

**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"),

ORDER

DEC Case No.
R6-20121107-72

-by-

**HEATH CUSHMAN d/b/a
IRONMAN SCRAP REMOVAL,**

Respondent.

This administrative enforcement proceeding involves allegations of the staff of the New York State Department of Environmental Conservation ("Department") that respondent Heath Cushman d/b/a Ironman Scrap Removal ("respondent"), in operating a facility located at 230 Quarry Road, Gouverneur, St. Lawrence County, New York (the "site"):

- stored more than one thousand (1,000) waste tires without a permit;
- disposed of solid waste without a permit;
- operated a solid waste management facility without a permit;
- discharged petroleum to the ground from a vehicle gasoline tank on August 21, 2012; and
- failed to report the petroleum discharge from the leaking vehicle gasoline tank to the State's spill hotline.

On May 29, 2013, a default hearing to address these alleged violations was convened before Michael S. Caruso and Richard R. Wissler, Administrative Law Judges ("ALJs") of the Department's Office of Hearings and Mediation Services.

ALJs Caruso and Wissler prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

Respondent failed to file an answer to the complaint served by Department staff in this matter, failed to attend the March 27, 2013 pre-hearing conference, and failed to appear for the default hearing held on May 29, 2013.

As a consequence of respondent's failure to answer or appear in this matter, the ALJs recommended that Department staff's motion for a default judgment be granted, and I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 6-8). Accordingly, staff is entitled to a judgment based on record evidence.

The civil penalty and remedial relief requested by Department staff and recommended by the ALJs are authorized and appropriate.

Department staff requested that, if respondent fails to reduce the number of waste tires at the site to less than one thousand (1,000), the Department may remove the waste tires from the site and have the tires managed in accordance with title 19 of ECL article 27, using money from the Waste Tire Management and Recycling Fund¹ and other money that may be available (see Hearing Exhibit 2, Staff's Complaint, at § II.e). I agree with the ALJs that respondent's site constitutes a noncompliant waste tire stockpile that may be abated by the State using moneys from the Fund. In the event of such State expenditures, the State is entitled to reimbursement to the maximum extent authorized by law (see ECL 27-1907[5]).²

¹This fund has now been renamed the Waste Management and Cleanup Fund ("Fund")(see Laws of 2010, ch 59, pt. DD, § 2).

² Department staff also requested language to reserve the Department's authority to order or undertake additional remedial measures, to recover funds for other remedial activity, or to seek compensation for natural resource damages. That language is unnecessary as nothing in this order would preclude the Department from pursuing any such additional remedial measures, recovery of funds, or compensation for natural resource damages.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Heath Cushman d/b/a Ironman Scrap Removal waived his right to be heard at the hearing.

II. Based upon record evidence, respondent Heath Cushman d/b/a Ironman Scrap Removal is adjudged to have violated:

- A. 6 NYCRR 360-13.1(b), for storing more than one thousand (1,000) waste tires at the site without a permit;
- B. 6 NYCRR 360-1.5(a), for disposing solid waste at the site without a permit;
- C. 6 NYCRR 360-1.7(a)(1)(i), for operating a solid waste management facility without a permit;
- D. Navigation Law § 173, for discharging petroleum to the ground at the site; and
- E. Navigation Law § 175, for failing to report the discharge of petroleum at the site.

III. Upon service of this order upon respondent, respondent shall immediately stop bringing or otherwise allowing any waste tires to come to the site in any manner or method, or for any purpose.

IV. Upon service of this order upon respondent, respondent shall immediately report the petroleum spill from the leaking vehicle gasoline tank to the Department's Spill Hotline: 1-800-457-7362.

V. Respondent shall perform the following within thirty (30) days of service of this order on respondent:

- A. reduce the number of waste tires at the site to less than (1,000) by removing the waste tires to a permitted solid waste management facility that is authorized to accept waste tires, and provide receipts demonstrating proper disposition of the waste tires from the facility, including the tonnage or approximate number of tires in each load of tires removed, the name and address of the hauler, and the

name and address of the facility receiving each load of tires;

- B. remove all construction and demolition debris and other solid waste from the ground at the site and dispose of it at a solid waste management facility authorized to take such waste and submit receipts demonstrating proper disposition of such waste; and
- C. hire a qualified environmental consultant or contractor to oversee or perform excavation, removal, and proper disposal of all contaminated soil associated with the spill from the vehicle gasoline tank that was leaking to the ground on August 21, 2012, and notify Department staff of the name and address of the consultant or contractor.

VI. Respondent shall perform the following within sixty (60) days of service of this order on respondent:

- A. cause the excavation and removal of soil contaminated by the discharge cited in subparagraph C of paragraph V of this order from the site to a solid waste management facility permitted to accept petroleum contaminated soils;
- B. submit an acceptable remedial subsurface investigation and engineering report showing the depths and areal extent of contamination, estimated tonnage of soils removed, and sampling reports and analysis of samples by a New York State certified laboratory for bottom of excavation and sidewall samples indicating complete removal of contaminated soils. In the event that the excavation encounters groundwater before removal of the contaminated soil is completed, a bottom soil sample may be omitted; and
- C. submit receipts from the waste hauler and disposal facility demonstrating proper hauling and disposal of contaminated soils from the site.

VII. If respondent fails to remove the waste tires pursuant to paragraph V of this order within thirty (30) days of service of this order upon respondent, the Department may cause the removal of all of the waste tires from the site and have them managed in accordance with ECL article 27, title 19, using moneys from the Waste Management and Cleanup Fund ("Fund") and other money that may be available. Respondent shall fully cooperate with the Department, provide all necessary access, and refrain from any activities that interfere with the Department, its employees,

contractors, or agents in the event that the Department should take over abatement of the waste tires at the facility.

VIII. The Department reserves the State's right to recover any funds expended with respect to the removal of waste tires from the site. Respondent shall reimburse the Fund, in accordance with ECL 27-1907(5), for the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the facility, including any and all investigation, prosecution, abatement and oversight costs, to the maximum extent authorized by law. Upon complete abatement of the noncompliant waste tires at the facility, the State shall notify respondent of the costs so incurred by the State and respondent shall pay these costs within thirty (30) days of receipt of such notification.

IX. Respondent is hereby assessed a civil penalty in the amount of forty thousand seven hundred dollars (\$40,700). Of this amount twenty thousand four hundred dollars (\$20,400) shall be suspended. The amount of penalty by violation and the conditions by which a portion is suspended are as follows:

- A. For violation of NYCRR 360-13.1(b), respondent is assessed a civil penalty of nineteen thousand two hundred dollars (\$19,200) with payment of six thousand four hundred dollars (\$6,400) of this amount suspended, conditioned upon respondent's compliance with subparagraph (A) of paragraph V of this order;
- B. For the violation of 6 NYCRR 360-1.5[a] and 360-1.7[a][1][i]) for disposing solid waste at the site without a permit and for operating a solid waste management facility without a permit, respondent is assessed a civil penalty of two thousand five hundred dollars (\$2,500) with payment of two thousand (\$2,000) of this amount suspended, conditioned upon respondent's compliance with subparagraph (B) of paragraph V of this order;
- C. For violation of Navigation Law § 173, respondent is assessed a civil penalty of fifteen thousand dollars (\$15,000) with payment of ten thousand dollars (\$10,000) of this amount suspended, conditioned upon respondent's compliance with subparagraph (C) of paragraph V and subparagraphs (A), (B), and (C) of paragraph VI of this order; and

D. For violation of Navigation Law § 175, respondent is assessed a civil penalty of four thousand dollars (\$4,000) with payment of two thousand dollars (\$2,000) suspended, conditioned upon respondent's reporting of the spill in accordance with paragraph IV of this order.

X. Within fifteen (15) days of the service of this order upon respondent, respondent shall pay the non-suspended civil penalties provided for in subparagraphs (A), (B), (C), and (D), of paragraph IX of this order. Respondent shall pay the non-suspended civil penalties, which total twenty thousand three hundred dollars (\$20,300), by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

Randall C. Young, Esq.
Regional Attorney
NYS Department of Environmental Conservation
Region 6
317 Washington Street
Watertown, New York 13601.

XI. In the event that respondent fails to comply with a condition set forth in subparagraph (A), (B), (C) or (D) of paragraph IX of this order, the suspended penalty referenced in the applicable subparagraph shall, upon notice to respondent by Department staff, be immediately due and payable and shall be submitted to the Department in the same form and to the same address set forth in paragraph X.

XII. All correspondence from respondent to the Department concerning this order shall be directed to Regional Attorney Randall C. Young at the address set forth in paragraph X.

XIII. The provisions, terms and conditions of this order shall bind respondent Heath Cushman d/b/a Ironman Scrap Removal, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
August 27, 2013

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

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

**HEARING
REPORT**

DEC Case No.
R6-20121107-72

**HEATH CUSHMAN d/b/a
IRONMAN SCRAP REMOVAL,**

Respondent.

Procedural History

Respondent Heath Cushman d/b/a Ironman Scrap Removal ("respondent") is the operator of an unpermitted solid waste management facility located in St. Lawrence County, New York (the "site"). Respondent was served with a notice of hearing and complaint dated February 28, 2013, alleging violations of 6 NYCRR 360-13.1, for storing more than one thousand waste tires at the site without a permit; 6 NYCRR 360-1.5 for disposing of solid waste at the site; 6 NYCRR 360-1.7 for operating a solid waste management facility without a permit; Navigation Law § 173 for discharging petroleum to the ground; and Navigation Law § 175 for failing to report the petroleum discharge at the site to the State's spill hotline.

The complaint seeks an order of the Commissioner: (1) finding respondent in violation of 6 NYCRR 360-13.1(b), 360-1.5(a), and 360-1.7(a)(1)(i), and Navigation Law §§ 173 and 175; (2) ordering respondent to refrain from further activities that would bring or allow any solid waste or waste tires to be brought to the site, and to report the spill coming from the leaky petroleum tank on the site; (3) directing respondent to perform the necessary work to bring the site into compliance; (4) assessing civil penalties; and (5) reserving the Department's rights and authority to abate and remediate the site if respondent fails to do so.

Service of the notice of hearing and complaint was made by certified mail and was received by respondent on March 1, 2013. The notice of hearing also informed respondent that a pre-hearing conference was scheduled for March 27, 2013 at 11:00 a.m. at the Region 6 offices located at 317 Washington Street, 5th Floor, Watertown, New York. Respondent was also served with a notice of default hearing dated April 12, 2013, which stated that a default hearing was scheduled for May 29, 2013 at 11:00 a.m. at the same Region 6 offices. Service of this notice was made by certified mail and was received by respondent on April 13, 2013. Respondent failed to attend the pre-hearing conference or file an answer to the complaint, and failed to appear for the default hearing scheduled in the matter on May 29, 2013.

As stated in the notice of default hearing, on May 29, 2013, a default hearing was convened before Administrative Law Judges Richard R. Wissler and Michael S. Caruso of the Department of Environmental Conservation's ("Department") Office of Hearings and Mediation Services ("OHMS") at the Department's Region 6 office at 11:00 o'clock in the morning. Department staff was represented by Randall C. Young, Esq., Regional Attorney, Department Region 6. No one appeared on behalf of respondent.

Pursuant to 6 NYCRR 622.15, Department staff orally moved for a default judgment based upon respondent's failure to answer the complaint. In support of its motion, Department staff called three witnesses: Jennifer Lauzon, Environmental Engineer 2 in the Division of Materials Management; Lawrence Ambeau, Regional Permit Administrator in the Division of Environmental Permits; and Gary McCullouch, Environmental Engineer 3, Regional Spill Engineer in the Division of Environmental Remediation. All of the witnesses called are employees of the New York State Department of Environmental Conservation, Region 6. In addition, Department staff submitted the following documents for the record, all of which were received in evidence:

1. Affidavit of service of April Sears, sworn to April 16, 2013, including U.S. Postal Service signed receipt with copy of letter notifying respondent of time, date and place of default hearing with a copy of the notice of hearing.
2. Affidavit of service of April Sears, sworn to March 4, 2013, including U.S. Postal Service signed receipt with cover letter, notice of hearing and complaint dated February 28, 2013.

3. Certification of official record of Toby W. Bogart sworn to May 10, 2013, with copy of St. Lawrence County Solid Waste Office Customer Waste Detail Report for Ironman Scrap Removal for the period of October 1, 2012 through April 1, 2013.
4. Public webpage of New York Criminal Justice System with photograph and address of respondent Heath Cushman.
5. May 7, 2012 letter from Jennifer Lauzon to respondent.
6. Nine photographs of respondent's facility taken May 23, 2012 with hand drawn diagram/photo log and tire estimate.
7. July 3, 2012 letter from Jennifer Lauzon to respondent.
8. Thirty-seven photographs of respondent's facility taken August 21, 2012 with hand drawn diagram/photo log and tire estimate.
9. NYSDEC Spill Report Form, Spill No. 1008789 created on November 22, 2010.
10. A proposed Commissioner's order.

Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the action. As applicable herein, the Department's default procedures in an enforcement action, found at 6 NYCRR 622.15, provide:

"(a) A respondent's failure to file a timely answer . . . constitutes a default and a waiver of respondent's right to a hearing. If [this] occurs the department may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record . . . and must contain:

(1) proof of service upon the respondent of the notice of hearing and complaint . . . ;

(2) proof of the respondent's failure . . . to file a timely answer; and

(3) a proposed order."

As the Commissioner stated in the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July

25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." In this case, Department staff, in addition to the factual allegations of the complaint, provided proof at the default hearing supporting staff's causes of action. Accordingly, the following findings of fact are based on a preponderance of the record evidence consisting of the testimony of the witnesses and submitted documents.

Findings of Fact

1. Respondent Heath Cushman resides at 1750 State Highway 812, Gouverneur, St. Lawrence County, New York, 13642. (Department Staff Exhibit 4.)
2. Respondent Heath Cushman is a natural person doing business as Ironman Scrap Removal at 230 Quarry Road, Gouverneur, St. Lawrence County, New York 13642. (Department Staff Exhibits 1, 2, 3 and 9.)
3. Respondent operates a junkyard at the site. (Testimony of Jennifer Lauzon.)
4. On May 23, 2012, respondent had an estimated 2,500 waste tires stored at the site. (Department Staff Exhibits 5, 6 and 7; Testimony of Jennifer Lauzon.)
5. On August 21, 2012, respondent had an estimated 6,436 waste tires stored at the site. (Department Staff Exhibit 8; Testimony of Jennifer Lauzon.)
6. On January 23, 2013, respondent had greater than 1,000 waste tires stored at the site. (Testimony of Jennifer Lauzon.)
7. The site is a solid waste management facility storing more than 1,000 waste tires. (Department Exhibits 5, 6, 7, and 8; Testimony of Jennifer Lauzon.)
8. Respondent has never applied for or received a solid waste management facility permit to operate the waste tire storage facility at the site. (Testimony of Jennifer Lauzon and Lawrence Ambeau.)
9. Respondent owns or operates a noncompliant waste tire

stockpile, as that term is defined in ECL 27-1901(6), since at least May 23, 2012. (Department Staff Exhibits 5, 6, 7 and 8; Testimony of Jennifer Lauzon.)

10. As of August 21, 2012, respondent had disposed of solid waste and construction and demolition debris consisting of old automobile bench seats, scrap wood, plywood, plastic pipe, plastic containers and other unidentifiable debris at the site. (Department Staff Exhibit 8; Testimony of Jennifer Lauzon.)
11. The site is a solid waste management facility where solid waste has been disposed. (Department Staff Exhibit 8; Testimony of Jennifer Lauzon.)
12. Respondent has never applied for or received a solid waste management facility permit to operate a solid waste disposal facility at the site. (Testimony of Jennifer Lauzon and Lawrence Ambeau.)
13. As of August 21, 2012, a petroleum spill, caused by a leaking fuel tank that had been removed from a vehicle and placed on the ground, existed at the site. (Department Staff Exhibit 8; Testimony of Jennifer Lauzon and Gary McCullouch.)
14. As of August 21, 2012, petroleum was discharged from the vehicle fuel tank indicated in Finding of Fact 13 onto the sandy soils and allowed to drain and percolate through the soil. (Department Staff Exhibit 8; Testimony of Jennifer Lauzon and Gary McCullouch.)
15. Respondent has not reported the spill to the Department's Spill Hotline or otherwise notified the Department of the spill. (Testimony of Gary McCullouch.)
16. Service of the notice of hearing and complaint dated February 28, 2013 was made by certified mail and was received by respondent on March 1, 2013. The notice of hearing notified respondent that a pre-hearing conference was scheduled for March 27, 2013 at 11:00 a.m. at the Department's Region 6 offices located at 317 Washington Street, 5th Floor, Watertown, New York. Respondent failed to attend the March 27, 2013 pre-hearing conference. (Department Staff Exhibit; Hearing Record.)
17. Service of the notice of the time and place of the default

hearing scheduled for May 29, 2013 at 11:00 a.m. at the Department's Region 6 offices located at 317 Washington Street, 5th Floor, Watertown, New York, was made by certified mail and was received by respondent on April 13, 2013. The notice advised respondent that if he failed to appear that Department staff would move on the record for a default judgment against him. (Department Staff Exhibit 1; Hearing Record.)

18. Respondent failed to file an answer to the complaint, failed to appear for the prehearing conference on March 27, 2013, and failed to appear for the default hearing scheduled in the matter on May 29, 2013, as directed in the notice of default hearing. (Department Staff Exhibit 1; Hearing Record.)

Discussion

Department staff's proof presents a prima facie case demonstrating respondent: 1) stored more than 1,000 waste tires at the site since at least May 23, 2012 without a permit in violation of ECL 27-0703(6) and its implementing regulation 6 NYCRR 360-13.1(b); 2) disposed of solid waste at the site without a permit in violation of 6 NYCRR 360-1.5; 3) operated a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7; 4) discharged petroleum to the ground at the site in violation of Navigation Law § 173¹; and 5) failed to report the discharge of petroleum at the site in violation of Navigation Law § 175.

The record shows that respondent was served the notice of hearing and complaint and failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for March 27, 2013; and was served with the notice of default hearing and failed to appear for the adjudicatory hearing scheduled in the matter on May 29, 2013. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent committed the above referenced

¹Department staff referenced a violation of Navigation Law § 172 in one paragraph of its complaint when it intended to reference a violation of Navigation Law § 173. Staff correctly referenced Navigation Law § 173 later in its pleadings and in its proposed order, and also noted the correction at the hearing.

violations of the ECL, Navigation Law and the respective regulations.

In the short time between staff's May 23, 2012 and August 21, 2012 inspection, the number of waste tires on the site increased from 2,500 to 6,436. Department staff's January 3, 2013 inspection revealed that respondent still had more than 1,000 waste tires stored at the site, though a measured estimate of the number of waste tires exceeding 1,000 was hindered by snow conditions. The only indication that a number of waste tires may have been removed by respondent is a receipt for waste tires received at a permitted solid waste management facility indicating that 34.79 tons of waste tires or approximately 3,479 waste tires had been received from respondent from October 1, 2012 to April 1, 2013 (see Department Staff Exhibit 3). Even if respondent took in no more waste tires at the site during this time, respondent would still be storing approximately 3,000 waste tires at the site. The record also demonstrates that respondent did not apply for or receive a solid waste management facility permit for the storage of more than 1,000 waste tires, in violation of 6 NYCRR 360-13.1(b) and 360-1.7.

Department staff proved by a preponderance of record evidence that respondent disposed of construction and demolition debris and other solid waste at the site. The mixed waste, consisting of old automobile bench seats, scrap wood, decaying wood, plywood, plastic pipe, crushed plastic containers and other unidentifiable debris, constitutes solid waste as the materials are clearly garbage, refuse or other discarded materials (materials that are abandoned by being disposed of, accumulated or stored) (see 6 NYCRR 360-1.2[a][1] and [2]). The solid waste here has been disposed of because it has been dumped, deposited or placed on the land at the site (see 6 NYCRR 360-1.2[a][3]). Such disposal of a solid waste requires a permit pursuant to 6 NYCRR 360-1.5. Again the record demonstrates that respondent did not apply for or receive a solid waste management facility permit to dispose of solid waste at the site. In short, respondent is operating a solid waste management facility without the required permit in violation of 6 NYCRR 360-1.5 and 1.7.

Department staff provided proof demonstrating that a petroleum spill occurred at the site and that it was not reported by respondent. Jennifer Lauzon testified that she smelled gasoline emanating from the area of the vehicle fuel tank sitting on the ground and from the stained soil that surrounded it during her August 21, 2012 inspection of the site as photographed in Exhibit 8. Gary McCullough, the Regional

Spill Engineer, testified that based on those photographs, it was clear a petroleum spill had occurred at the site and that it should have been reported. Mr. McCullouch also testified that he had searched the NYSDEC Spill reports and did not find that this spill had been reported, though a previous spill at the site had been reported and closed. Respondent violated Navigation Law § 173 because a discharge of petroleum to the ground occurred at the site. Respondent violated Navigation Law § 175 for failing to report this spill to the Department.

The record shows that respondent failed to file an answer to the complaint and failed to appear for the default hearing scheduled in the matter on May 29, 2013, as directed in the notice of default hearing.

Department staff indicated during the hearing, and we agree, that the penalty amounts requested by staff are consistent with the Department's prior practice as well as its penalty policies and applicable provisions of ECL 71-0703 and Navigation Law § 193. Staff requests penalties in the following amounts:

For violation of 6 NYCRR 360-13.1(b), a civil penalty up to the maximum allowed by law, but not less than nineteen thousand two hundred dollars (\$19,200) for violation of 6 NYCRR 360-13.1(b) with payment of six thousand four hundred dollars (\$6,400) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to waste tires.

For violation of 6 NYCRR 360-1.5(a)(1) or 360-1.7(a)(1)(i), an additional penalty of up to the maximum amount allowed by law but not less than two thousand five hundred dollars (\$2,500) with payment of two thousand dollars (\$2,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to solid waste.

For violation of Navigation Law § 173, a civil penalty of up to the maximum amount allowed by law but not less than fifteen thousand dollars (\$15,000) with payment of ten thousand dollars (\$10,000) of such penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to the petroleum spill excavation, removal and proper disposal.

For violation of Navigation Law § 175, a penalty up to the maximum allowed by law but not less than four thousand dollars (\$4,000) with payment of two thousand dollars (\$2,000) suspended, conditioned upon respondent's immediate reporting of the spill.

In addition to penalties, Department staff request a compliance schedule be adopted with deadlines for respondent to address the violations at the site. Staff also requests that a Commissioner's order authorize the Department to remove the waste tires using moneys from the waste management and cleanup fund.² To do so, the site must meet the statutory definition of a noncompliant waste tire stockpile - a site, facility or parcel of property where more than 1,000 waste tires are accumulated, stored or buried in a manner that the department determines violates any order, law or regulation related to waste tires, waste tire storage facilities or solid waste (see ECL 27-1901[6]). The facts in this case support such a conclusion. Respondent's facility or site constitutes a noncompliant waste tire stockpile.

Recommendation

Based upon the foregoing, we recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. Holding respondent in violation of 6 NYCRR 360-13.1(b) for storing more than one thousand waste tires without a permit;
3. Holding respondent in violation of 6 NYCRR 360-1.5 for disposing solid waste at the site without a permit;
4. Holding respondent in violation of 6 NYCRR 360-1.7 for operating a solid waste management facility without a permit;
5. Holding respondent in violation of Navigation § Law 173 for discharging petroleum to the ground at the site;

²Formerly the waste tire management and recycling fund. See L 2010, ch 59.

6. Holding respondent in violation of Navigation § Law 175 for failing to report the discharge of petroleum at the site;
7. Ordering respondent to immediately stop allowing any waste tires to come onto the facility in any manner or method, or for any purpose;
8. Ordering respondent to immediately report the petroleum spill from the leaking vehicle fuel tank to the Department's Spill Hotline: 1-800-457-7362;
9. Directing respondent to perform the following within thirty days of service of the order on respondent:
 - a. reduce the number of waste tires at the site to less than 1,000 by removing the waste tires to a permitted solid waste management facility that is authorized to accept waste tires, and provide receipts demonstrating proper disposal of the waste tires from the facility, including the tonnage or approximate number of tires removed in each load of tires removed, the name and address of the hauler, and the name and address of the facility receiving each load of tires;
 - b. remove all construction and demolition debris and other solid waste from the ground at the site and dispose of it at a solid waste management facility authorized to take such wastes and submit receipts showing proper disposition of such waste;
 - c. hire a qualified environmental consultant or contractor to oversee or perform excavation, removal, and proper disposal of all contaminated soil associated with the spill from the leaking vehicular fuel tank that was leaking to the ground on August 21, 2012, and notify Department staff of the name and address of the consultant or contractor;
10. Directing respondent to perform the following within sixty days of service of the order on respondent:
 - a. cause the excavation and removal of soil contaminated by the discharge cited above from the site to a solid waste management facility permitted to accept petroleum contaminated soils;

- b. submit an acceptable remedial subsurface investigation and engineering report showing the depths and areal extent of contamination, estimated tonnage of soils removed, and sampling reports and analysis of samples by a NYS certified laboratory for bottom of excavation and sidewall samples indicating complete removal of contaminated soils. In the event that the excavation encounters groundwater before removal of the contaminated soil is completed, bottom soil sample may be omitted; and
 - c. submit receipts from the waste hauler and disposal facility demonstrating proper hauling and disposal of contaminated soils from the site;
11. Reserving the Department's authority to order or undertake additional remedial measures to investigate and address petroleum contamination from discharges at the site or to recover any funds expended in relation to remediation of any petroleum discharges at the site;
 12. If respondent fails to remove the waste tires pursuant to the order, reserving the Department's authority to cause the removal of all of the waste tires from the site and have them managed in accordance with ECL article 27, title 19, using money from the waste management and cleanup fund and other money that may be available;
 13. Ordering respondent to fully cooperate with the Department, provide all necessary access, and refrain from any activities that interfere with the Department, its employees, contractors, or agents in the event that the Department should take over abatement of the waste tires at the facility;
 14. Reserving the State's right to recover any funds expended in removal of waste tires from the site and ordering respondent to reimburse the waste management and cleanup fund ("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 facility, including any and all investigation, prosecution, abatement and oversight costs, to the maximum extent authorized by law. Upon complete abatement of the noncompliant waste tires at the facility, the State shall notify respondent of the costs so incurred by

the State and respondent shall pay these costs within thirty days of receipt of such notification;

15. For violation of 6 NYCRR 360-13.1(b), directing respondent to pay a civil penalty of nineteen thousand two hundred dollars (\$19,200) for violation of 6 NYCRR 360-13.1(b), with payment of six thousand four hundred dollars (\$6,400) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to waste tires;
16. For violation of 6 NYCRR 360-1.5(a)(1) or 360-1.7(a)(1)(i), directing respondent to pay a civil penalty of two thousand five hundred dollars (\$2,500) with payment of two thousand (\$2,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to solid waste;
17. For violation of Navigation Law § 173, directing respondent to pay a civil penalty of fifteen thousand dollars (\$15,000) with payment of ten thousand dollars (\$10,000) of such penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order related to the petroleum spill excavation, removal and proper disposal; and
18. For violation of Navigation Law § 175, directing respondent to pay a civil penalty of four thousand dollars (\$4,000) with payment of two thousand dollars (\$2,000) suspended, conditioned upon respondent's immediate reporting of the spill.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

_____/s/_____
Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
June 5, 2013

EXHIBIT CHART

Matter of Heath Cushman d/b/a Ironman Scrap Removal – Region 6

May 29, 2013

Edirol File No. 040628102842

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Affidavit of Service of April Sears, sworn to April 16, 2013 including US Postal Service signed receipt with copy of letter notifying respondent of time, date and place of default hearing with a copy of Notice of Hearing	✓	✓	Department Staff	
2	Affidavit of Service of April Sears, sworn to March 4, 2013 including US Postal Service signed receipt with cover letter, Notice of Hearing and Complaint	✓	✓	Department Staff	
3	Certification of Official Record of Toby W. Bogart sworn to May 10, 2013 with copy of St. Lawrence County Solid Waste Office Customer Waste Detail Report for Ironman Scrap Removal for the period of October 1, 2012 through April 1, 2013	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
4	Public Webpage of New York Criminal Justice System with photograph and address of Respondent Heath Cushman	✓	✓	Department Staff	Received for purposes of identification
5	May 7, 2012 Letter from Jennifer Lauzon to Respondent	✓	✓	Department Staff	
6	Nine Photographs of Respondent's Facility taken May 23, 2012 with hand drawn diagram/photo log and tire estimate	✓	✓	Department Staff	
7	July 3, 2012 Letter from Jennifer Lauzon to Respondent	✓	✓	Department Staff	
8	Thirty-seven Photographs of Respondent's Facility taken August 21, 2012 with hand drawn diagram/photo log and tire estimate	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
9	NYSDEC Spill Report Form, Spill No. 1008789 created on November 22, 2010	✓	✓	Department Staff	
10	Staff's Proposed Order	✓	✓	Department Staff	