White in 1998. According to Respondents, those 50,000 tires remain the responsibility of the prior owner, Leora White.

This affirmative defense also fails, a review of the present record not demonstrating the existence of a substantive dispute of fact sufficient to require a hearing. As is apparent from the Findings, the responsibility for the 50,000 tires at the Site devolved to Respondents upon their acquisition of the Site in 1998. Indeed, this fact was acknowledged by Respondents upon the execution of Consent Order R620040802-51 on February 7, 2005. As noted in Finding 8, above, at Recital 2.A of Consent Order R620040802-51, Respondent Watertown Iron and Metal, Inc. expressly admitted that "At the time Respondent purchased the property from Leora White, Respondent was aware that the site contained an estimated 50,000 waste tires and became legally responsible for their proper handling and disposal."

Third Affirmative Defense
The Impossibility of Performance

As a third affirmative defense, Respondents plead impossibility. Respondents assert that during the same time they were to remove tires from the Site in Lisbon, as directed by Consent Order R620040802-51, they were compelled to vacate their

primary facility in Hounsfield, New York. This required the commitment of all of Respondents' time, resources and financial ability, rendering it impossible to comply with the terms of Consent Order R620040802-51.

As the Court of Appeals observed in discussing the narrow defense of impossibility in Kel Kim Corporation v. Central Markets, Inc., 70 NY2d 900, 902 (1987),

> "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforseen circumstances make performance burdensome.... Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."

Force majeure clauses can excuse non performance due to circumstances beyond the control of the parties, but "[o]rdinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." Id. at 902-903.

At the outset, it should be noted that Consent Order R620040802-51 contains no force majeure clause. The entire agreement of the parties with respect to Respondents' failure to perform is contained in Paragraph V of Consent Order R620040802-51, at Finding 12, above.

In this affirmative defense, Respondents are alleging a failure to perform under the terms of the Consent Order due to a lack of financial resources. Although Respondents' offer of proof in support of its defense in this regard is inadequate, it is also irrelevant and of no moment in the resolution of the present motion for order without hearing. As the Court of Appeals has stated, "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." (407 E. 61st Garage v. Savoy Fifth Ave. Corp., 23 NY2d 275, 281 [1968]). Accordingly, this affirmative defense fails as a matter of law.

Conclusions of Law

From the foregoing Findings of Fact, based upon the incontrovertible proofs submitted, the following conclusions of law are established for the purposes of this motion:

1. Since at least September 18, 1998, the Site has constituted a solid waste management facility as defined by the ECL and applicable regulations.

2. Since at least September 18, 1998, the Site has constituted a waste tire storage facility as defined by the ECL and applicable regulations.

3. Since September 18, 1998, to the date of this motion, Respondent Watertown Iron and Metal, Inc., was and is the owner of the Site and the solid waste management facility located thereon.

4. Since at least September 18, 1998, to the date of this motion, Respondent Wayne S. Jahada, was and is the President of Respondent Watertown Iron and Metal, Inc., and is the facility operator of the Site as that term is defined by 6 NYCRR 360-1.2(b)(113).

5. As facility operator of the Site, Respondent Wayne S. Jahada is personally liable for violations arising from the operation of the solid waste management and waste tire storage facility at the Site.

6. Since September 18, 1998, Respondents have violated 6 NYCRR 360-1.7(a)(1) by operating a waste tire storage facility at the Site without benefit of a valid solid waste management facility permit issued by the Department.

7. Since September 18, 1998, Respondent Watertown Iron and Metal, Inc., has violated 6 NYCRR 360-13.1 by failing to obtain a solid waste management facility permit to operate a waste tire storage facility on the Site.

8. Since September 18, 1998, Respondents have violated 6 NYCRR 360-13.3(a) by failing to submit to the Department an operation and maintenance manual for the Site.

9. Since September 18, 1998, Respondents have violated 6 NYCRR 360-13.3(a) and 6 NYCRR 13.2(h)(6) by failing to comply with NFPA 231D, 1989 edition, entitled *Standards for Storage of*

Rubber Tires, Appendix C thereof entitled *Guidelines for Outdoor Storage of Scrap Tires*, and in particular,

A. Provision C-3.2.1(a), which requires “fire lanes to separate [tire] piles and provide access for effective fire fighting operations,” by failing to have such access lanes at and about the Site;

B. Provision C-3.2.1(c), which requires “an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area,” by storing waste tires at the Site in piles in close proximity to natural cover and trees; and

C. Provision C-4.2.5, which requires that “the distance between storage and grass, weeds, and brush should be 50 feet,” by locating tire piles at the Site less than 50 feet from grass, weeds, and bushes.

10. Since September 18, 1998, Respondents have violated 6 NYCRR 360-13.3(a) and 6 NYCRR 360-13.2 by failing to submit to the Department a:

A. Site plan specifying the waste tire facility’s boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

B. Monitoring and inspection plan addressing such matters as the readiness of fire-fighting equipment and the integrity of the Site security system, as required by 6 NYCRR 360-13.2(e);

C. Closure plan identifying the steps necessary to close the facility, as required by 6 NYCRR 360-13.2(f);

D. Contingency plan, as required by 6 NYCRR 360-13.2(h);

E. Storage plan addressing the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i); and

F. Vector control plan providing that all waste tires be maintained in a manner which limits mosquito

breeding potential and other vectors, as required by 6 NYCRR 360-13.2(j).

11. Since September 18, 1998, Respondents have violated 6 NYCRR 360-13.3(a) and 6 NYCRR 360-13.2 by failing to maintain:

    A. Waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, as required by 6 NYCRR 360-13.2(i)(4);

    B. Fifty foot separation areas so that they are free of obstructions and vegetation at all times, as required by 6 NYCRR 360-13.2(i)(4);

    C. Fifty foot separation areas in such a manner that emergency vehicles will have adequate access, as required by 6 NYCRR 360-13.2(i)(4);

    D. The number of tires at or below the quantity for which it is permitted, as required by 6 NYCRR 360-13.2(i)(5);

    E. Waste tire piles at 50 feet or less in width, as required by 6 NYCRR 360-13.2(i)(3); and

    F. Waste tire piles at 10,000 square feet, or less, of surface area, as required by 6 NYCRR 360-13.2(i)(3).

12. Since September 18, 1998, Respondents have violated the operational requirements of 6 NYCRR 360-13.3 by:

    A. Failing to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(1);

    B. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, as required by 6 NYCRR 360-13.3(c)(4);

C. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have an active hydrant or viable fire pond on the facility, as required by 6 NYCRR 360-13.3(c)(4);

D. Failing to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, as required by 6 NYCRR 360-13.3(c)(5);

E. Owning and operating a waste tire storage facility having more than 2,500 tires that has potential ignition sources stored in tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6);

F. Owning and operating a waste tire storage facility having more than 2,500 tires that does not have the Site enclosed, at a minimum, in a 6 foot chain link fence or equivalent structure, as required by 6 NYCRR 360-13.3(d)(2);

G. Failing to ever prepare and file with the Department quarterly operation reports, as required by 6 NYCRR 360-13.3(e)(2);

H. Failing to ever prepare and file with the Department annual operation reports, as required by 6 NYCRR 360-13.3(e)(3); and

I. Storing waste tires for more than one week at the Site without removing the rims from the tires, as required by 6 NYCRR 360-13.3(b)(1).

13. Respondents violated the terms of Consent Order R620040802-51 by:

A. Failing to remove, for the period of June 15, 2005, to the date of the present motion, 20 tons of waste tires every seven days, as required by paragraph I(B)(1)(ii) of the Order;

B. Failing to remove 24,000 or 200 tons of tires from the site, as required by paragraph I(B) of the Order; and

C. Failing to submit weekly reports, as required by paragraph I(B)(1)(iv) of the Order.

14. By virtue of having violated the aforementioned provisions of law and regulation, Respondents own and operate a noncompliant waste tire stock pile as that term is defined in ECL 27-1901(6).

Civil Penalties and Other Relief Requested

As relief, Department Staff seeks an Order of the Commissioner:

1. Ratifying the State's authority to enter the Site and remove all waste tires there as authorized by Consent Order R620040802-51 and title 19 of article 27 and ECL 71-2703;

2. A. Directing Respondents to pay the suspended penalty of $136,000 pursuant to Consent Order R620040802-51, representing $2.00 for each of the 68,000 tires remaining on the Site as of August 26, 2005;

   B. Directing Respondents to pay an additional penalty up to the maximum allowed by law pursuant to ECL 71-2703, but not less than $100,000 for the continuing violations of Consent Order R620040802-51, from June 15, 2005, to the present;

   C. Specifying that liability for payment of such penalties is joint and several between Respondents Watertown Iron and Metal, Inc., and Wayne Jahada;

3. Directing Respondents to 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 take over abatement of the waste tire stockpiles at the Site;

4. Directing Respondents to 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 at issue and with the State's assumption of the responsibility to remove the waste tires. Upon complete abatement of the noncompliant waste tires at the Site, the State shall notify Respondents of the costs so incurred by the State and Respondents shall pay said costs within thirty days of receipt of such notification; and

5. Directing such other and further relief as the Commissioner may deem just and proper.

Ruling and Recommendation

Pursuant to 6 NYCRR 622.12(d), the proofs submitted by Department Staff in its motion for order without hearing establish each violation alleged sufficiently to warrant the granting of summary judgment under the CPLR. Moreover, Respondents have failed to raise any substantive dispute of fact sufficient to require a hearing. The relief requested by Department Staff is authorized under the ECL and is consistent with prior orders of the Commissioner.

Accordingly, on the issue of Respondents' liability for the violations alleged, Department Staff's motion is granted in all respects. I recommend that the Commissioner issue an Order directing the relief requested.