STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located in the Town of Scriba, Oswego County, New York, and Owned or Operated by,

ORDER

VISTA Index No. CO7-20040621-9

- by -

GENE PIEROPAN,

Respondent.

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Gene Pieropan ("respondent") to enforce provisions of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360. The proceeding was commenced pursuant to 6 NYCRR 622.12 by service of a motion for order without hearing dated August 11, 2004. The motion was served upon respondent Gene Pieropan by certified mail and received on August 13, 2004.

In Department staff's motion, which serves as the complaint in this matter, staff charge that since at least April 2000, respondent has owned and operated an unpermitted waste tire facility on a parcel of property in the Town of Scriba, Oswego County, in violation of 6 NYCRR 360-13.1. Also, various violations of 6 NYCRR 360-13.2 and 13.3 are charged, some for the period since at least April 2000, and others for the period since at least September 11, 2003, all concerning the facility's operation. As a consequence of the alleged violations, staff contends that respondent Gene Pieropan owns and operates a noncompliant waste tire stockpile within the meaning of Environmental Conservation Law ("ECL") 27-1901(6).

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

This matter was initially assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds. On December 8, 2005, he reassigned the matter to ALJ Edward

Buhrmaster, who prepared the attached hearing report. I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

Because respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6), the abatement measures Department staff seeks to have imposed in this matter are authorized by ECL 27-1907. Moreover, the penalty recommended by ALJ Buhrmaster is warranted by the circumstances of this case and consistent with the penalty assessment formula I have adopted in other noncompliant waste tire stockpile cases (see Matter of Parent, Jr., Order of the Acting Commissioner, Oct. 5, 2005; Matter of Wilder, Supplemental Order of the Acting Commissioner; Sept. 27, 2005; Matter of Bice, Order of the Commissioner, April 19, 2006).

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

1. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted to the extent indicated herein.

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

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

4. Respondent Gene Pieropan has owned and operated the waste tire storage facility without a valid permit in continuing violation of 6 NYCRR 360-13.1 since September 11, 2003.

5. Respondent has owned and operated the waste tire storage facility without any of the following Department-approved plans and, therefore, has operated the facility in violation of 6 NYCRR 360-13.3(a):

a. A site plan, as required by 6 NYCRR 360-13.2(b);

b. A monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e);

c. A closure plan, as required by 6 NYCRR 360-13.2(f);

d. A contingency plan, as required by 6 NYCRR 360-13.2(h);

e. A storage plan, as required by 6 NYCRR 360-13.2(i); and

f. A vector control plan, as required by 6 NYCRR 360-13.2(j).

6. Respondent is determined to have continuously violated the following operational requirements established in 6 NYCRR 360-13.3 during the period between September 11, 2003, and August 5, 2004:

a. Respondent violated 6 NYCRR 360-13.3(c)(4) by operating without an active hydrant or viable fire pond on the facility and fully charged large capacity carbon dioxide or dry chemical fire extinguishers;

b. Respondent violated 6 NYCRR 360-13.3(c)(6) by failing to eliminate potential ignition sources from the tire storage area; and

c. Respondent violated 6 NYCRR 360-13.3(d)(2) by failing to enclose the facility with a woven wire, chain-link or other acceptable fence material, at least six feet in height.

7. For the period from September 11, 2003 to August 5, 2004, respondent is determined to have continuously violated the following operational requirement established in 6 NYCRR 360-13.2:

a. Respondent violated 6 NYCRR 360-13.2(h)(6) by storing waste tires in piles in close proximity to natural cover and trees, and by locating tire piles within 50 feet of grass, weeds and bushes, in violation of National Fire Protection Association standards; and

b. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain more than 50 feet of separation distance between waste tire piles, and failing to maintain separation areas free of obstructions and vegetation at all times.

8. Respondent violated 6 NYCRR 360-13.3(e)(2) by failing to file quarterly operation reports with the Department.

9. Respondent violated 6 NYCRR 360-13.3(e)(3) by failing to file an annual report with the Department no later than 60 days after January 1, 2004.

10. As a result of the violations determined above, respondent is determined to be the owner and operator of a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6).

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

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

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

A. Respondent shall cause all waste tires to be removed from the site in the following manner and on the following schedule:

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

2. Starting no later than thirty (30) days after the date this order is served upon respondent, respondent shall remove and transport to Department-authorized locations and only in vehicles permitted to transport such waste pursuant to 6 NYCRR part 364 no less than 100 tons of waste tires for each seven calendar day period, the first day of the first such period being the first day removal and transportation shall commence. Respondent shall provide no less than one business day's advance notice to the following individuals of the start of waste tire removal activities:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO7-20040621-9

and

New York State Department of Environmental Conservation
615 Erie Boulevard West
Syracuse, New York 13204
ATTN: Steven E. Perrigo, P.E.
Re: VISTA Index No. CO7-20040621-9

3. Respondent shall use a certified 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 it after it is loaded with waste tires and immediately before it leaves the site for off-site transport and disposal.

4(i). Starting the first Monday after the end of the first seven calendar day period, and continuing each subsequent Monday until no waste tires shall remain at the site, respondent shall submit by means of delivery by the United States Postal Service, private courier service, or hand delivery a written report to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO7-20040621-9

and

New York State Department of Environmental Conservation
615 Erie Boulevard West
Syracuse, New York 13204
ATTN: Steven E. Perrigo, P.E.
Re: VISTA Index No. CO7-20040621-9

4(ii). Each report shall contain the following information pertaining to each seven calendar day period:

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

- - Column 1: Name, address and phone number of the transporter and the Part 364 permit number and license plate number of each transport vehicle;

- - Column 2: Weight of the waste tires in that vehicle's load; and

- - Column 3: 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.

b. Copies of the certified weight slips pertaining to each vehicle load, showing the pre-load and post-load weights pertaining to that vehicle, labeled in such a manner as to allow a reviewer to match each weight ticket 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, labeled in such a manner as to allow a reviewer to match each load accepted by that facility to the agreement with that facility. If an agreement covers more than one load, respondent shall submit only one copy of that agreement. If an agreement covers loads in more than one reporting period, respondent shall provide a copy of that agreement in the first report covering a load to which it pertains, and subsequent reports shall simply identify the report in which the copy of the agreement may be reviewed. Respondent shall also provide a copy of the receipt for each load of waste tires accepted at the facility accepting that vehicle's load.

d. A certification at the beginning of each report stating:

> I, Gene Pieropan, do hereby certify that I reviewed the following report; that based on my knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; that the New York State Department of Environmental

> Conservation has the right to rely upon the information contained in this report as being truthful and accurate and to conclude that the report does not omit any material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading; and that I know that any false statement made in this certification or in this report shall be punishable pursuant to Section 210.45 of the Penal Law, and as may be otherwise authorized by law.

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

III. As requested in article III of staff's request for relief, within 30 days after the date of service of this order upon respondent, respondent shall post with the Department financial security in the amount of $75,000 to secure the strict and faithful performance of each of respondent's obligations under the preceding paragraphs of this order.

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

V. As requested in article VI of staff's request for relief, respondent is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $4,000 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, if respondent shall fail to comply with any requirement of this order.

A. No later than 30 days after the date of service of this order upon respondent, respondent shall submit payment of $4,000 to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
RE: VISTA Index No. CO7-20040621-9

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

VI. As requested in article VII of staff's request for relief, respondent shall 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 extent authorized by law.

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

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
RE: VISTA Index No. CO7-20040621-9

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. CO7-20040621-9

New York State Department of Environmental Conservation
615 Erie Boulevard West
Syracuse, New York 13204
ATTN: Steven E. Perrigo, P.E.
RE: VISTA Index No. CO7-20040621-9

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

For the New York State Department of Environmental Conservation

By: /s/
Denise M. Sheehan
Commissioner

Dated: November 3, 2006
Albany, New York

TO: Gene Pieropan (via Certified Mail)
484 O'Connor Road
Oswego, New York 13126

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 in the Town of Scriba, Oswego County, New York, and Owned or Operated

HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING

- by -

VISTA INDEX No. CO7-20040621-9

GENE PIEROPAN,

Respondent.

Appearances

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

- - No appearance by or for Gene Pieropan, Respondent.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for an order without hearing on Gene Pieropan, the Respondent. The motion was served, in lieu of a notice of hearing and complaint, pursuant to Section 622.12 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Department Staff's motion papers, dated August 11, 2004, were mailed to the Respondent that day by certified mail. They were received by the Respondent on August 13, 2004, according to the return receipt furnished by the Department. This completed service pursuant to 6 NYCRR 622.3(a)(3).

According to 6 NYCRR 622.12(c), within 20 days of receipt of a motion for order without hearing, a response must be filed with the Department's chief administrative law judge, such response to include supporting affidavits and other available documentary evidence. No response has been filed, nor has the Respondent had any contact with the Department.

Department Staff sent a copy of its motion and supporting papers to James McClymonds, the Department's Chief Administrative Law Judge, together with proof of service on the Respondent. Judge McClymonds assigned this matter to himself; then, on December 8, 2005, he reassigned it to me.

By letter dated January 24, 2006, I requested additional information and argument from Department Staff. A response from Mr. Sullivan, with a supplemental Staff affidavit, was furnished on February 2, 2006.

CHARGES

According to the motion for order without hearing, the Respondent owns and operates a solid waste management facility having more than 1,000 waste tires, on a parcel of property in the Town of Scriba, Oswego County, New York.

The following violations are alleged by Department Staff for the period since at least April 2000:

- - Failure to provide the Department with a contingency plan detailing the measures to be undertaken during a fire emergency so as to assure compliance with, among other things, the applicable National Fire Protection Association (NFPA) standards, in violation of 6 NYCRR 360-1.9(h), as supplemented by 6 NYCRR 360-13.2(h).

- - Failure to receive a permit to operate a waste tire storage facility, in violation of 6 NYCRR 360-13.1.

- - Failure to submit to the Department any of the following:
    - - A site plan specifying the waste tire facility's boundaries, utilities, topography and structures, in violation of 6 NYCRR 360-13.2(b);
    - - A monitoring and inspection plan addressing such matters as the readiness of fire-fighting equipment and the integrity of the security system, in violation of 6 NYCRR 360-13.2(e);
    - - A closure plan, as required by 6 NYCRR 360-13.2(f);
    - - A contingency plan, as required by 6 NYCRR 360-13.2(h);
    - - A storage plan addressing the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i); and
    - - A vector control plan requiring that all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors, as required by 6 NYCRR 360-13.2(j).

- - Failure to prepare and file with the Department quarterly operation reports, in violation of 6 NYCRR 360-

13.3(e)(2), and annual reports, in violation of 6 NYCRR 360-13.3(e)(3).

These additional violations are alleged by Department Staff for the period since at least September 11, 2003:

- - Storage of waste tires in piles in close proximity to natural cover and trees, and location of tire piles within 50 feet of grass, weeds and bushes, in violation of applicable NFPA standards, and therefore in violation of 6 NYCRR 360-13.2(h)(6).

- - Failure to maintain more than 50 feet of separation distance between waste tire piles, in violation of 6 NYCRR 360-13.2(i)(4).

- - Failure to maintain separation areas free of obstructions and vegetation at all times, also in violation of 6 NYCRR 360-13.2(i)(4).

- - For a facility with more than 2,500 waste tires, failure to have an active hydrant or viable fire pond, and failure to have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, both in violation of 6 NYCRR 360-13.3(c)(4).

- - For a facility with more than 2,500 waste tires, failure to eliminate potential ignition sources from tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6).

- - For a facility with more than 2,500 waste tires, failure to enclose by a fence at least six feet in height, in violation of 6 NYCRR 360-13.3(d)(2).

RELIEF SOUGHT

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

A. Respondent owns and operates the site.

B. The site is a solid waste management facility.

C. Respondent committed the violations alleged in its motion papers.

D. As a result of these violations, the Respondent owns and operates a “noncompliant waste tire stockpile,” as defined by Environmental Conservation Law (ECL) 27-1901(6).

Additionally, Department Staff requests that the Commissioner order the Respondent to:

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

II. Remove all tires from the site to Department-authorized locations in strict compliance with a procedure and schedule outlined in the motion papers.

III. Post with the Department financial security in the amount of $75,000 to secure the strict and faithful performance of the Respondent’s tire removal obligations.

IV. Fully cooperate with the state and refrain from any activities that interfere with the state, its employees, contractors, or agents in the event that the state is required to take over abatement of the waste tire stockpiles.

V. Reimburse the state for the costs associated with completion of this enforcement action and any costs associated with overseeing the abatement of the waste tires in issue, and with the state’s assumption of the responsibility to remove the waste tires should the Respondent fail to strictly comply with the order’s requirements in this regard.

VI. 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 $4,000 plus the sum of $2 for each waste tire that the state shall have to manage under ECL Article 27, Title 19, if the Respondent fails to comply with any requirement related to the tire removal.

VII. Reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures from the fund that the state shall have made and may make in the future, to determine the existence of such violation, to respond to it, and, if need be, to establish that the parcel of land is a noncompliant waste tire stockpile and to investigate and, if necessary, abate that stockpile.

VIII. Undertake such other and further actions as may be determined appropriate.

MOTION PAPERS

Department Staff's motion was made pursuant to 6 NYCRR 622.12(a), which provides that in lieu of or in addition to a notice of hearing and complaint, Staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence. Department Staff's motion for order without hearing is dated August 11, 2004, and is accompanied by a supporting brief from Mr. Sullivan. The brief, also dated August 11, 2004, includes references to various exhibits which are attached to the motion papers:

Exhibit "A" - - A portion of the Town of Scriba, Oswego County, tax map showing the site, and a certified copy of a deed conveying site title to the Respondent on July 11, 1991.
Exhibit "B" - - Aerial photographs of the site taken on April 24 and November 21, 2003, with an enlargement of the site from the November 21, 2003, photograph.
Exhibit "C" - - An affidavit dated August 10, 2004, of Steven E. Perrigo, an environmental engineer in the Department's Region 7 office, with various attachments.

In response to my letter of January 24, 2006, Department Staff supplemented its motion papers with a letter from Charles Sullivan dated February 2, 2006, and a second affidavit from Mr. Perrigo, dated January 30, 2006. At the time I sent my letter to Department Staff, I sent a copy to the Respondent. As I directed, Department Staff also sent the Respondent a copy of its response.

FINDINGS OF FACT

Based upon the papers submitted by Department Staff - - no papers having been submitted by or on behalf of the Respondent - - the undisputed facts determinable as a matter of law are as follows:

1. The Respondent, Gene Pieropan, owns a parcel of land about three acres in size at 484-486 O'Connor Road in the Town of Scriba, such parcel being more particularly described in his deed as County Property No. 260, Lot 20, Tax Map No. 148-2-81. The parcel was deeded to the Respondent on July 11, 1991, by Janice Bristol of Mexico, New York.

2. As of August 5, 2004, this parcel (or site) contained about 40,000 waste tires. There were four main waste tire piles. One pile contained about 26,000 tires, a second contained about 9,600 tires, a third contained about 2,000 tires, and a fourth contained about 1,100 tires. In addition, there were several small waste tire piles scattered about the site. Access to the tire piles was restricted due to the piling up of scrap metal and placement of several junk cars in front of the piles.

3. No Department permit for a solid waste management facility (or, more particularly, a waste tire storage facility) has ever been issued for this site, or to Mr. Pieropan. No application has ever been filed to operate a solid waste management facility or waste tire storage facility at this site.

4. None of the following elements of an application for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time, have ever been filed with the Department:

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

5. No contingency plan for a fire emergency, as required in an application for a solid waste management facility permit, has ever been filed with the Department.

6. No quarterly reports on the facility's operation, and no annual reports, as required by the Department for waste tire storage facilities, have ever been filed with the Department.

7. The tires stored at the site are well-worn in appearance, with no apparent care taken as to preserving their value as tires that could be used on other vehicles legally.

Piled on top of each other, the tires, which retain water, are uncovered and completely exposed to the elements.

8. Nothing about the tire piles changed in the period between Department inspections that occurred on September 11, 2003, and August 5, 2004. During both of these comprehensive inspections:

- - There were no gates or fencing to control public access to the site.
- - Construction and demolition debris, weeds, trees and vegetation were around and between the waste tire piles, impeding access to the piles.
- - Weeds, trees and vegetation were growing through the stored tires.
- - Some of the piles were within 50 feet of each other.
- - Where 50 feet of separation was maintained between tire piles, the separation zone was not maintained free of vegetation and contained obstructions such as C&D debris, scrap metal and junk cars.
- - Rims had not been removed from tires in the piles.
- - Most of the tire piles were not accessible on all sides to fire fighting and emergency response equipment.
- - There was no on-site fire hydrant, fire pond or fire extinguisher.

9. The Department has not been provided with surety to cover the cost of handling emergencies threatening human health or the environment, or insolvency of the facility owner or operator requiring closure of the facility.

10. The stagnant water that collects in waste tires provides an optimal breeding ground for mosquitos that are associated with the spread of the West Nile virus, which can cause encephalitis in humans and has been found in New York State since 1999.

11. Tires are extremely flammable once ignited and burn vigorously. Fires at tire sites may burn above ground and, if the tires are buried, below the ground surface. Gaps and air pockets within a pile of tires make tire fires difficult to extinguish with water or even with foam or sand.

12. Fires at tire dumps may release large amounts of acrid smoke and extreme heat. Waste tire fires may also produce airborne emissions including particulate matter, polycyclic aromatic hydrocarbons, and other volatile hydrocarbons. Such

emissions make it difficult for fire fighters and equipment to approach a fire and put it out.

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

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

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

16. Tire fires have occurred at tire facilities in New York and other states. These fires can be catastrophic, resulting in, among other things, large public financial and resource expenditures to address them, mass evacuations to protect public safety, and oil releases that can detrimentally affect groundwater and surface waters.

DISCUSSION

Nature of the Motion

Department Staff served its motion for order without hearing in lieu of a complaint, and the Respondent has failed to respond or otherwise appear in this matter. Although his failure to respond in a timely manner would entitle Staff to a default judgment pursuant to 6 NYCRR 622.15, Staff argues that, based upon the facts of this matter, it is also entitled to judgment on the merits for the alleged violations of Part 360, and requests that the Commissioner order accordingly. In light of Staff's request, its papers are herein treated, pursuant to 6 NYCRR 622.12, as an unopposed motion for order without hearing.

Standards for Motion for Order Without Hearing

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

In this case, there was no response to Department Staff's motion. Accordingly, once it is concluded that Staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department Staff's motion may be granted.

Period of Violations

My findings of fact are based upon observations made during inspections conducted by Department Staff engineer Steven E. Perrigo on September 11, 2003, and August 5, 2004. They are also based upon the photographic and documentary evidence submitted with Department Staff's motion.

All the violations alleged by Department Staff are in relation to 6 NYCRR Subpart 360-13, which governs waste tire storage facilities. Some of the violations are alleged to have continued since April 2000; others, since September 11, 2003.

The first date for which Mr. Perrigo has provided an estimate of the number of stored tires is September 11, 2003, when he says there were at least 40,000 tires at the site. Mr. Perrigo adds that when he returned to the site on August 5, 2004, the piles did not appear to have decreased in size.

Though Mr. Perrigo claims that he also visited the site in April 2000, his affidavit contains no estimate of the number of waste tires there at that time. In his brief supporting Staff's motion, Mr. Sullivan asserts that at the time of this visit, more than 1,000 tires were present. However, there is no factual basis for that statement, either in Mr. Perrigo's affidavit or elsewhere in Staff's evidence.

The storage of 1,000 or more waste tires at a time requires a permit from the Department, according to 6 NYCRR 360-13.1(b). Therefore, to prove a violation of this section, the Department must establish, as a matter of fact, that more than 1,000 waste tires are present, and that no permit has been issued. Department Staff alleges that there has been a continuing violation of this section since April 2000. However, on the evidence it has provided, this violation can only be supported for the period since September 11, 2003, the date of the first recorded estimate.

Likewise, Department Staff's various allegations that the Respondent violated provisions of 6 NYCRR 360-13.2 and 13.3 may be sustained only for the period since September 11, 2003, not April 2000, as charged in Staff's motion. Section 360-13.2 sets out various application requirements for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time. In the absence of evidence that the Respondent was storing more than 1,000 tires prior to September 11, 2003, Department Staff cannot establish that the Respondent needed a permit until that date. Likewise, plans as described in Section 360-13.2 and quarterly and annual reports under Section 360-13.3(e)(2) and (3) are required only for waste tire storage facilities subject to the permitting requirements of 360-13.1(b).

Solid Waste Management Facility

Department Staff alleges that the subject site is a solid waste management facility. "Solid waste" is defined by statute as "materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection" [ECL 27-0701(1)]. According to ECL 27-0701(3), "solid waste management" includes the purposeful and systematic storage of solid waste, and a "solid waste management facility," according to ECL 27-0701(2), means "any facility employed beyond the initial solid waste collection process."

The site in question is a solid waste management facility because the tires stored there are well-worn and not in a condition for re-use. They are, in effect, waste tires purposefully and systematically stored in piles, where they have remained for an extended period of time. In fact, under the Department's regulations, "waste tire storage facilities" are among the examples outlined in the Department's regulation defining "solid waste management facility" [6 NYCRR 360-1.2(b)(158)].

Ownership and Operation

Department Staff has adequately demonstrated that the Respondent is owner and operator of the waste tire storage facility on his property. His ownership of the facility is demonstrated by the 1991 deed under which he acquired the real property on which the facility is located, and the lack of evidence indicating that property ownership has since passed to someone else.

Apart from owning the facility, the Respondent may also be considered its operator, even though there is no evidence that he placed the tires at the site, or that he has actively managed them in any way. The Department's Part 360 regulations define the "operator" of a solid waste management facility as "the person responsible for the overall operation" of the facility "with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the department-approved operating conditions at the facility or on the property on which the facility is located" [6 NYCRR 360-1.2(b)(113)]. As property owner, the Respondent is responsible for the facility's operation in the absence of evidence that another person was leasing the site or otherwise acting to operate it. (See Matter of Radesi, ALJ's Hearing Report, at 8, adopted by Commissioner's Decision and Order, March 9, 1994.) He had the authority to take corrective action, whether or not he exercised that authority. Also, there is no suggestion that he lacked knowledge of the facility. In fact, he received mail service of Staff's papers at the facility address, and is believed by Staff to occupy a trailer there.

Violations Related to Permitting and the Submittal of Required Plans and Reports

The Department's motion papers include allegations that the Respondent operated his waste tire storage facility without the required permit, plans and reports. These papers include an affidavit of Staff engineer Steven E. Perrigo, who wrote that he made a diligent search of records in a file that pertains to the facility, a file that he said had been "recently" opened in connection with this matter before Mr. Perrigo's affidavit was executed on August 10, 2004. According to Mr. Perrigo's affidavit, his search of the records in that file, the oldest of which go back to April 2000, revealed no record or entry with regard to the required permit, plans or reports.

Mr. Perrigo's affidavit left some question as to the extent of the search that the Department conducted of its records. To confirm that the Respondent did not have a permit and had not submitted the required plans or reports, I wrote Mr. Sullivan a letter dated January 24, 2006, which was copied to the Respondent. In the letter I requested that Staff submit an affidavit indicating that it had searched all of its relevant solid waste management facility records, not merely those that were in the file for this particular matter. I wrote that I expected this affidavit could come from Mr. Perrigo if, as he had indicated, he is the custodian of all Department records pertaining to solid waste management facilities in Region 7. I added that in similar enforcement matters involving unpermitted solid waste management facilities, the Department had provided testimony that it searched all relevant permitting records in relation to both the site location and the named respondent, for permits it had issued or other documents it may have received from a person conducting site activities.

My letter continued as follows:

"As it now reads, Mr. Perrigo's affidavit does not explain who opened the file that was searched, the purpose of that file, or what that file was expected to record or contain. It appears that it is one file among many over which Mr. Perrigo has custody, and that it has been opened for the purpose of this prosecution, rather than maintained in the regular course of the Department's business. Under these circumstances, the absence from that file of a record or entry as to the permit, or the referenced plans and reports, would not by itself establish that these documents do not exist elsewhere in the Department.

"The absence of a permit, and the absence of the referenced plans or reports, are also not demonstrated by Mr. Perrigo's inspection reports, which are attached to his affidavit. These reports, by their own terms, are meant to document violations observed during site inspections, and such inspections can reveal only site conditions, not the existence or lack of permits, plans or reports. In fact, the reports are mentioned in Mr. Perrigo's affidavit only with reference to violations attributable to site conditions, such as failure to adequately separate waste tire piles, and failure to keep separation areas free of vegetation."

Mr. Sullivan responded to my request by letter dated February 2, 2006, which, like my letter to him, was copied to the Respondent. Attached to that letter was a supplemental affidavit of Mr. Perrigo, dated January 30, 2006. That affidavit said that the Department's Division of Environmental Permits (DEP)

maintains a record - - within a database known as “DART” - - of all solid waste management facility permits the Department has issued over the years. According to Mr. Perrigo, with DEP assistance, he queried DART on January 30, 2006, to determine whether a solid waste management facility permit had ever been issued covering the site in question or to the Respondent, and that the response was “no” to both queries. This, Mr. Perrigo wrote, reinforced the statement in his earlier affidavit that no solid waste management facility permit had ever been issued covering the noncompliant waste tire stockpile.

Mr. Perrigo wrote that in the ordinary course of his duties as an environmental engineer in the Department’s Division of Solid and Hazardous Materials, he became aware of this site and set up a file for it, the purpose of which was to gather in one place what was known about the site as a solid waste management facility. According to Mr. Perrigo, a solid waste management facility inspection, such as the ones he conducted in 2003 and 2004, begins with a review of the file for that facility to determine, among other things, whether a permit has been issued and, if so, what special conditions exist that should be accounted for during the site visit, and to determine whether operational records are available, which are reviewed to provide the inspector with background information about the facility’s operations. Mr. Perrigo’s reports for both the September 11, 2003, and August 5, 2004, inspections indicate that the facility lacked a waste tire storage permit from the Department, in violation of 6 NYCRR 360-13.1(b), and that the facility was not permitted as a disposal facility either. Also, they state that no quarterly or annual reports had been filed with the Department, in violation of 6 NYCRR 360-13.3(e)(2) and (3).

Finally, Mr. Perrigo’s first affidavit, as attached to Staff’s motion papers, indicates that he made a diligent search of records in the Department’s file for this facility, as a result of which he found that the Respondent had never submitted any of the following plans that are required as part of an application for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time:

- - A site plan, as required by 6 NYCRR 360-13.2(b);
- - A monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e);
- - A closure plan, as required by 6 NYCRR 360-13.2(f);
- - A contingency plan, as required by 6 NYCRR 360-13.2(h);
- - A storage plan, as required by 6 NYCRR 360-13.2(i); and
- - A vector control plan, as required by 6 NYCRR 360-13.2(j).

Mr. Perrigo's two affidavits, the one provided with the motion and the one provided subsequently at my request, together are sufficient to demonstrate the permitting violation and the violations related to the failure to provide required plans and reports. The query of the DART database confirms that no solid waste management facility permit of any kind has ever been issued for this facility, to Mr. Pieropan or anyone else. The second affidavit confirms that Mr. Perrigo's search for records was comprehensive, so that the failure to locate plans that would be part of a permit application, and reports that would document the facility's operation, reliably indicates that such documents do not exist anywhere within the Department.

The Respondent's failures to submit the plans required as part of an application for an initial permit to construct a waste tire storage facility used to store 1,000 or more waste tires at a time constitute violations of 6 NYCRR 360-13.3(a), one violation for each missing plan. Section 360-13.3(a) requires that all activities at a waste tire storage facility subject to Part 360 permitting requirements "must be performed in accordance with the plans required by this Part and approved by the department." Needless to say, where the plans do not exist, the facility cannot operate in accordance with them. The Department treats the failures to submit the required plans as violations of operational requirements separate and distinct from the failure to apply for or obtain the permit itself. [See Commissioner's Supplemental Orders in Matter of Wilder, September 27, 2005, and Matter of Hornburg, May 5, 2006, and the accompanying ALJ's hearing reports in both matters.] Though these failures were not charged as violations of operational requirements in the motion for order without hearing, but instead as violations of permitting requirements, the pleadings may be conformed to the proof because Staff's papers did provide the Respondent with adequate notice of the factual bases for the charges (i.e., the failures to submit the plans). Had these plans existed, the Respondent had an opportunity to bring them to the Department's attention, and should have done so. Therefore, in the absence of prejudice to the Respondent, the pleadings are hereby amended to conform to the evidence, consistent with CPLR 3025(c).

Violations Related to Facility Operations

For the period between September 11, 2003, and August 5, 2004 - - in other words, the period between the two comprehensive site inspections by Mr. Perrigo, during which there was no apparent change in site conditions - - the Respondent's facility operated in violation of the following operational requirements

for waste tire storage facilities that require permitting under Part 360:

- - 6 NYCRR 360-13.3(c)(4), which requires that waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, an active hydrant or viable fire pond on the facility and fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility in quantities as deemed necessary in the contingency plan or other fire protection and fire prevention equipment as approved by the local fire marshal.

According to Mr. Perrigo's reports, the site did not have a fire hydrant, a fire pond or fire extinguishers when he conducted inspections on September 11, 2003, and August 5, 2004. Also, as noted above, there was no contingency plan that would address this subject.

- - 6 NYCRR 360-13.3(c)(6), which requires that potential ignition sources be eliminated.

According to Mr. Perrigo's reports, construction and demolition waste, weeds, trees and vegetation were observed around each pile and between the piles, impeding access when his inspections were performed on September 11, 2003, and August 5, 2004. Staff's motion papers contend that Section 360-13.3(c)(6) applies to facilities with more than 2,500 waste tires, but actually it applies to all waste tire storage facilities subject to the permitting requirements of Part 360 - - i.e., facilities storing more than 1,000 waste tires at a time.

- - 6 NYCRR 360-13.3(d)(2), which requires that facilities having a planned or actual capacity of 2,500 or more waste tires be enclosed by a woven wire, chain-link or other acceptable fence material, at least six feet in height.

According to Mr. Perrigo's reports, there was no fence around the facility when his inspections were performed on September 11, 2003, and August 5, 2004.

Apart from these violations of operating requirements at 6 NYCRR 360-13.3, the facility operated in violation of the following requirements of 6 NYCRR 360-13.2, which addresses application requirements for an initial permit to construct and operate a waste tire storage facility used to store 1,000 or more waste tires at a time:

- - 6 NYCRR 360-13.2(h)(6), which requires that a waste tire storage facility must comply with all applicable NFPA standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition. These standards require that there be an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area, and that grass, weeds and brush be kept 50 feet or more from stored tires. [See provisions C-3.2.1(c) and C-4.2.5 of Appendix C, "Guidelines for Outdoor Storage of Scrap Tires."] According to 6 NYCRR 360-13.2(h)(6), compliance with NFPA standards is to be assured through the contingency plan developed to minimize fire hazards. As noted above, the Respondent had no contingency plan on file with the Department. Also, according to Mr. Perrigo's inspection reports, the Respondent stored waste tires in piles among and in close proximity to weeds, trees and vegetation.

- - 6 NYCRR 360-13.2(i)(4), which requires that waste tire piles have a minimum separation distance of 50 feet between piles, and that these separation areas be maintained free of obstructions and vegetation at all times. Section 360-13.2 anticipates that these requirements will be set out in a storage plan that addresses the receipt and handling of waste tires, such plan to accompany a permit application. As noted above, there is no storage plan on file with the Department. Also, according to Mr. Perrigo's inspection reports, some of the tire piles were within 50 feet of each other, and even where 50 feet of separation was maintained between piles, that zone was not maintained free of vegetation and contained obstructions such as C&D debris, scrap metal and junk cars.

Sections 360-13.2(h)(6) and 360-13.2(i)(4), though included among the application requirements for a waste tire storage facility permit, establish mandatory, objective standards that govern the operation of such facilities. Therefore, violations of these provisions may be treated as operating deficiencies comparable to violations of Section 360-13.3. [See discussion of Section 360-13.2(i)(4) on pages 4 to 6 of the ALJ's hearing report of August 17, 2005, in Matter of Wilder, attached to the Commissioner's supplemental order in that matter, dated September 27, 2005.]

Operation of a Noncompliant Waste Tire Stockpile

Department Staff seeks a determination that the Respondent owns or operates a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6). ECL 27-1901(6), which was adopted effective September 12, 2003, defines "noncompliant waste tire stockpile" as "a facility, including a waste tire storage

facility, parcel of property, or site so designated by the department in accordance with this title, where one thousand or more waste tires or mechanically processed waste tires have been accumulated, stored or buried in a manner that the department . . . . has determined violates any judicial administrative order, decree, law, regulation, or permit or stipulation relating to waste tires, waste tire storage facilities or solid waste."

The Respondent owns and operates a noncompliant waste tire stockpile because he stores more than 1,000 waste tires on his property in a manner that violates Department regulations, as discussed above. In fact, when he inspected the facility in 2003 and 2004, Mr. Perrigo observed about 40,000 waste tires stored in an improper manner.

As a noncompliant waste tire stockpile, the Respondent's facility is subject to the abatement provisions of ECL 27-1907.

Requested Relief

Department Staff seeks an order of the Commissioner directing the Respondent to immediately stop allowing any waste tires to come onto his site in any manner or for any purpose. ECL 71-2703(1)(a) provides that any person who violates any provision of, or who fails to perform any duty imposed by, ECL Article 27, Title 7, or any rule or regulation promulgated pursuant thereto may be enjoined from continuing such violation. Respondent's ownership and operation of the waste tire storage facility without a permit constitutes a violation of ECL Article 27, Title 7, and the regulations promulgated pursuant thereto. Moreover, the operation of the facility in violation of requirements established at 6 NYCRR 360-13 also constitutes violation of the regulations promulgated pursuant to this statute. Thus, Staff is entitled to an order enjoining the Respondent from any further violations, and I recommend that the Commissioner issue an order accordingly.

Department Staff also seeks an order of the Commissioner directing the Respondent to remove all tires from the site in strict accordance with a plan and schedule detailed in the motion papers, to post with the Department financial security in the amount of $75,000 to secure the strict and faithful performance of the tire removal, to fully cooperate and refrain from interfering with the state in the event the state must take over abatement, and to reimburse the Waste Tire Management and Recycling Fund the full amount of any expenditures incurred by the state in this matter.

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

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

Accordingly, Staff is entitled to an order directing the Respondent to remove the tires from the site, and I recommend that the Commissioner grant such relief. In the event the Respondent does not comply with the removal order, he should be directed to reimburse the 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, consistent with the Commissioner's previous direction in Matter of Wilder. (See paragraph X of the Commissioner's supplemental order dated September 27, 2005, and the supporting ALJ's hearing report, dated August 17, 2005). This eliminates the need to determine the precise scope of remedial expenses recoverable under the statute, a matter the Commissioner has not addressed.

Separately, Department Staff has requested that it be reimbursed for the costs associated with the completion of this enforcement action and any costs associated with overseeing the abatement of the waste tires in issue and with the state's assumption of responsibility to remove the waste tires should the Respondent fail to do this himself. Staff has cited no additional authority for such relief, and therefore, as relief other than what would be appropriate under ECL 27-1907, it should not be afforded.

If abatement measures must be undertaken by Department Staff, Staff is entitled to the cooperation and non-interference of the Respondent, and the Commissioner's order should so indicate.

Also, Staff is entitled to the $75,000 financial security it wants the Respondent to post in order to secure the strict and faithful performance of his tire removal duties. As was determined in Wilder, the Commissioner has the inherent authority under the ECL to require the posting of financial security to ensure compliance with remedial obligations imposed in a Commissioner's order. Such authority is implied from the Commissioner's express obligation under ECL 3-0301 to prevent pollution and to mitigate situations where pollution has occurred, and the Commissioner's express injunctive powers under ECL 71-2903. (See pages 17 and 18 of the ALJ's hearing report of August 17, 2005, in Matter of Wilder, attached to the Commissioner's supplemental order in that matter, dated September 27, 2005.)

Finally, Department Staff seeks payment of an assessed civil penalty that would be the lesser of the maximum civil penalty authorized by law under Section 71-2703, or the sum of $4,000 plus the sum of $2 for each waste tire that the state shall have to manage if the Respondent fails to stop allowing waste tires onto the site or fails to remove those that are there now. A penalty based in part on the number of waste tires stored at the site cannot be precisely determined until the tires are counted during removal. However, based on the assumptions that no tires have been added since August 5, 2004, and that the state will have to remove the tires itself, the Respondent's liability would be $84,000 (i.e., $4,000 as a base penalty, plus $80,000 representing 40,000 waste tires estimated at the site x $2 per tire).

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

According to this policy, remedial or abatement actions do not replace the need for civil penalties. Such penalties, the policy states, are needed to deter future violations of the law, by removing any economic benefit of non-compliance, and to

reflect the seriousness of violations in relation to both the potential harm and actual damage they cause, and their relative importance in the regulatory scheme.

As noted in Mr. Sullivan's brief supporting Staff's motion, the Respondent's failure to come into compliance has brought him an economic benefit due to his having avoided cleanup costs that are his responsibility as owner and operator of the waste tire storage facility. Also, the alleged violations involve the potential for serious harm to the environment and human health, as noted in Mr. Perrigo's affidavit and confirmed in my findings of fact. A fire among the waste tires would be difficult to control and extinguish, releasing contaminants to the air and, potentially, to ground and surface waters.

The Respondent's failure to apply for and receive a permit for his waste tire storage facility is itself a serious violation of the ECL. The Department's ability to regulate such facilities depends on knowledge of where they exist and how they operate, which is facilitated by the permitting and reporting requirements. Also, the plans that are required as part of a permit application are meant to address the hazards such facilities present both to the environment and human health. In this case, not only do the plans not exist, but the operational hazards those plans - - particularly the storage plan - - are meant to address were evident during the 2003 and 2004 inspections. At those inspections, tire piles were not adequately separated, and separation areas were not maintained free of obstructions and vegetation.

If the Respondent removes the tires himself consistent with the terms of Staff's proposed order, the Respondent would be obligated to pay a penalty of only $4,000. However, to the extent the state has to manage this task itself, the penalty would become greater depending on the number of tires this involves. In Wilder, where a similar arrangement was approved by the Commissioner, Department Staff defended it on the bases that (1) it provides for a minimum penalty, irrespective of the Respondent's compliance with the Commissioner's order, to punish the Respondent for its violations and to deter future violations; (2) it provides the Respondent with an incentive to comply with the remedial obligations imposed by the order; and (3) it incorporates proportionality into the penalty calculation.

In Wilder, a base penalty of $50,000 was set in addition to a penalty of $2 per 20 pounds of tires that the state has to manage, on the understanding that 20 pounds is the approximate weight of one tire, and that contractors remove waste tires by

weight, not by tire count. The base penalty in Wilder is higher than the one proposed here; however, that case involved a facility holding approximately 350,000 waste tires, whereas this case involves, at last available count, 40,000 tires. Also, in Wilder, the Respondent had ignored repeated Department directions to bring his site into compliance, had breached an agreement with the Department to remediate the site, and had been convicted three times in town court for engaging in the storage of more than 1,000 waste tires without a permit. Such circumstances are not present here; in fact, there is no evidence of what conversations or dealings Mr. Pieropan has had with the Department.

Since Wilder, the Department has adopted similar penalty formulations in Matter of Parent (Order of the Commissioner, October 5, 2005, assessing a penalty of $50,000 plus $2 for each 20 pounds of tires the state must manage), Matter of Hoke (Order of the Commissioner, January 17, 2006, assessing a penalty of $40,000 plus $2 for each 20 pounds of tires the state must manage), Matter of Bice, Order of the Commissioner, April 19, 2006, assessing a penalty of $1,000 plus $2 for each twenty pounds of tires the state must manage), and Matter of Hornburg (Supplemental Order of the Deputy Commissioner, May 5, 2006, assessing a penalty of $500,000 plus $2 for each 20 pounds of tires the state must manage). A similar formulation in this case - - assessing a penalty of $2 for each 20 pounds of tires the state must manage, rather than $2 for each tire the state must manage - - would not change the total payable penalty, if as Staff maintains in these other cases, 20 pounds is the approximate weight of one tire. If, as Staff maintains, contractors remove tires by weight, not by tire count, it makes sense to assess a penalty in this matter that is consistent with how penalties have been assessed in comparable cases.

Needless to say, the Department may not impose a penalty that is greater than the statutory maximum for the violations combined. Staff acknowledges this by requesting a penalty calculated pursuant to its formula or the maximum civil penalty authorized by law, whichever is less.

ECL 71-2703(1)(a) provides that “[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by [ECL Article 27, Title 7] or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty.” Since May 15, 2003, the penalty has been $7,500 per violation and an additional $1,500 for each day during which the violation continues (L 2003, ch 62, pt C, Section 25).

In this case, Staff seeks to impose separate penalties for multiple violations arising out of a single, albeit continuous, course of conduct. As noted above, Mr. Perrigo conducted comprehensive inspections of the Respondent's facility on September 11, 2003, and August 5, 2004. At the time of the 2004 inspection, Mr. Perrigo noted that nothing appeared to have changed with regard to the tire piles, and, in particular, that they had not decreased in size. Among the findings noted at both the 2003 and 2004 inspections were those involving lack of gates or fencing; the placement of piles within 50 feet of each other; the location of weeds, trees and vegetation around and between piles, and growing through the piles; and the absence of a fire hydrant, fire pond or fire extinguishers. The fact that conditions were essentially the same during the 2003 and 2004 inspections suggests that the operational violations noted during the first inspection continued in essentially the same manner up until the time of the second inspection. Also, Mr. Perrigo has demonstrated that the facility has never been permitted and that the Respondent has never provided the plans that would normally be part of a permit application, or the annual and quarterly reports that are expected from operating facilities.

All this being said, one must also note that certain of the violations alleged in this matter are multiplicitous of each other and, thus, will not support separate penalties. In particular, charges that the Respondent did not comply with applicable NFPA standards, in violation of 360-13.2(h)(6) - - by storing waste tires in piles in close proximity to natural cover and trees, and by locating tire piles within 50 feet of grass, weeds and bushes - - are multiplicitous of charges that the Respondent failed to eliminate potential ignition sources from tire storage areas, in violation of 6 NYCRR 360-13.3(c)(6), and failed to maintain tire separation areas free of obstructions and vegetation, in violation of 6 NYCRR 360-13.2(i)(4). Also, for penalty purposes, the generalized failure to provide a contingency plan - - in violation of 6 NYCRR 360-1.9(h), for a solid waste management facility - - is no different from the particularized failure to provide a contingency plan for fires - - in violation of 6 NYCRR 360-13.2(h), for a waste tire storage facility.

The fact that separate penalties would not be warranted for each violation charged by the Department does not mean that the overall penalty requested by the Department cannot be supported. That is because there is a sufficient number of different violations, each of them of a continuing nature, that an assessed penalty of $84,000 (the likely maximum, based upon the 2004 tire

estimate) is far below the penalty that could be calculated under ECL 71-2703.

CONCLUSIONS OF LAW

1. The Respondent, Gene Pieropan, owns and operates a solid waste management facility at 484-486 O'Connor Road in the Town of Scriba, Oswego County.

2. The site is a non-compliant waste tire stockpile, as defined by ECL 27-1901(6), as a result of violations listed below, as well as a waste tire storage facility subject to the provisions of 6 NYCRR Subpart 360-13 because more than 1,000 waste tires are stored there.

3. Since September 11, 2003, the Respondent has operated the facility without a permit, in violation of 6 NYCRR 360-13.1.

4. Also since September 11, 2003, the Respondent has operated the facility without the following plans, in violation of 6 NYCRR 360-13.3(a):

- - A site plan, as required by 6 NYCRR 360-13.2(b);
- - A monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e);
- - A closure plan, as required by 6 NYCRR 360-13.2(f);
- - A contingency plan, as required by 6 NYCRR 360-13.2(h);
- - A storage plan, as required by 6 NYCRR 360-13.2(i); and
- - A vector control plan, as required by 6 NYCRR 360-13.2(j).

5. The Respondent has never filed quarterly or annual reports for the facility, in violation of 6 NYCRR 360-13.3(e)(2) and (3).

6. From September 11, 2003, until at least August 5, 2004, the Respondent operated the facility in violation of operational requirements at 6 NYCRR 360-13.3(c)(4) and (6), addressing fire prevention and control.

7. From September 11, 2003, until at least August 5, 2004, the Respondent operated the facility in violation of the operational requirement at 6 NYCRR 360-13.3(d)(2), addressing facility access.

8. From September 11, 2003, until at least August 5, 2004, the Respondent operated the facility in violation of application

requirements at 360-13.2(h)(6) and 360-13.2(i)(4), the violation of which may be treated as operating deficiencies comparable to violations of Section 360-13.3.

9. Department Staff is entitled to an order enjoining the Respondent from any further violations of ECL Article 27, Title 7, and the rules and regulations promulgated pursuant thereto.

10. Department Staff is entitled to an order directing the Respondent to remove the tires from the site in accordance with the plan and schedule detailed in its motion papers.

11. In the event the Respondent does not comply with the removal order, he should be 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.

12. If abatement measures must be undertaken by Department Staff, Staff is entitled to the cooperation and non-interference of the Respondent.

13. Department Staff is entitled to the $75,000 financial security it wants the Respondent to post in order to secure the strict and faithful performance of his tire removal duties.

14. A civil penalty of the sum of $4,000 plus the sum of $2 for each 20 pounds of waste tires that the state shall have to manage if the Respondent fails to stop allowing waste tires onto the site or fails to remove those that are there now, is authorized and warranted under the circumstances of this case.

RECOMMENDATIONS

I recommend that the Commissioner:

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

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

III. Impose the civil penalty recommended by Department Staff, except that, if the state must undertake site remediation,

the additional penalty should be $2 for each 20 pounds of tires the state must manage; and

IV. Impose the abatement measures requested by Department Staff.

/s/
Edward Buhrmaster
Administrative Law Judge

Dated: August 3, 2006
Albany, New York