STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located at 101-13 Greenway Avenue, Syracuse, New York 13217, and Owned or Operated by,

ORDER

GSI OF VIRGINIA, INC.,

VISTA Index No. CO7-20050322-1

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this proceeding to enforce provisions of Environmental Conservation Law ("ECL") article 27 and of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360 by service of a motion for order without hearing pursuant to 6 NYCRR 622.12. The motion dated August 2, 2006, which serves as the complaint in this matter, was served by certified mail, then by ordinary first class mail, on respondent GSI of Virginia, Inc. (Peter J. Winkelman, as president), in Southern Pines, North Carolina.

Staff charged respondent with operating a solid waste management facility on Greenway Avenue, Syracuse, Onondaga County (the "site"), without a permit in violation of 6 NYCRR 360-1.7(a)(1) and operating a waste tire storage facility at the site without a permit in violation of 6 NYCRR 360-13.1(b). Staff also charged respondent with various violations of 6 NYCRR 360-13.3 ("operational requirements" for waste tire storage facilities).

Respondent had until November 14, 2006 in which to respond to staff's motion. Respondent failed to do so and is now in default. Although respondent is in default, Department staff does not seek a default judgment. Instead, staff seeks a determination on the merits of its unopposed motion for order without hearing.

This matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached hearing report. I adopt ALJ Sanza's hearing report as my decision in this matter subject to the following comments.

The evidence supporting staff's August 2, 2006 motion establishes that respondent GSI of Virginia, Inc. has been and continues to be the owner and operator of a solid waste management facility at the site at which more than 1,000 waste tires are stored (see, e.g., Affidavit of Steven E. Perrigo, Department Environmental Engineer 2, sworn to July 11, 2006, at ¶4C [at least 5,000 tires at the site]). Department staff's motion also establishes that respondent owned and operated the solid waste management facility without a valid permit in continuing violation of 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) from at least June 10, 2004 until August 2, 2006, the date of staff's motion.

Department staff's motion has demonstrated that between June 10, 2004, and August 2, 2006, respondent continuously violated seven separate operational requirements of 6 NYCRR 360-13.3(a); one fire prevention and control requirement of 6 NYCRR 360-13.3(c); and two separate reporting and recordkeeping requirements of 6 NYCRR 360-13.3(e). As a result of the above violations, respondent's facility constitutes a "non-compliant waste tire stockpile" as that term is defined by ECL 27-1901(6). Accordingly, I conclude that staff is entitled to summary judgment on the issue of respondent's liability for the violations charged.

Based upon the record, I also conclude that the proposed civil penalty and remedial measures sought by Department staff to address the violations, and the dates recommended by staff by which respondent is to achieve compliance with applicable regulatory standards, are authorized and appropriate.

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

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

2. The subject site constitutes a solid waste management facility at which more than 1,000 waste tires are stored.

3. Respondent is adjudged to have operated a solid waste management facility without a valid permit in continuing violation of 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) from June 10, 2004 to August 2, 2006, the date of staff's motion.

4. (i). Respondent is adjudged to have continuously violated the following operational requirements provided for in 6 NYCRR 360-13.3(a) during the time period from June 10, 2004 to August

2, 2006:

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

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

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

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

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

(ii). Respondent is adjudged to have operated a waste tire storage facility without a Department-approved operation and maintenance manual covering the site's activities in continuing violation of 6 NYCRR 360-13.3(a) from June 10, 2004 to August 2, 2006.

5. Respondent is adjudged to have operated a waste tire storage facility with potential ignition sources stored in tire storage areas in continuing violation of 6 NYCRR 360-13.3(c)(6) from June 10, 2004 to August 2, 2006.

6. Respondent is adjudged to have operated a waste tire storage facility without preparing and filing quarterly operation reports with the Department in continuing violation of 6 NYCRR 360-13.3(e)(2) from June 10, 2004 to August 2, 2006.

7. Respondent is adjudged to have operated a waste tire storage facility without preparing and filing annual reports with the Department in continuing violation of 6 NYCRR 360-13.3(e)(3) from June 10, 2004 to August 2, 2006.

8. As a result of the above violations, respondent is adjudged

to have owned and presently operates a “noncompliant waste tire stockpile” as that term is defined in ECL 27-1901(6).

9. Staff’s request for relief as set forth in its motion for order without hearing dated August 2, 2006 is granted and it is hereby ordered that:

I. Respondent shall immediately stop allowing any waste tires to come onto the site in any manner or method, or for any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage.

II. 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 within 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 period being the first day removal and transportation shall commence. Respondent shall provide no less than one business day’s advance notice to the following individuals of the start of waste tire removal activities:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO7-20050322-1

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. CO7-20050322-1

3. Respondent shall use a certified weight scale to

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

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

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO7-20050322-1

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. CO7-20050322-1

(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, Peter J. Winkelman, as president and on behalf of respondent GSI of Virginia, Inc., 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 maybe 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. Within thirty (30) days after service of this order upon respondent, respondent shall post with the Department financial security in the amount of $7,500 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II of this order.

IV. 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. Respondent is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $10,000 plus, if respondent fails to comply with any requirement set forth in Paragraphs I or II of 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 thirty (30) days after the date of service of this order upon respondent, respondent shall submit payment of $10,000 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 deliver such payment by certified mail, overnight delivery or hand delivery to the Department of Environmental Conservation at the following address:

New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
Re: VISTA Index No. CO7-20050322-1

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

VI. 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, including

any and all investigation, prosecution and oversight costs, to the maximum extent authorized by law.

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, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
Re: VISTA Index No. CO7-20050322-1

with copies of such communications being sent to the following:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO7-20050322-1

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. CO7-20050322-1

VIII. The provisions, terms and conditions of this order shall bind respondent GSI of Virginia, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: May 31, 2007
Albany, New York

TO: GSI of Virginia, Inc. (By certified and regular mail)
c/o Peter J. Winkelman, President
565 E. Indiana Avenue
Southern Pines, North Carolina 28388

Charles E. Sullivan, Jr., Esq. (By regular mail)
New York State Department of
Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located at 101-13 Greenway Avenue, Syracuse, New York 13217, and Owned or Operated by,

GSI OF VIRGINIA, INC.,

Respondent.

HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING

VISTA Index No. CO7-20050322-1

Appearances:

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

- No appearance for GSI of Virginia, Inc., 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 GSI of Virginia, Inc. The motion was served in lieu of a notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a).

Department staff's motion was dated August 2, 2006, and was served upon respondent by certified mail sent to the care of the Commonwealth of Virginia, Clerk of the State Corporation Commission, P.O. Box 1197, Richmond, Virginia, 23218-1197. In addition, a copy of the motion papers was sent to respondent at an address in Southern Pines, North Carolina by certified mail, return receipt requested on September 18, 2006, and another copy was sent to that address by first class mail on October 25, 2006. No written response from respondent has been received to date, rendering it in default as of November 14, 2006.

Charges Alleged

Department staff's motion alleges that, since at least April 30, 2004, respondent has owned or operated a solid waste management facility having more than 1,000 waste tires without a permit in violation of article 27, title 7 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 360, on property located at 101-13 Greenway Avenue, Syracuse (Onondaga County), New York (the "facility" or "site"). Specifically, Department staff charged that:

A. Respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) since at least April 30, 2004 because respondent has never received a solid waste management facility permit to operate the waste storage facility on the site;

B. Respondent violated the provisions of 6 NYCRR 360-13.3(a) since at least April 30, 2004 because respondent operated the site without receiving the Department's approval for any of the following required plans:

1. A site plan that specifies the waste tire facility's boundaries, utilities, topography and structures;

2. A monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system;

3. A closure plan that identifies the steps necessary to close the facility;

4. A contingency plan;

5. A storage plan that addresses the receipt and handling of all waste tires and solid waste to, and from, the facility; and

6. A vector control plan that provides all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors.

C. Respondent violated the provisions of 6 NYCRR 360-13.3(a) since at least April 30, 2004 because respondent operated the site without a Department-approved operation and maintenance manual covering the site's activities;

D. Respondent violated the provisions of 6 NYCRR 360-13.3(c)(6) since at least April 30, 2004 because respondent operated the site that has potential ignition sources stored in tire storage areas;

E. Respondent violated the provisions of 6 NYCRR 360-13.3(e)(2) since at least April 30, 2004 because respondent has never prepared and filed quarterly operation reports with the Department; and

F. Respondent violated the provisions of 6 NYCRR 360-13.3(e)(3) since at least April 30, 2004 because respondent has never prepared and filed annual reports with the Department.

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 the site;

B. The site is a solid waste management facility;

C. Respondent violated the aforementioned provisions of law since at least April 30, 2004; and

D. As a result of the violations described in staff's motion, respondent owns a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

Additionally, Department staff requests that the Commissioner issue an order directing 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 of the Commissioner's order;

III. Post with the Department within 30 days of the Commissioner's order financial security in the amount of $7,500 in accordance with 6 NYCRR 360-1.12 and 360-13.2(g), and ECL 27-0703(6), to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above;

IV. Fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event that the State should be required to assume responsibility for the abatement the waste tire stockpiles at the site;

V. Pay an assessed penalty determined to be the lesser of the maximum civil penalty authorized by ECL 71-2703; or the sum of $10,000 plus the sum of $2 for each 20 pounds of waste tires that the State has to manage pursuant to ECL article 27, title 19, in the event respondent fails to comply with any requirement set forth in Paragraphs I and II above;

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

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

Papers Reviewed

Department staff's motion is brought 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 staff's motion is an attorney brief, also dated August 2, 2006, in support of the motion for order without hearing.

Attached as exhibits to the Department's motion are the following: (1) certified copy of a deed to respondent's property dated September 17, 1991 (Exhibit "A"); (2) affidavit of Steven

E. Perrigo, P.E., Environmental Engineer 2, Division of Solid & Hazardous Materials, Department Region 7, sworn to July 11, 2006, with a tire facility inspection report of respondent's property, photographs of respondent's property, and an abatement plan for respondent's property (Exhibit "B"); (3) copy of respondent's articles of incorporation (Exhibit "C"); (4) documents from New York State Department of State (Exhibit "D"); (5) documents from Commonwealth of Virginia State Corporation Commission (Exhibit "E"); (6) affidavit of service of Drew A. Wellette, Division of Environmental Enforcement, Department's Central Office, sworn to August 2, 2006, with various records and documents relating to a search for addresses for respondent (Exhibit "F"); (7) affidavit of Charles E. Sullivan, Jr., Esq., Division of Environmental Enforcement, Department's Central Office, sworn to August 1, 2006, with accompanying documents in support of a due diligence declaration to Virginia State Corporation Commission (Exhibit "G"); and (8) supporting caselaw and statutory references (Exhibit "H").

Additional exhibits include: (1) an August 2, 2006 service of process, notice, order or demand on the Clerk of the Virginia State Corporation Commission as statutory agent, with various attachments (Exhibit "S"); (2) Certificate of Compliance dated August 9, 2006 from the Clerk of the Virginia State Corporation Commission (Exhibit "T"); (3) affidavit of service of Drew A. Wellette, Division of Environmental Enforcement, Department's Central Office, sworn to September 18, 2006, with a letter relating to mailing motion papers to respondent at a Southern Pines, North Carolina address (Exhibit "U"); (4) copy of a certified mail receipt dated October 9, 2006 marked "unclaimed" (Exhibit "V"); (5) an October 12, 2006 service of process, notice, order or demand on the Clerk of the Virginia State Corporation Commission as statutory agent, with attachments (Exhibit "W"); (6) Certificate Of Compliance dated October 18, 2006 from the Clerk of the Virginia State Corporation Commission (Exhibit "X"); (7) affidavit of service of Drew A. Wellette, Division of Environmental Enforcement, Department's Central Office, sworn to October 25, 2006, with a letter relating to mailing motion papers to respondent at a Southern Pines, North Carolina address (Exhibit "Y"); and (8) a copy of Matter of Harner v County of Tioga, 5 NY3d 136 (2005)(Exhibit "Z").

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 September 6, 1991, respondent GSI of Virginia, Inc. acquired title to the subject property located at 101-13 Greenway Avenue, Syracuse, Onondaga County, from Peter Winkelman Co., Inc. The property ("site") is identified as Onondaga County Tax Map parcel 032.1-01-25.0.

2. The site contains a dilapidated building that contains and is surrounded by waste tires and other solid waste. The site is not completely enclosed by a fence.

3. Since at least February 1999, respondent made the property available for the disposal of used tires and tire casings. By June 2004, it was estimated that at least 5,000 discarded used tires were collected on the site.

4. The tires are well-worn in appearance, with no apparent care taken to preserve their value as tires that could be used on other vehicles legally. The tires were piled on top of each other and left completely exposed to the elements in an uncovered manner. These conditions have existed since at least June 10, 2004.

5. The site lacks an active hydrant or viable fire pond. The site also lacks strategically placed fire extinguishers. These conditions have existed since at least June 10, 2004.

6. Some tire piles at the site are not accessible on all sides to fire fighting and emergency response equipment. These conditions have existed since at least June 10, 2004.

7. Not all of the piles of tires at the site are separated by accessible fire lanes or emergency access roads. Combustible materials are co-located with the tires and between tire piles. These conditions have existed since at least June 10, 2004.

8. The tires at the site pose a significant threat of fire and, thus, a serious public health and safety hazard to the surrounding area due to the air pollution that would be created should the tires catch fire.

9. Water is allowed to pool in the tires at the site, creating a breeding ground for mosquitoes. No vector control

methods are employed at the site. As a result, the site constitutes a nuisance and public health hazard to surrounding residents. These conditions have existed since at least June 10, 2004.

10. Respondent has neither applied for nor received a permit to operate the facility located at the site. Respondent has failed to submit a site plan, monitoring or inspection plan, closure plan, contingency plan, storage plan, or vector control plan with the Department. Respondent has failed to obtain an approved operation and maintenance plan for the facility. Respondent has failed to provide financial assurance to the Department to cover the cost of closure of the facility. Respondent has failed to file quarterly operation reports or annual reports with the Department.

DISCUSSION

Nature of the Motion

Department staff served its motion for 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 note that respondent's failure to answer or otherwise appear would entitle it to a default judgment pursuant to 6 NYCRR 622.15. Nevertheless, Department staff contends 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 under the CPLR, a "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 are 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.

Nature of Respondent

According to Department staff's motion papers, respondent is a defunct foreign corporation, formerly incorporated in the Commonwealth of Virginia, that is the record owner of the property where the violations alleged in this proceeding are located. As evidence of this, Department staff's motion papers include the following:

(i) articles of incorporation for GSI of Virginia, Inc. in the State of Virginia dated May 3, 1991 and a certificate of incorporation for GSI of Virginia, Inc. issued by the State Corporation Commission of the Commonwealth of Virginia on

May 6, 1991 (see Exhibit "C");[1]

(ii) a certified copy of a deed conveying real property located at 101-13 Greenway Avenue, Syracuse, New York 13217, from Peter Winkelman Co., Inc. to GSI of Virginia, Inc. on September 6, 1991, and recorded in the Onondaga County Clerk's Office on September 17, 1991 in Book 3721 at Page 246 (see Exhibit "A");[2]

(iii) a certified copy of a deed conveying real property located at 102 Greenway Avenue, Syracuse, New York, from Peter Winkelman Co., Inc. to GSI of Virginia, Inc. on September 25, 1991, and recorded in the Onondaga County Clerk's Office on February 10, 1992 in Book 3750 at Page 65 (see Exhibit "G");[3]

(iv) a copy of the 1996 Annual Report filed by GSI of Virginia, Inc. with the State Corporation Commission of the Commonwealth of Virginia dated March 21, 1996 (see Exhibit "G");[4]

(v) property tax records from the City of Syracuse, Onondaga County, showing that the properties located at 101-13 Greenway Avenue, Syracuse, and 102 Greenway Avenue, Syracuse, were both owned by GSI of Virginia, Inc. with a mailing address of P.O. Box 6103, Syracuse, New York 13217

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[1] The articles of incorporation list the registered post office address of GSI of Virginia, Inc. as 258 N. Witchduck Road, Suite C, Virginia Beach, Virginia 23462, and the name of its registered agent as Harry W. Jernigan, III, Esq. of the Virginia State Bar, with a business office address identical to the registered office of the corporation.

[2] This deed indicates that GSI of Virginia, Inc. is a Virginia corporation with an address at 1025 Executive Boulevard, Chesapeake, Virginia 23320.

[3] This deed indicates that GSI of Virginia, Inc. is a Virginia corporation with an address at 841 Juniper Crescent, Chesapeake, Virginia 23320.

[4] The annual report lists the corporation's registered agent as Harry W. Jernigan, III, Esq., the address of the corporation's principal office as 1025 Executive Boulevard, Chesapeake, Virginia 23320, and the name of the principal officer or director of the corporation as Peter Winkelman, 2685 W. Landing Road, Virginia Beach, Virginia 23456. The report was signed by Peter J. Winkelman, as president, on March 21, 1996.

(see Exhibit “G”);

(vi) official documents from the Secretary of State of the New York State Department of State dated March 23, 2005, showing that no authority to do business, nor certificate of incorporation was found or on file with that department for GSI of Virginia, Inc. (see Exhibit “D”);

(vii) official documents from the State Corporation Commission of the Commonwealth of Virginia dated September 6 and 18, 2005, showing that GSI of Virginia, Inc., was automatically terminated as a Virginia corporation on September 1, 1997 for failure to pay annual registration fees required by Virginia law (see Exhibit “E”); and

(viii) a letter dated June 28, 2006 showing that, as of 1999, the law office of Harry W. Jernigan, Esq., 258 N. Witchduck Road, Suite C, Virginia Beach, Virginia 23462, had ceased acting as the registered agent for GSI of Virginia, Inc. (see Exhibit “F”).

Due to the unauthorized, foreign status of the corporate respondent, coupled with the numerous addresses associated with said corporation as noted, Department staff contends that it was compelled to expend significant effort in an attempt to serve papers in this proceeding upon respondent. In furtherance of this, the Department’s motion provides a detailed description of the various means utilized by staff to locate respondent. Department staff’s motion include the following:

(i) the affidavit of Charles E. Sullivan, Jr., Esq. made in support of a due diligence declaration to the Virginia State Corporation Commission (with exhibits) sworn to August 1, 2006 (see Exhibit “G”);

(ii) the affidavit of service of Drew A. Wellette (with exhibits) sworn to August 2, 2006, describing the ways he attempted to locate Peter J. Winkelman, the last known President of GSI of Virginia, Inc. (see Exhibit “F”); and

(iii) the affidavit of service of Kathleen M. Danaher sworn to April 8, 2005, indicating the various addresses she attempted to serve via certified mail, return receipt requested, a notice of motion for order without hearing and motion for order without hearing upon respondent (see Exhibit “G”).

Proof of Service

Department staff may commence an administrative enforcement proceeding by service of a motion for order without hearing (in lieu of or in addition to a notice of hearing and complaint) (see 6 NYCRR 622.12[a]). Service of the motion for order without hearing, which serves as the complaint in this matter, must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]). As part of its motion for order without hearing, Department staff must file proof of service of the motion and supporting papers on the respondent with the Chief Administrative Law Judge of the Department's Office of Hearings and Mediation Services (see 6 NYCRR 622.12[a]).

As appears from the affidavits of Charles E. Sullivan, Jr. Esq., and Kathleen M. Danaher (see Exhibit "G"), Department staff initially attempted to serve a notice of motion for order without hearing and motion for order without hearing in this matter on or about April 8, 2005 by mailing copies of same via certified mail, return receipt requested, to respondent at the following addresses:

(1) GSI of Virginia, Inc.
Peter J. Winkelman, President
2685 West Landing Road
Virginia Beach, Virginia 23456

(2) GSI of Virginia, Inc.
c/o Harry W. Jernigan, III, Esq., registered agent
258 North Witchduck Road, Suite C
Virginia Beach, Virginia 23456-6522

(3) GSI of Virginia, Inc.
1025 Executive Blvd.
Chesapeake, Virginia 23320

(4) GSI of Virginia, Inc.
c/o Commonwealth of Virginia
Clerk of the State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23218-1197 (four sets provided)

(5) GSI of Virginia, Inc.
P.O. Box 6549
Syracuse, New York 13217

Mr. Sullivan's August 1, 2006 affidavit states that all

but the sets of motion papers mailed in April 2005 to the former registered agent of GSI of Virginia, Inc. and to the Commonwealth of Virginia State Corporation Commission were returned, undelivered, with the notation "not deliverable as addressed, unable to forward" (see Exhibit "G"). Prior to the April 2005 mailing, Department staff had learned that GSI of Virginia, Inc. had not been authorized nor registered to do business in New York by the Department of State (see Exhibit "D").

After the April 2005 mailings were returned as being undeliverable, Department staff learned that GSI of Virginia, Inc. had ceased being a Virginia corporation in 1997 (see Exhibit "E") and no longer maintained a registered agent in Virginia for service of papers (see Exhibit "F"). As a result, Department staff attempted to find other addresses for GSI of Virginia, Inc. and its president, Peter Winkelman, as well as an alternate means of serving papers in this proceeding upon respondent (see Exhibit "F"). Ultimately, based upon information obtained about respondent after April 2005, Department staff elected to serve copies of the August 2, 2006 motion papers upon respondent by certified mail sent to the care of the Commonwealth of Virginia, Clerk of the State Corporation Commission, P.O. Box 1197, Richmond, Virginia, 23218-1197.

As explained in Mr. Sullivan's brief in support of the motion for order without hearing dated August 2, 2006, pursuant to Virginia state law, if no registered agent has been appointed or maintained for a Virginia corporation, or if the registered agent cannot be found with due diligence at the registered office, service may be made on the Clerk of the State Corporation Commission (See Va. Code Ann. § 13.1-637). When Department staff learned that the law office of Harry W. Jernigan, Esq., 258 N. Witchduck Road, Suite C, Virginia Beach, Virginia 23462, had ceased acting as the registered agent for GSI of Virginia, Inc., Department staff sent copies of the within motion papers by mail to the State Corporation Commission of the Commonwealth of Virginia as respondent's agent for service ostensibly in accordance with Virginia law.[5]

Nevertheless, it also appears from Department staff's papers that a copy of the August 2, 2006 notice of motion for order without hearing and motion for order without hearing in

[5] This method of service would be insufficient under New York law since such would have needed to have been accomplished via personal service upon the Virginia State Corporation assuming, without deciding, that the State of Virginia is an authorized agent for service upon a defunct Virginia corporation (see CPLR 311).

this proceeding was sent via certified mail, return receipt requested, to Peter J. Winkelman, President of GSI of Virginia, Inc., at 565 E. Indiana Avenue, Southern Pines, North Carolina 28388, on September 18, 2006 (see Exhibit "U"). That certified mailing was returned to the Department as "unclaimed" (see Exhibit "V"). Subsequently, on October 25, 2006, Department staff mailed another copy of its motion papers to respondent via first class mail to Mr. Winkelman, as President of GSI of Virginia, Inc., to the Southern Pines, North Carolina address noted above (see Exhibit "Y"). Following a March 13, 2007 written inquiry by me, a copy of which was also mailed to respondent at the Southern Pines, North Carolina address, Charles E. Sullivan, Jr., Esq. submitted an affidavit sworn to March 19, 2007, averring that Department staff's October 25, 2006 first-class mailing of the motion papers to respondent in Southern Pines, North Carolina was not returned to the Department by the U.S. Postal Service for any reason.[6]

1. Personal Service

Respondent, as a non-domiciliary corporate owner, user or possessor of real property situated within the State, is subject to the exercise of personal jurisdiction of the State (see CPLR 302[a][4]). This is so even where a party may no longer own, use or possess the real property at the time an action is commenced so long as the claim arises out of the prior relationship to the property (see Tebedo v Nye, 45 Misc 2d 222 [Sup Ct, Onondaga County 1965]).

When a basis of personal jurisdiction under CPLR 302

[6] Notably, respondent's copy of my March 13, 2007 letter, which was sent by first-class mail to the Southern Pines, North Carolina address, has not been returned to me. Additionally, at approximately 10:00 a.m. on Wednesday, March 21, 2007, the following message was left for me by an unidentified female caller on the State office-wide CAPNET voicemail system for my telephone extension:

> "This is the number I was supposed to dial for Sanza, Mark D. Sanza, in regards to Peter J. Winkelman. I keep getting mail for him. He does exist at this address but he has no money. He has nothing to do with GSI of Virginia anymore. He basically is a non-entity, so I'm just trying to leave you that message. There's no sense in even...you're wasting your time, and your paper, and your money. He has absolutely nothing. He lives in Southern Pines but he has nothing. So, forget it. Alright, bye."

exists for a defendant outside the State of New York, CPLR 313 dictates that service be made "in the same manner as service is made within the state." As a result, a plaintiff is to use the personal service methods of CPLR 308, 309, 310, 311, and so on wherever the defendant (or person authorized to accept service on defendant's behalf) may be found. But while a defendant subject to the jurisdiction of the State may be served outside of New York, that service must be made in the foreign jurisdiction in a manner consistent with the manner of service authorized under the laws of the State of New York (see Breer v Sears, Roebuck and Co., 184 Misc 2d 916, 922 [Sup Ct, Bronx County 2000]).

CPLR 311(a) provides the manner in which personal service upon a domestic or foreign corporation subject to jurisdiction of the State can be made.

> "Personal service upon a corporation ... shall be made by delivering the summons as follows:
>
> 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. ..."

Since respondent apparently never had any corporate representatives located in New York, the ordinary provisions for service of said agents under the CPLR were not available to Department staff in order to commence this proceeding. Nonetheless, as the service provisions of CPLR 311 allow, Business Corporation Law ("BCL") § 307 offers a method of serving the New York Secretary of State where an unauthorized foreign corporation is involved. That section provides, in pertinent part, as follows:

> "(a) In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign corporation not authorized to do business in this state is subject to a like jurisdiction. In any such case, process against such foreign corporation may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.

> (b) Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or his deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee, which fee shall be a taxable disbursement. Such service shall be sufficient if notice thereof and a copy of the process are:
>
> (1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or
>
> (2) Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff"

(see BCL 307[a] and [b] *[emphasis added]*). As noted, BCL 307 designates the New York Secretary of State as agent of an unauthorized foreign corporation that is subject to jurisdiction under any part of CPLR Article 3 (see CPLR 302[a][4]). Under BCL 307, this designation is imputed, stemming only from the corporation's activity in New York and, unlike for a domestic or authorized foreign corporation, the Secretary of State does not maintain a record of an unauthorized foreign corporation's address on file.[7] Under BCL 307, the Secretary of State is served with only one copy of the process and it is incumbent upon the party seeking to commence the action to serve another copy upon the foreign corporation.

To satisfy due process requirements, in addition to

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[7] Under BCL 306 (applicable to a domestic or authorized foreign corporation), two copies of the process are delivered to the Secretary of State who typically maintains a current listing of the corporation's address on file. Under BCL 306, the Secretary of State then mails one copy of the process to the corporation.

service on the Secretary of State, compliance with all of the additional BCL 307 provisions is required (see Flick v Stewart-Warner Corp., 76 NY2d 50 [1990]). In Stewart v Volkswagen of America, Inc., 81 NY2d 203 (1993), the Court of Appeals adhered to the rigid sequence of steps set forth in BCL 307 noting that the statute has a mandatory progression of options in which each becomes available only if the preceding one cannot be satisfied. The Court called it a "menu" and held that a plaintiff cannot choose from it at random, but most go in sequence in order to secure jurisdiction over a foreign corporation not authorized to do business in New York.

> "The statute [BCL 307] is precise as to the sequence of service and notice actions necessary to initiate and complete acquisition of jurisdiction. A party must first *serve* the Secretary of State, and then either *deliver* personally a copy of the process to the foreign corporation or *send* a copy of the process to [a descending list of alternatives]"

(id. at 205-206 *[emphasis in original]*).

In Stewart, supra, plaintiffs served the Secretary of State but did not deliver a copy personally to the foreign corporation, or send a copy to the foreign corporation in accordance with the order or specification of the statutory delineation in BCL 307 (id. at 206). In light of this defect, the plaintiffs did not establish jurisdiction and the action was dismissed (id. at 209).

Turning to the facts of this case, Department staff undertook considerable effort to locate and serve respondent in accordance with Virginia state law as previously outlined. In doing so, Department staff did not follow the strict mandates of BCL 307 by delivering a copy of the motion papers commencing this action to the New York Secretary of State.

2. Certified Mail Service

In the alternative, Department staff utilized a method in the regulations that allows for commencement of an administrative enforcement proceeding by service of a motion for order without hearing by certified mail (see 6 NYCRR 622.3[a][3]). When the certified mailing of the present motion was returned "unclaimed," Department staff followed that service by the use of regular mail which was not returned.

The Court of Appeals has upheld service by ordinary first class mail in circumstances where certified mail was returned "unclaimed" as satisfying constitutional due process "notice" requirements. In Harner v County of Tioga, 5 NY3d 136 (2005), notices of foreclosure proceedings commenced by the County sent to the property owner's address appearing in the tax rolls by certified mail pursuant to Real Property Tax Law § 1125(1)(a)[8] were returned marked "unclaimed," but ordinary mailings to that address were not returned.

> "Only the certified mailings were returned as 'unclaimed,' which for purposes of the Postal Service means that the '[a]ddresee abandoned or failed to call for [the] mail" (United States Postal Service Domestic Mail Manual part 507, exhibit 1.4.1 <http://pe.usps.gov/text/dmm300/507.htm> [last updated June 9, 2005] ... Given the implication of such endorsement -- which does not on its face indicate that an address is invalid as the notation 'undeliverable' implies -- and that none of the first class mailings were returned, the County reasonably believed that Harner was attempting to avoid notice by ignoring the certified mailings"

(id. at 140-141).

Considering this, coupled with Department staff's significant effort to locate respondent over the course of two years as previously detailed, the facts of this proceeding present a strong case for holding that the notice procedure employed by Department staff satisfied the requirements of 6 NYCRR 622.3(a)(3) and, in turn, due process. Here, the Department's regulations authorize service of a complaint (in this case, the motion for order without hearing) by certified mail, such service to be completed upon receipt.

Department staff's attempts to serve respondent by certified mail, return receipt requested, at various Virginia addresses in 2005 were returned to the Department undelivered, with the notation "not deliverable as addressed, unable to forward" (see Exhibit "G"). Thereafter, a subsequent attempt by staff to serve the within motion papers on respondent in September 2006 by certified mail, return receipt requested, at an address in Southern Pines, North Carolina was returned to the

[8] Real Property Tax Law 1125(1)(a) authorizes notice of commencement of a proceeding thereunder by first class mail.

Department with the notation "unclaimed" (see Exhibits "U" and "V"). Department staff then mailed another copy of its motion papers to respondent at the Southern Pines, North Carolina address by ordinary first class mail on October 25, 2006 that was not returned to the Department (see Exhibit "Y" and affidavit of Charles E. Sullivan, Jr., Esq., sworn to March 19, 2007).

There is a difference between a mailing being returned by the Postal Service as "not deliverable" and one that is marked "unclaimed" (see Harner, supra, at 140-141). The former connotes an invalid address while the latter implies avoidance of a properly addressed mailing. Based upon the fact that Department staff's October 25, 2006 first class mailing of the within motion papers and a copy of my March 13, 2007 letter to respondent's Southern Pines, North Carolina address have not been returned, it is reasonable to conclude that respondent received the motion but is attempting to avoid notice of this proceeding by ignoring the certified mailing of the motion in September 2006.[9] While utilizing the provisions of BCL 307 would, ordinarily, have been the easier method of service upon an unauthorized foreign corporation such as respondent, under the circumstances presented here, Department staff has demonstrated compliance with service by certified mail pursuant to 6 NYCRR 622.3(a)(3) (see Harner, supra). As such, Department staff acquired jurisdiction over respondent GSI of Virginia, Inc. in this matter.

Discussion of Facts

My findings of fact are based upon observations made during inspections of the site conducted by Department staff on June 10, 2004, April 1, 2005, and June 29, 2006. They are also based upon the photographic evidence and other public records of the Department and other entities submitted with staff's motion.

One of the factual allegations stated in the motion is not determinable as a matter of law based upon the submissions on the motion. Specifically, Department staff allege that respondent has operated a waste tire storage facility at the site "since at least April 30, 2004." The affidavit of Department employee Steven E. Perrigo, P.E., however, is based upon his personal observations of conditions at the site beginning from

[9] Also, the March 21, 2007 voicemail message left for me acknowledged that Mr. Winkelman, President of GSI of Virginia, Inc., had received copies of the Department's papers at the Southern Pines, North Carolina address.

June 10, 2004 at the earliest. To the extent that Department staff allege conditions prior to June 10, 2004, no proof is provided for such assertion. Thus, any findings of fact determined in this ruling are only determinable as a matter of law beginning from the period of June 10, 2004 until the date of the motion.

Staff's submissions on this motion establish, prima facie, that respondent GSI of Virginia, Inc. has owned the site since September 1991. The affidavits and photographic evidence attached to the motion as exhibits establish the facts alleged to have occurred at the site since at least June 10, 2004 and that conditions at the site had not improved by June 29, 2006.

The record reveals that at least 5,000 tires are present at the site. The tires are well-worn in appearance, exposed to the elements, and no apparent care has been taken to preserve their value as tires. The photographs reveal that the piles of tires are not maintained, are overgrown with grass, weeds, brush and trees, and make it difficult for access by firefighting or other emergency equipment. The site also lacks an active hydrant or viable fire pond, and lacks strategically placed fire extinguishers. The site is not completely fenced.

Department staff's review of Departmental records pertaining to the waste tire facility at the subject site reveals that no solid waste management facility permit to operate a waste tire storage facility has been issued. In addition, a review of the records reveals no site plan, monitoring or inspection plan, closure plan, contingency plan, storage plan, vector control plan or operation and maintenance manual are on file for the facility. Moreover, no quarterly operation reports or annual reports have been submitted for the site. No financial assurance to cover the cost of closure of the site has been provided to the Department.

Ownership and Operation

Department staff alleges that respondent is the owner and 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 parcel of real property upon which the site is located (see Exhibit "A"; see also Matter of Radesi, ALJ's Hearing Report at 8, concurred in by Commissioner's Decision and Order, March 9, 1994). Thus, Department staff made a prima facie showing that respondent owns and operates the subject facility (see Relief Sought ¶ A, above).

Liability for Violations Charged

1. Operating a Solid Waste Management Facility without a Permit

Department staff alleges that, since at least April 30, 2004, respondent has failed to apply for or receive a permit from the Department to construct or operate a solid waste management facility as defined in ECL 27-0701(2) (see Charges Alleged ¶ A, above). For the reasons given previously, this date should have been June 10, 2004.

Since December 1988, the Department's Part 360 regulations have included a subpart specifically applicable to the storage of waste tires before their treatment or disposal (see 6 NYCRR subpart 360-13). These regulations provide that "no person shall engage in the storage of more than 1,000 waste tires at a time without first having obtained a permit to do so pursuant to this Part" (6 NYCRR 360-13.1[b]). The Legislature subsequently amended ECL article 27 in 1989 to also expressly provide for the regulation of waste tire storage facilities (see ECL 27-0703[6]).

The used tires on the site at issue here constitute "solid waste" as defined in ECL 27-0701(1) and 6 NYCRR 360-1.2(a)(1),(2). Moreover, the used tires constitute "waste tires" as that term is defined by 6 NYCRR 360-1.2(b)(183) (see Matter of Hornburg, CALJ's Ruling/Hearing Report, Aug. 24, 2004 at 16-17, adopted by Commissioner's Order, Aug. 26, 2004, at 2; and Matter of Wilder, CALJ's Ruling/Hearing Report, Oct. 18, 2004 at 12, adopted by Commissioner's Order, Nov. 4, 2004, at 2).

The facts reveal that since at least June 10, 2004, respondent has never received a solid waste management facility permit to operate the waste tire storage facility on the site, in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b). 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 Relief Sought ¶ B, above). As the owner and operator of the site since 1991, respondent is a person engaged in the storage of more than 1,000 waste tires without a permit (see 6 NYCRR 360-1.2[117]). In addition, there is no evidence that respondent has begun removal of the waste tires pursuant to a Department-approved plan. Thus, respondent is liable for violating 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) from June 2004 to the present.

2. Violations of Operational Requirements under Section 360-13.3

Department staff alleges that respondent has violated six separate operational requirements (see Charges Alleged ¶¶ B.1-B.6, above) applicable to all waste tire storage facilities subject to the permitting requirements of Subpart 360-13 (see 6 NYCRR 360-13.3[a]). Section 360-13.3(a) provides that "all waste tire storage facilities subject to the permitting requirements of [Part 360] 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. All plans required by this Part must be incorporated into a final operations and maintenance (O&M) manual, a copy of which must be maintained and be available for reference and inspection at the facility." A final O&M manual approved by the Department is required for the facility to operate. Section 360-13.2 lists the types of plans that are required of waste tire storage facilities as follows: site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, and vector control plan (see 6 NYCRR 360-13.2[b], [e], [f], [h], [i], and [j]).

Staff alleges that respondent has been in violation of the provisions of section 360-13.3(a) by operating the subject facility without any of the plans noted since at least April 30, 2004. However, based upon the previous finding with respect to the initial date of the offense, and for the reasons that follow, the six violations staff allege are established as a matter of law from June 2004 to the present.

a. Site plan - Charge B.1

Section 360-13.2(b) requires a "site plan that must show the facility's property boundaries; site acreage; distances from adjacent residences, property owners and population centers; off-site utilities such as electric, gas, water, and storm and sanitary sewer systems; a north arrow; site topography; the location of screening provided, regulated wetlands, rights-of-way, surface water and classifications, floodplains, buildings and appurtenances, fences, gates, roads, staging areas, parking areas, drainage culverts and signs; monitoring wells; transportation systems in the vicinity of the facility including, but not limited to railways and ports; the location and identification of special waste handling and storage areas; and a wind rose." This site plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved

site plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required site plan in violation of section 360-13.3(a).

b. Facility monitoring and inspection plan - Charge B.2

Section 360-13.2(e) requires a "facility monitoring and inspection plan" that satisfies the requirements of section 360-1.14(f)(3) and "must address the following concerns: the presence of vermin; the readiness of fire-fighting equipment; and the integrity of the security system." This monitoring and inspection plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved monitoring and inspection plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required monitoring and inspection plan in violation of section 360-13.3(a).

c. Closure plan - Charge B.3

Section 360-13.2(f) requires a "closure plan" that complies with the requirements of section 360-1.14(w) and identifies "the steps necessary to close the facility." This closure plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved closure plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required closure plan in violation of section 360-13.3(a).

d. Contingency plan - Charge B.4

Section 360-13.2(h) requires, in addition to the requirements of section 360-1.9(h), a "contingency plan" that "must include but not be limited to" the specific provisions set forth in section 360-13.2(h)(1)-(6). This contingency plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved contingency plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required contingency plan in violation of section 360-13.3(a).

e. Storage plan - Charge B.5

Section 360-13.2(i) requires a "storage plan" to "address the receipt and handling of all waste tires and solid waste to, at and from the facility," among other things. This storage plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved storage plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required storage plan in violation of section 360-13.3(a).

f. Vector control plan - Charge B.6

Section 360-13.2(j) requires a "vector control plan" that "[a]ll waste tires be maintained in a manner which limits mosquito breeding potential and other vectors." This vector control plan would have been incorporated into a final O&M manual for the facility (6 NYCRR 360-13.3[a]). The record establishes that respondent failed to obtain an approved vector control plan from the Department in connection with its ownership and operation of a waste tire storage facility and, therefore, has been operating without the required vector control plan in violation of section 360-13.3(a).

In sum, the evidence submitted by staff on its motion shows that, since at least June 10, 2004 to the present, respondent owned and operated a waste tire storage facility used to store more than 1,000 tires at a time without any of the foregoing plans approved by the Department. Thus, the violations of section 360-13.3(a) alleged in Charges B.1 through B.6 above are established (see Matter of Hornburg, CALJ Hearing Report, April 17, 2006, at 4, adopted by Supplemental Order of the Executive Deputy Commissioner, May 5, 2006, at 2).

3. Operating a Waste Tire Storage Facility without an Operation and Maintenance Plan

Department staff alleges that respondent violated the provisions of section 360-13.3(a) by operating the facility without an approved operation and maintenance ("O&M") manual (see Charges Alleged ¶ C, above). As noted previously, a final O&M manual approved by the Department is required in order for a waste tire storage facility to operate. The evidence submitted by staff on its motion shows that, since at least June 10, 2004, respondent owned and operated a waste tire storage facility used to store more than 1,000 tires at a time without an O&M manual

approved by the Department. Therefore, respondent is liable for violating the provisions of 6 NYCRR 360-13.3(a) from June 2004 to the date of staff's motion.

4. Operating a Waste Tire Storage Facility with Potential Ignition Sources

Department staff alleges that respondent violated the provisions of section 360-13.3(c)(6) by operating a waste tire storage facility with potential ignition sources stored in tire storage areas (see Charges Alleged ¶ D, above). Section 360-13.3(c)(6) requires that "potential ignition sources must be eliminated and combustibles must be removed as they accumulate." The evidence reveals that weeds, grass, wood and other combustible materials have been allowed to accumulate in the waste tire piles and storage areas at respondent's property. These conditions have existed from June 10, 2004 to the date of staff's motion. Therefore, the alleged violation of section 360-13.3(c)(6) is established.

5. Failure to File Quarterly Operation Reports

Department staff alleges that respondent violated the provisions of section 360-13.3(e)(2) by failing to file quarterly operation reports for the facility with the Department (see Charges Alleged ¶ E, above). Section 360-13.3(e)(2) requires the owner or operator of a waste tire storage facility to file quarterly operation reports with the Department. The record establishes that since June 10, 2004 to the date of staff's motion, respondent has failed to file any quarterly operation reports for the facility at issue. Therefore, the alleged violation of section 360-13.3(e)(2) is established.

6. Failure to File Annual Reports

Department staff alleges that respondent violated the provisions of section 360-13.3(e)(3) by failing to file annual reports for the facility with the Department (see Charges Alleged ¶ F, above). Section 360-13.3(e)(3) requires the owner or operator of a waste tire storage facility to file annual reports with the Department. The record establishes that since June 10, 2004 to the date of staff's motion, respondent has failed to file any annual operation report for the facility at issue. Therefore, the alleged violation of section 360-13.3(e)(3) is established.

7. Operation of a Noncompliant Waste Tire Stockpile

Department staff seeks a determination that respondent has owned and operated and presently owns and operates a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6) (see Relief Sought ¶ D, above). ECL 27-1901(6), which became effective in September 2003, 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 proceeding, respondent has owned and operated, and presently owns and operates, the subject waste tire storage facility. As a consequence of the violations of Departmental regulations determined above (see Relief Sought ¶ C, above), the facility constitutes a noncompliant waste tire stockpile as defined by ECL 27-1901(6). Therefore, respondent has owned and operated 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, which includes a corporation (see 6 NYCRR 360-1.2[117]), who violates any provision of, or who fails to perform any duty imposed by, ECL article 27, title 7, or any rule or regulations promulgated pursuant thereto may be enjoined from continuing such violation.

Respondent's ownership and operation of the waste tire storage facility without a permit constitutes a violation of ECL article 27, title 7 and the regulations promulgated pursuant thereto. Moreover, the operation of the facility in violation of

the operational requirements established in 6 NYCRR 360-13.3 also constitutes a violation of the regulations promulgated pursuant to ECL article 27, title 7. Thus, staff is entitled to an order enjoining respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

Department staff also seeks an order of the Commissioner directing respondent to remove all tires from the site in strict accordance with the plan and schedule detailed in its 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 of the site (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). Based on the findings set forth above, Staff is entitled to the relief sought.

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

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

Accordingly, Department staff is entitled to an order directing respondent to remove the tires from the site and I recommend that the Commissioner grant the relief sought in paragraph II. In the event respondent does not comply with the removal order, respondent would be liable to reimburse the State for the full amount of any and all expenditures made from the Fund by the State at the site, including investigation, prosecution and oversight costs, to the fullest extent allowable under the law (see Matter of Wilder, CALJ Hearing Report, Aug.

17, 2005 at 18-19). Accordingly, staff is entitled to the relief sought in paragraph VI, and I recommend that the Commissioner grant that relief (see Matter of Hornburg, CALJ Hearing Report, April 17, 2006 at 9-10). Whether the removal of the tires is undertaken by respondent or by staff, staff is entitled to the cooperation and non-interference order staff seeks in paragraph IV, and I recommend that the Commissioner grant that relief.

Department staff also seeks an order of the Commissioner directing respondent to post with the Department financial security in the amount of $7,500 to secure strict and faithful performance of each of respondent's remedial obligations set forth in paragraphs I and II of its motion (see Relief Sought ¶ III, above). Based upon Matter of Radesi, Commissioner's Decision and Order, March 9, 1994, and Matter of Wilder, CALJ Hearing Report, Aug. 17, 2005, it has been concluded that 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 also Matter of Hornburg, CALJ Hearing Report, April 17, 2006 at 9-10). Accordingly, I recommend that the Commissioner grant the relief staff seeks in paragraph III of its motion.

Finally, Department staff requests that respondent be directed to 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 $10,000 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"

(see Relief Sought ¶ V, above). This penalty would be in addition to the remedial costs respondent would be liable for pursuant to ECL 27-1907.

In Matter of Wilder and Matter of Hornburg, the then-Acting Commissioner and then-Executive Deputy Commissioner, respectively, accepted the alternative penalty-assessment formula requested by Department staff (see Matter of Wilder, Supplemental Order, Sept. 27, 2005; and Matter of Hornburg, Supplemental Order, May 5, 2006). As previously determined, "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 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 in the Commissioner's prior order. In addition, the '$2 per 20-pounds of tires managed' provision incorporates proportionality into the penalty calculation" (see Matter of Hornburg, CALJ Hearing Report, April 27, 2006, at 8).

Determining the maximum penalty allowable by law requires an analysis of the number of violations for which a penalty is authorized. In this case, staff established that respondent was in violation of at least eleven separate applicable provisions of law or regulations continuing from June 10, 2004 until August 2, 2006. ECL 71-2703 provides that "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by [ECL article 27, title 7] or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed" $7,500 for each violation and an additional penalty of up to $1,500 for each day during which such violation continues (see ECL 71-2703[1][a]).

Based upon this, I calculate the maximum penalty authorized by ECL 71-2703 to be $12,985,500.[10] This amount was calculated as follows:

First day of violation (6/10/04)	--	$ 7,500
Penalty for period of 6/11/04 to 8/2/06 (782 days x $1,500 per day)	--	$ 1,173,000
Total		$ 1,180,500

Accordingly, the maximum penalty for eleven violations (x $1,180,500 per each violation) equals $12,985,500.

In this case, I recommend that the alternative penalty-assessment sought by Department staff be imposed. By staff's estimate, respondent's site contains at least 5,000 waste tires (see Exhibit "B"). Assuming respondent fails to comply with its remedial obligations, the approximate maximum penalty assessed under this method would be $20,000 ($10,000 plus another $10,000, the total of 5,000 tires at $2 per 20-pounds of tires [one tire being about 20 pounds]). Therefore, the alternative penalty would be significantly less than the maximum amount authorized by ECL 71-2703. Accordingly, I recommend that the Commissioner grant the lesser amount of relief staff seeks in paragraph V of

[10] In its motion papers, Department staff claimed the maximum penalty allowed by law in this matter currently exceeds $58 million but this figure was not further justified or substantiated in any detail.

its motion.

CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

Violations Established

1. The used tires and tire casings on the subject site are "solid waste" as that term is defined under 6 NYCRR 360-1.2(a), because the tires had served their original intended use and were discarded by their previous owners before being stored on the site.

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

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

4. From at least September 17, 1991, respondent has owned and operated the solid waste management facility at the site.

5. From at least June 10, 2004, respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) because it has been and is operating a solid waste management facility engaged in storing 1,000 or more waste tires at a time without first having obtained a valid permit to do so pursuant to 6 NYCRR part 360.

6. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved site plan, as required by 6 NYCRR 360-13.2(b).

7. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e).

8. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved closure plan, as required by 6 NYCRR 360-13.2(f).

9. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved contingency plan, as required by 6 NYCRR 360-13.2(h).

10. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved storage plan, as required by 6 NYCRR 360-13.2(i).

11. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved vector control plan, as required by 6 NYCRR 360-13.2(j).

12. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(a) because it owned and operated a waste tire storage facility without a Department-approved operation and maintenance manual covering the site's activities.

13. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(c)(6) because it owned and operated a waste tire storage facility with potential ignition sources stored in tire storage areas.

14. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(e)(2) because it owned and operated a waste tire storage facility and failed to file quarterly operation reports with the Department.

15. From at least June 10, 2004, respondent violated 6 NYCRR 360-13.3(e)(3) because it owned and operated a waste tire storage facility and failed to file annual reports with the Department.

Penalty Assessment

16. The violations of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) established in paragraph 5 above constitute a single violation for penalty calculation purposes.

17. The violations of 6 NYCRR 360-13.3(a) established in paragraphs 6 through 11 above, respectively, insofar as they relate to plans described in 6 NYCRR 360-13.2 constitute separate violations for penalty calculation purposes.

18. The violation of 6 NYCRR 360-13.3(a) established in paragraph 12 above, insofar as it relates to operating the

facility without an approved operation and maintenance manual, constitutes a separate violation for penalty calculation purposes.

19. The violation of 6 NYCRR 360-13.3(c)(6) established in paragraph 13 above, constitutes a separate violation for penalty calculation purposes.

20. The violation of 6 NYCRR 360-13.3(e)(2) established in paragraph 14 above, constitutes a separate violation for penalty calculation purposes.

21. The violation of 6 NYCRR 360-13.3(e)(3) established in paragraph 15 above, constitutes a separate violation for penalty calculation purposes.

22. The maximum penalty authorized by law for the separate violations established on Department staff's motion is $12,985,500. This amount is based upon eleven violations beginning on June 10, 2004 and continuing until August 2, 2006 (the date of staff's motion).

RECOMMENDATIONS

I recommend that the Commissioner issue an order granting Department staff's motion, holding respondent liable for the violations determined as a matter of law, and granting the relief requested by staff.

_____/s/_____
Mark D. Sanza
Administrative Law Judge

Dated: April 27, 2007
Albany, New York