

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Department Order Index No.
R9-20031107-63,

ORDER

- by -

VISTA Index No.
C09-20070817-4

ROUTE 20 AUTO PARTS, INC.,

Respondent.

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Route 20 Auto Parts, Inc. ("respondent") to address respondent's alleged violation of a Department Order on Consent. This proceeding was commenced on August 30, 2007, by service of a motion for order without hearing, served in lieu of a notice of hearing and complaint, upon respondent, 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").

Respondent operates an automobile recycling facility ("facility") at 10216 Southwestern Boulevard, Angola (Erie County), New York ("site") and is registered with New York State as a vehicle dismantler and scrap processor. Department staff allege that respondent violated an Order on Consent dated December 5, 2003, by failing to submit proper reports and failing to remove and properly dispose of waste tires from the site.

Department staff, claiming that respondent's submissions to the Department following service of the motion for order without hearing do not constitute a proper response, seek a default judgment (see 6 NYCRR 622.12[b]) or, in the alternative, a determination on the merits of the motion for order without hearing (see 6 NYCRR 622.12[c] and [d]).

This matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached hearing report. I adopt ALJ Sanza's hearing report as my decision in this matter, except as provided herein.

Respondent's site constitutes a "solid waste management facility" as that term is defined by 6 NYCRR 360-1.2(b)(158), and a "waste tire storage facility" that, because it contains 1,000

or more waste tires, is required to have a Department permit pursuant to 6 NYCRR subpart 360-13. Based on this record, the site contains an estimated 14,000 waste tires. In addition, respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in Environmental Conservation Law ("ECL") § 27-1901(6). Accordingly, Department staff is entitled to an order directing respondent to fully cooperate with the State and not interfere with its efforts to take over the abatement of the stockpile at the site (see Matter of Hornburg, CALJ Ruling/Hearing Report, Aug. 24, 2004, at 23, adopted by Commissioner's Order, Aug. 26, 2004).

Moreover, given respondent's violation of the terms of the Order on Consent including but not limited to respondent's failure to remove and properly dispose of waste tires from the site, I conclude that the civil penalties sought by Department staff, and recommended by ALJ Sanza, are warranted under the circumstances.

The ALJ has recommended that respondent be enjoined from accepting any additional waste tires at the site. I concur with that recommendation so long as respondent is not precluded from continuing to operate his vehicle dismantling and scrap processing business. Accordingly, respondent is enjoined from accepting any additional waste tires at the site, except for waste tires that are mounted on vehicles that respondent receives for purposes of dismantling or scrap processing.

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

1. Department staff's motion for default judgment is denied.
2. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in its entirety.
3. Respondent Route 20 Auto Parts, Inc. violated a Department Order on Consent (File No. 03-78, Index No. R9-20031107-63) by, among other things, failing to submit proper reports and failing to remove and properly dispose of waste tires from the facility.
4. For its violation of the Order on Consent, the suspension of respondent's obligation to pay four thousand five hundred dollars (\$4,500) of the five thousand dollar (\$5,000) penalty assessed pursuant to the Order on Consent is hereby vacated, and payment of the four thousand five hundred dollars (\$4,500) heretofore suspended obligation shall be due and payable within thirty (30)

days of the date of service of this order upon respondent Route 20 Auto Parts, Inc.

5. For its violation of the Order on Consent, respondent Route 20 Auto Parts, Inc. is hereby assessed a civil penalty of thirty thousand dollars (\$30,000), payment of which shall be due and payable within thirty (30) days of the date of service of this order upon respondent.

6. Respondent shall submit its respective payments of four thousand five hundred dollars (\$4,500) and thirty thousand dollars (\$30,000) in the form of certified checks, cashier's checks or money orders payable to the order of the "New York State Department of Environmental Conservation" and deliver such payments by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
VISTA Index No. CO9-20070817-4

7. Respondent is adjudged to presently operate a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6).

8. Respondent is hereby directed to immediately stop allowing any waste tires to come onto the property at 10216 Southwestern Boulevard, Angola (Erie County), New York except for waste tires that are mounted on vehicles that respondent receives for purposes of dismantling or scrap processing.

9. Respondent shall 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 stockpile at 10216 Southwestern Boulevard, Angola (Erie County), New York.

10. All communications from respondent to Department staff concerning this order shall be to Charles E. Sullivan, Jr., Esq., New York State Department of Environmental Conservation, Office of General Counsel, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

11. The provisions, terms and conditions of this order shall bind respondent Route 20 Auto Parts, Inc., and its successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: July 14, 2008
Albany, New York

TO: Route 20 Auto Parts, Inc. (Via First Class & Certified Mail)
10216 Southwestern Boulevard
Angola, New York 14006

Stefan M. Artymowycz (Via First Class & Certified Mail)
10216 Southwestern Boulevard
Angola, New York 14006

Charles E. Sullivan, Jr., Esq. (Via Ordinary Mail)
New York State Department of
Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Violation
of Department Order on Consent
having File No. 03-78 and Index
No. R9-20031107-63 by,

ROUTE 20 AUTO PARTS, INC.,

Respondent.

**HEARING REPORT ON
MOTION FOR ORDER
WITHOUT HEARING**

VISTA Index No.
CO9-20070817-4

Appearances:

- Charles E. Sullivan, Jr., Esq., for staff of the New York State Department of Environmental Conservation.
- Route 20 Auto Parts, Inc., respondent pro se.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by the service of a notice of motion and motion for an order without hearing against respondent Route 20 Auto Parts, Inc. ("respondent"). The motion for order without hearing was served in lieu of a notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a).

Department staff's motion papers, dated August 30, 2007, were sent by certified mail, return receipt requested, to respondent at its business address at 10216 Southwestern Boulevard, Angola, New York 14006. The signed receipt for the certified mailing indicates that the motion papers were received by Stefan Artymowycz on September 1, 2007 at the address noted above. In addition, on August 30, 2007, Department staff hand delivered an original and one copy of the motion papers in this proceeding to the Department of State in Albany, pursuant to Business Corporation Law § 306(b).

Thereafter, on the same date, Department staff served an additional copy of its motion papers upon respondent by first class mail at its last known address. That mailing was not returned to the Department. With a cover letter to the

Department's Office of Hearings and Mediation Services dated January 11, 2008, Department staff forwarded a copy of its motion papers maintaining that it is entitled to a default judgment, or in the alternative, that no material issues of fact exist and that staff is entitled to judgment as a matter of law for the violations alleged.

Charges Alleged

Department staff's August 30, 2007 motion alleges that, pursuant to a Department Order on Consent effective December 5, 2003 (File No. 03-78, Index No. R9-20031107-63), respondent admitted that it owned and operated a noncompliant waste tire stockpile on property located at 10216 Southwestern Boulevard, Angola (Erie County), New York (the "site"). In accordance with the Order on Consent, respondent agreed, among other things, to do the following:

1. Submit an annual waste fluid report for all fluids handled in each calendar year starting December 15, 2003 for calendar year 2002, and by March 1 of each year for each subsequent year;
2. Dispose of waste tires at the site at a rate of 1,200 waste tires per month starting November 2003 and each month thereafter until fewer than 1,000 waste tires remain on the site; and
3. Submit monthly reports, starting December 15, 2003 and monthly on the 15th of each subsequent month until fewer than 1,000 waste tires remain on the site, indicating the number of cars brought in, the number of cars disposed of, the number of tires disposed of, the name of the tire disposal facility to which the waste tires were sent, copies of tire disposal receipts, and the estimated number of tires remaining on the site.

Department staff's motion contends that respondent violated the Order on Consent in the following respects:

- (i) Failed to submit an annual waste fluid report for the year 2005;
- (ii) Failed to dispose of waste tires at the site at a rate of 1,200 waste tires per month starting November 2003 and each month thereafter until fewer than 1,000 waste tires remain on the site; and

(iii) Failed to submit monthly reports for the months after June 2005.

Relief Sought

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

A. The Department issued an Order on Consent in File No. 03-78, Index No. R9-20031107-63 to respondent on December 5, 2003;

B. Such Order on Consent obligated respondent to undertake the activities identified in paragraphs 1, 2 and 3 above; and

C. Respondent violated such Order on Consent in the manner identified in paragraphs (i), (ii) and (iii) above.

As a result of the violations alleged, Department staff requests that the Commissioner issue an order directing respondent to:

I. Vacate the suspension of the obligation to pay \$4,500 of the \$5,000 penalty previously assessed and direct respondent to pay the amount of \$4,500 no later than thirty (30) calendar days after the effective date of the Commissioner's Order;

II. Pay an assessed civil penalty of \$30,000 for having violated the Order on Consent no later than thirty (30) days after the effective date of the Commissioner's order;

III. Fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in their abatement of the noncompliant waste tire stockpile at the site; and

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

Papers Reviewed

Department staff's motion is brought pursuant to 6 NYCRR 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence."

Accompanying staff's motion is an affirmation captioned "Service Affirmation and Brief" of Department staff counsel Charles E. Sullivan, Jr., Esq., dated January 11, 2008 ("Sullivan Affirmation"). The Sullivan Affirmation describes the methods that Department staff utilized to serve its motion papers upon respondent in this matter, and contends that respondent has failed to submit a timely response thereto. As evidence of this, the Sullivan Affirmation includes five supporting exhibits numbered "1" through "5."

Exhibit "1" to the Sullivan Affirmation is an affidavit of service of Drew A. Wellette, Division of Environmental Enforcement, in the Department's Central Office, sworn to August 30, 2007, attesting to the service of staff's notice of motion and motion for order without hearing upon respondent as follows: (i) by sending the motion papers by certified mail, return receipt requested, to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 on August 30, 2007; (ii) by hand delivering an original and one copy of the motion papers for respondent to the New York State Department of State in Albany on August 30, 2007; and (iii) by sending the motion papers by first class mail to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 on August 30, 2007.

Exhibit "2" to the Sullivan Affirmation is the Department's certified mailing shipment request form and the receipt for staff's August 30, 2007 certified mailing of the notice of motion and motion for order without hearing to respondent. The certified mail receipt indicates that staff's motion papers were signed for by Stefan Artymowycz, on behalf of respondent, on September 1, 2007.

Exhibit "3" to the Sullivan Affirmation contains, among other things, a receipt for service of Department staff's motion against respondent upon the Department of State in Albany pursuant to Business Corporation Law § 306 on August 30, 2007, and a service of process cover sheet for same.

Exhibit "4" to the Sullivan Affirmation is an affidavit

by Department engineer Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, sworn to January 10, 2008 ("Grasso 2008 Affidavit"). The Grasso 2008 Affidavit supplements a previous affidavit prepared by Mr. Grasso in 2007 (see discussion below). The Grasso 2008 Affidavit includes four additional exhibits, numbered "1" through "4," which consist of various documents and materials sent by respondent to Mr. Grasso in September, October, November and December 2007.

Exhibit "1" to the Grasso 2008 Affidavit consists of the following documents: (A) respondent's annual waste fluid report for 2005, dated March 11, 2006; (B) respondent's monthly disposal reports for the months of July 2005 through August 2007; (C) three tire disposal receipts (two of which are dated August 7, 2007), totaling 1,170 tires; and (D) two tire disposal receipts for 1,000 and 4,000 waste tires respectively dated August 27, 2004 and October 8, 2004.

Exhibit "2" to the Grasso 2008 Affidavit consists of the following documents: (A) respondent's monthly disposal report for the month of September 2007; and (B) one tire disposal receipt dated August 8, 2007 for 332 tires. These documents were received by Mr. Grasso on October 16, 2007.

Exhibit "3" to the Grasso 2008 Affidavit consists of the following documents: (A) respondent's monthly disposal report for the month of October 2007; and (B) one tire disposal receipt dated October 14, 2007 for 576 waste tires. These documents were received by Mr. Grasso on November 16, 2007. Finally, Exhibit "4" to the Grasso 2008 Affidavit consists of respondent's monthly disposal report for the month of November 2007.¹ This document was received by Mr. Grasso on December 31, 2007.

Lastly, Exhibit "5" to the Sullivan Affirmation consists of Department staff's August 30, 2007 cover letter to respondent enclosing the motion, along with a copy of the notice of motion and motion for order without hearing. Included as part of staff's motion is the attorney brief of Department staff counsel Charles E. Sullivan, Jr., Esq., also dated August 30, 2007, in support of the motion for order without hearing, and two other exhibits: (1) a copy of a Department Order on Consent in File No. 03-78, Index No. R9-20031107-63, executed on behalf of respondent by its president, Stefan Artymowycz, on December 2, 2003, and on behalf of the Department by Gerald F. Mikol, former

¹ No disposal receipts were included with respondent's November 2007 monthly report.

Regional Director of the Department's Region 9 office, on December 5, 2003 ("Order on Consent") (Exhibit "A")²; and (2) the affidavit of Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, sworn to August 22, 2007 ("Grasso 2007 Affidavit") (Exhibit "B"). Included with the Grasso 2007 Affidavit as Attachment "1" is a single-page table of information captioned "Waste Tire Fires Occurring in New York Since 1989."

The Grasso 2007 Affidavit avers that the file maintained by the Department for respondent in this matter reveals that: (i) there is no record of receipt of respondent's 2005 annual waste fluid report; (ii) there are only four receipts for disposal of waste tires from the site for the period of January 5 through October 8, 2004 (with a total of 8,000 tires disposed of during that 9-month period); and (iii) respondent did not submit any monthly reports to the Department after June 2005 (see Grasso 2007 Affidavit, ¶ 5.A.).

The Sullivan Affirmation maintains that respondent failed to file a timely response to staff's August 30, 2007 motion for order without hearing and, therefore, staff is entitled to a default judgment pursuant to 6 NYCRR 622.15 (see Sullivan Affirmation at ¶ 5.B.1.). Alternatively, the Sullivan Affirmation contends that, if respondent's submissions to the Department, as described in and attached to the Grasso 2008 Affidavit, are deemed to be a response to staff's motion, they do not raise any factual dispute and, as such, staff is entitled to a judgment on the merits (see id. at ¶ 5.B.2.).

The basis for staff's request for default judgment, as set forth in the Sullivan Affirmation, is respondent's failure to file a timely response to staff's August 30, 2007 motion for order without hearing. The basis for staff's alternative request for judgment on the merits, as set forth in the Sullivan Affirmation, is that the materials submitted by respondent to the Department from September to December 2007 (see Grasso 2008 Affidavit) do not create any factual dispute and, instead, confirm the violations charged in the motion.

² Within the Order on Consent is a page captioned "Schedule A" setting forth the actions to be completed by respondent at the site and the due dates by which they were to be completed.

FINDINGS OF FACT

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

1. On December 2, 2003, respondent, by its president Stefan Artymowycz, executed a Department Order on Consent in File No. 03-78, Index No. R9-20031107-63 ("Order on Consent"). The Order on Consent was executed on behalf of the Department by Gerald F. Mikol, former Regional Director of the Department's Region 9 office, on December 5, 2003 (see Exhibit "A" attached to Department staff's August 30, 2007 motion for order without hearing).
2. In the Order on Consent, respondent admitted that it owned and operated a noncompliant waste tire stockpile on property located at 10216 Southwestern Boulevard, Angola (Erie County), New York (the "site") (see id., ¶¶ 5-6).
3. Pursuant to the Order on Consent, respondent agreed, among other things, to submit an annual waste fluid report to the Department for all fluids handled at the site in each calendar year starting December 15, 2003 for calendar year 2002, and by March 1 of each year for each subsequent year (see id., Schedule "A").
4. Pursuant to the Order on Consent, respondent agreed, among other things, to dispose of waste tires at the site at a rate of 1,200 waste tires per month starting November 2003 and each month thereafter until fewer than 1,000 waste tires remain on the site (see id.).
5. Pursuant to the Order on Consent, respondent agreed, among other things, to submit monthly reports to the Department, starting December 15, 2003 and monthly on the 15th of each subsequent month until fewer than 1,000 waste tires remain on the site, indicating the number of cars brought in, the number of cars disposed of, the number of tires disposed of, the name of the tire disposal facility to which the waste tires were sent, copies of tire disposal receipts, and the estimated number of tires remaining on the site (see id.).
6. On August 30, 2007, Department staff sent a notice of motion and motion for order without hearing, both dated August 30, 2007, in Department Case No. C09-20070817-4 to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 by certified mail, return receipt requested (see Sullivan Affirmation, Exhibits "1" and "2").

7. On August 30, 2007, Department staff hand delivered an original and one copy its August 30, 2007 motion against respondent to the New York State Department of State in Albany pursuant to Business Corporation Law § 306(b) (see id., Exhibits "1" and "3").

8. On August 30, 2007, Department staff sent another copy of its notice of motion and motion for order without hearing to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 by first class mail (see id., Exhibit "1"). That mailing was not returned to the Department (see id.).

9. On September 1, 2007, the certified mailing of Department staff's motion papers were signed for and received by respondent's president, Stefan Artymowycz, at 10216 Southwestern Boulevard, Angola, New York 14006 (see id., Exhibit "2").

10. With respect to the August 30, 2007 notice of motion and motion for order without hearing, staff contends that the time for respondent to serve a response, following the service of its motion papers on September 1, 2007, expired on October 1, 2007 (see Sullivan Affirmation, ¶ 5.A.).

11. On September 7, 2007, Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, received certain documents and materials from respondent relating to its obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 2, and Exhibit "1" attached thereto). One of these documents, the annual waste fluid report for 2005, was to have been submitted to the Department by March 1, 2006 pursuant to the Order on Consent (see id.). In addition, monthly disposal reports show that respondent did not dispose of any waste tires from the site for the months of July 2005 through July 2007, and that 1,170 waste tires were disposed of in August 2007 (see id.). Respondent's records indicate that, as of August 2007, 16,000 waste tires remained at the site.

12. On October 16, 2007, Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, received certain documents and materials from respondent relating to its obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 3, and Exhibit "2" attached thereto). The monthly disposal report for the month of September 2007 notes that respondent disposed of 832 tires from the site, while the tire disposal receipt associated with that report notes that 332 tires were disposed of (see id.). Respondent's records indicate that, as of September 2007, 15,170 waste tires remained at the site.

13. On November 16, 2007, Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, received certain documents and materials from respondent relating to its obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 4, and Exhibit "3" attached thereto). The monthly disposal report for the month of October 2007 and the tire disposal receipt associated with that report note that respondent disposed of 576 tires from the site (see id.). Respondent's records indicate that, as of October 2007, 14,594 waste tires remained at the site.

14. On December 31, 2007, Peter Grasso, Environmental Engineer II, in the Department's Region 9 office, received a document from respondent relating to its obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 5, and Exhibit "4" attached thereto). The monthly disposal report for the month of November 2007 notes that 590 waste tires were disposed of, however, no tire disposal receipts for this report were provided by respondent (see id.). Respondent's records indicate that, as of November 2007, 14,004 waste tires remained at the site.

15. Respondent did not comply with the Order on Consent because it failed to submit an annual fluid waste report for calendar year 2005 by March 1, 2006.

16. Respondent did not comply with the Order on Consent because it failed to dispose of waste tires at the site at a rate of 1,200 waste tires per month starting November 2003 and each month thereafter until fewer than 1,000 waste tires remained on the site.

17. Respondent did not comply with the Order on Consent because it failed to submit monthly reports, starting December 15, 2003 and monthly on the 15th of each subsequent month until fewer than 1,000 waste tires remain on the site, indicating the number of cars brought in, the number of cars disposed of, the number of tires disposed of, the name of the tire disposal facility to which the waste tires were sent, copies of tire disposal receipts, and the estimated number of tires remaining on the site.

DISCUSSION

Nature of the Motion

Department staff maintains that it served the August 30, 2007 motion for order without hearing in lieu of a complaint, and respondent failed to file a timely response to the motion (see 6 NYCRR 622.12[a]). Department staff contend that respondent's failure to respond or otherwise appear entitles it to a default judgment pursuant to 6 NYCRR 622.15. In the alternative, Department staff maintain that, if respondent's submissions to the Department, as described in the Grasso 2008 Affirmation, are deemed to be a response to staff's motion, they do not raise any factual dispute and, as such, staff is entitled to a determination on the merits. Thus, this motion will be treated as one seeking a default judgment pursuant to 6 NYCRR 622.15 and, in the alternative, one seeking an order without hearing pursuant to 6 NYCRR 622.12.

Standards for Default Judgment Motion

A respondent's failure either to respond to or otherwise answer staff's motion for order without hearing constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.12[b] and 622.15[a]). Under those circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

1. proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; and
2. proof of the respondent's failure to appear or failure to file a timely answer; and
3. a proposed order.

Standards for Motion for Order Without Hearing

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment made pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212. Section 622.12(d) provides that a contested motion for order without hearing "will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." Section 622.12(d) also

provides that the motion will be granted "in part if it is found that some but not all such causes of action or any defense should be granted, in whole or in part."

On a motion for summary judgment under CPLR 3212, a "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law The party opposing the motion ... must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988] [citations omitted] [quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)]). Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing ... a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (id.).

The Commissioner has also provided extensive direction concerning the showing parties must make in their respective motions and replies, and how the parties' filings will be evaluated (see Matter of Richard Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003). The Commissioner's discussion includes numerous citations to case law, the Department's enforcement regulations, and CPLR 3212 (see id.).

On a summary judgment motion, the law requires the fact finder to view the evidence in a light most favorable to the non-moving party, here the respondent; and, as such, respondent is entitled to every favorable inference, and a decision must be made on the version of the facts most favorable to him (see Henderson v New York, 178 AD2d 129 [1st Dept 1991]). Facts appearing in the movant's papers that the opposing party fails to controvert are deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]).

Proof of Service

In accordance with the Department's uniform enforcement regulations, staff may commence an administrative enforcement proceeding by service of a motion for order without hearing (in

lieu of or in addition to a notice of hearing and complaint) (see 6 NYCRR 622.12[a]). Service of a notice of motion for order without hearing, which serves as the complaint in this matter, "must be by personal service consistent with the CPLR or by certified mail" (see 6 NYCRR 622.3[a][3]).

As part of its motion for order without hearing, Department staff must file proof of service of the motion and supporting papers upon respondent with the Chief Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services (see 6 NYCRR 622.12[a]).

As appears from the Sullivan Affirmation (and Exhibits attached thereto), Department staff initially served its notice of motion and motion for order without hearing in this proceeding on August 30, 2007 by mailing copies of same via certified mail, return receipt requested, to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 (see Sullivan Affirmation, Exhibits "1" and "2"). The Sullivan Affirmation notes, and Exhibit "2" demonstrates, that the U.S. Postal Service successfully delivered staff's motion papers to respondent's president, Stefan Artymowycz, at 10216 Southwestern Boulevard, Angola, New York 14006, on September 1, 2007 (see id., Exhibit "2"). This method of service is consistent with the provisions of 6 NYCRR 622.3(a)(3).

Additionally, on August 30, 2007, Department staff hand delivered one original and one copy of its motion papers against respondent to the Secretary of State for the New York State Department of State in Albany (see Sullivan Affirmation, Exhibits "1" and "3"). This method of service upon a domestic corporation is consistent with the provisions of Business Corporation Law § 306(b). Thereafter, on August 30, 2007, Department staff sent a copy of its motion papers by first class mail to respondent at 10216 Southwestern Boulevard, Angola, New York 14006 (see Sullivan Affirmation, Exhibit "1"). This method of service is consistent with the provisions of CPLR 3215(g)(4)(ii).

Accordingly, the Sullivan Affirmation, and Exhibits "1," "2," and "3" attached thereto, demonstrates Department staff's service of the August 30, 2007 motion upon respondent in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3), Business Corporation Law § 306(b), and CPLR 3215(g)(4)(ii) (see Matter of Polanaya Corp., Order of the Acting

Commissioner, April 12, 2005, at 1).³

Discussion of Facts

My findings of fact are based upon the contentions made by Department Region 9 staff employee Peter Grasso based upon his review of the Department's file in this matter and the documents and materials submitted by respondent to Mr. Grasso, albeit untimely, in September, October, November and December, 2007, pursuant to the Order on Consent (see Grasso 2007 Affidavit, and Grasso 2008 Affidavit, and Exhibits "1" - "4" attached thereto).

Staff's papers on this motion, and respondent's submissions, establish, prima facie, that respondent entered into an Order on Consent in File No. 03-78, Index No. R9-20031107-63 with the Department on December 5, 2003, and that such Order on Consent obligated respondent to undertake certain activities with respect to the site at issue (see Sullivan Affirmation, Exhibit "5"). Furthermore, staff's papers, and respondent's submissions to Mr. Grasso in 2007, establish that respondent violated the Order on Consent by failing to undertake certain activities with respect to the site as required by the Order on Consent (see id.; see also Grasso 2007 Affidavit, and Grasso 2008 Affidavit, and Exhibits "1" - "4" attached thereto).

Department Staff's Default Motion

The August 30, 2007 notice of motion for order without hearing served upon respondent stated, pursuant to 622.12(b), that a response to the motion must be filed with the Chief Administrative Law Judge ("ALJ") within twenty days after the receipt of the motion and that the failure to answer constitutes a default.

As noted in the discussion on proof of service above, respondent received Department staff's motion papers at its business address on September 1, 2007 (see Sullivan Affirmation, Exhibit "2"). Thus, pursuant to the Department's regulations, respondent had until September 21, 2007 to file a response with the Department's Chief ALJ (see 6 NYCRR 622.12[c]).

Nevertheless, the Sullivan Affirmation contends that, pursuant to 6 NYCRR 622.12(a), respondent had thirty days from

³ I would note that, in effecting service in this matter, staff was only required to serve its motion papers either by certified mail upon respondent or by service upon the Secretary of State, not both.

the date of receipt of the motion papers, or until October 1, 2007, to file a response with the Chief ALJ (see Sullivan Affirmation, ¶ 5.A.). The Sullivan Affirmation does not explain how this time period was calculated based upon the regulatory provision cited; however, as will be discussed further below, whether respondent had until September 21 or October 1, 2007 to file a response to staff's motion, such determination was rendered academic when respondent submitted the first of four submissions to the Department beginning on September 7, 2007 (see Grasso 2008 Affidavit).

The Sullivan Affirmation maintains that respondent "failed to submit a written response to the Motion" and "Department staff do not believe that the September 7, 2007 submittal (or any of the later ones) constitutes a response to the motion as contemplated by the regulation" (see Sullivan Affirmation, ¶ 5.B.). Consequently, Department staff argues that respondent "failed to timely serve a written response to the Motion in this matter" and, as such, is "entitled to a default judgment pursuant to 6 NYCRR 622.15" (see id., ¶ 5.B.1.).

On September 7, 2007, Peter Grasso, an Environmental Engineer in the Department's Region 9 office, received certain documents and materials from respondent relating to its obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 2, and Exhibit "1" attached thereto). These documents consisted of: (A) respondent's annual waste fluid report for 2005, dated March 11, 2006; (B) respondent's monthly disposal reports for the months of July 2005 through August 2007; (C) three tire disposal receipts (two of which are dated August 7, 2007), totaling 1,170 tires; and (D) two tire disposal receipts for 1,000 and 4,000 waste tires respectively dated August 27, 2004 and October 8, 2004 (see id.).

Viewing respondent's submissions to Mr. Grasso on September 7, 2007 in the light most favorable to respondent, such submissions constituted a timely response to staff's motion prior to either the September 21 or October 1, 2007 dates by which to file such a response. While staff is correct that respondent's submissions to Mr. Grasso in September 2007 are not in keeping with the format prescribed by the Department's regulations (see 6 NYCRR 622.12[c]), nevertheless they are entitled to the liberal construction generally afforded papers submitted by a pro se party in an administrative proceeding (see CPLR 3026; see also Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, October 12, 2007, at 11). Moreover, given the date of respondent's initial submission to Mr. Grasso, coming shortly after service of the motion papers on September 1,

2007, it is reasonable to conclude that respondent intended its September 7, 2007 submission to constitute a response to the motion.

While Department staff contends that respondent failed to serve a timely written response to the motion in this matter, given respondent's September 7, 2007 submissions to Mr. Grasso, I cannot conclude that staff is entitled to a default judgment based upon the facts and circumstances presented here (see Grasso 2008 Affidavit ¶ 2, and Exhibit "1" attached thereto). Accordingly, Department staff's request for a default judgment pursuant to 6 NYCRR 622.15 should be denied.

Department Staff's Motion for Order Without Hearing

Alternatively, if the relief requested by staff in the foregoing discussion on default was denied, the Sullivan Affirmation requests a determination on its motion on the merits upon the grounds that the materials submitted by respondent to the Department over a four-month period in 2007 do not create any factual dispute (see Sullivan Affirmation, ¶ 5.B.2.). Staff's argument is based upon respondent's submissions to Mr. Grasso on September 7, October 16, November 16, and December 31, 2007 (see Grasso 2008 Affidavit, Exhibits "1" through "4").

Taken together, respondent's four separate monthly submissions to the Department from September to December 2007 do not raise any material question of fact requiring a hearing in this case. Rather, as argued by Department staff, respondent's submissions to the Department in 2007 actually confirm the violations charged in staff's motion (see Grasso 2008 Affidavit, ¶¶ 2 - 6).

For instance, respondent's submissions to Mr. Grasso on September 7, 2007 consist of documents and materials relating to obligations under the Order on Consent (see Grasso 2008 Affidavit ¶ 2, and Exhibit "1" attached thereto). One of these documents, the annual waste fluid report for 2005, was supposed to have been submitted to the Department by March 1, 2006 pursuant to the Order on Consent (see id.).⁴ In addition, monthly disposal

⁴ I would also note, while neither alleged in staff's motion nor mentioned in either of Mr. Grasso's affidavits, that the records submitted to the Department by respondent to date do not indicate that respondent submitted an annual waste fluid report for calendar year 2006 by March 1, 2007, as required by the Order on Consent (see Exhibit "A" attached to staff's motion for order without hearing, Schedule "A;" see also Grasso 2008 Affidavit, Exhibits "1" - "4").

reports for the months of July 2005 through July 2007 were not submitted on the 15th day of each month as required by the Order on Consent but, instead, were all submitted together in September 2007 (see id.). Furthermore, these monthly reports show that respondent did not dispose of any waste tires from the site during the two-year period between July 2005 through July 2007 in clear violation of the Order on Consent's requirement to dispose of 1,200 waste tires per month (see id.). Lastly, the records indicate that respondent disposed of 1,170 waste tires in August 2007, rather than 1,200 per month as required by the Order on Consent (see id.).

Likewise, respondent's subsequent submissions to Mr. Grasso in October, November and December, 2007, demonstrate a similar lack of compliance by respondent with its obligations under the Order on Consent. For example, the monthly disposal report for the month of September 2007 (submitted to Mr. Grasso on October 16, 2007) notes that respondent disposed of only 832 tires from the site that month, rather than 1,200 per month as required by the Order on Consent (see Grasso 2008 Affidavit, ¶ 3 and Exhibit "2" attached thereto).⁵ The monthly disposal report for the month of October 2007 (submitted to Mr. Grasso on November 16, 2007) and the tire disposal receipt associated with that report note that respondent disposed of only 576 tires from the site that month, rather than 1,200 per month as required by the Order on Consent (see Grasso 2008 Affidavit, ¶ 4 and Exhibit "3" attached thereto). Finally, the monthly disposal report for the month of November 2007 (submitted to Mr. Grasso on December 31, 2007) notes that respondent disposed of only 590 waste tires from the site that month, rather than 1,200 per month as required by the Order on Consent (see Grasso 2008 Affidavit, ¶ 5 and Exhibit "4" attached thereto). Respondent also did not provide any tire disposal receipts for the November 2007 monthly disposal report as required by the Order on Consent (see id.).

A review of respondent's records submitted to the Department reveals that respondent did not meet its obligation to dispose of 1,200 waste tires from the site per month during any month in the nearly 30-month period between July 2005 and November 2007 (see

⁵ The tire disposal receipt associated with respondent's monthly disposal report for September 2007 indicates that only 332 waste tires (rather than 832 tires as claimed in the monthly report) were disposed of from the site by respondent (see Grasso 2008 Affidavit, Exhibit "2"). In any event, whether the actual number of waste tires disposed of from the site that month was 332 or 832, either amount is less than the 1,200 tires per month required for disposal by the Order on Consent.

id.). In fact, the records submitted by respondent show that it disposed of a total of only 3,168 waste tires from the site between July 2005 and November 2007, and that, as of November 2007, more than 14,000 waste tires remained at the site (see id.).⁶ This represents an average disposal rate of approximately 100 waste tires per month for that time period, and is significantly less than the rate of 1,200 per month required by the Order on Consent.

Accordingly, based on the evidence submitted on this motion, and particularly respondent's submissions to Mr. Grasso, Department staff has established a prima facie case that respondent violated provisions of the Order on Consent. As such, I recommend that Department staff's motion for order without hearing be granted by the Commissioner.

Liability for Violations Charged

The December 2003 Order on Consent in this matter (File No. 03-78, Index No. R9-20031107-63) contains a provision entitled "Failure, Default, and Violation" which states:

"Respondent's failure to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and shall be deemed a violation of both this Order and the ECL" (see id.).

As the discussion in the preceding section of this ruling illustrates, the record demonstrates that respondent failed to perform certain obligations under the Order on Consent on numerous occasions over an extended period of time. Therefore, the allegation that respondent violated the provisions of the Order on Consent is established.

Penalty and Other Relief Requested

As a result of the violations alleged, Department staff's motion seeks to: (i) vacate the suspension of respondent's previous obligation to pay \$4,500 of the \$5,000 penalty assessed pursuant to the Order on Consent and direct respondent to pay the amount of \$4,500; and (ii) have respondent pay an additional assessed civil penalty of \$30,000 for having

⁶ According to respondent's records, there were approximately 17,000 waste tires at the site in July 2005.

violated the Order on Consent (see "Attorney Brief in Support of Motion for Order Without Hearing" of Department staff counsel Charles E. Sullivan, Jr., Esq., dated August 30, 2007, "Relief Sought; Discussion" at pp. 3-6).

The previous Order on Consent in this case (File No. 03-78, Index No. R9-20031107-63) originally assessed a civil penalty in the amount of \$5,000 against respondent (see Exhibit "A" attached to Department staff's motion for order without hearing). Of that, the obligation to pay \$4,500 of the assessed penalty amount was suspended pending respondent's compliance with the terms and conditions of the Order on Consent (see id.).

As more fully described previously, Department staff's proof on its motion establish that respondent failed to comply with the Order on Consent in substantive ways: (i) it did not submit its annual waste fluid report for 2005 by the time period set forth in the Order on Consent; (ii) it did not remove and dispose of waste tires from the site at a rate in accordance with the schedule contained in the Order on Consent for any month during the relevant time period; and (iii) it did not report on its waste tire removal and disposal activities in accordance with the schedule or in the manner set forth in the Order on Consent (see Grasso 2008 Affidavit, Exhibits "1" - "4").

Based on the foregoing, and by operation of the terms of the Order on Consent, the suspension of respondent's obligation to pay \$4,500 of the \$5,000 assessed penalty should be vacated, and respondent should be directed to pay the sum of \$4,500. Accordingly, I recommend that the Commissioner grant the relief requested by staff and direct respondent to pay the previously assessed sum of \$4,500 for violating provisions of the Order on Consent.

As another result of violating the Order on Consent, Department staff also requests an additional civil penalty to be assessed in the amount of \$30,000. Staff maintains that this penalty should be imposed because:

"Respondent has avoided all costs associated with complying with the obligations it voluntarily incurred under Department Order Index No. R9-20031107-63; and that disobedience gives rise to Department staff's concern that Respondent may never rid the Site of the waste tires, thereby giving rise to the need for the Department to undertake the removal and proper disposal of the waste tires, with monies from

the Waste Tire Management and Recycling Fund"

(see "Attorney Brief in Support of Motion for Order Without Hearing" of Department staff counsel Charles E. Sullivan, Jr., Esq., dated August 30, 2007, "Relief Sought; Discussion" at p. 5).

As the Order on Consent makes clear, respondent is the admitted owner and operator of a solid waste management facility and waste tire storage facility at 10216 Southwestern Boulevard, Angola, New York (see Exhibit "A" attached to Department staff's August 30, 2007 motion for order without hearing; see also Environmental Conservation Law ["ECL"] § 27-0703[6]). In particular, respondent admitted owning and operating a noncompliant waste tire stockpile at the site without a permit from the Department in violation of 6 NYCRR 360-13.1(b) (see Exhibit "A" attached to Department staff's August 30, 2007 motion for order without hearing).

The ECL provides for substantial financial penalties for violations of the Department's solid waste laws and regulations, including those related to noncompliant waste tire stockpiles such as respondent's (see ECL 71-2703[1]). 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 (ECL 71-2703[1][a]).

Determining the maximum penalty allowable by law typically requires an analysis of the number of violations for which a penalty is authorized. In this case, Department staff established that, among other obligations, respondent violated the provisions of the Order on Consent on an almost continual basis from the inception of it by failing to dispose of at least 1,200 waste tires from the site each month until fewer than 1,000 waste tires remained (see Grasso 2008 Affidavit, Exhibits "1" - "4"). Each monthly violation is a separate violation, for which respondent is liable for a civil penalty up to \$7,500, plus an additional penalty of up to \$1,500 for each day during which the violation continues (see ECL 71-2703[1][a]).

Given the foregoing, and the total number of months (at least 28) plus additional days in each month that respondent was in violation of this provision of the Order on Consent, it is clear that the maximum potential penalty allowed by law in this

matter would greatly exceed the sum of \$30,000 being sought by staff. Under the circumstances, however, the proposed penalty is reasonable and I recommend that the Commissioner grant the amount of relief Department staff seeks in its motion.

In addition to the requested civil penalties, staff's motion seeks to have the Commissioner direct respondent to fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in their abatement of the noncompliant waste tire stockpile at the site, and undertake such other and further actions as the Commissioner deems to be appropriate.

A noncompliant waste tire stockpile, such as respondent's, is subject to the abatement provisions of ECL 27-1907. ECL 27-1907 requires that the "owner or operator of a noncompliant waste tire stockpile shall, at the department's request, submit to and/or cooperate with any and all remedial measures necessary for the abatement of noncompliant waste tire stockpiles with funds from the waste tire management and recycling fund (the "Fund") pursuant to" State Finance Law § 92-bb (ECL 27-1907[2]). The expenses of remedial and fire safety activities at a noncompliant waste tire stockpile shall be paid by the owner or operator of the stockpile, or shall be paid from the Fund and shall be a debt recoverable by the State from the owner or operator (see ECL 27-1907[3]). Any and all monies recovered pursuant to ECL 27-1907 are to be credited to the Fund (see id.; ECL 27-1907[5]).

In this instance, respondent has failed to comply with its voluntary agreement to remove and properly dispose of waste tires from the site. In such event, respondent is liable to reimburse the State for the full amount of any and all expenditures made from the Fund by the State at the site, including investigation, prosecution and oversight costs, to the fullest extent allowable under the law (see Matter of Wilder, CALJ Hearing Report, Aug. 17, 2005 at 18-19). Accordingly, staff is entitled to respondent's cooperation and non-interference upon the State's abatement of the noncompliant waste tire stockpile at the site, and I recommend that the Commissioner grant that relief.

Furthermore, ECL 71-2703(1)(a) provides that any person, which includes a corporation such as respondent (see 6 NYCRR 360-1.2[117]), who violates any provision of, or who fails to perform any duty by, ECL article 27, title 7, or any rule or regulations promulgated pursuant thereto may be enjoined from continuing such violation. While not specifically requested by

staff, given respondent's admitted ownership and operation of a noncompliant waste tire stockpile, and its persistent failure to remove and properly dispose of waste tires from the site, staff is entitled to an order enjoining respondent from any further violations at the site, including allowing any additional waste tires onto the site (see ECL 71-2703[1][a], and Matter of GSI of Virginia, Inc., Order, May 31, 2007). Therefore, I recommend that the Commissioner grant this "other and further" relief to staff.

CONCLUSIONS OF LAW

In sum, my conclusions of law are as follows:

Violations Established

1. Respondent failed to comply with obligations under the December 2003 Order on Consent on various occasions over an extended period of time following the execution of it.
2. Respondent did not submit its annual waste fluid report for 2005 by the time period set forth in the Order on Consent (see Grasso 2008 Affidavit, Exhibits "1" - "4").
3. Respondent did not remove and dispose of waste tires from the site at a rate in accordance with the schedule contained in the Order on Consent for any month during the relevant time period encompassed by staff's motion (see id.).
4. Respondent did not report on its waste tire removal and disposal activities in accordance with the schedule or in the manner set forth in the Order on Consent (see id.).

Penalty Assessment

5. As a result of respondent's violation of the provisions of the Order on Consent, and by operation of the terms of the Order on Consent, the suspension of respondent's obligation to pay \$4,500 of the \$5,000 assessed penalty should be vacated, and respondent should be directed to pay the sum of \$4,500.
6. Respondent is the admitted owner and operator of a noncompliant waste tire stockpile at the site without a permit from the Department in violation of 6 NYCRR 360-13.1(b). As a result of respondent's violation of the provisions of the Order on Consent, respondent is liable for a civil penalty for violating the Department's solid waste laws and regulations (see ECL 71-2703[1][a]).

RECOMMENDATIONS

Based on the foregoing, I recommend that the Commissioner issue an order denying Department staff's default motion and, in the alternative, granting Department staff's motion for order without hearing, holding respondent liable for the violations determined as a matter of law, and granting the relief requested by staff and recommended herein.

/s/

Mark D. Sanza
Administrative Law Judge

Dated: February 11, 2008
Albany, New York