

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

In the Matter of the Alleged
Noncompliant Waste Tire Stockpile
Located at 67 Barnes Avenue, Utica,
New York 13502, and Owned and
Operated by

ORDER

SALVATORE VITI,

VISTA Index No.
CO6-20050816-2

Respondent.

In the Matter of the Alleged
Noncompliant Waste Tire Stockpile
Located at 67 Barnes Avenue, Utica,
New York 13502, and Owned and
Operated by

VISTA Index No.
CO6-20050816-3

A-1 AUTO PARTS, INC.,

Respondent.

Staff of the Department of Environmental Conservation ("Department") commenced these administrative enforcement proceedings against respondents Salvatore Viti ("Viti") and A-1 Auto Parts, Inc. ("A-1 Auto") to address both the alleged violation of a Department consent order by respondent Viti, as well as alleged violations of part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by respondent A-1 Auto. These proceedings were commenced on August 23, 2005, by service of separate motions for order without hearing upon respondents, pursuant to 6 NYCRR 622.12.

In one motion, Department staff alleges that respondent Viti violated a consent order dated September 16, 2004, by failing to remove all waste tires from property located at 67 Barnes Avenue in the Town of Marcy, County of Oneida, before June 16, 2005. In the other motion, Department staff alleges that respondent A-1 Auto, an automotive parts business owned and operated by respondent Viti, has operated a waste tire storage facility at the 67 Barnes Avenue property without a required Department permit, and in violation of various operational

requirements for such facilities.¹ Department staff contends that, as a result of the alleged violations, A-1 Auto owns or operates a noncompliant waste tire stockpile within the meaning of Environmental Conservation Law ("ECL") § 27-1901(6).

Respondents' time to answer or otherwise respond to staff's motions has expired, and no responses have been filed. Although respondents are technically in default (see 6 NYCRR 622.12[b] and [c]), Department staff does not seek default judgments. Instead, staff seeks determinations on the merits of its separate motions for order without hearing.

These matters were initially assigned to the Department's Chief Administrative Law Judge ("ALJ") James T. McClymonds. On November 22, 2005, Chief ALJ McClymonds reassigned them to ALJ Edward Buhrmaster. By staff's agreement, consideration of the pending motions was suspended to allow respondents an opportunity to remove and properly dispose of the waste tires at the subject property without incurring a civil penalty. When this effort was not completed, staff renewed its request that the motions be decided, and provided a supplemental affidavit, dated August 15, 2007, addressing conditions at the property since the time of staff's original motions. ALJ Buhrmaster prepared the attached hearing report, which I adopt as my decision in these matters, subject to the following comments.

Because respondents' facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-0109(6), Department staff is entitled to an order directing respondents to fully cooperate with the State and not interfere with its efforts to take over abatement of the stockpile at 67 Barnes Avenue, Town of Marcy, County of Oneida (see Matter of Wilder, CALJ Hearing Report, Aug. 17, 2005, and Supplemental Order, May 5, 2006; see also Matter of GSI of Virginia, Inc., Order, May 31, 2007). Moreover, based upon the record, I also conclude that the civil penalties proposed for each respondent, and recommended by ALJ Buhrmaster, are warranted under the circumstances as explained in

¹ While a search of public records has revealed that respondent A-1 Auto was dissolved by proclamation of the New York Secretary of State in June 2001 for failure to pay franchise taxes, by operation of law its corporate existence continues for purposes of paying liabilities or obligations, and for being sued in all courts and to participate in actions or proceedings, whether judicial, administrative, or otherwise, in its corporate name (see Business Corporation Law §§ 1005[a][2], 1006[a][4], and 1009, and Tax Law § 203-a).

the ALJ's hearing report.²

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motions for order without hearing are granted in their entirety.

II. Respondent Salvatore Viti violated a Department consent order (VISTA Index No. CO6-20040601-111) by failing to remove waste tires from the property at 67 Barnes Avenue, Town of Marcy, County of Oneida, by June 16, 2005.

III. The property at 67 Barnes Avenue, Town of Marcy, County of Oneida, 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" required to have a permit under 6 NYCRR Subpart 360-13 because it contains 1,000 or more waste tires.

IV. Respondent A-1 Auto Parts, Inc. has violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) by storing 1,000 or more waste tires at the 67 Barnes Avenue property since May 19, 2000, without the required Part 360 solid waste management facility permit.

V. Respondent A-1 Auto Parts, Inc. has violated 6 NYCRR 360-13.3(a) by operating the facility at the 67 Barnes Avenue property since May 19, 2000, without a: (i) Department-approved site plan; (ii) monitoring and inspection plan; (iii) closure plan; (iv) contingency plan; (v) storage plan; and (vi) vector control plan.

VI. Respondent A-1 Auto Parts, Inc. has violated 6 NYCRR 360-13.3(e) since May 19, 2000, by failing to file quarterly and annual reports on the facility's operation.

VII. For his violation of the consent order, respondent Salvatore Viti is hereby assessed a civil penalty in the amount

² By letter dated February 13, 2008 to ALJ Buhrmaster, Attorney Richard J. Brickwedde advised that he had been retained by respondent Viti and requested that this matter be suspended until the end of June 2008. By letter dated February 19, 2008, ALJ Buhrmaster noted that Department staff objected to any such suspension and the ALJ forwarded this letter for consideration. Based on my review of the letter and the arguments presented therein, I decline to further suspend the proceeding.

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 Viti.

VIII. For its violations of 6 NYCRR Part 360, respondent A-1 Auto Parts, Inc. is hereby assessed a civil penalty in the amount of fifty thousand dollars (\$50,000), payment of which shall be due within thirty (30) days of the date of service of this order upon respondent A-1 Auto Parts, Inc.

IX. Respondents shall submit their respective payments 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 Nos. CO6-20050816-2 and CO6-20050816-3

X. Respondent A-1 Auto Parts, Inc. is hereby directed to immediately stop allowing any waste tires to come onto the property at 67 Barnes Avenue, Town of Marcy, County of Oneida, in any manner or method or for any purpose, including but not limited to nor exemplified by acceptance, sufferance, authorization, deposit or storage. For purposes of this order, "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.

XI. Respondents Salvatore Viti and A-1 Auto Parts, Inc. 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 the 67 Barnes Avenue property.

XII. All communications from respondents 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.

XIII. The provisions, terms and conditions of this order shall bind respondents and their heirs and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: March 7, 2008
Albany, New York

TO: Salvatore Viti (Via Certified Mail)
67 Barnes Avenue
Utica, New York 13502

A-1 Auto Parts, Inc. (Via Certified Mail)
67 Barnes Avenue
Utica, New York 13502

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

In the Matter of the Alleged
Noncompliant Waste Tire Stockpile
Located at 67 Barnes Avenue,
Utica, New York, 13502, and Owned
or Operated by

HEARING REPORT ON
MOTION FOR ORDER
WITHOUT HEARING

SALVATORE VITI,

Respondent.

VISTA Index No.
C06-20050816-2

In the Matter of the Alleged
Noncompliant Waste Tire Stockpile
Located at 67 Barnes Avenue,
Utica, New York, 13502, and Owned
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HEARING REPORT ON
MOTION FOR ORDER
WITHOUT HEARING

A-1 AUTO PARTS, INC.,

Respondent.

VISTA Index No.
C06-20050816-3

Appearances:

- - Charles E. Sullivan, Jr., Esq., for the New York State Department of Environmental Conservation.
- - No appearance by or for Salvatore Viti or A-1 Auto Parts, Inc.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced two administrative enforcement proceedings, one against Salvatore Viti and the other against A-1 Auto Parts, Inc., by service of motions for orders without hearing on each respondent. The motions were hand-delivered to Mr. Viti in his individual capacity and as president of A-1 Auto Parts on August 23, 2005, by Mr. Sullivan, the Department's attorney. Service occurred at A-1 Auto Parts' business location: 67 Barnes Avenue, Town of Marcy, Oneida County, the location of an alleged noncompliant waste tire stockpile. The motions were served in lieu of complaints, pursuant to Section 622.12 of Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR").

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 was filed by either respondent.

Department Staff forwarded a copy of its motions and supporting papers, together with proof of service on the respondents, to James McClymonds, the Department's Chief Administrative Law Judge, on September 16, 2005. Judge McClymonds assigned these matters to himself; then, on November 22, 2005, he reassigned them to me.

On December 9, 2005, I had a conference call with Mr. Sullivan and Mr. Viti, during which I granted their joint request that I suspend consideration of these matters until February 1, 2006, to give Mr. Viti an additional, final opportunity to remove and properly dispose of the waste tires without incurring a civil penalty. I continued the suspension based on subsequent letters from and phone conversations with Mr. Sullivan, in which he indicated that Mr. Viti had reduced the stockpile's size and that Staff was hopeful that the tires would be removed in their entirety, resulting in withdrawal of the motions.

On July 25, 2007, Mr. Sullivan wrote me that Staff had worked with Mr. Viti for well over a year to get the site remediated in the absence of a Commissioner's order obligating Mr. Viti to a cleanup. Mr. Sullivan added that while this effort had been somewhat successful, the cleanup had not been completed. For that reason, Mr. Sullivan requested that I review and decide the motions, noting that Staff continued to seek the relief identified in its papers.

I wrote Mr. Sullivan and Mr. Viti a letter dated July 30, 2007, requesting that Mr. Sullivan provide as soon as possible a Staff affidavit explaining current site conditions, the approximate number of tires that remain, and how they are distributed (in other words, the extent to which they are gathered together in piles or scattered across the site). I wrote that the affidavit should also provide whatever additional information Staff considered relevant and wanted to provide as an update.

On August 15, 2007, Mr. Sullivan forwarded a responsive affidavit from Robert J. Senior, a Region 6 engineer in the Department's Division of Solid and Hazardous Materials. A copy of this affidavit, dated August 10, 2007, along with a copy of Mr. Sullivan's cover letter, was sent to Mr. Viti, who has not contacted me since Staff renewed the request that its motions be decided.

CHARGES

There are separate charges against Mr. Viti and A-1 Auto Parts.

Salvatore Viti

Mr. Viti is charged with violating a Department order dated September 16, 2004, which, among other things, obligated him to remove and properly dispose of all waste tires from the 67 Barnes Avenue property by June 16, 2005. Staff alleged that Mr. Viti violated the order by failing to remove all waste tires from the property before this deadline, adding that waste tires remained at the site as of August 23, 2005, the date of its motion.

A-1 Auto Parts

According to Department Staff, title to the property at 67 Barnes Avenue is in the name of A-1 Auto Parts, which, since 1988, has used the property to conduct an automotive parts business. Staff alleges that since May 19, 2000, A-1 Auto Parts has operated a waste tire storage facility at the property without a Department permit required by 6 NYCRR 360-1.7(a)(1) and 360-13.1(b).

Staff also alleges that, over this same period, A-1 Auto Parts has violated various operational requirements applicable to waste tire storage facilities pursuant to 6 NYCRR 360-13.3, particularly:

- - 6 NYCRR 360-13.3(a), in that it has operated the facility without various plans - - including a site plan, a monitoring and inspection plan, a closure plan, a contingency plan, a storage plan, and a vector control plan - - which are required as part of a Department-mandated operations and maintenance manual; and

- - 6 NYCRR 360-13.3(e)(2) and (3), in that it has failed to prepare and file quarterly and annual reports with the Department.

RELIEF SOUGHT

Salvatore Viti

Department Staff requests an order finding that the Commissioner issued an order dated September 16, 2004, obligating Mr. Viti to remove and properly dispose of all waste tires from

the site by June 16, 2005, and that Mr. Viti violated that order by failing to do so before the deadline or subsequently, up until August 23, 2005, the date of its motion.

Staff also requests that Mr. Viti be ordered to immediately pay a civil penalty of \$30,000, 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 waste tire stockpile, and undertake such other and further actions as may be deemed appropriate.

A-1 Auto Parts

Department Staff requests an order finding that A-1 Auto Parts owns or operates the site at which the tires are located, that the site is a solid waste management facility, that A-1 Auto Parts committed the regulatory violations charged to it, and that, as a result of these violations, A-1 Auto Parts owns or operates a noncompliant waste tire stockpile facility, as defined at ECL 27-1901(6).

Staff also requests that A-1 Auto Parts be ordered to immediately pay an assessed penalty of \$50,000, and 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.

Finally, as with Mr. Viti, Staff requests that A-1 Auto Parts 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, and that A-1 Auto Parts undertake such other and further actions as may be deemed appropriate.

MOTION PAPERS

Department Staff's motions were 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. Staff's motions are both dated August 23, 2005, and are accompanied by separate supporting briefs from Mr. Sullivan, both also dated August 23, 2005.

The brief accompanying the Viti motion includes as Exhibit "A" a three-page affidavit of Mr. Senior, dated August 18, 2005, with two attachments:

Attachment "1" - - A copy of a Department consent order, dated September 16, 2004, signed by Mr. Viti, resolving a matter identified as "VISTA Index No. CO6-20040601-111"; and

Attachment "2" - - Mr. Senior's tire facility inspection report, dated July 19, 2005, which includes photographs of the site taken that same day.

The brief accompanying the A-1 Auto Parts motion includes the following exhibits:

Exhibit "A" - - A certified copy of a deed, dated June 30, 1988, conveying property from Joseph C. Flint to S. Viti Realty Corp.;

Exhibit "B" - - A four-page affidavit of Mr. Senior, dated August 23, 2005, Attachment #1 to which is Mr. Senior's July 19, 2005, inspection report and accompanying photographs, and Attachment #2 to which is a chart listing waste tire fires occurring in New York State between 1989 and 2003;

Exhibit "C" - - A certificate of amendment of S. Viti Realty Corp.'s certificate of incorporation, changing the name of the corporation to A-1 Auto Parts, Inc., effective July 12, 1998;

Exhibit "D" - - A Dun & Bradstreet business information report for A-1 Auto Parts, Inc., printed August 18, 2005;

Exhibit "E" - - A "Hello Utica" web page excerpt for A-1 Auto Parts, Inc., printed August 18, 2005;

Exhibit "F" - - A New York State Department of State certification, dated August 18, 2005, addressing the corporate history of S. Viti Realty Corp.;

Exhibit "G" - - An internal Department memorandum of Mr. Senior, addressing a walk-over inspection of the "A-1 Junkyard" he conducted with Mr. Viti on May 19, 2000; and

Exhibit "H" - - A letter, dated July 30, 2002, to Mr. Viti from John Kenna of the Department's Region 6 office, identifying alleged violations at the "A-1 Auto" site, based on an inspection done on July 24, 2002.

As noted above, the documentary record here also includes an affidavit of Mr. Senior, dated August 10, 2007. While not directly relevant to the charges against Mr. Viti and A-1 Auto Parts, the affidavit describes site conditions in the period since the motions were made, as observed in a series of inspections conducted by Mr. Senior as recently as July 27, 2007. I requested the affidavit from Department Staff to confirm whether and to what extent relief anticipated in the motions - - in particular, abatement of the waste tire stockpile - - is still necessary.

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. Respondent Salvatore Viti owns and operates a waste tire storage facility located at 67 Barnes Avenue in the Town of Marcy, Oneida County. This location, which has a Utica mailing address, is also the place of business for Respondent A-1 Auto Parts.

2. A-1 Auto Parts acquired title to the 67 Barnes Avenue property in 1988 by deed that year from Joseph C. Flint, Jr., of Utica, to S. Viti Realty Corp. of New Hartford. Shortly after the transfer of title, in August 1988, S. Viti Realty Corp. changed its name to A-1 Auto Parts, Inc. On the certificate confirming this name change, Mr. Viti identified himself as the corporation's president, secretary and sole shareholder.

3. A-1 Auto Parts did business at the property from 1988 until at least 2001 as a dealer in used automotive parts and supplies. As a result of its failure to pay franchise taxes, A-1 Auto Parts was dissolved by proclamation of the New York State Secretary of State, published on June 27, 2001, pursuant to the state's tax law. Even so, it continued to hold itself out as doing business at this location.

4. Since May 19, 2000, there have been well more than 1,000 waste tires disposed at the 67 Barnes Avenue property. On May 19, 2000, Mr. Viti walked the property with Robert Senior, a Department engineer. The property had recently been inundated during a flood of the Mohawk River, and its fencing had been torn down and dragged, along with several hundred tires, into a Department-owned wetland.

5. On September 16, 2004, a Department consent order (VISTA Index No. CO6-20040601-111) was executed requiring that Mr. Viti remove all waste tires from the 67 Barnes Avenue property within nine months. In the consent order, resolving a matter in which he was the sole respondent, Mr. Viti expressly admitted that he owned and operated a noncompliant waste tire stockpile at the property. He also expressly admitted that the site was a solid waste management facility required to be, but not, permitted under 6 NYCRR Part 360, having more than 1,000 tires, and that, accordingly, he had been violating 6 NYCRR 360-1.7(a)(1) and 360-13.1.

6. To facilitate an amicable resolution of this matter, Mr. Viti consented to the order's issuance, waived his right to a hearing on the charges, and agreed to stop allowing any waste tires to come onto the site that were not found on a motor vehicle brought in for dismantling as part of the ordinary course of his business. He also agreed that by no later than nine months from the order's effective date (which was September 16, 2004, when it was signed by the Commissioner's designee) he would have no waste tires on the site.

7. The consent order required that once all the tires were removed from the site, Mr. Viti would promptly provide the Department a report detailing, by vehicle load, who transported the tires from the site and where the tires were accepted. The order said that once all tires were removed and the report was submitted, Mr. Viti would be able to accumulate waste tires taken from motor vehicles brought in for dismantling as part of the ordinary course of his business provided the total number of waste tires remaining at the site was less than 1,000.

8. Under terms of the consent order, all tires at the site when the order was signed were to have been removed by June 16, 2005.

9. On July 19, 2005, Mr. Senior returned to the property and conducted another inspection, again accompanied by Mr. Viti. On this date Mr. Senior estimated there were at least 15,000 waste tires at the site. The site may have contained well more than 15,000 waste tires, as the property was overgrown with vegetation and waste tires were located all over the place, in piles and scattered individually, in fields and among trees. The tires were well worn and weathered, and those with rims had the rims well rusted. Thousands of tires were located in dense vegetation that did not appear to have been disturbed during the entire growing season, certainly not since June 16, 2005, the deadline for the tires' removal. In addition, there were no

paths to many of the tires, which suggested that they had been there for a long time.

10. As of July 19, 2005, access to the tires was restricted by weeds, trees and vegetation growing adjacent to the tire piles. Tire piles were not accessible on all sides to fire fighting and emergency response vehicles, and the site did not have a fire hydrant, fire pond or fire extinguisher. Also, the site was not enclosed by a fence.

11. On August 23, 2005, Charles E. Sullivan Jr. served motions for orders without hearing - - one with Mr. Viti as respondent, the other with A-1 Auto Parts as respondent - - by hand delivery to Mr. Viti at the 67 Barnes Avenue property. At the time of service, Mr. Viti identified himself to Mr. Sullivan as president of A-1 Auto Parts.

12. While consideration of the motions was deferred at the parties' mutual request, to give Mr. Viti one last opportunity for site remediation, Mr. Senior returned to the property several times.

13. On an inspection occurring on August 25, 2006, Mr. Senior observed that about 2,000 waste tires had been removed from the site. On an inspection of December 12, 2006, Mr. Senior concluded that no additional tires had been removed, but he felt the lack of progress was mitigated by Mr. Viti's father's grave illness and ultimate death in Florida.

14. On April 17, 2007, Mr. Senior noted the continued presence of thousands of waste tires across the site in small and large piles. On April 23, 2007, he observed two assistants working on removing waste tires, but on April 30, 2007, he noted little, if any, additional progress. On May 7, 2007, Mr. Viti visited Mr. Senior's office and told him that he had fired the two assistants.

15. Mr. Senior noted little, if any, progress in the tire removal during visits he made to the site on May 11, June 12, and July 12, 2007. As of July 12, 2007, there were still at least 12,500 waste tires on the site. On July 12 and again on July 27, 2007, Mr. Senior observed that the waste tires remained without secure fencing, emergency access lanes and nearby firefighting equipment.

16. On or about May 30, 2007, Mr. Senior told Mr. Viti that he had until June 30, 2007, to clean up the site or the hearing in this matter would resume. On July 25, 2007, Mr. Sullivan

wrote me a letter requesting that I begin a review of the motion papers, given that there was still no full site cleanup.

17. 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. Viti or A-1 Auto Parts, Inc.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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. All combined, these conditions make it difficult for fire fighters and equipment to approach such fires and put them out.

23. According to U.S. Environmental Protection Agency studies of emissions from simulated open burning of scrap tires, more than 50 potentially harmful organic compounds can be identified during high burn rates.

24. 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.

25. 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, naphthenic and paraffinic oils, oxides of carbon and nitrogen, particulates and various aromatic hydrocarbons including toluene, xylene and benzene.

26. 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 motions for orders without hearing in lieu of complaints, and the respondents have failed to answer the motions with evidence of their own. Although their failure to respond in a timely manner would entitle Staff to default judgments pursuant to 6 NYCRR 622.15, Staff argues that, based upon the facts of this matter, it is entitled to summary judgment on its motions as a matter of law, and requests that the Commissioner issue orders making the findings requested in its papers. In light of Staff's request, its papers are being treated, pursuant to 6 NYCRR 622.12, as unopposed motions for orders without hearing. This hearing report recommends that both

motions be granted and that Staff be afforded its requested relief.

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."

In this case, there were no responses to Department Staff's motions. Accordingly, once it is determined 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, the Department Staff's motion may be granted.

Violation of Consent Order by Mr. Viti

In its motion papers, Department Staff alleges that Mr. Viti violated a Department consent order by failing to remove and properly dispose of waste tires on his property by the deadline set in that order. As noted in my findings of fact, that order, executed on September 16, 2004, required that Mr. Viti remove the tires within nine months of the order's effective date (in other words, by June 16, 2005). On July 19, 2005, fully a month after the deadline had passed, Mr. Senior, a Department engineer, inspected the site and found at least 15,000 tires still remaining there. The site conditions - - including the location of the tires amidst lush, mature and undisturbed vegetation - - and the condition of the tires themselves - - well weathered, with heavily rusted rims - - suggested that the tires were the same ones the Department had ordered Mr. Viti to remove, and not recent arrivals. This evidence adequately demonstrates that Mr. Viti violated the consent order in the manner charged by the Department. Not only were the tires not removed by the deadline set in the order, at least 12,500 of them remained at the site as of July 2007, according to Mr. Senior.

Violations of Part 360 Regulations by A-1 Auto Parts

Department Staff alleges that A-1 Auto Parts violated various provisions of the Part 360 regulations governing solid waste management facilities. "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 and disposal 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 that have been discarded and are now located in piles and scattered individually, in fields and among trees, where they have remained for an extended period of time. Since the evidence clearly shows that more than 1,000 waste tires have been stored at the site for longer than 60 days - - in fact, for many years - - without Department permission or benefit of a regulatory exemption, the site is considered an illegal "disposal" facility under 6 NYCRR 360-13.1(f), and, as a disposal facility, a solid waste management facility, according to ECL 27-0701(2). In fact, the Department's regulation defining "solid waste management facility" [6 NYCRR 360-1.2(b)(158)] includes "waste tire storage facilities" as an example.

A-1 Auto Parts is charged with violating 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) in relation to its business operations at the site since May 19, 2000. With certain exceptions not applicable here, Section 360-1.7(a)(1) prohibits operation of a solid waste management facility except in accordance with a Part 360 permit, and Section 360-13.1(b) prohibits the storage of 1,000 or more waste tires at a time without a Part 360 permit.

A-1 Auto Parts violated these provisions because, in conjunction with its automotive parts business, it has stored 1,000 or more waste tires at the site in question. According to Mr. Senior, there were well more than 1,000 waste tires at the site on May 19, 2000, when he walked it with Mr. Viti, A-1 Auto Parts' president, secretary and sole shareholder. That was the case also when Mr. Senior returned to the site on July 19, 2005, just prior to the commencement of these actions, and again on subsequent visits from August 2006 to July 2007.

Mr. Senior writes in his affidavit of August 23, 2005, which is part of Staff's motion papers, that as an environmental engineer with the Department, he has custody of the Department's records pertaining to solid waste facilities located in Herkimer and Oneida counties, including the records pertaining to this

site. Mr. Senior writes that he made a diligent search of the records in the file for this site and found no record of a permit to operate a waste tire storage facility or any other solid waste management facility.

Also, in his August 10, 2007, affidavit addressing recent site conditions, Mr. Senior writes that there continues to be no record of a solid waste management facility permit having been issued for the site. He adds that the Department's Division of Environmental Permits (DEP) maintains a record - - contained in a database having the acronym "DART" - - of all solid waste management facility permits the Department has issued over the years. He adds that on July 31, 2007, with DEP assistance, he queried DART and determined that no solid waste management facility permit had ever been issued for the site or to either A-1 Auto Parts or Mr. Viti.

A-1 Auto Parts is also charged with violating 6 NYCRR 360-13.3(a), which requires that all activities at a waste tire storage facility be performed in accordance with plans required by Part 360 and approved by the Department. According to Section 360-13.2, 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 must include such things as:

(1) A site plan showing, among other items, the facility's property boundaries; off-site utilities such as electric, gas, water, and storm and sanitary sewer systems; site topography; and buildings [6 NYCRR 360-13.2(b)];

(2) A monitoring and inspection plan addressing concerns such as the readiness of fire-fighting equipment and the integrity of the security system [6 NYCRR 360-13.2(e)];

(3) A closure plan identifying the steps necessary to close the facility [6 NYCRR 360-13.2(f)];

(4) A contingency plan describing the actions that must be taken in response to a fire or releases which could threaten human health or the environment [6 NYCRR 360-13.2(h)];

(5) A storage plan addressing the receipt and handling of all waste tires and solid waste to, at and from the facility [6 NYCRR 360-13.2(i)]; and

(6) A vector control plan providing that waste tires be maintained in a manner which limits mosquito breeding potential and other vectors [6 NYCRR 360-13.2(j)].

Pursuant to 6 NYCRR 360-13.3(a), the aforementioned plans must be incorporated into a final operations and maintenance manual, a copy of which must be maintained and be available for reference and inspection at the facility. According to Mr. Senior's August 23, 2005, affidavit, his diligent search of the Department's files for this facility found no record or entry with regard to any of these plans, and it may be presumed such plans do not exist, because if they did, Mr. Viti would have brought them to the Department's attention, at the site or in response to Department Staff's motion.

A-1 Auto Parts' operation of the waste tire storage facility without such plans having been approved by the Department is in violation of 6 NYCRR 360-13.3(a). Furthermore, for each missing plan there is a separate violation of this requirement for the period since May 19, 2000. 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. As confirmed in other Commissioner's decisions, 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 a permit. [See Commissioner's Supplemental Orders in Matter of Wilder, September 27, 2005, and Matter of Hornburg, May 5, 2006, and the accompanying ALJ's reports in both matters.]

Finally, A-1 Auto Parts is charged with violating 6 NYCRR 360-13.3(e) in relation to its failure to file quarterly and annual reports with the Department for the period since May 19, 2000.

According to Section 360-13.3(e)(2), an owner or operator of a regulated waste tire storage facility must prepare and file quarterly operation reports with the Department within 15 days after the end of each quarter. Such reports must include the total quantity of waste tires at the facility and the quantity added or removed since the previous report, identify any environmental problems, fires or significant changes or progress toward the ultimate disposal of or use of the waste tires received or located at the facility, identify the types and quantities of pesticides used during the reporting period, and include a monthly summary of the daily records addressing the quantity and origin of waste tires received and processed and the quantity and destination of waste tires removed from the facility.

Also, according to Section 360-13.3(e)(3), an owner or operator of a regulated waste tire storage facility must prepare and file an annual report on a form prescribed by or acceptable to the Department, no later than 60 days after the first day of January following each year or portion thereof of operation.

Again, Mr. Senior made a diligent search of the Department's records, and this search did not produce any quarterly or annual reports for this facility. The lack of such reports for the facility was noted in Mr. Senior's report of his July 19, 2005, inspection, and had such reports been filed with the Department, Mr. Viti would be expected to have alerted the Department in response to its motion papers.

Operation of a Noncompliant Waste Tire Stockpile

Department Staff seeks a determination that A-1 Auto Parts 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."

A-1 Auto Parts owns and operates a noncompliant waste tire stockpile because it stores more than 1,000 waste tires on its property in a manner that violates Department regulations, as discussed above. In fact, when he inspected the facility as recently as July 2007, Mr. Senior observed at least 12,500 tires remaining at the site, all without secure fencing, emergency access lanes and nearby firefighting equipment.

Civil Penalty

Department Staff requests that the Commissioner impose a \$30,000 civil penalty against Mr. Viti and a \$50,000 civil penalty against A-1 Auto Parts. Such relief is authorized by ECL 71-2703(1)(a), which 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 [which includes the Part 360 regulations for solid waste management facilities] . . . or any final determination or order of the commissioner made pursuant to this title 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).

The penalty against Mr. Viti is sought in relation to his failure to meet the cleanup deadline set in the September 16, 2004, consent order. Under that order, all tires were to have been removed from the site and properly disposed by June 16, 2005. However, as of July 19, 2005, when Mr. Senior returned to the site, this had not happened. In fact, it still had not happened as of July 27, 2007, the last date for which site information has been presented.

A \$30,000 penalty for violation of the consent order between June 16 and August 23, 2005, the date of Staff's motion against Mr. Viti, is authorized by ECL 71-2703(1). Also, the penalty is reasonable and rational, supported by the record in this matter, and consistent with the Commissioner's civil penalty policy, which states that civil penalties are intended to deter violations of the law as well as to reflect their seriousness in relation to both the potential harm and actual damage they cause, and their relative importance to the regulatory scheme.

ECL 71-2703(5) provides that in determining the amount of any penalty in this case, the Commissioner shall take into consideration any evidence introduced by a party regarding the economic impact of the penalty on a business, the compliance history of the violator, good faith efforts of the violator to comply, any economic benefit obtained from noncompliance, the amount of risk or damage to public health or the environment caused by the violator, whether the violation was procedural in nature, or such other factors as justice may require. Consideration of these factors in this case tends to support Staff's penalty recommendation, as noted in Staff counsel's brief in support of the motion for order without hearing.

As demonstrated by Staff, Mr. Viti failed to meet a deadline he himself had agreed to for ridding his site of waste tires. Staff says this failure resulted in decided economic benefit for Mr. Viti, though the exact benefit remains uncalculated. Staff acknowledges that its proposed penalty would have an economic impact on Mr. Viti, but adds that not assessing a penalty would send the wrong message to businesses trying to comply with their legal obligations. Staff notes that noncompliant waste tire stockpiles such as the one here constitute a serious threat to the environment and public health and safety, as explained in this report's findings of fact. Finally, Staff says that Mr.

Viti's failure to remove and dispose of the tires at his property is not a procedural violation, but one that is quite substantive, defeating the very purpose of the order: to have the person responsible for creating the noncompliant waste tire stockpile clean it up.

I agree with Staff counsel that this is not a case appropriate for penalty leniency as a tool to encourage Mr. Viti to undertake a cleanup. As Staff points out, that approach was tried previously by means of the 2004 consent order, which had no assessed penalty, yet Mr. Viti did not avail himself of the opportunity afforded him in that order to minimize his financial outlays. In fact, a penalty much higher than the \$30,000 requested would be authorized by statute and supported by the facts here.

The penalty against A-1 Auto Parts is sought in relation to the various Part 360 violations alleged in Staff's motion papers. This penalty is also authorized by ECL 71-2703(1)(a), reasonable and rational, supported by the record in this matter, and consistent with the Commissioner's civil penalty policy and the factors outlined for the Commissioner's consideration in ECL 71-2703(5). Of greatest concern is the failure to obtain a solid waste management facility permit, as such failure deprives the Department of its ability to ensure proper oversight of facility operations. As Staff counsel points out, the failures to provide the various plans required by regulation allowed A-1 Auto Parts to maintain a waste tire dump without thinking through how to ensure that nothing untoward happened and how to react correctly in the event of a contingency. Also, as Staff argues, the failures to file the required quarterly and annual reports undermine the self-reporting system on which the waste tire regulations are based.

A \$50,000 penalty for the combined Part 360 violations is well below the maximum allowed by former ECL 71-2703(1)(a), which in 2000, before penalties were increased in 2003, was \$5,000 per violation, with an additional penalty of not more than \$1,000 for each day during which the violation continued. The penalty is also well-supported by the record, particularly because, as Staff maintains, the site is a significant, real, and open hazard to the health and safety of all those people that surround it. The violations alleged by the Department continued from 2000, when Mr. Senior first inspected the site, to 2005, when Staff's motion was made. Even in July 2007, the facility was still operating without a permit, according to the most recent information available.

According to records of the New York State Department of State, A-1 Auto Parts was dissolved by proclamation of the Secretary of State published on June 27, 2001, as a result of its failure to pay franchise taxes. Nonetheless, Staff contends that its corporate existence continues for the purpose of paying its existing liabilities or obligations, which Staff says encompasses liability for violations of state law and regulations. Whether or not this is correct, Staff's requested civil penalty is fully supported even if the violation time frame is limited to the period from May 19, 2000, to June 27, 2001, rather than continuing to August 23, 2005, the date of Staff's motion.

Site Remediation

Department Staff requests that the Commissioner order A-1 Auto Parts to immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose. As Staff argues, such relief is appropriate to prevent A-1 Auto Parts from adding to the existing noncompliant waste tire stockpile, which would add to the number of waste tires that ultimately will have to be removed, thereby adding to the cost of abatement that the state will incur should it remove and dispose of the tires itself. Such relief is also authorized under ECL 71-2703(1)(a), which 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 - - which includes the Part 360 regulations - - may be enjoined from continuing such violation.

Department Staff also requests that the Commissioner order A-1 Auto Parts and Mr. Viti 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. Such a directive is consistent with ECL 27-1907(2), which provides 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. As noted above in this discussion, the site qualifies as a noncompliant waste tire stockpile as that term is defined by ECL 27-1901(6), given that more than 1,000 waste tires have been stored there in a manner violating Department regulation.

CONCLUSIONS OF LAW

1. Respondents Salvatore Viti and A-1 Auto Parts, for which Mr. Viti is president, secretary and sole shareholder, have owned and operated a waste tire storage facility subject to regulation under 6 NYCRR Subpart 360-13 at 67 Barnes Avenue in the Town of Marcy, Oneida County.

2. The site contains a "noncompliant waste tire stockpile," as defined at ECL 27-1901(6), as a result of Part 360 violations listed below.

3. Salvatore Viti violated a Department consent order executed on September 16, 2004, by failing to remove all waste tires from the site by June 16, 2005.

4. Since May 19, 2000, A-1 Auto Parts has operated a waste tire facility without the required Department permit, in violation of 6 NYCRR 360-1.7(a)(1) and 360-13.1(b).

5. Also since May 19, 2000, A-1 Auto Parts has operated the waste tire 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).

6. Since May 19, 2000, A-1 Auto Parts has operated the waste tire facility without filing quarterly reports required pursuant to 6 NYCRR 360-13.3(e)(2) and annual reports required pursuant to 6 NYCRR 360-13.3(e)(3).

7. A civil penalty of \$30,000 against Salvatore Viti and a civil penalty of \$50,000 against A-1 Auto Parts are authorized by law and warranted under the circumstances detailed in this report.

8. Department Staff is entitled to a Commissioner's order prohibiting A-1 Auto Parts from allowing any waste tires to come onto the site in any manner or method or for any purpose.

9. Department Staff is entitled to a Commissioner's order directing A-1 Auto Parts and Salvatore Viti 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.

RECOMMENDATIONS

I recommend that the Commissioner:

I. Grant Department Staff's motions for order without hearing;

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

III. Impose the civil penalties recommended by Department Staff; and

IV. Provide the remedial relief requested in Staff's motion papers.

/s/

Dated: November 13, 2007
Albany, New York

Edward Buhrmaster
Administrative Law Judge