STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

- of -

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

- by -

BCD TIRE CHIP MANUFACTURING, INC.,

Respondent.

DEC File No. R4-2011-0505-53

DECISION AND ORDER OF THE COMMISSIONER

March 26, 2013

DECISION AND ORDER OF THE COMMISSIONER

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation ("Department") alleges that respondent BCD Tire Chip Manufacturing, Inc. ("BCD Tire" or "respondent") stored, without a permit, 1,000 or more waste tires in the form of tire derived aggregate ("TDA") at its facility located at 16 William Street, Hagaman, New York, in violation of 6 NYCRR 360-13.1(b). The central issue is whether BCD Tire's TDA constitutes "waste tires" under Environmental Conservation Law ("ECL") article 27 and the Department's regulations. For the reasons that follow, the TDA at BCD Tire's facility do constitute waste tires and, because the TDA stockpiled at BCD Tire's facility was derived from more than 1,000 waste tires, BCD Tire was required to obtain a permit for its facility.

PROCEEDINGS

At its Hagaman facility, BCD Tire operates a scrap tire and recycling facility (see Finding of Fact No. 1, Summary Report, at 3 [attached]; Amended Answer [10-25-11], ¶¶ 3, 7). BCD Tire has been operating its facility in Hagaman since 2004 subject to solid waste management facility registration for tire shredding (see DEC Registration No. 29P01, Exhibit [Exh] 1to the Affidavit of Brian Conlon [1-4-12][Conlon Affid]). Prior to moving to Hagaman, BCD Tire operated a mobile tire shredding operation in Scotia, New York, from 2001 to 2004. The Scotia facility was also subject to a solid waste management facility registration (see DEC Registration No. 47P01, Conlon Affid, Exh 2).

Respondent makes and markets tire chips in the form of TDA as part of its recycling operation. The parties stipulated that "BCD's tire chip manufacturing process entails accepting waste tires at the facility, and processing the waste tires through a shredding machine at the facility to make [TDA]" (Lavery Email [10-28-11], Castiglione Affirm, Exh Q). The TDA consists of approximately 4 inch by 4 inch chips of rubber product (see Conlon Affid, ¶ 3). The parties further stipulated that "[t]he amount of the current tire derived aggregate stockpiled at the facility is derived from more than 1,000 waste tires" (Lavery Email).

In 2010, respondent BCD Tire executed an order on consent with the Department (see Order on Consent, DEC File No. R4-2010-0528-40 [6-24-10], Robak Affid, Exh 1). The consent order addressed Department staff's allegations that respondent was storing more than 1,000 waste tire equivalents in the form of tire chips at the Hagaman facility without a permit (see id. ¶¶ 7-10). Among other things, respondent agreed to reduce the number of waste tire equivalents to under 1,000 (see id., Schedule of Compliance).

Department staff commenced the present administrative enforcement proceeding by service of a notice of hearing and complaint dated August 2, 2011. In its first cause of action, staff alleged that respondent was operating a waste tire storage facility without a permit in violation of 6 NYCRR 360-13.1(b).[1] Brian Conlon, president of respondent BCD Tire, answered

[1] Department staff withdrew its second cause of action alleging that respondent violated the 2010 consent order.

with a letter response dated August 15, 2011, in which he essentially claimed that respondent was a tire shredding operation that was not subject to the permit requirement.

Department staff filed a statement of readiness with the Office of Hearings and Mediation Services by letter dated September 16, 2011. After obtaining an attorney, respondent filed an amended answer, dated October 25, 2011, in which it denied the allegations of the complaint and raised four affirmative defenses.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. During a conference call with the parties on October 27, 2011, the parties agreed that no material issues of fact existed in this matter and that Department staff should file a motion for order without hearing, the Department's equivalent to summary judgment (see 6 NYCRR 622.12). After the parties stipulated to facts (see Castiglione Affirm, Exh Q), Department staff filed the motion for order without hearing, dated December 8, 2011. Respondent served a response dated January 4, 2012, and filed a cross motion for an order without hearing.

ALJ Garlick has prepared the attached summary report in which he recommends granting Department staff's motion for order without hearing, and denying respondent's cross motion. The ALJ concluded that BCD Tire violated 6 NYCRR 360-13.1(b) by storing more than 1,000 waste tires at its facility without a permit from March 3 through October 19, 2011. Additionally, the ALJ recommended that I issue an order: (1) holding BCD Tire liable for violating 6 NYCRR 360-13.1(b) by storing more than 1,000 waste tires, in the form of TDA, at the facility from March 3 through October 19, 2011, without a permit; (2) imposing a civil penalty in the amount of thirty-one thousand dollars ($31,000); and (3) requiring BCD Tire to either apply for a waste tire storage facility permit or close the facility (see Summary Report, at 30).

I adopt the attached summary report as my decision in this matter, subject to the following comments.

DISCUSSION

A. Liability

As noted above, respondent's liability rests upon whether TDA is "waste tires" under the applicable statute and regulations. Department staff argues that, although not specifically defined in the statute or regulation, TDA is the equivalent of chipped tires and, therefore, are "portions of tires" that are included in the definition of "waste tires" at ECL 27-1901(13)[2] and 6 NYCRR 360-1.2(b)(183)[3] (see Summary Report, at 7). Respondent argues that (1) the TDA manufactured at the facility is manufactured product with value and, thus, not waste tires; (2) the facility is a recyclables handling and recovery facility regulated under subpart 360-12, and not a

[2] "'Waste tire' means any solid waste which consists of whole tires or portions of tires. Tire casings separated for retreading and tires with sufficient tread for resale shall be included under this term, however, crumb rubber shall not be considered a solid waste."

[3] "Waste tire means any solid waste which consists of whole tires or portions of tires. For the purposes of this Part, tire casings separated for retreading and tires with sufficient tread for resale shall be included under this term, however, crumb rubber shall not be considered solid waste."

waste tire storage facility regulated under subpart 360-13; (3) the TDA is not solid waste because some of it is sold and beneficially used as tire derived fuel ("TDF") under 6 NYCRR 360-1.15(b)(6) ; and (4) the TDA is not solid waste because it is covered by Departmental beneficial use determinations ("BUDs").

Facilities, such as BCD Tire's, that use waste tires in this manner, are subject to registration pursuant to 6 NYCRR 360-13.1(d), rather than the permit requirements of Part 360, provided that all the applicable requirements of subpart 360-13 are met (see 6 NYCRR 360-13.1[d][1]). However, pursuant to section 360-13.1(b), no 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. Thus, registered solid waste management facilities that use waste tires in their processes are required to obtain a Part 360 permit if 1,000 or more waste tires are stored at the facility.

In a regulation adopted in 1993, waste tires are defined to include any solid waste that consists of whole tires or portions of tires (see 6 NYCRR 360-1.2[b][183]; see also n 3, supra). The regulatory definition of waste tires was subsequently enacted into statute at ECL 27-1901(13) (see L 2003, ch 62, pt V1, § 3; see also n 2, supra). Portions of tires include shredded or chipped waste tires (see Matter of Izzo, Decision and Order of the Assistant Commissioner, July 16, 2010, at 12-13). Crumb rubber made from waste tires, however, is excluded from the definition of waste tires or portions of tires (see ECL 27-1901[13]; 6 NYCRR 360-1.2[b][183]).[4]

Since before the 1993 regulations, the State's policy concerning, and regulation of, waste tires and portions of waste tires is grounded on several significant public health, safety, and environmental concerns. First, waste tires and portions of waste tires pose a significant fire hazard. Waste tire fires can generate pungent and highly polluting smoke that can impact the entire neighboring community, and can be expensive and dangerous to fight (see, e.g., Matter of Izzo, at 13; Matter of Hornburg, Order of the Commissioner, Aug. 26, 2004, adopting Ruling/Hearing Report, at 8-9). This severe fire hazard justifies strict requirements for the storage of waste tires or portions of tires to prevent fires, and to facilitate fire fighting when tire fires occur. Second, waste tires and portions of tires can serve as a breeding ground for mosquitoes, snakes, rodents, and other vermin and, thus, vectors for diseases that threaten public health and safety.

Due to the significant public health and environmental threats posed by waste tires and portions of waste tires, it has been the Department's policy, since at least the early 1990s, to regulate waste tires until they are reduced to a volume, form, or use that minimizes those threats. Thus, under the Department's regulations, waste tires and portions of waste tires remain regulated waste until they are put to certain uses as provided by those regulations, or pursuant to case-specific BUDs by the Department (see 6 NYCRR 360-1.15[b], [d]). The precise point at which waste tires cease to be solid waste is specifically identified, either in regulation or in case-specific BUDs (see 6 NYCRR 360-1.15[b], [d][3]).

In this case, I agree with the ALJ that no material factual issues require adjudication and that Department staff established its entitlement to summary judgment on the issue of respondent

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[4] Crumb rubber is finely ground rubber derived from recycled or scrap tires with granules generally 1/4 inch or smaller in size (see, e.g., Colden Memorandum [11-8-93], Glander Affid, Exh 5).

BCD Tire's liability for the first cause of action (see 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 is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party]; see also Summary Report, at 6-7). The TDA at respondent's facility consists of shredded waste tires and, thus, are portions of waste tires subject to regulation under subpart 360-13. As stipulated to by the parties, the stockpiles of TDA at respondent's facility are derived from more than 1,000 waste tires (see Lavery Email [10-28-11]). Moreover, respondent lacks a waste tire storage facility permit issued pursuant to subpart 360-13. Thus, Department staff has established that respondent BCD Tire has been storing 1,000 or more waste tires at a time at its facility without a permit.

I also agree with the ALJ that respondent's arguments that TDA is not waste tires are unavailing. The mere circumstance that respondent's TDA has value as a product does not remove it from regulation as portions of waste tires (see Summary Report, at 13-14). As respondent notes, nothing in subpart 360-13 or section 360-1.15 specifically addresses TDA. Thus, the Department has not made a regulatory determination that TDA is not solid waste for purposes of Part 360. Accordingly, under long-standing Departmental policy designed to minimize the significant fire and other health threats posed by waste tires and portions of waste tires, TDA remains solid waste subject to regulation even though it may have value to respondent as a product.

Respondent BCD Tire argues that the Waste Tire Management and Recycling Act of 2003 ("2003 Act") modified the Department's approach to TDA, and exempted TDA from the application of ECL article 27. I agree with the ALJ and reject BCD Tire's arguments (see Summary Report, at 9-12). Respondent is correct that the 2003 Act set recycling and beneficial use of waste tires as legislative priorities (see ECL 27-1903[1]). Those priorities are entirely consistent with the priorities that have underpinned the Department's approach to waste tires prior to the 2003 Act. Moreover, nothing in the operative provisions of the Act modified the Department's approach to waste tires or portions of waste tires, such as respondent TDA. To the contrary, as noted above, the Legislature expressly adopted the Department's regulatory definition of waste tires, which includes portions of waste tires (see ECL 27-1901[13]). In addition, the 2003 Act expanded the remedies available to the Department to address the waste tire crisis facing the State, such as funding to abate unpermitted waste tire stockpiles and bring them into compliance with the Department's existing rules and regulations (see ECL 27-1907; ECL 27-1901[1]). Thus, the 2003 Act evinces a legislative intent not to modify the Department's approach to shredded or chipped waste tires, but to endorse and expand upon that approach.

Respondent cites ECL 27-1911 for the proposition that TDA manufactured for beneficial uses, such as for leachate or gas collection systems in landfills, is no longer solid waste under the 2003 Act. However, consistent with the Department's regulations and long-standing policies, section 27-1911(2) focuses on the use of waste tires for beneficial purposes. This is consistent with the Department's treatment of tire chips as solid waste until put to a beneficial use. Nothing in section 27-1911 or in the remainder of the 2003 Act warrants the conclusion that respondent's storage of TDA prior to being used for a beneficial purpose is now exempt from the Department's permit requirements.

Respondent also argues that its facility is a recyclables handling and recovery facility subject to regulation under subpart 360-12, and not subpart 360-13. Although a tire chip producer could be registered as a recyclables handling and recovery facility (see Colden Memorandum [11-8-93], Glander Affid, Exh 5, at 1), respondent did not apply for registration under subpart 360-12 (see DEC Registration No. 29P01, Conlon Affid, Exh 1). Moreover, because TDA is not considered to be a manufactured product under the regulations and therefore still constitutes waste tires, any facility storing 1,000 or more waste tires in the form of tire chips would still have to obtain a permit under subpart 360-13 (see Colden Mem), which respondent does not possess. Thus, I agree with the ALJ that this defense should be rejected (see Summary Report, at 12-13).

Similarly, I reject respondent's claims that its TDA is exempt from regulation under the Department's regulatory and case-specific BUDs. Respondent asserts that because some of its TDA is used by others as tire derived fuel ("TDF"), the TDA is exempt from regulation under the Department's regulatory BUD that is set forth in 6 NYCRR 360-1.15(b)(6). However, the exemption for tire chips used for energy recovery applies when the chips are used for energy recovery, not when waste tires are processed into chips (see 6 NYCRR 360-1.15[d][3] [a solid waste ceases to be a solid waste under the regulations when it is "used as a fuel for energy recovery"]). In other words, under the regulatory BUD, tire chips stop being solid waste when they are used as fuel for energy recovery, not before.

Moreover, contrary to respondent's assertion, the storage of TDF is regulated by subpart 360-13. The users of waste tires for on-site energy recovery must register their facility if they store waste tires or portions of tires (see 6 NYCRR 360-13.1[d][1][ii]). In addition, those users must comply with specific volume and storage requirements (see 6 NYCRR 360-13.1[d][2][i]). And, if those users store 1,000 or more waste tire equivalents, they would be required to obtain a permit under subpart 360-13 (see 6 NYCRR 360-13.1[d][1] [requiring registrants storing waste tires for on-site energy recovery to comply with all applicable requirements of subpart 360-13]). In this case, nothing in the record indicates that respondent is a user of TDF for on-site energy recovery. Nor is respondent in compliance with the requirements for the storage of TDF for on-site energy recovery. Thus, I accept the ALJ's recommendation and reject respondent's argument on this point (see Summary Report, at 15).

I also accept the ALJ's recommendations rejecting respondent's arguments that the TDA is exempt from regulation under certain case-specific BUDs (see id. at 16-17). In each of the BUDs cited, Department staff has specified the precise point at which the TDA ceases to be solid waste subject to regulation (see 6 NYCRR 360-1.15[d][3]). For example, in case-specific BUD No. 783-4-47, for the use of respondent's tire chips as a subbase for a riding arena, the Department specified that the "[t]ire chips shall cease to be a solid waste when received at the project site for inclusion into the specified riding arena structure" (BUD No. 783-4-47 [3-16-04], Glander Affid, Exh 3 [emphasis added]). Thus, under the express terms of the BUD, respondent's tire chips remain solid waste, and thus subject to regulation, until received at the project site. In addition, the BUD established volume limits for the tire chips once received at the project site to minimize risks from the stockpiling of those chips (see id. [tire chips may be staged at the site in 30 cubic yard or smaller piles prior to incorporation as subbase]).

Similarly, in case-specific BUD No. 967-0-00, for the use of respondent's TDA in residential on-site wastewater treatment systems, the Department specified that the TDA

> "ceases to be solid waste once placed in commerce. For use in leach field trenches, this means when the TDA that meets . . . specifications is <u>loaded on a transportation vehicle</u> for delivery to: 1) a distributor that supplies materials for residential septic tank system installations; 2) a residential septic tank system installer's supply yard; or 3) . . . a specific residential septic tank system installation site"

(BUD No. 967-0-00 [4-27-10], Lynch Affid, Exh 3, ¶ 3 [emphasis added]). Thus, under the express terms of this BUD, respondent's TDA remains solid waste, and thus subject to regulation, until loaded on specified transportation vehicles. Moreover, the BUD requires respondent to expressly notify the receiver of the TDA concerning specific storage and use requirements, again, to minimize the risks associated with stockpiling of TDA (<u>see</u> <u>id.</u> [respondent to "notify the distributor or installer that they cannot store more than 500 cubic yards of TDA at their site at any one time and that the TDA must only be used for septic system leach field installations"]).

With respect to the use of respondent's TDA in the Madison County landfill's leachate collection and gas venting systems, contrary to respondent's assertion, it has not established on this record that Madison County has a BUD for that use. Rather, the record reflects the Department's acceptance of the County's proposal concerning the long-term storage of tire chips contingent upon modifications to the County's landfill operations, its Operation and Maintenance Manual, and its Contingency Plan to bring the facility into compliance with subpart 360-13's regulations governing the storage of waste tires and portions of waste tires (<u>see</u> DiGiulio Letter [11-6-08], Conlon Affid, Exh 4; <u>see also</u> 6 NYCRR 360-13.2[h]; 360-13.3[a]). The modification of the County's landfill operations and storage of tire chips is entirely consistent with the regulations governing the storage of waste tires (<u>compare</u> Czerwinski Letter [1-16-09], Conlon Affid, Exh 4, <u>with</u> 6 NYCRR 360-13.2[i]). In any event, nothing in the cited correspondence indicates a BUD specifying that respondent's TDA ceases to be solid waste when stored at BCD Tire's facility. Nor is it likely that such a determination would be made -- a BUD for use of TDA in landfills would most likely specify that the TDA ceases to be solid waste when used in the landfill as a substitute for construction material, not before (<u>see</u> 6 NYCRR 360-1.15[d][3]).

In sum, neither the regulatory nor case-specific BUDs referenced by respondent provide that its TDA ceases to be solid waste when stored on site in large, undifferentiated piles. Accordingly, none of the BUDs exempts respondent's on-site storage of TDA from regulation under subpart 360-13.

Finally, I agree with the ALJ's assessment of any remaining defenses to liability raised by respondent (<u>see</u> Summary Report, at 17-19). Accordingly, Department staff has established its entitlement to summary judgment on the issue of respondent's liability for the storage of 1,000 or more waste tires in the form of TDA without a permit.

B. Penalty and Other Relief

ECL 71-2703 imposes a civil penalty of no more than seven thousand five hundred dollars ($7,500) for each violation of title 3 or 7 of article 27, or the rules and regulations promulgated thereto, and an additional one thousand five hundred dollar ($1,500) penalty for every day the violation continues.

Department staff is requesting a civil penalty of thirty-one thousand dollars ($31,000) for respondent's storing solid waste, in the form of TDA, from March 3 through October 19, 2011, without a permit (see Summary Report, at 20 n 5). Department staff is also requesting that respondent remove all waste tire "equivalents" from the facility and that respondent's registration (No. 29P01) be revoked.

The civil penalty of thirty-one thousand dollars ($31,000) that staff has requested and the ALJ recommends is appropriate and consistent with penalties imposed in other waste tire cases. I adopt the ALJ's rationale for the penalty and other remedial relief (see Summary Report, at 20-29), subject to the following modifications.

To the extent respondent claims it was unaware of the need to obtain a permit for the tires chips stored at the facility, the claim is unpersuasive. As early as 2001, when respondent received its approved registration for the Scotia, New York operation, respondent was expressly notified that it must obtain a permit if more than 1,000 waste tires were to be stored at its facility (see Forgea Letter [6-20-01], Conlon Affid, Exh 2). Certainly, by 2010, when respondent executed the consent order with the Department, respondent was aware that the storage of in excess of 1,000 tire equivalents in the form of TDA required a permit (see Order on Consent [6-24-10], Robak Affid, Exh 1). Notwithstanding the above, respondent continued to operate without a permit and out of compliance with the regulatory requirements governing waste tire storage facilities.

Moreover, the fire threat posed by the facility is significant (see Summary Report, at 25). The facility is located in a residential area (see Robak Affid, ¶ 45). On July 7, 2006, respondent's facility was the site of a major fire (see id. ¶ 46). Although the fire primarily involved an abandoned building at the site, it was the worst fire in Hagaman's history, which lasted for three days and involved over 35 fire departments from five different counties (see id. ¶ 46). Given the very large, undifferentiated pile of tire chips at the facility, and the lack of compliance with appropriate regulatory pile size and set back requirements, any future fire at the facility involving the tire chips could cause very severe impacts to the surrounding residential community.

Respondent, however, should be given the opportunity to bring the facility into compliance by either obtaining a permit for the facility, or reducing the number of tires stored at its facility as required by its registration. Whatever course respondent chooses, however, it has the responsibility to assure, by bringing its facility into compliance with applicable law, that its operation poses the least possible threat to human health and the environment. Because respondent had operated its facility for some time with no identified violations, and in recognition of the costs associated with addressing the TDA on site, I am suspending ten thousand dollars ($10,000) of the penalty amount, contingent upon respondent either (i) applying for a waste tire storage facility permit within forty-five (45) days of the service of this decision and order upon respondent, (ii) reducing the amount of waste tires stored at the facility to less than 1,000 waste tire equivalents within forty-five (45) days of the service of this decision and order upon respondent and providing documentation to Department staff within that forty-five day period that demonstrates that the reduction of waste tires at the site complied with all applicable legal requirements, or (iii) closing the facility within sixty (60) days of the service of this order upon respondent and providing documentation to Department staff within that sixty-day period that demonstrates that the closure of the facility met all applicable legal requirements. The non-suspended portion of the penalty (twenty-one thousand dollars [$21,000]) shall be due and payable within thirty (30) days after service of this decision and order upon respondent.

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

I. Department staff's motion for order without hearing is granted in part, and respondent BCD Tire Chip Manufacturing, Inc.'s cross motion for an order without hearing is denied.

II. Respondent BCD Tire Chip Manufacturing, Inc. is adjudged to have violated 6 NYCRR 360-13.1(b) by storing more than 1,000 waste tire equivalents, in the form of tire chips, at its Hagaman facility without a permit. Accordingly, respondent's facility is a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

III. Respondent BCD Tire Chip Manufacturing, Inc. is hereby assessed a civil penalty in the amount of thirty-one thousand dollars ($31,000), of which ten thousand dollars ($10,000) is suspended, contingent upon respondent complying with the terms and conditions of this decision and order.

The non-suspended portion of the penalty (twenty-one thousand dollars [$21,000]) shall be due and payable within thirty (30) days after service of this decision and order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Karen S. Lavery, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Office of General Counsel, Region 4
1130 North Westcott Road
Schenectady, NY 12306-2014

Should respondent fail to satisfy any of the terms and conditions of this decision and order, the suspended penalty (that is, ten thousand dollars [$10,000]) shall become immediately due and payable upon notice by Department staff, and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

IV. Upon service of this decision and order, respondent shall immediately stop allowing any waste tires to be brought onto respondent's facility in any manner or method or for any purpose. For purposes of this and the remaining paragraphs of this decision and order, a waste tire 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, or tire chips) and whether or not on tire rims. This prohibition shall continue until the remaining terms of this decision and order are complied with.

V. Within ten (10) days of the service of this decision and order upon respondent, respondent shall notify Department staff whether it will apply for a waste tire storage facility permit, bring the facility into compliance with its registration, or permanently close the facility.

A. If respondent decides to apply for a permit, it must, within forty-five (45) days of the service of this decision and order upon respondent, submit an approvable permit application to the Department. Upon submittal of an approvable permit application, respondent may resume accepting waste tires at the facility, provided the amount of waste tires stored at the facility does not exceed 1,000 waste tire equivalents at any time. At such time as Department staff notifies respondent that its application has been granted, respondent may store additional waste tire equivalents in amounts authorized by law and in compliance with its permit.

B. If respondent decides to bring its facility into compliance with its registration, it must, within forty-five (45) days of the service of this decision and order upon respondent, reduce and maintain the amount of waste tires stored at its facility to less than 1,000 waste tire equivalents. Within that forty-five day period, respondent shall provide documentation to Department staff that demonstrates that the reduction of waste tires at the site complied with all applicable legal requirements. Once the amount of waste tires stored at the facility is less than 1,000 waste tire equivalents, respondent may resume accepting waste tires at the facility, provided the amount of waste tires stored at the facility does not exceed at any time 1,000 waste tire equivalents.

C. If respondent decides to close the facility, it must:

1. Immediately and permanently cease accepting waste tires at the facility;
2. Remove all waste tires from the facility within sixty (60) days of the service of this decision and order upon it;
3. Surrender its Solid Waste Management Facility Registration

(No. 29P01) to the Department within sixty (60) days of the service of this decision and order upon it; and

4. Provide documentation to Department staff demonstrating that the closure of the facility met all applicable legal requirements within sixty (60) days of the service of this decision and order upon it.

VI. All communications from respondent to the Department concerning this decision and order shall be directed to Karen S. Lavery, Esq., Assistant Regional Attorney, at the address set forth in paragraph III of this decision and order.

VII. The provisions, terms and conditions of this decision and order shall bind respondent BCD Tire Chip Manufacturing, Inc., and its agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By:________________________________
Joseph J. Martens
Commissioner

Dated: March 26, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York ("ECL") and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),	SUMMARY REPORT DEC CASE NO: R4-2011-0505-53
-by-	
BCD Tire Chip Manufacturing, Inc.,	
Respondent.	

SUMMARY

This summary report recommends the Commissioner grant a motion for order without hearing brought by staff of the Department of Environmental Conservation (DEC Staff) and find BCD Tire Chip Manufacturing, Inc. (BCD or respondent) liable for storing 1,000 or more waste tires at its facility (located at 16 William Street, Hagaman, NY) without a permit, in violation of 6 NYCRR 360-13.1(b) for the period beginning on March 3, 2011 and ending on October 19, 2011. The central issue in this case is whether large piles of Tire Derived Aggregate (TDA) stored at the facility fall within the definition of "waste tires" found at 6 NYCRR 360-1.2(b)(183). This report recommends that the Commissioner agree with DEC Staff and conclude that TDA is properly categorized as waste tires. This report also recommends that the Commissioner impose a civil penalty of $31,000 on the respondent in his order. The Commissioner should also require BCD to either: (1) submit an approvable permit application for its facility within 30 days; or (2) cease accepting additional waste tires, remove the piles of TDA at the facility, and surrender its Solid Waste Management Facility Registration (registration). Finally, this report recommends that the Commissioner deny respondent's motion to dismiss this enforcement action.

PROCEEDINGS

With a cover letter dated August 2, 2011, DEC Staff commenced this action by service of a notice of hearing and a complaint. Attached to the complaint were five exhibits. In its complaint, DEC Staff alleged two causes of action against the respondent. Specifically, that BCD: (1) operated the facility without a permit in violation of 6 NYCRR 360-13.1(b); and (2) failed to comply with the terms and conditions of a consent order that BCD executed with DEC Staff (#R4-2010-0528-40), which addressed solid waste violations involving waste tire storage at the site that became effective on June 24, 2010.

With a cover letter dated August 15, 2011, Brian Conlon, President of BCD, responded to the complaint with an accompanying letter dated August 11, 2011, which he requested be treated as the answer. Attached to the second letter were seven exhibits. The second letter is addressed to several elected officials and news organizations and contains unsworn statements by Mr. Conlon about BCD's history and operations.

With a cover letter dated September 16, 2011, DEC Staff filed a statement of readiness with DEC's Office of Hearings and Mediation Services.

On September 22, 2011, this matter was assigned to me.

A conference call with the parties occurred on September 29, 2011. On this call the respondent was not represented by counsel. A second call occurred on October 13, 2011 and on this call the respondent was represented by counsel. Respondent had retained Joseph F. Castiglione, Esq. and Dean S. Sommer, Esq. of the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC.

With a cover letter dated October 25, 2011, respondent filed an amended answer with four exhibits attached. In its amended answer, the respondent denies the allegations in the complaint and raises four affirmative defenses.

A third call occurred on October 27, 2011 and on this call the parties agreed that since there were no material issues of fact in the matter, it was appropriate for DEC Staff to file a motion for order without hearing, which is the administrative equivalent of a motion for summary judgment.

By email dated October 28, 2011, the parties stipulated to the following facts (Castiglione affirmation, Exh. Q).

(1) BCD's tire chip manufacturing process entails accepting waste tires at the facility, and processing the waste tires

through a shredding machine at the facility to make tire derived aggregate.

(2) The amount of current tire derived aggregate stockpiled at the facility is derived from more than 1,000 waste tires.

With a cover letter dated December 8, 2011, DEC Staff filed a motion for order without hearing. The second cause of action in the complaint has been withdrawn in DEC Staff's motion. DEC Staff's papers included: (1) a notice of motion; (2) counsel's brief in support; (3) the affidavit of DEC Staff member Theodore Robak; (4) the affidavit of DEC Staff member Thomas Lynch; (5) the affidavit of DEC Staff member Richard Forgea; (6) the affidavit of DEC Staff member Christian Glander; and (7) a proposed judgment and order.

With a cover letter dated January 4, 2012, respondent's counsel served response papers, including a cross motion to dismiss. These papers included: (1) a notice of cross motion; (2) a memorandum of law; (3) the affirmation of Joseph F. Castiglione with 17 exhibits; and (4) the affidavit of Brian Conlon, with 10 exhibits.

Both DEC Staff counsel and respondent's counsel signed a letter, dated January 5, 2012, stating that no further responses were necessary and the matter was ripe for consideration.

FINDINGS OF FACT

1. BCD Tire Chip Manufacturing, Inc. (BCD) operates a scrap tire and recycling facility located at 16 William Street, in the Village of Hagaman, Town of Amsterdam, Montgomery County, New York. BCD's owner and president is Brian Conlon and the facility has 13 full-time employees. The company began operation in Scotia, New York, in 2001 and moved to its present location in 2004. The facility was issued a Solid Waste Management Facility Registration (#29P01) dated October 4, 2004[1] (Conlon affidavit, ¶ 1 & ¶ 2, and Exh. 1).

2. At the facility, BCD accepts waste tires and sorts them. Those with sufficient treads are resold as used tires. Those tires that cannot be reused are processed into chips

[1] The company's prior registration is also in the record (Castiglione affirmation, Exhibit K).

approximately 4” by 4” which results in a product commonly known as tire derived aggregate (TDA). There is no leftover waste component when the waste tire is processed into TDA. Currently, BCD accepts between 3,000 and 5,000 tires a day from various sources. BCD regularly processes 3,000 tires a day into TDA and produces between 5,000 and 7,500 tons of TDA a year, the equivalent of 500,000 to 750,000 waste tires. The TDA that is produced at the facility is shipped to customers within 3-100 days (Conlon affidavit, ¶ 3 & ¶ 4).

3. BCD never stores more than 1,000 whole tires, or portions of whole tires, for more than a day (Conlon affidavit ¶ 4). The parties have stipulated that BCD does stockpile TDA at the site and this stock pile contains more than 1,000 processed tires in the form of TDA (Castiglione affirmation, Exhibit Q).

4. BCD supplies TDA to a number of customers including: a landfill in Madison County (Conlon affidavit ¶ 5 & ¶ 6,and Exh. 4); an electric generating facility called ReEnergy Holdings LLC in Sterling, Connecticut (Conlon affidavit ¶ 8, Exh. 5); the City of Albany landfill; and the Colonie Town landfill (Conlon affidavit, ¶ 10).

5. On March 2, 2004, the Scotia facility was inspected by DEC Staff and no violations were found (Castiglione affirmation, Exhibit L).

6. In 2006, a fire occurred at BCD’s Hagaman facility that involved an abandoned and dilapidated building at the site that had formerly been used as a leather mill for approximately 150 years before BCD began operations at the site. The fire lasted for approximately 18 hours and the Hagaman Fire Department remained at the site for three days to address hot spots (Conlon affidavit, ¶ 18). During the fire, some TDA caught fire (Conlon affidavit, ¶ 19). After the fire, DEC Staff member George Elston inspected the facility and no violations were found (Conlon affidavit, ¶ 26).

7. By letter dated April 27, 2010, DEC Staff issued a Beneficial Use Determination (BUD) to BCD for TDA to be used in residential on-site wastewater treatment systems (Conlon affidavit, ¶ 17, and Exhs. 6 & 7).

8. On May 25, 2010, DEC Staff inspected the facility (Robak affidavit, Exh. 1, ¶ 4). During the inspection, DEC Staff documented that BCD was currently storing in excess of 1,000 tire equivalents in the form of chips (Robak affidavit, Exh. 1, ¶ 8).

9. BCD Tire Chip Manufacturing, Inc. entered into a consent order (#R4-2010-528-40) with DEC Staff that addressed solid waste violations involving waste tire storage at the site. This consent order became effective on June 24, 2010. In this consent order, the respondent admitted operating the facility without a permit, in violation of 6 NYCRR 360-13.1(b), and agreed to reduce the number of tire equivalents at the site to under 1,000, and to store tire chips in the "bunker" located at the rear of the property or in the trailers. The consent order assessed a total civil penalty of $1,500, $500 of which was payable and $1,000 suspended upon the respondent's compliance with the order (Robak affidavit, Exh. 1).

10. On March 3, 2011, DEC Staff inspected the facility. On March 4, 2011, DEC Staff member Elston wrote to the respondent notifying it that because BCD was storing more than 1,000 tires or shredded equivalents at the facility that it was not in compliance with the consent order (Robak affidavit, Exh. 2).

11. On April 27, 2011, DEC Staff again inspected the facility and an inspection report was completed by DEC Staff member Robak. Based on his observations, Mr. Robak estimated that there were between 22,000 and 27,500 waste tire equivalents at the site (Robak affidavit, Exh. 3). Mr. Robak also observed that the waste tire pile covered an area of about 16,000 square feet and was within 50 feet of the building at the site (Robak affidavit, ¶ 19).

12. On October 19, 2011, DEC Staff again inspected the facility and an inspection report was completed by DEC Staff member Robak. Based on his observations, Mr. Robak estimated that the waste tire pile was the same or slightly larger than it was on April 27, 2011 (Robak affidavit, Exh. 4).

DISCUSSION

In its motion for order without hearing, DEC Staff requests that the Commissioner issue an order finding the respondent liable for storing more than 1,000 waste tires at the facility without a permit in violation of 6 NYCRR 360-13.1(b) and imposing a payable civil penalty of $31,000. In addition, DEC Staff asks the Commissioner to: (1) direct the respondent to immediately cease accepting waste tires; (2) order the respondent to remove and properly dispose of all waste tires at the facility within sixty (60) days; and (3) revoke the registration for the facility. The respondent has cross-moved to have the matter dismissed because no permit was required for the operations of the facility. If a permit is required, the respondent requests that no penalty be imposed and that a reasonable amount of time be allowed for BCD to apply for and receive the necessary permit.

LIABILITY

In this case, DEC Staff has moved for an order without hearing on a single cause of action. Motions for order without hearing pursuant to 6 NYCRR 622.12 are the equivalent of summary judgment, and are governed by the standards and principles applicable to CPLR 3212 (see 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 is established sufficiently to warrant granting summary judgment under the CPLR (see id.). The motion must be denied if any party shows the existence of substantive disputes of fact sufficient to require a hearing (see 6 NYCRR 622.12[e]).

On the motion, Department staff bears the initial burden of establishing its entitlement to judgment as a matter of law on the violation charged (see Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). Department staff carries its burden by producing evidence sufficient to demonstrate the absence of any material issue of fact with respect to each element of the causes of action that is the subject of the motion (see id.). Because hearsay is admissible in administrative hearings, staff may support its motion with hearsay evidence, provided that the evidence is sufficiently relevant, reliable, and probative (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 2-3).

Once Department staff has carried its initial burden of establishing a prima facie case justifying summary judgment, the burden shifts to respondent to produce evidence sufficient to raise a triable issue of fact warranting a hearing (see Matter of Locaparra, at 4). As with the proponent of summary judgment, a party opposing summary judgment may not merely rely on conclusory statements or denials, but must lay bare its proof (see id. [and cases cited therein]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (see Zuckerman v New York City Tr. Auth., 49 NY2d 557, 562-563 [1980]; Drug Guild Distribs. v 3-9 Drugs, Inc., 277 AD2d 197, 198 [2d Dept 2000], lv denied 96 NY2d 710 [2001] [conclusory denial of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence]).

In this case, the respondent has raised four defenses which are discussed below. DEC's regulations provide that the respondent bears the burden of proof regarding any affirmative defenses (6 NYCRR 622.11(b)(2)).

As discussed in detail below, no material question of fact exists warranting a hearing. DEC Staff has shown that: (1) the facility stockpiles TDA derived from more than 1,000 waste tires; (2) TDA is properly categorized as waste tires as defined at 6 NYCRR 360-1.2(b)(183); and (3) BCD does not have a permit as required by 6 NYCRR 360-13.1(b). DEC Staff has also shown that the violation began on March 3, 2011 and continued through October 19, 2011. The respondent's arguments that the facility is exempt from the permit requirements of 6 NYCRR 360-13.1(b) are without merit. Therefore, the Commissioner should conclude that the respondent is liable for the alleged violation.

DEC Staff's argument

In the first cause of action set forth in its complaint, which is the basis for its motion for order without hearing against the respondent, DEC Staff alleges that BCD was required to obtain a permit, pursuant to 6 NYCRR 360-13.1(b), and failed to do so. BCD needed a permit because it routinely stores one thousand or more waste tires, in the form of TDA, at its facility. In an email dated October 28, 2011, the parties stipulated to the fact that BCD currently stockpiles TDA derived from more than one thousand waste tires (Castiglione affirmation, Exhibit Q). DEC Staff argues that TDA is not legally defined, but just another term for chipped waste tires and as such are "portions of tires" and included in the definition of "waste tire" found in law (ECL 27-1901[13]) and regulation (6 NYCRR 360-1.2[b][183]). Because TDA consists of waste tires, and because there is no question of fact BCD stored more than 1,000 waste tires at the site, BCD was required to obtain a permit pursuant to 6 NYCRR 360-13.1(b). There is no question of fact that BCD was never issued a permit pursuant to 6 NYCRR 360-13.1(b) (Forgea affidavit, ¶ 15).

In support of its position that it is correctly applying the statutory and regulatory definitions of "waste tires", DEC Staff also argues that it has consistently treated chipped waste tires as waste tires since at least 1990. DEC supplies copies of various documents to support its position, which are discussed in detail below.

In its response papers, DEC Staff contends that none of the arguments raised by the respondent, discussed in detail below, exempt the facility, the TDA, or the waste tires from the requirement to obtain a permit. Therefore, DEC Staff concludes, the respondent is liable for violating section 360-13.1(b).

DEC Staff alleges that the violation was first observed on March 3, 2011 (Complaint, ¶ 9). The last date that the violation was observed was October 19, 2011 (Robak affidavit, Exh. 4). The respondent does not claim that during this time that there were less than 1,000 waste tires (in the form of TDA) stored at the facility. Based on this, it is reasonable to conclude that DEC Staff has shown the violation continued for 231 days.

Respondent's arguments

The respondent advances several arguments regarding liability in both its amended answer and its memorandum of law. In its amended answer, after generally denying DEC Staff's allegations, four defenses are raised: (1) since the facility manufactures TDA, it is exempt from DEC regulation; (2) the present enforcement action is an abuse of DEC Staff's enforcement discretion; (3) DEC Staff cannot regulate tire chips under 6 NYCRR 360-13.1(b); and (4) that the 2010 consent order was based on an error of law.[2] In its memorandum of law, the respondent makes five arguments: (1) the TDA manufactured at the facility is not waste tires; (2) the facility is not a solid waste management facility, but rather a recyclables handling and recovery facility; (3) the TDA at the facility is not solid waste because it has value; (4) the TDA at the facility is not solid waste because some of it is sold and used as Tire Derived Fuel (TDF); and (5) the TDA at the facility is not solid waste

[2] This defense addresses the second cause of action in DEC Staff's complaint, which has been withdrawn (DEC Attorney Brief, ¶ 4).

because it is covered by Beneficial Use Determinations (BUDs). Each of these arguments is discussed below.

The legislature has exempted TDA from the definition of "waste tires"

The first argument raised by the respondent relates to both its first affirmative defense[3] and its first point in its memorandum of law. Specifically, the respondent argues that when the New York State Legislature enacted the "Waste Tire Management and Recycling Act of 2003" (the Act) as part of the budget that year, the State adopted a new approach to waste tire regulation. This new approach, according to BCD, included exempting TDA, a manufactured product, from the definition of "waste tires" found in DEC regulations. Therefore, according to the respondent, BCD's facility should not be subject to the requirements of subpart 360-13, DEC's solid waste management regulations applicable to waste tires, which were adopted in 1993. Before addressing this claim, some background is helpful.

In its papers, DEC Staff provides a brief history of its regulation of waste tires and TDA. DEC Staff includes a copy of a September 28, 1990 letter indicating the need for a permit for the storage of more than 1,000 waste tires or tire chips (Glander affidavit, Exh. 4). In 1993, amendments were made to DEC's solid waste regulations (6 NYCRR Part 360). DEC Staff provides a copy of a portion of the response to comments for the 1993 amendments that is consistent with the earlier letter (Lynch affidavit, Exh. 4). This position was restated in a November 8, 1993 internal DEC Staff memorandum (Glander affidavit, Exh. 5) and a second memorandum, dated January 12, 1996 (Glander affidavit, Exh. 6). The respondent does not dispute that DEC Staff regulated TDA as waste tires before the passage of the Act in 2003 and does not address whether this regulation was proper. There is no definition of TDA in DEC's regulations.

When the Act was adopted in 2003, the respondent argues, the Legislature changed the way facilities like BCD were categorized from waste tire storage facilities regulated under 360-13, to recyclables handling and recovery facilities regulated under 360-12. The Act, BCD claims, represented a new approach to the State's waste tire problem.

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[3] A defense based upon the inapplicability of a permit requirement to the activity is an affirmative defense under 6 NYCRR part 622 (see 6 NYCRR 622.4(c)).

There is no dispute that in enacting the Act, the Legislature intended to address the problems caused by waste tires and to promote recycling. This new approach was set forth in the section entitled "waste tire management priorities" (ECL 27-1903), which states the goals of recycling and beneficially using waste tires. According to the respondent, the Act only regulates waste tires and not products derived from them. The basis for this conclusion is the definition of "waste tire" in the Act which was adopted in 2003.

> "Waste tire" means any solid waste which consists of whole tires or portions of tires. Tire casings separated for retreading and tires with sufficient tread for resale shall be included under this term, however, crumb rubber shall not be considered a solid waste. (ECL 27-1901[13].)

The respondent argues that because TDA is not specifically included in the definition of waste tire and because TDA, like crumb rubber, is derived from waste tires, TDA is not properly categorized as waste tires

DEC Staff disputes the respondent's claim that the Act altered the regulatory landscape for tire processing facilities like BCD and argues that it has consistently regulated tire chips (including TDA) as waste tires since before the 1993 amendments to the solid waste regulations, 6 NYCRR part 360, through the present (Glander affidavit, ¶ 22). To support this position, DEC Staff provides a copy of a permit issued on May 29, 2008, to a facility that engages in the same activities as BCD that is located in Niagara Falls (Glander affidavit, Exh. 7). This permit includes the types of conditions BCD would be subject to if it were permitted, as well as the surety requirements for permittees (Glander affidavit, ¶ 35).

DEC Staff member Glander states that if the respondent's argument were adopted, it would "create a loop-hole in the regulations inconsistent with the goals and objectives of the solid waste management statutes and regulations governing both the proper disposal of solid waste and waste tires. If shredded or chipped waste tires [including TDA] are allowed to be 'stored' without any permitting requirements it would result in the creation of unpermitted waste chip landfills and a continuing fire hazard that the permit requirements are intended to mitigate" (Glander affidavit, ¶ 36). Mr. Glander concludes that since the purpose of the Act is to mitigate the effects of waste tire stockpiles, and the State has expended nearly $100 million to clean up existing stockpiles, the respondent's interpretation of the language of the Act would be contrary to the legislative intent (Glander affidavit, ¶ 36). DEC Staff argues that the permitting requirement in 360-13.1(b) and its interpretation of this requirement is consistent with the express language found in both the Act and its regulations (DEC's attorney brief, ¶ 68).

The respondent counters that DEC Staff could adequately regulate waste tire processing facilities under the provisions of 6 NYCRR subpart 360-12 and should do so. BCD argues that DEC Staff's interpretation of its regulations is irrelevant because it ignores the plain meaning of the language of the Act and that DEC Staff's assertion that it be given deference in interpreting the Act is misplaced. BCD contends that the language of the Act is unambiguous and the plain meaning of the language of the Act, specifically the definition of "waste tire," leads to the conclusion that the Legislature intended to change DEC's regulation of facilities, like BCD, that process waste tires. According to BCD, DEC Staff's interpretation of the term "waste tire" is arbitrary and capricious and is well beyond the plain meaning of the word.

There is a significant problem with respondent's argument that the definition of "waste tires" in the Act changed the state's approach to regulation of TDA. In particular, the definition is virtually identical to that found in the 1993 DEC regulations (6 NYCRR 360-1.2[b][183]) which reads:

> Waste Tire means any solid waste which consists of whole tires or portions of tires. For the purposes of this Part, tire casings separated for retreading and tires with sufficient tread for resale shall be included under this term, however, crumb rubber shall not be considered solid waste.

The Legislature's use of the near identical definition (only deleting "[f]or the purposes of this Part" from the regulations) does not indicate a desire to change DEC's method of regulating waste tires and the facilities that process them. Rather it is logical to infer that the Legislature wanted to maintain the existing regulatory framework and build on it. The Act does this by instituting a funding source and other provisions to address piles of abandoned tires. There is nothing in the Act to indicate the Legislature's desire to modify the way in which waste tire processing facilities are regulated.

Based on the above, the Commissioner should conclude that the Act did not alter DEC's regulatory scheme for the permitting of waste tire processors and should reject this argument and affirmative defense of the respondent.

BCD is a recycling handling and recovery facility

The second argument advanced by the respondent in its memorandum of law is that "DEC has no authority to regulate BCD under 6 NYCRR 360-13.1, as BCD is a recycling handling and recovery facility under 360-12.1 and 12.2, and BCD complies with these regulations" (respondent's memorandum of law, p. 40).

Continuing its argument that DEC Staff cannot regulate BCD's facility pursuant to 6 NYCRR 360-13, the respondent argues that the Act included a definition of the term "recyclables" found at ECL 27-1901(8).

> "Recyclables" means solid waste materials that exhibit the potential to be used to make marketable products for end users."

According to the respondent, this definition in the Act is applicable to TDA, because TDA has value and a market exists for its end use. Since the BCD facility is not a waste tire storage facility regulated by 6 NYCRR 360-13 (and does not need a permit), it falls into the regulatory category of a recyclables handling and recovery facility (regulated by 6 NYCRR 360-12). These facilities are specifically exempted from the requirement to obtain a permit pursuant to 6 NYCRR 360-13.1(a).

The respondent argues that the BCD facility meets the definition of a recyclables handling and recovery facility which is defined as "a solid waste processing facility, other than collection and transfer vehicles, at which nonputrescible recyclables are separated from the solid waste stream or at which previously separated nonputrescible recyclables are processed" (6 NYCRR 360-1.2[b][131]). As such, BCD only needs a registration pursuant to 6 NYCRR 360-12.1(d), which it possesses (Amended Answer, Exh. A). Therefore, the respondent concludes, DEC Staff has failed to demonstrate the alleged violation.

DEC Staff disputes the respondent's claim and argues that BCD is properly regulated under 6 NYCRR 360-13, and therefore, requires a permit, which it does not possess (Forgea affidavit, ¶ 15). As discussed above, BCD's argument that the Act changed DEC Staff's regulatory scheme for waste tire facilities in 2003 is without merit. Similarly, the claim that the BCD facility should be regulated pursuant to 6 NYCRR subpart 360-12 is contrary to the regulatory practice of DEC that has existed for over twenty years. Accordingly, the Commissioner should reject this argument of the respondent.

TDA is not a solid waste

The third argument advanced by the respondent in its memorandum of law is that "DEC has no authority to regulate BCD under 6 NYCRR 360-13.1, as the TDA is not solid waste: the TDA is a valuable product that is neither useless not worthless, and it is not accumulated or disposed of under 6 NYCRR 360-1.2" (respondent's memorandum of law, pp. 42-44). This same argument is raised in the respondent's third defense. The respondent argues that because the definition of "waste tire" found in the 2003 Act "means any solid waste which consists of whole tires or portions of tires" (ECL 27-1901[3]) and because TDA has economic value, TDA is not a solid waste.

The respondent notes that the Act itself does not define the term "solid waste", but the term is defined in ECL 27-0701(1).

> "Solid waste" means all putrescible and non-putrescible materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, except including but not limited to garbage, refuse, industrial and commercial waste, sludges from air or water control facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris, discarded automobiles and offal but not including sewage and other highly diluted water carried materials or substances and those in gaseous form. (ECL 27-0701[1])

The respondent contends that TDA is not solid waste (and therefore not waste tires) by citing 6 NYCRR 360-1.2(a)(2) which read as follows:

> A material is discarded if it is abandoned for being:
> (i) disposed of;
> (ii) burned or incinerated, including being burned as fuel for the purpose of recovering usable energy; or
> (iii) accumulated, stored, or physically, chemically or biologically treated (other than burned or incinerated) instead of or being disposed of.

Based on the three subsections, the respondent concludes that because the TDA produced at the BCD facility is not abandoned by being disposed of or accumulated, and is not spent, useless, worthless or in excess to the person that abandoned it, the TDA is not solid waste or waste tires, as defined by the Act. Because a permit is required only for "the storage of waste tires or portions of waste tires" (6 NYCRR 360-13.1[a]), BCD does not need a permit pursuant to 6 NYCRR 360-13(b)(1) and is not liable for the alleged violation.

The respondent continues that because the TDA at the facility has value and is shipped off site within 3-100 days (Conlon affidavit, ¶ 4) to various customers, DEC Staff cannot regulate BCD under 6 NYCRR 360-13.1. As discussed above, the respondent argues that BCD is a recycling handling and recovery facility under 360-12.1 and 12.2, and DEC Staff can regulate the facility pursuant to these sections, including imposing conditions to reduce the risk of fires. However, no liability can be established for violating 6 NYCRR 360-13.1, as alleged.

As discussed above, the Commissioner should reject this argument. The definition of "waste tire" found in the Act is functionally identical to that which has existed in regulation since 1993 and the definition of "solid waste" has not changed. There is no evidence that the Legislature intended to change the manner in which DEC regulates waste tire facilities, as the respondent contends. For the reasons set forth above, the Commissioner should reject this argument of the respondent.

Tire Chips are TDF and not regulated by DEC

The fourth argument advanced by the respondent in its memorandum of law is that "DEC has no authority to regulate BCD under 6 NYCRR 360-13.1, as the TDA manufactured by BCD is excluded as solid waste under 360-1.15(b)(6), as a beneficial use, because ReEnergy uses the TDA as tire derived fuel" (respondent's memorandum of law, p. 44). The respondent argues that because a portion of the TDA manufactured at the facility is used as TDF, it is exempt from regulation under 6 NYCRR 360-1.15(b)(6). Therefore, according to respondent, no liability can be established for violating 6 NYCRR 360-13.1.

There is no question that some of the tire chips manufactured at the BCD facility are sold to Reenergy and used as TDF. Mr. Conlon reports that, except for a recent shut down at the ReEnergy plant, BCD has been providing approximately 60 tons of TDF per week (the equivalent of about 6,000 waste tires) (Conlon affidavit, ¶ 8 & ¶ 9). This TDF is then used as fuel to produce electricity (Conlon affidavit, Exh. 5). BCD accepts between 3,000 and 5,000 waste tires a day (Conlon affidavit, ¶ 4).

The respondent argues that because some of the TDA is sold to be used as TDF, the provisions of 6 NYCRR 360-1.15(b)(6) exempt all the TDA at the facility from the requirements of 6 NYCRR 360-13. Under the provisions of 6 NYCRR 360-1.15(b)(6), whole tires or tire chips used in energy recovery are not considered solid waste as that term is used in DEC's solid waste management regulations. Since the TDF is not solid waste, no permit is required and the respondent should not be held liable for the alleged violation.

DEC Staff does not directly respond to BCD's contention that because less than half of the TDA produced at the facility is eventually used as TDF, all the TDA stored at the facility should be exempt from the permitting requirement. However, DEC Staff does make reference to 6 NYCRR 360-13.1(d)(ii) which states that no permit is required for storage of more than 1,000 waste tires if they are stored for on-site energy recovery (Lynch affidavit, ¶ 34). There is no similar exemption from the permit requirement for off-site manufacturers of TDF. Because of this, the Commissioner should reject respondent's argument.

TDA is exempt from regulation under Various BUDs

The fifth argument advanced by the respondent in its memorandum of law is that "DEC has no authority to regulate BCD under 6 NYCRR 360-13.1, as the TDA manufactured by BCD is excluded from solid waste under 360-1.15(d), as Madison County has a BUD; and BCD has a BUD" (respondent's memorandum of law, pp. 46-51). Because of these BUDs, the respondent argues that it cannot be found liable for violating 6 NYCRR 360-13.1(b).

In its papers, DEC Staff provides some background on BUDs, or Beneficial Use Determinations, and the process for obtaining one. The regulations provide that certain discarded materials that are being beneficially used and for which DEC Staff has made a determination pursuant to 6 NYCRR 360-1.15 are not solid waste. The process by which such determinations are made is set forth in this regulation. First, a petitioner may submit a written request for a BUD to DEC Staff (6 NYCRR 360-1.15[d][1]). DEC Staff then makes a case-by-case determination whether the proposal meets the criteria set forth in the regulation (6 NYCRR 360-1.15[d][2]). In making the determination to issue a BUD, DEC Staff determines the precise point at which the solid waste ceases to be such, under the regulations (6 NYCRR 360-1.15[d][3]). Mr. Lynch explains in his affidavit that a case specific BUD is a DEC Staff jurisdictional determination that a solid waste used in a specific beneficial manner is no longer regulated as a solid waste at a precise point (Lynch affidavit, ¶ 13).

The record of this proceeding includes copies of two BUDs issued by DEC Staff. DEC Staff provided copies of a petition, correspondence about, and a BUD (#783-4-47) issued on March 16, 2004, to BCD for the use of TDA as the sub-base for an indoor/outdoor riding area located in Glenville, New York (Glander affidavit, Exhs. 1, 2 & 3). This BUD specifically states that tire chips shall cease to be a solid waste when received at the project site for inclusion into the riding arena structure (Glander affidavit, Exh. 3, p. 1). Mr. Glander points out in his affidavit that the respondent admitted that waste tire chips were solid waste by applying for this BUD (Glander affidavit, ¶ 20).

Both parties provided copies of a second petition and BUD issued on April 27, 2010 to BCD (#967-0-00) for the use of TDA in on-site wastewater treatment systems (Lynch affidavit, Exhs. 1 & 3: Conlon affidavit, Exhs. 6 & 7). This BUD approved the use of TDA in place of gravel and stone in leach field trenches.

This BUD states that the TDA ceases to be solid waste when it is loaded on a transportation vehicle for delivery to: (1) a distributor that supplies materials for residential septic tank system installations; (2) a residential septic tank system installer's supply yard; or (3) a specific residential septic tank system installation site (Lynch affidavit, Exh. 3, p. 2). Mr. Lynch states in his affidavit that the respondent admitted that TDA was solid waste by applying for this BUD (Lynch affidavit, ¶ 16).

The respondent also makes reference to a BUD issued to Madison County for landfill cover; however, this BUD is not in the record. The respondent does provide a memorandum from Madison County announcing BCD's selection as the winning bidder to provide tire chips for landfill construction (Conlon affidavit, Exh. 3) and correspondence about the storage of the tire chips at the landfill (Conlon affidavit, Exh. 4). These letters to and from DEC Staff involve necessary changes to the landfill's O&M Manual and Contingency Plan to address concerns prior to the long-term storage of tire chips.

Based on the above discussion and the information in the record, there is no support for the respondent's contention that the TDA stored at the BCD facility is not solid waste (and therefore exempt from the permitting requirement of 360-13.1(b)) because of the various BUDs in the record. The two BUDs in the record specifically state that the TDA ceases to be solid waste only after it leaves the BCD facility. Therefore, the Commissioner should reject this argument of the respondent.

Respondent's remaining defenses

In addition to the arguments discussed above, the respondent also argues in its second affirmative defense that the present enforcement action constitutes discriminatory enforcement and is an abuse of DEC Staff's enforcement discretion. To the extent the respondent raises a discriminatory prosecution defense, that defense is not available in this administrative proceeding as a matter of law (<u>see</u> <u>Matter of McCulley</u>, ALJ Ruling on Motion for Order without Hearing, Sept. 7, 2007, at 7-8 [and cases cited therein]). To the extent the respondent raises an abuse of process claim (<u>see</u> <u>id.</u> at 8), the respondent has failed to prove the elements of the claim.

Whether the respondent's abuse of discretion claim goes beyond these two claims is unclear. In any event, this defense is not specifically argued in the respondent’s motion papers. Therefore, to the extent the abuse of discretion claim is an affirmative defense, the respondent has not met its burden of proof as required by 6 NYCRR 622.11(b)(2).

The record demonstrates that DEC Staff has consistently regulated tire processing facilities which store more than 1,000 waste tires or portions thereof (including TDA) by requiring a permit pursuant to 6 NYCRR 360-13.1(b). DEC Staff has supplied evidence that this approach has been ongoing at DEC for over twenty years. In addition, evidence in the record regarding the Alternative Resources Management, Inc. facility in Niagara Falls, a facility involved in similar tire processing operations as BCD, including the permit for the facility (Glander affidavit, Exh. 7) and correspondence regarding the facility (Glander affidavit, Exh. 8), indicate that BCD is not being treated in a manner different than other similar facilities.

Mr. Conlon expresses confusion as to why DEC Staff is now prosecuting BCD for storing TDA in an amount in excess of 1,000 waste tires when DEC Staff has been aware of BCD’s operations for years. BCD has been operating since 2001 and has been at its present location since 2004. It is uncontested that BCD has been routinely inspected by DEC Staff and that prior to 2010 no violations were observed, including inspections after the 2006 fire at the facility (Conlon affidavit, ¶ 26). Mr. Conlon states that at the time of the fire in 2006, he told DEC Staff about 3,649 waste tires (in the form of TDA) were present at the site (Conlon affidavit, ¶ 27). Mr. Conlon reports that the facility produces between 5,000 and 7,500 tons of tire chips per year (Conlon affidavit, ¶ 4) and this range is consistent with the 2006 and 2009 annual reports[4] for the facility that report 7,755 tons and 6,231 tons, respectively (Conlon affidavit, Exh. 10). These reports also record storage at the beginning of the year and at year’s end. The 2009 annual report states that 60 tons were being stored at the site at both the beginning and end of the year. Based upon Mr. Conlon’s statement that 100 whole tires weigh one ton (Conlon affidavit, ¶ 27), approximately 6,000 waste tires were stored at the facility. Subsequent DEC Staff inspections also disclose that the facility stored more than 1,000 waste tires in the form of TDA. These inspections occurred on May 25, 2010 (Robak affidavit, Exh. 1, ¶ 8), March 3, 2011 (Robak affidavit, Exh. 2), April 27, 2011 (Robak affidavit, Exh. 3), and October 19, 2011 (Robak affidavit, Exh. 4). Mr. Conlon’s confusion is compounded by the fact that DEC

[4] The annual reports for other years are not in this record.

Staff regularly uses BCD to cleanup waste tires at DEC facilities and has been used by DEC Staff for a number of years. In fact, while DEC's Region 4 was prosecuting this matter in October 2011, BCD accepted waste tires from DEC's Region 3 (Conlon affidavit, ¶ 30).

DEC Staff does not explain its past actions regarding BCD in its papers or why it now seeks to enforce against BCD for storing TDA in excess of 1,000 waste tires when BCD seems to have been operating in the same manner for years. However, this information is not relevant to the question of liability in this case. The information in the record supports the conclusion that the alleged violation occurred. This information may, however, be relevant to the questions of civil penalty amount and possible closure of the facility. Accordingly, the Commissioner should conclude that the respondent has failed to meet its burden of proof regarding this affirmative defense and that the present enforcement action is not an abuse of DEC Staff's enforcement discretion.

In its fourth defense, the respondent argues that the 2010 consent order was based on an error of law. The respondent does not address this in its motion papers. This defense is relevant to the second cause of action in the complaint (the allegation that the respondent violated the 2010 consent order), which DEC Staff has withdrawn. Therefore, this defense is moot.

Liability: Conclusion

DEC Staff has demonstrated that the TDA stored at the site is waste tires as defined in statute (ECL 27-1901[13]) and regulation (6 NYCRR 360-1.2[b][183]). There is no question of fact that BCD stores TDA in quantities in excess of 1,000 waste tires. Therefore, a permit issued pursuant to 6 NYCRR 360-13.1(b) is required. DEC Staff has shown that it has consistently regulated facilities that chip waste tires and store TDA on-site under 6 NYCRR 360-13.1(b) since at least 1990 and has not changed it regulatory posture following the passage of the Act in 2003. None of the arguments advanced by BCD obviate the need for it to obtain a permit. The record demonstrates that (1) BCD is not a recycling handling and recovery facility pursuant to 6 NYCRR 360-12; (2) TDA is solid waste, as that term is defined in law (ECL 27-0701[1]); (3) the TDA at the facility is not exempt as TDF pursuant to 360-1.15(b)(6); and (4) the various BUDs in the record do not obviate the need for BCD to obtain a permit. Based on the above, I recommend that the Commissioner conclude that DEC Staff has established that the respondent is liable for storing more than 1,000 waste tires without the necessary permit in violation of 6 NYCRR 360-13.1(b). The record demonstrates this violation began on March 3, 2011 and continued through October 19, 2011 for a total of 231 days.

CIVIL PENALTY

In addition to a finding of liability, DEC Staff seeks a payable civil penalty of $31,000.[5] DEC Staff supports its request by citing ECL 71-2703(1), which is applicable in this case. This section authorizes a civil penalty not to exceed seven thousand five hundred dollars ($7,500) for each violation and an additional penalty of fifteen hundred dollars ($1,500) per day that a violation continues. DEC Staff also cites the Department's Civil Penalty Policy (DEE 1, issued June 20, 1990) and the Department's recently issued Solid Waste Enforcement Policy (OGC 8, issued November 17, 2010). The respondent's counsel argues that if the Commissioner determines that the respondent is liable for the alleged violation, that no civil penalty should be imposed because significant mitigating factors exist.

DEC's Civil Penalty Policy and Solid Waste Enforcement Policy set forth a framework for calculating the appropriate amount of the civil penalty. The starting point of this calculation is the statutory maximum. This is followed by an analysis of the severity of the violation, the gravity component, the benefit component, and consideration of any relevant adjustments. DEC Staff's papers include information regarding its requested civil penalty, but while DEC Staff counsel makes passing reference to DEC's Solid Waste Enforcement Policy, no analysis of its contents is provided in DEC Staff's papers. The respondent also does not address this policy in its papers.

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[5] In its original complaint, DEC Staff sought a total penalty of $31,000, with $15,000 suspended upon the respondent timely closing the facility. In the attorney's brief submitted with its motion, DEC Staff requested a payable civil penalty of $31,000 and in its proposed order, submitted with its motion, DEC Staff requested a payable civil penalty of $31,500. In an email dated January 10, 2012, DEC Staff clarified that it seeks a total payable civil penalty of $31,000.

The potential statutory maximum civil penalty

DEC's Civil Penalty Policy states that penalty calculations for violations should begin with an analysis of the potential statutory maximum penalty. In its papers, DEC Staff provides an incorrect calculation of the statutory maximum penalty. The respondent does not provide any calculation in this regard.

DEC Staff states that it observed more than 1,000 waste tire equivalents (in the form of TDA) at the facility on three different dates: March 3, 2011, April 27, 2011, and October 19, 2011. DEC Staff calculates that the violation occurred on March 3, 2011 and continued through October 19, 2011, for a total of 229 days; however the correct calculation is 231 days. Since the maximum penalty for first day's violation is $7,500, and each day following carries a maximum penalty of $1,500, DEC Staff calculated a total of $425,000. However, the correct maximum penalty is $352,500.

DEC Staff then double counts some of the days the violation occurred by calculating that a second series of violations began with the April 27, 2011 inspection and ended on October 19, 2011 which totals an additional maximum penalty of $276,000. Since only one violation was alleged and proven, operation of a solid waste management facility without a permit in violation of 6 NYCRR 360-13.1(b), only one penalty per day is appropriate. DEC Staff also seeks to expand the calculation by claiming the alleged violation occurred every day the facility was open (since it began operations) which results in a calculation of a maximum civil penalty of over $3.8 million dollars (DEC Attorney Brief, ¶ 171).

The violation may have continued as long as DEC Staff suggests, but the evidence in the record only supports the conclusion that the violation began on March 3, 2011 and the last evidence that the violation continued is October 19, 2011. Based on the evidence in the record, the correct amount of the potential statutory maximum civil penalty is $352,500.

The severity of the violation

The first step set forth in the Solid Waste Enforcement Policy for applying the policy involves a determination about the severity of the violation. The policy establishes three classes of violations, Class I being the most serious. While the examples set forth in the policy do not specifically address the violation proven in this case, the narrative descriptions indicate that this violation is most likely a Class II violation because of the storage of unauthorized quantities of waste tires at the BCD facility. Class II violations require prompt attention to return the violator to compliance.

The benefit component

The next step set forth in both the Department's Civil Penalty policy and Solid Waste Enforcement Policy is an analysis of the benefit component or an estimate of the economic benefit enjoyed by the respondent as a result of delayed compliance. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (p. 7). In this case BCD has been operating without a permit for years, with the knowledge and acquiescence of DEC Staff. DEC Staff seems to have only notified the respondent of its need for a permit during the May 25, 2010 inspection (2010 Consent Order, Robak affidavit, Exh. 1, ¶ 8), and respondent admitted to operating without a permit in the consent order in June 2010. The last evidence in the record of this operation is the October 19, 2011 inspection report (Robak affidavit, Exh. 4).

In his affidavit, DEC Staff member Robak makes several statements regarding the economic benefit in this case, including BCD's: (1) revenue from the facility; (2) avoided compliance costs; and (3) costs of disposal of the TDA stored at the facility. He states that the requested civil penalty of $31,000 may be less than the economic benefit the respondent received by operating the facility without a permit (Robak affidavit, ¶ 59). The respondent does provide some information about the facility's income, but does not address the other two points Mr. Robak raises.

DEC Staff member Robak claims that the respondent has earned significant revenue from the facility (Robak affidavit, ¶ 55). However, no estimate is provided, nor is any proof supplied. The respondent states it receives between $0.25 and $1.50 for each tire received at the facility and has a payroll of about $300,000 per year (more than 1/3 of BCD's gross earnings) (Conlon affidavit, ¶¶ 24 & 25). There is no estimate of BCD's net income. Mr. Conlon states that over the last few years with the poor economy and on-going recession, he had not taken a salary as president, but used the money to pay employees to avoid layoffs (Conlon affidavit, ¶ 25). The record does not contain enough information to draw any conclusions about BCD's profits for the time it operated without a permit.

Mr. Robak also claims that the respondent avoided significant transactional costs by operating without a permit. These include the costs of preparing a permit application, a facility report, a site plan, a market analysis, plans and specifications, a monitoring and inspection plan, a closure plan, a contingency plan, a storage plan, a vector control plan, an operation plan, and posting surety (Robak affidavit, ¶ 56). Mr. Robak does not provide a specific dollar amount for these transactional costs that the respondent avoided, but based on his experience with other facilities, he states that the costs for engineering, preparation of the Environmental Assessment Form and legal fees could run into the tens of thousands of dollars (Robak affidavit, ¶ 57). However, this overestimates the economic benefit because if the Commissioner allows BCD to submit a permit application, these transaction costs are not avoided, merely delayed. Thus, the accurate measurement is some percentage of tens of thousands of dollars, representing the time value of money.

Mr. Robak also estimates that the cost of disposal of the tires at the site to be $55,000. This is based on his estimate that 22,000 chipped tires are stored at the site, and have a disposal fee of $2.50 per tire (Robak affidavit, ¶ 58). However, the inclusion of this amount is not warranted because this cost would be incurred if the Commissioner were to order the facility closed and the TDA disposed of. This cost would also be avoided if the Commissioner were to allow the TDA to be sold to BCD’s customers. There is nothing in the respondent’s papers that adds to this discussion.

In this case, it is difficult to estimate the economic benefit enjoyed by the respondent from this record.

The gravity component

The next step required is an analysis of the gravity component which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, p. 9). The Solid Waste Enforcement Policy states that a determination of the gravity component, using Appendix I of this document, is required.

<u>Potential for Harm</u>. DEC Staff addresses the potential harm from the violation in its papers. In his affidavit, DEC Staff member Robak notes that the BCD facility is in a residential

neighborhood and cites the danger of the facility catching fire as a potential harm that could occur (Robak affidavit ¶ 45). He makes reference to a "major tire fire" that occurred at the site on July 7, 2006 that lasted for three days and required the assistance of 35 fire departments from five counties (Robak affidavit, ¶ 46). He continues that strict compliance with applicable regulations is critical and his observation that the size of the tire pile was too big and too close to the building (in violation of 6 NYCRR 360-13.2[i][3] & [4]) show that there is a public safety risk posed by the continued operation of the facility (Robak affidavit, ¶ 47).

The respondent challenges Mr. Robak's contention that BCD was the site of a "major tire fire." In his affidavit, Mr. Conlon explains that the fire on the property involved a dilapidated building on the site that had historically been abandoned. He describes the structure as a 150 year old building with a brick exterior and wooden interior that had been used as a leather mill. The wooden interior had been soaked in oil and fuel oil to preserve the wood and prevent dust. When machinery in the building caught fire, it ignited the building, which the fire department opted to let burn to the ground. The fire did cause some of the TDA stored outside the building to ignite (Conlon affidavit, ¶ 18). Mr. Conlon reports that the fire in the TDA was quickly contained (Conlon affidavit, ¶ 19). According to BCD's 2006 annual report, any tires burnt in the fire (36.49 tons) were transported to the Hudson Falls burn plant for disposal (Conlon affidavit, Exh. 10). Photos of the fire provided by the respondent show a structure fire (Conlon affidavit, Exh. 9), while those provided by DEC Staff do show smoke coming from what appear to be piles of TDA (Robak affidavit, Exh. 6). The respondent also includes information from DEC's website listing known tire fires and notes that the BCD fire is not listed as a tire fire (Castiglione affirmation, Exh. G).

The respondent also includes information to support its claim that a fire at the facility is unlikely to occur in the future. BCD's operations are now entirely housed in a 175 foot by 65 foot steel building (Conlon affidavit, ¶ 3) and the TDA is stored behind the building (Conlon affidavit, ¶ 21). Access to the facility is restricted, the site is posted, and public access to the site is prevented (Conlon affidavit, ¶ 14). Mr. Conlon also states that: (1) BCD has sufficient indoor fire prevention/response equipment, including a chemical sprinkler system; (2) a creek runs along the property as a water source for any future fire; and (3) a fire detection system has been installed which is tied directly to the local 911 emergency response system (Conlon affidavit, ¶ 22).

Actual damage. In its papers, DEC Staff does not allege that there has been any actual damage to the environment from the alleged violation. There is nothing in the record to suggest that this violation has resulted in any actual damage.

Importance to the regulatory scheme. DEC Staff alleges in its papers that BCD's violation is very important to the regulatory scheme. In his affidavit, Mr. Robak also states that the permitting of waste tire storage facilities is critical to ensuring the proper management and disposal of waste tire and a key part of the regulatory scheme (Robak affidavit, ¶ 48). Permitting also ensures that vector and fire hazards are avoided to the greatest extent possible (Glander affidavit, ¶ 37).

The respondent does not directly address the violation's importance to the regulatory scheme, but does discuss the fact that the facility has been operating in a similar manner for years without a permit (but with a valid registration). The respondent also states that it files accurate and detailed reports with DEC Staff (Conlon Affidavit, ¶ 16). Mr. Conlon also states that over the years BCD was regularly inspected by DEC Staff and no violations were found prior to April 2010 (Conlon Affidavit, ¶ 26).

Gravity – conclusion.

Based on the evidence in the record, DEC Staff has not shown that the fire at the facility was a "major tire fire" as it claims. However, the large quantities of waste tires stored at the site and the failure to comply with the permitting requirements of 6 NYCRR 360-13.1(b) demonstrate that some fire danger exists. There is nothing in the record to suggest any actual harm from this violation. The requirement for a permit for facilities like BCD is very important. However, in this case, this is balanced by the fact that BCD was registered, regularly inspected by DEC Staff and apparently completely open and forth-coming with DEC Staff about its operations. Based on these factors, I recommend the Commissioner conclude that the gravity of this violation is moderate.

Penalty adjustments

As discussed above, once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. These are discussed below.

Respondent's culpability. There is no question that BCD is liable for its actions and has operated its facility for years without a permit in violation of 6 NYCRR 360-13.1(b). However, this operation has been done with respondent's belief that BCD was operating legally. This belief was based, until May 2010, on the representations and actions of DEC Staff. It is not clear from this record what prompted DEC Staff to take enforcement action nor is there information regarding the background or negotiations surrounding the consent order. The respondent did continue to operate the facility without a permit after signing the consent order and has made no effort to obtain a permit (Robak affidavit, ¶ 53).

Violator Cooperation. The respondent argues that it has always been transparent and open for regulatory inspection. Further, it argues that it has continually informed DEC Staff about its operations (Castiglione affirmation, p. 52). Indeed apart from the legal dispute regarding whether TDA is properly categorized as waste tires, relations between the parties seem to have been generally good. From the information in the record it is reasonable to conclude that BCD has been cooperative with DEC Staff. This cooperation, however, did not result in the violation being cured after it was brought to BCD's attention in the consent order, which imposed a minimal $500 payable fine.

History of non-compliance. There is nothing in the record to suggest any regulatory compliance issues at the BCD facility prior to April 2010. However, once BCD was informed by DEC Staff that it needed a permit or to reduce the quantity of waste tires stored at the facility to fewer than 1,000, it has not complied.

Ability to pay. There is nothing in the record to suggest BCD does not have the ability to pay a civil penalty.

Unique factors. The respondent raises several other issues in its papers that warrant a reduction in any penalty imposed. First, the respondent includes information about New York State's efforts to address the issues involving waste tires, including: (1) information from the University at Buffalo's Center for Waste Management (Castiglione affirmation, Exhs. A, B, C, D & E); (2) information from the New York State Department of Economic Development (Castiglione affirmation, Exh. F); and (3) information from DEC's website about waste tires (Castiglione affirmation, Exhs. G & H). This information sets forth the scope of the waste tire problem in New York, the challenges, the State's actions to address the problem and the beneficial uses of waste tires, once they are processed into TDA. Second, the respondent makes the case that BCD is part of the solution to the waste tire problem. However, this information does not warrant a penalty adjustment as a unique factor.

Penalty Adjustments – conclusion. Based on the information in the record and the discussion above, I recommend no penalty adjustment in this case. BCD has known of its need for a permit since May or June 2010 and has not taken steps to obtain one. The relatively minor civil penalty imposed in the consent order did not prompt compliance, so a larger one is warranted now.

Civil Penalty: Conclusion

The final step in calculating the appropriate civil penalty in this case is to apply Appendix I of the Solid Waste Enforcement Policy. Appendix I is difficult to understand and apply. The chart in the appendix supplies a range of percentages to be applied to the maximum penalty allowed by law, in this case $352,500. However, there is no explanation in the policy of how the chart is to be used in assessing the appropriate civil penalty. The Appendix seems to suggest that for Class II violations that a range of 45% - 60% of the maximum penalty should be imposed. The imposition of a penalty in this range would recoup the respondent's unlawful economic benefit and deter others from similar violations. Since this is BCD's second offense, the Appendix then states that this amount should be doubled and further states that since this case went to adjudication, and was not settled by consent order, the penalty amount must be significantly higher. This would seemingly require the imposition of a civil penalty in excess of 100% of the statutory maximum, a legal impossibility. DEC Staff does not discuss the Solid Waste Enforcement Policy in its motion papers. DEC Staff only cites the Civil Penalty Policy to arrive at its requested civil penalty of $31,000.

If the Solid Waste Enforcement Policy is used, the record of this proceeding would justify the payable civil penalty of $31,000 requested by DEC Staff. Indeed, the facts of this case in light of this Policy seem to justify a substantially higher civil penalty. However, the Commissioner is limited by the fact that the respondent is only on notice that a $31,000 penalty is being sought by DEC Staff. Because the policy suggests such a high penalty amount, it does not seem to justify the suspension of any portion of the civil penalty.

Based on the record of this matter and the discussion, above, the Commissioner should impose the $31,000 civil penalty requested by DEC Staff. The respondent's failure to comply with the consent order and obtain a permit after paying a relatively small $500 civil penalty in 2010 justify the imposition of the higher civil penalty in this case.

REGISTRATION REVOCATION AND REMEDIATION

In addition to a finding of liability and the imposition of a civil penalty DEC Staff also asks that the Commissioner order the respondent to: (1) immediately cease accepting waste tires at the facility upon service of the order; and (2) remove and properly dispose of all waste tires at the facility within sixty (60) days of service of the order. DEC Staff also requests that the Commissioner revoke the facility's registration. DEC Staff argues that the respondent cannot be allowed to continue to operate while its application for a permit is pending because "the permit issuing regulations at 6 NYCRR 360-13.1 set an entire scheme for storage, operation and maintenance of waste tire storage facility and furthermore the permit application would be subject to a determination of significance under SEQRA [(State Environmental Quality Review Act, ECL article 8, 6 NYCRR 617)] and public notice" (DEC Staff's Attorney's Brief, ¶ 160). This is the only rationale provided in DEC Staff's papers, apart from a general statement of support in an affidavit (Roback affidavit, ¶¶ 64-67).

The respondent argues that if liability is determined, the facility's registration should not be revoked and the waste tires should not be removed. Rather, the respondent contends that it would be appropriate based on the facts of the case for the Commissioner to order the respondent to obtain a permit from DEC (pursuant to 6 NYCRR 360-13.1[b]) within a reasonable time so as to allow continued operation of the facility and the benefits it provides (Respondent's Memorandum, p. 53). The respondent does not specify what a "reasonable amount of time" would be to obtain a permit, nor does DEC Staff.

DEC Staff's argument, that the permitting scheme in 6 NYCRR 360-13.1 requires the closure of the facility while an application is pending, is without merit. In the past, the Commissioner has required respondents who were found liable for operating without the required permit to timely submit a completed permit application as part of an enforcement order. In addition, DEC Staff's argument that SEQRA precludes the Commissioner from requiring the submission of a permit application in an enforcement order is also without merit. SEQRA specifically exempts enforcement actions (6 NYCRR 617.5[b][29]; see also New York State Public Interest Research Group v. Town of Islip, 71 NY2d 292 [1988]).

Based on the record in this matter, the respondent should be given the choice to either apply for a permit or close the facility. While the respondent has been operating without a permit and refused to apply for one when informed of the requirement, the civil penalty is adequate punishment for this offense. Given the respondent's past conduct of no recorded violations prior to the dispute regarding TDA storage and the generally good relations with DEC Staff in the past, closure of the facility in this case is not warranted. As DEC Staff acknowledged in an undated letter to the Mayor of Hagaman, BCD supplies an "important service in the area and helps to keep waste tires from being illegally disposed of" (Castiglione affirmation, Exh. O). BCD employs 13 people full time and pays about $16,000 in local taxes (Conlon affidavit, ¶ 25). Given these facts, the Commissioner should require the respondent to inform DEC Staff within ten (10) days of its intention to either apply for a permit or close the facility. If BCD decides to apply for a permit, it must submit an approvable permit application within forty-five (45) days. If BCD decides to close the facility, it must: (1) immediately cease accepting waste tires at the facility; (2) remove all waste tires from the facility within sixty (60) days; and (3) surrender its registration.

CONCLUSIONS OF LAW

1. Respondent BCD Tire Chip Manufacturing, Inc. violated 6 NYCRR 360-13.1(b) by storing more than 1,000 waste tires at its facility without a permit from March 3, 2011 through October 19, 2011.

RECOMMENDATION

Based on the record in this matter and the analysis above, the Commissioner should issue an order that: (1) finds the respondent BCD Tire Chip Manufacturing, Inc. liable for violating 6 NYCRR 360-13.1(b) by storing more than 1,000 waste tires (in the form of TDA) at the facility without a permit from March 3, 2011 until October 19, 2011; (2) imposes a payable civil penalty of $31,000; and (3) requires the respondent to inform DEC Staff within ten (10) days of its intention to either apply for a permit or close the facility. If BCD decides to apply for a permit, it must submit an approvable permit application within forty-five (45) days. If BCD decides to close the facility, it must: (1) immediately cease accepting waste tires at the facility; (2) remove all waste tires from the facility within sixty (60) days; and (3) surrender its registration. Finally, BCD's motion to dismiss this enforcement action should be denied.

/s/
____

Albany, New York

P. Nicholas Garlick
Administrative Law Judge

Exhibit List

DEC STAFF

Attached to the Notice of Hearing and Complaint

Exh. 1 – Order on consent with BCD effective 6/24/10
Exh. 2 – Solid waste registration for BCD dated 10/4/04
Exh. 3 – Letter from Elston to Conlon dated 3/4/11
Exh. 4 – Facility inspection report for BCD dated 4/27/11
Exh. 5 – Four black and white photos of the facility

Attached to affidavit of Richard Forgea

Exh. 1 – Solid waste registration for BCD dated 10/4/04
Exh. 2. – Cover letter dated 10/6/04 transmitting validated registration

Attached to affidavit of Christian Glander

Exh. 1 – BUD application to use TDA as base for riding area dated 6/5/03
Exh. 2 – Incomplete notice re: BUD to use TDA as base for riding area dated 10/24/03
Exh. 3 – BUD to use TDA as base for riding area dated 3/16/04
Exh. 4 – Letter from Nosenchuck to Abold dated 9/28/90
Exh. 5 – Memo from Fuchs to Colden dated 11/8/93
Exh. 6 – Memo from Colden to Kenna dated 1/12/96
Exh. 7 – Cover letter and permit for tire facility in Niagara Falls dated 5/29/08
Exh. 8 – Letter from O'Malley to Forget dated 2/5/08

Attached to affidavit of Thomas Lynch

Exh. 1 – BUD application from BCD to use TDA in septic systems dated 3/30/10
Exh. 2 – Solid waste registration for BCD dated 10/4/04
Exh. 3 – BUD to BCD to use TDA in septic systems dated 4/27/10
Exh. 4 – Excerpt from FEIS for Part 360 revisions dated May 1993

Attached to affidavit of Theodore Robak

Exh. 1 – Order on consent with BCD effective 6/24/10
Exh. 2 – Letter from Elston to Conlon dated 3/4/11
Exh. 3 – Facility inspection report for BCD dated 4/27/11
Exh. 4 – Facility inspection report for BCD dated 10/19/11
Exh. 5 – Copy of OGC 8: Solid Waste Enforcement Policy dated 11/17/10
Exh. 6 – Color photos (3) of 2006 fire at BCD

RESPONDENT

Attached to Answer

- Item 1 – Order on consent with BCD effective 6/24/10
- Item 2 – Letter from Elston to Conlon dated 3/4/11
- Item 3 – Solid waste registration for BCD dated 10/4/04
- Item 4 – Complaint dated 8/2/11
- Item 4A – Cover letter 8/2/11
- Item 5 – Notice of Hearing dated 8/2/11
- Item 6 – Fax copy of 6 NYCRR 360-13
- Item 7 – Two undated b&w photos of tire pile

Attached to Amended Answer

- Exh. A – Solid waste registration for BCD dated 10/4/04
- Exh. B – BUD to BCD to use TDA in septic systems for dated 4/27/10
- Exh. C – Order on consent with BCD effective 6/24/10
- Exh. D – Letter from Elston to Conlon dated 3/4/11

Attached to affirmation of Joseph F. Castiglione, Esq.

- Exh. A – Information from University at Buffalo's website "Introduction"
- Exh. B – Information from UB's website "The Challenge of Scrap Tire Management"
- Exh. C – Information from UB's website "New York State's Response"
- Exh. D – Information from UB's website "Beneficial Uses of TDA …"
- Exh. E – Information from UB's website "Current Suppliers of TDA in New York State"
- Exh. F – Analysis of New York Scrap Tire Markets: 2007 Update
- Exh. G – Information from DEC's website "Waste Tires"
- Exh. H – Copy of ECL Article 27, Title 19 "Waste Tire Management and Recycling"
- Exh. I – FOIL request from Sommers to DEC dated October 24, 2011
- Exh. J – Letter from Robak to McKiernan dated May 10, 2001
- Exh. K – SW registration application for BCD dated 6/12/01 & DEC registration validation letter dated 6/20/01
- Exh. L – Facility inspection report for BCD dated 3/2/04
- Exh. M – BCD's annual report for 2006
- Exh. N – BCD's annual report for 2009
- Exh. O – Letter from Elston to Natoli undated

Exh. P – FOIL reqest from Castiglione to Salamack (Village of Hagaman) dated 12/20/11

Exh. Q – Email stipulation by parties dated 10/28/11

Attached to affidavit of Brian F. Conlon

Exh. 1 – Solid waste registration for BCD dated 10/4/04 and cover letter from DEC Staff Forgea dated 10/6/04

Exh. 2 – SW registration application for BCD dated 6/12/01 & registration w/ cover letter dated 6/20/01

Exh. 3 – Memo dated 4/12/11 from Madison Co. to vendors re: BCD winning bid and blank application

Exh. 4 – Letter from DiGuilio to Czerwinski dated 11/6/08, letter from Czerwinski to DiGuilio dated 1/16/09, & undated letter from Czerwinski to DiGuilio

Exh. 5 – Information from ReEnergy website

Exh. 6 – BUD to BCD to use TDA in septic systems for dated 4/27/10

Exh. 7 – BUD application from BCD to use TDA in septic systems for dated 3/30/10

Exh. 8 – Information from the Hagaman FD website

Exh. 9 – Color photos (6) of 2006 fire at BCD

Exh. 10 – BCD’s annual report for 2006 and 2009