STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged
Noncompliant Waste Tire Stockpile
Located in the Town of Persia,
Cattaraugus County, New York,
and Owned or Operated by,

ORDER

VISTA Index No.
CO9-20040304-51

DAVID WILDER,

Respondent.

This proceeding to enforce provisions of Environmental Conservation Law ("ECL") article 27 and of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360 was commenced by Department Staff ("Staff") by the personal service on July 9, 2004 of a motion for order without hearing pursuant to 6 NYCRR 622.12 upon respondent David Wilder.

According to the affirmation of Charles E. Sullivan, Jr., Esq., Staff attorney, dated July 30, 2004 and submitted in support of the motion, respondent had until July 29, 2004 to respond to Staff's motion. Respondent failed to so respond and is now in default.

Staff charge that since at least October 3, 1989, respondent has operated a solid waste management facility located at 10260 Wilder Road, Town of Persia, Cattaraugus County, New York, DEC Region 9 (the "site"), without a permit in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1. Staff also charge respondent with various violations of 6 NYCRR 360-13.2 ("additional application requirements for an initial permit to construct and operate"), and 6 NYCRR 360-13.3 ("operational requirements").

Staff's motion, including the affidavits and other exhibits submitted in support of the motion, establishes that respondent David Wilder has been the owner and operator of a non-compliant waste tire stockpile within the meaning of ECL 27-1901(6). Department Staff's motion also establishes that since at least October 3, 1989, respondent operated a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1.

Department Staff has also demonstrated that since at least

March 16, 1995, respondent continuously violated eight separate operational requirements of 6 NYCRR 360-13.3, as set forth and described in Staff's motion and herein.

Although it is customary for orders of the Commissioner to be issued at the conclusion of a proceeding, Staff makes an adequate showing that exigent circumstances exist and, therefore, an expedited, partial determination of Staff's motion is justified.

I adopt the findings of fact and conclusions of law, together with the written discussion in support set forth in the ruling/hearing report of Chief Administrative Law Judge ("CALJ") James T. McClymonds dated October 18, 2004 and I conclude that at this point Staff is entitled to some but not all of the relief requested. The matters upon which the CALJ reserved decision are not presently before me.

THEREFORE, having considered this matter, it is ORDERED that:

1. Staff's motion for order without hearing is granted in part.

2. Respondent is determined to have owned and operated a solid waste management facility at the site without a valid permit in continuing violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1 during the period from October 3, 1989 until May 28, 2004, the date of the Staff's motion.

3. Respondent is determined to have continuously violated the following operational requirements provided for in 6 NYCRR 360-13.3 during the time period from March 16, 1995 to May 28, 2004:

> a. Respondent failed to maintain access roads within the storage facility in passable condition at all times to allow for access by fire fighting and emergency response equipment in violation of 6 NYCRR 360-13.3(c)(1).
>
> b. Respondent operated 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, in violation of 6 NYCRR 360-13.3(c)(4).

c. Respondent operated 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, in violation of 6 NYCRR 360-13.3(c)(4).

d. Respondent failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, in violation of 6 NYCRR 360-13.3(c)(5).

e. Respondent failed to eliminate potential ignition sources within the tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6).

f. Respondent operated a waste tire storage facility having more than 2,500 tires that is not enclosed by a six-foot high chain link fence or equivalent structure, in violation of 6 NYCRR 360-13.3(d)(2).

g. Respondent never prepared and filed quarterly operation reports with the Department, in violation of 6 NYCRR 360-13.3(e)(2).

h. Respondent never prepared and filed annual reports with the Department, in violation of 6 NYCRR 360-13.3(e)(3).

4. As a result of the above violations, respondent is determined to be the owner and operator of a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6).

5. Staff's request for relief as set forth in articles I, II, IV and VII of Staff's motion for order without hearing dated May 28, 2004 is granted in part as follows and 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 in article II of Staff's request for relief, it is hereby ordered:

A. Respondent shall cause all waste tires to be removed from the site in the following manner and schedule:

1. For purposes of this Paragraph II, "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); punchouts; and tire rims.

2. Starting within fifteen (15) days after the date of this order, respondent shall remove and transport to Department-authorized locations and only in vehicles permitted to transport such waste pursuant to 6 NYCRR Part 364 no less than 250 tons of waste tires for each seven calendar day period, 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 following individuals of the start of waste tire removal activities:

New York State Department of Environmental Conservation
625 Broadway, 9th floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO9-20040304-51

and

New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.
Re: VISTA Index No. CO9-20040304-51

3. Respondent shall use a certified weight scale to weigh each load of waste tires taken off the site for proper disposal, with the weight of waste tires being determined by first weighing a vehicle used to transport the waste tires before loading it with waste tires and then by weighing the vehicle after it is loaded with waste tires and immediately before it leaves the site for off-site transport and disposal.

4(i). Starting the first Monday after the end of the first seven calendar day period following the date of this order, and continuing each subsequent Monday until no waste tires shall remain at the site, respondent shall submit by means of delivery by the United States Postal Service, private courier service, or hand delivery a written report to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 9th floor

Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO9-20040304-51
and
New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.
Re: VISTA Index No. CO9-20040304-51

(ii). Each such report shall contain the following information pertaining to each seven calendar-day period and the following certification:

a. A chart for each of the seven calendar days to which the report pertains that shall have five columns labeled as follows:

name, address, & phone number of the transporter and the Part 364 permit number and license plate number of the transport vehicle to which the weights shown to the right pertain	that vehicle's weight in pounds before loading it with waste tires	that vehicle's weight in pounds after loading it with waste tires and immediately before it goes off site	weight of the waste tires in that vehicle's load (*viz.*, third column, less second column) in pounds	the name, address, and phone number of the facility accepting the waste tires in that vehicle's load

with each row in the chart relating to an individual load on a specifically identified vehicle and with copies of the two weigh tickets used to determine the weight of that load.

b. Copies of the certified weight slips

pertaining to each vehicle load, showing the pre-load and post-load weights pertaining to that vehicle. The weight slips shall be labeled in such a manner as to allow a reviewer to match each weight slip with the weight shown on the chart to which it pertains.

c. A copy of each agreement with a facility accepting the waste tires in that vehicle's load. Each agreement shall be labeled in such a manner as to allow a reviewer to match each load accepted by that facility to the agreement with that facility (if an agreement covers more than one load, respondent shall submit only one copy of that agreement. If an agreement covers loads in more than one reporting period, respondent shall provide a copy of that agreement in the first report covering a load to which it pertains, and subsequent reports shall simply identify the report in which the copy of the agreement may be reviewed.); and a copy of the receipt for each load of waste tires accepted at the facility accepting that vehicle's load.

d. The following certification shall appear at the beginning of each such report:

> I, David Wilder, 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.

B. Should respondent fail to strictly comply with any provision of this order, Department Staff is directed to remove the waste tires by such means as they may deem appropriate, to

the extent monies may be available from the Waste Tire Management and Recycling Fund and from other sources.

III. As requested in article IV of Staff's request for relief, respondent is directed 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.

IV. As requested in article VII of Staff's request for relief, respondent is directed 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.

V. All communications between respondent and Department Staff concerning this order shall be made to Charles E. Sullivan, Jr., Esq., at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
Re: VISTA Index No. CO9-20040304-51

with copies of such communications being sent to the following:

New York State Department of Environmental Conservation
625 Broadway, 9th floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO9-20040304-51

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Buffalo, New York 14203-2999
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Re: VISTA Index No. CO9-20040304-51

VI. Decision is reserved with respect to other items of relief requested by Staff and not expressly granted hereby, including the assessment of any penalty.

VII. The provisions, terms and conditions of this order shall bind respondent and his heirs and assigns.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Erin M. Crotty, Commissioner

Dated: November 4, 2004
Albany, New York

TO: David Wilder
10260 Wilder Road
Gowanda, New York 14070-9686

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

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located in the Town of Persia, Cattaraugus County, New York, and Owned or Operated by,	RULING/HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING
DAVID WILDER,	
Respondent.	VISTA Index No. CO9-20040304-51

Appearances:

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

-- No appearance for David Wilder, respondent.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for an order without hearing as against respondent David Wilder. The motion was served in lieu of notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a). Department staff's motion was dated May 28, 2004, and was personally served upon respondent on July 9, 2004. Thus, Department staff obtained personal jurisdiction over respondent. No response from respondent has been received to date, rendering him in default as of July 29, 2004.

Charges Alleged

Department staff alleges that since at least October 3, 1989, respondent has owned or operated a waste tire storage facility located at 10260 Wilder Road, Town of Persia, Cattaraugus County, New York (the "site"). In its motion, Department staff asserts that respondent violated Environmental Conservation Law ("ECL") article 27 and 6 NYCRR part 360. Department staff's specific charges are that:

A. Respondent violated 6 NYCRR 360-1.7(a)(1) since at least October 3, 1989, because respondent has never received a solid waste management facility permit from the Department authorizing the operation of the waste tire storage facility on the site;

B. Respondent violated 6 NYCRR 360-13.1 since at least October 3, 1989, because respondent has never received a solid waste management facility permit to operate the waste tire storage facility on the site;

C. Respondent violated 6 NYCRR 360-13.2(h) since October 9, 1993, because respondent has never submitted to the Department a contingency plan that details the measures to be undertaken in the event of a fire emergency so as to assure compliance with, among other things, the applicable National Fire Protection Association standards;

D. Since at least March 16, 1995, respondent:

1. violated 6 NYCRR 360-13.2(h)(6) because he never complied with National Fire Protection Association "Standards for Storage of Rubber Tires," NFPA 231D, 1989 edition, Appendix C ("Guidelines for Outdoor Storage of Scrap Tires") ("NFPA 231D"), Provision C-3.2.1(a), which requires fire lanes to separate piles and provide access for firefighting operations, by allowing roads and access lanes at and about the site to be blocked by tires, trees and erosion;

2. violated 6 NYCRR 360-13.2(h)(6) because he never complied with NFPA 231D, 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;

3. violated 6 NYCRR 360-13.2(h)(6) because be never complied with NFPA 231D, Provision C-4.2.5, which requires that the distance between storage and grass, weeds and brush should be 50 feet or more, by locating tire piles at the site within 50 feet of grass, weeds and bushes;

E. Since October 3, 1989, respondent:

1. has never submitted to the Department any of the following:

i. a site plan that specifies the waste

tire facility's boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

ii. a monitoring and inspection plan which addresses 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);

iii. a closure plan that identifies the steps necessary to close the facility, as required by 6 NYCRR 360-13.2(f);

iv. a contingency plan, as required by 6 NYCRR 360-13.2(h);

v. a storage plan that addresses the receipt and handling of all waste tires and solid waste to, and from, the facility, as required by 6 NYCRR 360-13.2(i); and

vi. a vector control plan that provides 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);

2. has failed to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, in violation of 6 NYCRR 360-13.2(i)(4);

3. has failed to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times, in violation of 6 NYCRR 360-13.2(i)(4);

4. has failed to maintain 50-foot separation areas in such a manner that emergency vehicles will have adequate access, in violation of 6 NYCRR 360-13.2(i)(4);

5. has failed to maintain the number of tires at or below the quantity for which it is permitted, in violation of 6 NYCRR 360-13.2(i)(5);

6. has failed to maintain waste tire piles at 20 feet or less in height, in violation of 6 NYCRR 360-13.2(i)(3);

7. has failed to maintain waste tire piles at 50 feet or less in width, in violation of 6 NYCRR 360-13.2(i)(3);

8. has failed to maintain waste tire piles at

10,000 square feet, or less, of surface area, in violation of 6 NYCRR 360-13.2(i)(3);

F. Since March 16, 1995, respondent:

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

2. has owned or operated 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, in violation of 6 NYCRR 360-13.3(c)(4);

3. has owned or operated 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, in violation of 6 NYCRR 360-13.3(c)(4);

4. has failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, in violation of 6 NYCRR 360-13.3(c)(5);

5. has owned or operated 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);

6. has owned or operated 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, in violation of 6 NYCRR 360-13.3(d)(2);

7. has never prepared and filed with the Department quarterly operation reports, in violation of 6 NYCRR 360-13.3(e)(2); and

8. has never prepared and filed with the Department annual reports, in violation of 6 NYCRR 360-13.3(e)(3).

Relief Sought

Department staff maintains that no material issues of fact exist and that the Department is entitled to judgment as a

matter of law for the violations alleged. Accordingly, Department staff requests that the Commissioner issue an order finding that:

A. Respondent owns or operates the site;

B. The site is a solid waste management facility;

C. Respondent violated the aforementioned provisions of law during the periods of time identified for each such violation; and

D. As a result of the violations, respondent owns or operates a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

Additionally, Department staff requests that the Commissioner order respondent 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 from the site in strict compliance with the plan and schedule detailed in the motion, such removal to commence two weeks after the date of the Commissioner's order;

III. Post with the Department within 30 days of the Commissioner's order financial security in the amount of $600,000 in accordance with 6 NYCRR 360-1.12 and 360-13.2(g), and ECL 27-0703(6), to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above;

IV. 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;

V. 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 Paragraph I or II above, such costs to be payable within 30 days after notification by the State;

VI. Pay a penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703, or the sum of $50,000, plus $2 for each waste tire that the State shall have to manage under ECL article 27, title 19, in the event respondent fails to comply with any requirement of the above referenced plan to abate the stockpile;

VII. Reimburse the Waste Tire Management and Recycling Fund pursuant to ECL 27-1907(5) the full amount of any and all disbursements from the Fund to date, as well as any future disbursements, to determine the existence of the violations alleged, to respond to the violations, and, if need be, to establish that the parcel of land is a noncompliant waste tire stockpile, and to investigate and abate that noncompliant waste tire stockpile; and

VIII. Undertake such other and further actions as may be determined appropriate.

Papers Reviewed

Department staff's motion is pursuant to 6 NYCRR 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." Accompanying the motion is an attorney brief in support of motion for order without hearing.

Attached as exhibits to the motion are the following: internal Department memorandum from Jeffrey N. Nyitrai, Supervisor of Real Property, Region 9, to Jim Jensen, dated March 12, 2004, together with copies of respondent's deed and tax map and aerial photograph of respondent's property (Exhibit "A"); internal Department memorandum from Jeff Rupp, Environmental Conservation Officer, to Robert J. Mitrey, dated February 21, 1990, regarding People v David Wilder, Town of Persia Town Court proceedings (Exhibit "B"); memorandum dated May 10, 1995 from Hon. Adolph H. Namlik, Town Justice, Town of Persia, to Thomas Thrasher regarding the disposition of charges pending against respondent in that court (Exhibit "C"); internal Department memorandum from Nancy Bartha, DEC Division of Solid Waste and Hazardous Materials, Region 9, to David Wilder Tire Pile file, dated June 2, 2000 (Exhibit "D"); internal Department memorandum from Jeffrey Rupp to Nancy Bartha, dated September 28, 2000 regarding People v David Wilder (Exhibit "E"); affidavit of Mark J. Hans, P.E., DEC Division of Solid Waste and Hazardous

Materials, Region 9, sworn to May 21, 2004, with attachment "1," Tire Facility Inspection Report with photographs of site, and attachment "2," Waste Tire Abatement Plan (Exhibit "F"); aerial photographs of the site (Exhibit "G"); agreement dated November 15, 1994, between the Department and David Wilder regarding the removal of tires (Exhibit "H"); internal Department memorandum from Rodger Schlaf to Robert Mitrey, dated October 18, 1989, regarding an October 3, 1989 inspection of the site (Exhibit "I"); and an affidavit of Nancy J. Bartha, Environmental Engineering Technician II, DEC Division of Solid Waste and Hazardous Materials, Region 9, sworn to May 21, 2004, regarding inspections of the site (Exhibit "J").

Expedited Review

Attached to Department staff's motion is a July 30, 2004 letter ("Sullivan letter") requesting that this matter be expedited. Department staff noted that the subject site is alleged to be one of about 100 waste tire stockpiles in New York that must be abated by December 31, 2010; that, because respondent has failed to respond to the motion, Department will have to undertake the abatement of respondent's noncompliant waste tire stockpile; that the site is the eighth largest in the State with at least 350,000 tires. Staff recommends immediate abatement, and states that a contract for undertaking the abatement of the site calls for activities to begin in Fall 2004.

FINDINGS OF FACT

Based upon the papers submitted on this motion, the undisputed facts determinable as a matter of law are as follows:

1. On July 7, 1981, respondent David H. Wilder, together with his wife and a third person, acquired title to the subject parcel located at 10260 Wilder Road, Persia, Cattaraugus County. The parcel, known as the Southern Tier Tire Site, is identified as Cattaraugus County, Town of Persia Tax Map parcel 26.002-1-3.1.

2. The site contains a ravine that is about 500-feet long and about 350-feet wide. The ravine is about 50-feet deep, with a northern slope about 75 high. The ravine is connected to the Wilder residence 200 to 300 yards to the west by a single-lane dirt road. The dirt road splits at the western edge of the ravine. One branch of the road continues downward easterly about 100 yards into the center of the ravine. A second branch curves upward northeasterly and borders the northern rim of the ravine.

A third branch circles back toward the west, above and behind the Wilder residence.

3. By October 3, 1989, used tires were haphazardly dumped in a pile along the northern side of the ravine and in one or two piles in the base of the ravine. The largest tire pile was estimated to be 350 to 400 feet long by 60 feet wide by 5 feet deep. The second tire pile was estimated at 100 feet long by 80 feet wide by 8 feet deep, and the third pile was 50 feet in diameter by 6 feet deep. In 1989, the site was estimated to contain at least 100,000 tires.

4. By April 1, 2004, waste tires were piled with an average depth of over 10 feet in multiple large piles across the site. In 2004, the site is estimated to contain at least 350,000 tires.

5. Since at least March 16, 1995, some of the used tire piles are greater than 10,000 square feet in surface area and exceed 50 feet in width. Vegetation and trees grow around and through the tires. Many tires are partially or completely buried.

6. The piles are not separated by fire lanes or access roads. A 50-foot separation is not maintained between piles and between the piles and property boundary lines. Many of the waste tires piled on the side of the hill are not accessible on all sides to fire fighting and emergency response vehicles. Those access roads that exist within the site are not plowed during winter. These conditions have existed since at least March 16, 1995.

7. Water is allowed to pool in the tires, creating a breeding ground for mosquitos. No vector control methods are employed at the site. These conditions have existed since at least March 16, 1995.

8. The site lacks an active hydrant or viable fire pond. The site also lacks strategically placed fire extinguishers. The site is not fenced. These conditions have existed since at least March 16, 1995.

9. Respondent has neither applied for nor received a permit to operate the facility located at the site. Respondent has failed to submit a site plan, monitoring or inspection plan, closure plan, contingency plan, storage plan, or vector control plan with the Department. Respondent has failed to provide financial assurance to the Department to cover the cost of

closure of the facility. Respondent has failed to file quarterly operation reports or annual reports with the Department.

10. In August 1987, respondent was directed by Department staff to cease accepting tires at the site, and in February 1988, respondent was informed that he could not store tires without a valid permit.

11. On February 20, 1990, in Persia Town Court, respondent pleaded guilty to a charge of engaging in the storage of more than 1,000 waste tires without a permit, in violation of 6 NYCRR 360-13.1(b).

12. On August 24, 1994, respondent was arraigned in Persia Town Court on a second charge of engaging in the storage of more than 1,000 waste tires without a permit, in violation of 6 NYCRR 360-13.1(b). On November 15, 1994, respondent pleaded guilty to the charge and was assessed a $1,500 fine. On the same date, respondent entered into an agreement with the Department wherein he agreed, among other things, to cease accepting any waste tires at the facility, to separate the waste tires into piles of specified dimensions, and to begin removing the waste tires from the site.

13. On May 31, 2000, after a bench trial in Persia Town Court, respondent was found guilty of a third charge of storing more than 1,000 waste tires without a permit, and sentenced to pay a $5,000 fine and to five days incarceration in the Cattaraugus County jail.

DISCUSSION

Nature of the Motion

Department staff served its motion for an order without hearing in lieu of complaint, and respondent has failed to file a timely answer or otherwise appear in response (see 6 NYCRR 622.12[a]). Department staff notes that respondent's failure to answer would entitle Department staff to a default judgment pursuant to 6 NYCRR 622.15. Nevertheless, Department staff believes that, based upon the facts of this matter, it is entitled to judgment on the merits as a matter of law and requests a Commissioner's order accordingly. Thus, this motion will be treated as one seeking an order without hearing pursuant to 6 NYCRR 622.12.

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 should be granted, in whole or in part."

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, respondent has not submitted any response to Department staff's motion. Accordingly, once it is concluded that staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department staff's motion may be granted.

Discussion of Facts

My findings of fact are based upon observations made during inspections conducted by Department staff on October 3,

1989, and between March 16, 1995, and April 1, 2004. They are also based upon the photographic evidence and other public records of the Department submitted with staff's motion.

Some of the factual allegations stated in the complaint are not determinable as a matter of law based upon the submissions on the motion. In Charge E.6, Department staff alleges that respondent failed to maintain waste tire piles at 20 feet or less in height. The affidavits submitted on the motion present conflicting evidence on this point, however. Nancy J. Bartha, who conducted the April 1, 2004 inspection, stated that she never saw respondent keeping waste tire piles at 20 feet or less in height (see Exh J). Mark J. Hans, who also conducted the April 1, 2004 inspection, states that the average depth of tires at the site is more than 10 feet, but does not state that the 20-foot limit was exceeded (see Exh F). To the extent Ms. Bartha indicates that tire depths exceeded 20 feet during inspections conducted between March 16, 1995 and April 1, 2004, no substantiation is provided for such an assertion. Thus, Department staff fails to make a prima facie showing that tire depths at the site have exceeded 20 feet.

Moreover, the findings of fact determined in paragraphs 5 through 8 of this ruling are only determinable as a matter of law for the period from March 16, 1995 until the date of the complaint. No evidence concerning the specific conditions determined in those paragraphs was provided for the period from October 3, 1989 until March 16, 1995. Thus, Department staff has failed to make a prima facie showing of the factual allegations underlying Charges E.2 through E.5, and E.8 to the extent they concern the period from October 3, 1989 to March 16, 1995.

Solid Waste Management Facility

Department staff alleges that the subject site is a solid waste management facility. The Environmental Conservation Law ("ECL") defines "solid waste management facility" as "any facility employed beyond the initial solid waste collection process" (ECL 27-0701[2]). "Solid waste management" means "the purposeful and systematic . . . storage . . . 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]). The ECL expressly recognizes that a facility engaged in the storage of 1,000 or more waste tires is a solid waste management facility (see ECL 27-0703[6] [requiring that the owner or operator of a facility storing 1,000 or more waste tires must seek a solid waste management facility permit or cease

operations]).

The Department's regulations provide further definition of a solid waste management facility. Since 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]).

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]).

Since amendments 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 material," which, in turn, is defined as material that is "abandoned by being . . . accumulated [or] stored . . . instead of or before being disposed of" (6 NYCRR 360-1.2[a][1], [2]).

The used tires on the site constitute "solid waste" as that term is defined under the ECL. Moreover, the used tires constitute "waste tires" as that term is defined under the regulations in effect during all times relevant to this proceeding. Since at least October 3, 1989, more than 1,000 waste tires have been and are being stored on the site and, thus, the site constitutes a waste tire storage facility. Accordingly, Department staff has made a prima facie showing that since at least October 3, 1989, the site constitutes a solid waste management facility under the ECL and Part 360.

Department staff's prima facie showing is further supported by respondent's admissions in the Persia Town Court proceedings in 1990 and 1994. Respondent's guilty pleas in 1990 and 1994 to the charges of engaging in the storage of more than 1,000 waste tires without a permit in violation of 6 NYCRR 360-13.1(b) are admissible as admissions in these administrative proceedings (see Cohens v Hess, 92 NY2d 511, 514-515; Ando v Woodberry, 8 NY2d 165, 167-168). By admitting that he committed the acts charged, respondent admitted that the facility was a solid waste management facility, a necessary element of the charge.

Moreover, respondent's conviction in 2000 on the third charge of engaging in the storage of more than 1,000 waste tires without a permit provides further evidence supporting Department staff's claim that the site remained a solid waste management facility in 2000. Respondent's conviction for the criminal violation charged (see ECL 71-2703[2][a]) does not have conclusive effect under the doctrine of collateral estoppel in these proceedings (see Gilberg v Barbieri, 53 NY2d 285, 294 [1981]). Nevertheless, the criminal conviction is evidence supporting staff's prima facie case that respondent could seek to rebut (see id.). By failing to oppose staff's motion for order without hearing, however, respondent has foregone the opportunity to litigate the issue.

Owner and Operator

Department staff alleges that respondent is the owner or operator of the solid waste management facility at the site. Respondent's ownership and operation of the facility (see 6 NYCRR 360-1.2[b][113], [114]) is established by evidence of respondent's co-ownership of the underlying parcel upon which the facility is located (see Matter of Radesi, ALJ's Hearing Report, at 8, concurred in by Commissioner's Decision and Order, March 9, 1994).

Staff's prima facie showing is also supported by respondent's admissions in 1990 and 1994 in Persia Town Court that he was guilty of engaging in the storage of more than 1,000 waste tires without a permit (see Ando, supra), and by his conviction in 2000 on the third charge of violating 6 NYCRR 360-13.1(b) (see Gilberg, supra). Respondent's ownership or operation of the facility was a necessary element of both the 1990 and 1994 guilty pleas, and the 2000 conviction. Thus, Department staff has made a prima facie showing that respondent owns and operates the subject facility.

Liability for Violations Charged

1. Operating Without a Permit

Department staff alleged that since at least October 3, 1989, respondent has been operating a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1), and has been operating a waste tire storage facility without a permit in violation of 6 NYCRR 360-13.1(b). Section 360-1.7(a)(1) provides that "no person shall . . . construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to" Part

360. Section 360-13.1(b) specifically 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" Part 360.

The evidence submitted in support of this motion reveals that, since at least October 3, 1989, respondent has failed to obtain a Part 360 permit to operate the waste tire storage facility on the site. Thus, Department staff has established that from October 3, 1989 to the present, respondent violated the regulatory requirement that he obtain a Part 360 permit.

2. Violations of Operational Requirements under Section 360-13.3

Department staff alleges that respondent has violated eight separate operational requirements (see Charges F.1-F.8, above) applicable to all waste tire storage facilities subject to the permitting requirements of Subpart 360-13 (see 6 NYCRR 360-13.3). Staff alleges that respondent has been in violation since at least March 16, 1995, the date of the site inspection during which the alleged operational requirement violations were first noted by Department staff. For the reasons that follow, the eight violations staff allege are established as a matter of law.

a. Section 360-13.3(c)(1)

Section 360-13.3(c)(1) requires that "all approach roads to the facility and access roads within the facility must be constructed for all weather conditions and maintained in passable condition at all times to allow for access by fire-fighting and emergency response equipment." The record establishes that the existing access roads are not plowed during the winter and, thus, are not maintained in passable conditions at all times to allow for access by fire-fighting and emergency response equipment. Moreover, these conditions have existed since at least March 16, 1995 and persist to the present. Thus, the alleged violation of section 360-13.3(c)(1) is established.

b. Section 360-13.3(c)(4) -- Fire Extinguishers

Section 360-13.3(c)(4) requires that "waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, . . . fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility in quantities as deemed necessary in the contingency

plan or other fire protection and prevention equipment as approved by the local fire marshal." The record reveals that respondent's waste tire facility has an actual capacity well in excess of 2,500 waste tires. Nevertheless, no fire extinguishers or other fire protection and prevention equipment are located at the facility. These conditions have existed since at least March 16, 1995 and persist to the present. Thus, the alleged violation of section 360-13.3(c)(4) is established.

c. Section 360-13.3(c)(4) -- Active Hydrant or Viable Pond

Section 360-13.3(c)(4) also requires that "waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, an active hydrant or viable fire pond on the facility." The evidence establishes that no active hydrant or viable fire pond exists on the facility. This condition has existed since at least March 16, 1995 and persists to the present. Thus, the alleged violation of section 360-13.3(c)(4) is established.

d. Section 360-13.3(c)(5)

Section 360-13.3(c)(5) requires that "waste tire piles must be accessible on all sides to fire fighting and emergency response equipment." The evidence reveals that the large waste tire piles at respondent's facility are not accessible on all sides to fire fighting and emergency response equipment, and are not divided by fire lanes or access roads. This condition has existed since at least March 16, 1995 and persists to the present. Thus, the alleged violation of section 360-13.3(c)(5) is established.

e. Section 360-13.3(c)(6)

Section 360-13.3(c)(6) requires that "potential ignition sources must be eliminated and combustibles must be removed as they accumulate." Weeds, grass and other combustible materials have been allowed to accumulate in the waste tire storage area. This condition has existed since at least March 16, 1995, and persists to the present. Thus, the alleged violation of section 360-13.3(c)(6) is established.

f. Section 360-13.3(d)(2)

Section 360-13.3(d)(2) requires that "[f]acilities having a planned or actual capacity of 2,500 or more waste tires must be enclosed by a woven wire, chain-link or other acceptable

fence material, at least six feet in height." The evidence establishes that respondent's facility is not enclosed by a fence of any sort. This condition has existed since at least March 16, 1995, and persists to the present. Thus, the alleged violation of section 360-13.3(d)(2) is established.

g. Section 360-13.3(e)(2)

Section 360-13.3(e)(2) requires that the owner or operator of a waste tire storage facility must file quarterly operation reports with the Department. The record establishes that since at least March 16, 1995, respondent has failed to file any quarterly operation reports. Thus, the alleged violation of section 360-13.3(e)(2) is established.

h. Section 360-13.3(e)(3)

Section 360-13.3(e)(3) requires that the owner or operator of a waste tire storage facility must file annual reports with the Department. The record establishes that since at least March 16, 1995, respondent has failed to file any annual reports. Thus, the alleged violation of section 360-13.3(e)(3) is established.

3. Violations of Permit Application Requirements under Section 360-13.2

Department staff alleges that respondent has violated various provisions of section 360-13.2, which establishes application requirements for a permit to operate a waste tire storage facility used to store 1,000 or more waste tires at a time. Department staff specifically alleges that respondent has failed to submit various plans in violation of 6 NYCRR 360-13.2(b), (e), (f), (h), (i), and (j) (see Charges C, D.1-3, and E.1), or otherwise maintain the facility in accordance with the storage plan requirements established at 6 NYCRR 360-13.2(i)(3), (4), and (5) (see Charges E.2-8).

As I have previously noted in an unrelated noncomplaint waste tire stockpile case (see Matter of Hornburg, ALJ Ruling/Hearing Report, Aug. 24, 2004, at 20-21), it is not apparent, under the circumstances presented here, whether the failure to submit the plans referred to by staff, or otherwise operate the facility in accordance with the standards that govern those plans, are violations separate and distinct from the respondent's failure to apply for or obtain a waste tire storage facility permit. Because the question is one of first impression, I am reserving for briefing and oral argument the

issue whether respondent is separately liable for the violations of section 360-13.2 alleged (see id. at 21).

4. Operation of a Noncompliant Waste Tire Stockpile

Department staff seeks a determination that respondent owns or operates 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, § 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, respondent owns and operates 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, respondent owns or operates a noncompliant waste tire stockpile.

Penalty and Other Relief Requested

Department staff seeks an order of the Commissioner directing respondent to immediately stop allowing any waste tires onto the site (see Relief Sought ¶ I, above). ECL 71-2703(1)(a) provides that any person who violates any provision of, or who fails to perform any duty imposed by, ECL article 27, title 7, or any rule or regulations promulgated pursuant thereto may be enjoined from continuing such violation. Respondent's ownership and operation of the waste tire storage facility without a permit constitutes a violation of ECL article 27, title 7 and the regulations promulgated pursuant thereto. Moreover, the operation of the facility in violation of the operational requirements established at 6 NYCRR 360-13.3 also constitutes a

violation of the regulations promulgated pursuant to ECL article 27, title 7. Thus, staff is entitled to an order enjoining respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

Department staff also seeks an order of the Commissioner directing respondent to remove all tires from the site in strict accordance with the plan and schedule detailed in the motion papers (see Relief Sought ¶ II, above), to fully cooperate and refrain from interfering with the State in the event the State must take over abatement (see id. ¶ IV), and to reimburse the Waste Tire Management and Recycling Fund ("Fund") the full amount of any expenditures incurred by the State to investigate, establish liability for, and abate the noncompliant waste tire stockpile (see id. ¶ VII). Staff is entitled to the relief sought, in part.

ECL 27-0703(6) provides that the owner or operator of a solid waste management facility engaged in the storage of 1,000 or more tires shall submit to the Department a completed application for a permit to continue to operate such facility, or cease operations and begin removal of the waste tires from the facility. In addition, ECL 27-1907 requires that the "owner or operator of a noncompliant waste tire stockpile shall, at the department's request, submit to and/or cooperate with any and all remedial measures necessary for the abatement of noncompliant waste tire stockpiles with funds from the waste tire management and recycling fund pursuant to" State Finance Law § 92-bb (ECL 27-1907[2]).

The expenses of remedial and fire safety activities at a noncompliant waste tire stockpile shall be paid by the owner or operator of the stockpile, or shall be paid from the Fund and shall be a debt recoverable by the State from the owner or operator (see ECL 27-1907[3]). Any and all monies recovered pursuant to ECL 27-1907 are to be credited to the Fund (see id.; ECL 27-1907[5]).

Accordingly, staff is entitled to an order directing respondent to remove the tires from the site and I recommend that the Commissioner grant the relief sought in paragraph II. In the event respondent does not comply with the removal order, respondent would be liable to reimburse the State for expenses of "remedial and fire safety activities" at the site that are paid from the Fund. Accordingly, staff is entitled to part of the relief sought in paragraph VII, and I recommend that the Commissioner grant that relief. Whether the removal of the tires is undertaken by respondent or by staff, staff is entitled to the

cooperation and non-interference order staff seeks in paragraph IV, and I recommend that the Commissioner grant that relief.

I reserve decision, however, on the remaining relief sought by Department staff in paragraph VII, and the relief sought in paragraphs III, V, and VI (see Hornburg, ALJ Ruling/Hearing Report, at 23-24). It is not clear whether the relief sought in the remainder of paragraph VII, and in paragraphs III and V are authorized by statute or regulation, and briefing and oral argument should be allowed before resolving the question (see id.). The appropriate penalty, as requested in paragraph VI, cannot be assessed until the open questions concerning liability and relief are resolved.

CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

1. The used tires on the subject site are "waste tires" as that term was defined under 6 NYCRR former 360-1.2(b)(167), because the tires had ceased to serve the purpose for which they were initially intended and had been discarded.

2. The used tires on the subject site are "waste tires" as that term is defined under 6 NYCRR 360-1.2(b)(183) because the tires are solid waste consisting of whole tires or portions of tires.

3. The 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.

4. The 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 (see also 6 NYCRR former 360-1.2[b][145]).

5. Since at least October 3, 1989, respondent has owned and operated the solid waste management facility at the site.

6. Since at least October 3, 1989 to the present, respondent violated 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1 because he never received a solid waste management facility permit from the Department authorizing the operation of the waste tire storage facility on the site.

7. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(1) because he failed to maintain access roads

within the storage facility in passable conditions at all times to allow for access by firefighting and emergency response equipment.

8. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a waste tire storage facility with an actual capacity of 2,500 or more waste 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.

9. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a waste tire storage facility with an actual capacity of 2,500 or more waste tires that does not have an active hydrant or viable fire pond on the facility.

10. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(5) because he failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment.

11. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(6) because he failed to eliminate potential ignition sources within the storage area.

12. Since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(d)(2) because he operated a waste tire storage facility having an actual capacity of 2,500 or more waste tires that is not enclosed by a woven wire, chain-link or other acceptable fence material, at least six feet in height.

13. Since at least March 16, 1995, respondent violated 6 NYCRR 13.3(e)(2) by failing to file quarterly operation reports with the Department.

14. Since at least March 16, 1995, respondent violated 6 NYCRR 13.3(e)(3) by failing to file annual reports with the Department.

15. As a result of the above violations, respondent owns or operates a “noncompliant waste tire stockpile” as that term is defined by ECL 27-1901(6).

RECOMMENDATIONS

Ordinarily, under the Department’s uniform enforcement hearing procedures, the ALJ would resolve all issues concerning

liability and penalty raised on a motion for order without hearing before preparing a hearing report and submitting the report to the Commissioner for final decision (see 6 NYCRR 622.12[d], [f]). In this case, exigent circumstances exist that warrant a departure from the ordinary procedures. As Department staff has indicated in its July 30, 2004 letter, if any abatement of the facility is to take place this year, a contract would need to be awarded as soon as possible, with abatement measures to begin two weeks after the date of the Commissioner's order.

Although I have determined that issues of liability, penalty, and other appropriate relief remain to be resolved, I also conclude that staff has established its entitlement to an order directing abatement of respondent's facilities based upon the violations that are presently determinable as a matter of law. Accordingly, I am forwarding this ruling to the Commissioner with my recommendations herein. In the event the Commissioner adopts my recommendations, a timely order may issue and abatement measures may begin, while the questions reserved upon are being resolved.

Accordingly, I recommend that the Commissioner issue an order granting Department staff's motion in part, holding respondent liable for the violations determinable as a matter of law at this time, and granting in part the relief requested by staff.

/s/

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James T. McClymonds
Chief Administrative Law Judge

Dated: Albany, New York
October 18, 2004