STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the 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,

- by -

A&D AUTO RECYCLING AND SALES, LLC,

Respondent.

RULING

DEC Case No.
R7-20150629-75

October 5, 2018

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.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that respondent A&D Auto Recycling and Sales, LLC (respondent), violated a 2015 order on consent executed by respondent and several provisions of the statute governing vehicle dismantling facilities (ECL 27-2303) at a facility located in the Village of Central Square, Town of Hastings, Oswego County. Department staff moves for an order without hearing on its October 28, 2016 complaint. For the reasons that follow, Department staff's motion is granted in part and otherwise denied.

I. PROCEEDINGS

Respondent A&D Auto Recycling and Sales, LLC, owns and operates a vehicle dismantling facility located at 40 U.S. Route 11, Central Square, NY 13036 (Village of Central Square, Town of Hastings, Oswego County). Department staff commenced this administrative enforcement proceeding by personally serving an October 28, 2016 notice of hearing and complaint upon respondent at the facility on November 7, 2016 (see 6 NYCRR 622.3[a][3]; see also Affidavit of Personal Service dated Nov. 8, 2016, Department's Memorandum of Law in Support of Staff's Motion for Order Without Hearing [Mem of Law], Exh G).[1] In the complaint,

[1] In its memorandum of law, Department staff states that respondent was also served the notice of hearing and complaint by certified mail. Included in the papers is a copy of a green card indicating that respondent received a mailing on October 31, 2016 (see Mem of Law, Exh F). The papers do not include, however, an affidavit of

Department staff alleges that respondent violated a 2015 order on consent executed by respondent to resolve multiple violations of the ECL at the facility. The complaint also alleges multiple additional violations of ECL 27-2303.[2] The complaint seeks an order holding respondent in violation of the 2015 consent order and the ECL provisions charged, imposing a civil penalty in the amount of $30,000, directing payment of the $2,000 penalty suspended by the consent order, and directing compliance with the schedule of compliance attached to the complaint.

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 on the October 28, 2016 complaint. Accompanying the motion are an affirmation of Margaret A. Sheen, Esq., in support of the motion (Sheen Affirm); an affidavit of Nicole Smith in support of the motion (Smith Aff); a memorandum of law in support of the motion with exhibits (Mem of Law); and an affidavit of service dated December 22, 2017. To date, respondent has not responded to Department staff's motion. Accordingly, staff's motion is being processed as an unopposed motion for order without hearing.

Upon the filing of staff's motion, the matter was assigned to the undersigned Administrative Law Judge (ALJ).

II. FINDINGS OF FACT

The following facts are determinable as a matter of law on this motion for order without hearing, which is the administrative equivalent of a motion for summary judgment under CPLR 3212.

1. Respondent A&D Auto Recycling and Sales, LLC, is a New York domestic limited liability company. Respondent owns and operates a vehicle dismantling facility located at 40 U.S. Route 11 in the Village of Central Square, Town of Hastings, Oswego County, New York (facility). The facility is a "vehicle dismantler" as defined by ECL 27-2301(11) (Smith Aff ¶ 5; Order on Consent Case No. R7-20150629-75 [2015 Consent Order] ¶ 1.)

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certified mail service. Accordingly, I rely only on the personal service of the notice of hearing and complaint for personal jurisdiction over respondent in this matter.

[2] The copy of the October 28, 2016 complaint attached to staff's motion is missing pages 2 and 3 (see Mem of Law, Exh F). In response to my inquiry, counsel for Department staff filed with my office a complete copy of the complaint from staff's file and states that on information and belief, respondent was served the full complaint (see Letter from Margaret A. Sheen, Assistant Regional Attorney, to Chief Administrative Law Judge James T. McClymonds dated April 25, 2018). Counsel further states that the copies of the complaint maintained in her computer file and hard copy file, which are kept in the regular course of business, are not missing pages 2 and 3, and concludes the missing pages in the motion papers was due to a copying or scanning error during the reproduction of those papers for this motion.

I conclude that Department staff has sufficiently established that respondent received the complete complaint in this matter. Accordingly, I need not address staff's alternative request that I treat the motion as a motion for order without hearing in lieu of complaint.

2. A June 15, 2015 inspection of the facility revealed that respondent failed to submit annual reports by March 1 in violation of ECL 27-2303(1); failed to clean the surfaces where fluids were drained on a daily basis in violation of ECL 27-2303(2); failed to verify that accepted end of life vehicles were free of leaks in violation of ECL 27-2303(4); and failed to prepare and implement a facility contingency plan in violation of ECL 27-2303(17). (2015 Consent Order ¶ 8.)

3. In December 2015, respondent executed the 2015 Consent Order to resolve the violations observed at the facility. The Consent Order imposed a payable penalty of $2,000, and a suspended penalty of $2,000 that would become payable in the event respondent failed to comply with the terms of the consent order. The Consent Order also contained a schedule of compliance that required respondent, among other things, to remediate all spillage of regulated fluids at the facility observed during the inspection, and remove and properly dispose of any soil affected by those fluids within 60 days after execution of the order. The schedule of compliance also required respondent 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. The Consent Order became effective December 30, 2015. (See Mem of Law, Exh A.)

4. On January 5, 2016, respondent paid the $2,000 payable penalty (see Receipt, Mem of Law, Exh A). As of December 21, 2017 (the date of the affidavit of staff's witness), however, Department staff had not received from respondent any proof of cleanup or disposal receipts as required by the 2015 Consent Order's schedule of compliance (see Smith Aff ¶ 8).

5. On June 29, 2016, Department staff sent respondent a notice of violation of the 2015 Consent Order (see Smith Aff ¶ 9; Mem of Law, Exh B). In the notice of violation, staff noted that the penalty suspended in the Consent Order was due and payable (see id.).

6. On September 29, 2016, Department staff conducted a site inspection at respondent's facility. During the inspection, staff observed and documented that surfaces on which waste fluids were drained were not cleaned. Staff also observed fluid stained ground surfaces, including on the ground at the entrance of the facility in front of the gate where vehicles were left. Staff further observed an oil sheen on ponded surface water behind the main building at the facility and waste fluids leaking from the garage door into surface water. Staff also noted that waste fluids were not completely drained from vehicles for proper disposal. (See Smith Aff ¶¶ 10 and 12; Vehicle Dismantling Facility Inspection Report dated Sept. 29, 2016, Mem of Law, Exh E; NYSDEC Spill Report Form, Spill No. 1606446, id.).

7. On October 5, 2016, Department staff sent respondent a notice of violation for the violations found during the September 29, 2016 site inspection (see Smith Aff ¶ 11; Mem of Law, Exh D). Subsequently, staff commenced this administrative enforcement proceeding by personally serving the October 28, 2016 notice of hearing and complaint on respondent (see Mem of Law, Exhs F and G).

III. DISCUSSION

A. Standards of Review

Motions for order without hearing under 6 NYCRR 622.12 are governed by the same principles that govern summary judgment motions pursuant to CPLR 3212 (see 6 NYCRR 622.12[d]). A motion for order without hearing will be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant directing judgment as a matter of law in favor of any party (see 6 NYCRR 622.12[d]; CPLR 3212[b]). Likewise, where the motion includes several causes of action, the motion may be granted in part if it is found that some but not all causes of action or defenses are sufficiently established (see 6 NYCRR 622.12[d]; CPLR 3212[e]). Similarly, the existence of a triable issue of fact regarding the amount of civil penalty does not prevent the granting of a motion for order without hearing on the issue of liability (see 6 NYCRR 622.12[f]; CPLR 3212[c]).

On a motion for summary judgment pursuant to the CPLR, the movant must establish its cause of action or defense sufficiently to warrant directing judgment in its favor as a matter of law. The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to meet the parties' burdens. (See Matter of Wilder, Ruling/Hearing Report on Motion for Order Without Hearing at 10, adopted by Order of the Commissioner, Nov. 4, 2004 [citing Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1988), and quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)].)

Thus, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (see id. [citing Cheeseman v Inserra Supermarkets, Inc., 174 AD2d 956, 957-958 [3d Dept 1991]). Ordinarily, once Department staff has made a prima facie showing, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (Cheeseman, 174 AD2d at 957-958). Here, however, respondent has failed to oppose staff's motion. Accordingly, once it is concluded that staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations, it may then be determined whether those claims have been established as a matter of law. If so, Department staff's motion may be granted. (See Matter of Wilder, Hearing Report at 10.)

To carry its burden of making a prima facie showing of its entitlement to summary judgment, Department staff must proffer "sufficient" evidence to support the factual assertions in its complaint (see Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 3 [and cases cited therein]). "Sufficient" evidence is such relevant proof as a reasonable person may accept as adequate to support a conclusion or ultimate fact (see id.). Moreover, a summary judgment motion may be supported by both direct and

circumstantial evidence (see Seelinger v Town of Middletown, 79 AD3d 1227, 1229 [3d Dept 2010]). To establish a prima facie case based upon circumstantial evidence, staff need only show facts and conditions from which the alleged violation may be reasonably inferred (see id. at 1229 [citing Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743, 744 (1986)]). Staff is not required to positively exclude every other possible inference other than those that support respondent's liability (see Schneider, 67 NY2d at 744). Nevertheless, the proof must render inferences of respondent's lack of liability sufficiently remote or technical to enable the fact finder to reach a conclusion based not on speculation, but upon the logical inferences to be drawn from the evidence (see id.; see also Jerome Prince, Richardson on Evidence § 4-303 [Farrell 11th ed 1995]). Staff need only prove that it was "more likely" or "more reasonable" that respondent's conduct caused the violation (Gayle v City of New York, 92 NY2d 936, 937 [1998]; see also New York Telephone Co. v Harrison & Burrowes Contrs., Inc., 3 AD3d 606, 608 [3d Dept 2004]).

B. Respondent's Liability

1. Consent Order Violations

The complaint pleads six causes of action. In its first cause of action, Department staff alleges that as of February 29, 2016 and continuing through the present time, 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 (see Complaint at 4). Appendix A, paragraph 3 of the 2015 Consent Order provides:

> "Within sixty (60) days after execution of this order, all spillage of fluids on-site at the facility viewed during the time of the [June 15, 2015] inspection shall be cleaned up. This includes areas outside near the drainage area and near the front gate. Affected soils must be removed and properly disposed and disposal receipts shall be sent to the Department's Region 7 Office in Syracuse. The release of petroleum is prohibited by Article 12 of the Navigation Law, and spills shall be handled and reported in accordance with section 175 of that law and Department regulation (17 NYCRR Part 32)"

(2015 Consent Order at 8, Mem of Law, Exh A).

In her December 21, 2017 affidavit, Nicole Smith, an Environmental Engineer and trained inspector employed by the Department, attests that her review of the Department's records and a record search reveals that the Department has not received any proof of cleanup or disposal receipts as required by the 2015 Consent Order (see Smith Aff ¶ 8). It is reasonable to infer from respondent's failure to submit proof of clean up or disposal receipts that respondent did not undertake the required clean up. Accordingly, Department staff has made a prima facie showing that respondent violated Appendix A, paragraph 3 of the Consent Order by not cleaning up the property as required within 60 days after execution of the Consent Order. Moreover, staff has made a prima facie showing that the violation continued at least until December 21, 2017, the date of Ms. Smith's affidavit.

In its second cause of action, Department staff alleges that as of March 14, 2016, and continuing through the present time, respondent violated Appendix A, paragraph 4 of the 2015 Consent Order by failing to send certificates of disposal to the Department, among other things. Appendix A, paragraph 4 of the Consent Order required respondent to send verification of the facility's cleanup in the form of photos, receipts, invoices, certificates of disposal or recycling, and so on within 15 days of completion of each item (see 2015 Consent Order at 8, Mem of Law, Exh A). Ms. Smith's affidavit establishes that the Department did not receive any proof of cleanup or disposal receipts from respondent with respect to the 2015 Consent Order (see Smith Aff ¶ 8). Accordingly, Department staff has made a prima facie showing that respondent violated Appendix A, paragraph 4 of the 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. Moreover, staff has made a prima facie showing that this violation also continued at least until December 21, 2017, the date of Ms. Smith's affidavit.

2. Vehicle Dismantling Facilities Act Violations

In its remaining causes of action, Department staff alleges multiple violations of the statute governing vehicle dismantling facilities, ECL article 27, title 23 (as added by L 2006, ch 180).[3] As a "vehicle dismantler" as defined by ECL 27-2301(11), respondent is subject to the requirements of title 23 of ECL article 27 (see Smith Aff ¶ 5; 2015 Consent Order ¶ 1). The alleged violations are based on observations by Department staff during a September 29, 2016 inspection of the facility (see Smith Aff ¶ 10).

In its third cause of action, Department staff alleges that on or before September 29, 2016, and continuing thereafter, respondent violated ECL 27-2303(2) by failing to daily clean the surfaces on which fluids are drained. ECL 27-2303(2) provides that "surfaces [on which fluid draining, removal, and collection activities are conducted] shall be cleaned daily, or more frequently when spillage has occurred, using absorbent materials that are collected and properly disposed of." In her affidavit in support of staff's motion, Ms. Smith, the Department employee who conducted the September 29, 2016 site inspection, attested that surfaces on which waste fluids were drained were not cleaned (see Smith Aff ¶ 12[b]). Ms. Smith supported her affidavit with photographs taken during the inspection that show stained ground surfaces where fluid draining activities were undertaken (see id., Exhs A and B). Ms. Smith also attested that she called a spill into the Department's spill hotline due to the extensive staining and spillage of waste fluids at the site (see id.; see also NYSDEC Spill Report Form, Mem of Law, Exh E). Thus, Department staff has made a prima facie showing that respondent violated ECL 27-2303(2) by failing to clean the surfaces on which fluid draining, removal, and collection activities are conducted at the site.

In its memorandum of law, Department staff argues that respondent also violated ECL 27-2303(2) by failing to conduct all draining, removal, and collection activities on an

[3] Another title 23 governing wireless telephone recycling was added by another act (see L 2006, ch 730).

appropriate surface (see Mem of Law at 7). ECL 27-2303(2) requires that all fluid draining, removal, and collection activities be conducted on an asphalt or concrete surface or other surface that allows equivalent protection to surface and groundwater. This theory of liability, however, was not pleaded in the complaint (see Complaint ¶ 23, Mem of Law, Exh F), and absent a motion to amend the complaint, does not provide a basis for finding liability.

In its fourth cause of action, Department staff alleges that on or before September 29, 2016, and continuing thereafter, respondent violated ECL 27-2303(3) by failing to completely drain all fluids from vehicles for appropriate disposal. ECL 27-2303(3) provides that "[a]ll fluids shall be completely drained, removed, collected, and stored for appropriate use, treatment, or disposal." In her affidavit, Ms. Smith stated that during the September 29, 2016, inspection, she observed that waste fluids were not completely drained from vehicles for proper disposal, and that waste fluid stains were observed on the ground (see Smith Aff ¶ 12[c]). Ms. Smith also offers a photograph taken during the inspection showing a waste fluid stain on the ground (see id., Exh C). Based on this evidence, Department staff has made a prima facie showing that respondent violated ECL 27-2303(3) by failing to completely drain all fluids from vehicles for appropriate disposal.

In its fifth cause of action, Department staff alleges that on or before September 29, 2016, and continuing thereafter, respondent violated ECL 27-2303(4) by failing to make sure that accepted end of life vehicles are free of leaks. ECL 27-2303(4) provides that "[e]nd of life vehicles arriving at the facility shall be inspected upon arrival for leaking fluids and unauthorized waste. Leaks should be remedied or contained to avoid releases of fluids to the environment." In support of this charge, Ms. Smith offers a photograph taken during the September 29, 2016 inspection that shows significant waste fluid staining on the ground at the entrance of the facility in front of the gate where vehicles are left for disposal (see Smith Affid, Exh D). From this evidence, it is reasonably inferable that respondent failed to make sure end of life vehicles left at the facility for disposal were free of leaks and that any leaks were remedied or contained to avoid the release of fluids to the environment. Thus, Department staff has made a prima facie showing that respondent violated ECL 27-2303(4) by failing to make sure that accepted end of life vehicles are free of leaks.

In its sixth cause of action, Department staff alleges that on or before September 29, 2016, and continuing thereafter, respondent violated ECL 27-2303(10) by failing to prevent fluids from entering surface or ground waters. ECL 27-2303(10) provides that "[f]luids shall not be intentionally released on the ground or to surface water." Unlike the remaining subdivisions of ECL 27-2303, subdivision 10 contains the element of "intent." Department staff does not identify, and review of ECL article 27 and the ECL generally does not reveal, a definition of "intentional release" for purposes of subdivision 10. Giving the term its ordinary meaning, an actor acts "intentionally" when the actor acts voluntarily with a desire to cause the consequences of the act, or with the belief that the consequences are substantially certain to result from the act (see e.g. Staples v Sisson, 274 AD2d 779, 781 [3d Dept 2000]; Acevedo v Consolidated Edison Co. of New York, Inc., 189 AD2d 497, 500-501 [1st Dept], lv dismissed 82 NY2d 748 [1993]; see also NY PJI 3:1; Restatement [Second] of Torts § 8A [1965]). Accordingly, to establish a

violation of ECL 27-2303(10), Department staff must prove that respondent voluntarily discharged fluids with the desire to release those fluids to the ground or to surface water, or with the belief that the release to the ground or surface water was substantially certain to result from the discharge.

Intent is usually proved by circumstantial evidence (see Staples, 274 AD2d at 781; see also NY PJI 3:1, comment). However, the circumstantial evidence proffered on staff's motion is insufficient to demonstrate that respondent's intentional conduct is the more likely cause of the discharges to the ground or surface water than other possible causes (see id.; Gayle v City of New York, 92 NY2d at 937; New York Telephone Co., 3 AD3d at 608). Here, Ms. Smith attests that during the September 29, 2016 inspection, she observed an oil sheen on ponded surface water behind the facility's main building, and waste fluids leaking from the garage door into the surface water (see Smith Aff ¶ 12[e]). Ms. Smith also proffers a photograph taken during the inspection showing ponded water with a sheen located adjacent to a building (see Smith Aff, Exh E). This evidence is equally consistent with respondent's negligent or unintentional discharge of fluids to the ground or surface water as it is with respondent's intentional conduct. Staff has supplied no other proof establishing that respondent's voluntary or intentional discharge of fluids to the ground or surface water is the more likely cause of the violation (compare Matter of Jones and Coast Transp. and Recycling, LLC, Hearing Report at 2, 5, adopted by Order of the Commissioner, June 22, 2011). Accordingly, staff has failed to make a prima facie showing of its entitlement to summary judgment on the sixth cause of action.

With respect to the duration of the ECL 27-2303 violations, Department staff alleged that those violations continued after September 29, 2016. However, in support of its motion, staff provides no proof of facility conditions after the September 29, 2016, inspection and, therefore, offers no proof that the violations continued after that day. Accordingly, staff has not made a prima facie showing of continuing violations sufficient for a grant of summary judgment.

C. Penalty and Remedial Relief

In its complaint, Department staff seeks an order (1) imposing a civil penalty of $30,000 as against respondent for the violations charged in the complaint, (2) directing respondent to pay the $2,000 penalty suspended by the 2015 Consent Order, and (3) directing respondent to comply with the schedule of compliance attached to the complaint. With respect to the civil penalty sought, summary judgment cannot be granted at this time. Staff's penalty calculation and justification is premised upon its establishment of the violations charged in all six causes of action and their continuation for the time periods alleged in the complaint (see Smith Aff ¶ 16). As held above, however, staff has not established its entitlement to summary judgment on the sixth cause of action, and has not established that the remaining ECL 27-2303 violations continued for the time period charged in the complaint. Accordingly, the appropriate penalty cannot be evaluated at this time.

With respect to the remedial relief sought by staff, the proposed schedule of compliance would require respondent to construct a concrete pad with berms where vehicles are to be dismantled, and to obtain coverage under the SPDES Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity (GP-0-12-001).[4] As noted above, however, the complaint does not charge respondent for violating ECL 27-2303(2) by failing to conduct fluid draining, removal, and collection activities on an asphalt, concrete, or other surface that allows equivalent protections to surface and groundwater. In addition, the complaint does not charge respondent for failure to obtain coverage under the MSGP. Accordingly, Department staff has not established the bases for these two items of relief contained in the proposed schedule of compliance.

IV. CONCLUSION AND RULING

Based on the foregoing, Department staff's motion for order without hearing is granted in part on issues of liability and otherwise denied.

Department staff has established its entitlement to summary judgment on the issue of respondent's liability for 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.

(2) Respondent violated Appendix A, paragraph 4 of the 2015 Consent Order by failing to send verification of cleanup of the facility in form of photos, receipts, invoices, or certificates of disposal to the Department within 15 days of completion of each item (Second Cause of Action). This violation continued from March 14, 2016 to December 21, 2017.

(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).

[4] I note that the MSGP currently in effect is GP-0-17-004, which became effective March 1, 2018.

This matter will be set down for further proceedings on the violations not established on staff's motion for order without hearing, penalty, and remedial relief.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: Albany, New York
October 5, 2018

Cc: (Via email and regular mail)

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