

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

In the Matter of the Alleged Violations of Articles 17, 24, and 27 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Parts 360 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

DEC Case No.
R5-20070808-760

- by -

RICHARD KWAK,

Respondent.

Respondent Richard Kwak owns and operates an automobile dismantling facility located at 1130 Route 146A in Ballston Lake, New York (facility). In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") is seeking an order requiring respondent to (1) pay a civil penalty for alleged environmental violations arising from the facility's operation, and (2) undertake remedial measures to address spills, discharges, and other violations at the facility.

Department staff commenced this administrative enforcement proceeding against respondent Richard Kwak by service of a notice of hearing and complaint upon respondent by certified mail, return receipt requested, on May 7, 2010. Respondent received the papers on May 10, 2010.

Department staff's complaint contained twenty-three causes of action, in which Department staff alleged that respondent violated sections of the Environmental Conservation Law ("ECL"), the Navigation Law, part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and 6 NYCRR part 750 at the facility. The violations cited include, but are not limited to: the release of fluids, petroleum, and other contaminants into the environment and the failure to report and remediate those releases; failure to ensure the safe handling, processing, and storage of residues and fluids; lack of secondary containment at the facility; improper storage of lead acid batteries; failure to comply with applicable filing and recordkeeping requirements; placement of fill in a New York State regulated freshwater wetland; and storage or disposal of solid waste without the required permits.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired at the end of May 2010, and this time was not extended by Department staff. Respondent failed to file an answer, and Department staff subsequently filed a motion for default judgment, dated September 9, 2010, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

As the ALJ notes, Department staff has documented several years of serious environmental violations at the facility. Notwithstanding the efforts of Department staff, respondent has failed to address and correct those deficiencies. In this proceeding, Department staff proposes, and the ALJ recommends, a civil penalty of \$150,000, of which \$120,000 would be suspended, contingent upon respondent's compliance with the injunctive relief requested. Based upon the record, I conclude that the proposed civil penalty of \$150,000 is appropriate. Although the severity and longstanding nature of the violations support a reduction in the amount of the suspended penalty (and a corresponding increase in the amount of the payable penalty), the more compelling need is for respondent to direct his resources to remediate the problems as soon as possible. This consideration, together with the incentive that suspending a substantial portion of the penalty should provide to implement the remedial measures, and other specific circumstances of this matter, support Department staff's penalty proposal that the ALJ has recommended be adopted. Accordingly, I adopt the ALJ's recommendation.

With respect to the measures that Department staff recommended to address the violations, the ALJ has supplied greater detail with respect to remedial activities (see Default Summary Report, at 7-9). Her recommendations, along with Department staff's recommendations, are appropriate, authorized, and consistent with the actions that are required for the facility to come into compliance.¹ I have, however, made some minor adjustment to the sequence and timing of the remedial measures for purposes of consistency.

¹ The ALJ recommends that in the event that respondent remains non-compliant, the matter should be referred to the District Attorney of Saratoga County or the Office of the New York Attorney General for criminal proceedings after the first deadline in the compliance schedule is missed (see Default Summary Report, at 10). I decline to accept this recommendation, so as not to foreclose other appropriate administrative options. Accordingly, if respondent fails to comply with this order, Department staff is directed to immediately notify the Department's Office of General Counsel for consideration of appropriate future action.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent Richard Kwak is adjudged to be in default and to have waived his right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in Department staff's complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated:

- A. ECL § 27-2303(1), for the failure to submit an annual report to the Department for 2008 and 2009 and failure to submit an annual report to the Department in a timely manner for 2006 and 2007;
- B. ECL § 27-2303(2), for the failure to conduct all fluid draining, removal, and collection activities at the facility on asphalt, concrete, or other surface that allows equivalent protections to surface and groundwater;
- C. ECL § 27-2303(3), for the failure to completely drain, remove, collect, and store fluids for appropriate use, treatment, or disposal;
- D. ECL § 27-2303(6), for the failure to maintain fluids in appropriate containers for specific waste vehicle fluids, failure to store fluids in closed containers in good condition, failure to clearly and legibly mark the contents of these containers, and failure to maintain the containers on a bermed asphalt, concrete surface, or other surface that allows equivalent protection to groundwater;
- E. ECL § 27-2303(7), for the failure to keep lead acid batteries off the ground and covered in order to restrict water from coming into contact with the batteries, failure to maintain those batteries in leak proof containers separately from intact lead acid batteries, and failure to provide for absorption of any leakage;
- F. ECL § 27-2303(9) and 6 NYCRR § 360-13.1, for the failure to keep the number of waste tires off vehicles stored at the facility to less than one thousand or to obtain a permit;
- G. ECL § 27-2303(10), for the intentional release of fluids onto the ground or surface water;

- H. ECL § 27-2303(12), for the failure to properly control access to and use of the facility with fencing, gates, signs, or natural barriers;
- I. ECL § 27-2303(14), for the failure to ensure the safe handling, processing, and storage of residues, including, but not limited to, product left over after an automobile is crushed and parts have been extracted, in such a manner as to prevent off-site migration of run-off;
- J. ECL § 27-2303(17), for the failure to have a contingency plan for the facility in the event of a fire, a spill or release of vehicle waste fluids, or the receipt of unauthorized material;
- K. ECL § 27-2303(18), for the failure to maintain records indicating the date upon which an end of life vehicle is received;
- L. 6 NYCRR § 360-13.3(a), for the failure to maintain an operations and maintenance manual at the facility;
- M. 6 NYCRR § 360-13.3(c), for the failure to maintain access roads that are passable at all times for fire-fighting and emergency response equipment; failure to have 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; failure to maintain waste tire piles accessible on all sides to firefighting and emergency equipment; failure to eliminate potential ignition sources, and failure to remove combustibles or other flammable liquids from the vicinity of tire piles;
- N. 6 NYCRR § 360-13.3(d), for the failure to maintain signage at the facility's entrance directing visitors to report to the facility office and failure to maintain a 6-foot fence with locked gate restricting access to the facility;
- O. 6 NYCRR § 360-13.3(e), for the failure to maintain records including daily logs regarding receipt and removal of waste tires and failure to submit quarterly and annual waste tire reports to the Department;
- P. Navigation Law § 173(1), for the discharge of petroleum in numerous areas of the facility;

- Q. Navigation Law § 175, for the failure to immediately notify the Department of petroleum discharges;
- R. Navigation Law § 176, for the failure to immediately contain petroleum discharges;
- S. ECL § 17-0501, for the discharge of petroleum-based wastes and other wastes onto the ground and into an unnamed tributary of the Alplaus Kill (a Class C water of the state), a Class 2 freshwater wetland (B-31), and groundwater;
- T. ECL § 24-0701, for dumping and discharging rubbish, fill, waste, and petroleum based products into Class 2 freshwater wetland B-31 without a permit;
- U. 6 NYCRR § 360-1.5, for the disposal of solid waste at the facility without a permit; and
- V. 6 NYCRR § 750-1.4(b), for the failure to submit a Notice of Intent pursuant to the State Pollutant Discharge Elimination System Multi-Sector General Permit No. GP-0-06-002.

IV. Respondent Richard Kwak is hereby assessed a civil penalty in the amount of one hundred fifty thousand dollars (\$150,000), of which one hundred twenty thousand dollars (\$120,000) shall be suspended contingent upon respondent's compliance with the terms and conditions of this order. The non-suspended portion of the civil penalty (thirty thousand dollars [\$30,000]) shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Christopher A. Lacombe, Esq.
Regional Attorney
New York State Department of Environmental Conservation
Region 5 Headquarters
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977

If respondent fails to comply with any of the terms and conditions of this order, the suspended portion of the penalty (\$120,000) shall become immediately due and payable, and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

V. For purposes of remediating the facility, respondent shall undertake the following:

- A. upon service of the order upon respondent, immediately cease all car crushing operations at the facility until respondent has (1) constructed an appropriate surface containment pad; (2) identified, labeled, stored or disposed all the fluids at the facility; and (3) received Department staff's approval to recommence crushing operations;
- B. upon service of the order upon respondent, immediately cease the acceptance of all waste tires (except for those affixed on an end of life vehicle brought to the facility) until respondent has removed and properly disposed of all the waste tires currently at the facility;
- C. upon service of the order upon respondent, begin to maintain records indicating the date upon which an end of life vehicle is received at the facility;
- D. within thirty (30) days of the service of the order upon respondent, retain the services of an environmental engineering firm to prepare a work plan to remediate conditions at the facility and to bring the facility into compliance with applicable environmental laws and regulations. Within sixty (60) days of the service of the order upon respondent, submit an approvable work plan to Department staff, which is to include the following:
 1. measures to remediate soil and ground and surface water contamination at the facility, including but not limited to the excavation and disposal of all petroleum-stained soils at the facility, and measures to address any petroleum-impacted surface or groundwater;
 2. a plan and schedule for removal of all fill from the wetland and the regulated adjacent area;
 3. a schedule of when remedial measures will be undertaken and the expected completion dates;
 4. a contingency plan and operation and maintenance plan for the facility; and
 5. the opportunity for a joint site visit by

Department staff, respondent, and respondent's engineering firm, to identify and review all areas of contamination at the facility.

Upon the approval of the work plan by Department staff, respondent shall immediately implement it.

- E. within thirty (30) days of the service of the order upon respondent, remove all lead acid batteries from the ground of the facility;
- F. within thirty (30) days of the service of the order upon respondent, store all broken or leaking lead acid batteries in a leak proof container which is separate from intact lead acid batteries, with protections in place to absorb any leakage; arrange for proper transport and disposal of all broken or leaking batteries by a licensed hauler to an approved recycling or disposal facility; and submit documentation of such disposal or recycling to Department staff;
- G. within thirty (30) days of the service of the order upon respondent, place all lead acid batteries under a cover or tarp;
- H. within thirty (30) days of the service of the order upon respondent, complete the annual report forms for waste fluid disposal for 2008 and 2009 and submit them to the Department;
- I. within forty-five (45) days of the service of the order upon respondent, retain a licensed hauler to remove and transport all on-site waste fluids to an authorized facility for recycling or disposal and submit documentation of such removal, recycling, or disposal to Department staff;
- J. within sixty (60) days of the service of the order upon respondent, erect and maintain fencing, gates, signs, or natural barriers to minimize trespass and abandonment of waste fluids and solid waste;
- K. within sixty (60) days of the service of the order upon respondent, retain a licensed hauler to remove all waste tires from the site and transport these tires to a Department-authorized recycling or disposal facility and submit documentation of such removal and disposal or recycling to Department staff;
- L. within sixty (60) days of the service of the order upon respondent, retain a licensed hauler to remove all solid waste

from the facility, recycle or dispose of the waste at authorized solid waste management facilities, and submit documentation of such removal and recycling or disposal to Department staff;

M. within sixty (60) days of the service of the order upon respondent, obtain coverage under the Department's stormwater general permit program for stormwater discharges from the facility;

N. within sixty (60) days of the service of the order upon respondent, arrange for flagging of freshwater wetland B-31 and its adjacent area on the facility property; and

O. within one hundred twenty (120) days of the service of the order upon respondent, install, for the draining and storage of waste fluids, an appropriate surface and containment berm made of asphalt, concrete, or other surface that allows equivalent protections to surface and groundwater.

VI. All communications from respondent to the Department concerning this order shall be made to:

Christopher A. Lacombe, Esq.
Regional Attorney
New York State Department of Environmental Conservation
Region 5 Headquarters
1115 NYS Route 86
P.O. Box 296
Ray Brook, New York 12977

VII. The provisions, terms, and conditions of this order shall bind respondent Richard Kwak, and his agents, heirs, successors, and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: October 12, 2010
Albany, New York

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In the Matter of the Alleged Violations of
Articles 17, 24, and 27 of the Environmental
Conservation Law, Article 12 of the Navigation Law,
and Parts 360 and 750 of Title 6
of the New York Compilation of Codes, Rules and
Regulations by:

**DEFAULT SUMMARY
REPORT**

DEC File No. R5-20070808-760

RICHARD KWAK,

Respondent.

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Proceedings

This proceeding involves the automobile dismantling facility known as Glenville Auto that is owned by Richard Kwak and located at 1130 Route 146A in Ballston Lake, New York. The New York State Department of Environmental Conservation (DEC or Department) staff inspected the facility on December 31, 2006, and again on June 27, 2007, September 30, 2008, and documented the respondent's failures to comply with Articles 17, 24, and 27 of the Environmental Conservation Law (ECL) and Parts 360 and 750 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). The respondent failed to take action to rectify the numerous violations that were spelled out in the notices of violation (NOVs) that staff provided to him at each inspection. On July 14, 2009, staff re-inspected the facility and noted that with few exceptions, the facility remained out of compliance. On May 7, 2010, by certified mail, DEC staff served a notice of hearing and complaint upon Kwak. The certified mail receipt was signed by Richard Kwak or his agent and returned to the Department indicating that he received the notice of hearing and complaint on May 10, 2010.

According to staff, the respondent failed to file an answer to the complaint, and hence, staff moved for a default judgment by motion dated September 9, 2010. The papers that were sent to Chief Administrative Law Judge (CALJ) James T. McClymonds with a copy to Mr. Kwak on September 10, 2010, include: Notice of Motion for Default Judgment and Order; Motion for Default Judgment and Order; Affirmation in Support of Motion for Default Judgment and Order with Exhibits A – E; and Affidavit of Kevin Wood dated September 7, 2010. The exhibits are:

- A – Affidavit of Service of Notice of Hearing and Complaint dated September 9, 2010 with Exhibit 1 – certified mail receipt and letter dated May 7, 2010 from Regional Attorney Christopher Lacombe to Richard Kwak;
- B - Certified Mail Receipt dated May 10, 2010;

- C – Notice of Hearing and Complaint with Exhibits A –T as follows:
- A – Deeds dated March 21, 2000;
 - B – Clifton Park tax map dated March 1, 2009;
 - C – Aerial photograph;
 - D – Photographs of Glenville Auto from County Route 146A;
 - E - Photographs of end of life vehicles on site;
 - F - Vehicle Dismantling Facility Inspection Report dated December 21, 2006;
 - G - Notice of Violation dated February 23, 2007;
 - H - Vehicle Dismantling Facility Inspection Report dated June 27, 2007;
 - I - Vehicle Dismantling Facility Inspection Report dated September 30, 2008;
 - J - Vehicle Dismantling Facility Inspection Report dated July 14, 2009;
 - K - Photographs of spill areas at Glenville Auto without asphalt or concrete surfaces under containers;
 - L - Photographs of batteries, tires, cars, drum in wet areas at Glenville Auto;
 - M – Photographs of piles of waste tires at Glenville Auto;
 - N – Photographs of tires and junk vehicles in wetlands at Glenville Auto;
 - O - Photographs of lack of passable access for firefighting and emergency response equipment at Glenville Auto;
 - P - Photographs of flammable liquids in vicinity of tire piles at Glenville Auto;
 - Q – Photographs of entrance to facility and office at Glenville Auto;
 - R - Photograph of lack of gate to barrier on west side of facility;
 - S - Aerial map of 1999 amendment to freshwater wetland B-31;
 - T - Photographs of fill in wetland area at Glenville Auto;
- D – Affidavit of Kevin Wood dated September 7, 2010; and
- E - Proposed Order.

CALJ McClymonds assigned the matter to me on September 14, 2010. As of the date of this summary report, the DEC Office of Hearings and Mediation Services (OHMS) has not received any reply to staff’s motion from the respondent.

Discussion

Section 622.15 of 6 NYCRR, “Default Procedures” provides, in pertinent part: “(b) The motion for a default judgment . . . must contain (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent’s failure to appear or failure to file a timely answer; and (3) a proposed order.” In his September 9, 2010, affirmation in support of staff’s motion, Regional Attorney Christopher A. Lacombe affirms that “[o]n May 7, 2010, Betty Vann, a secretary in this office, served via U.S. Postal Service Certified Mail with U.S. Postal Service Domestic Return Receipt annexed thereto, a Notice of Hearing and Complaint upon Richard Kwak. . . . Subsequently, this office received the aforementioned U.S. Postal Service Domestic Return Receipt signed by, or on behalf of, the Respondent, Richard Kwak, bearing a delivery date of May 10, 2010. . . . Respondent failed to file an Answer to the Complaint or have any other contact with the Department.” A copy of Betty Vann’s affidavit of service and the certified mail receipts are attached to Mr. Lacombe’s affirmation as Exhibits A and B.

In both the affirmation of Mr. Lacombe and the affidavit of Kevin Wood and the supporting exhibits, the staff describes in detail their repeated efforts to gain the respondent's compliance with the relevant law and regulations. The staff's descriptions of the site and the photographs provided as exhibits portray an array of extremely serious environmental violations that have existed for several years at minimum. Exhibit E to Mr. Lacombe's affirmation is staff's proposed order.

Staff has met the requirements for a default judgment.

Penalty

The staff's uncontested allegations, which are deemed admitted as a result of the default, demonstrate that the respondent has violated multiple regulations at its automobile dismantling facility. More particularly, staff alleges that the respondent:

- 1) failed to submit an annual report to the Department for 2008 and 2009 and failed to submit an annual report to the Department in a timely manner for 2006 and 2007, in continuing violation of ECL § 27-2303(1);
- 2) failed to conduct all fluid draining, removal, and collection activities on asphalt or concrete surface or other surface that allows equivalent protections to surface and groundwater, in continuing violation of ECL § 27-2303(2);
- 3) failed to completely drain, remove, collect and store fluids for appropriate use, treatment or disposal, in continuing violation of ECL § 27-2303(3);
- 4) failed to maintain fluids in appropriate containers for specific waste vehicle fluid; to store fluids in closed containers in good condition; to clearly and legibly mark these containers as to contents; and to maintain them on bermed asphalt or concrete surface or surface that allows equivalent protection to groundwater, in continuing violation of ECL § 27-2303(6);
- 5) failed to maintain lead acid batteries off the ground and covered so as to restrict water from coming into contact with batteries and to maintain them in leak proof containers separately from intact lead acid batteries and to provide for materials to absorb any leakage, in continuing violation of ECL § 27-2303(7);
- 6) failed to keep the number of waste tires off vehicles store on property to less than one thousand or to obtain a permit, in continuing violation of ECL § 27-2303(9) and 6 NYCRR § 360-13.1;
- 7) intentionally released fluids onto the ground or surface water, in continuing violation of ECL § 27-2303(10);
- 8) failed to properly control access to and use of the facility with fencing, gates, signs or natural barriers, in continuing violation of ECL § 27-2303(12);
- 9) failed to ensure the safe handling, processing and storage of residues, including, but not limited to, product left over after an automobile is crushed and parts have been extracted, in such a manner as to prevent off-site migration of run-off, in continuing violation of ECL § 27-2303(14);

- 10) failed to have a contingency plan for the facility in the event of a fire, a spill or release of vehicle waste fluids, or receipt of unauthorized material, in continuing violation of ECL § 27-2303(17);
- 11) failed to maintain records indicating the date upon which an end of life vehicle is received, in continuing violation of ECL § 27-2303(18);
- 12) failed to maintain an operation and maintenance manual on the property, in continuing violation of 360-13.3(a);
- 13) failed to maintain access roads that are passable at all times for fire-fighting and emergency response equipment; failed to have 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; failed to maintain waste tire piles accessible on all sides to firefighting and emergency equipment; failed to eliminate potential ignition sources and remove combustibles as they accumulate; and maintained flammable liquids in vicinity of tire piles, in continuing violation of 6 NYCRR § 360-13.3(c);
- 14) failed to maintain signage at facility's entrance directing visitors to report to facility office and failed to maintain 6-foot fence with locked gate restricting access to facility, in continuing violation of 6 NYCRR § 360-13.3(d);
- 15) failed to maintain records including daily log regarding receipt and removal of waste tires and submit quarterly and annual report to DEC, in continuing violation of 6 NYCRR § 360-13.3(e);
- 16) discharged petroleum in numerous areas of the facility, in continuing violation of Navigation Law § 173.1¹;
- 17) failed to immediately notify the Department of petroleum discharges, in continuing violation of Navigation Law § 175;
- 18) failed to immediately contain petroleum discharges, in continuing violation of Navigation Law § 176;
- 19) discharged petroleum-based wastes and other wastes onto the ground and into an unnamed tributary of the Alplaus Kill, a Class C water of the state, into a Class 2 freshwater wetland B-31, and into groundwater, in continuing violation of ECL § 17-0501;
- 20) dumped and discharged rubbish, fill, waste and petroleum based products into Class 2 freshwater wetland B-31 without a permit, in continuing violation of ECL § 24-0701;
- 21) disposed of solid waste at this facility without a permit to do so, in continuing violation of 6 NYCRR § 360-1.5; and
- 22) failed to submit Notice of Intent or Transfer (NOIT) to DEC to obtain coverage pursuant to the State Pollutant Discharge Elimination System Multi-Sector General Permit No. GP-0-06-002, in continuing violation of 6 NYCRR § 750-1.4(b).

In its complaint, staff provided notice to the respondent that it was seeking an order for a civil penalty in an amount of \$150,000 and an order requiring the respondent to perform the following:

¹ In staff's seventeenth cause of action it alleges that the respondent violated Navigation Law § 183.1 by discharging petroleum. This is apparently a typographical error as the correct citation is Navigation Law § 173(1).

- within 30 days of the issuance of the order, remove all lead acid batteries from the ground of the facility;
- within 30 days of the issuance of the order, store all broken or leaking batteries in a leak proof container which is separate from intact lead acid batteries, with provisions in place to absorb any leakage;
- within 30 days of the issuance of the order, place all lead acid batteries under a cover or tarp;
- within 30 days of the issuance of the order, complete annual report forms for waste fluid disposal for 2008 and 2009;
- within 45 days of the issuance of the order, retain a licensed hauler to remove and transport all on-site waste fluids to an authorized facility for proper recycling or disposal;
- within 60 days of the issuance of the order, erect and maintain fencing, gates, signs or natural barriers to minimize trespass and abandonment of wastes;
- within 60 days of the issuance of the order, retain a licensed hauler to remove all waste tires from the site and transport these tires to a Department-authorized recycling or disposal facility;
- within 60 days of the issuance of the order, retain a licensed hauler to remove all solid waste from the facility and recycle/dispose of at authorized solid waste management facilities;
- within 120 days of the issuance of the order, install an appropriate surface for draining and storing waste fluids; such surface to be made of asphalt, concrete or another material that allows equivalent protections to surface and groundwater;
- cease the processing of vehicles (draining, crushing, etc.) until this pad is installed;
- secure and label all fluids on site;
- remove stored fluids in a timely fashion consistent with applicable laws;
- address all petroleum stained soils on-site through excavation and documented disposal;
- address any petroleum impacted surface water through containment and removal and eliminate source of contamination;
- if needed, assess any impacts to soils, surface water, and groundwater not addressed in the above items;
- within 60 days of the issuance of the order, remove all fill from the wetland and buffer area;
- within 60 days of the issuance of the order, obtain coverage under the general permit for the storm water discharges from his automobile recycling facility; and
- such other and further relief as the Commissioner may deem appropriate.

The staff has documented nearly four years of serious environmental violations at this facility along with repeated communications with the respondent to obtain compliance without bringing an enforcement proceeding. Despite the staff's willingness to give time to the respondent to come into compliance, the respondent has utterly failed to meet these requirements. The conditions at this facility present a potential threat to the community of Ballston Lake based upon the proximity of leaking petroleum and battery acid to tire piles and surface and groundwaters.

ECL § 71-1929 (water violations) provides for penalties of up to \$37,500 per day for each violation of Titles 1-11 and 19 of Article 17. ECL § 71-2303 (wetland violations) provides for a penalty not to exceed \$3,000 for every violation of Article 24. Navigation Law § 192 (petroleum spill) provides for penalties of not more than \$25,000 and if the violation of Article 12 of the Navigation Law is of a continuing nature, each day becomes “an additional, separate and distinct offense.” ECL 71-2703 (solid waste) provides for a penalty not to exceed \$22,500 for each violation and an additional \$22,500 for each day a violation of Article 27 continues. ECL § 71-4003 is a general penalty provision for violations not otherwise addressed in Article 71 of the statute and provides for penalties of \$500 per violation and \$500 for each additional day the violation continues. This statute is applied to the violations of Title 23, Article 27, because no other statute establishes an applicable penalty for such violations. Clearly, based upon the uncontested evidence submitted by staff, the penalties in this matter would quickly add up into the millions of dollars.

DEC Environmental Engineer Kevin Wood, the individual who conducted the four inspections of the facility, has meticulously spelled out the conditions at the site as well as his calculations and rationale for the penalties staff has requested for the violations of Title 23 of Article 27 of the ECL, Part 360 of Title 6 of NYCRR, the Navigation Law, and Articles 17 and 24 of the ECL. I find these recommendations to be reasonable although it is clear (as indicated by Mr. Wood in his affidavit) that a much higher penalty could be ordered if not actually extracted from this respondent.² Because Mr. Wood has appropriately broken down the penalty request per violation with references to the applicable statutes and policies, I see no reason to reiterate the request in detail here. *See*, Wood Affidavit, ¶¶ 5-73. With respect to staff’s request to suspend the bulk of the penalty, I agree with staff that in order to encourage compliance the request for suspension of \$120,000 is appropriate, even though the respondent has provided no reason for leniency.

Each of these penalty provisions of the ECL and Navigation Law also allow for the Commissioner to order injunctive relief. As noted above, staff has requested that the Commissioner order numerous measures to address the violations including the removal of the waste tires, the proper storage of petroleum, batteries, and fluids, establishment of operational plans, identification of materials, and access controls, clean up of the spills and contaminated soils, removal of materials from wetlands, removal of solid waste and liquids from facility, creation of appropriate pad for crushing of cars so as to contain fluids, and the cessation of crushing activities until such pad is constructed. Staff’s requests for injunctive relief address all the appropriate categories based upon the violations, law and policy. However, based upon the respondent’s unwillingness to embark upon the organization and cleanup of the facility as staff has recommended to him for a period of 43 months, it is unlikely that he alone would succeed in such efforts.

In his affidavit, Mr. Wood stated that “[t]his solid waste has been on site from December 21, 2006 until July 14, 2009. . . . Each time I have inspected the facility I have recommended to Respondent that he begin organizing the facility by crushing the junk cars on site, selling the

² I would only bring to staff’s attention that DEE-22, the penalty schedule contained in the Petroleum Bulk Storage Inspection Enforcement policy, is meant for matters in which the respondents agree to settle violations in a consent order. However, it is certainly a logical place to start in developing a penalty amount.

recyclable metals, disposing of the construction and demolition materials at a land fill and properly disposing of waste tires. Respondent's commitment and effort in removing this solid waste material has been, at best, marginal." ¶ 37. Mr. Wood also states that "[r]espondent's facility is highly disorganized. It has a large number of junk cars which should be crushed and recycled. In addition, Respondent's facility has construction and demolition materials on its grounds. Lastly, between 5,000 and 10,000 waste tires are located on the site. Cumulatively, these individual items make the site very disorganized and ultimately noncompliant." ¶ 36.

As noted on the DEC website, "automobile recycling is one of the largest recycling industries in the United States, but without proper waste handling it can cause significant environmental impacts." <http://www.dec.ny.gov/chemical/8505.html>. Accordingly, in 2006, the Legislature enacted Chapter 180 of the Laws of 2006 - Article 27 Title 23: Vehicle Dismantling Facilities. This law expanded the existing solid waste management requirements for these facilities in order to address the generation of vehicle fluids and waste components such as mercury switches, lead-acid batteries, etc. Because these elements can contribute to and cause environmental degradation related to storm water, hazardous waste, air emissions, and petroleum spills, in addition to the solid waste management concerns particularly with respect to waste tires, this law was enacted to address and prevent such impact.

From the documentation produced by staff in its motion for a default judgment, the respondent's facility embodies all of the environmental problems that the Vehicle Dismantling Facilities law endeavored to address. In order to attempt to provide the most effective means of addressing the environmental hazards that exist at this facility, I recommend that the Commissioner order the respondent to retain the services of an environmental engineering firm that will develop a plan for the remediation of this facility including the cleanup of the petroleum spills and any contaminated soils and water. This plan would also require the flagging of the wetland boundaries and specifications for the removal of any solid waste and contamination from freshwater wetland B-31. Upon approval by DEC of this plan, the respondent, under the supervision of the environmental engineering firm he employs and the Department staff would embark on the cleanup of this facility. This is in keeping with the orders that the Department has issued in many matters with respect to petroleum spills. In addition, I agree with staff that pending the construction of a concrete or similar pad to retain fluids, the respondent should be enjoined from crushing more cars. I would strengthen this injunction by recommending that the Commissioner enjoin the crushing of more cars until all drums, batteries, and fluids are cleaned up from the grounds including containment, identification and labeling, and removal. As part of this order, staff must be permitted to continue to access the facility as needed.

Accordingly, I recommend that the Commissioner adopt the staff's recommendations for the penalty and incorporate staff's requests for injunctive relief into an order that also requires the supervisory and planning aspects I suggest as follows:

within 30 days of the issuance of the order, the respondent is to retain the services of an environmental engineering firm that will have access to the facility and prepare a work plan that will be submitted to the Department staff for review and approval and will provide for a site visit to determine the extent of any soil and water contamination. Within 60 days of the service of the order, the work plan

that provides for measures and a schedule to remediate any soil and water contamination and address the source of such contamination shall be submitted to DEC for approval. The work plan will also include a plan to address the numbered measures below and will be submitted to the Department for review and approval;

any contamination will be remediated no later than 120 days from the issuance of the Commissioner's order; upon service of the Commissioner's order, the respondent will cease all car crushing until such time as he has constructed the appropriate containment pad and cleaned up and properly stored, identified and labeled and/or disposed of all the fluids currently on the site and received the Department staff's approval to recommence crushing;

upon service of the Commissioner's order, the respondent will cease the acceptance of all waste tires until such time as he has removed and properly disposed of all the waste tires currently on the facility property via a licensed hauler to an appropriate solid waste or recycling facility and submitted such documentation to the Department; and

the respondent will continue to allow Department staff access to this facility to ascertain the status of the cleanup and remediation.

- 1) within 30 days of the issuance of the Commissioner's order, the respondent shall remove all lead acid batteries from the ground of the facility;
- 2) within 30 days of the issuance of the Commissioner's order, the respondent shall store all broken or leaking batteries in a leak proof container which is separate from intact lead acid batteries, with provisions to be in place to absorb any leakage and arrange for proper transport and disposal of the broken or leaking batteries by a licensed hauler to an approved facility and submit documentation of such disposal to DEC;
- 3) within 30 days of issuance of the Commissioner's order, the respondent shall place all lead acid batteries under a cover or tarp;
- 4) within 30 days of the issuance of the Commissioner's order, the respondent shall complete the annual report forms for waste fluid disposal for 2008 and 2009;
- 5) within 45 days of issuance of the Commissioner's order, the respondent shall retain a licensed hauler to remove and transport all on-site waste fluids to an authorized facility for proper recycling or disposal and submit documentation of such removal and disposal/recycling to the Department;
- 6) within 60 days of issuance of the Commissioner's order, the respondent shall erect and maintain fencing, gates, signs or natural barriers to minimize trespass and abandonment of wastes;

- 7) within 60 days of the issuance of the Commissioner's order, the respondent shall retain a licensed hauler to remove all waste tires from the site and transport these tires to a Department-authorized recycling or disposal facility and submit documentation of such removal and disposal/recycling to the Department pursuant to 6 NYCRR § 360-13.3(e);
- 8) within 60 days of the issuance of the Commissioner's order, the respondent shall retain a licensed hauler to remove all solid waste from the facility and recycle or dispose of the waste at authorized solid waste management facilities and submit documentation of such removal and recycling or disposal to the Department;
- 9) within 120 days of the issuance of the Commissioner's order, the respondent shall install an appropriate containment pad and berm for draining and storing waste fluids made of asphalt, concrete or another surface that allows equivalent protections to surface and groundwater;
- 10) within 10 days of issuance of the Commissioner's order, the respondent shall secure and label all fluids on site;
- 11) the respondent shall remove stored fluids in a timely fashion consistent with applicable laws;
- 12) within 90 days of the issuance of the Commissioner's order, the respondent shall arrange for flagging of the wetland and adjacent area on this facility and submit as part of the work plan, a plan and schedule for removal of all fill from the wetland and regulated adjacent area;
- 13) within 60 days of the issuance of the Commissioner's order, the respondent shall obtain coverage under the general permit for the storm water discharges from the automobile recycling facility.
- 14) within 60 days of issuance of the Commissioner's order, the respondent shall complete a contingency plan and operation and maintenance plan for the facility; and
- 15) within 7 days of the issuance of the Commissioner's order, the respondent shall begin to maintain records indicating the date upon which an end of life vehicle is received pursuant to ECL § 27-2303(18).

Conclusion

The respondent, Richard Kwak, is in default for failure to submit an answer to the staff's notice of hearing and complaint. Deeming the allegations of the complaint as admitted by respondent, he is in violation of the cited provisions of ECL Articles 17, 24, and 27, Parts 360 and 750 of 6 NYCRR, and of the Navigation Law §§ 173, 175, and 176. Based upon the lengthy period of time that has elapsed since the Department staff notified the respondent of the many serious violations at its facility and the respondent's failure to comply with the Department's

directives, the staff's requested penalty of \$150,000 is warranted. I recommend that the Commissioner adopt the staff's request for a suspended penalty of \$120,000 contingent upon the respondent's compliance with the relief directed by the Commissioner as described above. The \$30,000 payable portion of the penalty would be paid by the respondent within thirty days of service of the Commissioner's order.

I recommend that the Commissioner issue an order that requires the respondent to comply with the remedial measures described above. Given the duration of these violations and their severity, I recommend that in the event that the respondent remains non-compliant, the matter should be referred to the District Attorney of Saratoga County or the Attorney General's office for criminal proceedings after the first deadline in the compliance schedule is missed.

/s/

Dated: September 28, 2010
Albany, New York

Helene G. Goldberger
Administrative Law Judge