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"),

ORDER[1]

VISTA INDEX No. CO9-20051227-4

- by -

ROBERT HARRIS,

Respondent.

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against Robert Harris ("respondent") to enforce provisions of part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The proceeding was commenced pursuant to 6 NYCRR 622.12 by service of a motion for order without hearing dated January 17, 2006. The motion was served upon respondent by certified mail and received on January 19, 2006.

In Department staff's motion, which serves as the complaint in this matter, staff charged that respondent violated an order on consent (VISTA Index No. CO9-20040528-103) addressing a waste tire stockpile at his automobile dismantling business located at 7631 North Gale Road in Westfield, New York, as well as various provisions of 6 NYCRR part 360 governing waste tire storage facilities.

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

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[1] By memorandum dated February 2, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

This matter was referred to the Office of Hearings and Mediation Services on May 17, 2006, and assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached hearing report. I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

Respondent signed the consent order, dated September 21, 2004, in which he acknowledged his ownership and operation of the stockpile on a site that did not have a required waste tire storage facility permit. Though ordered to remove and properly dispose of the waste tires within a year, he failed to do so, and continued to operate the facility from September 21, 2005 until January 17, 2006, the date of staff's motion, without the required permit and without a (i) Department-approved site plan, (ii) monitoring and inspection plan, (iii) closure plan, (iv) contingency plan, (v) storage plan, (vi) vector control plan, and (vii) operation and maintenance manual.

Given these circumstances, the relief requested in staff's motion should be granted in part, as follows. By its motion, staff requested that part of the penalty imposed under this order be calculated using the following formula: "the sum of $2 for each 20 pounds of waste tires [20 pounds of waste tires equates to the approximate average weight of a single tire] . . . that the State of New York shall have to manage under ECL Article 27, Title 19[.]" As the ALJ's report notes, the imposition of similarly structured penalties in other waste tire cases has been previously approved. The rationale for such a penalty is that the significance of the violations and the potential harm to the environment increases as the volume of waste tires increases.

Here, however, staff has not provided an estimate of the total weight of the waste tires at the site and, therefore, the total amount of the resultant penalty is uncertain. In that regard, I note that staff's motion papers state only that "well over 1,000 waste tires" are stored at the site. Conceivably, if the weight of such tires removed from the site were of sufficient magnitude, this formula could result in a penalty amount that would exceed the statutory maximum established by ECL 71-2703.[2]

[2] Pursuant to ECL 71-2703(1)(a), where a violation does not result in a release of solid waste, the penalty is not to exceed $7,500 for each violation and an additional penalty of not more than $1,500 for each day the violation continues. Here, the record establishes that each of the eight violations of 6 NYCRR part 360 lasted at least 118 days (that is, following September 21, 2005, the date respondent breached the consent order, through

Therefore, the penalty amount requested by staff is granted, provided that the total penalty imposed does not exceed the statutory maximum.[3]

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part, as follows.

II. Respondent Robert Harris violated the September 21, 2004, consent order by failing to remove all the waste tires from his property at 7631 North Gale Road, Westfield, New York, by September 21, 2005.

III. Respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) by continuing to operate a waste tire storage facility without the required permit from September 21, 2005, until January 17, 2006, the date of staff's motion.

IV. Respondent violated 6 NYCRR 360-13.3(a) by continuing to operate the facility without a (i) Department-approved site plan, (ii) monitoring and inspection plan, (iii) closure plan, (iv) contingency plan, (v) storage plan, (vi) vector control plan, and (vii) operation and maintenance manual from September 21, 2005, until January 17, 2006.

January 17, 2006, the date of staff's motion for order without hearing). Staff, in its brief, cites to ECL 71-2703(1)(b)(ii) which provides for a larger maximum penalty where more than 10 cubic yards of solid waste are released. However, because staff does not expressly allege that more than ten cubic yards were released, nor articulate how each of the violations of part 360 independently resulted in such a release, I have utilized the lower penalty amount set forth in ECL 71-2703(1)(a) for my purposes here.

[3] Assuming none of the violations resulted in a release of solid waste into the environment and not taking into account any penalty for the violation of the consent order, the maximum statutorily authorized penalty for operating the facility without a permit and the seven other violations of 6 NYCRR part 360 would be $1,464,000.

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

A. Respondent is assessed a civil penalty of twenty-five thousand dollars ($25,000) which payment shall be due within 30 days of the date of service of this order upon respondent.

B. Within 30 days of being presented with a written statement from the Department regarding the weight of waste tires the State has removed from the site, respondent shall pay an additional penalty calculated by the Department as the sum of $2 for each 20 pounds of waste tires that the State shall have to manage under title 19 of ECL article 27, provided, however, that the total penalty imposed by this order may not exceed the maximum amount authorized by ECL 71-2703(1)(a) for the violations so determined by this order.

C. Respondent shall submit all payments 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 payment shall be delivered by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
RE: VISTA Index No. CO9-20051227-4

VI. 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 their abatement of the site's noncompliant waste tire stockpile.

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

VIII. The provisions, terms and conditions of this order shall bind respondent Robert Harris, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Louis A. Alexander
Assistant Commissioner

Dated: February 16, 2007
Albany, New York

TO: Robert Harris (via Certified Mail)
Harris Auto Wrecking
7631 North Gale Road
Westfield, New York 14787

Charles E. Sullivan, Esq. (via Regular Mail)
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Noncompliant Waste Tire Stockpile Located at 7631 North Gale Road, Westfield, New York, 14787, and Owned or Operated

-by-

ROBERT HARRIS,

Respondent.

HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING

VISTA INDEX No. CO9-20051227-4

Appearances:

- - Charles E. Sullivan, Jr., Esq., for the New York State Department of Environmental Conservation.
- - No appearance by or for Robert Harris, 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 order without hearing on Robert Harris, the Respondent. The motion was served, in lieu of a notice of hearing and complaint, pursuant to Section 622.12 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Department Staff's motion papers, dated January 17, 2006, were mailed to the Respondent that day by certified mail. They were received by the Respondent on January 19, 2006, according to the return receipt furnished by the Department. This completed service pursuant to 6 NYCRR 622.3(a)(3).

According to 6 NYCRR 622.12(c), within 20 days of receipt of a motion for order without hearing, a response must be filed with the Department's chief administrative law judge, such response to include supporting affidavits and other available documentary evidence. No timely response was made; however, before the running of the 20 days on February 8, 2006, the Respondent called Mr. Sullivan, Department Staff counsel, asking whether Mr. Sullivan wanted to receive receipts substantiating the removal of at least some of the waste tires from the waste tire stockpile. Because of that call, during a conversation with the Respondent on February 14, 2006, Mr. Sullivan agreed not to pursue the motion for order without hearing provided the Respondent complied with certain directives in a letter he addressed to the Respondent on February 15, 2006. These directives involved the removal of all waste tires, first shredded and then whole, from the stockpile at a rate of no less than two 30-yard containers

per week, with weekly reporting to the Department of the Respondent's removal and disposition activities.

On March 7, 2006, the Department received disposal receipts for shipments of tire shreds from the Respondent, only one of which, dated March 2, 2006, concerned a shipment of tire shreds occurring after February 20, 2006. By e-mail dated May 17, 2006, Nancy Bartha of the Department's Region 9 Staff reported to Mr. Sullivan that the Respondent had failed to honor his obligations set out in Mr. Sullivan's February 15, 2006, letter, and that Staff had no indication that the Respondent had undertaken any further shred removal since March 2, 2006.

Based on Ms. Bartha's e-mail and photographs she had taken at the site on March 13, 2006, showing shredded tire piles, Mr. Sullivan wrote to the Chief ALJ on May 17, 2006, requesting that Staff's motion for order without hearing be granted. Mr. Sullivan wrote in his letter that after speaking with the Respondent on February 14, 2006, he had decided to exercise his prosecutorial discretion, and in a final good faith attempt to resolve this matter prior to submitting the motion papers, had agreed to hold the matter in abeyance provided the Respondent complied with the terms outlined in Mr. Sullivan's February 15 letter. Mr. Sullivan then added that, as demonstrated by Ms. Bartha's May 17 e-mail note and the photographs taken on March 13, Mr. Harris had failed to carry out the letter's terms, and as far as Department Staff could tell, had made little effort to comply. Accordingly, in his letter, which was copied to the Respondent, he indicated that Department Staff had decided to press forward with this proceeding.

Upon receipt of Mr. Sullivan's May 17 letter, the Chief ALJ assigned me this matter for a ruling on the motion for order without hearing.

CHARGES

According to the motion for order without hearing, the Respondent admits that he owns and operates a waste tire stockpile on a parcel of property at 7631 North Gale Road, Westfield, New York, that does not comply with the Department's Part 360 regulations governing such solid waste management facilities.

The motion states that the Respondent consented to the issuance of a Department order (Index No. CO9-20040528-103) dated September 21, 2004, which, among other things, obligated him to remove and properly dispose of all waste tires from the site by

September 21, 2005, and authorized him, after September 21, 2005, to accumulate up to 1,000 waste tires but only those taken from motor vehicles brought in for dismantling as part of his on-site automotive dismantling business.

The motion adds that the Respondent has violated the consent order by not having disposed of all waste tires at the site by September 21, 2005, by not having timely submitted a report on his removal and disposal activities, as also required under the consent order, and by having more than 1,000 waste tires on the site since at least September 22, 2005.

According to the motion, the Respondent has also violated the following regulations pertaining to waste tire storage facilities for the period since September 21, 2004:

- - 6 NYCRR 360-1.7(a)(1) and 360-13.1(b), in that he has continued to operate the waste tire storage facility without a permit to do so; and

- - 6 NYCRR 360-13.3(a), in that he has operated the waste tire storage facility without Department approval of a site plan, a monitoring and inspection plan, a closure plan, a contingency plan, a storage plan, a vector control plan, and an operation and maintenance manual, all of which are required for facilities used to store 1,000 or more tires at a time.

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 above. Accordingly, Staff requests an order confirming the violations and ordering the Respondent to pay a civil penalty of $25,000 plus the sum of $2 for each 20 pounds of waste tires that the state shall have to manage under ECL Article 27, Title 19. Furthermore, Staff seeks an order requiring the Respondent to fully cooperate with the state and refrain from any activities that interfere with the state, its employees, contractors, or agents in their abatement of the site’s noncompliant waste tire stockpile.

MOTION PAPERS

Department Staff’s motion was made pursuant to 6 NYCRR 622.12(a), which provides that in lieu of or in addition to a notice of hearing and complaint, 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. Department Staff's motion for order without hearing is dated January 17, 2006, and is accompanied by a supporting brief from Mr. Sullivan. The brief, also dated January 17, 2006, includes references to two exhibits which are attached to the motion papers:

Exhibit "A" - - An affidavit of January 12, 2006, by Nancy J. Bartha, an environmental engineering technician in the Department's Region 9 office, with two attachments; and

Exhibit "B" - - An affidavit of January 10, 2006, by David Vitale, an engineer in the Department's central office in Albany.

FINDINGS OF FACT

1. The Respondent, Robert Harris, owns and operates a waste tire stockpile located at 7631 North Gale Road, Westfield, New York, which is also the location of his automobile dismantling business, Harris Auto Wrecking.

2. The Respondent consented to the issuance of an order on consent (VISTA Index No. CO9-20040528-103) dated September 21, 2004.

3. In that order, the Respondent expressly admitted his ownership and operation of the noncompliant waste tire stockpile, and that the site on which it was located was a solid waste management facility required to be, but not, permitted under 6 NYCRR Part 360-1.7(a)(1) and 360-13.1, because it contained more than 1,000 waste tires.

4. The consent order said that in the spirit of facilitating an amicable resolution of the matter, the Respondent agreed to immediately, upon the order's effective date (September 21, 2004), stop allowing any waste tires to come onto the site that were not found on a motor vehicle brought in for dismantling as part of the Respondent's ordinary business. The Respondent also agreed that by no later than one year from the order's effective date, he would have no waste tires on the site, and that within five calendar days after all the tires were removed, he would submit to the Department a report identifying all the transporters and transport vehicles, all the facilities accepting the waste tires, and the weight of tires in each vehicle's load.

5. According to the consent order, after the point was reached at which there were no waste tires on the site and the Respondent had submitted his report, the Respondent would be allowed to accumulate waste tires taken from motor vehicles

brought in for dismantling as part of the ordinary course of his business provided the total number of waste tires at the site remained less than 1,000.

6. At the time the consent order was issued, Respondent had well more than 1,000 tires piled at his site. This remained the case until at least January 2006, when Staff served its motion for order without hearing.

7. On November 7, 2005, the site was inspected by Nancy Bartha, an environmental engineering technician with the Department's Region 9 office. Ms. Bartha inspected the site to see if the Respondent had met his obligations under the consent order, and concluded that he had not.

8. While there were many tires at the site on November 7, 2005, that appeared to have been newly placed there, there were also well more than 1,000 waste tires, whole as well as shredded, that had been at the site since well before September 21, 2004.

9. At no time prior to January 2006, when Staff made its motion, did the Respondent submit to the Department an application to construct or operate a solid waste management facility at the site, or a report, consistent with the consent order's requirements, confirming the removal of tires from the property.

10. At no time prior to January 2006 did the Department approve any of the following:

- - A site plan specifying the waste tire facility's boundaries, utilities, topography and structures;
- - A monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system;
- - A closure plan that identifies the steps necessary to close the facility;
- - A contingency plan designed to minimize hazards to human health and the environment resulting from fires or releases into the air, onto the soil or into groundwater or surface water;
- - A storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the facility;
- - A vector control plan that provides that all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors; and
- - An operation and maintenance manual covering the site's activities.

11. Noncompliant waste tire stockpiles such as the Respondent's pose significant potential harm to the environment in a number of ways. The stagnant water that collects in waste tires provides an optimal breeding ground for numerous mosquito species that are associated with the spread of the West Nile virus, a mosquito-transmitted virus that can cause encephalitis in humans and that has been found in New York State since the fall of 1999.

12. Additionally, noncompliant stockpiles pose public health and safety hazards by their potential for fire. Tire fires are extremely flammable once ignited and burn vigorously. Fires at tire sites may burn above ground and, if the tires are buried, below the surface. Gaps and air pockets within a pile of tires make tire fires difficult to extinguish with water or even with foam or sand.

13. Fires at tire dumps may release large amounts of acrid smoke and extreme heat. Waste tire fires may also produce airborne emissions including particulate matter, polycyclic aromatic hydrocarbons, and other volatile hydrocarbons. Such emissions make it difficult for fire fighters and their equipment to even approach a fire and put it out.

14. According to U.S. Environmental Protection Agency studies of emissions from simulated open burning of waste tires during high burn rates, more than 50 potentially harmful organic compounds can be identified, most of them aliphatically, olefinically, or acetylenically substituted aromatics.

15. The high temperatures typically present in large-scale tire fires may pyrolyze the tires, which causes them to break down into their constituent parts, including approximately two to three gallons of petroleum per tire. When released, these constituent parts pose a significant threat to the surrounding environment and, in particular, to underlying groundwater and adjacent surface waters.

16. In addition, a wide variety of decomposition products are generated during scrap tire fires, including ash, sulfur compounds, polynuclear aromatic hydrocarbons usually detected in oil runoff, aromatic, napthenic and paraffinic oils, oxides of carbon and nitrogen, particulates and various aromatic hydrocarbons including toluene, xylene and benzene.

17. Fires have occurred at tire facilities in New York and other states. These fires can be catastrophic, resulting in, among other things, large public financial and resource

expenditures to address them, mass evacuations to protect public safety, and oil releases that can detrimentally affect groundwater and surface waters.

DISCUSSION

Nature of the Motion

Department Staff served its motion for order without hearing in lieu of a complaint, and the Respondent failed to respond in writing within 20 days of his receipt of the motion on January 19, 2006. Although his failure to respond in a timely manner would entitle Staff to a default judgment pursuant to 6 NYCRR 622.15, Staff argues that, based upon the facts of this matter, it is also entitled to a judgment on the merits of its claims, and requests that the Commissioner order accordingly. In light of Staff's request, its papers are herein treated, pursuant to 6 NYCRR 622.12, as an unopposed motion for order without hearing.

Standards for Motion for Order Without Hearing

A motion for order without hearing 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." That section also provides that the motion may be granted "in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established."

In this case, there has been no written response to Department Staff's motion, meaning that Staff's is the only evidence that has been filed. 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.

Violations of Consent Order

In its motion for order without hearing, Department Staff alleges that the Respondent violated the September 21, 2004, consent order (1) by not having disposed of all waste tires at the site by September 21, 2005, (2) by not having timely

submitted a report on his removal and disposal activities, and (3) by having more than 1,000 waste tires on the site since at least September 22, 2005.

The 2004 consent order (a copy of which is Attachment 1 to Ms. Bartha's affidavit) demonstrates the Respondent's agreement to remove and properly dispose of all waste tires at the site within a year after the order was executed, and to report those activities to the Department within five days after they were completed. It also confirms an express understanding that if the tires were removed and the proper report was filed with the Department, the Respondent could again accumulate up to 1,000 waste tires taken from motor vehicles brought to the site for dismantling.

The Respondent did not meet his obligations to remove and properly dispose of tires at the site by September 21, 2005, as evidenced by the affidavits of Ms. Bartha and Mr. Vitale, which are attached to the order.

Ms. Bartha's affidavit and accompanying report for a facility inspection she conducted on November 7, 2005, indicate that the cleanup anticipated by the consent order did not occur. She writes in her affidavit that on November 7, 2005, she saw at the site a number of waste tires that appeared to have been newly placed there, and more than 1,000 waste tires, whole as well as shredded, that had been at the site since well before September 21, 2004, based on previous site inspections she had conducted and the Respondent's own admission that he had not completed the waste tire cleanup as required under the consent order.

Also, Ms. Bartha notes in her report that on November 7, 2005, the Respondent had a few men removing the rims from tires in piles that appeared to have been created recently, and that the Respondent told Ms. Bartha he intended to sell the rims for scrap and then use the sale proceeds to dispose of the shredded tire pile. According to Ms. Bartha's report, the Respondent also said that the whole tires on the site, including those that were there on and before September 21, 2005, and those put there since, would not be removed from the site and properly disposed until possibly the summer of 2006.

Not only did the Respondent fail to remove the tires from his site by September 21, 2005, he failed to make the report anticipated under the consent order, which, if it existed, would be some evidence that the removal had occurred. According to the consent order, that report was to have been submitted to David Vitale, an environmental engineer in the Department's Division of

Solid & Hazardous Materials. Mr. Vitale, who works at the Department's central office in Albany, submitted an affidavit of January 10, 2006, as part of Staff's motion. As of that date, Mr. Vitale had not yet received the report, which, had the Respondent met the clean-up deadline in the consent order, would have been due no later than the end of September 2005.

Because the Respondent did not meet the clean-up deadline, he was in violation of the consent order as of September 21, 2005, a violation that continued at least until November 7, 2005, according to Staff's motion papers, and apparently is ongoing, based on Mr. Sullivan's May 17, 2006, letter. The Respondent's failure to submit the report anticipated under the consent order is not a separate violation, because, according to the order's terms, the report was to have been made "[w]ithin five days after Respondent shall have no waste tires on the site." At the time Staff's motion was filed, the Respondent had not fully rid the site of waste tires, so the precondition for submitting the report had not occurred.

The consent order states, "It is expressly understood that after the point is reached at which there are no waste tires on the Site and after Respondent shall have submitted to the Department the report identified in . . . this Order, Respondent may accumulate waste tires taken from motor vehicles brought in for dismantling as part of the ordinary business of the Respondent provided the total number of waste tires at the site remains less than 1,000." This understanding is consistent with 6 NYCRR 360-13.1(b), which provides that no person shall engage in storing more than 1,000 or more tires at a time without first having obtained a permit to do so from the Department. According to Ms. Bartha's report, there were well more than 1,000 waste tires at the site when she inspected it on November 7, 2005. That was a violation of Section 360-13.1(b) because the Respondent lacked a waste tire storage facility permit, but it was not a separate violation of the consent order, since, in this regard, the consent order merely restated what the regulation requires, without imposing a special obligation on the Respondent.

In summary, the Respondent violated the consent order, as the Department alleges, but only by not having disposed of all waste tires at the site by September 21, 2005. Because he has not fully rid the site of waste tires, he has not been obliged to submit the report required under the consent order. Also, his continuing unpermitted storage of more than 1,000 waste tires at the site is a violation of 6 NYCRR 360-13.1(b), but not a

separate violation of the consent order, which merely reflects an understanding of the regulatory requirement.

Regulatory Violations

Apart from the alleged violations of the consent order, Department Staff also alleges that the Respondent, during the period since September 21, 2004, has violated the following regulations:

- - 6 NYCRR 360-1.7(a)(1) and 360-13.1(b), for continuing to operate a waste tire storage facility without the required Department permit; and
- - 6 NYCRR 360-13.3(a), for operating the facility without a Department-approved site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, vector control plan, and operation and maintenance manual.

The permitting violation is demonstrated by the January 12, 2006, affidavit of Ms. Bartha, which states that she conducted a diligent search of the Department's files concerning the site, and found no solid waste management facility permit authorizing operation of the waste tire storage facility. Not only was there no permit, but, according to Ms. Bartha, there was no record of a permit application by the Respondent to construct or operate the facility.

Section 360-1.7(a)(1) establishes the permitting requirement for construction and operation of a solid waste management facility, and Section 360-13.1(b) establishes that same requirement for such a facility used to store 1,000 or more waste tires at a time. The 2004 consent order included an express admission by the Respondent that he had been violating these regulations, and set a schedule under which the Respondent agreed to remove all waste tires from his site by September 21, 2005, and, once that happened, to accumulate no more than 1,000 waste tires in the future. There was no requirement in the order that the Respondent seek a waste tire storage facility permit, presumably because it was understood that, once the site was emptied of tires, he would not again be accumulating enough to need one.

As noted above, Ms. Bartha's site inspection on November 7, 2005, confirmed that there were well over 1,000 waste tires at the site, whole as well as shredded, that had been there since well before September 21, 2004. This demonstrates a violation for the period from September 21, 2005, to the inspection date. Though the Respondent has never had a permit to operate his

facility, a violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) cannot be found for the year leading up to September 21, 2005, because, for that time, the Respondent operated under the authority of the consent order, with the understanding that, at some point before the end of that period, he would remove all the waste tires from the site. [See 6 NYCRR 360-13.1(f)(2), which indicates that a facility storing more than 1,000 waste tires for longer than 60 days is not considered a disposal facility in violation of Part 360 if it is under consent order with the Department.] For the period after September 21, 2005, his failure to remove the more than 1,000 waste tires that were at the site on September 21, 2004, constituted a violation of the Part 360 permitting requirements as well as a violation of the consent order he had signed.

Beyond the permitting violations, the Respondent also violated operational requirements governing waste tire storage facilities where more than 1,000 waste tires are held at a time. According to the Department's regulations, an application for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time must include, among other things, the following:

- - A site plan specifying the waste tire facility's boundaries, utilities, topography and structures [6 NYCRR 360-13.2 (b)];
- - A monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system [6 NYCRR 360-13.2(e)];
- - A closure plan that identifies the steps necessary to close the facility [6 NYCRR 360-13.2(f)];
- - A contingency plan designed to minimize hazards to human health and the environment resulting from fires or releases into the air, onto the soil and into the groundwater [6 NYCRR 360-13.2(h)(1)];
- - A storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the facility [6 NYCRR 360-13.2(i)]; and
- - A vector plan that provides that all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors [6 NYCRR 360-13.2(j)(1)].

The regulations also require that all plans required by the regulations for a facility used to store 1,000 or more waste tires at a time, including the plans referenced above, be incorporated into a final operations and maintenance manual, a copy of which must be maintained and available for reference and inspection at the facility [6 NYCRR 360-13.3(a)].

According to Ms. Bartha's affidavit, her diligent search of the Department's files concerning this site turned up no record of Department approval of any of the above-referenced plans, and also no record of Department approval of an operations and maintenance manual covering the site's activities. The Respondent's operation of the waste tire storage facility without such plans approved by the Department and incorporated into an operations and maintenance manual violates 6 NYCRR 360-13.3(a), one violation for each plan and another for the manual.

Section 360-13.3(a) requires that all activities at a waste tire storage facility subject to Part 360 permitting requirements "must be performed in accordance with the plans required by this Part and approved by the Department." Not only were no plans approved by the Department, no plans were apparently submitted for approval, given Ms. Bartha's statement that she found no record of an application by the Respondent to construct or operate a waste tire storage facility.

The Respondent's continued operation of the facility after September 21, 2005, in the absence of Department-approved plans and an operations and maintenance manual violates 6 NYCRR 360-13.3(a), but only for the period after September 21, 2005, because, as noted above, the facility operated for the preceding year under the authority of the consent order. The Department treats the failures to submit the required plans as violations of operational requirements separate and distinct from the failure to apply for or obtain a waste tire storage facility permit. [See Commissioner's Supplemental Orders in Matter of Wilder, September 27, 2005, and Matter of Hornburg, May 5, 2006, and the accompanying ALJ's hearing reports in both matters.]

Requested Relief

The Department requests a civil penalty of $25,000 to be paid immediately, plus an additional amount equal to the sum of $2 for each 20 pounds of waste tires that the state shall have to manage under ECL Article 27, Title 19. A penalty based in part on the tonnage of waste tires stored at the site cannot be precisely determined until the tires are weighed during removal. However, based on the understanding that 20 pounds is the weight of one tire and there are a few thousand tires at the site, the total penalty could be in the range of close to $30,000 or more.

Such a penalty would be far below the statutory maximum that could be assessed based on continuing violations of the consent order and the Part 360 regulations simply for the period between September 21, 2005, and November 7, 2005, the date of Ms.

Bartha's inspection. ECL 71-2703(1)(a) 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 . . . or any final determination or order of the commissioner made pursuant to this title shall be liable for a civil penalty." Since May 15, 2003, the penalty has been $7,500 per violation and an additional $1,500 for each day during which the violation continues (L2003, ch 62, pt C, Section 25). Any one of the violations demonstrated by the Department, by itself, would in all likelihood support the modest penalty sought by Staff.

Staff's proposed penalty is reasonable and rational, supported by law and the record in this matter, and consistent with the type of relief Staff has requested, and the Commissioner has ordered, in similar matters. The relief is also consistent with the Commissioner's civil penalty policy, which was issued on June 20, 1990 as a guide for developing penalties for violations of the ECL and the Department's regulations.

According to this policy, remedial or abatement actions do not replace the need for civil penalties. Such penalties, the policy states, are needed to deter future violations of the law, by removing any economic benefit for non-compliance, and to reflect the seriousness of violations in relation to both the potential harm and actual damage they cause, and their relative importance in the regulatory scheme.

The $25,000 penalty reflects both the Respondent's disregard of the consent order, under which he was to have rid his site of waste tires, as well as the continuing operation of a waste tire storage facility without the required permit and the plans that would be part of a permit application. The additional penalty of $2 for each 20 pounds of waste tires that the state shall have to manage is an attempt to make the total penalty proportionate to the effort the state must expend to remediate the site. Similar penalty structures have been employed in comparable cases, including Matter of Wilder (Supplemental Order of the Commissioner, September 27, 2005, assessing a penalty of $50,000 plus $2 for each 20 pounds of tires the state shall have to manage), Matter of Parent (Order of the Commissioner, October 5, 2005, also $50,000 plus $2 for each 20 pounds of tires the state shall have to manage), Matter of Hoke (Order of the Commissioner, January 17, 2006, $40,000 plus $2 for each 20 pounds of tires the state shall have to manage), Matter of Bice (Order of the Commissioner, April 19, 2006, $1,000 plus $2 for each 20 pounds of tires the state shall have to manage), and Matter of Hornburg (Supplemental Order of the Deputy Commissioner, May 5, 2006,

$500,000 plus $2 for each 20 pounds of tires the state shall have to manage). As noted in Wilder, 20 pounds is the approximate weight of one tire, and contractors remove tires by weight rather than by count, so that a penalty calculated by weight of tires removed is easier to calculate, not to mention more accurate in approximating the effort involved in site clean-up.

Addressing factors accounted for in the penalty policy, Respondent's failure to come into compliance with Department regulations - - essentially continuing to operate his business in the same manner he had before issuance of the consent order - - has resulted in decided economic benefit to him. As argued by Department Staff, the Respondent continued to generate revenues while avoiding the costs associated with waste tire removal. His accumulation of tires violated permitting requirements as well as a consent order requiring removal of the tire stockpile, and presented a significant potential risk of environmental harm, as noted in my findings of fact. Under the circumstances, Staff's proposed penalty is warranted, even if its charges cannot be fully sustained.

Having violated the consent order, the Respondent is no longer trusted by Department Staff to remove the tires himself. In that regard, all Staff seeks is that the order require the Respondent 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 is required to take over the stockpile's abatement. Such a directive is consistent with ECL 27-1907(2), which provides 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 Section 92-bb.

CONCLUSIONS OF LAW

1. The Respondent, Robert Harris, violated the September 21, 2004, consent order by failing to remove all the waste tires from his automobile dismantling business at 7631 North Gale Road, Westfield, New York, by September 21, 2005.

2. The Respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) by continuing to operate a waste tire storage facility without the required permit from September 21, 2005, until at least November 7, 2005.

3. For the same period, the Respondent violated 6 NYCRR 360-13.3(a) by continuing to operate the facility without a Department-approved site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, vector control plan, and operation and maintenance manual.

4. A civil penalty of $25,000 to be paid immediately, plus an additional amount equal to the sum of $2 for each 20 pounds of waste tires that the state shall have to manage under ECL Article 27, Title 19, is authorized and warranted under the circumstances of this case.

5. Department Staff is also entitled to an order requiring the Respondent to fully cooperate with the state and refrain from any activities that interfere with the state, its employees, contractors, or agents in their abatement of the site's noncompliant waste tire stockpile.

RECOMMENDATIONS

I recommend that the Commissioner:

I. Grant Department Staff's motion for order without hearing to the extent reflected in this report;

II. Determine that the Respondent committed the violations referenced above for the periods specified in this report;

III. Impose the civil penalty recommended by Department Staff; and

IV. Direct the Respondent to fully cooperate with the state and refrain from any activities that interfere with the state, its employees, contractors or agents in their abatement of the site's noncompliant waste tire stockpile.

/s/
Edward Buhrmaster
Administrative Law Judge

Dated: September 13, 2006
Albany, New York