STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Articles 27 and 71 of the Environmental Conservation Law ("ECL") and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

PASQUALE IZZO, MICHAEL IZZO, ERNEST FORCE, individually and as Vice President of WINDSOR ASSOCIATES doing business as NEW YORK TIRE RECYCLING and as an officer of NEW YORK TIRE RECYCLING COMPANY, INC. also known as NEW YORK TIRE CORP., and as Vice President of STEPHANIE FORCE WASTE TIRE MANAGEMENT CORP. also known as and doing business as WASTE TIRE MANAGEMENT CORP., and STEPHANIE FORCE, individually and as President of STEPHANIE FORCE WASTE TIRE MANAGEMENT CORP. also known as and doing business as WASTE TIRE MANAGEMENT CORP.,

Respondents.

DEC Case No. 1-1999-11-05-89

DECISION AND ORDER OF THE ASSISTANT COMMISSIONER

July 16, 2010

DECISION AND ORDER OF THE ASSISTANT COMMISSIONER[1]

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") was granted leave to appeal pursuant to section 622.10(d)(2)(ii) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") from the December 1, 2005 and March 28, 2006 rulings of Chief Administrative Law Judge ("Chief ALJ") James T. McClymonds. The Chief ALJ had granted in part and denied in part Department staff's motion for order without hearing. For the reasons that follow, Chief ALJ McClymonds's rulings are modified by granting Department staff's motion for order without hearing against respondents Pasquale Izzo and Michael Izzo, granting the motion in part against respondent Ernest Force, and, as so modified, the rulings are otherwise adopted and affirmed.

Factual and Procedural Background

For a complete discussion of the factual and procedural background of this case, see the Proceedings and Findings of Fact contained in the December 1, 2005 Ruling. For purposes of this appeal, the procedural background is as follows. Department staff initially commenced this administrative enforcement proceeding against respondents Pasquale Izzo and Michael Izzo (collectively, the "Izzo respondents") by service of a notice of hearing, pre-hearing conference, and a verified complaint in January 2000. By leave of Administrative Law Judge ("ALJ") Susan J. DuBois, the ALJ originally assigned to this matter, a verified amended complaint adding respondents Ernest Force and Stephanie Force (collectively, the "Force respondents") was served on all respondents in June 2000.

The amended complaint alleged that the Izzo respondents are the owners or operators of an unpermitted landfill and solid waste management facility located on Old Northport Road, Kings Park, Township of Smithtown, in Suffolk County (hereinafter the "facility" or "site"). The amended complaint also alleged that respondent Ernest Force, as primary operator and principal of New York Tire Recycling, Company, Inc., also known as New York Tire Corp., and Windsor Associates d/b/a New York Tire Recycling (collectively, "New York Tire"), was the operator of an unpermitted solid waste management facility at the site and personally liable for violations of the Environmental Conservation Law ("ECL") arising from the operation of the facility.

[1] By memorandum dated June 30, 2009, a copy of which is attached, Commissioner Alexander B. Grannis delegated decision making authority in this matter to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

Department staff's amended complaint charged that, since 1987, the Izzo respondents allowed New York Tire to bring waste tires to the site. As relevant here, the amended complaint alleged that:

> (1) all the named respondents violated 6 NYCRR 360-1.7(a)(1) by operating a solid waste management facility at the site without a permit; and
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> (2) all the named respondents violated 6 NYCRR 360-13.1(b) by storing 1,000 or more waste tires at the site without a permit.[2]

The Izzo respondents filed a joint answer, and the Force respondents filed a separate joint verified answer in June 2000. A statement of readiness for an adjudicatory hearing was issued in August 2000, but the hearing was adjourned because the parties entered into a stipulation with Department staff on November 15, 2000 ("November 2000 stipulation"). The November 2000 stipulation was intended to resolve all issues in the matter except for the ultimate disposition of approximately 1.5 million shredded tires buried on the site.[3] This remaining issue was to be the subject of an administrative hearing or, in the alternative, a motion for a summary order.

Prior to the Department's initiation of this proceeding, in 1990, State Supreme Court, Suffolk County (Cannavo, J.), issued an order granting the Town of Smithtown a preliminary injunction against respondents noting, at that time, that an estimated 2 million tires were stored at the site and directing, among other things, that respondents stop using the site as a facility for the storage or shredding of tires without necessary permits (see Town of Smithtown v Force, Oct. 2, 1990, Suffolk County Index No. 15859/1990). Notably, Justice Cannavo ordered respondents to remove all tires on the site, either above-ground or buried, within four months of his

[2] Staff's amended complaint further alleged that the Izzo respondents disposed of construction and demolition ("C&D") debris at the site without Departmental authorization, approval, or permit.

[3] Among other things, the Izzo respondents and Force respondents stipulated to the following facts in 2000:

(a) Beginning in December 1987, and continuing through February 1990, New York Tire brought approximately 3 million tires to the site;

(b) Although some of the tires were processed and recycled, the majority of tires remained on site until at least 1995. Of those tires remaining on site, 1.5 million were shredded and stored in a partially covered depression on the site, and 800,000 were not shredded; and

(c) By November 2000, approximately 1.5 million shredded tires remained below grade on the site, and between 50,000 to 70,000 unshredded tires remained above grade on the site.

order (see id.). Prior to the issuance of that order in October, the Izzo respondents and the Force respondents had also entered into an on-the-record stipulation with the Town of Smithtown before Justice Cannavo on August 14, 1990, providing, among other things, that:

> (i) the Izzos and Forces would remove all tires, whether shredded or whole, from the surface of the site on or before January 31, 1991; and
>
> (ii) the Izzos and Forces would clean the remaining portions of land under the surface and remove all tires, whole or shredded, any equipment, residues, and by-products of any kind or nature from the pit on site on or before August 31, 1991.

Town of Smithtown v Force, Index No. 15859/1990, Hearing Transcript, Aug. 14, 1990.

In 1992, the Town of Smithtown moved to hold respondents in contempt of court for failing to obey the terms and conditions of Justice Cannavo's prior order and in-court stipulation. That motion was adjourned by the parties for a period of three years until it was submitted and thereafter denied by Justice Cannavo (see Town of Smithtown v Force, Oct. 15, 1999, Index No. 15859/1990).

In 1993, the Department commenced a proceeding to revoke a waste transporter permit held by respondent Force. After a hearing, respondent Force's waste transporter permit was revoked (see Matter of Ernest J. Force, Commissioner's Order, Sept. 30, 1993). In that proceeding, respondent Force stipulated that he failed to comply with ECL article 17 and 6 NYCRR former 360-13 in that he operated the site without a permit and in non-conformance with the operational requirements of 6 NYCRR former 360-13.3 and 13.4 (see Matter of Ernest J. Force, ALJ Hearing Report, at 7).

In 1995, the Town of Smithtown declared the respondents' site a public nuisance and commenced cleanup of at least 700,000 tires from the surface of the site (see Smithtown Town Board Resolution #244, March 21, 1995, and Smithtown Order to Remove Public Hazard, March 21, 1995).[4]

In 1999, the Town of Smithtown moved for supplemental relief from respondents in State Supreme Court, including a judgment in the amount of $1,454,705.83 for reimbursement as expenses incurred by the Town for hiring independent contractors to shred tires on and partially

[4] In 1996, the Town of Smithtown filed an amended complaint against respondents (amending its 1990 complaint against them), alleging additional causes of action stemming from the Town's undertaking removal of tires from the site.

remediate the site. In finding that the Town's methods of removing the tires and financing that removal were reasonable, Justice Cannavo noted that "[b]etween the years of 1995 and 1998, the Town safely disposed of over one million tires and provided security at the site to prevent vandalism and a potential ecological disaster" (see Town of Smithtown v Force, Oct. 15, 1999, Index No. 15859/1990).

After the Town's cleanup, approximately 1.5 million shredded tires remained below grade on the site and potentially as many as 300,000 waste tires remained on the surface. Thereafter, the Department commenced this proceeding against respondents to remediate the remainder of the tires located at the site as they had previously stipulated and had been ordered to do so before Justice Cannavo in 1990.

In January 2001, the Force respondents filed a motion seeking an order allowing the shredded tires on the property to remain buried at the site. Department staff opposed the motion. ALJ DuBois denied the motion, holding that substantial fact questions existed concerning whether the tires could remain buried at the site without posing an environmental or safety hazard (see ALJ Ruling on Motion, Feb. 26, 2001, at 4).

In August 2001, the Force respondents renewed their previous motion based upon a then-recent investigation report concerning the buried tires at the site prepared on their behalf. Department staff again opposed the motion. ALJs P. Nicholas Garlick and Maria E. Villa, who had been re-assigned to the matter, denied the Force respondents' renewal motion, concluding that fact questions still remained concerning whether the tires could remain buried at the site (see ALJs Ruling on Motion, Oct. 1, 2001, at 4-5).

In December 2001, ALJs Garlick and Villa convened the hearing on the issues related to the buried tires at the site. At that time, respondents indicated that they had reached a settlement with Department staff on the remaining issues, the terms of which were placed on the record with the ALJs (see Hearing Transcript, Dec. 19, 2001). Thereafter, Department staff prepared a consent order embodying the terms of the settlement for signature by all parties and circulated it among the parties. Staff indicated that, in the event that respondents failed to comply with the subsequent consent order, staff would request that the matter be restored to the hearing calendar and that the consent order would serve as the stipulated facts for the hearing. Staff's request was rendered academic when respondents failed to execute the consent order.

Department Staff's 2005 Motion for Order Without Hearing

In February 2005, Department staff filed a motion for order without hearing seeking summary judgment on the June 2000 amended complaint against the Izzo respondents and respondent Ernest Force for their alleged failure to comply with the terms of the November 2000 stipulation with Department staff and the additional settlement terms placed on the record at the Department's hearing in December 2001 (see 6 NYCRR 622.12[a]). In its motion, Department staff sought a determination on the first two causes of action alleged in its June 2000 amended complaint.[5]

The Izzo respondents did not file a response to staff's motion. In April 2005, respondent Ernest Force filed an opposition to the motion consisting of an attorney's affirmation, and an affidavit by Ernest Force with various exhibits, including personal financial information and a report of temperature monitoring data from the shredded tires buried at the site conducted monthly from November 2002 to November 2004. Respondent Ernest Force averred that, since 2002, the Izzo respondents had denied him access to the site, thereby preventing him from removing tires in compliance with previous stipulations with the Department and with the 1990 order of Supreme Court, Suffolk County (Cannavo, J.) entered in Town of Smithtown v Force (Oct. 2, 1990, Index No. 15859/1990).

On December 1, 2005, Chief ALJ McClymonds, the presently assigned ALJ, granted Department staff's motion on the issue of liability as against the Izzo respondents and respondent Ernest Force, but otherwise denied the motion. The ALJ directed that a hearing be convened to assess civil penalty amounts and appropriate remedial relief, including a determination on the disposition of tires buried at the site (see Chief ALJ Ruling on Motion, Dec. 1, 2005).

In his ruling, the ALJ noted it was undisputed that, since at least July 2002, the removal of unshredded tires from the surface of the site had ceased and that, as of January 23, 2004, approximately 300,000 whole tires remained on the surface of the site and 1.5 million shredded tires remained buried at the site (see id. at 8). Accordingly, because respondents had failed to comply with the November 2000 stipulation with the Department and the settlement terms placed on the hearing record before the ALJs in December 2001, Department staff was no longer bound by its previous agreements and could proceed against respondents by motion (see id. at 9).

[5] Staff expressly noted in its motion that respondent Stephanie Force was not a subject of the motion. In addition, staff did not seek a determination on the third cause of action in the amended complaint relating to alleged C&D debris at the site.

Based upon the evidence submitted on the motion, including agency and public records, and affidavits of Department staff, and applying well-established principles of law concerning facts found in related actions, the Chief ALJ determined, as a matter of law, that the Izzo respondents and respondent Ernest Force:

> (1) violated 6 NYCRR former 360.2(b) and 6 NYCRR 360-1.7(a)(1) by owning or operating a solid waste management facility without a Part 360 permit since at least December 1987;
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> (2) violated 6 NYCRR 360-13.1(b) by owning or operating a waste tire storage facility on the site since at least October 2, 1990; and
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> (3) as a result of those violations, they owned or operated a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6)

(see id. at 10-16). However, the ALJ held that triable issues requiring a hearing were raised concerning:

> (1) the duration of the violations established, which is relevant to the determination of the maximum penalty allowed; and
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> (2) the remedial relief and penalty sought against respondent Ernest Force based upon his alleged inability to pay and his alleged inability to comply with any Departmental remediation order due to the denial of site access by the Izzo respondents.

With respect to remediation of the buried shredded tires at the site, applying the "law of the case" doctrine, Chief ALJ McClymonds held that, consistent with the previous ALJ rulings in this matter, a hearing was required to determine the potential harm to the environment or human health that the buried shredded tires posed at the site (see id. at 16-17).

Department Staff's Motion for Reconsideration

By letter dated December 5, 2005, Department staff requested that Chief ALJ McClymonds reconsider certain portions of the December 1, 2005 ruling on the motion for order without hearing or, in the alternative, that the Commissioner grant staff leave to appeal from that ruling pursuant to 6 NYCRR 622.10(d)(2)(ii).[6]

[6] A party seeking expedited review of a ruling by an ALJ (except a motion for recusal

Staff argued that certain issues concerning the penalty and the remedial relief sought by the Department could have been determined by the ALJ on the prior motion and, thus, a hearing was not necessary. Specifically, Department staff requested reconsideration of, and sought to challenge on appeal, the following items:

> (1) whether the waste tires on the surface of the site must be removed and properly disposed of and the waste tires buried on the site, whether whole or shredded, must be excavated, removed from the site, and properly disposed of;
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> (2) whether Department staff's request for relief that respondents immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose may be granted;
>
> (3) whether Department staff's request for relief with respect to the Izzo respondents that, in strict accordance with the motion, they cause all waste tires to be removed from the site may be granted;
>
> (4) whether Department staff's request for relief that respondents 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 is required to take over abatement and remediation of the waste tires at the site may be granted;
>
> (5) whether Department staff's request for relief with respect to the Izzo respondents' joint and several obligation to, within 45 days after the service of a decision on the motion upon them, pay an assessed penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703, or the sum of $250,000 plus the sum of $2 for each 20 pounds of waste tires that the State shall have to manage under ECL article 27, title 19 may be granted;

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of an ALJ) under 6 NYCRR part 622 must first make a motion to the Commissioner for leave to file an expedited appeal. A movant must demonstrate that failure to decide such an appeal on an expedited basis (i) would be unduly prejudicial to one of the parties, or (ii) would result in significant inefficiency in the hearing process. The Commissioner's determination whether to grant leave to appeal is discretionary. See 6 NYCRR 622.10[d][2][ii]; see also Matter of Bath Petroleum Storage, Inc., Commissioner's Second Interim Decision, Jan. 26, 2005, at 2.

(6) whether Department staff's request for relief with respect to the Izzo respondents' joint and several obligation to post with the Department within 30 days after service of a decision on the motion, financial security in the amount of $2 million to secure the strict and faithful performance of each of their obligations noted in the motion may be granted; and

(7) whether Department staff's request for relief with respect to the Izzo respondents reimbursing the State for the costs associated with completion of this enforcement action and any costs associated with overseeing the abatement of waste tires and with the State's assumption of the responsibility to implement a waste tire abatement plan may be granted. Department staff subsequently withdrew this last item request for relief from consideration (See Staff's Request for Reconsideration and for Leave to Appeal, December 5, 2005, at 10).

On March 28, 2006, Chief ALJ McClymonds granted staff's motion for reconsideration and, upon reconsideration, modified his prior ruling in part but otherwise adhered to his determination of December 1, 2005. In particular, Chief ALJ McClymonds clarified that no triable issues of fact had been raised concerning the Izzo respondents' ownership of the site, or their joint and several obligation to remove tires from the surface of the site (see Chief ALJ Ruling on Reconsideration, March 28, 2006, at 3-4).

In addition, Chief ALJ McClymonds clarified that the Izzo respondents were prohibited from accepting any more waste tires at the site and were directed to refrain from interfering with the Department in the event the State assumed the removal and disposal of surface tires. Chief ALJ McClymonds further concluded that the Izzo respondents had to reimburse the State for the full amount of any expenditures incurred by the State to abate tires from the surface of the site, and to post financial security to guarantee performance of their remedial obligations (see id. at 4, 8).

However, Chief ALJ McClymonds adhered to his determination that triable issues of fact requiring a hearing on penalty and remediation remained concerning the following:

(i) the earliest date of the violations alleged in the first and second causes of action;

(ii) respondent Ernest Force's ability to comply with remedial obligations; and

(iii) the appropriate penalty and amount of financial security to be imposed upon respondents.

(see id. at 8).

Upon issuance of the ruling on consideration, the Chief ALJ transferred the proceeding to the Commissioner's office for consideration of staff's motion for leave to appeal (see id. at 8).

Submissions on Motion for Leave to Appeal and on Appeal

Following transfer of the motion for leave to appeal, Department staff submitted additional information on April 20, 2006 in support of its motion to the Commissioner. In its submission, Department staff provided further argument in support of its contention that no evidentiary hearing was necessary in this case, based in part upon determinations in prior-related proceedings and the intent of the provisions of ECL 27-0703(6) and ECL article 27, title 19.[7] Staff framed the three issues for determination on this appeal as follows:

(i) whether respondents, as a matter of law, must remove and properly dispose of the waste tires, whether buried or on the surface, whether whole or shredded, based upon the language of ECL 27-0703(6);

(ii) whether a hearing with oral presentations is needed to consider the merits of Department staff's removal and proper disposal plan; and

(iii) whether a hearing with oral presentations is needed for the penalty phase in order to examine the factual issues regarding the earliest date of the violations alleged in the first and second causes of action, respondent Force's ability to comply with remedial obligations, and the appropriate penalty and amount of financial security to be imposed on respondents.

With respect to issue (i), Department staff argues that ECL 27-0703(6) allows no remediation option other than removal of all waste tires, whether whole or shredded, from the site. With respect to issue (ii) and (iii), staff requests that if further evidentiary hearings are required, the Commissioner should direct that those hearings be conducted through written, as opposed to oral, presentation. Moreover, staff stipulates that the start date of the

[7] This title, known as the "Waste Tire Management and Recycling Act of 2003," was added by the legislature during the course of this proceeding and enumerates State priorities in tire disposal.

first and second causes of action was October 2, 1990 (the date of Justice Cannavo's order in Town of Smithtown v Force [Suffolk County Index No. 15859/1990]) (see Sullivan Letter, April 20, 2006, at 8).

By letter dated May 3, 2006, Assistant Commissioner Louis A. Alexander advised the parties that then-Commissioner Denise M. Sheehan had granted Department staff's motion for leave to file an expedited appeal from the rulings dated December 1, 2005 and March 28, 2006 the of Chief ALJ. Pursuant to 6 NYCRR 622.6(e) and (f), Assistant Commissioner Alexander provided that staff had until May 17, 2006 to further supplement its submissions on appeal. The other parties to this proceeding were given until June 21, 2006 to file a response to Department staff's appeal.

By letter dated June 19, 2006, respondent Ernest Force submitted a written response to Department staff's appeal.[8] Respondent Ernest Force maintains that a hearing is necessary to determine the issues outlined by Chief ALJ McClymonds and that the only question on appeal should be whether Chief ALJ's prior determinations that triable issues of fact exist was correct. Respondent Force asserts that the request to conduct further proceedings, if any, on papers was not made to the ALJ and, thus, is not before the Commissioner on this appeal.

Concerning the start date for the violations, respondent Force accepts staff's stipulation, subject to his argument that he should not be held responsible for the violations. Respondent Force also argues that issues of fact remain concerning the threat posed by and, therefore, the necessity of removing, the 1.5 million shredded tires buried at the site, and that such issues require an evidentiary hearing. Respondent Force challenges staff's assertion that ECL 27-0703(6) requires that buried shredded tires be excavated. Respondent urges that, pursuant to ECL 27-0703(6), 27-0703(1) and 27-1911(2), the Department has discretion to determine a reasonable and feasible abatement plan. Respondent asserts that it will establish at hearing that a reasonable and feasible abatement plan involves leaving the shredded tires buried at the site, and redeveloping the site consistent with its zoning as heavy industrial. Finally, respondent Ernest Force contends that a hearing is necessary to determine his ability to comply with and pay for an as-yet undetermined penalty and any remedial obligations associated with abating the site based upon, among other things, his allegation that the Izzo respondents have denied him access to the site.

By letter dated June 26, 2006, Department staff responded to respondent Ernest Force's letter dated June 19, 2006, and submitted

[8] Although advised of the opportunity to do so, the Izzo respondents did not submit a response to staff's appeal.

further argument in support of its position that a hearing with oral presentation of evidence was unnecessary. Staff maintains, contrary to respondent Ernest Force's contention, that a determination on the issues raised in its prior motion in this proceeding could be accomplished by written submissions only.

By letter dated June 29, 2006, Assistant Commissioner Louis A. Alexander advised the parties that then-Commissioner Sheehan had determined to receive Department staff's June 26, 2006 submission and advised the other parties to the proceeding that they could file further responses to staff's letter by July 19, 2006.

By letter dated July 18, 2006, the attorneys for respondent Ernest Force submitted a brief written response repeating his previous arguments in opposition to staff's position.[9] No other submissions were authorized, nor were any other submissions accepted on this appeal.

Discussion

In his rulings, the Chief ALJ concluded that respondents failed to raise a triable issue of fact concerning their liability and that Department staff established its entitlement to summary judgment on the issue of respondents Pasquale Izzo, Michael Izzo, and Ernest Force's liability for the violations alleged in the first and second causes of actions in the amended complaint (see ALJ Ruling on Motion for Order without Hearing, at 8-16, 17-18; ALJ Ruling on Motion for Reconsideration, at 2-3). That conclusion has not been challenged on appeal. Accordingly, respondents' liability for the violations alleged is affirmed.

The issues raised on this appeal concern the appropriate remedial plan and penalty to be imposed as a result of the violations established.

Removal and Disposal of Buried Shredded Waste Tires

Department staff's motion for order without hearing is the administrative equivalent of summary judgment (see 6 NYCRR 622.12), and is reviewed on the merits on this appeal. The law of the case doctrine, as properly noted by Department staff, does not apply to the Commissioner sitting in administrative appellate review of a ruling of an ALJ.

In its motion for order without hearing, staff sought removal

[9] Although again advised of the opportunity to do so, the Izzo respondents did not submit a response to staff's appeal.

of all waste tires from respondents' site in strict accordance with a plan similar to those that have been approved by the Commissioner in other proceedings (see Matter of Hornburg, Chief ALJ Ruling/Hearing Report, Aug. 24, 2004, adopted by Commissioner's Order, Aug. 26, 2004; Matter of Wilder, Chief ALJ Ruling/Hearing Report, Oct. 18, 2004, adopted by Commissioner's Order, Nov. 4, 2004). In his rulings, the Chief ALJ held that staff's summary judgment motion could be granted with respect to the approximately 300,000 tires that remain on the surface of the site. However, with respect to the approximately 1.5 million shredded tires buried at the site, the ALJ held that a hearing is required to determine whether the shredded tires may remain buried.

Staff asserts that, as a matter of law, ECL 27-0703(6) requires that all buried shredded tires must be removed from the site. I agree, and determine that no hearing is required on that issue. Section 27-0703(6) expressly provides that an owner or operator of a solid waste management facility engaged in the storage of one thousand (1,000) or more waste tires in existence on or after September 12, 2003 "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." As of January 23, 2004, the site contained approximately 1.8 million shredded and unshredded tires, both on the surface and buried on the site (see Ruling of the Chief ALJ on Motion for Order Without Hearing, Dec. 1 2005, at 8 [Finding of Fact #12]).

Respondents never submitted a permit application for the facility and are not in compliance with the statutory requirement in ECL 27-0703(6). Accordingly, respondents are obligated to remove all the waste tires from the site on that basis alone. Furthermore, I see no basis in the applicable law to distinguish between tires that are on the surface of, or buried on, a site, or whether the tires are whole or shredded (see, e.g., New York State Waste Tire Stockpile Abatement Plan, NYSDEC, July 2004, at 2 [item #8], 22; see also ECL 27-1901[13][definition of "waste tire" includes whole tires or portions of tires]; ECL 27-1901[6] [definition of noncompliant waste tire stockpiles includes buried waste tires]).[10] Therefore, all the tires at the site, whole or shredded, buried or on the surface, must be removed in accordance with the mandate set forth in ECL 27-0703(6).

Respondent Force seeks to challenge the removal plan proposed by Department staff. As the ALJ noted, an approvable plan must

[10] I note that respondents stipulated in August 1990 to remove all tires from the site, and Justice Cannavo's subsequent order in October 1990 directed respondents to remove all tires from the site.

include measures "necessary and appropriate" to bring a solid waste facility into "substantial compliance" with the ECL and Department regulations (see Ruling on Reconsideration, at 5-7). ECL 27-1911(2), which was enacted as part of the Waste Tire Management and Recycling Act, prohibits the disposal of waste tires "in a landfill unless the department has determined that it is not feasible to convert the tires to a beneficial use." I read the term "landfill" as used in the statute to be a facility that is permitted or otherwise authorized by the Department and not an unauthorized and unpermitted disposal area, such as this site, which fails to comply with the required or appropriate regulatory standards for those facilities. Based on this record, the remedial relief for the removal of the waste tires from the site proposed by Department staff is appropriate and authorized.

In addition, the State Legislature has imposed severe restrictions with respect to the operation of landfills on Long Island. Notably, ECL 27-0704(4) prohibits the operation of new landfills in Suffolk County after 1983 except under strict requirements. ECL 27-0704(5) required closure of all landfills in Suffolk County (where the site is located) by December 1990, except for those protected by double liners that accept only those wastes approved for the location of the site, and were in compliance with other limitations and restrictions (see also, Matter of Town of East Hampton v Jorling, 179 AD2d 337 [2d Dept 1992], appeal dismissed and lv dismissed in part, and otherwise denied 81 NY2d 818 [1993]). These statutory requirements would apply here, and they have not been met at respondents' site.

The Waste Tire Management and Recycling Act, which was enacted in 2003, resulted from the State Legislature's "recognition of the horrendous problems caused by the storage of huge numbers of used tires in dumps, often causing pungent and highly polluting fires" (Weinberg, Practice Commentaries, McKinney's Cons Laws of New York, Book 17 ½, ECL 27-1901, at 448). The improper disposal of tires clearly poses an environmental and public health and safety threat, and no triable issues of fact exist where, as here, such improper disposal has occurred. Moreover, Department staff in its summary judgment motion clearly made a prima facie showing concerning the significant environmental and public health threat posed by the buried shredded tires at the site, justifying their removal (see Affidavit of Terry Allen Gray, sworn to on February 9, 2005, Department Staff Motion for Order without Hearing, Exh N). In addition, Department staff's expert affidavit outlined the industrial standards that would have to be met to safely bury tire shreds, and asserted that such standards have not been met at respondents' facility (see id.).

Respondent Force's submissions in support of his motions in 2001, and in opposition to staff's 2005 motion for order without hearing, fail to raise triable issues of fact sufficient to warrant the denial

of summary judgment to the Department. At most, respondent Force's evidence raises fact issues concerning whether the buried tire shreds are presently heating up. His submissions, however, fail to challenge the threat the buried tire shreds pose to air, surface water, groundwater, and soil if they do combust in the future, as asserted by the Department's expert. Moreover, respondent Force's submissions fail to raise any issues concerning the facility's non-compliance with industrial standards, the statutory and regulatory requirements governing the landfilling of waste tires in general, or the specific statutory requirements for landfills in Suffolk County. His submissions also fail to account for the prohibitions that apply to the burial of waste tires as evidenced by ECL 27-0704 and 27-1911. Accordingly, summary judgment on Department staff's remedial plan, which includes removal of the waste tires from the site, shall be granted.

Duration of Violations

In Department staff's April 20, 2006 submissions on its motion for leave to appeal, staff stipulated that the violations alleged in the first and second causes of action began on October 2, 1990, the date of Justice Cannavo's order in Town of Smithtown v Force (Sup Ct, Suffolk County, Index No. 15859/1990). The Izzo respondents have not appeared to contest the start date for the violations, and respondent Ernest Force agrees to the stipulation, subject to his arguments concerning his responsibility for the violations. Thus, no hearing is required to establish the duration of the violations alleged. Those portions of the amended complaint alleging violations occurring before October 2, 1990, are dismissed.

Penalty and Remedial Obligations Sought Against the Izzo Respondents

The Izzo respondents have not appeared or otherwise opposed Department staff's motion for order without hearing. Having concluded that no triable issues of fact have been raised concerning the remediation plan proposed by staff or the duration of the violations established, both the penalty and remedial obligations to be imposed upon the Izzo respondents may be determined. As noted above, the undisputed facts reveal that since at least October 2, 1990, the Izzo respondents have never received a solid waste management facility permit to operate the waste tire storage facility on the site, in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b).

Department staff's motion sought an assessed penalty in an amount determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703 or the sum of $250,000 plus, if respondents failed to comply with staff's proposed removal and disposal plan, the sum of $2 for each 20 pounds of waste tires that the State would have to manage under ECL article 27, title 19. This penalty would be in

addition to the remedial costs respondents would be liable for pursuant to ECL 27-1907. The alternative penalty-assessment formula requested by Department staff in its motion has been accepted by Commissioners in other similar proceedings (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005; Matter of Hornburg, Supplemental Order of the Executive Deputy Commissioner, May 5, 2006). As determined in those matters, the rationale for the penalty-assessment formula proposed by staff is that "it (1) provides for a minimum penalty, irrespective of respondent's compliance with the Commissioner's order, to punish respondent for violations of the State's laws and regulations and to deter future violations, and (2) provides respondent with an incentive to comply with the remedial obligations imposed in the Commissioner's prior order. In addition, the '$2 per 20-pounds of tires' provision incorporates proportionality into the penalty calculation" (see Matter of Hornburg, Chief ALJ Hearing Report, April 17, 2006, at 8).

Determining the maximum penalty allowable by law requires an analysis of the number of violations for which a penalty is authorized. In this case, the Izzo respondents violated both 6 NYCRR 360-1.7(a)(1) and 360-13.1(b). The violations of section 360-1.7(a)(1) and section 360-13.1(b) constitute a single violation for penalty calculation purposes where, as here, the violations arise from a single course of conduct (see Matter of Wilder, Chief ALJ Hearing Report, at 9-12, adopted by Acting Commissioner's Supplemental Order, Sept. 27, 2005, at 2). Based upon staff's stipulation, the single violation continued from October 2, 1990, to February 11, 2005, the date of staff's motion for order without hearing.

ECL 71-2703 provides that "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by [ECL article 27, title 7] or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed" $7,500 for each violation and an additional penalty of up to $1,500 for each day during which such violation continues (see ECL 71- 2703[1][a]). Based upon this, the maximum penalty authorized by ECL 71-2703 for the violations of sections 360-1.7(a) and 360-13.1(b) is $7,842,000. This amount was calculated as follows:

First day of violation (10/2/90)	--	$ 7,500
Penalty for period from 10/3/90 to 2/11/05 (5,223 days x $1,500 per day)	--	$ 7,834,500
Total		$ 7,842,000

In this case, however, Department staff's alternative penalty-assessment proposal sought the lesser of the maximum civil penalty under ECL 71-2703 or the sum of $250,000 plus, if respondents failed to comply with staff's proposed removal and disposal plan, the

sum of $2 for each 20 pounds of waste tires that the State would have to manage. Respondents' site contains upwards of 1.8 million waste tires. Assuming the Izzo respondents fail to comply with their remedial obligations, the approximate maximum penalty assessed under this alternative method would be slightly under $4,000,000 (1.8 million tires at $2 per 20-pounds of tires [one tire weighing about 20 pounds] or $3,600,000, plus the minimum penalty of $250,000). Therefore, the alternative penalty sought by Department staff would be less than the maximum amount authorized by ECL 71-2703. Moreover, under the circumstances, the penalty assessed against the Izzo respondents is justified.

Based upon prior related determinations and stipulations involving the Izzo respondents' site, as well as the Izzo respondents' blatant disregard for their longstanding legal obligation to remove and dispose of waste tires from the site, Department staff has also clearly demonstrated that the Izzo respondents should be required to post financial security in the amount of $2 million in order to secure the strict and faithful performance of their respective obligations noted in staff's motion.

Penalty and Remedial Obligations Sought against Respondent Ernest Force

For the reasons stated by the Chief ALJ, respondent Force has raised triable issues of fact concerning the appropriate penalty and remedial obligations to be imposed upon him because of his lack of access to the site and his ability to pay a penalty. Thus, the Chief ALJ's rulings are affirmed in part, and the matter will be remanded to the Chief ALJ for further proceedings consistent with this decision and order.

As to staff's request that the Chief ALJ be directed to conduct further proceedings through written, as opposed to the oral, presentation of evidence, the determination whether to allow for the submission of written testimony falls within the discretion of the Chief ALJ. Accordingly, any request with respect to written submissions should be made to the Chief ALJ in the first instance. Staff should note, however, that even if the Chief ALJ allows for written submissions, respondent Force and Department staff retain the right of cross-examination which, if exercised, would generally necessitate the convening of an evidentiary hearing (see 6 NYCRR 622.11[a][4]).

CONCLUSION

Based upon the record and foregoing discussion, I modify the rulings of the Chief ALJ by granting Department staff's motion for order without hearing against respondents Pasquale Izzo and Michael

Izzo. I conclude that the proposed civil penalty sought by Department staff against the Izzo respondents to address the violations determined by Chief ALJ McClymonds is authorized and appropriate. I also conclude that the remedial measures sought against the Izzo respondents are authorized and warranted, and the dates recommended by staff by which the Izzo respondents are to achieve compliance with applicable regulatory standards are authorized and reasonable.

With respect to respondent Ernest Force, I conclude that Department staff's motion for order without hearing shall be granted with respect to respondent Force's liability. As noted in the Ruling on Motion for Order without Hearing, respondent Force contends that since 2002, the Izzo respondents have denied him access to the site, thereby preventing him from carrying out remedial activities as agreed to in the stipulations. Respondent Force's lack of access to the site raises triable factual issues. Because the penalty that Department staff seeks is linked to the amount of waste tires a respondent fails to remove from a site, his alleged inability to access the site raises questions regarding the propriety of imposing the penalty structure that Department staff has recommended. In addition, respondent Force has furnished financial information that raises triable fact issues concerning his ability to pay a penalty.

Accordingly, with respect to respondent Force, this matter is remanded to the Chief ALJ for proceedings with respect to penalty and remedial relief. These remaining issues would be appropriate for mediation, and I encourage Department staff and respondent Force to consider mediation, as an alternative to an adjudicatory proceeding in this matter. I hereby direct the Chief Administrative Law Judge to schedule a conference call with Department staff and respondent Force to discuss the opportunity for mediation of the remaining issues.

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

I. The rulings of Chief ALJ James McClymonds dated December 1, 2005 and March 28, 2006 are modified by granting Department staff's motion for order without hearing against respondents Pasquale Izzo and Michael Izzo ("Izzo respondents"), granting the motion in part against respondent Ernest Force (individually and as Vice President of Windsor Associates doing business as New York Tire Recycling and as an officer of New York Tire Recycling Company, Inc., also known as New York Tire Corp., and as Vice President of Stephanie Force Waste Tire Management Corp., also known as and doing business as Waste Tire Management Corp.)("Ernest Force") and, as so modified, the rulings are otherwise adopted and affirmed.

II. The Izzo respondents and respondent Ernest Force are adjudged

to have owned or operated a solid waste management facility without a valid permit in continuing violation of 6 NYCRR 360-1.7(a)(1) from October 2, 1990 to February 11, 2005, the date of staff's motion for order without hearing.

III. The Izzo respondents and respondent Ernest Force are adjudged to have owned or operated a waste tire storage facility without a permit in continuing violation of 6 NYCRR 360-13.1(b) from October 2, 1990 to February 11, 2005.

IV. The Izzo respondents and respondent Ernest Force are adjudged to have owned or operated a noncompliant waste tire stockpile as that term is defined in ECL 27-1901(6).

V. The Izzo respondents 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.

VI. The Izzo respondents are jointly and severally responsible for the proper removal of waste tires from the site, and shall cause all waste tires to be removed from the site in the following manner and schedule:

A. For purposes of this paragraph, the term "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), whether or not on tire rims, and whether on the surface or buried.

B. Starting within sixty (60) days after the date of service of this order upon them, the Izzo respondents 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 250 tons of waste tires for each seven calendar day period, the first day of the first period being the first day removal and transportation shall commence. The Izzo respondents shall provide no less than one business day's advance notice to the following individual 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. 1-1999-11-05-89

C. The Izzo respondents 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.

D.(1). 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, the Izzo respondents shall submit by means of delivery by the United State Postal Service, private courier service, or hand delivery, a written report to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. 1-1999-11-05-89

(2). Each report shall contain the following information pertaining to each seven calendar day period and the following certification:

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

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

Each row in the chart shall relate to an individual load on a specifically identified vehicle. Copies of the two weigh tickets used to determine the weight of that load shall be attached to the chart.

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, and a copy of the receipt for each load of waste tires accepted at the facility accepting 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, the Izzo respondents shall submit only one copy of that agreement. If an agreement covers loads in more than one reporting period, respondents 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.

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

> I, [name of signatory respondent], 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.

e. Should the Izzo respondents fail to strictly comply with any provision of this order, Department staff is directed to remove the waste tires from the site by any means as staff may deem appropriate, to the extent monies may be available from the Waste Tire Management and Recycling Fund or from other sources.

VII. The Izzo respondents are directed to fully cooperate with the State and refrain from any activities that would interfere with the State, its employees, contractors, or agents should the State be required to take over abatement of the waste tire stockpiles at the site.

VIII. Within thirty (30) days after service of this order upon respondents, the Izzo respondents shall post with the Department financial security in the amount of $2,000,000 to secure the strict and faithful performance of their obligations under this order. The Izzo respondents are jointly and severally liable for the posting of this financial security.

IX. Respondents Pasquale Izzo and Michael Izzo are jointly and severally assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $250,000 plus, if the Izzo respondents fail to comply with any requirement set forth of this order, the sum of $2 for each twenty (20) pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19.

A. No later than forty-five (45) days after the date of service of this order upon respondents, the Izzo respondents shall submit payment of $250,000 in the form of a certified check, cashier's check or money order payable to the "New York State Department of Environmental Conservation" and deliver such payment by certified mail, overnight delivery or hand delivery to the Department of Environmental Conservation at the following address:

New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Michael Caruso, Esq.
Re: VISTA Index No. 1-1999-11-05-89

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

X. All communications between any of the respondents and Department staff concerning this order, other than as provided for in paragraphs VI.B and VI.D.1, above, shall be made to Michael Caruso, Esq., at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Michael Caruso, Esq.
Re: VISTA Index No. 1-1999-11-05-89

with copies of those 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. 1-1999-11-05-89

XI. The provisions, terms, and conditions of this order shall bind respondents Pasquale Izzo, Michael Izzo, and Ernest Force (individually and as Vice President of Windsor Associates doing business as New York Tire Recycling and as an officer of New York Tire Recycling Company, Inc., also known as New York Tire Corp., and as Vice President of Stephanie Force Waste Tire Management Corp., also known as and doing business as Waste Tire Management Corp.), and their agents, successors, and assigns, in any and all capacities.

XII. The matter is remanded to Chief Administrative Law Judge James McClymonds for further proceedings consistent with this decision and order.

For the New York State Department
of Environmental Conservation

By: _____
Louis A. Alexander
Assistant Commissioner

Dated: July 16, 2010
Albany, New York

TO: Pasquale Izzo (Via Certified Mail)
16 Indian Trace
Kings Park, New York 11754

Michael Izzo (Via Certified Mail)
10 Printer Court
Huntington Station, New York 11746

Ernest Force (Via Certified Mail)
611 Center Bay Drive
West Islip, New York 11795

Lilia Factor, Esq. (Via Certified Mail)
Lamb & Barnosky, LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, New York 11747-9034

Leonard J. Shore, Esq. (Via Certified Mail)
366 Veterans Memorial Highway
Commack, New York 11725

Michael Caruso, Esq. (Via Intra-Agency Mail)
New York State Department of
Environmental Conservation
Office of the General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500