STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located at or on Premises Located at 200 6th Street, Rome, Oneida County, New York, and Owned or Operated

- by -

RICKY J. HOKE,

Respondent.

ORDER

VISTA Index No. CO6-20040806-2

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding as against respondent Ricky J. Hoke ("respondent") to enforce provisions of Environmental Conservation Law ("ECL") article 27 and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360.

The proceeding was commenced pursuant to 6 NYCRR 622.12 by service upon respondent of a December 22, 2004 motion for order without hearing in lieu of notice of hearing and complaint. The motion was mailed to respondent by certified mail on December 23, 2004. Respondent received the motion on December 24, 2004, and service was complete upon such receipt (see 6 NYCRR 622.3[a][3]).

In Department staff's motion, which serves as the complaint in this matter, staff charged that since at least October 22, 2003, respondent has operated a solid waste management facility located at 200 6th Street, Rome, Oneida County, New York (the "site"), without a permit in violation of ECL 27-0703(6), 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b). Staff also charge respondent with various violations of operational requirements established by 6 NYCRR 360-13.2 and 6 NYCRR 360-13.3. As a consequence of the violations alleged, Department staff contended that respondent owns or operates a noncompliant waste tire stockpile, as that term is defined by ECL 27-1901(6).

Department staff extended respondent's time to answer the motion until February 18, 2005. Respondent has nonetheless failed to serve a response to the motion. Although respondent is

technically in default as of February 18, 2005, Department staff does not seek a default judgment. Instead, staff seeks a determination on the merits of its motion for order without hearing.

The matter was assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds, who prepared the attached hearing report dated December 6, 2005. I adopt the Chief ALJ's hearing report as my decision in this matter, subject to my comments herein.

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

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

1. Department staff's motion for order without hearing is granted in part and otherwise denied.

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

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

4. Respondent Ricky J. Hoke has owned and operated a solid waste management facility at the site since at least February 10, 2004.

5. Respondent is determined to have owned and operated a solid waste management facility at the site without a valid permit in continuing violation of ECL 27-0703(6), 6 NYCRR 360-1.7(a)(1), and 6 NYCRR 360-13.1(b) during the period from February 10, 2004 until December 22, 2004, the date of staff's motion.

6. Respondent is determined to have continuously violated

the following regulatory provisions during the period from February 10, 2004 until December 22, 2004:

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

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

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

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

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

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

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

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

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

7. Respondent is determined to have continuously violated the following regulatory provisions during the period from December 9, 2004 to December 22, 2004:

a. Respondent violated 6 NYCRR 360-13.2(i)(7) by failing to receive Department approval to place waste tires in excavations.

b. Respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a waste tire storage facility with an actual capacity of 2,500 or more waste tires without an active hydrant or viable fire pond on the facility.

c. Respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a waste tire storage facility with an actual capacity of 2,500 or more waste tires without fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility.

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

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

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

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

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, and tire chips); and whether or not on tire rims.

2. Starting within thirty (30) days after the date of service of this order, 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 100 tons of waste tires for each seven calendar day period, the first day of the first such period being the first day removal and transportation shall commence. Respondent shall

provide no less than one business day's advance notice to the following individuals of the start of waste tire removal activities:

New York State Department of Environmental Conservation
625 Broadway, 9th floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO6-20040806-2

and

New York State Department of Environmental Conservation
207 Genesee Street
Utica, New York 13501-2885
ATTN: Robert J. Senior, P.E.
Re: VISTA Index No. CO6-20040806-2

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

New York State Department of Environmental Conservation
625 Broadway, 9th floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO6-20040806-2

and

New York State Department of Environmental Conservation
207 Genesee Street
Utica, New York 13501-2885
ATTN: Robert J. Senior, P.E.
Re: VISTA Index No. CO6-20040806-2

(ii). Each such report shall contain the

following information pertaining to each seven calendar-day period and the following certification:

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

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

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

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

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

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

I, Ricky J. Hoke, do hereby certify that I

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

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

III. As requested in article III of staff's request for relief, within 30 days after the date of service of this order upon respondent, respondent shall post with the Department financial security in the amount of $40,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above.

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

V. As requested in article VI of Staff's request for relief, respondent is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $40,000 plus, if respondent fails to comply with any requirement set forth in this order, the sum of $2 for each twenty (20) pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19.

A. No later than 30 days after the date of service of this order upon respondent, respondent shall submit payment of $40,000 to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
RE: VISTA Index No. CO6-20040806-2

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

VI. As requested in article VII of staff's request for relief, respondent is directed to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site, including any and all investigation, prosecution, abatement 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. CO6-20040806-2

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. CO6-20040806-2

and

New York State Department of Environmental Conservation
207 Genesee Street
Utica, New York 13501-2885
ATTN: Robert J. Senior, P.E.

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

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Denise M. Sheehan,
Commissioner

Dated: January 17, 2006
Albany, New York

TO: (via Certified Mail)
Ricky J. Hoke
Hoke Auto Sales
930 Erie Boulevard West
Rome, New York 13440

(via Regular Mail)
Charles E. Sullivan, Jr., Esq.
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 Alleged Noncompliant Waste Tire Stockpile Located at or on Premises Located at 200 6th Street, Rome, Oneida County, New York, and Owned or Operated

- by -

RICKY J. HOKE,

Respondent.

HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING

VISTA Index No. CO6-20040806-2

Appearances:

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

-- No appearance for Ricky J. Hoke, 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 as against respondent Ricky J. Hoke. The motion was served in lieu of notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a). Department staff's motion was dated December 22, 2004, and was served upon respondent by certified mail on December 23, 2004. Respondent received the motion on December 24, 2004. Thus, Department staff obtained personal jurisdiction over respondent upon respondent's receipt of the motion (see 6 NYCRR 622.3[a][3]).

Upon respondent's request, Department staff twice extended respondent's time for answering the motion. The first extension gave respondent until January 21, 2005, and the second extension gave respondent until February 18, 2005 to respond. No response to the motion has been received to date, rendering respondent in default as of February 18, 2005.

Charges Alleged

Department staff alleges that since at least October 22, 2003, respondent has owned or operated a waste tire storage facility located at 200 6th Street, Rome, Oneida County, New York (the "site"). In its motion, Department staff asserts that respondent violated Environmental Conservation Law ("ECL") article 27 and 6 NYCRR part 360. Department staff's specific charges are that since at least October 22, 2003:

A. Respondent has violated ECL 27-0703(6), 6 NYCRR 360-1.7(a)(1), and 6 NYCRR 360-13.1(b) because respondent has never received a solid waste management facility permit to operate the waste tire storage facility on the site;

B. Respondent:

1. violated 6 NYCRR 360-13.3(a) because he operated the site without receiving prior written Departmental approval for placement of waste tires in excavations;

2. violated 6 NYCRR 360-13.3(a) because he has operated the site without any of the following Department-approved plans:

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

ii. a monitoring and inspection plan that addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system;

iii. a closure plan that identifies the steps necessary to close the facility;

iv. a contingency plan;

v. a storage plan that addresses the receipt and handling of all waste tires and solid waste to, and from, the facility; or

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

3. violated 6 NYCRR 360-13.3(a) because he operated the site without a Department approved operation and maintenance manual covering the site's activities;

4. violated 6 NYCRR 360-13.3(c)(4) because he has operated a waste tire storage facility with more than 2,500 tires without an active hydrant or viable fire pond on the facility;

5. violated 6 NYCRR 360-13.3(c)(4) because he has operated a waste tire storage facility with more than 2,500 tires without fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility;

6. violated 6 NYCRR 360-13.3(e)(2) because he has never prepared and filed with the Department quarterly operation reports; and

7. violated 6 NYCRR 360-13.3(e)(3) because he has never prepared and filed with the Department annual reports.

Relief Sought

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

A. Respondent owns or operates the site;

B. The site is a solid waste management facility;

C. Respondent violated the aforementioned provisions of law during the periods of time identified for each such violation; and

D. As a result of the violations, respondent owns or operates a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

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

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

II. Remove all tires from the site in strict compliance with the plan and schedule detailed in the motion, such removal to commence no later than 30 days after the date of

the Commissioner's order;

III. Post with the Department within 30 days of the Commissioner's order financial security in the amount of $40,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II above;

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

V. Pay a penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703, or the sum of $40,000, plus $2 for each waste tire that the State shall have to manage under ECL article 27, title 19, in the event respondent fails to comply with any requirement of the above referenced plan to abate the stockpile;[1]

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 appropriate.

Papers Reviewed

Department staff's motion is pursuant to 6 NYCRR 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together

[1] In Department staff's motion, paragraph V of the requested relief originally sought reimbursement for certain costs associated with the present enforcement action (see Motion, at 5). By letter dated February 24, 2005, Department staff withdrew the request for relief identified in the original paragraph V (see Sullivan Letter [2-24-05]). Accordingly, the original paragraph V will not be considered, and the remaining items of relief have been renumbered for purposes of this report.

with supporting affidavits reciting all the material facts and other available documentary evidence." Accompanying the motion is an attorney brief in support of motion for order without hearing and a service affirmation brief.

Attached as exhibits to the motion are the following:

Exhibit A -- internal Department memorandum from Bruce Robinson, Bureau of Real Property, Region 6, to John Keating and Ed Blackmer, dated December 3, 2004, together with copies of respondent's deed and tax map, and an aerial photograph of respondent's property;

Exhibit B -- affidavit of Robert J. Senior, P.E., Environmental Engineer 2, Division of Solid & Hazardous Materials, Region 6, sworn to on December 16, 2004, with attachment "1," Tire Facility Inspection Report, December 9, 2004, with photographs of site; attachment "2," Site Photographs dated October 2003 and October 2004; attachment "3," ECAT 232745 and Rome City Court Certificate of Conviction; attachment "4," Waste Tire Fires Occurring in New York State Since 1989; and attachment "5," Noncompliant Waste Tire Stockpile Abatement Plan;

Exhibit C -- excerpt from Final Environmental Impact Statement for Revisions/Enhancements to 6 NYCRR Part 360 Solid Waste Management Facilities, dated May 1993;

Exhibit D -- registration form for a Solid Waste Management Facility, dated April 27, 2004 by Ricky J. Hoke, together with letter from Robert J. Senior, P.E. to respondent dated May 5, 2004;

Exhibit E -- letter from John Kenna, P.E. to John F. Klucsik, dated October 12, 2001, together with letter from Mark J. Hans, P.E. to Kenneth P. Smith, dated January 9, 2003, and letter from Daniel L. Steenberge, P.E., to Willy Grimmke, P.E., dated June 10, 2004;

Exhibit F -- letter from Ricky J. Hoke to recipient, dated September 26, 1990, together with letter from Norman H. Nosenchuck, P.E. to Ricky J. Hoke, dated November 25, 1991; and

Exhibit G -- news article, Tire Plans Raise Concerns, by R. Patrick Corbett; news article, Neighbors Opposed to Tire Compacting Project, by Steve Jones; and news article, Tire Recycling Plant Approved, with Restrictions.

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 December 9, 2003, respondent Richard J. Hoke acquired title to the subject parcel located at 200 6th Street, Rome, Oneida County, New York. The parcel is identified as Oneida County, City of Rome Tax Map parcel no. 243.013-1-1.4.

2. The site presently contains an estimated 21,700 waste tires in tight bales. These estimates were made by Robert J. Senior, P.E., Environmental Engineer 2, Division of Solid & Hazardous Materials, Region 6, based on his inspection of the facility on December 9, 2004.

3. Approximately 11,700 of the waste tires are partially buried below grade in a trench along 6th Street, immediately next to the site's fence. The site has two rows of buried waste tire bales and a third row was in the process of being buried as of December 9, 2004. The tire filled trench is located within 50 feet of the property boundary. The tires that are not buried are stacked in a field on the site.

4. The tires are "well-worn" in appearance with no apparent care taken to preserve their value as tires. The tires are uncovered, completely exposed to the elements, and tightly baled.

5. Since October 22, 2003, no active hydrant or viable fire pond is located on the facility. Also since October 22, 2003, no fully charged large capacity carbon dioxide or dry chemical fire extinguishers are located in strategically placed enclosures throughout the entire facility.

6. On February 10, 2004, a Department Environmental Conservation Officer ("ECO") issued respondent a ticket charging him with a violation of 6 NYCRR 360-13.1(b) -- storing in excess of 1,000 waste tires without a permit. On June 30, 2004, in Rome City Court, respondent was convicted for the offense. Respondent was sentenced to discharge on the conditions that state licensing be secured by October 1, 2004, that if licensing was not secured that the tires be disposed of, except for less than 1,000, and that no tires be buried on the property.

7. On April 27, 2004, respondent, as the facility owner, filed a request for registration for a solid waste management facility on the site. By letter dated May 5, 2004, the

Department informed respondent that the facility did not qualify for a manufacturing exemption pursuant to 6 NYCRR 360-12.1(b)(2). Instead, the Department informed respondent that the facility required a waste tire storage facility permit and a beneficial use determination for the baled tires. The Department also noted that the facility was presently in violation of the section 360-13.1(b) permit requirement.

8. During the December 9, 2004 inspection, respondent stated to the Department inspector, Robert J. Senior, P.E., that he planned to bury the waste tires along 6th Street and build a parking lot over the waste tires. He also told the inspector that be did not intend to pursue a Part 360 solid waste management facility permit.

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

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

DISCUSSION

Nature of the Motion

Department staff served its motion for an order without hearing in lieu of complaint, and respondent has failed to file a timely answer or otherwise appear in response to the motion (see 6 NYCRR 622.12[a]). Department staff notes that respondent's failure to answer would entitle Department staff to a default judgment pursuant to 6 NYCRR 622.15. Nevertheless, Department staff believes that, based upon the facts of this matter, it is entitled to judgment on the merits as a matter of law and requests a Commissioner's order accordingly. Thus, this

motion will be treated as an unopposed motion for an order without hearing pursuant to 6 NYCRR 622.12.

Standards for Motion for Order without Hearing

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

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

In this case, respondent failed to submit any response to Department staff's motion. Accordingly, once it is concluded that staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department staff's motion may be granted.

Discussion of Facts

My findings of fact are based upon observations made during inspections conducted by Department staff on October 22, 2003, and December 9, 2004. They are also based upon the photographic evidence and other public records of the Department submitted with staff's motion.

With respect to the number of tires on the site, February 10, 2004 is the earliest date it can be determined that 1,000 or more tires were stored on the site. That is the date that the ECO observed 1,000 or more tires at the site, as evidenced by the ticket issued to respondent.

The existence of 1,000 or more tires at the site on February 10, 2004, is further supported by respondent's conviction in the Rome City Court proceeding in 2004. Necessary to that conviction was the determination by the Rome City Court that respondent stored 1,000 or more tires at the site (see 6 NYCRR 360-13.1[b]). Because respondent was only charged with a violation (as compared to a misdemeanor), respondent's conviction for the violation charged does not have conclusive effect under the doctrine of collateral estoppel in these proceedings (see Gilberg v Barbieri, 53 NY2d 285, 294 [1981]). Nevertheless, the conviction for the violation is evidence supporting staff's prima facie case that respondent could seek to rebut (see id.). By failing to oppose staff's motion for order without hearing, however, respondent has foregone the opportunity to litigate the issue.

With respect to the number of tires on the site prior to February 10, 2004, no evidence is supplied with the motion upon which a finding may be based. Although Mr. Senior indicates in his affidavit that he inspected the site in October 2003, he did not provide an estimate of the number of tires observed during that inspection. The earliest date Mr. Senior provides an estimate is December 9, 2004, when he observed approximately 21,700 tires in tight bales. Accordingly, Department staff fails to make a prima facie showing concerning the number of tires on the site prior to February 10, 2004.

Solid Waste Management Facility

Department staff alleges that the subject site is a solid waste management facility pursuant to 6 NYCRR 360-1.2(b)(158). Under the Department's regulations, "solid waste management facilities" means "any facility employed beyond the initial solid waste collection process and managing solid waste,

including but not limited to . . . waste tire storage facilities" (6 NYCRR 360-1.2[b][158]). "Waste tires" are defined as "any solid waste which consists of whole tires or portions of tires" (6 NYCRR 360-1.2[b][183]). "Solid waste" is defined, among other things, as "discarded materials," which, in turn, is defined as material that is "abandoned by being . . . accumulated [or] stored . . . instead of or before being disposed of" (6 NYCRR 360-1.2[a][1], [2]).

Discarded used tires are still "waste tires" and, therefore, subject to regulation, even if they are baled. As explained by the Department in the final environmental impact statement accompanying the 1993 amendments to the Part 360 regulations, "[c]ompacted, baled, shredded or chipped waste tires are still subject to the requirements of Subpart 360-13 when 1,000 or more waste tires are stored. There is no storage exemption based on such processing operations" (Final Environmental Impact Statement for Revisions/Enhancements to 6 NYCRR Part 360 Solid Waste Management Facilities, May 1993, at RS 13-1).

The baled used tires on the site constitute "waste tires" as that term is defined under the regulations in effect during all times relevant to this proceeding. Since at least February 10, 2004, more than 1,000 waste tires have been and are being stored on the site and, thus, the site constitutes a waste tire storage facility (see 6 NYCRR 360-13.1[b], [f]). Accordingly, Department staff has made a prima facie showing that since at least February 10, 2004, the site constitutes a solid waste management facility under Part 360.

Department staff's prima facie showing is further supported by respondent's conviction in the Rome City Court proceeding in 2004. Necessary to that conviction was the determination by the Rome City Court that the 1,000 or more tires respondent stored at the site were waste tires (see 6 NYCRR 360-13.1[b]). As noted above, although respondent's conviction for the criminal violation charged does not have conclusive effect under the doctrine of collateral estoppel in these proceedings, the conviction is evidence supporting staff's prima facie case (see Gilberg, 53 NY2d at 294).

Owner and Operator

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

respondent's ownership since December 9, 2003, of the underlying parcel upon which the facility is located (see Matter of Radesi, ALJ's Hearing Report, at 8, concurred in by Commissioner's Decision and Order, March 9, 1994). Respondent's ownership of the facility is also established by respondent's statements included in the April 27, 2004 registration form he filed with the Department. Staff's prima facie showing is further supported by respondent's conviction in 2004 on the charge of violating 6 NYCRR 360-13.1(b) (see Gilberg, supra). Respondent's ownership or operation of the facility was a necessary element of the 2004 conviction.

Respondent's status as operator of the facility is also supported by the statements he made to the Department's inspector on December 9, 2004. Those statements indicate that respondent was the person responsible for the overall operation of the facility with the authority and knowledge to make and implement decisions concerning the facility (see 6 NYCRR 360-1.2[b][113] [definition of operator]). Thus, Department staff has made a prima facie showing that respondent has owned and operated the subject facility, which has been in existence since at least February 10, 2004, as determined above.

Department staff also alleges that respondent has operated an illegal solid waste management facility at the site since at least October 22, 2003. No evidence was submitted with the Department's motion that is sufficient to support that allegation, however. Although Mr. Senior states in his affidavit the legal conclusion that respondent "operated" an "illegal waste tire storage facility" since at least October 2003, the factual basis for this legal conclusion is not provided on the motion (see Senior Affidavit, Motion, Exhibit B, at 1). As noted above, the number of waste tires on the site cannot be determined for the period before February 10, 2004. Thus, Department staff has failed to make a prima facie showing that respondent operated a waste tire storage facility containing 1,000 or more waste tires on the site prior to February 10, 2004.

Liability for Violations Charged

1. Operating Without a Permit

Department staff alleged that since at least October 22, 2003, respondent has been operating a solid waste management facility without a permit in violation of ECL 27-0703(6) and 6 NYCRR 360-1.7(a)(1), and has been operating a waste tire storage facility without a permit in violation of 6 NYCRR 360-13.1(b).

ECL 27-0703(6) provides that “the owner or operator of a solid waste management facility engaged in the storage of one thousand or more waste 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 and dispose of or treat them in a lawful manner pursuant to a removal plan approved by the department.”

Section 360-1.7(a)(1) of 6 NYCRR provides that "no person shall . . . construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to" Part 360. Section 360-13.1(b) specifically provides that "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to" Part 360.

The evidence submitted in support of this motion reveals that respondent has failed to obtain a Part 360 permit to operate the waste tire storage facility on the site. The evidence also establishes that since at least February 10, 2004, at least 1,000 waste tires have been stored at the facility. Thus, Department staff has established that from February 10, 2004 to the date of the motion, respondent violated the statutory and regulatory requirements that he obtain a Part 360 permit.

Although respondent has technically violated three separate provisions -- ECL 27-0703(6), 6 NYCRR 360-1.7(a)(1), and 6 NYCRR 360-13.1(b) -- those three provisions presumptively constitute a single, continuous violation for penalty assessment purposes (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ Hearing Report, at 9-12; Matter of Steck, Commissioner’s Order, March 29, 1993, at 5).

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

Department staff alleges that respondent has violated twelve separate operational requirements applicable to all waste tire storage facilities subject to the permitting requirements of Subpart 360-13 (see Charges B.1-B.7, above). Staff alleges that respondent has been in violation of the operational requirements since at least October 22, 2003, the date of the site inspection during which the alleged operational violations were first noted by Department staff. For the reasons that follow, the following violations staff allege are established as a matter of law.

a. Section 360-13.2(i)(7) -- Placement of Tires in Excavations

Department staff alleges that respondent has operated the facility without obtaining prior written Department approval for placement of waste tires in excavations as required by 6 NYCRR 360-13.2(i)(7). Section 360-13.2(i)(7) provides that "[w]aste tire piles may not be located in excavations or below grade without prior written approval by the department."

The record establishes that respondent has never received Departmental permission to place waste tires in excavations. The record further establishes that tires have been placed in excavations since at least December 9, 2004. Thus, a violation of section 360-13.2(i)(7) is established, beginning on December 9, 2004 and continuing to the date of the motion.

Rather than plead this violation as a violation of section 360-13.2(i)(7), however, Department staff pleaded this charge as a violation of section 360-13.3(a). Because section 360-13.2(i)(7) establishes a mandatory, objective standard, that section itself imposes an operational requirement applicable to waste tire facilities that can be separately violated (see Matter of Wilder, Supplemental Order, adopting ALJ Hearing Report, at 5-6). Thus, it was unnecessary for staff to plead the section 360-13.2(i)(7) violation as a section 360-13.3(a) violation. To the extent the pleadings must be conformed to the proof, such an amendment is granted (see id. at 3-4).

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

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

The evidence submitted by staff on its motion shows that since at least February 10, 2004, respondent owned or operated a waste tire storage facility used to store more than

1,000 tires at a time without any of the required plans. Thus, the violations of section 360-13.3(a) alleged in Charges B.2(i) through (vi) are established. Moreover, six separate violations are presumptively established, one for each of the plans required but not obtained by respondent.

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

Section 360-13.3(a) provides "all waste tire storage facilities subject to the permitting requirements of this Part must comply with the following operational requirements: Operation and maintenance manual." The record establishes that respondent has failed to submit an operation and maintenance manual to the Department for approval. Moreover, respondent's facility has been subject to the permitting requirements of Part 360 since at least February 10, 2004. Thus, the alleged violation of section 360-13.3(a) is established beginning February 10, 2004 and continuing until the date of staff's motion.

d. Section 360-13.3(c)(4) -- Active Hydrant or Viable Fire Pond

Section 360-13.3(c)(4) requires that "waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, an active hydrant or viable fire pond on the facility." The record reveals that respondent's waste tire storage facility has an actual capacity in excess of 2,500 waste tires. The evidence also establishes that no active hydrant or viable fire pond exists on the facility.

The Department alleges that these conditions have existed since October 22, 2003. However, nothing in the record establishes that 2,500 or more waste tires were stored at the facility on October 22, 2003. The earliest evidence of the storage of over 2,500 waste tires on the property is that provided by the December 9, 2004 inspection. At that time, an estimated 21,700 waste tires were stored on the site. Thus, the alleged violation of section 360-13.3(c)(4) is established, beginning on December 9, 2004, and continuing until the date of staff's motion.

e. Section 360-13.3(c)(4) -- Fire Extinguishers

Section 360-13.3(c)(4) also requires that "waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, . . . fully charged large

capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility in quantities as deemed necessary in the contingency plan or other fire protection and prevention equipment as approved by the local fire marshal." As noted above, the record reveals that respondent's site has contained at least 2,500 waste tire since December 9, 2004. Moreover, the record reveals that no fire extinguishers or other fire protection and prevention equipment are located at the facility. Thus, the alleged violation of section 360-13.3(c)(4) is established, beginning December 9, 2004, and continuing to the date of staff's motion.

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

Section 360-13.3(e)(2) requires that the owner or operator of a waste tire storage facility must file quarterly operation reports with the Department. The record establishes that since at least February 10, 2004, respondent owned or operated a waste tire storage facility with 1,000 or more waste tires without filing any quarterly operation reports. Thus, the alleged violation of section 360-13.3(e)(2) is established.

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

Section 360-13.3(e)(3) requires that the owner or operator of a waste tire storage facility must file annual reports with the Department. The record establishes that since at least February 10, 2004, respondent owned or operated a waste tire storage facility with 1,000 or more waste tires without filing any annual reports. Thus, the alleged violation of section 360-13.3(e)(3) is established.

3. Operation of a Noncompliant Waste Tire Stockpile

Department staff seeks a determination that respondent owns or operates a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6). ECL 27-1901(6), which was adopted effective September 12, 2003 (see L 2003, ch 62, pt V1, § 7), defines "noncompliant waste tire stockpile" as:

> "a facility, including a waste tire storage facility, parcel of property, or site so designated by the department in accordance with this title, where one thousand or more waste tires or mechanically processed waste tires have been accumulated, stored or buried in a manner that the department . . . has

> determined violates any judicial administrative order, decree, law, regulation, or permit or stipulation relating to waste tires, waste tire storage facilities or solid waste."

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

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

Penalty and Other Relief Requested

Department staff seeks an order of the Commissioner directing respondent to immediately stop allowing any waste tires onto the site (see Relief Sought ¶ I, above). ECL 71-2703(1)(a) provides that any person who violates any provision of, or who fails to perform any duty imposed by, ECL article 27, title 7, or any rule or regulations promulgated pursuant thereto may be enjoined from continuing such violation. Respondent's ownership 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 by 6 NYCRR subpart 360-13 also constitutes a violation of the regulations promulgated pursuant to ECL article 27, title 7. Thus, staff is entitled to an order enjoining respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

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

2004, adopting ALJ Ruling/Hearing Report, at 17-18; Matter of Wilder, Supplemental Order, adopting ALJ Hearing Report, at 18-19). Thus, staff is entitled to the relief sought.

Department staff also requests that respondent be required to post with the Department financial security in the amount of $40,000 to secure strict and faithful performance of each of respondent's remedial obligations (see Relief Sought ¶ III, above). The Commissioner has the inherent authority under the ECL to require the posting of financial security to ensure compliance with remedial obligations imposed in a Commissioner's order (see Matter of Wilder, Supplemental Order, adopting ALJ Hearing Report, at 17-18; Matter of Radesi, Commissioner's Decision and Order, March 9, 1994; see also State v Barone, 74 NY2d 332, 336-337 [1989]). Accordingly, I recommend that the Commissioner grant the relief staff seeks in article III of its motion.

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

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

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

In this case, I recommend that the Acting Commissioner assess a penalty using the penalty-assessment formula established in Matter of Wilder. For the minimum penalty, I recommend that $40,000 be imposed based upon, among other things, respondent's lack of cooperation with the Department and his history of non-compliance (see DEC Civil Penalty Policy, DEE-1, June 20, 1990, at IV.E[2], [3]). The record establishes that respondent was aware of his obligations under the ECL and its implementing regulations, but failed to bring his facility into compliance. The record also establishes respondent's disregard for a court order directing him to bring his facility into compliance with the law. Moreover, even if the Department were forced to manage every tire estimated to be on the property, the maximum penalty would amount to $83,400 (21,700 tires times $2/tire plus $40,000). This amount falls below the maximum penalty that could be authorized under ECL 71-2703.

CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

1. The baled used tires on the subject site constitute "waste tires" as that term is defined under the ECL.

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

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

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

5. Since at least February 10, 2004, respondent has owned and operated a solid waste management facility at the site.

6. Since at least February 10, 2004 to December 22, 2004, the date of staff's motion, respondent violated ECL 27-0703(6), 6 NYCRR 360-1.7(a)(1) and 6 NYCRR 360-13.1(b) because he owned and operation a solid waste management facility at the site without a permit from the Department authorizing the operation of the waste tire storage facility on the site.

7. Since at least December 9, 2004, to December 22, 2004,

respondent violated 6 NYCRR 360-13.2(i)(7) because he failed to receive prior written Department approval for placing waste tires in excavations.

8. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved site plan, as required by 6 NYCRR 360-13.2(b).

9. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e).

10. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved closure plan, as required by 6 NYCRR 360-13.2(f).

11. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved contingency plan, as required by 6 NYCRR 360-13.2(h).

12. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved storage plan, as required by 6 NYCRR 360-13.2(i).

13. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved vector control plan, as required by 6 NYCRR 360-13.2(j).

14. Since at least February 10, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(a) because he owned or operated a waste tire storage facility without a Department approved operation and maintenance manual.

15. Since at least December 9, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a waste tire storage facility with an actual capacity of 2,500 or more waste tires that does not have an active hydrant or viable fire pond on the facility.

16. Since at least December 9, 2004, to December 22, 2004, respondent violated 6 NYCRR 360-13.3(c)(4) because he operated a

waste tire storage facility with an actual capacity of 2,500 or more waste tires that does not have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility.

17. Since at least February 10, 2004, respondent violated 6 NYCRR 360-13.3(e)(2) by failing to file quarterly operation reports with the Department.

18. Since at least February 10, 2004, respondent violated 6 NYCRR 360-13.3(e)(3) by failing to file annual reports with the Department.

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

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

RECOMMENDATIONS

I recommend that the Commissioner:

I. Grant in part and otherwise deny Department staff’s motion for an order without hearing;

II. Determine that respondent committed the violations referenced above during the time periods specified;

III. Impose the civil penalty recommended above; and

IV. Impose the abatement measures requested by Department staff.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 6, 2005
Albany, New York