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

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| In the Matter of the Alleged Violations of Articles 23 and 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York | **ORDER**<br><br>DEC File Number<br>R6-20031121-106 |
|---|---|

- by -

**LEORA WHITE, d/b/a**
**LEORA WHITE SCRAP IRON AND METAL,**

Respondent.

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Respondent Leora White, doing business as Leora White Scrap Iron and Metal ("respondent"), operates a salvage yard in the Town of Lisbon, 4110 New York State Highway 68, St. Lawrence County, New York ("facility"). The facility is a repository for various solid wastes including scrap metal, junked cars, spent automotive batteries, discarded propane cylinders, and waste tires. More than 68,000 waste tires are located at the facility.

## Background

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent to enforce provisions of Environmental Conservation Law ("ECL") articles 23 and 27, and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by service of a notice of hearing and complaint and motion for order without hearing. Department staff subsequently moved for a default judgment based upon respondent's failure to timely file an answer to the complaint and also moved for leave to amend or supplement its pleadings as contained in both the motion for order without hearing and the complaint.

For the reasons set forth in ALJ Richard R. Wissler's ruling of February 28, 2006, Department staff's motion for an order without hearing and its separate motion for default judgment were denied. Department staff's motion to amend or supplement its pleadings was granted. Pursuant to 6 NYCRR 622.12(e), the motion

for order without hearing was deemed a complaint and, for the purposes of an adjudicatory hearing, its allegations were joined with the allegations of the complaint upon which the motion for default was based. Combining the averments of both the motion for order without hearing and the complaint, as amended and supplemented, a total of 31 regulatory violations were alleged against respondent.

ALJ Wissler subsequently convened an adjudicatory hearing at the Department's Region 6 office in Watertown, New York. Following the submission of closing briefs by the parties, ALJ Wissler prepared the attached hearing report ("ALJ Wissler's Report"), which I adopt as my decision in this matter, subject to the following comments.

From sometime prior to 1998 and until September 17, 1998, respondent owned and operated the facility. On September 17, 1998, respondent sold the facility to Watertown Iron and Metal, Inc. From on or about February 26, 2001, until July 22, 2004, respondent again operated the facility. At no time while respondent was either the owner and operator or only the operator of the facility, did she apply to the Department for a solid waste management facility permit or a waste tire storage facility permit pursuant to 6 NYCRR 360-1.7(a)(1) or 6 NYCRR 360-13.1(b).

## Discussion

### Waste Tire Storage Violations

Respondent has operated the facility in contravention of the regulatory operational requirements for waste tire storage facilities set forth in 6 NYCRR 360-13.2 and 360-13.3(a). Of particular note is respondent's failure to comply with the dimensional, quantity and other operational standards established in 6 NYCRR 360-13.2(i) and 360-13.2(h)(6), and the applicable National Fire Protection Association ("NFPA") standards incorporated therein (see Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ Hearing Report, at 4-8 [concluding that 6 NYCRR 360-13.2(i) and (h)(6) contain operational requirements]). Respondent also failed to submit any of the reports required pursuant to the Department's waste tire storage regulations (see 6 NYCRR 360-13.3[e][2] and [3]).

With respect to the various facility plans required by 6 NYCRR 360-13.2, it has previously been held that an operational violation is not the failure to submit the plans, as alleged here, but the operation of a waste tire storage facility without

approved plans, in violation of 6 NYCRR 360-13.3(a) (see Matter of Wilder, ALJ Hearing Report, at 2-4).

Although Department staff alleged violations of section 360-13.2, respondent was on notice of the factual basis and nature of the correct theory of liability under section 360-13.3(a). In addition, at the hearing, respondent had ample opportunity to oppose the assertion that the required plans were never submitted nor approved. Thus, respondent would not be prejudiced if the pleadings are amended to conform to the correct theory of liability (see Matter of Wilder, ALJ Hearing Report, at 3 [and cases cited therein]). Accordingly, I find that respondent operated a waste tire storage facility without the required plans in violation of 6 NYCRR 360-13.3(a), not section 360-13.2.

Although the ALJ determined that a number of waste tire storage regulations were violated, he concluded that the record did not support a finding that the regulations governing approach roads/access roads (see 6 NYCRR 360-13.3[c][1]) and potential ignition sources (see 6 NYCRR 360-13.3[c][6]) were violated (see Hearing Report, at 46-48).

Section 360-13.3(c)(1) of 6 NYCRR establishes that the approach roads to a waste tire storage facility and access roads within such facility must be constructed for all weather conditions and must be maintained in passable condition at all times to allow for access by fire-fighting and emergency equipment. Based upon my review of the record, I conclude that the access roads within the facility were not constructed for all weather conditions and were not maintained in a passable condition, and, accordingly, that a violation of 6 NYCRR 360-13.3(c)(1) is supported by a preponderance of the evidence.

I interpret the regulatory reference to "access roads" in 6 NYCRR 360-13.3(c)(1) to mean the network of access routes to the waste tire piles on the site. A review of various exhibits in the record (see, e.g., Staff Exhibits 9, 10, 12, 18, 21, 22, 25, 29, 77, and 113) demonstrates that, although access roads may be maintained to certain of the tire piles, certain piles are located in areas where no maintained access roads exist, including several piles situated in areas of overgrown vegetation with no cleared pathways to them (see also testimony of Region 6 Solid and Hazardous Materials Engineer Edward Blackmer, Adjudicatory Hearing Transcript ["Tr"], at 81). In particular, no access roads exist to various rows of tires along the edges of the facility (see, e.g., Staff Exhibits 25 and 29). For purposes of this regulatory standard, such access must be provided by roads on the facility itself; to the extent that access exists

through unrelated neighboring facilities or adjoining properties, this is insufficient to meet the regulatory standard.

Moreover, "passable," for purposes of these regulations means an access road that is paved or otherwise cleared of vegetation such that it is suitable for vehicular traffic. In addition, "passable" means that the road must be free of obstacles that pose a threat to or otherwise restrict the transit of fire-fighting and emergency response equipment or personnel. At this facility, discarded propane and other tanks as well as other waste material, including scrap metal that could puncture rubber-tired emergency equipment, either are on the access roads, litter the shoulders and sides of the roads to the waste tire piles, or (where there are no such roads) are piled in and among the vegetative growth leading up to the piles (see, e.g., Staff Exhibits 8 [showing propane tanks with and without tank valves], 10, 11, 26, 81). As testified to by Regional Environmental Engineer Gary P. McCullough, and unrefuted by respondent, the presence of the propane tanks would restrict the passage of fire-fighting and emergency response equipment to the waste tire piles (see, e.g., Tr, at 135 [presence of propane cylinders "blocks off any area of access through the site" and cylinders when heated "could explode (and) throw shrapnel"], 137-38; see also, Tr, at 76-77 [noting obstacles from discarded scrap strewn about the facility to the movement of emergency and other vehicles]).

The ALJ also determined that the record did not support a finding that 6 NYCRR 360-13.3(c)(6) was violated. This regulatory provision reads as follows:

> "(c) Fire prevention and control. In addition to the contingency plan requirements set forth in paragraph 360-1.9(h)(1) of this Part:
>
> . . .
>
> (6) potential ignition sources must be eliminated and combustibles must be removed as they accumulate. Smoking, welding, storage of flammable liquids, and open fires are prohibited in the storage area."

The ALJ noted that the record did not indicate that any smoking, welding, storage of flammable liquids, or open fires occurred in the area of the facility where the piles of waste tires were located (see id.), and I do not disagree with that conclusion. I read this regulatory provision, however, more broadly than being limited to the activities in the second sentence of 6 NYCRR 360-13.3(c)(6). A review of the photo exhibits indicates that piles

of combustible materials are located in or near the waste tire piles (see, e.g., Staff Exhibits 31, 36, 44, 48, and 84). This alone is sufficient to find a violation of the regulatory section (see also Staff Exhibit 122 [noting two areas where wood, pallets and other materials had been piled and pushed over the bank along the eastern perimeter of the facility, which was in close proximity to one of the waste tire piles]).

Furthermore, the record indicates that an odor of butyl mercaptan, which would indicate the presence of propane, was detected in and around the discarded cylinders on the site (see, e.g., Tr, at 150, 255). The detection of a compound that is added to propane to indicate its presence is sufficient to support a finding of a potential ignition source. Accordingly, I determine that a preponderance of the evidence supports a finding that respondent violated 6 NYCRR 360-13.3(c)(6).

As a result of the violations, respondent's facility is a "noncompliant waste tire stockpile" as that term is defined in ECL 27-1901(6). Accordingly, the waste tire abatement measures Department staff seeks to have imposed in this matter are authorized by ECL 27-1907.

As noted, fee ownership of the facility was transferred to Watertown Iron and Metal, Inc. on September 17, 1998. As to respondent Leora White's liability for the violations determined after the date of that transfer, I agree with the ALJ that the facts establish that respondent was the operator of the facility from on or about February 26, 2001 until July 22, 2004 and at the time the violations arose. Accordingly, respondent is individually liable for those violations.

**Hazardous Waste Storage Violations**

Department staff also alleged that respondent engaged in the storage of hazardous waste without a permit in violation of ECL 27-0913(1)(a), specifically referring to the piles of discarded propane cylinders at various areas in the facility and a partially filled drum of sodium potassium hydroxide (Cannonball 5) in an onsite building. The ALJ concluded that, although the propane cylinders were a solid waste, on this record it had not been shown whether the propane cylinders still contained product and that they constituted a hazardous waste (see Hearing Report, at 30). The ALJ also was unable to conclude whether the material in the drum was in use or constituted a solid waste (see Hearing Report, at 31). Accordingly, he found that the allegations relating to a violation of ECL 27-0913(1)(a) had not been proven by a preponderance of the evidence.

Respondent is obligated under the State's regulations to determine whether the waste that it generates or stores is hazardous waste and to follow applicable requirements regarding storage, transportation and disposal. Furthermore, respondent has not received any permit from the Department to store, transport or otherwise manage hazardous waste.

Although the record may not be sufficient to determine whether ECL 27-0913(1)(a) was violated with respect to the propane cylinders, I conclude that a reasonable inference can be made on this record that a violation of ECL 27-0913(1)(a) occurred with respect to the drum of Cannonball 5 (see, e.g., Schneider v Kings Highway Hosp. Center, Inc., 67 NY2d 743, 744-745 [1986][liability may be based upon the logical inferences drawn from the record evidence]). On August 5, 2003, Department staff first found the drum of Cannonball 5 inside a building at the facility, and estimated that it contained at least thirty gallons of material (Tr, at 317). As a waste, Cannonball 5, with a pH of 13.8, would constitute a characteristic hazardous waste (see 6 NYCRR 371.3[c]; Tr, at 313). Respondent was unable to identify a use for the material (see, e.g., Tr, at 318, 382). Absent any ability by respondent operator of the facility to identify any use for the Cannonball 5 at the facility or otherwise account for its presence, and based upon the circumstances and conditions of the drum's storage, it is a reasonable inference that the material was abandoned at the facility and, thus, a solid waste (see 6 NYCRR 371.1[c]). Because of its corrosivity, the abandoned Cannonball 5 constituted a hazardous waste and should have been managed according to the applicable hazardous waste requirements. Accordingly, I find that respondent violated ECL 27-0913(1)(a).

**Penalty and Injunctive Relief**

The penalty of $6,800 for the violations of the waste tire requirements that Department staff requested and the ALJ has recommended is warranted by the circumstances of this case. It is consistent with the penalty-assessment formula adopted in other noncompliant waste tire stockpile cases (see Matter of Parent, Order of the Acting Commissioner, Oct. 5, 2005; Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005). Notwithstanding the ALJ's finding that two of the waste tire violations were not proven, the ALJ did not reduce the requested penalty amount, and I am making no further adjustments to the staff-requested penalty.

With regard to the violation of ECL 27-1701 for the improper handling of lead-acid batteries at the facility, the ALJ

recommends the imposition of the penalty of $1,350 requested by Department staff. I accept that recommendation. I also accept, based on this record, the ALJ's modification of Department staff's penalty request for respondent's violation of ECL 23-2308 with respect to the improper disposal of used oil, recommending a penalty of $1,000.

With respect to the violations of ECL 27-0913(a), Department staff requested a $7,500 penalty but, in its closing brief, referenced only the propane cylinders at the site and not the drum of Cannonball 5 in its discussion of the penalty for hazardous waste violations (see Department staff's closing brief, at 53). In this matter, the ALJ found no violations of the hazardous waste regulations. Although I find a violation with respect to the drum of Cannonball 5, in that no penalty appears to have been requested for that violation and upon further review of the record in this matter, no penalty is being imposed for this violation. However, the violation of ECL 27-0903(1)(a) warrants the award of the remedial relief requested by Department staff.

Accordingly, I am accepting the ALJ's recommendation that a civil penalty of $9,150 be imposed upon respondent.

Department staff also requested various injunctive relief in its complaint. By this order and in consideration of this record and the relief requested by Department staff, I am directing respondent to:

1. With respect to the discarded propane cylinders at the facility, submit a letter report to the Department within thirty (30) days of the service of this order that states whether the cylinders are empty or if they contain product (propane or other material) such that the cylinders need to be managed as hazardous waste. For any cylinders that must be managed as hazardous waste, respondent shall describe the procedures that have been implemented to ensure appropriate treatment and disposal;

2. Immediately cease to accept cylinders that contain propane or other ignitable or combustible material at the facility except where such cylinders are for use at the facility;

3. With respect to the drum of Cannonball 5, furnish appropriate documentation regarding the proper disposal or recycling of the Cannonball 5 material. Respondent shall also determine, by testing where necessary, whether any other containers of material that are present at the facility constitute hazardous waste. The results of any such testing

shall be included in the letter report. Respondent shall properly label all containers of hazardous waste and used oil;

4. Within sixty (60) days of the service of this order upon respondent, submit an investigation work plan to define the nature and extent of petroleum contamination at the site to the Department for its review and approval. Following respondent’s completion of the investigation as set forth in the Department-approved investigation work plan, respondent shall submit a remedial work plan for Department’s review and approval and then implement the Department-approved remedial work plan; and

5. Immediately ensure that the lead-acid batteries on-site are stored in a manner that prevents any releases to the environment and that the batteries are reclaimed or disposed in accordance with applicable requirements.

The aforementioned relief is reasonable and warranted by the circumstances.

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

I. Respondent Leora White, d/b/a Leora White Scrap Iron and Metal, is adjudged to have committed the following violations:

A. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved site plan specifying, among other requirements, the Facility’s boundaries, as required by 6 NYCRR 360-13.2(b).

B. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the Facility’s security system, as required by 6 NYCRR 360-13.2(e).

C. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved closure plan identifying the steps necessary to close the Facility, as required by 6 NYCRR 360-13.2(f).

D. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved contingency plan detailing, among other things, the measures to be undertaken in the event of a fire emergency so as to assure compliance with the applicable National Fire Protection

Association standards, as required by 6 NYCRR 360-13.2(h).

E. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the facility, as required by 6 NYCRR 360-13.2(i).

F. Respondent violated 6 NYCRR 360-13.3(a) by operating a waste tire storage facility without a Department-approved vector control plan that provides that all waste tires at the facility be maintained in a manner which limits mosquito breeding potential and other vectors, as required by 6 NYCRR 360-13.2(j).

G. During the time respondent was the operator of the facility, respondent violated the operational requirements of 6 NYCRR 360-13.2(i) by: (1) failing to maintain waste tire piles 50 feet or less in width in violation of paragraph 3 of subdivision 360-13.2(i); (2) failing to maintain waste tire piles at 10,000 square feet, or less, of surface area in violation of paragraph 3 of subdivision 360-13.2(i); (3) failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, and the borders of the facility's property in violation of paragraph 4 of subdivision 360-13.2(i); (4) failing to maintain the 50 foot separation areas so that they are free of obstructions and vegetation at all times so that emergency vehicles will have adequate equipment access, in violation of paragraph 4 of subdivision 360-13.2(i); and (5) failing to maintain the number of waste tires at or below the quantity for which the facility is permitted in violation of paragraph 5 of subdivision 360-13.2(i).

H. During the time respondent was the operator of the facility, respondent failed to comply with various provisions of 6 NYCRR 360-13.3, the operational requirements for waste tire storage facilities, including:

1. Respondent violated 6 NYCRR 360-13.3(b)(1), by failing to remove rims from waste tires within one week of their receipt by the facility;

2. Respondent violated 6 NYCRR 360-13.3(c)(1) by failing to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment;

3. Respondent violated 6 NYCRR 360-13.3(c)(4) by

failing to have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility and by failing to have an active hydrant or viable fire pond on the facility, which facility had more than 2,500 waste tires onsite;

4. Respondent violated 6 NYCRR 360-13.3(c)(5) by failing to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment;

5. Respondent violated 6 NYCRR 360-13.3(c)(6) by failing to eliminate potential ignition sources and to remove combustibles as they accumulated;

6. Respondent violated 6 NYCRR 360-13.3(d)(2) by failing to enclose the facility containing more than 2,500 waste tires with a six-foot chainlink fence, or equivalent;

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

8. Respondent violated 6 NYCRR 36-13.3(e)(3) by failing to prepare and file annual reports with the Department.

I. Respondent violated ECL 27-1701(3)(d) by improperly disposing of lead-acid batteries by depositing and dumping them outdoors and on the bare ground such that their contents could enter the environment.

J. Respondent violated ECL 23-2308 by improperly disposing of used oil.

K. Respondent violated ECL 27-0913(1)(a) by storing hazardous waste (drum of Cannonball 5) without a permit.

II. The Facility is a “noncompliant waste tire stockpile” as defined under ECL 27-1901(6).

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

IV. Respondent is ordered to pay a civil penalty in the amount

of nine thousand one hundred and fifty dollars ($9,150.00). No later than 30 days after the date of service of this order upon respondent, respondent shall submit payment of the total assessed penalty to the Department. Payment shall be in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered by certified mail, overnight delivery or hand delivery to the Department at the following address: Randall C. Young, Esq., Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

V. Respondent is ordered 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 take over abatement of the waste tires at the facility.

VI. Respondent is ordered to reimburse the Waste Tire Management and Recycling Fund ("Fund"), in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the facility, including any and all investigation, prosecution, abatement and oversight costs, to the maximum extent authorized by law. Upon complete abatement of the noncompliant waste tires at the facility, the State shall notify respondent of the costs so incurred by the State and respondent shall pay these costs within thirty days of receipt of such notification.

VII. Within thirty (30) days of service of this order upon respondent, respondent shall submit a letter report to the Department:

A. Stating whether the waste cylinders at the facility are empty, or contain product (propane or other material) that would require the cylinders to be managed as hazardous waste (and for those cylinders, what procedures have been implemented to ensure appropriate treatment and disposal); and

B. Furnishing appropriate documentation regarding the proper disposal or recycling of the drum of Cannonball 5. Respondent shall also determine, by testing where necessary, whether any other containers of material that are present at the facility constitute hazardous waste. The results of any such testing shall be included as part of the letter report. Respondent shall properly label all containers of hazardous waste and used oil.

VIII. Within sixty (60) days of the service of this order upon

respondent, respondent shall submit an investigation work plan to define the nature and extent of petroleum contamination at the site to the Department for its review and approval. Following respondent's completion of the investigation pursuant to the Department-approved investigation work plan, respondent shall submit a remedial work plan to the Department for review and approval and then implement the Department-approved remedial work plan.

IX. Upon service of this order on respondent, respondent shall immediately cease to accept cylinders that contain propane or other ignitable or combustible material at the facility except where such cylinders are for use at the facility.

X. Upon service of this order upon respondent, respondent shall immediately ensure that the lead-acid batteries on-site are stored in a manner that would prevent any releases from the batteries to the environment and that such batteries are reclaimed or disposed in accordance with applicable requirements.

XI. All communications from respondent to the Department concerning this order shall be made to Randall C. Young, Esq., Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

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

For the New York State Department of Environmental Conservation

By: _______/s/_________________________________
Alexander B. Grannis,
Commissioner

Dated: August 13, 2008
Albany, New York

TO: Leora White (via Certified Mail)
4267 State Route 68
Rensselaer Falls, NY 13680

Randall C. Young, Esq. (via Regular Mail)
Regional Attorney
New York State Department of
Environmental Conservation
Division of Legal Affairs, Region 6
317 Washington Street
Watertown, New York 13601

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of the -

Alleged Violation of Articles 23 and 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

- by -

**LEORA WHITE, d/b/a**
**LEORA WHITE SCRAP IRON AND METAL**

Respondent.

DEC Case No. R6-20031121-106

HEARING REPORT

- by -

/s/

___________________________
Richard R. Wissler
Administrative Law Judge
October 15, 2007

## SUMMARY

In this Administrative Enforcement Hearing Report, the assigned Administrative Law Judge (ALJ), Richard R. Wissler, finds that respondent, Leora White, d/b/a Leora White Scrap Iron and Metal, has violated (a) Environmental Conservation Law (ECL) article 23 (Mineral Resources), title 23 (Rerefining of Used Oil) by failing to properly dispose of used oil; (b) ECL article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste), title 7 (Solid Waste Management and Resource Recovery Facilities), as well as various of this title's implementing regulations promulgated under title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), particularly part 360 thereof, by operating a waste tire storage facility which has not been permitted by the Department and by failing to comply with various regulatory requirements governing the operation of waste tire storage facilities; and (c) ECL article 27, title 17 (Lead-Acid Battery Recycling) by failing to properly dispose of lead-acid batteries. The ALJ recommends that the Commissioner issue an order finding that respondent has violated the aforementioned provisions of the ECL and 6 NYCRR and recommends that the Commissioner impose a payable civil penalty of $9,150.00. Moreover, the ALJ recommends that the Commissioner find that the Facility is a noncompliant waste tire stockpile pursuant to ECL 27-1901 and is subject to the provisions thereof. In addition, the ALJ recommends that the Commissioner direct that respondent desist from the further receipt of waste tires at the subject Facility's site and, to the extent that she is legally authorized to do so, assist and cooperate with the Department in the abatement and remediation of the site.

## PROCEDURAL BACKGROUND

### Motions Pursuant to 6 NYCRR 622.12, 622.15 and 622.5

By three separate motions, Staff of the Department of Environmental Conservation (Department Staff) moved for (1) an order without hearing pursuant to section 622.12 of 6 NYCRR, (2) a default pursuant to 6 NYCRR 622.15, based upon respondent's failure to timely file an answer to a complaint duly served, and (3) leave to amend or supplement its pleadings as contained in both the motion for order without hearing and the complaint pursuant 6 NYCRR 622.5. All three motions arose in the context of enforcement actions taken by the Department against Leora White (respondent) for various alleged violations of articles 23

and 27 of the ECL and 6 NYCRR part 360.

The motion for order without hearing, dated September 13, 2004, alleged various violations of 6 NYCRR part 360, particularly subpart 360-13. The complaint upon which the motion for default was based alleged violations of 6 NYCRR part 360, ECL 27-1701, ECL 27-0913, and ECL 23-2308. The complaint was dated September 24, 2004, while the motion for default was dated October 29, 2004. The motion to amend the pleadings, dated February 16, 2006, sought to include an additional allegation in each pleading asserting respondent's ownership and operation of an alleged waste tire storage facility prior to September 1998, containing more than 1000 waste tires, without authorization to do so pursuant to a permit issued by the Department under 6 NYCRR part 360.

For the reasons set forth in my ruling of February 28, 2006, the motion for an order without hearing was denied, the motion for default was denied, and the motion to amend or supplement the pleadings was granted. Moreover, the motion for order without hearing, as amended and supplemented, was deemed a complaint and, for the purposes of an adjudicatory hearing, its allegations were joined with the allegations of the complaint upon which the motion for default was based, also now amended and supplemented.

**Regulatory Violations Alleged**

Combining the averments of both pleadings, a total of 31 regulatory violations were alleged against respondent. Specifically, violations of 6 NYCRR part 360 and the ECL were alleged as follows:

1. 360-1.7(a)(1) No permit to construct or operate a solid waste management facility.

2. 360-13.1(b) No permit to store 1000 or more waste tires.

3. 360-13.2(b) Failure to submit to the Department a site plan specifying the waste tire facility's boundaries.

4. 360-13.2(e) Failure to submit to the Department a monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the facility's security system.

5. 360-13.2(f) Failure to submit to the Department a closure

plan identifying the steps necessary to close the facility.

6. 360-13.2(h) Failure to submit to the Department a contingency plan detailing, among other things, the measures to be undertaken in the event of a fire emergency so as to assure compliance with the applicable National Fire Protection Association standards, (NFPA) particularly, NFPA 231D (1989 edition). As to the NFPA, three separate and additional violations of 360-13.2(h)(6), as follows:

7. 360-13.2(h)(6) Failure to comply with NFPA 231D Appendix C-3.2.1(a) by failing to have fire lanes to separate waste tire piles to provide access for effective fire fighting operations;

8. 360-13.2(h)(6) Failure to comply with NFPA 231D Appendix C-3.2.1(c) by failing to control weeds, grass and other combustible materials in the waste tire storage area in that respondent stored waste tires in close proximity to natural cover and trees; and

9. 360-13.2(h)(6) Failure to comply with NFPA 231D Appendix C-4.2.5 by locating waste tire piles within less than 50 feet of grass, weeds and brush.

10. 360-13.2(i) Failure to submit to the Department a storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the facility. In this regard, respondent is alleged to be in violation of the required elements of such a plan, in particular:

11. 360-13.2(i)(3) Failure to maintain waste tire piles 50 feet or less in width;

12. 360-13.2(i)(3) Failure to maintain waste tire piles at 10,000 square feet, or less, of surface area;

13. 360-13.2(i)(4) Failure to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures;

14. 360-13.2(i)(4) Failure to maintain 50 foot separation areas so that they are free of obstructions and vegetation at all times;

15. 360-13.2(i)(4) Failure to maintain 50 foot separation areas in such a manner that emergency vehicles would have adequate access;

16. 360-13.2(i)(5) Failure to maintain the number of waste tires at or below the quantity for which the facility is permitted; and

17. 360-13.2(i)(7) Failure to receive prior written Department approval to locate waste tires in excavations or below grade.

18. 360-13.2(j) Failure to submit to the Department a vector control plan that provides that all waste tires be maintained in a manner which limits mosquito breeding potential and other vectors.

19. 360-13.3(b)(1) Failure to remove rims from waste tires within one week of their receipt by the facility.

20. 360-13.3(c)(1) Failure to maintain access roads within the storage facility in passable condition at all times to allow for access by firefighting and emergency response equipment.

21. 360-13.3(c)(4) Failure to have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility, a facility having more than 2,500 waste tires actually on site.

22. 360-13.3(c)(4) Failure to have an active hydrant or viable fire pond on the facility, a facility having more than 2,500 waste tires actually on site.

23. 360-13.3(c)(5) Failure to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment.

24. 360-13.3(c)(6) Failure to eliminate potential ignition sources from the waste tire storage areas.

25. 360-13.3(d)(2) Failure to enclose its site, containing more than 2500 waste tires, with a six-foot chainlink fence, or equivalent.

26. 360-13.3(e)(2) Failure to prepare and file quarterly operation reports with the Department.

27. 360-13.3(e)(3) Failure to prepare and file annual reports with the Department.

28. 360-1.14(q) Permitting open burning of solid waste at a solid waste management facility, without benefit of a restricted burning permit issued by the Department.

29. ECL 23-2308 Permitting the improper disposition of used oil at the facility by allowing the storage of the same in open drums and buckets, some of which were leaking and contaminating the soil.

30. ECL 27-0913(1)(a) Permitting the storage of hazardous waste without benefit of a permit issued by the Department by storing discarded cylinders of propane, some still containing propane, a hazardous waste pursuant to 6 NYCRR 371.3(b) since it exhibits the characteristic of ignitability; and drums of sodium potassium hydroxide having a pH of 13.8, a hazardous waste pursuant to 6 NYCRR 371.3(c) since it exhibits the characteristic of corrosivity.

31. ECL 27-1701(3)(d) Failure to properly dispose of lead-acid batteries by allowing the accumulation of the same and not delivering the same to a recycling facility, another collector, or as a method of last resort to an authorized hazardous waste facility.

**Adjudicatory Hearing**

As directed in the ruling of February 28, 2006, an adjudicatory hearing to consider the above allegations was convened before ALJ Wissler, of the Department's Office of Hearings and Mediation Services, on March 6, 2006, in the Department's Region 6 Headquarters, 317 Washington Street, Watertown, New York, and was continued on March 7, 2006.

Department staff was represented by Randall C. Young, Esq., Regional Attorney for Region 6. Respondent appeared pro se and was assisted by two of her acquaintances, Ann Beutel and Ruby Forney.

Department staff called eight witness, Gabriel Snyder, a former employee at respondent's facility; Edward Blackmer, Regional Solid and Hazardous Materials Engineer for Region 6; Lawrence Ambreau, Deputy Permit Administrator for Region 6; Gary P. McCullouch, an Environmental Engineer II with the Region 6 Division of Solid and Hazardous Materials; Michael Sherry, an Environmental Conservation Police Officer (ECO); Lieutenant Jeffrey W. Jarvis of the Department's Division of Law Enforcement; Peter R. Taylor, Regional Spill Engineer for Region 6; and Donald I. Johnson, an Environmental Engineer I with the Region 6 Division of Environmental Remediation in Utica. Respondent called one witness, Robert Reynolds, a former employee at respondent's facility.

In all, 130 exhibits (Ex.) were received in evidence.

As directed by the ALJ, both Department staff and respondent submitted closing briefs which were received on May 1, 2006, upon which date the hearing record closed.

## FINDINGS OF FACT

1. The facility which is the subject of this proceeding (Facility) is located at 4110 New York State Route 68 in the Town of Lisbon, St. Lawrence County, New York and is comprised of two parcels of land identified on the tax maps of St. Lawrence County as parcel numbers 61.003.1.14.1 and 61.003.1.15. The Facility is also within the geographic boundaries and jurisdiction of the Department's Region 6.

2. The Facility is used for the commercial operation of a salvage yard and is a repository for various solid wastes including scrap metals, junk cars, spent lead-acid automotive batteries, discarded propane cylinders and waste tires. At the middle of the southern end of the site, approximately 50 feet north of New York State Route 68, is located a building housing the administrative offices for the Facility. About 50 feet further north of this building are located two additional buildings, an 8800 square foot maintenance building to the east and a shed, approximately one fourth that size, to the west, used for the storage of waste batteries. These latter two buildings are about 15

feet apart.

3. Prior to September 1998, the Facility was owned and operated by respondent and known as White's Scrap Iron and Metal.

4. On September 17, 1998, by bargain and sale deed of transfer executed pursuant to a purchase agreement and in consideration of a note secured by a mortgage, respondent conveyed all right, title and interest in the Facility to Watertown Iron and Metal, Inc.

5. The aforementioned note and mortgage were executed by one Wayne S. Jahada, President of Watertown Iron and Metal, Inc.

6. At all times subsequent to September 17, 1998, title to the Facility has remained in Watertown Iron and Metal, Inc.

7. Approximately ten months after executing the note referred to in Finding of Fact 4, Watertown Iron and Metal, Inc. permanently defaulted on its payment.

8. On or about February 26, 2001, Watertown Iron and Metal, Inc., through its President, Wayne S. Jahada, agreed to allow respondent to enter and operate the Facility.

9. An aerial photograph of the Facility taken in May 1997 and archived as part of the New York State Global Information System indicates that, at the time of the photo, more than 50,000 waste tires were present on the grounds of the Facility.

10. Estimates made during Departmental inspections of the Facility on November 25, 1998; December 7, 1998; September 27, 2002; August 5, 2003; and July 22, 2004, indicated that on each occasion the site contained more than 50,000 waste tires. The total estimate made on December 7, 1998, was based upon the sum of the estimates of 21 distinct piles of tires observed on that date and indicated the presence of between 59,500 and 68,500 waste tires at the site. Estimates made during the inspections subsequent to December 7, 1998, reflect this same range, generally placing the number at 68,000 waste tires.

11. During the inspection of September 27, 2002, Department Staff observed:

    A. Various piles of waste tires, separated by dense weeds, brush and other vegetation. Some of the tires were

still mounted on their rims.

B. Stacks of lead-acid automotive batteries, some with broken casings; piles of construction and demolition debris, including used building materials, empty five-gallon plastic pails and insulation; and piles of other solid waste, including discarded electronic equipment.

C. Used lubricating oil stored in various drums and pails, in the maintenance shed. Oil spillage and staining was observed on the floor by the drums and adjacent to a floor drain.

D. Certain mechanical equipment utilized by the Facility to crush junk cars. This equipment was not located upon any concrete pad or other impervious surface, but upon bare ground.

12. During the inspection of September 27, 2002, Department Staff did not observe (a) the presence of any vector control measures at the site, such as the placement of tarpaulins over the tire piles to prevent the collection of rainwater and control the breeding of mosquitoes, or traps to control rodents; (b) the presence of fire control equipment at the site; (c) the presence of any fire hydrants at the site; (d) the presence of a fire pond at the site; and (e) the presence of any large capacity fire extinguishers at the site.

13. On August 5, 2003, the Facility was again inspected by Department Staff and the conditions observed at that time were similar to those observed on September 27, 2002. In particular, Department Staff observed the following conditions:

A. Various piles of waste tires totaling more than 60,000. One of the piles of waste tires previously observed during the inspection of September 27, 2002, had increased in size due to the addition of more waste tires.

B. The waste tires were gathered primarily in three large piles in the center of the site, the middle and largest pile approximately 20 feet high, 95 feet wide and 240 feet long. The middle and western-most piles were each partially divided by aisles cut into them, but none of these aisles were more than 30 feet in width. The three large piles were separated by areas of vegetation

in the form of high dense weeds and brush.

C. Flanking the three large piles along the western and eastern borders were eleven windrows of tires, six along the western border and five along the eastern border. Each windrow was about 20 feet wide, 60 feet long, and 4 to 5 feet high. Aisle space between the windrows was less than 30 feet and overgrown with dense weeds and brush.

D. The width of the aisle spaces between the waste tire piles were, in all cases, less than 50 feet and in many cases less than 30 feet. These aisle spaces were overgrown with dense weeds, brush and other vegetation and, in some instances, obstructed by scrap metal. In every case, these aisle space conditions were high enough and severe enough to preclude the ingress and egress of vehicles, including emergency vehicles.

E. Dark staining of the soil and sheens on puddles near the car crushing equipment. Samples taken from a water puddle and the soil near the rear of the car crushing equipment were analyzed and the results indicated the presence of lubricating oil.

F. Certain 5-gallon pails at the rear of the maintenance building containing what appeared to be motor and lubricating oil. The soil in the area of the pails was stained black. Samples taken from these soils, as well as an adjacent water puddle, were analyzed and the results each indicated the presence of lubricating oil.

G. Four unlabeled drums in the maintenance building. Samples taken from these drums were analyzed and the results indicated the presence of lubricating oil. The floor in the area of the drums and around and adjacent to a nearby floor drain was stained with spilled oil.

H. A pile of several dozen propane cylinders. Some of these cylinders still had valves attached to them. The aroma of butyl mercaptan, added to otherwise odorless propane to provide it with a detectable odor, could be smelled emanating from the pile of propane tanks.

I. Several pallets stacked three to four deep with lead-acid automotive batteries in the shed adjacent to the maintenance building. In addition a random pile of several dozen other batteries was located outside the

shed, some lying on what appeared to be the junked bed of a pick-up truck and others lying on the bare ground. The casings of some of these batteries, including some of those lying on the bare ground, were cracked open revealing their lead core. In addition, some of the batteries were missing cell caps.

J. The 15-foot wide space between the maintenance building and the battery shed was filled with used pallets and other debris piled several feet high and strewn about in a haphazard manner. The area was also overgrown with vegetation in the form of grasses, weeds, brush and small trees.

14. On August 5, 2003, no vector control measures were observed in place at the Facility.

15. On August 5, 2003, no fire control equipment, such as a viable fire pond or fully charged large capacity carbon dioxide or dry chemical fire extinguishers, was observed in place at the Facility.

16. On July 22, 2004, Department Staff inspected the Facility again and the conditions observed at that time were similar to those observed on August 5, 2003. In particular, during the inspection on July 22, 2004, Department Staff observed that:

A. Approximately 68,000 waste tires were present at the Facility, many still mounted on rims.

B. The waste tires were situated in several piles and windrows. The largest pile of waste tires exceeded 10,000 square feet in area and had a width greater than 50 feet and a height of approximately 20 feet. This pile contained more than 25,000 waste tires.

C. On either side of the main pile of waste tires and along the western and eastern borders of the Facility were twelve windrows of waste tires, six windrows along each side. Each windrow was approximately 20 feet wide, 60 feet long, 4 to 5 feet high and contained approximately 1200 waste tires.

D. All of the waste tire piles were uncovered and exposed to the elements.

E. The distances between the waste tire piles were less

than 50 feet; the distances between the windrows did not exceed 30 feet.

F. Vegetation in the form of forbs; grass; weeds, including purple loosestrife 6 feet high and brush, some with 1 ½ to 2 inch diameter trunks, was located in the areas of separation between the piles and windrows of waste tires. Also strewn and interspersed between the piles and windrows and among the vegetation were piles and pieces of scrap metal. The conditions presented by this dense vegetation and scrap metal were such as would preclude ingress and egress of emergency vehicles to the waste tire piles. In addition, the windrows were located along and against the eastern and western borders of the Facility which were themselves lined with dense vegetation and trees, further precluding the ingress and egress of emergency vehicles via routes from adjoining properties.

G. The Facility was not enclosed by a six foot high chain-link or other similar fence.

H. There was no active hydrant or viable fire pond at the Facility.

I. There were no large capacity carbon dioxide or dry chemical fire extinguishers at the Facility.

J. Discarded propane cylinders, some with valves in place, were piled at the periphery of the tire piles at the Facility.

K. None of the tire piles was covered with plastic or other impermeable barrier.

L. No vector control measures were being implemented at the Facility.

17. A search of the Department's records revealed that no permit to construct or operate a solid waste management facility had ever been issued to respondent.

18. A search of the Department's records revealed that no permit to store 1000 or more waste tires had ever been issued to respondent.

19. A search of the Department's records revealed that no application, nor any supporting documentation thereof, for a

permit to store 1000 or more waste tires had ever been submitted to the Department by respondent. Accordingly, with respect to the Facility, this search revealed that respondent had never submitted any of the various application documents required under 6 NYCRR 360-13.2 including a (1) site plan, (2) monitoring and inspection plan, (3) closure plan, (4) contingency plan demonstrating compliance with all applicable National Fire Protection Association (NFPA) standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition, (5) storage plan and (6) vector control plan.

20. A search of the Department's records revealed that respondent had never filed a quarterly operation report for the Facility with the Department.

21. A search of the Department's records revealed that respondent had never filed an annual operation report for the Facility with the Department.

## APPLICABLE STATUTORY PROVISIONS

### 6 NYCRR 360-1.2 Definitions.

The following terms have the following specific meanings when used in this Part:

(a) Solid waste and related terms.

(1) Solid waste means ... any garbage, refuse ... and other discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations, and from community activities ....

(b) Other definitions of general applicability.

* * *

(29) Combustion means the thermal treatment of solid waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the waste. Examples of combustion processes include incineration, pyrolysis and fluidized bed.

* * *

(110) Open burning means the combustion of any material or solid waste in the absence of any of the following characteristics:

(i) control of combustion air to maintain adequate temperature for efficient combustion;

(ii) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; or

(iii) control of emissions of the gaseous combustion products.

* * *

(113) Operator or facility operator means the person responsible for the overall operation of a solid waste management facility or a part of a facility with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the department-approved operating conditions at the facility or on the property on which the facility is located.

* * *

(158) Solid waste management facility means any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to ... waste tire storage .... The term includes all structures, appurtenances, and improvements on the land used for the management or disposal of solid waste.

* * *

(183) Waste tire means any solid waste which consists of whole tires or portions of tires.

**6 NYCRR 360-1.7 Permit requirements, exemptions and variances.**

(a) Permit requirements.

(1) ... [N]o person shall:

(i) construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part....

## 6 NYCRR SUBPART 360-13. WASTE TIRE STORAGE FACILITIES

### 6 NYCRR 360-13.1 Applicability.

(a) Storage. This Subpart regulates only the storage of waste tires or portions of waste tires....

(b) Temporary storage. No person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to this Part.

### 6 NYCRR 360-13.2 Additional application requirements for an initial permit to construct and operate.

In addition to the requirements set forth in Subpart 360-1 of this Part, 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 the following:

* * *

(b) Site plan. A site plan that must show the facility's property boundaries; site acreage; distances from adjacent residences, [and other matters relating to the physical layout of the facility].

* * *

(e) Monitoring and inspection plan. A facility monitoring and inspection plan [which, among other matters, must provide for scheduled facility inspections]. The inspection plan must address the following concerns: the presence of vermin; the readiness of fire-fighting equipment; and the integrity of the security system.

(f) Closure plan. A closure plan [which] must identify the steps necessary to close the facility.

* * *

(h) Contingency plan. ... [T]he contingency plan must include but not be limited to:

(1) Scope. The contingency plan must be designed 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.

(2) Contents. The contingency plan must describe the actions that must be taken in response to a fire or releases which could

threaten human health or the environment. The contingency plan also must provide for the worst case contingency such as a fire occurring at the facility at its maximum capacity. Consideration must be provided regarding on-site water supply, access routes to the site, security, alarms, training, drills and on-site fire protection equipment.

* * *

(6) The facility must comply with all applicable National Fire Protection Association standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition (see section 360-1.3 of this Part).

(i) Storage plan. The storage plan must address the receipt and handling of all waste tires and solid waste to, at and from the facility. The plan must address the following matters:

* * *

(3) Waste tire piles must not exceed 20 feet in height. Horizontal dimensions of waste tire piles at the base of the pile must have a surface area no greater than 10,000 square feet, with the width not to exceed 50 feet.

(4) Waste tire piles must have a minimum separation distance of 50 feet between piles, and between a pile and: the facility property boundaries: a public right-of-way located at the facility property boundary: any other buildings or structures. These 50-foot separation areas must be maintained free of obstructions and vegetation at all times and maintained in such a manner that emergency vehicles will have adequate equipment access.

(5) The facility must not store waste tires in excess of the quantity for which the facility is permitted.

* * *

(7) Waste tire piles may not be located in excavations or below grade without prior written approval by the department.

(j) Vector control plan. This plan must provide that:

(1) All waste tires be maintained in a manner which limits mosquito breeding potential and other vectors.

(i) A method of acceptable vector control will require that tires received must be drained of water within 24 hours of receipt and

must include one or more of the following:

(a) covering by plastic sheets or other impermeable barriers, other than soil, to prevent the accumulation of precipitation;

(b) chemical treating to eliminate vector breeding ...

(c) mechanical tire size reduction into pieces no larger than four by six inches ... or

(d) any other method approved by the department in writing.

**6 NYCRR 360-13.3 Operational requirements.**

In addition to the requirements of section 360-1.14 of this Part, all waste tire storage facilities subject to the permitting requirements of this Part must comply with the following operational requirements:

* * *

(b) Sorting of waste tires.

(1) Rims must be removed from the waste tires within one week of receipt at the facility.

* * *

(c) Fire prevention and control. In addition to the contingency plan requirements set forth in paragraph 360-1.9(h)(1) of this Part:

(1) approach roads to the facility and access roads within the facility must be constructed for all weather conditions and maintained in passable condition at all times to allow for access by fire-fighting and emergency response equipment;

(2) the facility must be maintained free from weeds, trees and vegetation which may restrict access to or operations of the facility;

* * *

(4) waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, an active hydrant or viable fire pond on the facility and fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility in quantities as deemed necessary in the contingency

plan or other fire protection and prevention equipment as approved by the local fire marshal;

(5) waste tire piles must be accessible on all sides to fire fighting and emergency response equipment; and

(6) potential ignition sources must be eliminated and combustibles must be removed as they accumulate. Smoking, welding, storage of flammable liquids, and open fires are prohibited in the storage area.

(d) Access.

* * *

(2) Facilities having a planned or actual capacity of 2,500 or more waste tires must be enclosed by a woven wire, chain-link or other acceptable fence material, at least six feet in height. Access must be controlled by locking gates. Keys for the locking gates shall be provided to local fire and police officials for emergency fire response unless otherwise approved by the department.

* * *

(e) Reporting and recordkeeping. In addition to the requirements of subdivisions 360-1.4(c) and 360-1.14(i) of this Part, the facility owner or operator must:

* * *

(2) Prepare and file duplicate original quarterly operation reports with the department's central office and the office of the department administrating the region within which the facility is located ... within 15 days after the end of each quarter. The report must:

(i) include the total quantity of waste tires at the facility and the quantity added or removed since the previous report;

(ii) identify any environmental problems, fires or significant changes or progress toward the ultimate disposal of or use of waste tires received or located at the facility.

* * *

(3) Prepare and file an annual report with the department's central office and the office of the department administrating the region within which the facility is located ... no later than 60 days after the first day of January following each year or

portion thereof of operation.

## 6 NYCRR 360-1.14 Operational requirements for all solid waste management facilities.

(a) Applicability. Except as elsewhere provided in this Part, any person who designs, constructs, maintains or operates any solid waste management facility subject to this Part must do so in conformance with the requirements of this section.

* * *

(q) Open burning. Open burning at a solid waste management facility is prohibited, except for the infrequent burning of agricultural wastes, silvicultural wastes, land clearing debris (excluding stumps), diseased trees or debris from emergency cleanup operation, pursuant to a restricted burning permit issued by the department. Measures must be taken immediately to extinguish any non-permitted open burning and the department must be notified that it has occurred.

## ECL 23-2308 Prohibited disposal of used oil

1. No person shall engage in the improper disposal of used oil. Used oil shall only be deposited in an available used oil retention facility or disposed of as otherwise authorized or permitted by the commissioner.

* * *

## ECL 27-0913. Permits and registrations for storage, transportation, treatment, or disposal of hazardous wastes

1. a. No person shall engage in storage, treatment, or disposal, including storage at the site of generation, of hazardous wastes without first having obtained a permit pursuant to title seven of this article. Such permits shall require corrective action, including corrective action beyond the facility boundary where necessary to protect human health and the environment, for all releases of hazardous waste or constituents from any solid waste management unit at a permitted treatment, storage or disposal facility, regardless of the time at which waste was placed in such unit, and shall contain schedules of compliance for such corrective action where such corrective action cannot be completed prior to issuance of the permit.

* * *

**ECL 27-1701. Lead-acid battery recycling**

* * *

(3)(d) No collector shall dispose of a lead-acid battery except by delivery to a recycling facility, another collector, or as a method of last resort to an authorized hazardous waste facility.

**Standards for Storage of Rubber Tires**
**NFPA 231D, 1989 edition**

Promulgated by the National Fire Protection Association (NFPA), and made applicable to waste tire storage facilities in the State by 6 NYCRR 360-13.2(h)(6), these standards contain several appendices, including an Appendix C entitled "Guidelines for Outdoor Storage of Scrap Tires."

Sections C-3.2.1(a) and (c) of Appendix C provide:

C-3.2.1 The fire hazard potential inherent in scrap rubber tire storage operations can best be controlled by a positive fire prevention program. The method of stacking should be solid piles in an orderly manner and should include:

(a) Fire lanes to separate piles and provide access for effective fire fighting operations.

* * *

(c) An effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area.

Section C-4.2.5 of Appendix C provides:

C-4.2.5 The distance between storage and grass, weeds, and brush should be 50 ft (15 m).

**DISCUSSION**

**Liability of Respondent**

Before examining the factual proofs adduced at the adjudicatory hearing in support of the various alleged regulatory violations, a discussion of respondent's possessory interest in the Facility is required. Since that interest changed during the times relevant to this matter, consideration must be given to the extent to which this change affects her responsibility and,

therefore, her liability for the violations alleged.

The record shows that respondent owned the Facility for some years prior to September 1998. In a signed statement given to ECO Michael Sherry on September 12, 2003, respondent states that she has "been an owner and operator of [the Facility] for many years...." (Transcript of Adjudicatory Hearing of March 6 and 7, 2006, at 158, hereinafter abbreviated "T" and page number; Statement of Leora White of September 12, 2003, part of Exhibit D, an attachment to Department Staff's Motion for Order Without Hearing, dated September 13, 2004, OHMS Ex. 1.) Her ownership and control of the Facility for some years prior to September 1998 is further supported by additional assertions in her statement to ECO Sherry with respect to the car crushing equipment at the Facility. She states: "I purchased the car crusher in 1990 and it has been set up at [the Facility] in the same place until it was removed by Jahada. We crushed cars between 1990 and 1998 and again when I returned in 2001 through August 2003." (Id.)

Respondent's ownership of the Facility prior to September 1998, is also evidenced by the Junk Dealers' License issued to her by the Town Clerk of the Town of Lisbon, St. Lawrence County, on March 26, 1997, authorizing her to engage in the business of "dealing in junk" at the Facility for the one year period April 1, 1997 through March 31, 1998. (Department Staff Exhibit 72, hereinafter abbreviated "DS Ex." and exhibit number.)

On September 17, 1998, respondent sold the Facility to Watertown Iron and Metal, Inc. (Watertown), which acted through its President, Wayne S. Jahada. (DS Ex. 58) Part of the purchase price paid by Watertown to respondent for the Facility was in the form of a loan made by respondent to it in the amount of $250,000.00, secured by a mortgage. (DS Ex. 59) Some months thereafter, Watertown defaulted in its payments on the loan. (Statement of Leora White of September 12, 2003, part of OHMS 1, supra.) At no time has respondent sought to foreclose on the mortgage and title to the Facility has remained in the name of Watertown.

In a document signed by the parties January 4, 2001, respondent and Watertown agreed that respondent could enter the Facility "and commence operations." (DS Ex. 61) This right of reentry and use of the Facility was reiterated in a subsequent written agreement signed by the parties on February 26, 2001. (DS Ex. 62) On November 15, 2001, the parties executed yet another agreement which stated that respondent would "have use of the [Facility] and agreed upon equipment, (as agreed upon in

previous agreement dated February 26, 2001) until July 1, 2002." (DS Ex. 63)

The record in this matter demonstrates, however, that even after July 1, 2002, respondent continued to use and operate the Facility. For example, respondent employed and directed the activities of Gabriel Snyder during the time he worked at the Facility, from June 2002 to September 2003. (T 40-41) Moreover, respondent was present at the Facility when it was inspected by the Department on August 5, 2003, and identified herself as the "owner" of the Facility. (T 157-158) Respondent was also present at the Department's inspection of the Facility on July 22, 2004, and gave her permission for Department Staff to enter and inspect the premises. (T 68) At all times during which Department Staff was present, the Facility was actively operating.

Before proceeding further, however, the prior history of a related Department enforcement action should be noted. In a separate enforcement action concluded subsequent to the hearing in this matter and entitled Matter of Wayne Jahada, individually, and Watertown Iron and Metal, Respondents, (Order of the Commissioner, dated November 21, 2006), respondents therein (Jahada/Watertown) were found in violation of essentially the same 6 NYCRR part 360 waste tire violations also alleged herein against respondent Leora White. Jahada/Watertown were found by the Commissioner to be the owners and operators of a noncompliant waste tire stock pile at the Facility as that term is defined at ECL 27-1901(6). They were ordered to assist and cooperate with the State in the abatement of the waste tire stock piles at the Facility, and assessed a payable civil penalty in the amount of $236,000.00. The Jahada/Watertown action was based, in part, on the same observations made during the Department inspection of July 22, 2004, discussed herein in and relied on by Department Staff in support of the action against Ms. White.

In the Jahada/Watertown matter, respondents were also found to have jointly and severally violated the terms of Consent Order R620040802-51, dated February 7, 2005, wherein it was acknowledged by Watertown that at the time it acquired the Facility from respondent White in September of 1998, it "was aware that the site contained an estimated 50,000 waste tires and became legally responsible for their proper handling and disposal." Moreover, at the transfer of property by respondent White in 1998, Jahada/Watertown executed a mortgage agreement which provided at Paragraph 10: "If I receive notice from any governmental body that the property, or my use, occupation or maintenance of that property, violates any law, then I agree to

correct such violation within ninety (90) days." (DS Ex. 59) While these contractual promises by Jahada/Watertown, may provide respondent White with some measure of indemnification which could be pursued in another forum of competent jurisdiction, they do not preclude a finding of respondent White's liability for the violations alleged herein nor the Department's discretion in prosecuting her.

As noted, pursuant to 6 NYCRR 360-1.2(b)(113) an operator or facility operator "means the person responsible for the overall operation of a solid waste management facility or a part of a facility with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the department-approved operating conditions at the facility or on the property on which the facility is located."

While no longer the titled owner of the Facility after September 17, 1998, it is apparent on this record that respondent was the operator of the Facility from January 2001 through the Department's inspection of July 22, 2004. Clearly, during that time, she had "the authority and knowledge to make and implement decisions." Moreover, as will be discussed, her "actions or failure to act" resulted in noncompliance with various regulatory requirements of 6 NYCRR part 360 for which she is responsible and liable.

## Proof of the Allegations of the Complaint and of the Allegations Asserted in the Motion for Order Without Hearing

### The Complaint

#### First Cause of Action

The complaint alleges five causes of action, the first cause of action asserting that respondent violated 6 NYCRR 360-1.7(a) by operating a solid waste management facility without benefit of a permit issued by the Department authorizing such activity. In support of this assertion, the factual allegations of the complaint aver that an inspection of the Facility made in November 1998 revealed the presence of an estimated 50,000 waste tires at the Facility. In addition, the complaint alleges that an inspection of the site on August 5, 2003, revealed the presence of approximately 68,000 waste tires, as well as the presence of "construction and demolition debris, household waste, and waste oil deposited and disposed of at the site ... [and] at least fourteen drums containing waste oil, residuals of waste

oil, and unknown materials." (Complaint of September 24, 2004, [hereinafter cited "Complaint"] p. 2, part of OHMS Ex. 3) Finally, the complaint avers: "The Department has never issued a permit authorizing operation of a solid waste management facility at the site." (Id.)

Inasmuch as waste tires are solid waste pursuant to 6 NYCRR 360-1.2(a)(1) and (b)(183), the presence of waste tires alone on the site of the Facility, as seen in an aerial photographs taken in 1997 and 2003, and observed during Department inspections in November 1998, September 2002, August 2003 and July 2004, indicate that the Facility has been operated for some years as a solid waste management facility, as that term is defined at 6 NYCRR 360-1.2(b)(158). (See, e.g., DS Exs. 3, 15, 20, 30, 33, 42, 44, 76, 77, 113, 120, 121 and 122; Respondent [hereinafter "R"] Ex. C)

The record here, however, indicates that the Facility also served as a repository for other items of solid waste including junk cars, discarded propane cylinders and other scrap metal, discarded electronic equipment and construction and demolition debris. (See, e.g., DS Exs. 8, 34, 35, 36, 48, 49, 83, 91, 97, 103, 106 and 113; R Ex. D)

As the record indicates, a search was made of the Department application review tracking (DART) system, a database summarizing all permit applications made to the Department and all permits issued by the Department since 1988. (T 94) This search revealed that at no time during the period in which DART data has been compiled has respondent ever sought or received a permit from the Department to operate a solid waste management facility (SWMF). (Id.) From these facts, it is thus also apparent that respondent did not apply for or receive a SWMF permit when she was the owner of the Facility prior to September 17, 1998, nor subsequent thereto when she was the operator of the Facility. Her 1998 change in ownership status with respect to the Facility did not obviate the regulatory requirement that she obtain the appropriate SWMF permit to operate the Facility. The allegations of the first cause of action in the complaint have been proven by a preponderance of the credible evidence.

**Second Cause of Action**

The second cause of action alleges that responded engaged in the open burning of solid waste at the Facility in contravention of 6 NYCRR 360-1.14(q). At paragraph 10, the complaint avers that an "[i]nspection of the site on August 5, 2003, found burned and partially burned construction and demolition debris at the

site. Upon information and belief, Respondent burned or allowed the burning of solid waste at the site." (Complaint, p. 3, OHMS Ex. 3)

The only proof offered by Department Staff with respect to this charge is the testimony of Peter R. Taylor concerning Department Staff Exhibit 102. At page 257 of the adjudicatory hearing transcript the following colloquy occurs:

> "Q. And looking at Staff's Exhibit One O Two, can you tell us what that is?
>
> A. This is a picture I took of the wood stove that was inside of the maintenance building, that appeared to have been used to burn insulation off copper wire.
>
> Q. Does it – - what's that inside the stove, can you say?
>
> A. That is a piece of wire."

Department Staff Exhibit 102 depicts a small cubical stove, with sides measuring perhaps 18 inches or less. The stove has a hinged door. The door of the stove is open revealing its interior chamber. The base of the chamber appears covered with ash. Inside the chamber are also depicted a small pillow about one foot square, some shop rags, a Styrofoam coffee cup and a few feet of what appears to be insulated electrical cable. None of these items show any signs of having been burned.

As Taylor points out, this is a "wood stove" inside the maintenance building. Whether its purpose is to "burn insulation off copper wire," provide heat to the maintenance building or perform some combination of both of these functions is unknown from this record. Indeed, the presence of the unburned articles in the stove's chamber suggest that, at the time of the photograph, the stove was serving as nothing more than a trash receptacle.

As previously noted, the terms "combustion" and "open burning" are defined for the general purposes of 6 NYCRR part 360 at 6 NYCRR 360-1.2(b)(29) and (110), respectively, as follows:

> "(29) <u>Combustion</u> means the thermal treatment of solid waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the waste.

Examples of combustion processes include incineration, pyrolysis and fluidized bed.

(110) Open burning means the combustion of any material or solid waste in the absence of any of the following characteristics:

(i) control of combustion air to maintain adequate temperature for efficient combustion;

(ii) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; or

(iii) control of emissions of the gaseous combustion products."

Aside from mere speculation, the record here does not support a finding by the preponderance of the credible evidence that the wood stove was being utilized as a "device" for "the thermal treatment of solid waste." Nor does it suggest the Facility's utilization, as part of its operations, of a combustion process of the nature illustrated by the examples cited in 6 NYCRR 360-1.2(b)(29). Moreover, the record does not suggest that "open burning" was conducted at the Facility as contemplated by the definition cited at 6 NYCRR 360-1.2(b)(110), there being no indication as to whether any of the controls or containment provided in subparagraphs (i), (ii) and (iii) of subdivision 360-1.2(b)(110) were, in fact, absent.

As noted, the second cause of action of the complaint alleges a violation of 6 NYCRR 360-1.14(q), which provides:

"(q) Open burning. Open burning at a solid waste management facility is prohibited, except for the infrequent burning of agricultural wastes, silvicultural wastes, land clearing debris (excluding stumps), diseased trees or debris from emergency cleanup operation, pursuant to a restricted burning permit issued by the department. Measures must be taken immediately to extinguish any non-permitted open burning and the department must be notified that it has occurred."

The subdivision clearly contemplates, and would permit, the kind of open air conflagration typical of land clearing, farming or forestry operations. Thus, while the subdivision would, for example, prohibit the open air burning of construction and demolition debris, its obvious intent is not to prohibit the type of combustion that would occur in a small wood stove. The

evidence of such open burning is not adduced in this record. Accordingly, a violation of 6 NYCRR 360-1.14(q), as alleged in the complaint, has not been proven by a preponderance of the evidence.

**Third Cause of Action**

The third cause of action alleges a violation of ECL 27-1701(3)(d) for respondent's failure to properly dispose of lead-acid batteries. The complaint avers at paragraph 13: "Inspection of the facility in August 2003 found lead-acid automotive batteries piled outdoors. Some of these were broken and leaking." (Complaint, p. 3, OHMS Ex. 3)

During the inspection of the Facility on August 5, 2003, Department Staff observed dozens of lead-acid batteries stored on pallets in the battery shed. (DS Exs. 108 and 109) In addition, Department Staff observed several dozen other lead-acid batteries located outside just south of the battery shed. (DS Exs. 110-112) From the photograph exhibits, many of these other batteries were placed within what appears to be the bed of a junked pick-up truck. (See, e.g., DS Ex. 110) As may also be seen in the photographs, however, numerous other batteries were piled around this bed and were lying on the bare ground. (See, DS Exs. 110 and 112) Moreover, the fill caps or seals for the cells of some of the batteries lying on the ground were missing. (Id.) As Taylor testified during the adjudicatory hearing (T 256):

> "Q. And what's the significance of the missing fill caps?
>
> A. The - - without the fill caps, when it rains the battery could fill up, which would allow the dielectric fluid to run out onto the ground.
>
> Q. And when you say dielectric fluid, do you know what type of fluid that would be?
>
> A. Be sulfuric acid."

In addition, some of the batteries in both the truck bed and on the ground were lying on their sides, their fill caps vertical to the ground, presenting the threat of spillage of their acid contents on the ground. (DS Exs. 110 and 112)

As the photographs also indicate, certain of these lead-acid batteries lying on the ground had cracked cases exposing their internal lead plates directly to the environment. (See, e.g., DS

Ex. 111)

As noted, ECL 27-1701(3)(d) provides: "No collector shall dispose of a lead-acid battery except by delivery to a recycling facility, another collector, or as a method of last resort to an authorized hazardous waste facility." The statute defines "collector" as "any person who accepts lead-acid batteries in order to transfer them to a recycling facility, an authorized hazardous waste facility or another collector." (ECL 27-1701[2][b]) Moreover, the statute defines "dispose" or "disposal" as "the abandonment, discharge, deposit, injection, dumping, spilling, leaking or placing of any substance so that such substance or any related constituent thereof may enter the environment." (ECL 27-1701[2][d])

It is clear from the proofs adduced at the adjudicatory hearing, particularly the photographs of the interior of the battery shed and the batteries piled outside the shed, that on August 5, 2003, respondent was a "collector" of lead-acid batteries within the meaning of the statute. (DS Exs. 108, 109, 110 and 112) In addition, the proofs adduced show that on August 5, 2003, respondent improperly disposed of lead-acid batteries within the meaning of the statute. The record shows that respondent placed batteries without fill caps outside which were exposed to the elements, most notably, precipitation. Moreover, in numerous other instances in and about the junked truck bed, respondent piled batteries on their sides or in such a haphazard and precarious manner as could allow leakage of their sulfuric acid content. In so doing, respondent dumped or placed them in such a manner as could allow the batteries' internal substance or any related constituent thereof, particularly, sulfuric acid, to enter the environment.

The record demonstrates by a preponderance of the credible evidence that on August 5, 2003, respondent disposed of lead-acid batteries in a manner other than "delivery to a recycling facility, another collector, or as a method of last resort to an authorized hazardous waste facility." Accordingly, respondent has violated ECL 27-1701(3)(d), as alleged in the complaint.

**Fourth Cause of Action**

The fourth cause of action alleges that respondent engaged in the storage, treatment or transportation of hazardous waste without a permit issued by the Department authorizing such activity, in violation of ECL 27-0913(1)(a). The factual basis for the allegation is averred at paragraphs 16 and 17 of the complaint (Complaint, p. 4, OHMS Ex. 3), as follows:

> "16. Inspections of the facility in August 2003 found piles of old discarded cylinders of propane. Some of the cylinders had not been emptied prior to receipt by the facility and were leaking propane. Pursuant to 6 NYCRR Part 371.3 and 371.4, propane, when it becomes a waste, is a hazardous waste.
>
> 17. Inspection of the facility also found that at least one of the drums at the site contained sodium potassium hydroxide, with pH of 13.8, a characteristic hazardous waste. No apparent use for the sodium potassium hydroxide existed at the facility, and Respondent could not identify a use for the material. Upon information and belief, the sodium potassium hydroxide was not generated at the facility."

During the inspection of the Facility on August 5, 2003, two piles of discarded propane cylinders were observed. (DS Exs. 84, 103 and 104) As can be seen in Department Staff Exhibits 103 and 104, some of the tanks still had valves affixed to them. As can also be seen, especially in Exhibit 104, some of the tanks had holes cut in them.

Peter Taylor testified that during the inspection of August 5, 2003, when in the vicinity of one of piles of propane tanks, he noticed the odor of butyl mercaptan, a substance added to propane, an otherwise odorless gas, to give it a detectable odor. (T 244; 254-255) Taylor characterized the odor as "strong." (T 244) Officer Sherry, who was also present, said "[t]here was propane smell in the air," and that the local fire department was called since it was decided that they should be "on standby in case something happened." (T 150) The observation of the odor and the contact made with the local fire department was confirmed by Lieutenant Jarvis. (T 216) While the actions of the Department personnel in these circumstances were reasonable and appropriate, it must also be noted that this record does not indicate whether any of the discarded tanks were actually determined to still contain compressed propane. For example, the record does not indicate that any of the valves affixed to some of the tanks were, in fact, opened to determine the presence of compressed propane.

During the subsequent inspection of July 22, 2004, a pile of discarded propane cylinders was also observed and is depicted in Department Staff Exhibit 8. When Exhibit 8, taken in July 2004, is compared with Exhibit 103, taken in August 2003, it is apparent that some of the same discarded tanks depicted in the

latter photograph are also depicted in the former. However, whether the pile of discarded tanks observed in 2004 is the same pile which smelled of butyl mercaptan in 2003 is unknown on this record. While Gary P. McCullouch testified that he observed the pile of discarded propane tanks during the inspection of July 22, 2004, he noted that he "was not able to determine whether any of the cylinders had product in them." (T 135) McCullouch also stated that should any of the discarded tanks still contain propane, it would deter firefighters in their efforts to address any fires which might occur in nearby waste tire piles. (Id.) Noting that some of the discarded tanks still had valves attached, he said, "any cylinder, pressurize[d] cylinder with a valve attached is extremely hazardous," and that "in a fire situation, when heated could explode [and] throw shrapnel." (Id.) Again, however, while these concerns are well founded, this record does not indicate that any of the discarded tanks still contained compressed propane, at the time of either the inspection in 2003 or 2004. Thus, unproven by this record is the factual allegation asserted in paragraph 16 of the complaint that "[s]ome of the cylinders had not been emptied prior to receipt by the facility and were leaking propane."

Certain solid wastes are hazardous wastes if they possess particular characteristics, such as ignitability. As 6 NYCRR 371.3(b)(1)(iii) provides; "a solid waste exhibits the characteristic of ignitability if a representative sample of the waste ... is an ignitable compressed gas ...." Clearly, discarded compressed propane is an ignitable solid waste and, therefore, a hazardous waste. However, the issue here is whether or not the odor of butyl mercaptan observed during the inspection of August 5, 2003, supports a finding that compressed propane gas was present in one or any of the discarded cylinders observed that day. This record does not support such a finding. The odor of butyl mercaptan is as indicative of the residual odor of an empty but open cylinder as it is of a leaking cylinder of compressed propane.

Part 371.1 of 6 NYCRR establishes the procedures for identifying those solid wastes which are subject to regulation as hazardous wastes. Subdivision 371.1(h) addresses residues of hazardous wastes in empty containers and provides:

> "(h) Residues of hazardous waste in empty containers.
>
> (1)(i) Any hazardous waste remaining in ... an empty container ... as defined in paragraph (2) of this subdivision, is not subject to regulation under this Part and Parts 372 through 373, and 376 of this Title [being the regulations applicable to generators,

> transporters, storage facilities and land disposal of hazardous wastes]. (Note: The discarding of the empty drum ... may be subject to the disposal requirements of Part 360 and the transportation requirements of Part 364 of this Title.)
>
> (ii) Any hazardous waste in ... a container that is not empty ... as defined in paragraph (2) of this subdivision, is subject to regulation under this Part and Parts 372 through 373, and 376 of this Title.
>
> * * *
>
> (2)(ii) A container that has held a hazardous waste that is a compressed gas is empty when the pressure in the container approaches atmospheric.
>
> * * *
>
> Note: Approaching atmospheric pressure means that the pressure is essentially equal to atmospheric pressure."

Again, on this record, it cannot be determined if the odor of butyl mercaptan observed on August 5, 2003, was emanating from discarded cylinders still holding compressed propane, and thus a hazardous waste subject to regulation, or merely the residual odor of butyl mercaptan emanating from empty cylinders with internal pressures at or near atmospheric pressure. Accordingly, with respect to the discarded propane cylinders, while they are indeed a solid waste stored without benefit of a solid waste permit issued pursuant to 6 NYCRR 360-1.7(a)(1), they have not, by a preponderance of the evidence, been shown to constitute the storage of a hazardous waste without benefit of a permit issued pursuant to ECL 27-0913(1)(a).

During the inspection of August 5, 2003, a 55-gallon drum labeled "Cannonball 5 - Sodium Potassium Hydroxide" was observed in the shop located within the maintenance building. (DS Exs. 118 and 119) The top of the drum was removed and it was noted that the drum was more than half full, containing perhaps thirty gallons. (T 317) A sample of the drum's contents was analyzed by OP-TECH Environmental Services, of Massena, New York. (DS Ex. 119) This analysis revealed that the drum did, in fact, contain sodium potassium hydroxide with a pH of 13.8. (Id.) At the hearing, Donald I. Johnson, an Environmental Engineer I with the Department, testified that with a pH of 13.8, the contents of the drum constituted "a hazardous material" and that it was "extremely caustic." (T 313 and 316) Asked if the content of the drum was a waste product, Johnson stated, "We really don't know if - - if that was new product or a waste product." (T 315) When questioned by Lieutenant Jarvis, at the time of the August 5, 2003 inspection, respondent indicated that she had no

knowledge of the drum nor how it came to be in the shop area. (T 382) In its report, dated October 9, 2003, OP-TECH Environmental Services noted:

> "The drum labeled "Cannonball 5" appears to have been in its original drum with the company label. This material is highly hazardous due to its corrosive characteristics (pH 13.8). It is unclear whether it was being used for a specific application or whether it was collected as waste by the junkyard."

The Department's regulations make clear that a solid waste will be considered a hazardous waste if it exhibits the characteristic of corrosivity. As 6 NYCRR 371.3(c)(1)(i) provides:

> "(c) <u>Characteristic of corrosivity.</u>
>
> (1) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:
>
> (i) it is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5 as determined by a pH meter ...."

Since the pH of the contents in the drum labeled "Cannonball 5" is greater than 12.5, being pH 13.8, it is apparent that it exhibits the characteristic of corrosivity. Hence, if the content of the drum is a solid waste, it is a hazardous waste. The record here, however, does not support a finding that the content of the drum is, in fact, a solid waste. The term solid waste is defined at 6 NYCRR 371.1(c)(1) as "any discarded material that is not excluded [by certain provisions not applicable herein]." Moreover, pursuant to 6 NYCRR 371.1(c)(2), a "discarded material" is any material which has been abandoned, recycled, considered inherently waste-like, or a military munition identified as a solid waste. On the proof adduced at the hearing, the contents of the drum labeled "Cannonball 5" does not fall within any of these enumerated categories of discarded materials. Accordingly, on this hearing record, the contents of the drum, while clearly a hazardous material, cannot, by a preponderance of the evidence, be said to be a solid waste. Thus, if it is not a solid waste, it is not a hazardous waste to which the permit requirements of ECL 27-0913(1)(a) are applicable.

From the foregoing, it follows that the allegations of the

fourth cause of action have not been proven by a preponderance of the credible evidence.

**Fifth Cause of Action**

The fifth cause of action alleges that respondent engaged in the improper disposal of used oil in violation of ECL 23-2308. The factual allegations of the complaint at paragraph 20 (Complaint, p. 5, OHMS Ex. 3) assert:

> "20. Inspection of the facility found open drums and buckets of used lubricating oil leaking to the ground at the site. Lubricating oils contaminated the soil at various locations at the site and the floor of the facility's shop building."

The complaint is not specific as to the date of the Facility inspection during which the improper disposal of used oil was observed. None of the testimony of Department Staff concerning the inspection of July 22, 2004, makes mention of the storage or disposition of used oil. Moreover, of the photographs taken by Department Staff during the inspection of July 22, 2004, being Department Staff Exhibits 5 through 23, none depict the storage or spillage of used oil. Department Staff Exhibit 7 shows the car crushing machine located near the maintenance shed on that date, but no spillage or containers of used oil is therein depicted.

In the Facility inspection of September 27, 2002, Peter R. Taylor testified that he observed "used oil stored inside what I call the maintenance building." (T 236) Department Staff Exhibits 76 through 83 are various photos taken during the inspection of September 27, 2002. Exhibit 80 is a photo of a group of various buckets and drums in the maintenance building. Many of the containers depicted, as well as the concrete floor where they are located, are stained with a black substance which appears to be used oil. No tests of the contents of these buckets or the stains on the floor were performed. Exhibit 79 is a photo of the car crusher machine. From this photo, it is not possible to tell if the dark areas that appear on the ground beneath and near the crusher are from the spillage of automotive fluids, including used oil, or the result of precipitation. The soils in these areas were not tested. Donald I. Johnson, who was present during the inspection of September 27, 2002, testified that the car crusher "had not been in operation" that day. (T 314)

To this point, while not confirmed by any laboratory

analysis, the record does support a finding, by a preponderance of the evidence, based upon the credible testimony of Department Staff and the photographic evidence, that on September 27, 2002, used oil was stored in the Facility's maintenance shed and had spilled and was thus improperly disposed within the meaning of the statute. However, during the Facility inspection on August 5, 2003, the presence of spills of used oil on the grounds of the site and the storage of used oil in the maintenance shed and spillage of the same on the floor of the shed were unequivocally confirmed.

During the August 5, 2003, inspection, dark staining of the soils near and beneath the car crushing equipment was observed, as well as what appeared to be free-phase petroleum product floating on nearby puddles of rainwater. (T 244; 250-251; 307; DS Exs. 86, 87 and 115-118) As is apparent from the photographs taken that day, the car crushing equipment was not located upon any impervious surface, or on or within any material or berm-like construction designed to provide spill containment. (See, e.g., DS Exs. 86,87 and 115)

In addition to the stained soils observed in the area of the car crusher on August 5, 2003, stained soils were also observed in an area to the rear of the maintenance shed. (DS Exs. 116 and 117). Moreover, a number of drums and other containers, including open pails and an open pan, were observed in the maintenance shed, which appeared to contain used oil. (T 257-258; DS Exs. 101 and 118) Dark staining on the concrete floor beneath and adjacent to the drums and containers was noted. (Id.) Dark staining was noted as well in and around a floor drain in the maintenance shed. (DS Ex. 89) The use of an absorbent material, scattered on the floor in the area of this drain, was observed. (T 258)

At the request of Department Staff, OP-TECH Environmental Services, of Massena, New York, (OP-TECH) responded to the Facility during the inspection on August 5, 2003. (T 309-311) OP-TECH collected four samples from the area by the car crushing equipment, a soil sample and a liquid sample from a puddle obtained near the front of the crusher and a soil sample and a liquid sample from a puddle obtained near the rear of the crusher. (DS Ex. 119, p. 1) Subsequent laboratory analysis of the four samples indicated the presence of lubricating oil in each sample. (Id., p. 2)

OP-TECH also took samples in the area to the rear of the maintenance shed, noting in its report that "[s]everal 5-gallon pails were discovered with no lids and containing a petroleum

product presumed to be motor/lubricating oil. The surrounding soils around the pails were stained black by the oil and there were also puddles of oil/water in the surrounding area." (Id.) Two samples were taken in this area, one from the soils and one from the puddles. Each sample indicated the presence of lubricating oil. (Id.)

In addition, OP-TECH took samples from the drums located in the maintenance shed. (DS Ex. 118) A total of 14 drums were observed. Their report notes (DS Ex. 119, p. 2),

> "The drums were not labeled as to their contents and were not properly secured with covers. The drums were also not within a bermed area to contain the contents in the event of leakage or a spill. Most of the drums were empty but still contained residual product. Obvious staining was noticed on the floor surrounding the drums. A product sample was collected from four of the drums containing what appeared to be motor/lubricating oil. The four grab samples were combined into one composite sample [and subsequent laboratory testing] indicated the product was lubricating oil."

The improper disposal of used oil is prohibited by ECL 23-2308(1), which, as noted, provides: "No person shall engage in the improper disposal of used oil. Used oil shall only be deposited in an available used oil retention facility or disposed of as otherwise authorized or permitted by the commissioner."

At this juncture, it must be pointed out that Department Staff's express theory of prosecution in this cause of action is that respondent violated ECL 23-2308(1) by improperly disposing of used oil, as evidenced by the spillage of the same. However, proof of such a violation would also require that Department Staff demonstrate by a preponderance of the evidence that respondent's facility did not constitute "an available used oil retention facility" as defined in ECL 23-2307(1).

In pertinent part, ECL 23-2307(1)(a) provides that "[e]very service establishment, and every other person [or] industrial operation ... generating at least five hundred gallons of used oil annually, shall ... provide and maintain used oil retention facilities, properly sheltered and protected to prevent spillage, seepage or discharge of used oil into storm or sanitary sewers or into or on any lands or waters of the state including groundwaters thereof."

The adduced proof does not establish that the Facility was providing and maintaining a "used oil retention facility" within the meaning of the statute. Even assuming, for the sake of argument, that the used oil observed in the maintenance shed was collected from vehicles which were crushed, the five hundred gallon annual generation threshold required to establish that respondent may have maintained an oil retention facility has not been satisfied. This finding is supported by the testimony adduced by witnesses for both Department Staff and respondent.

Robert F. Reynolds, who worked for respondent from 1992 to 1998 and testified on her behalf, said that during that time in the 1990s used oil and fluids from the vehicles would be collected in "barrels" and "stored in a room," (T 387 and 404). Although this testimony is as to facts predating the Department inspections relevant to the present matter, it is, to some extent, corroborated by Department Staff Exhibit 80 (being a photograph of the drums and containers in the maintenance shed observed on September 27, 2002, and surmised to contain used oil) and Department Staff Exhibits 101 and 118 (being photographs of the drums and containers in the maintenance shed observed on August 5, 2003, some of which were confirmed by laboratory analysis to contain used oil). However, the five hundred gallon generation threshold is not demonstrated.

Reynolds' testimony must be compared to that of Gabriel Snyder who also worked for respondent, but from June 2000 to September 2003, and was so employed by her during the period in which the Department inspections of 2002 and 2003 occurred. In discussing the vehicle crushing process during direct examination, Snyder testified as follows:

> "Q. What happened with lubricating - - waste lubricating oils from the cars?
>
> A. They were never removed.
>
> Q. So, what would happen to them?
>
> A. Either when they're picked up by the forks they drained wherever the cars were thrown or they went into the crusher the - - generally the fluids went underneath the crusher."

Snyder's testimony is also, to some degree, corroborated by the spills observed in the area of the crusher on August 5, 2003, which were tested and the presence of used oil confirmed.

From the foregoing, inasmuch as the five hundred gallon threshold has not been proven, it is clear that the Facility was not "an available used oil retention facility" as defined in ECL 23-2307(1) and, accordingly, cannot be raised as a defense to the alleged violation of ECL 23-2308(1).

To reiterate, ECL 23-2308(1) prohibiting the improper disposal of used oil states: "No person shall engage in the improper disposal of used oil. Used oil shall only be deposited in an available used oil retention facility or disposed of as otherwise authorized or permitted by the commissioner." From this statutory mandate it is clear that any disposition of used oil other than to "an available used oil retention facility or disposed of as otherwise authorized or permitted by the commissioner" is improper.

As defined at ECL 23-2301(1), "[t]he term 'used oil' means all petroleum-based lubricating oils which have through use been contaminated by physical or chemical impurities which have not been removed by subsequent rerefining ...." Moreover, as defined at ECL 23-2301(10), "[t]he term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking or placing of any used oil into or on any land or water so that such used oil or any related constituent thereof may enter the environment or be emitted into the air or discharged into any waters of the state including groundwaters thereof...."

From the foregoing, it is clear that observations made on August 5, 2003, and by sample analysis subsequently confirmed, of the (1) spillage of oil on the ground in the area of the car crushing equipment, (2) the spillage of oil on the ground at the rear of the maintenance shed, (3) the spillage of oil from containers in the maintenance shed, (4) and the spillage of oil on the floor of the maintenance shed in each instance constituted the improper disposal of used oil in violation of ECL 23-2308(1). Thus, the allegations of the fifth cause of action have been proven by a preponderance of the evidence.

## **Motion for Order Without Hearing**

The motion for order without hearing alleges the violation of twenty-seven separate 6 NYCRR part 360 regulatory requirements. (Motion for Order Without Hearing, dated September 13, 2004, OHMS Ex. 1) In general the allegations entail violations of the Department's solid waste and waste tire facility permitting requirements and the operational requirements mandated of such facilities. A cite to each of the regulatory

sections alleged to have been violated and a discussion the adduced proof in support thereof follows.

## Permit Violations

### 6 NYCRR 360-1.7(a)(1)

In pertinent part, this paragraph provides at subparagraph (i) that "no person shall construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to [6 NYCRR part 360]."

The facts alleged and proven with respect to the first cause of action in the complaint, as discussed above, are equally applicable to this asserted regulatory violation. The facts show, by a preponderance of the evidence, that respondent at no time possessed a permit issued to her by the Department authorizing the operation of a solid waste management facility at the site of the Facility.

### 6 NYCRR 360-13.1(b)

This subdivision states that "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to [6 NYCRR part 360]."

As the record indicates, based upon the various inspections of the Facility by Department Staff, the number of waste tires observed each time at the site was estimated to be between 50,000 and 70,000 waste tires. (T 124, 233-234; DS Ex. 122) A sketch of the site showing the location of various waste tire piles, with an estimate of the number of waste tires in each pile, made by Peter Taylor on December 7, 1998, indicates that the total number of waste tires present at that time was between 59,500 and 68,500. (DS Ex. 122) Taylor also testified that at the August 5, 2003, inspection the total number of waste tires at the Facility could have been 68,000. (T 348) Aerial photographs taken of the Facility in 1997 and 2003 indicate that the size and orientation of the main pile of tires on the site remained essentially unchanged. (T 372) Estimates and measurements made showed that this main pile was as much as 20 feet high, 240 feet long and 95 feet wide. (T 80; DS Ex. 121) While estimates suggested that this main pile contained approximately 25,000 tires, calculations made by Department Staff indicated that even if the depth of tires in this pile was a uniform layer only one foot thick, this main pile alone would contain 5,000 to 6,000

waste tires. (T 376) Moreover, these calculations do not include the tires contained in the perhaps dozen windrows, each containing 1,000 to 1,500 tires and other piles of tires observed about the site on various inspections each containing several hundreds or even thousands of waste tires. (T 78; DS Exs. 77, 84, 85 and 92)

As noted previously, a search was made of the Department application review tracking (DART) system, a database summarizing all permit applications made to the Department and all permits issued by the Department since 1988. (T 94) This search revealed there are no entries for respondent nor for the Facility in this database. (Id.) Accordingly, the proof shows, by a preponderance of the evidence, that neither during the time she owned the Facility nor during the time she subsequently operated the Facility did respondent ever apply for or receive a permit from the Department, issued pursuant to 6 NYCRR 360-13.1(b), authorizing her to store more than 1000 waste tires at the Facility.

6 NYCRR 360-13.2

This subdivision enumerates certain reports, plans and other documentation which must be provided to the Department in support of any application to permit the construction or operation of a waste tire storage facility. Each failure to provide this information constitutes a separate and distinct violation of the Department's implementing regulations and these violations are not subsumed by a finding that respondent never applied for nor ever received a permit to operate a waste tire storage facility pursuant to 6 NYCRR 360-13.1(b). In particular, the following permit application requirement violations are alleged:

6 NYCRR 360-13.2(h)(6)

This paragraph directs an applicant for a waste tire storage facility permit to submit to the Department a contingency plan "designed 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." (6 NYCRR 360-13.2[h][1]) Paragraph (6) of the subdivision provides: "(6) The facility must comply with all applicable National Fire Protection Association standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition...."

Promulgated by the National Fire Protection Association (NFPA), and made applicable to waste tire storage facilities in the State by 6 NYCRR 360-13.2(h)(6), these standards contain

several appendices, including an Appendix C entitled "Guidelines for Outdoor Storage of Scrap Tires."

Sections C-3.2.1(a) and (c) and Section C-4.2.5 of Appendix C provide:

> "C-3.2.1 The fire hazard potential inherent in scrap rubber tire storage operations can best be controlled by a positive fire prevention program. The method of stacking should be solid piles in an orderly manner and should include:
>
> (a) Fire lanes to separate piles and provide access for effective fire fighting operations.
>
> * * *
>
> (c) An effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area.
>
> C-4.2.5 The distance between storage and grass, weeds, and brush should be 50 ft (15 m)."

The motion for order without hearing alleges three separate violations of 6 NYCRR 360-13.2(h), each one based upon an asserted violation of one of the three NFPA Appendix C standards articulated above. The factual basis for each of these violations has been demonstrated by a preponderance of the evidence.

In each of the inspections conducted in 2002, 2003 and 2004, dense vegetation in the form of forbs, high weeds, brush and trees was observed growing and completely filling the spaces between the various piles of waste tires at the site. (T 70-72, 80, 134-136; DS Exs. 9, 12, 18, 21, 26, 30 and 31 and 118) In addition, some of the waste tire piles were located against the eastern and western borders of the site where heavy vegetation existed, including hedgerows and lines of trees, which would preclude the ingress and egress of emergency and firefighting equipment. (T 134, 364; DS Exs. 27 and 28, 38, 40 and 41) Moreover, debris, particularly scrap metal, was observed interspersed among the vegetation between the piles, contributing to the impassable condition of the spaces between the piles, as well as presenting a tire puncture hazard for emergency vehicles. (T 71-72, 76, 80-81; DS Exs. 10, 37, 44, 54, 76, 92 and 99) Finally, none of the aisle spaces between adjacent waste tire piles was 50 feet in width, all of them being no more than 40 feet in width, and some only 30 feet. (T 72, 106, 136; DS Exs. 12, 15, 18, 26, 33, 54, 76 and 77)

From the foregoing, it is clear, by a preponderance of the evidence, that respondent failed to provide and maintain passable fire lanes at least 50 feet wide between adjacent waste tire piles at the Facility which "provide access for effective fire fighting operations." As the evidence shows, respondent clearly did not engage in "[a]n effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area." Finally, it is apparent that respondent did not ensure that "[t]he distance between [waste tire] storage and grass, weeds, and brush [was] 50 ft (15 m)." Accordingly, respondent failed to operate the Facility in a manner which comported with the three provisions of the NFPA standards articulated above and, thus, has violated 6 NYCRR 360-13.2(h)(6) in these three separate respects.

Finally, the factual record demonstrates by a preponderance of the evidence that a contingency plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

6 NYCRR 360-13.2(i)

This subdivision and paragraphs (3), (4), (5) and (7) thereof require an applicant for a waste tire storage facility permit to submit a storage plan which

> "must address the receipt and handling of all waste tires and solid waste to, at and from the facility. The plan must address the following matters:
>
> * * *
>
> (3) Waste tire piles must not exceed 20 feet in height. Horizontal dimensions of waste tire piles at the base of the pile must have a surface area no greater than 10,000 square feet, with the width not to exceed 50 feet.
>
> (4) Waste tire piles must have a minimum separation distance of 50 feet between piles, and between a pile and: the facility property boundaries: a public right-of-way located at the facility property boundary: any other buildings or structures. These 50-foot separation areas must be maintained free of obstructions and vegetation at all times and maintained in such a manner that emergency vehicles will have adequate equipment access.
>
> (5) The facility must not store waste tires in excess of the quantity for which the facility is permitted.

* * *

(7) Waste tire piles may not be located in excavations or below grade without prior written approval by the department."

The motion for order without hearing alleges that respondent violated paragraph (3) in two separate ways, paragraph (4) in three separate ways and paragraphs (5) and (7) each once.

With respect to paragraph (3), the record indicates that based upon geographic information system (GIS) aerial photographs taken in May 1997 and again in May 2003, the horizontal dimensions of the main pile of waste tires at the Facility was 95 feet by 240 feet. While arithmetically this would suggest an area of 22,800 square feet, Department Staff, in an apparent allowance for the less than symmetrical shape of the pile, estimated its area to be 16,000 square feet, well in excess of the 10,000 square foot limit set by the regulation. (T 128; 369-375; DS Exs. 120 and 121) However, while the record suggests that this pile of waste tires was approximately 20 feet high, it does not indicate that this pile, or any other pile of waste tires at the Facility, in fact, exceeded 20 feet in height. (T 71) Accordingly, a preponderance of the evidence shows that respondent has violated 6 NYCRR 360-13.2(i)(3) by allowing a waste tire pile at the Facility more than 50 feet wide and exceeding 10,000 square feet in area.

As noted in the discussion of the aisle spaces between adjacent waste tire piles, as it pertained to alleged violations of 6 NYCRR 360-13.2(h)(6), none of them were 50 feet wide, all of them being no more than 40 feet wide, and some only 30 feet. (T 72, 106, 136; DS Exs. 12, 15, 18, 26, 33, 54, 76 and 77) This same evidence establishes by a preponderance of the evidence that respondent violated paragraph (4) of 6 NYCRR 360-13.2(i).

With respect to paragraph (5) of 6 NYCRR 360-13.2(i), the previous discussion as to respondent's operation of a waste tire storage facility without benefit of a permit issued pursuant to 6 NYCRR 360-13.1(b) is equally applicable here. As there noted, that subdivision states "[n]o person shall engage in storing 1,000 or more waste tires at a time without first having obtained a permit to do so pursuant to [6 NYCRR part 360]." Without a permit issued by the Department, respondent was, thus, only permitted to store 1000 waste tires or less at the Facility. However, the proof clearly shows that respondent owned or operated a waste tire facility at the site which contained approximately 68,000 waste tires without any permit at all. Since respondent had no permit authorizing her to store more than

the permitted 1000 waste tires, she obviously stored “waste tires in excess of the quantity for which the facility is permitted”. The facts thus proven demonstrate by a preponderance respondent’s violation of 6 NYCRR 360-13.2(i)(5).

With regard to an alleged violation of 6 NYCRR 360-13.2(i)(7) for allowing the location of waste tire piles in excavations or below grade without prior written approval by the Department, the factual record adduced does not support such a finding. The absence of such proof is acknowledged by Department Staff. (Department Staff’s Closing Brief, p. 29)

Finally, and more generally, the record demonstrates by a preponderance of the evidence that a storage plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

6 NYCRR 360-13.2(b)

This subdivision requires that an applicant 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 provide to the Department a site plan showing,

> “the facility's property boundaries; site acreage; distances from adjacent residences, property owners and population centers; off-site utilities such as electric, gas, water, and storm and sanitary sewer systems; a north arrow; site topography; the location of screening provided, regulated wetlands, rights-of-way, surface water and classifications, floodplains, buildings and appurtenances, fences, gates, roads, staging areas, parking areas, drainage culverts and signs; monitoring wells; transportation systems in the vicinity of the facility including, but not limited to railways and ports; the location and identification of special waste handling and storage areas; and a wind rose.”

The factual record adduced at the adjudicatory hearing, particularly as to the search made of the DART database, demonstrates by a preponderance that such a site plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

6 NYCRR 360-13.2(e)

This subdivision requires that an applicant 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 provide to the Department a facility monitoring and inspection plan which "must satisfy the requirements of paragraph 360-1.14(f)(3) of this Part, and having an inspection schedule reflecting inspections to be conducted at a frequency of no less than once per quarter. The inspection plan must address the following concerns: the presence of vermin; the readiness of fire-fighting equipment; and the integrity of the security system."

The factual record adduced at the adjudicatory hearing, particularly as to the search made of the DART database, demonstrates by a preponderance that such a facility monitoring and inspection plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

6 NYCRR 360-13.2(f)

This subdivision requires that an applicant 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 provide to the Department a closure plan which "must comply with the closure requirements described in subdivision 360-1.14(w) of this Part and must identify the steps necessary to close the facility."

The factual record adduced at the adjudicatory hearing, particularly as to the search made of the DART database, demonstrates by a preponderance that such a closure plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

6 NYCRR 360-13.2(j)

This subdivision requires that an applicant 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 provide to the Department a vector control plan which must provide that:

> "(1) All waste tires be maintained in a manner which limits mosquito breeding potential and other vectors.
>
> (i) A method of acceptable vector control will require that tires received must be drained of water within 24 hours of receipt and must include one or more of the following:

(a) covering by plastic sheets or other impermeable barriers, other than soil, to prevent the accumulation of precipitation;

(b) chemical treating to eliminate vector breeding provided all chemicals used are registered for use in New York State and are applied by a person licensed in New York State to apply pesticides;

(c) mechanical tire size reduction into pieces no larger than four by six inches, with storage in piles in compliance with paragraphs 360-13.2(i)(3) and (4) of this section and allow for complete water drainage; or

(d) any other method approved by the department in writing.

(2) If a fire pond is provided, the vector control plan must include provisions to limit mosquito breeding potential and other vectors in the vicinity of the pond."

The factual record adduced at the adjudicatory hearing, particularly as to the search made of the DART database, demonstrates by a preponderance that such a vector control plan was never provided by respondent to the Department, either during the time she owned the Facility, or during the time she operated the Facility. (T 72-75 and 93-95)

## Operational Violations

6 NYCRR 360-13.3

This section articulates certain operational requirements with which all waste tire storage facilities must comply. Department Staff asserts and the proof establishes that respondent has violated certain of these requirements, as follows.

6 NYCRR 360-13.3(b)(1)

This paragraph directs that rims "be removed from the waste tires within one week of receipt at the facility." The record indicates that during the various inspections of the Facility, and especially during those of 2002, 2003 and 2004, Department Staff observed certain waste tires still mounted on rims. (T 70 and 259-260) That some of these waste tires remained on their rims for more than one week is conclusively demonstrated by the photographic evidence. Department Staff Exhibit 76 is a

photograph of a waste tire pile at the Facility taken during the inspection of September 27, 2002. Toward the right hand side of the photograph, and indicated by an arrow, is a white wall tire still mounted on a grey rim. Just below this tire and slightly to the left is a black wall tire still mounted on a rim, rust brown in color. Department Staff Exhibit 85 is a photograph of the same tire pile taken during the Facility inspection of August 5, 2003, nearly a year later. Toward the right hand side of this latter photograph, and indicated by an arrow, is the same white wall tire still mounted on the grey rim seen in the earlier photograph, Department Staff Exhibit 76. Moreover, just below this tire and slightly to the left is the same black wall tire still mounted on its rim, rust brown in color, and depicted in earlier photograph, Department Staff Exhibit 76. Accordingly, the proof demonstrates by a preponderance that respondent failed to remove rims from waste tires within one week of their receipt by the Facility in violation of 6 NYCRR 360-13.2(b)(1).

6 NYCRR 360-13.3(c)(1), (4), (5) and (6)

These paragraphs of this subdivision address certain matters pertaining to fire prevention and control and require that

> "(1) approach roads to the facility and access roads within the facility must be constructed for all weather conditions and maintained in passable condition at all times to allow for access by fire-fighting and emergency response equipment;
>
> * * *
>
> (4) waste tire facilities having a planned or actual capacity of 2,500 or more waste tires must have, at a minimum, an active hydrant or viable fire pond on the facility and fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire facility in quantities as deemed necessary in the contingency plan or other fire protection and prevention equipment as approved by the local fire marshal;
>
> (5) waste tire piles must be accessible on all sides to fire fighting and emergency response equipment; and
>
> (6) potential ignition sources must be eliminated and combustibles must be removed as they accumulate. Smoking, welding, storage of flammable liquids, and open fires are prohibited in the storage area."

At the outset, with respect to paragraphs (1) and (5), a distinction must be drawn between "approach roads to the facility and access roads within the facility" alluded to in paragraph (1) and the spacing between waste tire piles necessary to ensure that they are "accessible on all sides to fire fighting and emergency response equipment" alluded to in paragraph (5). The plain import of the regulatory language of the two paragraphs is clear. Paragraph (1) is concerned with roads laid out, constructed and intended for vehicular use and maintained at all times in a manner so to allow their use by emergency equipment. Paragraph (5), however, is concerned with the appropriate spacing of waste tire piles, and the maintenance of those spaces, such that the piles are accessible on all sides to emergency equipment. Thus, approach roads to and access roads within the facility are to be provided and maintained so as to allow emergency equipment to get to the waste tire piles, and the spaces between the piles are to be made wide enough and maintained so that once emergency equipment has arrived on the scene via those approach roads and access roads, it will have adequate, unobstructed access on all sides of a waste tire pile to address any emergency.

With respect paragraph (1), the record does not support a finding by a preponderance of the evidence adduced that approach roads to the Facility and access roads within the Facility were not constructed for all weather conditions and were not maintained in passable condition at all times to allow for access by fire-fighting and emergency response equipment. In this instance, the approach road to the Facility is New York State Highway 68, which runs contiguous to the southern border of the property and is maintained throughout the year. (See, e.g. DS Exs. 25 and 27) Moreover, the evidence indicates that access roads within the Facility were, in fact, maintained in passable condition. For example, Department Staff Exhibits 6, 7, 11 and 17, taken in 2004; Exhibits 25, 27, 29, 32, 34-37, 39, 43 and 103, taken in 2003; and Exhibit 113, taken in 2002; all depict access roads within the Facility which are clear, passable and, in some cases, actually being used by trucks and Facility equipment at the time the photograph was taken. In addition, although the access roads within the Facility are not paved, the record, as presented, is silent as to whether or not they are useable under all weather conditions and maintained in a passable condition at all times. Thus, a finding that they are not useable and passable at all times cannot be made. The photographic exhibits indicate that access roads within the Facility would allow for site access by fire-fighting and emergency response equipment. Accordingly, a finding of a violation of 6 NYCRR 360-13.3(c)(1), on this record, is not supported by a preponderance of the evidence.

With respect to paragraph (4), the record shows, by a preponderance of the evidence adduced, that this regulatory provision has been twice violated by respondent inasmuch as each of the two requirements of the section have not been met. As to the elements of the violations, it is clear that during the entire time period relevant here, being May 2003 to July 2004, the Facility contained far more than 2,500 waste tires, with estimates ranging from 50,000 to 70,000 waste tires. (T 124, 233-234; DS Ex. 122) As to the first manner in which the provision was violated, the record shows that no active hydrant or viable fire pond was ever observed at the Facility during any of the Department's inspections. (T 76, 238-239 and 129-130) As to the second manner in which the provision was violated, the record shows that no fully charged large capacity carbon dioxide or dry chemical fire extinguishers were ever observed at the Facility during any of the Department's inspections. (Id.) Moreover, the record is silent as to any other fire protection and prevention equipment that may have been approved by the local fire marshal for the Facility.

With respect to paragraph (5), it is clear by a preponderance of the evidence, that the waste tire piles at the Facility were not accessible on all sides to fire fighting and emergency response equipment. The discussion, above, of the facts establishing respondent's violation of 6 NYCRR 360-13.2(h)(6) as to her failure to meet NFPA standards is equally applicable here. As there noted and as observed by Department Staff during every inspection of the Facility, dense vegetation including high weeds, brush and trees, and scrap metal completely filled the less than 50 foot spaces between the separate piles of waste tires. (T 70-72, 80, 106 and 134-136; DS Exs. 9, 12, 15, 18, 21, 26, 30 and 31, 33, 54, 76 and 77 and 118) Moreover, some of the waste tire piles were located against the borders of the site where heavy vegetation existed, including hedgerows and lines of trees. (T 134, 364; DS Exs. 27 and 28, 38, 40 and 41) These conditions would preclude the ingress and egress of fire fighting and emergency response equipment, thus rendering the waste tire piles inaccessible on all sides to such equipment, in contravention of the regulatory requirement.

With respect to paragraph (6), the record does not support a finding of facts sufficient to demonstrate by a preponderance respondent's violation of this regulatory provision. In the first instance, the record does not indicate that smoking, welding, the storage of flammable liquids, the accumulation of combustibles, or open fires ever occurred in the area of the Facility where the piles of waste tire were located. Secondly, the previous discussion as to the status of the propane cylinders

observed on the site on August 5, 2003, and on July 22, 2004, as still containing and leaking compressed propane, and thus characteristically ignitable and, therefore, hazardous waste, is equally applicable here. That discussion noted that this record does not indicate that any of the discarded tanks still contained compressed propane, at the time of either the inspection in 2003 or 2004. Accordingly, it was noted that the record did not support a finding that any of the tanks were leaking propane. This being the case, it cannot be said that the cylinders constituted a potential ignition source which should have been eliminated, in compliance with paragraph (6).

6 NYCRR 360-13.3(d)(2)

The record shows, by a preponderance of the credible evidence, that at no time during the period of May 1997 to September 2004 was the Facility completely enclosed "by a woven wire, chain-link or other acceptable fence material, at least six feet in height." (6 NYCRR 360-13.3[d][2]; T 89, 152, 292, 296 and 339) The lack of appropriate fencing around the perimeter of the Facility is apparent in the various photographs taken of the site. (See, e.g., DS Exs. 1 and 2, 25, 29, 32 and 38; Resp. Ex. D) Accordingly, the record supports a finding that respondent violated 6 NYCRR 360-13.3(d)(2).

6 NYCRR 360-13.3(e)(2) and (3)

The record indicates that a search of the Department's files revealed that respondent has never filed with the Department either the quarterly operation reports or the annual reports required by these paragraphs. (T 74) Accordingly, by a preponderance of the evidence adduced, respondent has violated both of these regulatory provisions.

## DEPARTMENT STAFF'S RECOMMENDATION AS TO THE APPROPRIATE PENALTY TO BE ASSESSED

Due to the procedural manner in which this matter arose, three separate forms of relief have been proposed by Department Staff. The motion for default judgement proposes certain relief based upon the allegations of the complaint, the motion for order without hearing proposes certain additional and other relief for the violations alleged therein, and Department Staff's closing brief proposes yet a third form of relief. (OHMS Exs. 1 and 2; Closing Brief of Department Staff, dated April 28, 2006, hereinafter abbreviated "DSCB")

In its closing brief, Department Staff articulates a thorough analysis of the various factual scenarios presented by the proof. (DSCB at 33-39) Moreover that discussion considers the overlap of the factual elements of these scenarios, indicating which multiple violations alleged are supported by the same proof, for which a single penalty should be assessed, and which are not. (Id.) Finally, Department Staff indicates which of the violations are continuous and which, in its view, are not, and calculates the maximum penalties which could be assessed for them. (Id. at 40-42) From this analysis it concludes that a penalty of up to $2,700 could be assessed for the lead-acid battery violation of ECL 27-1701(3)(d), a penalty of up to $1,400,000 could be assessed for the used oil violation of ECL 23-2308, a penalty of up to $37,500 could be assessed for the hazardous waste violation of ECL 27-0913, and a penalty of up to $217,050,500 which could be assessed for the thirty-five alleged violations of 6 NYCRR part 360, for a total possible penalty of $218,490,700. (Id.) After considering various factors such as the business impact to respondent of a civil penalty, respondent's compliance history, the economic benefit derived by respondent for her regulatory noncompliance and the risk to public health, Department Staff concludes that the calculated penalty continues to remain above 200 million dollars. (Id. at 49)

But while thus duly noting the magnitude of the civil penalty which could be imposed, Department Staff also recognizes the Department's legislative mandate, under ECL article 27 title 19, to seek the abatement of noncompliant waste tire stockpiles. (Id. at 49-53) Following a review of other Commissioner's orders regarding waste tire violations, Department Staff recommends, with respect to the 6 NYCRR part 360 violations, that respondent (1) be assessed a civil penalty in the amount of $6,800, (2) be directed to cooperate and comply with a Department approved plan of abatement for the waste tires at the Facility, and (3) should she not cooperate and comply with the Department's plan of abatement, such that the State must enter the Facility and manage the waste tires pursuant to the mandates of ECL 27-1907, she be assessed a further civil penalty of $20 for each ton of waste tires the State so manages, up to the maximum civil penalty allowed by law, being, in this matter, in excess of $200 million, as noted above. (Id.) It should be noted that in its request for relief in both the default motion on the complaint and the motion for order without hearing, Department Staff consistently requested a payable civil penalty of $6,800. (OHMS Exs. 1 and 2)

With respect to the 6 NYCRR part 360 violations, Department Staff's recommended payable penalty of $6,800 plus, in effect, a

suspended penalty of a potentially and significantly greater amount, is reasonable and achieves a balance between the punishment and deterrence goals of regulatory enforcement, on the one hand, and the abatement and correction of environmental harm on the other. Moreover, the recommendation comports with the provisions of ECL 27-2703.

With regard to the violation of ECL 27-1701 for the improper handling of lead-acid batteries, Department Staff, in the default motion on the complaint requested a civil penalty in the amount of $100. (OHMS Ex. 2) In its closing brief, however, it requested a civil penalty in the amount of $1,350. (DSCB at 53) Although no explanation for this upward increase is the penalty amount is indicated other than the deterrence effect on other potential violators, it is appropriate in this matter. (Id.) The proof adduced here, and as discussed above, shows that several of the batteries had no cell caps on them, thus exposing their contents to the elements, particularly precipitation. In addition, as can be seen in Department Staff Exhibit 110, dozens of the batteries therein depicted are either lying on their sides on the ground or dumped in such a haphazard manner as could allow their sulfuric acid contents to be released to the environment. Thus, the civil penalty of $1,350.00, requested by Department Staff and authorized by ECL 71-2722, is reasonable and appropriate for this violation.

With respect to the improper disposal of used oil pursuant to ECL 23-2308, Department Staff in its default motion on the complaint requested a civil penalty in the amount of $250. (OHMS Ex. 2) In is closing brief, however, Department Staff requested a civil penalty in the amount of $56,000, arguing that the violation was of a continuing nature, spanning some 56 weeks. The penalty was thus based on a single violation amount of $200 times a 5-day work week for 56 consecutive weeks. (DSCB at 54)

An examination of the legislative history of ECL article 23 title 23, as well as its concomitant enforcement provision, ECL 71-2201, suggests that $250 is the maximum authorized penalty to be assessed for each proven instance of the improper disposition of used oil in this matter.

Added as Chapter 740 of the Laws of 1978, ECL article 23 title 23 was originally intended to foster the reclamation, rerefining and reuse of used oil. The original enactment did not define the term “disposal” nor did it contain section 23-2308 which addresses the prohibited disposal of used oil.

As part of the original enactment, a new section, ECL 71-

2201, was added providing administrative and civil sanctions for a violation of ECL article 23 title 23. The first subdivision of this section authorized a penalty of up to $1,000 for a violation of the provisions ECL article 23 title 23 and an additional penalty of up to $500 for each day a violation continued. Expressly excepted from this authorization, however, was an authorized penalty for a violation of 23-2307, the refusal of a designated establishment to accept used oil. In accordance with ECL 71-2201(2), a violation of ECL 23-2307 specifically authorized imposition of a civil penalty of up to $100.

Title 23 was amended by Chapter 901 of the Laws of 1983. The enactment amended ECL 23-2301 by adding a new section 23-2301(10) which defined of the term "disposal." In addition, the enactment added a new section, 23-2308, which prohibited the improper disposal of used oil. The enactment further amended the first subdivision of ECL 71-2201 which authorized a penalty of up to $1,000 for a violation of the provisions ECL article 23 title 23 and an additional penalty of up to $500 for each day a violation continued. Expressly excepted from this authorization, in addition to violations of 23-2307, were violations of new section 23-2308. A new section, ECL 71-2201(3), was added which provides:

> "3. Any person who violates any provision of section 23-2308 of this chapter shall be subject to a civil penalty not to exceed two hundred fifty dollars for each violation."

As the foregoing makes clear, the continuing violation penalties authorized under ECL 71-2201(1) cannot be imposed for a violation of ECL 23-2308. For a violation of ECL 23-2308, the Legislature has specifically provided the maximum civil penalty which can be imposed. Accordingly, the maximum authorized penalty upon a finding that respondent engaged in the improper disposal of used oil in violation of ECL 23-2308 is $250 for each such occasion proven.

The issue here, then, is the number of occasions the record, by a preponderance of the credible evidence, supports a finding that respondent improperly disposed of used oil in violation of ECL 23-2308.

Gabriel Snyder testified that he worked at the Facility from June 2002 to September 2003. (T 41-42) During that time, he asserted, the Facility crushed twenty to thirty cars per day, the fluids of those vehicles spilling upon the ground while being crushed. (T 42) Before being crushed, however, the tires "were

pulled off the cars and thrown out back in piles." (Id.) No date specific documents, manifests, operational logs or other proof is offered to support this testimony. Indeed, this testimony is not corroborated by the facts, as proven. If the Facility crushed twenty to thirty cars per day for the 56 weeks Snyder worked there, this would mean that 80 to 120 waste tires came into the Facility each day as a result of their removal from the cars prior to being crushed. Assuming 280 Facility work days during the 56 week period of Snyder's employment, this would mean that in that time 22,400 to 33,600 waste tires would have been added to the Facility, resulting in a fifty percent or more increase in the size or number of the waste tire piles at the site. The photographic evidence and the estimations of Department Staff spanning the period of Snyder's employment do not support such a conclusion, finding that the size of the tire piles remained essentially constant throughout at about 68,000 waste tires. (Cf. DS Exs. 2 and 3; T 125, 348 and 372) Thus, it is not possible to say with the certainty needed to satisfy the burden of proof that respondent violated ECL 23-2308 twenty to thirty times a day, or indeed, once a day, for 56 weeks from June 2002 to September 2003.

The previous discussion of the fifth cause of action of the complaint is equally applicable here. The proof adduced in this matter shows that on four specific occasions respondent violated ECL 23-2308 by improperly disposing of used oil. First, the testimony of Peter R. Taylor proves that on September 27, 2002, used oil was stored in the Facility's maintenance shed in open buckets and drums and some had spilled on the floor. (DS Ex. 80)

Second, the proof shows that on August 3, 2003, and as confirmed by subsequent laboratory analysis, used oil had been spilled on the ground in the area of the car crusher. (T 244; 250-251; 307; DS Exs. 86, 87 and 115-119)

Third, the proof shows that on August 3, 2003, and as confirmed by subsequent laboratory analysis, used oil had been spilled in the rear of the maintenance building. (DS Ex. 119)

Fourth, the proof shows that on August 3, 2003, and as confirmed by subsequent laboratory analysis, used oil had been spilled on the floor of and in a floor drain located in the maintenance shed. (T 257-258; DS Exs. 89, 101 and 118-119)

The proof thus adduced shows that respondent violated ECL 23-2308 four distinct times. Accordingly, a total civil penalty of $1,000.00 is authorized by ECL 71-2201(3) and is appropriate.

**CONCLUSIONS**

1. Watertown Iron & Metal, Inc., also known as White's Scrap Iron & Metal, (Facility) located at 4110 New York State Highway 68, Rensselaer Falls, Town of Lisbon, St. Lawrence County, New York, is a solid waste management facility as defined by 6 NYCRR 360-1.2(b)(158).

2. The Facility is a waste tire storage facility within the meaning of 6 NYCRR part 360-13, and is subject to the regulatory requirements therein imposed.

3. From sometime prior to 1998 and until September 17, 1998, respondent owned and operated the Facility without benefit of a solid waste management facility permit or a waste tire storage facility permit issued by the Department pursuant to 6 NYCRR 360-1.7(a)(1) or 6 NYCRR 360-13.1(b), respectively.

4. From on or about February 26, 2001, until July 22, 2004, respondent operated the Facility without benefit of a solid waste management facility permit or a waste tire storage facility permit issued by the Department pursuant to 6 NYCRR 360-1.7(a)(1) or 6 NYCRR 360-13.1(b), respectively.

5. At no time while she was either the owner and operator or only the operator of the Facility, did respondent ever apply for the aforementioned permits, nor did she submit any of the reports, plans and other documentation required pursuant to 6 NYCRR 360-13.2. In particular, respondent violated:

a. 6 NYCRR 360-13.2(b) by failing to submit to the Department a site plan specifying, among other requirements, the Facility's boundaries.

b. 6 NYCRR 360-13.2(e) by failing to submit to the Department a monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the Facility's security system.

c. 6 NYCRR 360-13.2(f) by failing to submit to the Department a closure plan identifying the steps necessary to close the Facility.

d. 6 NYCRR 360-13.2(h) by failing to submit to the Department a contingency plan detailing, among other things, the

“measures to be undertaken in the event of a fire emergency so as to assure compliance with ... the applicable National Fire Protection Association standards,” (NFPA) particularly, NFPA 231D (1989 edition). Respondent violated this regulatory provision in four distinct ways: (1) in general, by failing to submit such plan; (2) in failing to comply with NFPA 231D Appendix C-3.2.1(a) by failing to provide fire lanes to separate waste tire piles in order to provide access for effective fire fighting operations; (3) in failing to comply with NFPA 231D Appendix C-3.2.1(c) by failing to implement an effective fire prevention maintenance program to control weeds, grass and other combustible materials in the waste tire storage area by storing waste tires in close proximity to natural cover and trees; and (4) by failing to comply with NFPA 231D Appendix C-4.2.5 by locating waste tire piles within less than 50 feet of grass, weeds and brush.

e. 6 NYCRR 360-13.2(i) by failing to submit to the Department a storage plan that addresses the receipt and handling of all waste tires and solid waste to, at and from the Facility. Respondent violated this regulatory provision in four distinct ways: (1) in general, by failing to submit such plan; (2) failing to maintain waste tire piles 50 feet or less in width in violation of paragraph 3 of subdivision 360-13.2(i); (3) failing to maintain waste tire piles at 10,000 square feet, or less, of surface area in violation of paragraph 3 of subdivision 360-13.2(i); (4) failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, and the borders of the Facility’s property in violation of paragraph 4 of subdivision 360-13.2(i); (5) failing to maintain said 50 foot separation areas so that they are free of obstructions and vegetation at all times so that emergency vehicles will have adequate equipment access in violation of paragraph 4 of subdivision 360-13.2(i); and (6) failing to maintain the number of waste tires at or below the quantity for which the Facility is permitted.

f. 6 NYCRR 360-13.2(j) by failing to submit to the Department a vector control plan that provides that all waste tires at the Facility be maintained in a manner which limits mosquito breeding potential and other vectors.

6. During the time she was the operator of the Facility, respondent failed to comply with various provisions of 6 NYCRR 360-13.3, the operational requirements for waste tire storage facilities. In particular, respondent violated:

a. 6 NYCRR 360-13.3(b)(1) by failing to remove rims from waste tires within one week of their receipt by the Facility.

b. 6 NYCRR 360-13.3(c)(4) in two distinct ways by (1) failing to have fully charged large capacity carbon dioxide or dry chemical fire extinguishers located in strategically placed enclosures throughout the entire Facility, which had more than 2,500 waste tires actually on site; and (2) by failing to have an active hydrant or viable fire pond on the Facility, which had more than 2,500 waste tires actually on site.

c. 6 NYCRR 360-13.3(c)(5) by failing to maintain waste tire piles that are accessible on all sides to fire fighting and emergency response equipment.

d. 6 NYCRR 360-13.3(d)(2) by failing to enclose the Facility containing more than 2500 waste tires with a six-foot chainlink fence, or equivalent.

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

f. 6 NYCRR 36-13.3(e)(3) by failing to prepare and file with the Department annual reports.

7. Based upon the foregoing, the Facility is a "noncompliant waste tire stockpile" as defined under ECL 27-1901.

8. At all times relevant herein, respondent was a collector of lead-acid batteries, as defined under ECL 27-1701(2)(b). On August 5, 2003, respondent improperly disposed of lead-acid batteries by depositing and dumping them outdoors and on the bare ground such that their contents could enter the environment, in violation of ECL 27-1701(3)(d).

9. Based upon observations made on September 27, 2002, and upon observations made on August 5, 2003, and subsequently confirmed by laboratory analyses, respondent improperly disposed of used oil in violation of ECL 23-2308.

## RECOMMENDATION

In consideration of the above Findings of Fact, Discussion and Conclusions, I recommend the Commissioner issue an order finding that respondent, Leora White, doing business as Leora White Scrap Iron & Metal, has violated the aforementioned

provisions of 6 NYCRR parts 360-1.7 and 360-13, as well as ECL 23-2308 and ECL 27-1701(3)(d). For these violations, I recommend that the Commissioner impose a total civil penalty of $9,150.00. Moreover, I recommend that the Commissioner find that the Facility is a noncompliant waste tire stockpile pursuant to ECL 27-1901 and is subject to the provisions thereof. In addition, I recommend that the Commissioner direct that respondent desist from the further receipt of waste tires at the Facility and, to the extent that she is legally authorized to do so, assist and cooperate with the Department in the abatement and remediation of the site.