STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Noncompliant Waste Tire Stockpile Located on Route 60, Sinclairville, New York, and Owned by,

ORDER

Beverly R. Hornburg,

Respondent.

VISTA Index No. CO9-20040309-42

This proceeding to enforce provisions of Environmental Conservation Law ("ECL") article 27 and of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360 was commenced by Department Staff ("Staff") by the personal service on respondent Beverly R. Hornburg of a motion for order without hearing pursuant to 6 NYCRR 622.12 on June 5, 2004.

According to the affirmation of Charles E. Sullivan, Jr., Esq., Staff attorney, dated June 30, 2004 and submitted in support of the motion, respondent had until June 24, 2004 in which to respond to Staff's motion and she has failed to do so and is now in default.

Staff charged respondent with operating a solid waste management facility on Route 60, Sinclairville, Chautauqua County, DEC Region 9 (the "site"), without a permit in violation of 6 NYCRR former 360.2 from August 26, 1981, to August 7, 1989, and operating a waste tire storage facility at the site without a permit in violation of 6 NYCRR 360-13.1 from August 7, 1989 to May 27, 2004. Staff also charged respondent with various violations of 6 NYCRR 360-13.2 ("additional application requirements for an initial permit to construct and operate"), and of 6 NYCRR 360-13.3 ("operational requirements").

Staff's motion, including the affidavits of Steven Maley, Mark J. Hans, Paul D. Martin and Thomas C. Hetherington in support of the motion, establishes that respondent Beverly R. Hornburg has been the owner or operator of a non-compliant waste tire stockpile within the meaning of ECL 27-1901(6). Department Staff's motion also establishes that respondent operated a solid waste management facility without a permit required by 6 NYCRR former 360.2 from August 26, 1981 until August 7, 1989, and owned

or operated a waste tire storage facility without a permit in violation of 6 NYCRR 360-13.1 from August 7, 1989 to May 27, 2004, the date of the motion.

Department Staff has also demonstrated that between December 31, 1988, and May 27, 2004, respondent continuously violated eight separate operational requirements of 6 NYCRR 360-13.3, as set forth and described in Staff's motion and herein.

Although it is customary for orders of the Commissioner to be issued at the conclusion of a proceeding, Staff makes an adequate showing that exigent circumstances exist and, therefore, an expedited, partial determination of Staff's motion is justified.

I adopt the findings of fact and conclusions of law, together with the written discussion in support set forth in the ruling/hearing report of Chief Administrative Law Judge ("CALJ") James T. McClymonds dated August 24, 2004 and I conclude that at this point Staff is entitled to some but not all of the relief requested. The matters upon which the CALJ reserved decision are not presently before me, and I reserve decision on those issues.

THEREFORE, having considered this matter, it is ORDERED that:

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

2. Respondent is determined to have operated a solid waste management facility without a valid permit in continuing violation of 6 NYCRR former 360.2 from August 26, 1981 to August 7, 1989.

3. Respondent is determined to have operated a waste tire storage facility without a permit in continuing violation of 6 NYCRR 360-13.1 from August 7, 1989 to May 27, 2004, the date of Staff's motion for order without hearing.

4. Respondent is determined to have continuously violated the following operational requirements provided for in 6 NYCRR 360-13.3 during the time period from December 31, 1988 to May 27, 2004:

> a. Respondent failed to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment in violation of 6 NYCRR 360-

13.3(c)(1).

b. Respondent operated a waste tire storage facility having more than 2,500 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, in violation of 6 NYCRR 360-13.3(c)(4).

c. Respondent operated a waste tire storage facility having more than 2,500 tires that does not have an active hydrant or viable fire pond on the facility, in violation of 6 NYCRR 360-13.3(c)(4).

d. Respondent failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment, in violation of 6 NYCRR 360-13.3(c)(5).

e. Respondent failed to eliminate potential ignition sources within the tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6).

f. Respondent operated a waste tire storage facility having more than 2,500 tires that is not enclosed by a 6-foot high chain link fence or equivalent structure, in violation of 6 NYCRR 360-13.3(d)(2).

g. Respondent never prepared and filed quarterly operation reports with the Department, in violation of 6 NYCRR 360-13.3(e)(2).

h. Respondent never prepared and filed annual reports with the Department, in violation of 6 NYCRR 360-13.3(e)(3).

5. As a result of the above violations, respondent is determined to have owned and presently operates a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6).

6. Staff's prayer for relief as set forth in articles I, II, IV and VII of Staff's motion for order without hearing dated May 27, 2004 is granted in part as follows and it is hereby ordered that:

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

acceptance, sufferance, authorization, deposit, or storage.

II. As requested in article II of Staff's prayer for relief, it is hereby ordered:

A. In accordance with the requirements of this Paragraph II, respondent shall cause all waste tires to be removed from the site in the following manner and schedule:

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

2. Starting within thirty (30) days after the date 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 400 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. CO9-20040309-42

and

New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.
Re: VISTA Index No. CO9-20040309-42

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 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. CO9-20040309-42

and

New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.
Re: VISTA Index No. CO9-20040309-42

(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 five 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	that vehicle's weight in pounds before loading it with waste tires	that vehicle's weight in pounds after loading it with waste tires and immediately before it goes off site	weight of the waste tires in that vehicle's load (*viz.*, third column, less second column) in pounds	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, Beverly R. Hornburg, 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 IV of Staff's prayer 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.

IV. As requested in article VII of Staff's prayer 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.

V. All communications between respondent and 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. CO9-20040309-42

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. CO9-20040309-42

and

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270 Michigan Avenue
Buffalo, New York 14203-2999
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Re: VISTA Index No. CO9-20040309-42

VI. Decision is reserved with respect to other items of relief requested by Staff and not expressly granted hereby, including the assessment of any penalty.

VII. The provisions, terms and conditions of this order shall bind respondent and her heirs and assigns.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Erin M. Crotty, Commissioner

Dated: August 26, 2004
Albany, New York

TO: Beverly R. Hornburg
2842 Gerry Ellington Road
Gerry, New York 14740

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 Noncompliant Waste Tire Stockpile Located on Route 60, Sinclairville, New York, and Owned by,

BEVERLY R. HORNBURG,

Respondent.

RULING/HEARING REPORT ON MOTION MOTION FOR ORDER WITHOUT HEARING

VISTA Index No. CO9-200040309-42

Appearances:

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

-- No appearance for Beverly R. Hornburg, 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 Beverly R. Hornburg. 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 May 27, 2004, and was personally served upon respondent on June 4, 2004. Thus, Department staff obtained personal jurisdiction over respondent. No response from respondent has been received to date, rendering her in default as of June 24, 2004.

Charges Alleged

Department staff alleges that since at least August 26, 1981, respondent has owned or operated a waste tire storage facility containing more than 2,500 tires located on Route 60, Sinclairville, 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:

1. Respondent violated 6 NYCRR 360-1.7(a)(1) because, since at least August 26, 1981, respondent never applied for or received a permit from the Department to "construct or operate a solid waste management facility;"

2. Respondent violated 6 NYCRR 360-13.1 because, since at least August 7, 1989, respondent never applied for or received a solid waste management facility permit from the Department to operate the waste tire storage facility on the site;

3. Respondent violated 6 NYCRR 360-13.2(h) because respondent never submitted a contingency plan detailing measures to be undertaken in the event of a fire emergency;

4. Respondent violated 6 NYCRR 360-13.2(h)(6) because respondent never complied with National Fire Protection Association "Standards for Storage of Rubber Tires," NFPA 231D, 1989 edition, Appendix C ("Guidelines for Outdoor Storage of Scrap Tires") ("NFPA 231D "), Provision C-3.2.1(a), which requires fire lanes to separate piles of tires for access for firefighting operations, by failing to provide access lanes;

5. Respondent violated 6 NYCRR 360-13.2(h)(6) because respondent never complied with NFPA 231D, Provision C-3.2.1(c), which requires an effective fire prevention maintenance program including control of weeds, grass and other combustible materials in the storage area, by storing piles in close proximity to natural cover and trees;

6. Respondent violated 6 NYCRR 360-13.2(h)(6) because respondent never complied with NFPA 231D, Provision C-4.2.5, which requires a distance of 50 feet or more between storage and grass, weeds and brush, by locating the tire piles at the site within 50 feet of grass, weeds and bushes;

7. Respondent violated the following provisions of 6 NYCRR 360-13.2 by failing to submit, since December 31, 1988, any of the following:

(A) A site plan specifying the site's boundaries, utilities, topography and structures, as required by 6 NYCRR 360-13.2(b);

(B) A monitoring and inspection plan addressing readiness of fire-fighting equipment and integrity of security systems, as required by 6 NYCRR 360-13.2(e);

(C) A closure plan identifying the steps necessary to close the facility, as requiredby 6 NYCRR 360-13.2(f);

(D) A contingency plan, as required by 6 NYCRR 360-13.2(h);
(E) A storage plan addressing receipt and handling of all waste tires and solid waste to and from the facility, as required by 6 NYCRR 360-13.2(i); and
(F) A vector control plan providing that all waste tires will be maintained in a manner which limits mosquito breeding potential and other vectors, as required by 6 NYCRR 360-13.2(j);

8. Respondent violated 6 NYCRR 360-13.2(i)(4) because respondent failed to maintain waste tire piles with no less than 50-feet separation distance between piles, and buildings and other structures;

9. Respondent violated 6 NYCRR 360-13.2(i)(4) because respondent failed to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times;

10. Respondent violated 6 NYCRR 360-13.2(i)(4) because respondent failed to maintain 50-foot separation areas in such a manner that emergency vehicles will have adequate access;

11. Respondent violated 6 NYCRR 360-13.2(i)(5) because respondent failed to maintain the number of tires at or below the quantity for which it is permitted;

12. Respondent violated 6 NYCRR 360-13.2(i)(3) because respondent failed to maintain waste tire piles at 50 feet or less in width;

13. Respondent violated 6 NYCRR 360-13.2(i)(3) because respondent failed to maintain waste tire piles at 10,000 square feet, or less, of surface area;

14. Respondent violated 6 NYCRR 360-13.2(i)(7) because respondent never received prior written Department approval to locate waste tires in excavations or below grade;

15. Respondent violated 6 NYCRR 360-13.3(c)(1) because respondent failed to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment;

16. Respondent violated 6 NYCRR 360-13.3(c)(4) because respondent owned or operated a waste tire facility having more

than 2,500 tires that does not have a fully charged large capacity carbon dioxide or dry chemical fire extinguisher located in strategically placed enclosures throughout the entire facility;

17. Respondent violated 6 NYCRR 360-13.3(c)(4) because respondent owned or operated a waste tire facility having more than 2,500 tires that does not have an active hydrant or viable fire pond on the facility;

18. Respondent violated 6 NYCRR 360-13.3(c)(5) because respondent failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment;

19. Respondent violated 6 NYCRR 360-13.3(c)(6) because respondent failed to eliminate potential ignition sources within the tire storage areas;

20. Respondent violated 6 NYCRR 360-13.3(d)(2) because respondent owned or operated a waste tire storage facility having more than 2,500 tires that does not have the site enclosed, at a minimum, in a six-foot chain link fence or equivalent structure;

21. Respondent violated 6 NYCRR 360-13.3(e)(2) because respondent never prepared or filed with the Department quarterly operation reports; and

22. Respondent violated 6 NYCRR 360-13.3(e)(3) because respondent never prepared or filed with the Department annual reports.

Relief Sought

Department staff maintains that no material issue of fact exists 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 owned the site in the past when the waste tires were first accumulated, and now 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 described in the motion, respondent has owned and presently 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 accordance with the plan and schedule detailed in the motion;

III. Post with the Department within 30 days of the Commissioner's decision and order financial security in the amount of $5.25 million in accordance with 6 NYCRR 360-1.12 and 360-13.2(g), and ECL 27-0703(6) to secure the strict and faithful performance of respondent's remediation and abatement obligations;

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

V. Reimburse the State for the costs associated with prosecution of this enforcement action, and any costs associated with overseeing the abatement of the waste tires in issue and with the State's assumption of the responsibility to implement the waste tire abatement plan should respondent fail to strictly comply with the abatement plan referred to above, such costs payable within 30 days after notification by the State;

VI. Pay a penalty determined to be the lesser of the maximum civil penalty authorized by ECL 71-2703; or the sum of $500,000, plus $2 for each waste tire that the State has to manage pursuant to ECL article 27, title 19, in the event respondent fails to comply with any requirement of the above referenced plan to abate the stockpile;

VII. 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, 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

VIII. Undertake any other and further actions determined to be appropriate.

Papers Reviewed

Department staff's motion is pursuant to 6 NYCRR 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." Accompanying the motion is an attorney brief in support of motion for order without hearing. Attached as exhibits to the motion are affidavits by Steven Maley, Assistant Land Surveyor II, Department Region 9 ("Exhibit A"); Mark J. Hans, P.E., Environmental Engineer III, Division of Solid & Hazardous Materials, Department Region 9 ("Exhibit F"); Kevin R. Hintz, Senior Sanitary Engineer, Bureau of Hazardous and Solid Waste ("Exhibit G"); Robert Mitrey, Regional Solid Waste Engineer, Bureau of Hazardous and Solid Waste ("Exhibit H"); David H. Hornburg, deceased husband of respondent ("Exhibit I"); Thomas C. Hetherington, Fire Protection Specialist in the Office of Fire Prevention and Control, New York State Department of State ("Exhibit Y"); and Paul D. Martin, Deputy Chief of the Fire Prevention Bureau, New York State Office of Fire Prevention and Control ("Exhibit Z").

Also attached to the motion are the May 9, 1986 Findings of Fact, Conclusions of Law and Order issued in State of New York v David and Beverly Hornburg, d/b/a H&H Tires Service, Inc. (Sup Ct, Chautauqua County, Adams, J., Index No. G2525) ("Exhibit B"); the September 15, 1986 Order and Judgment in the same proceeding ("Exhibit L"); and respondent's verified notice of intention to file a claim served in Matter of Beverly R. Hornburg, Individually and d/b/a H&H Tire v State of New York (Court of Claims, July 14, 1995); respondent's verified notice of claim against Chautauqua County and others (Matter of Beverly R. Hornburg, Individually and d/b/a H&H Tire v County of Chautauqua, Sup Ct, Chautauqua County, July 14, 1995); and respondent's verified notice of claim against the Sinclairville Fire Department and Town of Charlotte (Matter of Beverly R. Hornburg, Individually and d/b/a H&H Tire v Sinclairville Fire Dept., Sup Ct, Chautauqua County, July 28, 1995) (all three in "Exhibit E").

Additional exhibits include ground and aerial

photographs of the site taken between 1988 and 2004 ("Exhibit C" and "Exhibit D"); letters from Gerald F. Mikol to Laurie L. Militello ("Exhibit J"); and from Lydia Romer, Chief Clerk, Chautauqua County Surrogate's Court, to Charles E. Sullivan, Jr.. Esq. ("Exhibit N"); photographs and news clippings from the 1995 tire fire at the site ("Exhibit K"); the death certificate of David H. Hornburg ("Exhibit M"); and deeds of February 11, 1981; November 13, 1981; August 1, 1983; July 30, 1986; April 10, 1989; December 18, 1991; and January 3 and 27, February 8, and March 24, 1992 (Exhibits "S","Q," "O," "T," "U," "V," "R," "W," "X" and "P," respectively).

Expedited Review

On July 13, 2004, Department staff submitted a letter ("Sullivan letter") requesting that this matter be expedited. Department staff noted that the subject site is alleged to be one of about 100 waste tire stockpiles in New York that must be abated by December 31, 2010 according to ECL 27-1907; that, because respondent has failed to respond to the motion, Department will have to undertake the abatement of respondent's noncompliant waste tire stockpile; that the site is the third largest in the State, which has allegedly already caught fire and is a breeding site for mosquito, thereby creating a need for immediate abatement; and that the contract for undertaking the abatement of the site requires that activities begin in early August 2004.

FINDINGS OF FACT

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

1. Prior to 1992, respondent Beverly R. Hornburg and her husband, decedent David H. Hornburg, owned the subject site on Route 60 in the Town of Charlotte, Chautauqua County, New York, near the Village of Sinclairville. The site covers three parcels of property identified as Town of Charlotte Tax Parcels 10-1-20.14, 10-1-20.10 and 10-1-20.5.1. The address of the site is 6134 Route 60, Sinclairville, New York.

2. Since about 1978, respondent and her husband made the property available, for a fee, for the disposal of used tires and tire casings. Those used tires were discarded by their original owners before being sent to respondent's site. By 1986, approximately four to five million discarded used tires were collected on the site.

3. In 1992, respondent transferred her ownership interest in the underlying parcels to her husband for $1.00. Respondent's husband subsequently died intestate on November 25, 1994.

4. Since 1992, respondent is the owner and operator of, and does business as, H&H Tire. H&H Tire is a tire management and storage facility that operates on the subject site.

5. The tires are dumped haphazardly in at least 21 large piles at various locations on the approximately 30-acre site. The tires are well-worn, exposed to the elements, and no attempt has been made to preserve their value as tires. Many tires are located below grade.

6. The tires are dumped in piles greater than 50 feet wide, greater than 20 feet high, or greater than 10,000 square feet in surface area. Eighteen of the 21 tire piles exceed 10,000 square feet in surface area or are wider than 50 feet. The largest pile measures 70,000 square feet in surface area, and the smallest of the 18 piles measures 7,000 square feet (70 feet by 100 feet). The piles are not separated from surrounding vegetation, buildings, structures, or property lines. The separation between piles and the access roads that exist are not maintained, are overgrown with wild grasses, weeds, brush and trees, and cannot support or allow the access of firefighting equipment. The piles are not otherwise divided by fire lanes or access roads.

7. The site lacks an active hydrant or viable fire pond. The site also lacks strategically placed fire extinguishers. The site is not fenced.

8. The tires at the site pose a significant threat of fire and, thus, a serious hazard to the surrounding area due to the air pollution that would be created should the tires catch fire. In 1995, a large fire occurred at the site that burned for at least five days. The fire forced the evacuation of local residents and the closure of a local school. Equipment and personnel from 40 volunteer fire departments, eight towns, and the County were employed to combat the fire. Present estimates indicate that between 3.5 million and 8 million tires remain at the site after the fire.

9. The site constitutes a breeding ground for large numbers of mosquitoes. As a result, the site constitutes a nuisance and potential health hazard to neighboring residents. As early as 1983, respondent was notified of the mosquito breeding problem and, in 1985, stipulated to undertake a mosquito

spraying program. That program failed due to inadequacy of respondent's equipment. In 1986, Supreme Court, Chautauqua County, ordered respondent to undertake a mosquito control program (see State v Hornburg, Sup Ct, Chautauqua County, May 9, 1986, Adams, J., Index No. G2525). Respondent failed to comply with the court's order.

10. As early as 1981, respondent was informed by the Department that a permit was required to operate the facility at the site. In 1985, respondent entered into a stipulation to develop a proposal to dispose of the stockpiled tires and operate the dump in an environmentally sound manner. Respondent failed to submit such a plan. In 1986, Supreme Court, Chautauqua County (Adams, J.), enjoined respondent from receiving additional tires at the dump and ordered respondent to apply for a permit from the Department (see id.). The court subsequently determined that respondent failed to comply with its order (see id., Sept. 15, 1986).

11. Respondent has neither applied for nor received a permit to operate the facility located at the site. Respondent has failed to submit a site plan, monitoring or inspection plan, closure plan, contingency plan, storage plan, or vector control plan with the Department. Respondent has failed to obtain written Departmental approval to locate tires in excavations or below grade. Respondent has failed to provide financial assurance to the Department to cover the cost of closure of the facility. Respondent has failed to file quarterly operation reports or annual reports with the Department.

DISCUSSION

Nature of the Motion

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

Standards for Motion for Order without Hearing

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

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

In this case, respondent has not submitted any response to Department staff's motion. Accordingly, once it is concluded that staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department staff's motion may be granted.

Discussion of Facts and Conclusions of Law for Activities Prior to 1986

Issues of fact and conclusions of law concerning

activities on the site prior to 1986 were determined by Supreme Court, Chautauqua County and, thus, are established through application of the doctrine of collateral estoppel, or issue preclusion. In State of New York v David and Beverly Hornburg, d/b/a H&H Tires Services, Inc. (Sup Ct, Chautauqua County, Adams, J., Index No. G2525), the State of New York commenced an action against respondent and her husband, alleging, among other things, that respondent operated a solid waste facility without a permit, and that operation of the dump constituted a public nuisance. The State moved for summary judgment in a proceeding in which respondent had the full and fair opportunity to participate. Documentary evidence and affidavits supporting the State's motion in Supreme Court and corroborating the court's findings and conclusions are also provided in this motion.

Supreme Court granted judgment in the State's favor (see Findings of Fact, Conclusions of Law, and Order, May 9, 1986). In its findings of fact, the court determined that respondent and her husband owned a site on Route 60 in the Town of Charlotte, Chautauqua County, near the Village of Sinclairville (see id. at 4). Since about 1978, respondent made her property available, for a fee, for the disposal of used tires and tire casings. At the time of the court's decision, the site contained about four to five million tires.

The court also determined that the tires were dumped haphazardly in large piles at various locations on the site, and that the tire piles were not divided by fire lanes or access roads (see id.). The court held that due to water collecting in the tires, large numbers of adult mosquitoes, including two species capable of transmitting the California encephalitis virus, were breeding at the site and migrating onto neighboring residential property, thereby preventing neighboring landowners from pursuing business and recreational activities out of doors during mosquito season (see id. at 4-5). The court also concluded that the site posed a serious hazard to the surrounding area should the tires catch fire (see id. at 5).

The court held that as early as 1981, respondent was informed by the Department that a permit was required to operate the dump, but respondent failed to apply for or receive such a permit (see id. at 5). The court noted that in 1985, respondent and her husband entered into a stipulation agreeing to proceed as quickly as possible to develop a proposal, subject to Departmental approval, to dispose of the stockpiled tires and to operate the site in an environmentally sound manner, but that they failed to submit any such plan (see id. at 7). Instead, respondent and her husband continued to receive shipments of

tires for disposal on their property, took no action to process the tires or reduce their inventory, and placed an order for tire processing machinery without prior Departmental approval (see id.).

The court also determined that as early as 1983, respondent and her husband were notified about the mosquito breeding problem (see id. at 6). The court held that from 1983 through 1985, respondent and her husband made no attempt to undertake a mosquito spraying program. Although respondent and her husband entered into a stipulation with the State in 1985 that obligated them to undertake a spraying program, that program failed due to the inadequacy of respondent's equipment (see id. at 6-7).

In its conclusions of law, the court held that respondent's used tires and tire casings were "discarded" and, therefore, "solid waste" as that term was defined under ECL 27-0701(1) and the regulations in place at the time (see id. at 8). The court also held that respondent and her husband allowed the used tires to be "disposed of" on their property and, thus, that the facility was a "solid waste management facility" under ECL 27-0701(2) and applicable regulations (see id.). The court concluded that respondent and her husband were the "owners" and "operators" of the facility (see id. at 10). The court rejected respondent's defense that her operations met the definition of "recycling" or "beneficial use or reuse" under the regulations (see id. at 8-9). The court also concluded that the facility was operating without a solid waste permit (see id. at 9).

In addition, the court held that respondent and her husband's operation constituted a public nuisance (see id. at 9). The court based this conclusion upon respondent's failure to control the breeding of mosquitoes and prevent them from migrating onto neighboring property, and respondent's failure to store the tires in a manner consistent with good fire prevention practices, thereby giving rise to the threat of uncontrolled fire.

Discussion of Facts for Activities After 1986

Staff's submissions on this motion establish, prima facie, the facts alleged to have occurred since issuance of the 1986 order of Supreme Court, Chautauqua County. With respect to the allegation that respondent continued to own the site from 1986 until 1992, documentary evidence shows that in 1992, respondent transferred her ownership interest in the property to her husband for $1.00. Thus, staff makes a prima facie showing

that respondent continued to own the subject site until 1992.

Respondent's husband subsequently died intestate on November 25, 1994. Irrespective of the state of Mr. Hornburg's estate and respondent's ownership of the site, staff makes a prima facie showing that respondent continued to operate the facility located on the site from 1992 until the date of the motion. In verified notices of claim filed in 1995 as against the State, Chautauqua County and several county agencies, the Village of Sinclairville, the Town of Charlotte and the Sinclairville Fire Department, respondent admitted that she did business as H&H Tire, that she was the owner and operator of H&H Tire, a tire management and storage facility, and that H&H Tire was located on the subject site. She also admitted that a fire occurred on the site in April 1995 and continued to burn until July 1995, that approximately 500,000 tires were lost in the fire, and that the tires were her property. These admissions, verified by respondent, constitute informal judicial admissions in these proceedings and, thus, prima facie evidence of the facts asserted (see Matter of Liquidation of Union Indem. Ins. Co. of New York, 89 NY2d 94, 103 [1996]; Cook v Barr, 44 NY 156, 158 [1870]; Jack C. Hirsch, Inc. v North Hempstead, 177 AD2d 683 [1991]; see also Prince, Richardson on Evidence § 8-219, at 529-530 [11th ed, Farrell]). Respondent's continued operation of the site since 1995 is established by the affidavit of Mark J. Hans, P.E., who indicates that respondent continues to act as a point of contact for operations on the site.

The affidavits and photographic evidence attached to the motion as exhibits corroborate the findings of fact and conclusions of law reached in the 1986 Supreme Court order and establish that conditions at the site have not improved since that order was issued. The record shows that as many as 21 large piles of used tires cover much of the approximately 30-acre site. The tires are well-worn in appearance, exposed to the elements, and no apparent care has been taken to preserve their value as tires. The photographs reveal that many of the tires are located below grade.

The record also confirms that a fire occurred at the site in April and May 1995 that forced the evacuation of local residents and the closure of a local school. Equipment and personnel from 40 volunteer fire departments, eight towns, and the County were employed to combat the fire. Present estimates indicate that between 3.5 million and 8 million tires remain at the site.

The record also reveals that the tires are not

maintained in piles 50 feet or less in width, 20 feet or less in height, or 10,000 square feet or less in surface area. A March 2004 inspection revealed that 18 of the 21 piles exceeded 10,000 square feet in surface area or were wider than 50 feet. The largest pile measured 70,000 square feet in surface area, and the smallest of the 18 measured 7,000 square feet (70 feet by 100 feet). The piles are not separated from surrounding vegetation, buildings, structures, or property lines. The separations between piles and the access roads that exist are not maintained, are overgrown with wild grasses, weeds, brush and trees, and cannot support or allow the access of firefighting equipment. The site also lacks an active hydrant or viable fire pond, and lacks strategically placed fire extinguishers. The site is not fenced.

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

Liability for Violations Charged

1. Operating a Solid Waste Management Facility without a Permit

Department staff alleges that since at least August 26, 1981, respondent has failed to apply for or receive a permit from the Department to construct or operate a solid waste management facility. Specifically, staff alleges that from 1981 to 1989, respondent failed to apply for or receive a permit as required by the regulations generally applicable to solid waste management facilities (see Charge 1, above) and, from 1989 to present, the specific waste tire storage facility permit required by 6 NYCRR subpart 360-13 (see Charge 2, above).

Since 1973, the ECL has required that persons operating a new solid waste management facility obtain Departmental approval (see L 1973, ch 399, § 2 [adding ECL former 27-0507]). Since 1979, ECL 27-0707, has provided:

> "no person shall commence operation, including site preparation and construction, of a new solid waste management facility until such person has obtained a permit pursuant to this title"

(ECL 27-0707[1]; see L 1979, ch 233, § 30). A "solid waste management facility" is defined as:

> "any facility employed beyond the initial solid waste collection process including, but not limited to, transfer stations . . . processing systems, including resource recovery facilities for reducing solid waste volume . . . and facilities for compacting, composting or pyrolization of solid wastes, . . . and other solid waste disposal, reduction, or conversion facilities"

(ECL 27-0701[2]). "Solid waste management" is defined as "the purposeful and systematic . . . storage" of solid waste (see ECL 27-0701[3]). "Solid waste" is material which is "discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard, or rejection" (see ECL 27-0701[2]). The ECL authorizes the Department to adopt and promulgate rules and regulations governing the operation of solid waste management facilities (see ECL 27-0703[2]).

a. 1981 to 1989

The Departmental regulations in effect from 1981 to 1989 provided that "no person shall . . . operate a solid waste management facility except in accordance with a valid operation permit issued to such person by the department pursuant to this Part" (see 6 NYCRR former 360.2[b]).[1] In addition to the definition provided by ECL 27-0701(2), the regulations also

[1] In its motion, Department staff cites 6 NYCRR 360-1.7(a)(1) as the relevant regulatory provision applicable to the charged failure to obtain a permit from 1981 to 1989. Section 360-1.7(a)(1) was not adopted until October 1988 and did not become effective until December 31, 1988. In its decision, however, Supreme Court, Chautauqua County, cited the correct regulatory provision and that decision was attached to the motion and served upon respondent. Accordingly, respondent may not be heard to argue that she was not given due notice of the correct regulatory provision supporting staff's first charge.

included, among other things, "storage areas or facilities" in the definition of "solid waste management facilities" (see 6 NYCRR former 360.1[d][69]). "Solid waste" was further defined under the regulations (see 6 NYCRR former 360.1[c]).

As noted above, Supreme Court, Chautauqua County, determined in 1986 that the used tires and tire casings on respondent's site met the statutory and regulatory definition of "solid waste" and that the facility was a "solid waste management facility" (see Order, at 8). The court also determined that respondent and her husband were "owners" and "operators" of a solid waste management facility and that the obligations imposed by 6 NYCRR former part 360 were applicable to them (see id. at 10). The court concluded that because respondent and her husband admittedly had not applied for or obtained a solid waste permit, they were in violation of ECL article 27 and 6 NYCRR former part 360.

The evidence submitted in support of this motion reveals that respondent and her husband remained the "owners" and "operators" of the solid waste management facility on the site, and that, by 1989, they still had not obtained a solid waste permit pursuant to 6 NYCRR former 360.2(b). Thus, Department staff has established that from at least 1981 to 1989, respondent violated the regulatory requirement that she obtain a solid waste permit.

b. 1989 to present

Effective December 31, 1988, the Department amended the general provisions of Part 360 to expressly incorporate waste tire storage facilities. Since December 31, 1988, the regulations have included "waste tire storage facilities" within the definition of "solid waste management facilities" (see 6 NYCRR 360-1.2[b][158]; see also 6 NYCRR former 360-1.2[b][145]).

Also since December 1988, the regulations have included an express definition for waste tires. From 1989 to 1993, the regulations defined "waste tires" as "any tire that has ceased to serve the purpose for which it was initially intended due to factors such as, but not limited to, wear or imperfections, and has been discarded" (see 6 NYCRR former 360-1.2[b][167]).

Since amendments effective October 9, 1993, the regulatory definition of "waste tires" was changed to "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 material," which, in turn, is defined as

material that is "abandoned by being . . . accumulated [or] stored . . . instead of or before being disposed of" (6 NYCRR 360-1.2[a][1], [2]).

The 1988 amendments to Part 360 also included a new subpart specifically applicable to the storage of waste tires before their treatment or disposal (see 6 NYCRR subpart 360-13). Effective December 31, 1988, the regulations provide that "no person shall engage in the storage of more than 1,000 waste tires at a time without first having obtained a permit to do so pursuant to this Part" (6 NYCRR 360-13.1[b]). Under the transition rules adopted in the 1988 amendments, owners or operators of existing waste tire storage facilities were required to submit by August 9, 1989, a complete application for a permit to operate or commence removal of the waste tires in accordance with a Department approved plan (see 6 NYCRR former 360-13.1[c]).

The Legislature subsequently amended ECL article 27 to also expressly provide for the regulation of waste tire storage facilities. In 1989, the Legislature added subdivision 6 to ECL 27-0703 effective August 7, 1989 (see L 1989, ch 88). Under subdivision 6, "the owner or operator of a solid waste management facility engaged in the storage of one thousand or more waste tires in existence on or after the effective date of this subdivision 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" (ECL 27-0703[6], as amended by L 2003, ch 62).

Staff alleges, and the undisputed facts reveal, that since August 7, 1989, respondent has never received a solid waste management facility permit to operate the waste tire storage facility on the site, in violation of 6 NYCRR 360-13.1. The used tires on the site are "waste tires" under the regulatory definitions applicable during the relevant time frame. Moreover, more than 1,000 waste tires have been and are being stored on the site. As the co-owner of the site until 1992, and as operator of the facility since then, respondent is a person engaged in the storage of more than 1,000 waste tires without a permit. In addition, no evidence exists that respondent has begun removal of the waste tires pursuant to a Department approved plan. Thus, from 1989 to present, respondent is liable for violating 6 NYCRR 360-13.1(b).

2. Violations of Operational Requirements under Section 360-13.3

Department staff alleges that respondent has violated eight separate operational requirements (see Charges 15-22, above) applicable to all waste tire storage facilities subject to the permitting requirements of Subpart 360-13 (see 6 NYCRR 360-13.3). Staff allege that respondent has been in violation since December 31, 1988, the date the operational requirements came into effect (see 6 NYCRR 360-13.3, as filed Oct. 28, 1988, effective Dec. 31, 1988). For the reasons that follow, the eight violations staff allege are established as a matter of law.

a. Section 360-13.3(c)(1)

Section 360-13.3(c)(1) requires that "all approach roads to the facility and access roads within the facility must be constructed for all weather conditions and maintained in passable condition at all times to allow for access by fire-fighting and emergency response equipment." The record establishes that the facility largely lacks access roads, and that those that do exist are overgrown and not maintained to allow for access by fire-fighting and emergency response equipment. Moreover, these conditions have existed since December 31, 1988 and persist to the present. Thus, the alleged violation of section 360-13.3(c)(1) is established.

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

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, . . . 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." The record reveals that respondent's waste tire facility has an actual capacity well in excess of 2,500 waste tires. Nevertheless, no fire extinguishers or other fire protection and prevention equipment is located at the facility. These conditions have existed since December 31, 1988 and persist to the present. Thus, the alleged violation of section 360-13.3(c)(4) is established.

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

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, an active hydrant or viable fire pond on the facility." The evidence establishes that no active hydrant or viable fire pond exists on the facility. This condition has existed since December 31, 1988, and persists to the present. Thus, the alleged violation of section 360-13.3(c)(4) is established.

d. Section 360-13.3(c)(5)

Section 360-13.3(c)(5) requires that "waste tire piles must be accessible on all sides to fire fighting and emergency response equipment." The evidence reveals that the large waste tire piles at respondent's facility are not accessible on all sides to fire fighting and emergency response equipment, and are not divided by fire lanes or access roads. This condition has existed since December 31, 1988, and persists to the present. Thus, the alleged violation of section 360-13.3(c)(5) is established.

e. Section 360-13.3(c)(6)

Section 360-13.3(c)(6) requires that "potential ignition sources must be eliminated and combustibles must be removed as they accumulate." Weeds, grass and other combustible materials have been allowed to accumulate in the waste tire storage area. This condition has existed since December 31, 1988, and persists to the present. Thus, the alleged violation of section 360-13.3(c)(6) is established.

f. Section 360-13.3(d)(2)

Section 360-13.3(d)(2) requires that "[f]acilities having a planned or actual capacity of 2,500 or more waste tires must be enclosed by a woven wire, chain-link or other acceptable fence material, at least six feet in height." The evidence establishes that respondent's facility is not enclosed by a fence of any sort. This condition has existed since December 31, 1988, and persists to the present. Thus, the alleged violation of section 360-13.3(d)(2) is established.

g. Section 360-13.3(e)(2)

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 December 31, 1988, respondent has failed to file any quarterly operation reports. Thus, the alleged violation of

section 360-13.3(e)(2) is established.

h. Section 360-13.3(e)(3)

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 December 31, 1988, respondent has failed to file any annual reports. Thus, the alleged violation of section 360-13.3(e)(3) is established.

3. Violations of Permit Application Requirements under Section 360-13.2

Department staff alleges that respondent has violated various provisions of section 360-13.2, which establishes application requirements for a permit to operate a waste tire storage facility used to store 1,000 or more waste tires at a time. For the reasons that follow, however, I am reserving decision on whether respondent is liable for these alleged violations.

Department staff specifically alleges that since December 31, 1988, respondent has failed to submit a site plan, a monitoring and inspection plan, a closure plan, a contingency plan, a storage plan, and a vector control plan, in violation of 6 NYCRR 360-13.2(b), (e), (f), (h), (i), and (j) (see Charge 7, above). Staff also alleges that respondent failed to maintain the facility in accordance with the storage plan requirements established at 6 NYCRR 360-13.2(i)(3), (4), and (5), or obtain Departmental approval to locate waste tires in excavations or below grade as required by paragraph 360-13.2(i)(7) (see Charges 8-14, above). In addition, staff alleges that since October 9, 1993, respondent has failed to submit the contingency plan as required by section 360-13.2(h) as amended, and failed to comply with various provisions of the National Fire Protection Association standards incorporated therein (see Charges 3-5).

It is not apparent, under the circumstances presented, whether the failure to submit the plans referred to by staff, or otherwise operate the facility in accordance with the standards that govern those plans, are violations separate and distinct from respondent's failure to apply for or obtain a waste tire storage facility permit. The regulations expressly provide that "an application for an initial permit to construct or operate a waste tire storage facility used to store 1,000 or more waste tires at a time must include" the plans cited by staff (6 NYCRR 360-13.2). Moreover, the express standards cited are included in

the permit application requirement provisions of section 360-13.2, not the operational requirement provisions of section 360-13.3. While it is likely that the failure to submit the plans cited or otherwise comply with the standards governing those plans are relevant aggravating factors to be considered when determining the gravity of a respondent's failure to apply for or obtain a permit, a plain reading of the regulations suggests that such failure is a basis for permit denial, and does not constitute a separate violation of operating requirements.

The question presented here is apparently one of first impression, given the context of this case. Moreover, Department staff's submissions do not contain legal arguments addressing the issue. I consider it inappropriate to resolve these open questions without first affording the opportunity for development of the issue. Accordingly, I am reserving for oral argument and briefing the issue whether respondent is separately liable for the violations of section 360-13.2 alleged.

4. Operation of a Noncompliant Waste Tire Stockpile

Department staff seeks a determination that respondent has owned and presently 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 has owned and presently 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 has owned and presently 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 at 6 NYCRR 360-13.3 also constitutes a violation of the regulations promulgated pursuant to ECL article 27, title 7. Thus, staff is entitled to an order enjoining respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

Department staff also seeks an order of the Commissioner directing respondent to remove all tires from the site in strict accordance with the plan and schedule detailed in 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. ¶ VII). Staff is entitled to the relief sought, in part.

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

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

Accordingly, staff is entitled to an order directing respondent to remove the tires from the site and I recommend that the Commissioner grant the relief sought in paragraph II. In the event respondent does not comply with the removal order, respondent would be liable to reimburse the State for expenses of "remedial and fire safety activities" at the site that are paid from the Fund. Accordingly, staff is entitled to part of the relief sought in paragraph VII, and I recommend that the Commissioner grant that relief.

However, to the extent staff seeks reimbursement for costs associated with determining the existence of the violations alleged, responding to the violations, establishing that the parcel of land is a noncompliant waste tire stockpile, and investigating that stockpile, I am reserving decision for further argument and briefing. It is not clear that assessment of costs beyond those associated with "remedial and fire safety activities" are authorized by ECL 27-1907(3).

Moreover, I reserve decision on the remaining relief sought by Department staff. In paragraph III, Department staff seeks the posting of a surety to secure strict and faithful performance of respondent's remediation and abatement obligations. However, the statutory and regulatory provision cited appear to contemplate the posting of a surety as a condition for permit issuance or denial (see ECL 27-0703[6]; 6 NYCRR 360-1.12 and 13.2[g]). It is not clear whether these or any other statutory or regulatory provisions authorize the imposition of a surety requirement upon respondent in the absence of a permit.

In paragraph V, Department staff also request costs associated with prosecution of this enforcement action, and any costs associated with overseeing site remediation as well as the State's assumption of responsibility for implementing the abatement plan in the event respondent fails to strictly comply with such plan. It is not clear whether these costs are different than those sought pursuant to paragraph VII and, if so, the statutory authorization for such costs.

Finally, because I have reserved decision on the alleged violations of 6 NYCRR 360-13.2, it is appropriate to reserve decision on the penalty to be assessed. Thus, I reserve decision concerning the relief sought in paragraph VI.

CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

1. The used tires and tire casings on the subject site were "solid waste" as that term was defined under 6 NYCRR former 360.1(c), because the tires had served their original intended use and were discarded by their previous owners before being stored on the site.

2. The site constituted a "solid waste management facility" as that term was defined under 6 NYCRR former 360.1(d)(69), because solid waste in the form of used tires and tire casings was stored at the facility.

3. The used tires and tire casings on the subject site were also "waste tires" as that term was defined under 6 NYCRR former 360-1.2(b)(167), because the tires had ceased to serve the purpose for which they were initially intended and had been discarded.

4. The used tires and tire casing on the subject site are also "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.

5. 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 (see also 6 NYCRR former 360-1.2[b][145]).

6. Respondent Beverly R. Hornburg owned and operated the solid waste management facility on the site in the past, when the waste tires were first accumulated, and now operates the facility on the site.

7. From August 26, 1981, to August 7, 1989, respondent violated 6 NYCRR former 360.2(b) because she operated a solid waste management facility without a valid permit issued to her by the Department pursuant to 6 NYCRR former part 360.

8. From August 7, 1989 until the present, respondent violated 6 NYCRR 360-13.1(b) because she has been and is a person

engaged in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to 6 NYCRR part 360.

9. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(c)(1) because she has failed to maintain access roads within the storage facility in passable conditions at all times to allow for access by firefighting and emergency response equipment.

10. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(c)(4) because she 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 through the entire facility.

11. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(c)(4) because she 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.

12. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(c)(5) because she failed to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment.

13. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(c)(6) because she failed to eliminate potential ignition sources within the storage area.

14. Since December 31, 1988, respondent violated 6 NYCRR 360-13.3(d)(2) because she operated a waste tire storage facility having an actual capacity of 2,500 or more waste tires that is not enclosed by a woven wire, chain-link or other acceptable fence material, at least six feet in height.

15. Since December 31, 1988, respondent violated 6 NYCRR 13.3(e)(2) by failing to file quarterly operation reports with the Department.

16. Since December 31, 1988, respondent violated 6 NYCRR 13.3(e)(3) by failing to file annual reports with the Department.

17. As a result of the above violations, respondent has owned and presently operates a “noncompliant waste tire stockpile” as that term is defined by ECL 27-1901(6).

RECOMMENDATIONS

Ordinarily, under the Department's uniform enforcement hearing procedures, the ALJ would resolve all issues concerning liability and penalty raised on a motion for order without hearing before preparing a hearing report and submitting the report to the Commissioner for final decision (see 6 NYCRR 622.12[d], [f]). In this case, exigent circumstances exist that warrant a departure from the ordinary procedures. As Department staff has indicated in its July 13, 2004 letter, if any abatement of the facility is to take place this year, a contract would need to be awarded as soon as possible.

Although I have determined that issues of liability, penalty, and other appropriate relief remain to be resolved, I also conclude that staff has established its entitlement to an order directing abatement of respondent's facilities based upon the violations that are presently determinable as a matter of law. Accordingly, I am forwarding this ruling to the Commissioner with my recommendations herein. In the event the Commissioner adopts my recommendations, a timely order may issue and abatement measures may begin, while the questions reserved upon are being resolved.

Accordingly, I recommend that the Commissioner issue an order granting Department staff's motion in part, holding respondent liable for the violations determinable as a matter of law at this time, and granting in part the relief requested by staff.

/s/
James T. McClymonds
Chief Administrative Law Judge

Dated: Albany, New York
August 24, 2004