

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

---

In the Matter of the Alleged  
Noncompliant Waste Tire Stockpile  
Located along Kraiss Road, Pulaski, New  
York, and Owned or Operated,

**ORDER**

VISTA Index No.  
CO7-20050322-2

- by -

**AMANDA J. BICE,**

Respondent.

---

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Amanda J. Bice ("respondent") to enforce provisions of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360. The proceeding was commenced pursuant to 6 NYCRR 622.12 by service of a motion for order without hearing dated April 5, 2005. The motion was served upon respondent Amanda J. Bice by certified mail and received April 11, 2005.

In Department staff's motion, which serves as the complaint in this matter, staff charge that since at least January 8, 2004, respondent has owned or operated a solid waste management facility engaged in the storage of at least 7,000 waste tires located along Kraiss Road in the Town of Richland, Oswego County, New York (the "site"), without a permit in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b). Staff also charge respondent with various violations of operational requirements established by 6 NYCRR 360-13.3. As a consequence of the violations alleged, staff contends that respondent Amanda J. Bice owns or operates a non-compliant waste tire stockpile within the meaning of ECL 27-1901(6).

Respondent's time to answer the motion expired on May 2, 2005. No response has been filed by respondent. Although respondent is technically in default as of May 2, 2005, Department staff does not seek a default judgment. Instead, staff seeks a determination on the merits of its motion for order without hearing.

The matter was assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds, who prepared the attached hearing report dated April 11, 2006. I adopt the Chief ALJ's

hearing report as my decision in this matter, subject to my comments herein.

Because respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6), the abatement measures Department staff seeks to have imposed in this matter are authorized by ECL 27-1907. Moreover, the penalty recommended by Chief ALJ McClymonds is warranted by the circumstances of this case and consistent with the penalty-assessment formula I have adopted in other noncompliant waste tire stockpile cases (see Matter of Parent, Order of the Acting Commissioner, Oct. 5, 2005; Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005).

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

1. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part and otherwise denied.

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

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

4. Respondent Amanda J. Bice has owned or operated the solid waste management facility at the site without a valid permit in continuing violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) during the period from June 16, 2004, the date of Department staff's inspection of the site, until April 5, 2005, the date of staff's motion.

5. Respondent is determined to have continuously violated the following operational requirements established in 6 NYCRR 360-13.3 during the time period from June 16, 2004 to April 5, 2005:

a. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved site plan, as required by 6 NYCRR 360-13.2(b).

b. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility

without a Department approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e).

c. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved closure plan, as required by 6 NYCRR 360-13.2(f).

d. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved contingency plan, as required by 6 NYCRR 360-13.2(h).

e. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved storage plan, as required by 6 NYCRR 360-13.2(i).

f. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved vector control plan, as required by 6 NYCRR 360-13.2(j).

g. Respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved operation and maintenance manual.

h. Respondent violated 6 NYCRR 360-13.3(e)(2) by failing to file quarterly operation reports with the Department.

i. Respondent violated 6 NYCRR 360-13.3(e)(3) by failing to file annual reports with the Department.

j. Respondent violated 6 NYCRR 360-13.3(c)(6) by operating the site with potential ignition sources in the tire storage areas.

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

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

I. Respondent shall immediately stop allowing any waste tires to come onto the site in any manner or method, or for

any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage.

II. As requested in article II of Department staff's request for relief, it is hereby ordered:

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

1. For purposes of this Paragraph II, "waste tires" includes, but is not limited to, tires of any size (including passenger, truck, and off-road vehicle tires), whether whole or in portions (including halved, quartered, cut sidewalls, cut tread lengths, tire shreds, tire chips), and whether or not on tire rims.

2. Starting no later than thirty (30) days after the date this order is served upon respondent, respondent shall remove and transport to Department-authorized locations and only in vehicles permitted to transport such waste pursuant to 6 NYCRR part 364 no less than 10 tons of waste tires for each seven calendar day period, the first day of the first such period being the first day removal and transportation shall commence. Respondent shall provide no less than one business day's advance notice to the following individuals of the start of waste tire removal activities:

New York State Department of Environmental Conservation  
625 Broadway, 9<sup>th</sup> floor  
Albany, New York 12233-7253  
ATTN: David Vitale, P.E.  
Re: VISTA Index No. C07-20050322-2

and

New York State Department of Environmental Conservation  
615 Erie Boulevard West  
Syracuse, New York 13204  
ATTN: Steven E. Perrigo, P.E.  
Re: VISTA Index No. C07-20050322-2

3. Respondent shall use a certified weight scale to weigh each load of waste tires taken off the site for proper disposal, with such weight of waste tires being determined immediately before that load leaves the site for off-site transport and authorized disposal or at the point of authorized disposal.

4(i). Starting the first Monday after the end of the first seven calendar day period, and continuing each

subsequent Monday until no waste tires shall remain at the site, respondent shall submit by means of delivery by the United States Postal Service, private courier service, or hand delivery a written report to the Department at the following address:

New York State Department of Environmental Conservation  
625 Broadway, 9<sup>th</sup> floor  
Albany, New York 12233-7253  
ATTN: David Vitale, P.E.  
Re: VISTA Index No. C07-20050322-2

and

New York State Department of Environmental Conservation  
615 Erie Boulevard West  
Syracuse, New York 13204  
ATTN: Steven E. Perrigo, P.E.  
Re: VISTA Index No. C07-20050322-2

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

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

name, address, & phone number of the transporter and the Part 364 permit number and license plate number of the transport vehicle to which the weights shown to the right pertain	weight of the waste tires in that vehicle's load	the name, address, and phone number of the facility accepting the waste tires in that vehicle's load
---	--	--

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

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

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

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

I, Amanda J. Bice, do hereby certify that I reviewed the following report; that based on my knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; that the New York State Department of Environmental Conservation has the right to rely upon the information contained in this report as being truthful and accurate and to conclude that the report does not omit any material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and that I know that any false statement made in this certification or in this report shall be punishable pursuant to section 210.45 of the Penal Law, and as may be otherwise authorized by law.

B. Should respondent fail to strictly comply with any provision of this order, Department Staff is directed to remove the waste tires by such means as they may deem appropriate, to the extent monies may be available from the Waste Tire Management and Recycling Fund and from other sources.

III. As requested in article III of staff's request for relief, within 30 days after the date of service of this order upon respondent, respondent shall post with the Department

financial security in the amount of \$10,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above.

IV. As requested in article IV of staff's request for relief, respondent is directed to fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event that the State should be required to take over abatement of the waste tire stockpiles at the site.

V. As requested in article V of staff's request for relief, respondent is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of \$1,000 plus, if respondent fails to comply with any requirement set forth in this order, the sum of \$2 for each twenty (20) pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19.

A. No later than 30 days after the date of service of this order upon respondent, respondent shall submit payment of \$1,000 to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation  
625 Broadway, 14th floor  
Albany, New York 12233-5500  
ATTN: Charles E. Sullivan, Jr., Esq.  
RE: VISTA Index No. CO7-20040322-2

B. The remainder of the civil penalty, if any, shall be due and payable within 30 days after Department staff serves a demand for such upon respondent.

VI. As requested in article VI of staff's request for relief, respondent is directed to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site.

VII. All communications from respondent to Department staff concerning this order shall be made to Charles E. Sullivan, Jr., Esq., at the following address:

New York State Department of Environmental Conservation

625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500  
ATTN: Charles E. Sullivan, Jr., Esq.  
Re: VISTA Index No. CO7-20050322-2

with copies of such communications being sent to the following:

New York State Department of Environmental Conservation  
625 Broadway, 9<sup>th</sup> floor  
Albany, New York 12233-7253  
ATTN: David Vitale, P.E.  
Re: VISTA Index No. CO7-20050322-2

and

New York State Department of Environmental Conservation  
615 Erie Boulevard West  
Syracuse, New York 13204  
ATTN: Steven E. Perrigo, P.E.  
Re: VISTA Index No. CO7-20050322-2

VIII. The provisions, terms and conditions of this order shall bind respondent and her heirs and assigns, in any and all capacities.

For the New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Denise M. Sheehan  
Commissioner

Dated: April 19, 2006  
Albany, New York

TO: Amanda J. Bice (via Certified Mail)  
P.O. Box 173  
Richland, New York 13144-0173

Charles E. Sullivan, Jr., Esq. (via Regular Mail)  
New York State Department of  
Environmental Conservation  
625 Broadway, 14<sup>th</sup> floor  
Albany, New York 12233-5500



STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

In the Matter of the Alleged  
Noncompliant Waste Tire Stockpile  
Located along Kraiss Road, Pulaski, New  
York, and Owned or Operated,

**HEARING REPORT ON  
MOTION FOR ORDER  
WITHOUT HEARING**

- by -

VISTA Index No.  
CO7-20050322-2

**AMANDA J. BICE,**

Respondent.

---

Appearances:

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

-- No appearance for Amanda J. Bice, respondent.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for an order without hearing against respondent Amanda J. Bice. The motion was served in lieu of notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a). Department staff's motion dated April 5, 2005, was served upon respondent by certified mail and received on April 11, 2005. Thus, Department staff obtained personal jurisdiction over respondent (see 6 NYCRR 622.3[a][3]). Respondent's time for answering expired on May 2, 2005. No response from respondent has been received to date, rendering her in default as of May 2, 2005.

Charges Alleged

Department staff alleges that since at least January 8, 2004, respondent has owned or operated a waste tire storage facility located along Kraiss Road in the Town of Richland, Oswego

County, New York ("the site"). In its motion, Department staff asserts that respondent violated 6 NYCRR part 360. Department staff's specific charges are that:

A. Respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) since at least January 8, 2004, because respondent never received a solid waste management facility permit to operate the waste tire storage facility on the site;

B. 1. Since at least January 8, 2004, respondent:

i. violated 6 NYCRR 360-13.3(a) because she has operated the site without receiving Department approval for any of the following plans:

- a. a site plan that specifies the waste tire facility's boundaries, utilities, topography and structures.
- b. a monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system.
- c. a closure plan that identifies the steps necessary to close the facility.
- d. a contingency plan.
- e. a storage plan that addresses the receipt and handling of all waste tires and solid waste to, and from, the facility.
- f. a vector control plan that provides that all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors.

ii. violated 6 NYCRR 360-13.3(a) because she operated the site with receiving Department approval for an operation and maintenance manual covering the site's activities.

iii. never prepared and filed with the Department:

- a. quarterly operation reports, in violation of 6 NYCRR 360-13.3(e)(2).

- b. annual reports, in violation of 6 NYCRR 360-13.3(e)(3).

2. Since at least June 16, 2004, respondent has operated the site with potential ignition sources in the tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6).

Relief Sought

Department staff maintains that no material issues of fact exist and that the Department is entitled to judgment as a matter of law for the violations alleged. Accordingly, Department staff requests that the Commissioner issue an order finding that:

- A. Respondent owns or operates the site;
- B. The site is a solid waste management facility;
- C. Respondent violated the aforementioned provisions of law during the periods of time identified for each such violation; and
- D. As a result of the violations, respondent owns or operates a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

Additionally, Department staff requests that the Commissioner order respondent to:

- I. Immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage;
- II. Remove all tires from the site in strict compliance with the plan and schedule detailed in the motion, such removal to commence within 30 days after the date of the Commissioner's order;
- III. Post with the Department within 30 days of the Commissioner's order financial security in the amount of \$10,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above;
- IV. Fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event that the State should be

required to assume responsibility for abatement of the waste tire stockpiles at the site;

V. Pay an assessed penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703; or the sum of \$1,000 plus the sum of \$2 for each 20 pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19 if respondent shall fail to comply with any requirement set forth in Paragraphs I or II above;

VI. Reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund the State shall have made and may make in the future, to determine the existence of such violation, to respond to it, and if need be, to establish that the parcel of land is a noncompliant waste tire stockpile and to investigate and, if necessary, abate that noncompliant waste tire stockpile; and

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

#### Papers Reviewed

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

Attached as exhibits to the motion are the following: copy of respondent's deed and tax map number from Robert F. Bice Sr. to Amanda J. Bice, and a copy of deed and tax map number from county of Oswego to Robert Bice (Exhibit "A"); affidavit of Richard Coriale, P.E., Environmental Engineer 2, Region 7, sworn to on March 24, 2005, with attachment "1," Tire Facility Inspection Report with photographs of site, and attachment "2," Waste Tire Fires Occurring in New York State Since 1989, and attachment "3," Noncompliant Waste Tire Stockpile Abatement Plan (Exhibit "B").

#### FINDINGS OF FACT

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

1. On January 8, 2004, respondent Amanda J. Bice acquired title to the subject parcel located at Kraiss Road, Pulaski, Oswego County, New York. The parcel is identified as Tax Map No. 118.00-03-12.00.

2. The site contains at least 7,000 waste tires. This estimate was made by Richard Coriale, P.E., Environmental Engineer 2, Region 7, based on his inspection of the facility on June 16, 2004.

3. The tire piles are located amidst grass, weeds, and brush and in close proximity to trees and bushes. The tires also appear to be intermixed with other assorted waste materials, including wood and metal.

4. Mr. Coriale describes the tires as "well-worn" and notes that the tires were uncovered, completely exposed to the elements, and that no care was taken to preserve their value.

5. Respondent has neither applied for nor received a permit to operate the facility located at the site. Respondent has failed to submit a site plan, monitoring or inspection plan, closure plan, contingency plan, storage plan, vector control plan, or operation and maintenance manual with the Department. Respondent has failed to file quarterly operation reports or annual reports with the Department.

6. The tires at the site pose a significant potential threat to public health and safety, and to the environment. Waste tire piles are a common breeding ground for mosquitos which, in turn, are associated with the spread of disease such as West Nile Virus to humans. The tires also pose a significant fire threat. Should the tires catch fire, large amount of acrid smoke containing many toxic compounds may be released into the air. The high temperatures associated with tire fires make fire fighting operations difficult and hazardous. In addition, the extreme heat may pyrolyze the tires, causing them to break down into constituent parts, including approximately two to three gallons of petroleum per tire, which in turn, poses a threat to ground and adjacent surface waters, among other things.

#### DISCUSSION

##### Nature of the Motion

Department staff served its motion for an order without hearing in lieu of complaint, and respondent has failed to file a timely answer or otherwise appear in response (see 6 NYCRR

622.12[a]). Department staff notes that respondent's failure to answer would entitle Department staff to a default judgment pursuant to 6 NYCRR 622.15. Nevertheless, Department staff believes that, based upon the facts of this matter, it is entitled to judgment on the merits as a matter of law and requests a Commissioner's order accordingly. Thus, this motion will be treated as one seeking an order without hearing pursuant to 6 NYCRR 622.12.

#### Standards for Motion for Order without Hearing

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

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

In this case, respondent has not submitted any response to Department staff's motion. Accordingly, once it is concluded that staff has carried its initial burden of establishing a prima

facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department staff's motion may be granted.

### Discussion of Facts

My findings of fact are based upon observations made during the inspection conducted by Department staff on June 16, 2004. They are also based upon the photographic evidence and other public records of the Department submitted with staff's motion.

### Solid Waste Management Facility

Department staff alleges that the subject site is a solid waste management facility pursuant to 6 NYCRR 360-1.2(b)(158). Under the Department's regulations, "solid waste management facilities" means "any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to . . . waste tire storage facilities" (6 NYCRR 360-1.2[b][158]). "Waste tires" are defined as "any solid waste which consists of whole tires or portions of tires" (6 NYCRR 360-1.2[b][183]). "Solid waste" is defined, among other things, as "discarded materials," which, in turn, is defined as material that is "abandoned by being . . . accumulated [or] stored . . . instead of or before being disposed of" (6 NYCRR 360-1.2[a][1], [2]).

The discarded used tires on the site constitute "waste tires" as that term is defined under the regulations in effect during all times relevant to this proceeding (see Matter of Wilder, Commissioner's Order, Nov. 4, 2004, adopting ALJ's Ruling/Hearing Report, at 11-12). Since at least June 16, 2004, more than 1,000 waste tires have been and are being stored on the site and, thus, the site constitutes a waste tire storage facility (see 6 NYCRR 360-13.1[b], [f]). Accordingly, Department staff has made a prima facie showing that since at least June 16, 2004, the site constitutes a solid waste management facility under Part 360.

### Owner or Operator

Department staff alleges that respondent is the owner or operator of the solid waste management facility at the site. Respondent's ownership and operation of the facility (see 6 NYCRR 360-1.2[b][113], [114]) is established by evidence of respondent's ownership of the underlying parcel upon which the

facility is located (see Matter of Wilder, Commissioner's Order, adopting ALJ's Ruling, at 13; Matter of Radesi, ALJ's Hearing Report, at 8, concurred in by Commissioner's Decision and Order, March 9, 1994).

### Liability for Violations Charged

#### 1. Operating Without a Permit

Department staff alleged that since at least January 8, 2004, respondent has been operating a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1), and has been operating a waste tire storage facility without a permit in violation of 6 NYCRR 360-13.1(b). Section 360-1.7(a)(1) provides that "no person shall . . . construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to" Part 360. Section 360-13.1(b) specifically provides that "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to" Part 360.

The evidence submitted in support of this motion reveals that, since at least June 16, 2004, respondent has failed to obtain a Part 360 permit to operate the waste tire storage facility on the site. Thus, staff has made a prima facie showing of the violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) from June 16, 2004 until the time of the motion. Because Department staff introduced no evidence establishing that prior to June 16, 2004, more than 1,000 waste tires were stored on the property, no prima facie showing is made for the period prior to June 16, 2004.

Although respondent has technically violated two separate provisions -- 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) -- those two provisions presumptively constitute a single, continuous violation for penalty assessment purposes (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ Hearing Report, at 9-12; Matter of Steck, Commissioner's Order, March 29, 1993, at 5).

#### 2. Violations of Operational Requirements Applicable to Waste Tire Storage Facilities

Department staff alleges that respondent has violated ten separate operational requirements applicable to all waste tire storage facilities subject to the permitting requirements of Subpart 360-13 (see Charges B.1-B.2, above). Staff alleges that



respondent has been in violation of the operational requirements since at least January 8, 2004. For the reasons that follow, the following violations staff allege are established as a matter of law for the period from June 16, 2004, the date of the site inspection, until the date of the motion.

a. Section 360-13.3(a) -- Failure To Operate Pursuant to Approved Plans

Department staff alleges that respondent has operated the site without any of the operational plans required by Part 360. Section 360-13.3(a) provides that "all waste tire storage facilities subject to the permitting requirements of this Part must comply with the following operational requirements: . . . All activities at the facility must be performed in accordance with plans required by this Part and approved by the department." Section 360-13.2 requires a site plan, a monitoring and inspection plan, a closure plan, a contingency plan, a storage plan, and a vector control plan for waste tire storage facilities used to store 1,000 or more waste tires at a time (see 6 NYCRR 360-13.2[b], [e], [f], [h], [i], [j]).

The evidence submitted by staff on its motion shows that since at least June 16, 2004, respondent owned or operated a waste tire storage facility used to store more than 1,000 tires at a time without any of the required plans. Thus, the violations of section 360-13.3(a) alleged in Charges B.1(i)(a) through (f) are established. Moreover, six separate violations are presumptively established, one for each of the plans required but not obtained by respondent.

b. Section 360-13.3(a) -- Operation and Maintenance Manual

Section 360-13.3(a) provides "all waste tire storage facilities subject to the permitting requirements of this Part must comply with the following operational requirements: Operation and maintenance manual." The record establishes that respondent has failed to submit an operation and maintenance manual to the Department for approval. Moreover, respondent's facility has been subject to the permitting requirements of Part 360 since at least June 16, 2004. Thus, the alleged violation of section 360-13.3(a) is established beginning June 16, 2004 and continuing until the date of staff's motion.

c. Section 360-13.3(e)(2) -- Quarterly Operation Reports

Section 360-13.3(e)(2) requires that the owner or operator of a waste tire storage facility must file quarterly operation reports with the Department. The record establishes that since at least June 16, 2004, respondent owned or operated a waste tire storage facility with 1,000 or more waste tires without filing any quarterly operation reports. Thus, the alleged violation of section 360-13.3(e)(2) is established.

d. Section 360-13.3(e)(3) -- Annual Reports

Section 360-13.3(e)(3) requires that the owner or operator of a waste tire storage facility must file annual reports with the Department. The record establishes that since at least June 16, 2004, respondent owned or operated a waste tire storage facility with 1,000 or more waste tires without filing any annual reports. Thus, the alleged violation of section 360-13.3(e)(3) is established.

e. Section 360-13.3(c)(6) -- Potential Ignition Sources

Section 360-13.3(c)(6) requires that "potential ignition sources must be eliminated and combustibles must be removed as they accumulate." Weeds, grass and other combustible materials have been allowed to accumulate in the waste tire storage area. This condition has existed since at least June 16, 2004, and persisted to the date of the motion. Thus, the alleged violation of section 360-13.3(c)(6) is established.

3. Operation of a Noncompliant Waste Tire Stockpile

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

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

or solid waste."

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

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

#### Penalty and Other Relief Requested

Department staff seeks an order of the Commissioner directing respondent to immediately stop allowing any waste tires onto the site (see Relief Sought ¶ I, above). ECL 71-2703(1)(a) provides that any person who violates any provision of, or who fails to perform any duty imposed by, ECL article 27, title 7, or any rule or regulations promulgated pursuant thereto may be enjoined from continuing such violation. Respondent's ownership or operation of the waste tire storage facility without a permit constitutes a violation of ECL article 27, title 7 and the regulations promulgated pursuant thereto. Moreover, the operation of the facility in violation of the operational requirements established by 6 NYCRR subpart 360-13 also constitutes a violation of the regulations promulgated pursuant to ECL article 27, title 7. Thus, staff is entitled to an order enjoining respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

Department staff also seeks an order of the Commissioner directing respondent to remove all tires from the site in strict accordance with the plan and schedule detailed in the motion papers (see Relief Sought ¶ II, above), to fully cooperate and refrain from interfering with the State in the event the State must take over abatement (see id. ¶ IV), and to reimburse the Waste Tire Management and Recycling Fund ("Fund") the full amount of any expenditures incurred by the State to investigate, establish liability for, and abate the noncompliant waste tire stockpile (see id. ¶ VI). Because of the facility's status as a noncompliant waste tire stockpile, the abatement measures and reimbursement obligations are authorized by ECL 27-1907 (see Matter of Wilder, Order of the Commissioner, Nov. 4, 2004, adopting ALJ Ruling/Hearing Report, at 17-18; Matter of Wilder, Supplemental Order, adopting ALJ Hearing Report, at 18-19). Thus, staff is entitled to the relief sought.

Department staff also requests that respondent be required to post with the Department financial security in the amount of \$10,000 to secure strict and faithful performance of each of respondent's remedial obligations (see Relief Sought ¶ III, above). The Commissioner has the inherent authority under the ECL to require the posting of financial security to ensure compliance with remedial obligations imposed in a Commissioner's order (see Matter of Wilder, Supplemental Order, adopting ALJ Hearing Report, at 17-18; Matter of Radesi, Commissioner's Decision and Order, March 9, 1994; see also State v Barone, 74 NY2d 332, 336-337 [1989]). Accordingly, I recommend that the Commissioner grant the relief staff seeks in article III of its motion.

Department staff also requests that a civil penalty be assessed against respondent. A justification for the requested penalty is provide in Department staff's brief supporting the motion.

In Matter of Wilder (Supplemental Order, adopting ALJ's Hearing Report, at 15-16), the then-Acting Commissioner recently adopted a penalty-assessment formula recommended by Department staff for use in noncompliant waste tire stockpile cases. That formula consists of the sum of a minimum penalty plus \$2 for each 20 pounds<sup>1</sup> of waste tires that the State of New York has to manage under the Waste Tire Management and Recycling Act of 2003 (see ECL art 27, tit 19). The rationale for the penalty-assessment formula is that it (1) provides for a minimum penalty, irrespective of respondent's compliance with the Commissioner's order, to punish respondent for the violations of the State's laws and regulations, and to deter future violations, and (2) provides respondent with an incentive to comply with the remedial obligations imposed by the Commissioner's order (see Matter of Wilder, ALJ's Hearing Report, at 16). In addition, the "\$2 per 20-pounds of tires managed" provision incorporates proportionality into the penalty calculation (see id.).

In this case, I recommend that the Commissioner assess a penalty using the penalty-assessment formula established in Matter of Wilder. For the minimum penalty, I recommend that \$1,000 be imposed based upon staff's justification (see Affidavit

---

<sup>1</sup> Each waste tire weighs approximately 20 pounds. The Department uses the \$2/20 pounds formula rather than the \$2/tire formula because when contractors remove waste tires from a site during remediation, the amount of tires removed is tracked by weight, not by counting individual tires.

in Support of Motion, at 9-13; DEC Civil Penalty Policy, DEE-1, June 20, 1990). Even if the Department were forced to manage every tire estimated to be on the property, the maximum penalty would amount to \$15,000 (7,000 tires times \$2/tire plus \$1,000). This amount falls below the maximum penalty that could be authorized under ECL 71-2703.

#### CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

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

2. Since at least June 16, 2004, the site constitutes a "waste tire storage facility" subject to the provisions of 6 NYCRR subpart 360-13 because more than 1,000 waste tires are stored at the site.

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

4. Since at least January 8, 2004, respondent has owned or operated a solid waste management facility at the site.

5. Since at least June 16, 2004 to April 5, 2005, the date of staff's motion, respondent violated 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) because she owned or operated a solid waste management facility at the site without a permit from the Department authorizing the operation of the waste tire storage facility on the site.

6. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved site plan, as required by 6 NYCRR 360-13.2(b).

7. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e).

8. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or

operated a waste tire storage facility without a Department approved closure plan, as required by 6 NYCRR 360-13.2(f).

9. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved contingency plan, as required by 6 NYCRR 360-13.2(h).

10. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved storage plan, as required by 6 NYCRR 360-13.2(i).

11. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved vector control plan, as required by 6 NYCRR 360-13.2(j).

12. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(a) because she owned or operated a waste tire storage facility without a Department approved operation and maintenance manual.

13. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(e)(2) by failing to file quarterly operation reports with the Department.

14. Since at least June 16, 2004, respondent violated 6 NYCRR 360-13.3(e)(3) by failing to file annual reports with the Department.

15. Since at least June 16, 2004, to April 5, 2005, respondent violated 6 NYCRR 360-13.3(c)(6) by operating the site with potential ignition sources in the tire storage areas.

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

17. With respect to allegations of violation occurring prior to the dates specified above, Department staff failed to make a prima facie showing of its entitlement to judgment as a matter of law.

#### RECOMMENDATIONS

I recommend that the Commissioner:

- I. Grant in part and otherwise deny Department staff's motion for an order without hearing;
- II. Determine that respondent committed the violations referenced above during the time periods specified;
- III. Impose the civil penalty recommended above; and
- IV. Impose the abatement measures requested by Department staff.

\_\_\_\_\_/s/\_\_\_\_\_  
James T. McClymonds  
Chief Administrative Law Judge

Dated: April 11, 2006  
Albany, New York