

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

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 360,

ORDER
DEC Case No.
R7-20150629-75

- by -

A&D AUTO RECYCLING AND SALES, LLC,

Respondent.

This administrative enforcement proceeding concerns respondent A&D Auto Recycling and Sales, LLC's violations of (a) several provisions of ECL article 27, and (b) a 2015 order on consent (R7-20150629-75) (2015 Consent Order) relating to a vehicle dismantling facility located at 40 U.S. Route 11, Central Square, Oswego County, New York (facility). Respondent is the owner and operator of the facility.

Staff of the New York State Department of the Environmental Conservation (Department or DEC) commenced this proceeding by personal service of a notice of hearing and complaint on respondent at the facility on November 7, 2016. Respondent failed to serve or file an answer to the complaint. On December 22, 2017, Department staff served and filed a notice of motion and motion for order without hearing pursuant to 6 NYCRR 622.12. In its papers, Department staff set forth the following six causes of action:

1. Respondent violated Appendix A, paragraph 3 of the 2015 Consent Order by not cleaning all spillage of fluids on-site at the facility, and by not removing and properly disposing of affected soils at the facility within 60 days of the execution of the 2015 Consent Order. This violation continued from February 29, 2016 to December 21, 2017;
2. Respondent violated Appendix A, paragraph 4 of the 2015 Consent Order by failing to send verification of cleanup of the facility in the form of photos, receipts, invoices, or certificates of disposal to the Department within 15 days of completion of each item. This violation continued from March 14, 2016 to December 21, 2017;
3. On or before September 29, 2016, respondent violated ECL 27-2303(2) by failing to clean the surfaces on which fluids were drained;
4. On or before September 29, 2016, respondent violated ECL 27-2303(3) by failing to completely drain all fluids from vehicles for appropriate disposal;

5. On or before September 29, 2016, respondent violated ECL 27-2303(4) by failing to make sure that accepted end of life vehicles are free of leaks; and
6. On or before September 29, 2016, respondent violated ECL 27-2303(10) by failing to prevent fluids from entering surface or ground waters.

Department staff requested a civil penalty in the amount of thirty thousand dollars (\$30,000) for the alleged violations. In addition, Department staff requested that respondent, because of its failure to comply with the 2015 Consent Order, be directed to pay the two thousand dollar (\$2,000) penalty that was suspended pursuant to the 2015 Order on Consent (see Consent Order at 2 § II [penalty suspended to guarantee compliance and to become payable if respondent fails to comply with the order]). Department staff also requested that respondent undertake various remedial actions at the site.

Respondent did not file or serve a response to staff's motion papers. Accordingly, Department staff motion is an unopposed motion for order without hearing (see 6 NYCRR 622.12).

The matter was assigned to Chief Administrative Law Judge (ALJ) James McClymonds. In a ruling dated October 5, 2018 (October 2018 Ruling), Chief ALJ McClymonds granted Department staff's motion for order without hearing on the issue of liability against respondent on the first through fifth causes of action. Chief ALJ McClymonds denied staff's motion with regard to the sixth cause of action and reserved ruling on the requested civil penalty and remedial relief pending a hearing (see October 2018 Ruling at 9-10). I hereby adopt the October 2018 Ruling subject to my comments below

By letter dated February 25, 2019 and supplemental affidavit of DEC Environmental Engineer Nicole Smith, of same date (Smith Supplemental Affidavit), Department staff sought permission to amend its pleading to withdraw the sixth cause of action, amend the duration of the violations and reduce the civil penalty for the first through fifth causes of action. Department staff now seeks: (a) an amended civil penalty of twenty-three thousand dollars (\$23,000) for the first through fifth causes of action; (b) the payment of the two thousand dollar (\$2,000) suspended penalty provided for in the 2015 Consent Order; and (c) remedial relief as detailed in the schedule of compliance which accompanied the motion for order without hearing (see Smith Supplemental Affidavit ¶ 10). Thereafter, the matter was reassigned to ALJ Michele M. Stefanucci, who prepared the attached summary report (Summary Report) which I adopt as my decision in this matter subject to my comments below.

I concur with the determination that Department staff is entitled to a finding of liability on the first through fifth causes of action (see October 2018 Ruling at 5-9). Department staff has provided sufficient proof that respondent violated several provisions of ECL 27-2303, as well as the 2015 Consent Order. Furthermore, as detailed in the summary report of ALJ Stefanucci, because Department staff elected not to pursue the sixth cause of action, an amended civil penalty in the amount of \$23,000 (twenty-three thousand) dollars is authorized and appropriate in the circumstances here.

Pursuant to ¶ 2 of the 2015 Consent Order, a suspended penalty of two thousand dollars (\$2,000) would become due and payable in the event that respondent failed to comply with the terms and conditions of the consent order. As Department staff has established liability (first and second causes of action) for violation of the 2015 Consent Order, the suspended penalty in the amount of two thousand dollars (\$2,000) is due and payable (see October 2018 Ruling at 9).

Department staff requests an order directing respondents to complete several remedial actions (see Motion for Order without Hearing, Schedule A). Department staff has established that it is entitled to clean up of the spillage of all fluids on-site, as well as removal and proper disposal of all affected soils, daily washing of the surfaces upon which fluid draining and collection of fluids is performed, inspection of end of life vehicles for any leaks and clean-up of any such leaks to avoid a release of fluids onto the ground (see October 2018 Ruling at 5-8; Summary Report at 4-5). Furthermore, nothing in this order relieves respondent of its cleanup and disposal obligations set forth in the Schedule of Compliance attached as Appendix A to the 2015 Consent Order that respondent previously executed.

The October 2018 Ruling states that because Department staff's complaint did not charge respondent with a violation of ECL 27-2303(2) for respondent's failure to conduct fluid draining, removal, and collection activities on an asphalt, concrete, or other surface that allows equivalent protections to surface and groundwater or failure to obtain coverage under the SPDES Multi-Sector General Permit (MSGP), Department staff is not entitled to these two items of relief in this order (see October 2018 Ruling at 7, 9). However, I note that the statutory provision (ECL 27-2303[2]) expressly provides that all fluid draining and removal collection activities are to occur on an asphalt, concrete or other surface that allows equivalent protections to surface and groundwater. Accordingly, respondent is obligated to comply with that statutory requirement in the operation of its facility. Similarly, respondent is required to obtain coverage, as appropriate, under the MSGP for Stormwater Discharges Associated with Industrial Activity.¹

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

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 on the first, second, third, fourth, and fifth causes of action is granted.
- II. Based on record evidence, respondent A&D Auto Recycling and Sales, LLC, is adjudged to have violated:
 - A. Appendix A, paragraph 3 of the 2015 Consent Order by not cleaning all spillage of fluids on-site at the facility, and by not removing and properly disposing of affected soils at the facility within 60 days of the execution of the 2015 Consent Order. This violation continued from February 29, 2016 to December 21, 2017.
 - B. Appendix A, paragraph 4 of the 2015 Consent Order by failing to send verification of cleanup of the facility in the form of photos, receipts, invoices, or

¹ The MSGP currently in effect is GP-0-17-004, which became effective March 1, 2018.

certificates of disposal to the Department within 15 days of completion of each item. This violation continued from March 14, 2016 to December 21, 2017.

- C. ECL 27-2303(2), on September 29, 2016, by failing to daily clean the surfaces on which fluids were drained.
 - D. ECL 27-2303(3), on September 29, 2016, by failing to completely drain all fluids from vehicles for appropriate disposal.
 - E. ECL 27-2303(4), on September 29, 2016, by failing to make sure that accepted end of life vehicles are free of leaks.
- III. Respondent A & D Auto Recycling and Sales, LLC, is assessed a civil penalty in the amount of twenty-three thousand dollars (\$23,000) dollars for the violations referenced in paragraph II of this order. In addition, respondent is hereby directed to pay the sum of two thousand dollars (\$2,000) which civil penalty had been suspended under a 2015 order on consent (R7-20150629-75), contingent upon respondent's compliance with the provisions, terms and conditions of the order, and with which provisions, terms and conditions respondent failed to comply. Accordingly, respondent is directed to pay a combined civil penalty of twenty-five thousand dollars (\$25,000).

Within thirty (30) days of service of this order on respondent A & D Auto Recycling and Sales, LLC, respondent shall pay the combined civil penalty of twenty-five thousand dollars (\$25,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The civil penalty shall be submitted to:

Margaret A. Sheen, Esq.
Office of General Counsel
NYS Department of Environmental Conservation – Region 7
615 Erie Boulevard West, 2nd Floor
Syracuse, New York 13204-2400

- IV. Within sixty (60) days of service of this order on respondent A & D Auto Recycling and Sales, LLC, respondent shall clean up the spillage of all fluids on-site, remove and properly dispose of all affected soils, conduct daily washing of the surfaces upon which draining and collection of fluids is performed, and inspect end of life vehicles for any leaks and remedy any such leaks to avoid a release of fluids onto the ground. Verification in the form of photos, receipts, invoices, certificates of disposal shall be submitted to:

NYSDEC – Region 7
Division of Materials Management
615 Erie Boulevard West
Syracuse, New York 13204

Respondent also remains fully subject to the cleanup and disposal obligations set forth in the Schedule of Compliance attached as Appendix A to the 2015 Consent Order which respondent previously executed.

- V. The provisions, terms and conditions of this Order, shall bind respondent A & D Auto Recycling and Sales, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: /s/
Basil Seggos
Commissioner

Dated: Albany, New York
February 27, 2020

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

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 360,

SUMMARY REPORT
DEC Case No.
R7-20150629-75

- by -

A&D AUTO RECYCLING AND SALES, LLC,

Respondent.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Margaret A. Sheen, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.
- No appearance for respondent A&D Auto Recycling and Sales, LLC.

By motion for order without hearing dated December 22, 2017, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent A&D Auto Recycling and Sales, LLC (respondent), for violation of a 2015 order on consent (2015 Consent Order) executed by respondent, and various provisions of ECL 27-2303 at a facility located in the Village of Central Square, Town of Hastings, Oswego County, New York. In a ruling dated October 5, 2018 (October 2018 Ruling), Chief Administrative Law Judge (ALJ) James McClymonds granted the Department's motion for order without hearing finding the following:

1. Respondent violated Appendix A, paragraph 3 of the 2015 Consent Order by not cleaning all spillage of fluids on-site at the facility, and by not removing and properly disposing of affected soils at the facility within 60 days of the execution of the 2015 Consent Order. This violation continued from February 29, 2016 to December 21, 2017 (First Cause of Action).
2. Respondent violated Appendix A, paragraph 4 of the 2015 Consent Order by failing to send verification of cleanup of the facility in the form of photos, receipts, invoices, or certificates of disposal to the Department within 15 days of completion of each item. This violation continued from March 14, 2016 to December 21, 2017 (Second Cause of Action).

3. On September 29, 2016, respondent violated ECL 27-2303(2) by failing to daily clean the surfaces on which fluids were drained (Third Cause of Action).
4. On September 29, 2016, respondent violated ECL 27-2303(3) by failing to completely drain all fluids from vehicles for appropriate disposal (Fourth Cause of Action).
5. On September 29, 2016, respondent violated ECL 27-2303(4) by failing to make sure that accepted end of life vehicles are free of leaks (Fifth Cause of Action).

Chief ALJ McClymonds denied the motion with regard to the sixth cause of action and reserved ruling on the civil penalty and relief requested pending a hearing.

By letter dated February 25, 2019, Department staff sought permission to amend its pleading to withdraw the sixth cause of action and to amend the timeframe of the violations as well as the civil penalty for the first through fifth causes of action (*see* February 25, 2019 letter [February 2019 Letter] from Margaret A. Sheen to Chief ALJ McClymonds). In support of the request, Department staff submitted a supplemental staff affidavit from Nicole Smith, Environmental Engineer, sworn to February 25, 2019, with an amended penalty calculation (Supplemental Smith Affidavit). Department staff now seeks:

- a civil penalty of twenty-three thousand dollars (\$23,000);
- the two thousand dollar (\$2000) suspended penalty provided for in the 2015 Consent Order; and
- remedial relief as detailed in the schedule of compliance which accompanied the motion for order without hearing (*see* February 2019 letter).

The matter was subsequently reassigned to the undersigned.

Department staff's request to withdraw the sixth cause of action and amend the penalty request is granted. I note that respondent will suffer no prejudice from withdrawal of this claim (*see* 6 NYCRR 622.5[b]; *see* February 2019 Letter). In fact, as a result of the request, Department staff's civil penalty has been reduced from thirty thousand dollars (\$30,000) to twenty-three thousand dollars (\$23,000).

As the October 2018 Ruling sets forth the findings of fact and conclusions of law, such will not be repeated herein. Liability has been found on the first through fifth causes of action (*see* October 2018 Ruling at 9). Accordingly, I turn to Department staff's penalty request.

Penalties

Department staff requests that respondent be assessed a civil penalty in the amount of twenty-three thousand dollars (\$23,000) (*see* Supplemental Smith Affidavit ¶¶ 9, 10).

Specifically, staff requests ten thousand dollars (\$10,000) each for the first and second causes of action, and three thousand dollars (\$3,000) for the third, fourth and fifth causes of action (*id.*). Department staff also seeks the two thousand dollar (\$2,000) suspended penalty as provided for in Appendix A, paragraphs 3 and 4 of the 2015 consent order (*see* Memorandum of Law, Exhibit A). Finally, as detailed in the schedule of compliance (Schedule A) which accompanied the motion for order without hearing, Department staff requested that respondent do the following:

- Within sixty (60) days, clean-up all spillage of fluids seen on-site at the facility during the time of inspection. Affected soils must be removed and properly disposed of;
- Immediately, begin washing daily the surfaces upon which draining and collection of fluids is performed;
- Immediately, begin inspecting end of life vehicles that arrive at the facility for any leaks and immediately remedy the leaks to avoid a release of fluids onto the ground;
- Within sixty (60) days, submit an approvable design and plan to construct a concrete pad with berms where the vehicles are to be dismantled to capture spilled fluids and prevent runoff. Within sixty (60) days after receiving Department approval, complete construction of the approved pad;
- Send verification to the Department in the form of photos, receipts, invoices, and certificates of disposal; and,
- Within ninety (90) days, submit a Notice of Intent (NOI) to obtain coverage under the SPDES Multi-Sector General Permit for stormwater discharge associated with industrial activity (GP-0-12-001).

Pursuant to ECL 71-4003, any person who violates ECL 27-2303 shall be liable for a civil penalty of not more than one thousand dollars, and an additional civil penalty of not more than one thousand dollars (\$1,000) for each day the violation continues. In calculating the civil penalty in this matter, Department staff utilized the Department's Civil Penalty Policy (DEE -1) as well as the Solid Waste Enforcement Policy (OGC-8) (*see* Smith Supplemental Affidavit ¶ 4). DEE-1 provides that calculation of the maximum potential civil penalty for all provable violations is the starting point of any civil penalty calculation (*see* DEE-1 IVB). Department staff notes that an appropriate civil penalty is derived from consideration of factors such as the potential for harm and the extent of deviation from the legal requirements (*see* Smith Supplemental Affidavit ¶ 6).

First Cause of Action

Department staff has calculated a maximum civil penalty for the first cause of action in an amount equal to six hundred sixty-one thousand dollars (\$661,000) (*see* Smith Supplemental Affidavit ¶ 7). To arrive at this amount, Department staff multiplied the number of days (661) of the violation by a civil penalty of \$1,000 per day (*id.*).¹

¹ The duration of the violation is February 29, 2016 (60 days from execution of the consent order) until December 21, 2017 (the date of Department staff's affidavit) (*see* October 2018 Ruling at 9).

Second Cause of Action

Department staff has calculated a maximum civil penalty for the second cause of action equal to six hundred forty-seven thousand dollars (\$647,000) (*see* Smith Supplemental Affidavit ¶ 7). To arrive at this amount, Department staff multiplied the number of days (647) of the violation by a civil penalty of \$1,000 per day (*id.*).²

Third – Fifth Causes of Action

Department staff has calculated a maximum civil penalty for the third through fifth cause of action equal to three thousand dollars (\$3,000) (*see* Smith Supplemental Affidavit ¶ 7). To arrive at this amount, Department staff multiplied the number of violations, in this case 3, by a civil penalty of \$1,000 per violation (*id.*). The date of these violations is September 29, 2016 (October 2018 Ruling at 6-7).

In Department staff's supplemental affidavit, staff notes that the maximum penalty in this matter equates to \$1,311,000 (*see* Smith Supplemental Affidavit ¶7). Staff acknowledges that although the violations at issue here are major violations which would equate to 100% of the penalty, Department staff is only requesting 1.5% of the calculated civil penalty, in an effort to ensure that respondent's finances are spent on facility compliance measures (*id.*). Based on the record before me, I conclude that staff's request for a civil penalty in the amount of twenty-three thousand dollars (\$23,000) is authorized.

Pursuant to paragraph 2 of the 2015 Consent Order, a suspended penalty of two thousand dollars (\$2,000) would become due and payable in the event that respondent fails to comply with the terms and conditions of the consent order. As Department staff has established liability (first and second causes of action) for violation of the 2015 Consent Order, the suspended penalty in the amount of two thousand dollars (\$2,000) is now due and payable (October 2018 Ruling at 9).

Finally, based on a review of the record and the October 2018 Ruling, I am also recommending that certain remedial actions be undertaken.

Recommendations

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for order without hearing on the first through fifth causes of action finding that respondent violated:
 - Appendix A, paragraph 3 of the 2015 Consent Order by failing to clean all spillage of fluids and failing to remove and properly dispose of affected soils at

² The duration of the violation is March 14, 2016 until December 21, 2017 (the date of Department staff's affidavit) in the amount of six hundred forty-seven thousand dollars (\$647,000) (*see Matter of A & D Auto Recycling and Sales, LLC*, Ruling at 9, October 5, 2018).

the facility within 60 days of the execution of the 2015 Consent Order (First Cause of Action).

- Appendix A, paragraph 4 of the 2015 Consent Order by failing to send verification of cleanup of the facility in the form of photos, receipts, invoices, or certificates of disposal to the Department within 15 days of completion of each item (Second Cause of Action).
 - ECL 27-2303(2) on September 29, 2016, by failing to daily clean the surfaces on which fluids were drained (Third Cause of Action).
 - ECL 27-2303(3) on September 29, 2016, by failing to completely drain all fluids from vehicles for appropriate disposal (Fourth Cause of Action).
 - ECL 27-2303(4) on September 29, 2016, by failing to make sure that accepted end of life vehicles are free of leaks (Fifth Cause of Action).
2. Directing respondent, within thirty (30) days of service of this order, to pay a civil penalty in the amount of twenty-three thousand (\$23,000) dollars.
 3. Directing respondent, within thirty (30) days of service of this order, to pay the suspended penalty as provided for in the 2015 Consent Order, in the amount of two thousand (\$2,000) dollars.
 4. Directing respondent, within sixty (60) days of service of this order, to clean up the spillage of all fluids on-site; remove and properly dispose of all affected soils; conduct daily washing of the surfaces upon which draining and collection of fluids is performed; and inspect end of life vehicles for any leaks and remedy any such leaks to avoid a release of fluids onto the ground.

Michele M. Stefanucci
Administrative Law Judge

Dated: Albany, New York
February 3, 2020