STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Noncompliant Waste Tire Stockpile Located in the Town of Persia, Cattaraugus County, New York, and Owned and Operated

SUPPLEMENTAL ORDER

VISTA Index No. CO9-20040304-51

- by -

DAVID WILDER,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for an order without hearing as against respondent David Wilder. The motion alleged that respondent was the owner and operator of a solid waste management facility engaged in the storage of more than 1,000 waste tires located at 10260 Wilder Road, Town of Persia, Cattaraugus County, New York, and that the facility was in violation of multiple provisions of Environmental Conservation Law ("ECL") article 27, and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

In an order dated November 4, 2004, former Commissioner Erin M. Crotty adopted a ruling/hearing report by Chief Administrative Law Judge ("CALJ") James T. McClymonds dated October 18, 2004, granted Department staff's motion in part, held respondent liable for the violations determinable as a matter of law at that time, and granted in part the relief requested by staff. Among the relief granted was a direction, in paragraph I of the order, that respondent immediately stop accepting waste tires at the site. In paragraph II of the order, respondent was directed to remediate the facility pursuant to specific guidelines and according to a strict schedule. In paragraph IV of the order, respondent was directed to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site.

Both Commissioner Crotty and CALJ McClymonds reserved decision on the remainder of staff's motion pending oral argument

on the remaining issues. After conducting oral argument, CALJ McClymonds prepared a hearing report dated August 17, 2005, addressing the remainder of Department staff's motion for order without hearing. I adopt the conclusions of law, together with the written discussion in support, set forth in the hearing report as my decision in this matter.

NOW, THEREFORE, having considered this matter, it is ORDERED that:

1. The remainder of Department staff's motion for order without hearing is granted in part, and otherwise denied.

2. In addition to the violations determined in the Commissioner Crotty's November 4, 2004 order, respondent David Wilder is determined to have continuously violated the following regulatory provisions during the period from October 3, 1989 until May 28, 2004, the date of staff's motion:

a. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved site plan, as required by 6 NYCRR 360-13.2(b) and 6 NYCRR former 360-13.1(c)(1)(ii).

b. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e) and 6 NYCRR former 360-13.3(b).

c. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved closure plan, as required by 6 NYCRR 360-13.2(f) and 6 NYCRR former 360-13.3(c).

d. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved contingency plan, as required by 6 NYCRR 360-13.2(h) and 6 NYCRR former 360-13.3(e).

e. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved storage plan, as required by 6 NYCRR 360-

13.2(i) and 6 NYCRR former 360-13.3(f).

f. Respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved vector control plan, as required by 6 NYCRR 360-13.2(j) and 6 NYCRR former 360-13.3(g).

g. Respondent violated 6 NYCRR 360-13.2(i)(3) and 6 NYCRR former 360-13.3(f)(3) by failing to maintain waste tire piles at 50 feet or less in width.

h. Respondent violated 6 NYCRR 360-13.2(i)(3) and 6 NYCRR former 360-13.3(f)(3) by failing to maintain waste tire piles at 10,000 square feet or less of surface area.

i. Respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by storing 1,000 or more waste tires at the site in excess of the quantity allowed.

3. Respondent is further determined to have continuously violated the following regulatory provisions during the period from March 16, 1995 to May 28, 2004:

a. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures.

b. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times.

c. Respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas in such a manner that emergency vehicles have adequate access.

d. Respondent violated National Fire Protection Association Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition (“NFPA 231D”) Provision C-3.2.1(a) and, thus, 6 NYCRR 360-13.2(h)(6), by allowing roads and access lanes at and about the site to be blocked by tires, trees, and erosion and, thereby, interfering with access for firefighting operations.

e. Respondent violated NFPA 231D Provision C-3.2.1(c) and, thus, 6 NYCRR 360-13.2(h)(6), which requires an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area, by storing waste tires at the site in piles in close proximity to natural cover and trees.

f. Respondent violated NFPA 231D Provision C-4.2.5 and, thus, 6 NYCRR 360-13.2(h)(6), by locating tire piles at the site within 50 feet of grass, weeds, and bushes.

4. For the violations determined herein and in the November 4, 2004 order, and in addition to the duties and obligations imposed in paragraphs I through VII of the November 4, 2004 order, it is hereby ordered that:

VIII. Respondent David Wilder is assessed a civil penalty pursuant to ECL 71-2703. The penalty shall be the sum of $50,000 plus, if respondent fails to comply with any requirement set forth in Paragraphs I or II of the Commissioner's November 4, 2004 order, the sum of two dollars ($2) for each twenty (20) pounds of waste tires that the State of New York shall have to manage under ECL article 27, title 19. No later than 30 days after the date of service of this supplemental order upon respondent, respondent shall submit payment of $50,000 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 deliver such payment by certified mail, overnight delivery or hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

ATTN: Charles E. Sullivan, Jr., Esq.
RE: VISTA Index No. CO9-20040304-51

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

IX. Within 30 days after the date of service of this supplemental order upon respondent, respondent shall post with the Department financial security in the amount of $600,000 to secure the strict and faithful performance of each of

respondent's obligations under Paragraphs I and II of the November 4, 2004 order.

X. Paragraph IV of the November 4, 2004 order is modified to indicate that respondent is directed to reimburse the Waste Tire Management and Recycling Fund, in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund for remedial and fire safety activities at the site, including any and all investigation, prosecution and oversight costs, to the maximum extent authorized by law. The remainder of the November 4, 2004 order, except Paragraph VI (in which Commissioner Crotty reserved decision on the remainder of Department staff's motion), is continued in full force and effect.

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

New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500
ATTN: Charles E. Sullivan, Jr., Esq.
Re: VISTA Index No. CO9-20040304-51

with copies of such communications being sent to the following:

New York State Department of Environmental Conservation
625 Broadway, 9th floor
Albany, New York 12233-7253
ATTN: David Vitale, P.E.
Re: VISTA Index No. CO9-20040304-51

and

New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: Mark J. Hans, P.E.
Re: VISTA Index No. CO9-20040304-51

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

For the New York State Department
of Environmental Conservation

/s/
By: _____
Denise M. Sheehan
Acting Commissioner

Dated: September 27, 2005
Albany, New York

TO: David Wilder (VIA CERTIFIED MAIL)
10260 Wilder Road
Gowanda, New York 14070-9686

Charles E. Sullivan, Jr., Esq.
New York State Department of Environmental Conservation
625 Broadway, 14th floor
Albany, New York 12233-5500

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

DAVID WILDER,

Respondent.

HEARING REPORT ON MOTION FOR ORDER WITHOUT HEARING

VISTA Index No. CO9-20040304-51

Appearances:

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

-- No appearance for David Wilder, respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of motion and motion for an order without hearing on respondent David Wilder. The motion was served in lieu of notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a). No response from respondent was received, rendering him in default as of July 29, 2004.

As the assigned Administrative Law Judge ("ALJ") for the matter, I forwarded to the Commissioner a ruling/hearing report dated October 18, 2004 ("ALJ Ruling"), containing certain findings of fact and conclusions of law. I also recommended that the Commissioner grant Department staff's motion in part, hold respondent liable for the violations determinable as a matter of law at that time, and grant in part the relief requested by staff, including a direction to respondent to cease receiving and to begin removing the waste tires at the site. I reserved decision, however, on several issues of liability and various items of relief sought by staff, including the appropriate penalty to be imposed. Former Commissioner Erin M. Crotty issued an order dated November 4, 2004, adopting the October 18, 2004 ruling/hearing report, and granting the partial relief

recommended.

This hearing report addresses the issues upon which I reserved decision in my October 18, 2004 ruling.

PROCEEDINGS

A detailed background and procedural history of this proceeding prior to my October 18, 2004 ruling is contained in that ruling, and will not be repeated here. Proceedings since issuance of the Commissioner's November 4, 2004 order are as follows.

Department staff filed a letter dated December 23, 2004, presenting arguments on the matters upon which I reserved decision. In that letter, staff also requested leave to conform the pleadings to the proof with respect to Charge E.1(i) through (vi) (see Motion for Order Without Hearing ["Motion"], at 2-3; ALJ Ruling, at 2-3). Staff served its December 23, 2004 letter upon respondent by first class mail. Respondent did not file a response.

A hearing was convened on February 24, 2005 for purposes of conducting oral argument on the reserved issues. Charles E. Sullivan, Jr., Esq., Director, Division of Environmental Enforcement, appeared on behalf of Department staff. Although I gave respondent notice of the hearing by letter dated February 18, 2005, neither respondent nor his representative appeared. Pursuant to 6 NYCRR 622.10(b)(1)(viii), the oral argument was recorded and a transcript prepared.

Subsequent to the hearing, Department staff submitted additional comments in a letter dated February 25, 2005, addressing several matters that arose during oral argument. Staff served the February 25, 2005 letter upon respondent by first class mail. No response from respondent has been received.

FINDINGS OF FACT

The findings of fact relevant to this hearing report are contained in my October 18, 2004 ruling and will not be repeated here.

DISCUSSION

Violation of Solid Waste Management Plan Requirements

In its motion for order without hearing, which serves

as the complaint in this matter, Department staff charged respondent with violations of 6 NYCRR 360-13.2(b), (e), (f), (h), (i), and (j) for failing to submit to the Department a site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, and vector control plan, respectively, since at least October 3, 1989 (see Charges E.1[i]-[vi], Motion, at 2-3). In addition, in Charge C (see id. at 2), staff charged respondent with violating section 360-13.2(h) by failing to submit a contingency plan since at least October 9, 1993.

In my October 18, 2004 ruling, I reserved decision on whether respondent's failure to submit the plans referred to by staff constituted violations separate and distinct from respondent's failure to apply for or obtain a Departmental waste tire storage facility permit (see ALJ Ruling, at 16). The rationale was that because section 360-13.2 expressly requires submission of the plans as part of a permit application, the failure to submit plans did not appear to constitute the violation of operating standards (see id. [citing Matter of Hornburg, ALJ Ruling/Hearing Report, Aug. 24, 2004, at 20-21]).

In its motion to amend the pleadings to conform to the proof, staff moved to modify the theory by which it sought to hold respondent liable for failing to submit the above referenced plans. Staff contended that it should have charged respondent with violations of 6 NYCRR 360-13.3(a) and, then, as specific instances of such violations, referred to each plan identified in 6 NYCRR 360-13.2 that was neither provided nor approved.[1] Staff argued that respondent would not be prejudiced if the pleadings were amended to reflect the corrected theory of liability and, thus, sought authorization to so amend the pleadings.

During oral argument on February 24, 2005, I granted staff's motion (see Transcript, at 15). In so ruling, I relied upon the standards governing motions to amend pleadings to conform to the evidence under CPLR 3025(c), which authorizes amending pleadings to conform theories of liability as well as factual allegations to the evidence (see Tr., at 12; see also Dauernheim v Lendlease Cars, Inc., 238 AD2d 462, 463 [2d Dept 1997]; Matter of Cerio v New York City Tr. Auth., 228 AD2d 676 [2d Dept 1996]). I concluded that because the original complaint provided respondent with adequate notice of the factual basis for and the actual nature of the charge, and because respondent had

[1] See also 6 NYCRR former 360-13.4(a). Former 360-13.4(a) was the version of section 360-13.3(a) in effect until October 9, 1993.

due notice of the motion to amend the pleadings, no prejudice would inure to respondent if staff's motion was granted (see Tr., at 14). Accordingly, staff's charge as amended is considered herein.

Section 360-13.3(a) provides that "all waste tire storage facilities subject to the permitting requirements of [Part 360] must comply with the following operational requirements: * * * All activities at the facility must be performed in accordance with plans required by this Part and approved by the department." Section 360-13.2 requires a site plan, monitoring and inspection plan, closure plan, contingency plan, storage plan, and vector control plan for waste tire storage facilities used to store 1,000 or more waste tires at a time (see 6 NYCRR 360-13.2[b], [e], [f], [h], [i], [j]; see also 6 NYCRR former 360-13.3 [effective until Oct. 8, 1993]; id. former 360-13.1[c][1][ii] [requiring a site plan for existing facilities]). The evidence submitted by staff on its motion shows that since at least October 3, 1989, respondent owned and operated a waste tire storage facility used to store more than 1,000 tires at a time without any approved plans. Thus, the violations of section 360-13.3(a) alleged in Charges E.1(i) through (vi) are established.

With respect to Charge C, staff conceded at oral argument that it is the same charge as Charge E.1(iv), but with a later start date alleged (see Tr., at 77). Thus, as discussed further below, a separate penalty is not authorized for Charge C.

Violations of Dimensional and Quantity Standards

In my prior ruling, I reserved decision on the issue whether operation of a waste tire storage facility in violation of the dimensional and quantity standards provided for in section 360-13.2(i) constituted violations separate and distinct from respondent's failure to apply for and obtain a waste tire storage facility permit (see ALJ Ruling, at 16-17 [citing Matter of Hornburg, ALJ Ruling, at 20-21]). Because the dimensional and quantity standards appear in a section governing permit application requirements, I questioned whether those standards constituted operational requirements that could be violated absent their incorporation into a storage plan that, in turn, is incorporated into a permit (compare Matter of Williamson [Mohawk Tire Storage Facility, Inc.], Decision and Order of the Commissioner, Oct. 18, 1999, adopting ALJ Report, at 8-9 [finding that many of the tire piles in a permitted facility violated the dimensional standards prescribed in section 360-13.2(i)]).

Department staff maintains that the dimensional and quantity standards contained in section 360-13.2(i) should be interpreted as operational requirements that can be violated in the absence of a permit. Staff explains that the absolute requirements contained in subdivision (i) were intended by the drafters of the regulations to be operational requirements. Because compliance with those standards was also required to be addressed in the storage plan to be submitted with the permit application, however, they were placed in the permit application section of the regulations to avoid duplicative drafting. Accordingly, staff asserts that it properly pleaded violations of section 360-13.2(i)(3), (4), and (5) in Charges E.2 through E.8.

In the alternative, staff contended during oral argument that the dimensional and quantity standards are incorporated into the operational requirements by section 360-13.3(a). Section 360-13.3(a) requires that all waste tire storage facilities subject to the permitting requirements of Part 360 be operated in accordance with approved storage plans that, in turn, must comply with the dimensional and quantity standards in section 360-13.2(i). Staff urges that in the event the ALJ or the Commissioner concludes that these violations were incorrectly pleaded, the pleadings can be amended by the ALJ or the Commissioner sua sponte to conform the correct theory of liability to the proof.

The determination whether section 360-13.2(i) imposes operational requirements is, at its base, an exercise in discerning the intent of the regulation's drafters (see Matter of Steck, Commissioner's Order, March 29, 1993, at 2-3; see also Statutes § 92). Accordingly, I accept staff's reading of the regulation as a reasonable and rational interpretation. Among the apparent purposes of the section 360-13.2(i) dimensional standards is to aid in the prevention and fighting of fires at waste tire storage facilities. Construing the dimensional standards in section 360-13.2(i) as operational requirements is consistent with the overall intent and purpose of subpart 360-13 to improve safety and minimize environmental harms posed by waste tire piles. Moreover, an unpermitted facility should not be allowed to avoid the dimensional requirements applicable to permitted facilities simply by failing to obtain a permit (see 6 NYCRR 360-1.4).

Thus, to the extent the standards contained in section 360-13.2(i) are objective and self-executing standards that are drafted in mandatory terms, they should be viewed as operating standards that apply to waste tire facilities even in the absence of an approved permit. Accordingly, the standards enunciated in

section 360-13.2(i)(3) and (4), which govern the height, width and area dimensions of the tire piles, and the width and condition of access roads between the tire piles, are operational requirements applicable to respondent's facility.[2]

Although I view section 360-13.2(i)(5) as presenting a closer case, I nevertheless conclude that that section also imposes an operational requirement. Section 360-13.2(i)(5) provides that a "facility must not store waste tires in excess of the quantity for which the facility is permitted." When subdivision (5) is read in conjunction with ECL 27-0703(6) -- which requires that owners or operators of solid waste management facilities engaged in the storage of 1,000 or more waste tires must obtain a solid waste management permit (see also 6 NYCRR 360-13.1[b]) -- an objective, maximum threshold is established, even for unpermitted facilities. In the circumstance of an unpermitted facility, the maximum quantity allowed would be less than 1,000 waste tires. Thus, section 360-13.2(i)(5) imposes an operational requirement upon respondent, even in the absence of a permit.[3]

With respect to the violations of the section 360-13.2(i) operating standards alleged in the motion, the evidence submitted establishes that since October 3, 1989, respondent stored 1,000 or more waste tires at his facility without Departmental authorization to do so. Accordingly, respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by failing to maintain the number of tires at or below the quantity allowed for his facility, namely, less than 1,000 waste tires (see Charge E.5, Motion, at 3; Finding of Fact Nos. 3 and 4, ALJ Ruling, at 8). The evidence also establishes that since October 3, 1989, respondent violated section 360-13.2(i)(3) and former section 360-13.3(f)(3) by failing to maintain waste tire piles at 50 feet or less in width (see Charge E.7; Finding of Fact No. 3, ALJ Ruling, at 8). Since October 3, 1989, respondent also violated section 360-13.2(i)(3) and former section 360-13.3(f)(3) by failing to maintain waste tire piles at 10,000

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[2] The same conclusion is drawn with respect to the similar provisions of 6 NYCRR former 360-13.3(f). Former section 360-13.3(f) was the version of section 360-13.2(i) in effect until October 9, 1993.

[3] The same conclusion is drawn with respect to the similar provisions of 6 NYCRR former 360-13.3(f)(5). Former section 360-13.3(f)(5) was the version of section 360-13.2(i)(5) in effect until October 9, 1993.

square feet or less of surface area (see Charge E.8; Findings of Fact Nos. 3 and 5, ALJ Ruling, at 8).

The evidence also establishes that since March 16, 1995, respondent failed to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures, failed to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times, and failed to maintain 50-foot separation areas in such a manner that emergency vehicles will have adequate access, all in violation of the requirements of section 360-13.2(i)(4) (see Charges E.2-4; Findings of Fact No. 6, ALJ Ruling, at 8). Staff failed to make a prima facie showing concerning the existence and condition of separation areas prior to March 16, 1995 (see ALJ Ruling, at 11) and, thus, violations during that period cannot be determined as a matter of law based upon the evidence submitted on the motion.

With respect to Charge E.6 -- respondent's alleged failure to maintain waste tire piles at 20 feet or less in height -- staff's evidence is equivocal and raises an issue of fact concerning whether the 20-foot height limit was exceeded (see ALJ Ruling, at 11). Thus, the violation alleged in Charge E.6 cannot be determined as a matter of law on this motion and summary judgment should denied as to this charge.

Violation of National Fire Protection Association Standards

For reasons similar to those concerning the alleged violations of dimensional and quantity standards under section 360-13.2(i), in my prior ruling, I reserved decision on the issue whether National Fire Protection Association ("NFPA") standards governing waste tire storage are operating standards applicable to a waste tire storage facility in the absence of an approved contingency plan submitted pursuant to section 360-13.2(h). The express terms of section 360-13.2(h) require submission of a contingency plan as part of an application for a waste tire storage facility permit. Section 360-13.2(h) further provides that "the contingency plan must include but not be limited to: . . . (6) The facility must comply with all applicable National Fire Protection Association standards, including Standards for Storage of Rubber Tires, NFPA 231D, 1989 edition" ("NFPA 231D").[4]

For the reasons stated above with respect to the

[4] Section 360-13.2(h)(6) was added to subpart 360-13 effective October 9, 1993.

dimensional standards, I conclude that to the extent NFPA 231D establishes mandatory, objective and self-executing standards for the storage of waste tires, those standards should be interpreted as operational requirements governing a waste tire storage facility, even in the absence of an approved contingency plan or Departmental permit. Moreover, I conclude that the NFPA 231D standards relied upon by staff -- Provisions C-3.2.1(a), C-3.2.1(c) and C-4.2.5 -- are such mandatory, objective, and self-executing standards.

Finally, the evidence establishes that since March 16, 1995, respondent violated the NFPA 231D provisions charged by staff. Provision C-3.2.1(a) requires fire lanes to separate piles and provide access for effective firefighting operations. In Charge D.1, staff alleged that since March 16, 1995, respondent violated Provision C-3.2.1(a) and, thus, section 360-13.2(h)(6), by allowing roads and access lanes at and about the site to be blocked by tires, trees, and erosion. Charge D.1 as pleaded is established by the evidence (see Findings of Fact Nos. 5 and 6, ALJ Ruling, at 8). Provision C-3.2.1(c) requires an effective fire prevention maintenance program including control of weeds, grass and other combustible materials within the storage area. In Charge D.2, staff alleges that respondent violated Provision C-3.2.1(c) and, thus, section 360-13.2(h)(6), by storing waste tires at the site in piles in close proximity to natural cover and trees. Charge D.2 is also established by the evidence (see Findings of Fact No. 5, ALJ Ruling, at 8). Provision C-4.2.5 requires that the distance between storage and grass, weeds and brush should be 50 feet or more. Charge D.3 alleges that respondent violated Provision C-4.2.5 and, thus, section 360-13.2(h)(6), by locating tires piles at the site within 50 feet of grass, weeds, and bushes. That charge is also established (see Finding of Fact No. 5, ALJ Ruling, at 8).

Penalty Assessment

In its motion, Department staff requests that respondent be directed to pay:

> "an assessed penalty determined to be the lesser of the maximum civil penalty authorized by law under ECL 71-2703; or the sum of $50,000, plus, if Respondent shall fail to comply with any requirement [imposed by order upon respondent concerning any further receipt of waste tires at the site, or his obligation to remove the tires already at the site], the sum of $2 for each waste

tire that the State of New York shall have to manage under ECL Article 27, Title 19"

(Motion, Article VI, at 8). With respect to the maximum penalty authorized by law, staff seeks a penalty for the time period from the first date of each violation until April 30, 2004 (see Attorney Brief in Support of Motion, at 15).

With respect to the alternative penalty sought, during oral argument, staff modified the formula from $2 per tire to $2 per each 20 pounds of tires (see Tr., at 146). Twenty pounds is approximately the weight of one tire (see id.). Moreover, the contractors that remove waste tires usually do so by weight, not by counting tires (see id.).

1. Maximum Penalty -- Number of Violations

ECL 71-2703 provides that "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by [ECL article 27, title 7] or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty" (ECL 71-2703[1][a]). The original civil penalty authorized when ECL 71-2703 was enacted was $2,500 "for each such violation" and an additional $1,000 "for each day during which such violation continues" (L 1980, ch 550, § 1, effective Sept. 1, 1980). Effective January 1, 1996, the penalty was increased to $5,000 per violation and an additional $1,000 for each day during which the violation continued (see L 1995, ch 508, § 1). Effective May 15, 2003, the penalty was further increased to $7,500 per violation and an additional $1,500 for each day during which the violation continued (see L 2003, ch 62, pt C, § 25).

The first step in determining the maximum penalty allowable by law requires an analysis of the number of violations for which a penalty is authorized. In this case, staff seeks to impose multiple penalties for multiple violations arising out of a single, albeit continuous, course of conduct. In this context, the Commissioner employs the rules of statutory construction used by courts in criminal cases where multiple punishments are sought to be imposed in a single prosecution for multiple offenses arising out of a single criminal transaction (see Matter of Steck, Commissioner's Order, March 29, 1993, at 4).

Under criminal law principles of statutory construction, where multiple sentences are sought to be imposed in a single prosecution for multiple offenses arising from a single course of conduct, the courts apply the Blockburger test to determine whether multiple offenses are defined by the

legislature (see Missouri v Hunter, 459 US 359, 366-368 [1983] [citing Blockburger v United States, 284 US 299, 304 (1932)]; see also People v Gonzalez, 99 NY2d 76, 82-83 [2002]). Under that test, if each statutory provision violated contains an element or requires proof of a fact the other does not, separate offenses are defined and separate punishments are presumed to be authorized (see Missouri v Hunter, 459 US at 366-368; Albernaz v United States, 450 US 333, 339-340 [1981]). As described by one court, the relationship of "multiple" offenses under the Blockburger test is that of overlapping circles (see Aparicio v Artuz, 269 F3d 78, 96-98 [2d Cir 2001]).

On the other hand, if one or both statutory provisions fail to contain an element not contained in the other, the "same" offense is defined and separate punishments are presumed not to be authorized (see Missouri v Hunter, 459 US at 366-367). The relationship of the statutory provisions is that of concentric circles (see Aparicio, 269 F3d at 96-98). In the criminal law context, this often occurs when one statute is a lesser included offense of another (see Rutledge v United States, 517 US 292, 297, 307 [1996] [a guilty verdict on the greater offense necessarily includes a finding that the lesser included offense is violated]).

Because the Blockburger test only establishes a rule of statutory construction in the context of a single prosecution for multiple offenses, however, it is the intent of the legislature that controls the analysis, not the outcome of the Blockburger test (see Missouri v Hunter, 459 US at 368; see also People v Gonzalez, 99 NY2d at 82 [accord]). Thus, when separate offenses are defined, the Blockburger test does no more than raise a presumption that multiple sentences are authorized. That presumption is not controlling, however, in the face of a clear indication of contrary legislative intent (see Albernaz, 450 US at 340). Conversely, where application of the Blockburger test suggests that the "same" offense is prescribed by two statutory provisions, a single sentence is presumed to be authorized only in the absence of a clear indication of contrary legislative intent (see Missouri v Hunter, 459 US at 366-367; Rutledge, 517 US at 297, 307). Nothing in Blockburger or the principles upon which it is based prevents the legislature from authorizing multiple punishments for the same offense (see Missouri v Hunter, 459 US at 368).[5]

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[5] The effect of the Blockburger test in the distinct context of multiple prosecutions is different than in the context of a single prosecution for multiple offenses. In the former

Finally, the focus of the Blockburger test is on the statutory elements of the offense involved (see Iannelli v United States, 420 US 770, 785 n 17 [1975]). If each statutory provision requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the two offenses (see id.).

The same principles are applied in Departmental enforcement proceedings. Where two regulatory provisions are violated by a single transaction or course of conduct, and each provision contains an element not contained in the other, multiple violations are presumed and multiple penalties authorized (see Matter of Steck, supra, at 5). Where one regulation contains at least one element that the second does not, but the second regulation contains no element not included in the first, or where two regulations contain identical elements, a single violation is presumed and a single penalty authorized, absent a clear indication of contrary regulatory intent (see Matter of Q.P. Service Sta. Corp., Decision and Order of the Commissioner, Oct. 20, 2004, at 4 [permanent closure notification requirement under 6 NYCRR 613.9(c) did not add anything to the section 612.2(d) closure reporting requirement and nothing in the plain language, structure or purpose of the respective sections justified treating the two violations as distinct]).

Applying these principles to the violations established in this case, I conclude that some of the charges are multiplicitous of other charges and, thus, will not support separate penalties.

a. Charges A and B

In Charge A, staff established that from October 3, 1989 to May 28, 2004, the date of staff's motion, respondent

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context, if an offense in a later prosecution is the "same" under the Blockburger test as an offense in a prior prosecution, principles of double jeopardy would bar the subsequent prosecution (see, e.g., United States v Sessa, 125 F3d 68, 71-72 [2d Cir 1997], cert denied sub nom. Scarpa v United States, 522 US 1065 [1998]). In contrast, in the context of a single prosecution for multiple offenses, the Blockburger rule of statutory construction is not a constitutional rule that requires negating clearly expressed legislative intent (see Missouri v Hunter, 459 US at 368).

violated 6 NYCRR 360-1.7(a)(1) by operating a solid waste management facility without a permit (see Conclusion of Law No. 6, ALJ Ruling, at 19). In Charge B, staff established that from October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.1 by operating a waste tire storage facility used to store 1,000 or more waste tires at a time, without the permit specific to such facilities (see id.).

Comparing the two regulatory provisions, their relationship is that of concentric circles. Section 360-1.7(a) applies to all regulated solid waste management facilities generally (see 6 NYCRR 360-1.2[b][158] [definition of solid waste management facility]), whereas section 360-13.1 applies specifically to waste tire storage facilities. All violations of section 360-13.1 necessarily involve a violation of section 360-1.7(a), but not all violations of section 360-1.7(a) necessarily involve a violation of section 360-13.1. Thus, the application of the Blockburger test raises a presumption that only a single penalty is authorized.

Moreover, an examination of the regulatory scheme offers no clear indication to the contrary. The regulations indicate that only a single permit would be issued to a waste tire storage facility containing both general terms pursuant to subpart 360-1 and specific terms pursuant to subpart 360-13 (see 6 NYCRR 360-1.7[a][1][i] [requiring "a valid permit issued pursuant to this Part" (emphasis added)]; id. 360-13.1[b] [prohibiting storage of tires without "a permit to do so pursuant to this Part" (emphasis added)]; id. 360-13.2 [imposing permit application requirements in addition to the requirements set forth in subpart 360-1]; id. 360-13.3 [imposing operational requirements in addition to the requirements of section 360-1.14]). Interpreting the regulations to allow for two penalties for the failure to obtain a permit for a waste tire storage facility might also be seen as improperly doubling the Legislatively-authorized penalty for the single obligation imposed by statute (see ECL 27-0703[6] [requiring the owner or operator of a solid waste management facility engaged in the storage of 1,000 or more waste tires in existence on or after the effective date of subdivision (6) to submit a complete application for a permit to continue to operate or cease operations]; Matter of Steck, supra, at 5). Accordingly, I conclude that the violations established pursuant to Charges A and B constitute a single violation for penalty calculation purposes.

b. Charges D.1, E.4 and F.1

In Charge D.1, staff established that since at least March 16, 1995, respondent violated 6 NYCRR 360-13.2(h)(6) because he failed to comply with NFPA 231D, Provision C-3.2.1(a), by failing to maintain access roads to allow for effective fire fighting operations. Provision C-3.2.1(a) requires fire lanes to separate piles and provide access for effective fire fighting operations.

In Charge F.1, staff established that since at least March 16, 1995, respondent violated 6 NYCRR 360-13.3(c)(1), also by failing to maintain access roads to allow for effective fire fighting operations (see Conclusion of Law No. 7, ALJ Ruling, at 19-20). Section 360-13.3(c)(1) requires that "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."

Charges D.1 and F.1 require identical factual proofs to establish the violations alleged -- that the access roads were not maintained to provide access for effective fire fighting operations since March 16, 1995. Accordingly, they presumptively charge the "same" offense for penalty calculation purposes.

In Charge E.4, staff established that respondent failed to maintain 50-foot separation areas in such a manner that emergency vehicles will have adequate access in violation of 6 NYCRR 360-13.2(i)(4). Staff's evidence established this violation from March 16, 1995 on. Charge E.4 contains an element of factual proof -- the minimum 50-foot separation area -- not contained in Charges D.1 and F.1. However, Charges D.1 and F.1 contain no element not contained in Charge E.4. Accordingly, all three charges are presumed to be the "same" violation, and only one penalty is authorized for the three violations.

Finally, nothing in the regulatory history indicates a clear intention to impose multiple penalties for the three charges. In fact, at oral argument, staff indicated that the charges might be multiplicitous for penalty-calculation purposes (see Tr., at 44-59).

c. Charges D.3 and E.3

In Charge D.3, staff established that since at least March 16, 1995, respondent violated 6 NYCRR 360-13.2(h) because he failed to comply with NFPA 231D, Provision C-4.2.5 by locating

tire piles at the site within 50 feet of grass, weeds, and bushes. Provision C-4.2.5 requires that the distance between tire storage and grass, weeds, and brush be 50 feet.

In Charge E.3, staff established that respondent failed to maintain 50-foot separation areas so that they are free of vegetation at all times in violation of 6 NYCRR 360-13.2(i)(4). Staff's evidence established this violation from March 16, 1995 on.

Charge E.3 contains a broader element than Charge D.3. Section 360-13.2(i)(4) requires 50-foot separation areas that are "free of obstructions and vegetation" (emphasis added). However, Provision C-4.2.5, which requires 50-foot separation areas that are free of "grass, weeds, and brush," contains no element not contained in section 360-13.2(i)(4). Although all violations of section 360-13.2(i)(4) do not necessarily involve a violation of Provision C-4.2.5, all violations of the latter provision necessarily involve violations of the former. Thus, presumptively, the two violations are the "same" offense. Nothing in the regulatory history suggests to the contrary and, again, staff indicated that these two charges might be multiplicitous for penalty purposes (see Tr., at 81-82).

d. Charges C and E.1(iv)

As previously noted, Charge C (failure to submit a contingency plan pursuant to 6 NYCRR 360-13.2[h] since at least October 3, 1989) and Charge E.1(iv) (failure to submit a contingency plan as required by section 360-13.2[h] since at least March 16, 1995) are the identical charge, but with different start dates. Accordingly, only one penalty is authorized for a continuing violation beginning on October 3, 1989.

e. Remaining Charges and Maximum Authorized Penalty

The remaining charges each contain elements that the other charges do not and, accordingly, separate penalties are presumptively authorized. No clear regulatory intent suggests otherwise. Based upon this analysis, 21 separate violations have been established, ten continuing from October 3, 1989 until April 30, 2004, and eleven continuing from March 16, 1995 until April 30, 2004.

Accordingly, the maximum penalty authorized by law would be $93,641,500. This maximum was calculated by assuming

that the per-day penalty authorized for each day a violation continued increased as the statute was amended. The maximum penalty for each violation that began on October 3, 1989 and continued until April 30, 2004 is calculated as follows:

First day of violation (10/3/89)	--	$ 2,500
Penalty for period from 10/4/89 to 12/31/95 (2,280 day x $1,000)	--	2,280,000
Penalty for period from 1/1/96 to 5/14/03 (2,691 days x $1,000)	--	2,691,000
Penalty for period from 5/15/03 to 4/30/04 (352 days x $1,500)	--	528,000
Total		$ 5,501,500

The maximum penalty for each violation that began on March 16, 1995 is calculated as follows:

First day of violation (3/16/95)	--	$ 2,500
Penalty for period from 3/17/95 to 12/31/95 (290 days x $1,000)[6]	--	290,000
Penalty for period from 1/1/96 to 5/14/03 (2,691 days x $1,000)	--	2,691,000
Penalty for period from 5/15/03 to 4/30/04 (352 days x $1,500)	--	528,000
Total		$ 3,511,500

Accordingly, (10 violations x $5,501,500) plus (11 violations x $3,511,500) equals $93,641,500.

2. Alternative Penalty Calculation

As noted above, Department staff seeks the lesser of the maximum penalty authorized by law or the sum of $50,000 plus $2 for each 20 pounds of waste tires that the State of New York has to manage under the Waste Tire Management and Recycling Act of 2003 (see ECL art 27, tit 19). This penalty would be in addition to the costs of remediation respondent would be liable for pursuant to ECL 27-1907.

Department staff recognizes that this alternative penalty assessment is novel. Nevertheless, staff contends that

[6] In its penalty calculation, Department staff erred and indicated 813 days for this time period (see Attorney's Brief, Appdx I, at 22).

the proposed assessment method accomplishes several important goals: (1) it provides for a minimum penalty, irrespective of respondent's compliance with the Commissioner's order, to punish respondent for the violations of the State's laws and regulations and to deter future violations, (2) it provides respondent with an incentive to comply with the remedial obligations imposed by the Commissioner's prior order, and (3) the "$2 per 20-pounds of tires managed" provision incorporates proportionality into the penalty calculation.

Department staff's alternative penalty assessment appears reasonable and rational, is consistent with and justified under the Commissioner's Civil Penalty Policy (DEE-1, June 20, 1990), and would fall within the Commissioner's authority to adopt. By latest estimate, respondent's site contains approximately 350,000 waste tires (see Finding of Fact No. 3, ALJ Ruling, at 8). Assuming respondent fails to comply with his remediation obligations, the approximate maximum penalty assessed under this method would be $750,000 (350,000 tires at $2 per 20-pounds of tire [one tire being about 20 pounds] plus the $50,000 minimum penalty). Thus, the alternative penalty would be well within the $93,641,500 maximum authorized by law.

The $50,000 minimum penalty is warranted in this case due to respondent's gross lack of cooperation with the Department and his significant history of non-compliance (see Civil Penalty Policy, at IV.E[2], [3]). The record establishes that since 1987, respondent has ignored the Department's repeated directions to bring the site into compliance with the law, and breached his agreement with the Department to remediate the site (see Findings of Fact Nos. 10 and 12, Ruling, at 9). In addition, respondent was convicted three times in Persia Town Court for engaging in the storage of more than 1,000 waste tires without a permit and still failed to come into compliance with the law (see Findings of Fact Nos. 11-13, id.).

A disadvantage of staff's penalty-assessment formula is that the penalty may be indeterminable for a time. As staff notes, however, nothing in the statute requires that the assessed penalty be a sum certain, and once the State is required to remediate the site, the actual penalty would be finally determinable. Accordingly, I recommend that the Commissioner adopt staff's alternative penalty assessment.

Financial Security Requirement

In my October 18, 2004 ruling, I reserved decision on the relief sought in article III of staff's motion -- the

requirement that respondent post with the Department financial security in the amount of $600,000 to secure strict and faithful performance of each of respondent's remedial obligations imposed in paragraphs I and II of the Commissioner's November 4, 2004 order (see ALJ Ruling, at 19 [citing Matter of Hornburg, ALJ Ruling, at 23]). I questioned whether the provisions staff cited in its motion in support of the security requirement, which require the posting of a surety as a condition for permit issuance or denial (see ECL 27-0703[6]; 6 NYCRR 360-1.12 and 13.2[g]), authorized the imposition of financial security as an item of relief in an enforcement proceeding and in the absence of a permit.

In its December 23, 2004 letter, staff argued that the financial security obligation is imposed upon respondent by 6 NYCRR 360-1.4(a)(1), which provides that every solid waste management facility in the State is subject to every applicable requirement identified in Part 360 pertaining to the type of facility at issue. During oral argument, however, I pointed out that staff was not seeking to establish respondent's violation of the surety requirement and, thus, the issue whether the surety obligation is an operational requirement was not relevant (see Tr., at 108-109). Instead, staff was seeking imposition of financial security as an item of relief for other violations.

In the alternative, staff argued that the Commissioner has the implied authority to require the posting of financial security to ensure compliance with remedial obligations imposed upon a respondent. That implied authority follows from the Commissioner's express obligation under ECL 3-0301 to prevent pollution and to mitigate situations where pollution has occurred, and the Commissioner's express injunctive powers under ECL 71-2703.

In support of its argument, staff cited Matter of Radesi (Commissioner's Decision and Order, March 9, 1994). In that case, the Commissioner accepted the recommendation of the ALJ and required the respondent to post a financial surety to secure remediation of a waste tire site (see id. at 2). The rationale provided by the ALJ was that if the surety were not required, the respondent could fail to comply with the order while paying a penalty less than the cost of remediation (see ALJ Hearing Report, at 12).

Based upon Matter of Radesi and the arguments of staff, I conclude that the Commissioner has the inherent authority under the ECL to require the posting of financial security to ensure compliance with remedial obligations imposed in a Commissioner's

order. Accordingly, I recommend that the Commissioner grant the relief staff seeks in article III of its motion.

Reimbursement of Investigation, Prosecution and Oversight Costs

In article VII of its request for relief, Department staff requested an order directing respondent to reimburse the Waste Tire Management Fund ("Fund"), in accordance with ECL 27-1907(5), the full amount of any and all expenditures made from the Fund by the State to investigate, establish liability for, and abate the noncompliant waste tire stockpile at respondent's site (see Motion, article VII, at 8). In my October 18, 2004 ruling, I recommended that staff's request be granted to the extent of directing respondent to reimburse the State for any and all expenditures made from the Fund for "remedial and fire safety activities" (see ALJ Ruling, at 18 [citing ECL 27-1907[3]). The Commissioner adopted my recommendation (see Commissioner's Order [11-4-04], at 7).

In making my recommendation, however, I questioned whether investigation costs, prosecution costs, and oversight costs were chargeable to the Fund (see Ruling, at 19 [citing Hornburg, ALJ Ruling, at 23]). In response, Department staff argues that the term "expenses of remedial . . . activities at a noncompliant waste tire stockpile" is sufficiently broad to encompass all the costs staff might expend at the site. Staff contends that such costs incurred by the State have been regularly viewed as authorized under analogous federal and state laws, including the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") (see 42 USC § 9601[24]; see also, e.g., United States v Lowe, 118 F3d 399 [5th Cir 1997]; United States v Mottolo, 695 F Supp 615, 631 [D NH 1988]), and the New York Navigation Law (see Navigation Law § 181[1]; see also, e.g., AMCO Intl., Inc. v Long Is. R.R. Co., 302 AD2d 338, 340-341 [2d Dept 2003]; Don Clark, Inc. v U.S. Fid. and Guar. Co., 145 Misc 2d 218 [1989]).

Given the remedial nature of the Waste Tire Management and Recycling Act of 2003 and the breadth of governmental expenses recoverable under analogous laws, it is likely that the Legislature intended that expenses of remedial activities be sufficiently broad so as to encompass all expenses incurred by the State for remediation of noncompliant waste tire stockpiles. However, I also conclude that it is not necessary at this time to determine the precise scope of remedial expenses recoverable under the statute. Indeed, until the State incurs remedial costs and expends monies from the Fund to cover them, the question is not ripe. It is sufficient at this time and in this

administrative enforcement proceeding to clarify that respondent is liable for all remedial expenses incurred by the State at the site, including investigation, prosecution and oversight costs, to the fullest extent allowable under the law, and I recommend that the Commissioner so modify the prior order in this case.

Finally, in article V of its request for relief, Department staff also sought reimbursement of costs (see Motion, at 8). At oral argument, staff withdrew that request for relief (see Sullivan Letter [12-23-04], at 3-4; Tr., at 112-113). Accordingly, it need not be considered.

CONCLUSIONS OF LAW

In addition to conclusions of law numbers 1-15 included in my prior ruling (see Ruling, at 19-20), my conclusions of law with respect to the remainder of staff's motion are as follows:

Violations Established

16. From at least October 3, 1989 to May 28, 2004, the date of staff's motion, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved site plan, as required by 6 NYCRR 360-13.2(b) and 6 NYCRR former 360-13.1(c)(1)(ii).

17. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved monitoring and inspection plan, as required by 6 NYCRR 360-13.2(e) and 6 NYCRR former 360-13.3(b).

18. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved closure plan, as required by 6 NYCRR 360-13.2(f) and 6 NYCRR former 360-13.3(c).

19. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved contingency plan, as required by 6 NYCRR 360-13.2(h) and 6 NYCRR former 360-13.3(e).

20. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-

13.4(a) because he owned and operated a waste tire storage facility without a Department-approved storage plan, as required by 6 NYCRR 360-13.2(i) and 6 NYCRR former 360-13.3(f).

21. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.3(a) and 6 NYCRR former 360-13.4(a) because he owned and operated a waste tire storage facility without a Department-approved vector control plan, as required by 6 NYCRR 360-13.2(j) and 6 NYCRR former 360-13.3(g).

22. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(3) and 6 NYCRR former 360-13.3(f)(3) by failing to maintain waste tire piles at 50 feet or less in width.

23. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(3) and 6 NYCRR former 360-13.3(f)(3) by failing to maintain waste tire piles at 10,000 square feet or less of surface area.

24. From at least October 3, 1989 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(5) and 6 NYCRR former 360-13.3(f)(5) by storing 1,000 or more waste tires at the facility in excess of the quantity allowed.

25. From at least March 16, 1995 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain waste tire piles with no less than 50 feet of separation distance between piles and buildings and other structures.

26. From at least March 16, 1995 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas so that they are free of obstructions and vegetation at all times.

27. From at least March 16, 1995 to May 28, 2004, respondent violated 6 NYCRR 360-13.2(i)(4) by failing to maintain 50-foot separation areas in such a manner that emergency vehicles have adequate access.

28. From at least March 16, 1995 to May 28, 2004, respondent violated NFPA 231D Provision C-3.2.1(a) and, thus, 6 NYCRR 360-13.2(h)(6), by allowing roads and access lanes at and about the site to be blocked by tires, trees, and erosion and, thereby, interfering with access for firefighting operations.

29. From at least March 16, 1995 to May 28, 2004, respondent violated NFPA 231D Provision C-3.2.1(c) and, thus, 6

NYCRR 360-13.2(h)(6), which requires an effective fire prevention maintenance program including control of weeds, grass, and other combustible materials within the storage area, by storing waste tires at the site in piles in close proximity to natural cover and trees.

30. From at least March 16, 1995 to May 28, 2004, respondent violated NFPA 231D Provision C-4.2.5 and, thus, 6 NYCRR 360-13.2(h)(6), by locating tire piles at the site within 50 feet of grass, weeds, and bushes.

31. Department staff failed to make a prima facie showing of its entitlement to judgment as a matter of law on its claim that respondent violated 6 NYCRR 13.2(i)(3) by failing to maintain waste tire piles at 20 feet or less in height.

32. Department staff failed to make a prima facie showing of its entitlement to judgment as a matter of law on its claims that respondent violated the provisions cited in paragraphs 25 through 27 above for the period prior to March 16, 1995.

Penalty Assessment

33. The violations of 6 NYCRR 360-1.7(a)(1) and 360-13.1 established in paragraph 1 of the Commissioner's November 4, 2004 order (Order, at 2) constitute a single violation for penalty calculation purposes.

34. The violations of 6 NYCRR 360-13.2(i)(4) and 360-13.2(h)(6) established in paragraphs 27 and 28 above, respectively, and the violation of 6 NYCRR 360-13.3(c)(1) established in paragraph 3(a) of the Commissioner's order (Order, at 2) constitute a single violation for penalty calculation purposes.

35. The violations of 6 NYCRR 360-13.2(i)(4) and 360-13.2(h)(6) established in paragraphs 26 and 30 above, respectively, constitute a single violation for penalty calculation purposes.

36. The maximum penalty authorized by law for the separate violations established on Department staff's motion is $93,641,500. This amount is based upon ten violations beginning on October 3, 1989 and continuing until April 30, 2004, and eleven violations beginning on March 16, 1995 and continuing until April 30, 2004.

RECOMMENDATIONS

I recommend that the Commissioner issue a supplemental order consistent with my conclusions herein that would:

I. Grant in part and otherwise deny the remainder of Department staff's motion for order without hearing;

II. Determine the violations referenced in paragraphs 16-30 above;

III. Impose the alternative penalty sought by Department staff in article VI of its request for relief, as amended during oral argument;

IV. Require respondent to post with the Department the financial security requested by Department staff to ensure respondent's compliance with his remedial obligations under the Commissioner's November 4, 2004 order;

V. Modify paragraph IV of the Commissioner's November 4, 2004 to indicate that respondent is liable to reimburse the Waste Tire Management and Recycling Fund for the full amount of any and all expenditures made from the Fund by the State for remedial and fire safety activities at the site, including any and all investigation, prosecution, and oversight costs, to the maximum extent authorized by law; and

VI. Otherwise continue the Commissioner's November 4, 2004 order in this matter.

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James T. McClymonds
Chief Administrative Law Judge

Dated: August 17, 2005
Albany, New York