STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

BEVERLY R. HORNBURG,

Respondent.

SUPPLEMENTAL ORDER OF THE EXECUTIVE DEPUTY COMMISSIONER

VISTA Index No. CO9-200040309-42

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for order without hearing against respondent Beverly R. Hornburg.[1] The motion alleged that respondent was the owner or operator of a solid waste management facility engaged in the storage of between 3.5 million and 8 million waste tires located on Route 60, Sinclairville, New York (the "site"), and that the facility was in violation of multiple provisions of Environmental Conservation Law ("ECL") article 27, and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

In an order dated August 26, 2004, former Commissioner Erin M. Crotty adopted a ruling/hearing report by Chief Administrative Law Judge ("CALJ") James T. McClymonds dated August 24, 2004, granted Department staff's motion in part, held respondent liable for the violations determinable as a matter of law at that time, and granted in part the relief requested by staff. Among the relief granted was a direction, in paragraph I of the order, that respondent immediately stop accepting waste tires at the site. In paragraph II of the order, respondent was directed to remediate the facility pursuant to specific guidelines and according to a strict schedule. In paragraph IV of the order, respondent was directed to reimburse the Waste Tire

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[1] By memorandum dated February 25, 2005, then Acting Commissioner Denise M. Sheehan delegated her decision making authority in this matter to then Deputy Commissioner Lynette M. Stark. The parties were so informed by letter dated February 28, 2005. On February 2, 2006, Deputy Commissioner Stark was named Executive Deputy Commissioner.

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.

Both Commissioner Crotty and CALJ McClymonds reserved decision on the remainder of staff's motion pending oral argument on the remaining issues. After conducting oral argument, CALJ McClymonds prepared the attached hearing report dated April 17, 2006, addressing the remainder of Department staff's motion for order without hearing. I adopt the conclusions of law, together with the written discussion in support, set forth in the hearing report as my decision in this matter.

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

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

2. In addition to the violations determined in Commissioner Crotty's August 26, 2004 order, respondent Beverly R. Hornburg is determined to have continuously violated the following regulatory provisions during the period from December 31, 1988 until May 27, 2004, the date of staff's motion:

a. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved site plan, as required by 6 NYCRR 360-13.2(b) and 6 NYCRR former 360-13.1(c)(1)(ii).

b. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e) and 6 NYCRR former 360-13.3(b).

c. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved closure plan, as required by 6 NYCRR 360-13.2(f) and 6 NYCRR former 360-13.3(c).

d. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved contingency plan, as required by 6 NYCRR 360-13.2(h)

and 6 NYCRR former 360-13.3(e).

e. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved storage plan, as required by 6 NYCRR 360-13.2(i) and 6 NYCRR former 360-13.3(f).

f. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved vector control plan, as required by 6 NYCRR 360-13.2(j) and 6 NYCRR former 360-13.3(g).

g. Respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by storing 1,000 or more waste tires at the site in excess of the quantity allowed.

3. It is further determined that from at least October 9, 1993, until May 27, 2004, the date of staff's motion, respondent Beverly R. Hornburg violated National Fire Protection Association Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition ("NFPA 231D") Provision C-3.2.1(a) and, thus, 6 NYCRR 360-13.2(h)(6), by failing to provide fire lanes or access roads at the site.

4. Respondent Beverly R. Hornburg is further determined to have continuously violated the following regulatory provisions during the period from May 1995, until May 27, 2004, the date of staff's motion:

a. Respondent violated 6 NYCRR 360-13.2(i)(3) by failing to maintain waste tire piles at 50 feet or less in width.

b. Respondent violated 6 NYCRR 360-13.2(i)(3) by failing to maintain waste tire piles at 10,000 square feet or less of surface area.

c. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures.

d. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all

times.

e. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas in such a manner that emergency vehicles have adequate access.

f. Respondent violated NFPA 231D Provision C-3.2.1(c) and, thus, 6 NYCRR 360-13.2(h)(6), which requires an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area, by storing waste tires at the site in piles in close proximity to natural cover and trees.

g. Respondent violated NFPA 231D Provision C-4.2.5 and, thus, 6 NYCRR 360-13.2(h)(6), by locating tire piles at the site within 50 feet of grass, weeds, and bushes.

5. It is further determined that from at least March 29, 2004 until May 27, 2004, the date of staff's motion, respondent Beverly R. Hornburg failed to obtain prior written approval from the Department before locating waste tires in excavations or below grade, in violation of 6 NYCRR 360-13.2(i)(7).

6. For the violations determined herein and in the August 26, 2004 order, and in addition to the duties and obligations imposed in paragraphs I through VII of the August 26, 2004 order, it is hereby ordered that:

VIII. Respondent Beverly R. Hornburg is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $500,000 plus, if respondent fails to comply with any requirement set forth in Paragraphs I or II of the Commissioner's August 26, 2004 order, the sum of two dollars ($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. No later than 30 days after the date of service of this supplemental order upon respondent, respondent shall submit payment of $500,000 in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and deliver such payment by certified mail, overnight delivery or hand delivery to the Department 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

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.

IX. Within 30 days after the date of service of this supplemental order upon respondent, respondent shall post with the Department financial security in the amount of $5,250,000 to secure the strict and faithful performance of each of respondent's obligations under Paragraphs I and II of the August 26, 2004 order.

X. Paragraph IV of the August 26, 2004 order is modified to indicate that respondent is directed to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site, including any and all investigation, prosecution and oversight costs, to the maximum extent authorized by law. The remainder of the August 26, 2004 order, except Paragraph VI (in which Commissioner Crotty reserved decision on the remainder of Department staff's motion), is continued in full force and effect.

XI. All communications from respondent to Department Staff concerning this supplemental 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

New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.

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

For the New York State Department
of Environmental Conservation

/s/

By: _____
Lynette M. Stark
Executive Deputy Commissioner

Dated: May 5, 2006
Albany, New York

TO: Beverly R. Hornburg (Via Certified Mail)
2842 Gerry Ellington Road
Gerry, New York 14740

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

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

BEVERLY R. HORNBURG,

Respondent.

HEARING REPORT ON 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.

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 on 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). No response from respondent was received, rendering her in default as of June 24, 2004.

As the assigned Administrative Law Judge ("ALJ") for the matter, I forwarded to the Commissioner a ruling/hearing report dated August 24, 2004 ("ALJ Ruling"), containing certain findings of fact and conclusions of law. I also recommended that the Commissioner grant Department staff's motion in part, hold respondent liable for the violations determinable as a matter of law at that time, and grant in part the relief requested by staff, including a direction to respondent to cease receiving and to begin removing the waste tires at the site. I reserved decision, however, on several issues of liability and various items of relief sought by staff, including the appropriate penalty to be imposed. Former Commissioner Erin M. Crotty issued an order dated August 26, 2004, adopting the August 24, 2004 ruling/hearing report, and granting the partial relief recommended.

This hearing report addresses the issues upon which I reserved decision in my August 24, 2004 ruling.

PROCEEDINGS

A detailed background and procedural history of this proceeding prior to my August 24, 2004 ruling is contained in that ruling, and will not be repeated here. Proceedings since issuance of the Commissioner's August 26, 2004 order are as follows.

Department staff filed a letter dated December 23, 2004, presenting arguments on the matters upon which I reserved decision. In that letter, staff also requested leave to conform the pleadings to the proof with respect to Charges E(1)(i) through (vi), as those charges were identified in staff's motion (see Motion for Order Without Hearing ["Motion"], at 2-3; ALJ Ruling, at 2-3). Staff served its December 23, 2004 letter upon respondent by first class mail. Respondent did not file a response.

A hearing was convened on February 24, 2005 for purposes of conducting oral argument on the reserved issues. Charles E. Sullivan, Jr., Esq., Director, Division of Environmental Enforcement, appeared on behalf of Department staff. Although I gave respondent notice of the hearing by letter dated February 18, 2005, neither respondent nor her representative appeared. Pursuant to 6 NYCRR 622.10(b)(1)(viii), the oral argument was recorded and a transcript prepared.

Subsequent to the hearing, Department staff submitted additional comments in a letter dated February 25, 2005, addressing several matters that arose during oral argument. Staff served the February 25, 2005 letter upon respondent by first class mail. No response from respondent has been received.

FINDINGS OF FACT

The findings of fact relevant to this hearing report are contained in my August 24, 2004 ruling and will not be repeated here.

DISCUSSION

Liability for Violations Charged

1. Failure to Operate Pursuant to Approved Plans

In its motion for order without hearing, which serves as the complaint in this matter, Department staff charged respondent with violations of 6 NYCRR 360-13.2(b), (e), (f), (h), (i), and (j) for failing to submit to the Department a site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, and vector control plan, respectively, since at least December 31, 1988 (see Charges E.1[i]-[vi], Motion, at 2-3). In addition, in Charge C (see id. at 2), staff charged respondent with violating section 360-13.2(h) in October 9, 1993, by failing to submit a contingency plan.

In my August 24, 2004 ruling, I reserved decision on whether respondent's failure to submit the plans referred to by staff constituted violations separate and distinct from respondent's failure to apply for, or obtain, a Departmental waste tire storage facility permit (see ALJ Ruling, at 21). The rationale was that because section 360-13.2 expressly requires submission of the plans as part of a permit application, the failure to submit plans did not appear to constitute the violation of operating standards (see ALJ Ruling, at 20-21).

In its motion to amend the pleadings to conform to the proof, staff moved to modify the theory by which it sought to hold respondent liable for failing to submit the above referenced plans. Staff contended that it should have charged respondent with violations of 6 NYCRR 360-13.3(a) and, then, as specific instances of such violations, referred to each plan identified in 6 NYCRR 360-13.2 that was neither provided nor approved.[2] Staff argued that respondent would not be prejudiced if the pleadings were amended to reflect the corrected theory of liability and, thus, sought authorization to so amend the pleadings.

During oral argument on February 24, 2005, I granted staff's motion (see Transcript, at 14). In so ruling, I relied upon the standards governing motions to amend pleadings to conform to the evidence under CPLR 3025(c), which authorizes amending pleadings to conform theories of liability as well as

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[2] See also 6 NYCRR former 360-13.4(a). Former 360-13.4(a) was the version of section 360-13.3(a) in effect until October 9, 1993.

factual allegations to the evidence (see Tr., at 12; see also Dauernheim v Lendlease Cars, Inc., 238 AD2d 462, 463 [2d Dept 1997]; Matter of Cerio v New York City Tr. Auth., 228 AD2d 676 [2d Dept 1996]). I concluded that because the original complaint provided respondent with adequate notice of the factual basis for and the actual nature of the charge, and because respondent had due notice of the motion to amend the pleadings, no prejudice would inure to respondent if staff's motion was granted (see Tr., at 14; see also Matter of Wilder, ALJ Hearing Report, Aug. 17, 2005, at 3-4, adopted by Acting Commissioner's Supplemental Order, Sept. 27, 2005). Accordingly, staff's charges as amended are considered herein.

Section 360-13.3(a) provides that "all waste tire storage facilities subject to the permitting requirements of [Part 360] must comply with the following operational requirements: * * * All activities at the facility must be performed in accordance with plans required by this Part and approved by the department." Section 360-13.2 requires a site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, and 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]; see also 6 NYCRR former 360-13.3 [effective until Oct. 8, 1993]; id. former 360-13.1[c][1][ii] [requiring a site plan for existing facilities]). The evidence submitted by staff on its motion shows that since at least December 31, 1988, respondent owned and operated a waste tire storage facility used to store more than 1,000 tires at a time without any approved plans. Thus, the violations of section 360-13.3(a) and former section 360-13.4(a) alleged in Charges E.1(i) through (vi) are established.

With respect to Charge C, staff conceded at oral argument that it is the same charge as Charge E.1(iv), but with a later start date alleged (see Tr., at 77). Thus, a separate penalty is not authorized for Charge C (see Matter of Wilder, ALJ Hearing Report, at 14).

2. Violations of Dimensional and Quantity Standards

In my prior ruling, I reserved decision on the issue whether operation of a waste tire storage facility in violation of the dimensional and quantity standards provided for in section 360-13.2(i) constituted violations separate and distinct from respondent's failure to apply for and obtain a waste tire storage facility permit (see ALJ Ruling, at 20-21). Because the dimensional and quantity standards appear in a section governing permit application requirements, I questioned whether those

standards constituted operational requirements that could be violated absent their incorporation into a storage plan that, in turn, is incorporated into a permit (compare Matter of Williamson [Mohawk Tire Storage Facility, Inc.], Decision and Order of the Commissioner, Oct. 18, 1999, adopting ALJ Report, at 8-9 [finding that many of the tire piles in a permitted facility violated the dimensional standards prescribed in section 360-13.2(i)]).

In Matter of Wilder, it was determined that to the extent the standards contained in section 360-13.2(i) are objective and self-executing standards that are drafted in mandatory terms, they impose operating standards applicable to waste tire facilities even in the absence of an approved permit (see Supplemental Order, adopting ALJ Hearing Report, at 5-6). Accordingly, the standards enunciated in section 360-13.2(i)(3), (4), and (5), which govern the height, width and area dimensions of the tire piles, the width and condition of access roads between the tire piles, and the quantity of tires that are authorized to be stored at a facility, are operational requirements applicable to respondent's facility.[3]

With respect to the violations of the section 360-13.2(i) operating standards alleged in the motion, the evidence submitted establishes that since December 31, 1988, respondent stored 1,000 or more waste tires at his facility without Departmental authorization to do so. Accordingly, respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by failing to maintain the number of tires at or below the quantity allowed for his facility, namely, less than 1,000 waste tires (see Charge E.5, Motion, at 3; Finding of Fact No. 8, ALJ Ruling, at 8).

The evidence also establishes that at least since May 1995, the date of Mark J. Hans's first inspection of the facility, respondent violated section 360-13.2(i)(3) by failing to maintain waste tire piles at 50 feet or less in width (see Charge E.6. Motion, at 3; Finding of Fact No. 6, ALJ Ruling, at 8). Since at least May 1995, respondent also violated section 360-13.2(i)(3) by failing to maintain waste tire piles at 10,000 square feet or less of surface area (see Charge E.7, Motion, at 3; Findings of Fact Nos. 6, ALJ Ruling, at 8).

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[3] The same conclusion is drawn with respect to the similar provisions of 6 NYCRR former 360-13.3(f). Former section 360-13.3(f) was the version of section 360-13.2(i) in effect until October 9, 1993.

The evidence also establishes that since May 1995, respondent failed to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, failed to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times, and failed to maintain 50-foot separation areas in such a manner that emergency vehicles will have adequate access, all in violation of the requirements of section 360-13.2(i)(4) (see Charges E.2-4, Motion, at 3; Findings of Fact No. 6, ALJ Ruling, at 8).

3. Placement of Tires in Excavations

Department staff allege that respondent has failed to obtain prior written Department approval to locate waste tires in excavations or below grade, in violation of 6 NYCRR 360-13.2(i)(7). Section 13.2(i)(7) is an operational requirement applicable to waste tire facilities (see Matter of Hoke, ALJ's Hearing Report, at 13, adopted by Commissioner's Order, Jan. 17, 2006). The evidence submitted with the motion establishes that since at least March 29, 2004, the date of Mr. Hans's last inspection of the site, many waste tires at the facility are partially or completely buried. The evidence also reveals that respondent failed to obtain prior written approval to locate the waste tires below grade. Thus, Charge E.8 is established from March 29, 2004 to the present.

4. Violation of National Fire Protection Association Standards

For reasons similar to those concerning the alleged violations of dimensional and quantity standards under section 360-13.2(i), in my prior ruling, I reserved decision on the issue whether National Fire Protection Association ("NFPA") standards governing waste tire storage are operating standards applicable to a waste tire storage facility in the absence of an approved contingency plan submitted pursuant to section 360-13.2(h). The express terms of section 360-13.2(h) require submission of a contingency plan as part of an application for a waste tire storage facility permit. Section 360-13.2(h) further provides that "the contingency plan must include but not be limited to: . . . (6) The facility must comply with all applicable National Fire Protection Association standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition" ("NFPA 231D").[4]

[4] Section 360-13.2(h)(6) was added to subpart 360-13 effective October 9, 1993.

For the reasons stated above with respect to the dimensional standards, to the extent NFPA 231D establishes mandatory, objective and self-executing standards for the storage of waste tires, those standards are operational requirements governing a waste tire storage facility, even in the absence of an approved contingency plan or Departmental permit (see Matter of Wilder, ALJ Hearing Report, at 7-8). Moreover, the NFPA 231D standards relied upon by staff -- Provisions C-3.2.1(a), C-3.2.1(c) and C-4.2.5 -- are such mandatory, objective, and self-executing standards (see id.).

The evidence establishes that respondent violated the NFPA 231D provisions charged by staff. Provision C-3.2.1(a) requires fire lanes to separate piles and provide access for effective firefighting operations. In Charge D.1, staff alleged that since October 9, 1993, respondent violated Provision C-3.2.1(a) and, thus, section 360-13.2(h)(6), by failing to provide access lanes at and about the site. The evidence submitted on the motion establishes that the facility has lacked fire lanes or access roads at least since Supreme Court's May 9, 1986 order. Thus, Charge D.1 is established from October 9, 1993, to the present (see Findings of Fact No. 6, ALJ Ruling, at 8).

Provision C-3.2.1(c) requires an effective fire prevention maintenance program including control of weeds, grass and other combustible materials within the storage area. In Charge D.2, staff alleges that respondent violated Provision C-3.2.1(c) and, thus, section 360-13.2(h)(6), by storing waste tires at the site in piles in close proximity to natural cover and trees. Charge D.2 is also established by the evidence from May 1995 to the present (see Findings of Fact No. 6, ALJ Ruling, at 8). Provision C-4.2.5 requires that the distance between storage and grass, weeds and brush should be 50 feet or more. Charge D.3 alleges that respondent violated Provision C-4.2.5 and, thus, section 360-13.2(h)(6), by locating tires piles at the site within 50 feet of grass, weeds, and bushes. That charge is also established (see Finding of Fact No. 6, ALJ Ruling, at 8).

Although staff established the NFPA standards violations charged, these violations are multiplicitous with other violations established in this matter (see Matter of Wilder, ALJ Hearing Report, at 9-11, 13-14). Charge D.1 (violation of NFPA 231D, Provision C-3.2.1[a]) is multiplicitous with Charge E.4 (violation of 6 NYCRR 360-13.2[i][4]) established above, and Charge F.1 (violation of 6 NYCRR 360-13.3[c][1]) established in my prior ruling (see Conclusion of Law No. 9, ALJ Ruling, at 25). Charge D.2 (violation of NFPA 231D, Provision C-3.2.1[c]) is multiplicitous with Charge F.5 (violation of 6 NYCRR

360-13.3[c][6]) established in my prior ruling (see Conclusion of Law No. 13, ALJ Ruling, at 25). Charge D.3 (violation of NFPA 231D, Provision C-4.2.5) is multiplicitous with Charge E.3 (violation of 6 NYCRR 360-13.2[i][4]). Thus, Charges D.1, D.2 and D.3 are not separate offenses that support separate penalties. In fact, at oral argument, staff indicated that these charges might be multiplicitous for penalty-calculation purposes (see Tr., at 44-59, 78-82).

Penalty Assessment

In paragraph VI of its prayer for relief, Department staff seeks the lesser of the maximum penalty authorized by law or the sum of $500,000 plus $2 for each waste tire the State of New York has to manage under the Waste Tire Management and Recycling Act of 2003 (see ECL art 27, title 19). During oral argument, staff modified the alternative penalty-assessment formula from $2 per tire to $2 per each 20 pounds of tires (20 pounds is approximately the weight of one tire) (see Tr., at 146). This penalty would be in addition to the costs of remediation respondent would be liable for pursuant to ECL 27-1907.

In Matter of Wilder, the then-Acting Commissioner adopted the alternative penalty-assessment formula recommended by Department staff (see Supplemental Order, adopting ALJ's Hearing Report, at 15-16). 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 in the Commissioner's prior order. In addition, the "$2 per 20-pounds of tires managed" provision incorporates proportionality into the penalty calculation.

In this case, I recommend that alternative penalty assessment sought by Department staff be imposed. By latest estimate, respondent's site contains between 3,500,000 and 8,000,000 waste tires (see Finding of Fact No. 8, ALJ Ruling, at 8). Assuming respondent fails to comply with her remediation obligations, the approximate maximum penalty assessed under this method would be between $7,500,000 (3,500,000 tires at $2 per 20-pounds of tire [one tire being about 20 pounds] plus the $500,000 minimum penalty) and $16,500,000 (8,000,000 tires at $2 per 20-pounds of tire [one tire being about 20 pounds] plus the $500,000 minimum penalty). Thus, the alternative penalty would be below

the maximum authorized by ECL 71-2703, as amended.[5]

The $500,000 minimum penalty is warranted in this case due to respondent's gross lack of cooperation with the Department and her significant history of non-compliance (see Commissioner's Civil Penalty Policy, DEE-1, June 20, 1990, at IV.E[2], [3]). The record establishes that since 1981, respondent has ignored the Department's repeated directions to bring the site into compliance with the law and breached her agreement with the Department to remediate the site (see Finding of Fact No. 10, Ruling, at 9). In addition, in 1986, Chautauqua County Supreme Court enjoined respondent from receiving additional tires and ordered her to apply for a permit from the Department and undertake mosquito control measures (see Findings of Fact Nos. 9 and 10, ALJ Ruling, at 8-9). The court subsequently determined that respondent failed to comply with its order (see id.).

Other Relief Requested

In my August 24, 2004 ruling, I reserved decision on the relief sought in article III of staff's motion -- the requirement that respondent post with the Department financial security in the amount of $5,250,000 to secure strict and faithful performance of each of respondent's remedial obligations imposed in paragraphs I and II of the Commissioner's August 26, 2004 order (see ALJ Ruling, at 23). I also reserved decision on whether staff was entitled to the entire relief sought in article VII of its request for relief -- the requirement that respondent reimburse the Waste Tire Management and Recycling Fund for all costs expended from the Fund for the remediation of the site, including all investigation, prosecution, and oversight costs incurred by staff. In Matter of Wilder, I concluded, and the

[5] ECL 71-2703 provides that "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by [ECL article 27, title 7] or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty" (ECL 71-2703[1][a]). The original civil penalty authorized when ECL 71-2703 was enacted was $2,500 "for each such violation" and an additional $1,000 "for each day during which such violation continues" (L 1980, ch 550, § 1, effective Sept. 1, 1980). Effective January 1, 1996, the penalty was increased to $5,000 per violation and an additional $1,000 for each day during which the violation continued (see L 1995, ch 508, § 1). Effective May 15, 2003, the penalty was further increased to $7,500 per violation and an additional $1,500 for each day during which the violation continued (see L 2003, ch 62, pt C, § 25).

Acting Commissioner concurred, that these items of relief were authorized (see ALJ Hearing Report, at 16-19). For the reasons stated in Wilder, I recommend that the relief reserved upon be awarded in this matter.

Finally, in article V of its request for relief, Department staff also sought reimbursement of costs (see Motion, at 8). At oral argument, staff withdrew that request for relief (see Sullivan Letter [12-23-04], at 3-4; Tr., at 112-113). Accordingly, it need not be considered.

CONCLUSIONS OF LAW

In addition to conclusions of law numbers 1-17 included in my prior ruling (see ALJ Ruling, at 24-25), my conclusions of law with respect to the remainder of staff's motion are as follows:

Violations Established

18. Respondent Beverly R. Hornburg continuously violated the following regulatory provisions during the period from December 31, 1988 until May 27, 2004, the date of staff's motion:

a. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved site plan, as required by 6 NYCRR 360-13.2(b) and 6 NYCRR former 360-13.1(c)(1)(ii).

b. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e) and 6 NYCRR former 360-13.3(b).

c. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved closure plan, as required by 6 NYCRR 360-13.2(f) and 6 NYCRR former 360-13.3(c).

d. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved contingency plan, as required by 6 NYCRR 360-13.2(h) and 6 NYCRR former 360-13.3(e).

e. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved storage plan, as required by 6 NYCRR 360-13.2(i) and 6 NYCRR former 360-13.3(f).

f. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because she operated a waste tire storage facility without a Department-approved vector control plan, as required by 6 NYCRR 360-13.2(j) and 6 NYCRR former 360-13.3(g).

g. Respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by storing 1,000 or more waste tires at the site in excess of the quantity allowed.

19. From at least October 9, 1993, until May 27, 2004, the date of staff's motion, respondent Beverly R. Hornburg violated National Fire Protection Association Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition ("NFPA 231D") Provision C-3.2.1(a) and, thus, 6 NYCRR 360-13.2(h)(6), by failing to provide fire lanes or access roads at the site.

20. Respondent Beverly R. Hornburg continuously violated the following regulatory provisions during the period from May 1995, until May 27, 2004, the date of staff's motion:

a. Respondent violated 6 NYCRR 360-13.2(i)(3) by failing to maintain waste tire piles at 50 feet or less in width.

b. Respondent violated 6 NYCRR 360-13.2(i)(3) by failing to maintain waste tire piles at 10,000 square feet or less of surface area.

c. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures.

d. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times.

e. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas in such a

manner that emergency vehicles have adequate access.

f. Respondent violated NFPA 231D Provision C-3.2.1(c) and, thus, 6 NYCRR 360-13.2(h)(6), which requires an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area, by storing waste tires at the site in piles in close proximity to natural cover and trees.

g. Respondent violated NFPA 231D Provision C-4.2.5 and, thus, 6 NYCRR 360-13.2(h)(6), by locating tire piles at the site within 50 feet of grass, weeds, and bushes.

21. From at least March 29, 2004 until May 27, 2004, the date of staff's motion, respondent Beverly R. Hornburg failed to obtain prior written approval from the Department before locating waste tires in excavations or below grade, in violation of 6 NYCRR 360-13.2(i)(7).

22. Department staff failed to make a prima facie showing of its entitlement to judgment as a matter of law on its claims that respondent violated the provisions cited in paragraph 20 above for the period prior to May 1995, and in paragraph 21 for the period prior to March 29, 2004.

Penalty Assessment

23. The violations established in paragraphs 19 and 20(e) above, and Conclusion of Law No. 9 in my prior ruling (see ALJ Ruling, at 25), respectively, constitute a single continuous violation for penalty calculation purposes.

24. The violations established in paragraph 20(f) and Conclusion of Law No. 13 in my prior ruling (see ALJ Ruling, at 25), respectively, constitute a single continuous violation for penalty calculation purposes.

25. The violations established in paragraphs 20(d) and 20(g), respectively, constitute a single continuous violation for penalty calculation purposes.

26. The alternative civil penalty in the amount of $500,000 plus $2 for each 20 pounds of waste tires the State of New York has to manage under the Waste Tire Management and Recycling Act of 2003 is authorized and warranted under the circumstances of this case.

RECOMMENDATIONS

I recommend that the Commissioner issue a supplemental order consistent with my conclusions herein that would:

I. Grant in part and otherwise deny the remainder of Department staff's motion for order without hearing;

II. Determine the violations referenced in paragraphs 18-21 above;

III. Impose the alternative penalty sought by Department staff in article VI of its request for relief, as amended during oral argument;

IV. Require respondent to post with the Department the financial security requested by Department staff to ensure respondent's compliance with her remedial obligations under the Commissioner's August 26, 2004 order;

V. Modify paragraph IV of the Commissioner's August 26, 2004 to indicate that respondent is liable to reimburse the Waste Tire Management and Recycling Fund for the full amount of any and all expenditures made from the Fund by the State for remedial and fire safety activities at the site, including any and all investigation, prosecution, and oversight costs, to the maximum extent authorized by law; and

VI. Otherwise continue the Commissioner's August 26, 2004 order in this matter.

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James T. McClymonds
Chief Administrative Law Judge

Dated: April 17, 2006
Albany, New York