

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 27 of the Environmental Conservation Law (ECL) of the State of New York, and of Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (6 NYCRR), Part 360 and Part 613 by

**CARRIER SALVAGE & RECYCLING, LLC, and CNY
SCRAP PROCESSING, LLC,**

Respondents.

**RULING ON
MOTION FOR
ORDER WITHOUT
HEARING**

**DEC CASE NO.
R7-20151223-102**

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Margaret Sheen, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation; and
- Shelly Carrier, for respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC.¹

SUMMARY

This ruling addresses a contested motion for order without hearing brought by staff of the New York State Department of Environmental Conservation (DEC or Department). The motion requests a Commissioner's order finding respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC liable for violating ECL 27-0707, ECL 27-2303, ECL 17-1009, 6 NYCRR 360-1.5(a), 6 NYCRR 360-1.7(a), and 6 NYCRR 613-1.9(a), and requiring respondents to perform remedial activities and pay a civil penalty in the amount of \$6,000.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by serving respondents with a notice of hearing and complaint dated June 22, 2016 (*see* motion, exhibit J). Respondents filed an answer dated July 21, 2016, that denied the allegations of the complaint and raised three “affirmative defenses” (*see* motion, exhibit C [answer]).

¹ In referring to respondents, this report will use the entity names as they appear in the Department of State corporate database (*see* motion, exhibit B).

On February 13, 2017, Department staff served respondents with a notice of motion and motion for order without hearing dated the same date (motion) and filed the motion with the Department's Office of Hearings and Mediation Services.² The motion included attached exhibits A through J as follows:

- Exhibit A Tax Map CNY Scrap Processing, LLC, 2411 Wetmore Rd., Branchport, NY 14418-9710;
- Exhibit B NYS Department of State Entity Information for Carrier Salvage & Recycling, LLC, and CNY Scrap Processing, LLC;
- Exhibit C Shelly Carrier affidavit of service dated July 25, 2016, and answer dated July 21, 2016;
- Exhibit D Notice of violation dated January 30, 2014, facility inspection reports dated May 22, 2014, October 1, 2014, November 6, 2014, January 28, 2015, May 21, 2015, November 29, 2016, and related Department correspondence dated June 2, 2014 and October 1, 2014;
- Exhibit E Petroleum Bulk Storage Application for CNY Scrap Processing, LLC signed March 21, 2016 with notice of incomplete application dated July 6, 2016;
- Exhibit F Letter from Nicole Chisholm, Environmental Engineer 1 to Kevin Carrier dated July 29, 2015 regarding removal of C&D debris from freshwater wetlands;
- Exhibit G Cover letter with proposed order on consent dated January 26, 2016;
- Exhibit H Letter from Mindy L. Zoghlin, Esq. (Bansbach Zoghlin P.C. Rochester, New York) dated February 9, 2016, requesting 60 day extension to answer proposed consent order;
- Exhibit I Letter from Margaret Sheen (undated) to Mindy L. Zoghlin, Esq. regarding 60 day extension request; and
- Exhibit J Cover letter, notice of hearing and complaint dated June 22, 2016.

² The motion is denominated as a motion for order without hearing in lieu of complaint, however, Department staff have filed a complaint in this proceeding.

In addition, staff submitted affidavits of service of the motion dated February 13, 2017; a supporting attorney affirmation of Margaret Sheen, Assistant Regional Attorney, dated February 13, 2017 (Sheen Affirm); a memorandum of law; and a supporting affidavit of Nicole Smith, Environmental Engineer, sworn to February 10, 2017 (Smith aff).

By letter dated March 1, 2017 and received by the Office of Hearings and Mediation Services on March 6, 2017, Shelly Carrier, on behalf of respondents, filed a response to staff's motion, attaching respondents' July 21, 2016 answer, and requesting a hearing. Respondents' papers consist of their response to staff's motion and answer to staff's complaint with exhibits A1-A5 and B1-B32.

FINDINGS OF FACT

The facts that are undisputed or are determinable as a matter of law on this motion for order without hearing are as follows (see 6 NYCRR 622.12[e]).

1. Respondent CNY Scrap Processing, LLC (CNY Scrap Processing) is the owner of 14725 State Route 104, Sterling, New York 14418, having acquired the property on May 25, 2011 (the site). The property is classified as a junkyard. The business address of CNY Scrap Processing is 2411 Wetmore Rd., Branchport, NY 14418-9710. (*See* motion, exhibit A.)

Department Notices and Inspections

2. On January 30, 2014, Department staff sent a notice of violation (NOV) to respondent Carrier Salvage & Recycling, LLC (Carrier Salvage & Recycling), Kevin Carrier, 2440 Wetmore Road, Branchport, NY 13111, alleging a violation of ECL 27-2303 for failing to submit a vehicle dismantling facility mandatory annual report for the operating year 2012 by March 4, 2013 (*see* motion, exhibit D, January 30, 2014 NOV).
3. On May 22, 2014, Department staff inspected 14725 State Route 104 in Martville, New York.³ According to the inspection report, the facility name was "Carrier Salvage and Recycling." Kevin Carrier was present. The inspection report noted the following violations: (1) improper draining, removal and collection of fluids in violation of ECL 27-2303(2); (2) improper storage of vehicle fluids in violation of ECL 27-0303(3); failure to store fluids on a bermed surface in violation of ECL 27-2303(6); (4) storage of more than 1,000 waste tires off vehicles in violation of ECL 27-0303(9); (5) failure to have a

³ The parties' papers use 14725 State Route 104, Martville, NY and 14725 State Route 104, Sterling, NY, interchangeably as the address of the CNY Scrap Processing site. Martville is located within the Town of Sterling, New York. The parties do not dispute the location of the CNY Scrap Processing site.

contingency plan in violation of ECL 27-0303(17); (6) failure to submit an annual report in violation of ECL 27-0303(1); and (7) improper handling of solid waste in violation of ECL 27-2303(14). The May 22 inspection report noted under “observations” the presence of “some C&D on-site, generated from dismantling trailers.” (*See* motion, exhibit D, May 22, 2014 inspection report.)

4. Department staff sent respondent Carrier Salvage & Recycling a NOV by certified mail dated June 2, 2014 concerning the May 22, 2014 inspection. The NOV documented five violations including: (1) failure to submit annual reports by March 1 in violation of ECL 27-0303(1); (2) failure to store fluids on a bermed, concrete or equivalent surface in violation of ECL 27-2303(6); (3) illegal storage of more than 1,000 waste tires without a permit in violation of ECL 27-2303(9); (4) failure to prevent fluids from entering ground or surface waters in violation of ECL 27-2303(10); and (5) failure to prepare and implement a contingency plan in violation of ECL 27-2303(17). Staff included a proposed schedule of compliance for Carrier Salvage & Recycling to address the five violations noted in the NOV. (*See* motion, exhibit D, NOV dated June 2, 2014.)
5. Staff inspected the facility on October 1, 2014. The inspection report noted the following continuing violations: (1) illegal storage of more than 1,000 waste tires without a permit in violation of ECL 27-2303(9); and (2) failure to submit annual reports by March 1 in violation of ECL 27-0303(1). Staff cited respondent for a violation of ECL 27-2303(7) related to the storage of lead acid batteries. The inspection report also noted the following: the facility must register the waste oil tank; the facility expected the waste tires and construction and demolition debris (C&D) to be disposed of within 30 days; and a berm had been constructed since the last inspection. (*See* motion, exhibit D, inspection report dated October 1, 2014.)
6. Department staff sent respondent Carrier Salvage & Recycling a NOV on October 1, 2014 that documented three violations including: (1) illegal storage of more than 1,000 waste tires without a permit; (2) failure to submit annual vehicle dismantler reports for 2012 and 2013; and (3) stained soils had not been removed from the site and properly disposed. Staff directed respondents to remove the waste tires at the rate of 1,000 tires per month, submit the annual reports by July 13, 2014, and remove affected soils and provide receipts indicating proper disposal. (*See* motion, exhibit D, NOV dated October 1, 2014.)
7. Department staff inspected the facility on November 6, 2014. The inspection report noted several thousand waste tires remained on site without a permit in violation of ECL 27-2303(9), 50 tons of tires had been removed since the last inspection, the facility had receipts dated October 21, 23, 30 and November 3, 2014, and “Ricelli is planning to pick up piles in the woods within the month.” (*See* motion, exhibit D, inspection report dated November 6, 2014.)

8. Department staff inspected the facility on January 28, 2015. The inspection report did not document any violations. (*See* motion, exhibit D, inspection report dated January 28, 2015.)
9. Department staff inspected the facility on May 21, 2015. The inspection report did not document any violations. The facility name was recorded as “Carrier Salvage/CNY Scrap.” The report noted that 500-600 waste tires remained on site. The tires with rims would go to Weitsman and the others would go to Seneca Meadows. The report also indicated that Department staff would be doing a wetland delineation. (*See* motion, exhibit D, inspection report dated May 21 2015.)
10. On July 29, 2015, Department staff (Nicole Chisholm) sent a letter to Kevin Carrier, Carrier Salvage & Recycling LLC, 14725 State Route 104, Martville, New York 13111. The letter advised Mr. Carrier that staff had completed the wetland delineation and that “a trailer, construction and demolition (C&D) debris and several tires were located in the wetland area and buffer zone at the time of delineation. This material must be removed from the site and properly disposed of by December 1, 2015.” (*See* motion, exhibit F.)
11. On January 25, 2016, Department staff sent respondents a proposed order on consent “pertaining to violations of article 27, title 7” of the ECL regarding the facility at “14725 State Route 104, Sterling, Onondaga County, New York” (*see* motion, exhibit G).
12. Department staff inspected the facility on November 29, 2016 and found no violations. The facility name was noted as “Carrier Salvage & Recycling (aka CNY Scrap Processing, LLC).” The report noted that the trailer mentioned in the consent order had been removed and staff had inspected the PBS tank. (*See* motion, exhibit D, inspection report dated November 29, 2016.)

Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC

13. CNY Scrap Processing was incorporated on June 22, 2011. The address for service of process is: CNY Scrap Processing, LLC, 2411Wetmore Road, Branchport, New York 14418. (Motion, exhibit B, New York State Department of State Division of Corporations Entity Information.)
14. Carrier Salvage & Recycling, LLC was incorporated on September 19, 2005. The address for service of process is Carrier Salvage & Recycling, LLC, 2411Wetmore Road, Branchport, New York 14418. (*Id.*)
15. CNY Scrap Processing operates an automobile junkyard, scrap processing, vehicle dismantler and mobile car crusher facility at 14725 State Route 104, Sterling, New York

14418 (motion, exhibit C, answer dated July 21, 2016 [answer], affirmative defense first and second cause of action at 2-3).

16. Carrier Salvage & Recycling and Kevin Carrier have been in the business of remediating junk scrap yards for 35 years and have been involved with the remediation of the CNY Scrap Processing site at 14725 State Route 104, Martville, New York, since 2011 (response letter to motion for order without hearing dated March 1, 2017 [response to motion], ¶¶ 1-4).
17. Carrier Salvage & Recycling has arranged for waste removal at the site owned by CNY Scrap Processing, including waste tires, fuel oil, and other waste (*see* answer, exhibits B-1 through B-32).
18. Kevin Carrier is the primary operator of 14725 State Route 104, Martville, New York, has been present at every inspection of the CNY Scrap Processing site conducted by Department staff, and is the person with whom Department staff has corresponded regarding alleged violations at the site (*see* motion, exhibits D, E, F, and G).
19. Shelly Carrier is the daily on-site operator of 14725 State Route 104, Martville, New York and represents both Carrier Salvage & Recycling and CNY Scrap Processing (*see* response to motion at 1-2; answer at 1-4; motion, exhibit E [petroleum bulk storage application]).

SUMMARY OF PARTIES' POSITIONS

Department Staff

According to Department staff, respondents operate a vehicle dismantling facility located at 14725 State Route 104, Sterling, New York (the site) (*see* motion, exhibit J, notice of hearing and complaint dated June 22, 2016, ¶¶ 4-6 [complaint]). Staff allege that on or before and during the Department inspections dated May 22, 2014, November 6, 2014, January 28, 2015, and May 21, 2016, and continuing through the present time, respondents violated 6 NYCRR 360-1.5(a) by failing to remove C&D solid waste that had been stored at the site for more than 18 months without a permit; violated ECL 27-2707 and 6 NYCRR 360-1.7(a) by operating a solid waste management facility at the site without a permit; and violated ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register a petroleum bulk storage (PBS) tank with the Department. In addition, staff allege that respondents violated ECL 27-2303(1) by failing to submit an annual report/waste fluids report to the Department by March 1, 2016. (*See* complaint ¶¶ 20-29.)

Respondents

Respondents claim that they are exempt from the requirement to obtain a solid waste management facility permit pursuant to 6 NYCRR 360-12.1(c) because they are an automobile dismantler that is not engaged in handling materials that constitute hazardous waste. Respondents further claim that Carrier Salvage & Recycling and CNY Scrap Processing do not accept construction and demolition debris. (*See* answer, affirmative defense first and second cause of action at 1-2.)

With respect to the third cause of action, respondents claim that the 300 gallon used oil tank on site is now registered and in compliance with 6 NYCRR 613-1.9(a) (*see* answer, affirmative defense third cause of action at 3).

With respect to the fourth cause of action, respondents claim that on July 16, 2016 they submitted the annual vehicle dismantler report to the Department that was required to be submitted on March 1, 2016 (*see* answer, affirmative defense fourth cause of action at 3).

DISCUSSION

Standard of Review

Pursuant to the Department's regulations, "[a] contested motion for order without hearing will be granted if, upon all papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the Civil Practice Rules Law (CPLR)" (6 NYCRR 622.12[d]). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

According to Department precedent, "[s]ummary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law" (*Matter of Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report). Once the moving party has put forward a prima facie case demonstrating the absence of any material issue of fact, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 3-4).

To prevail on its motion, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by offering evidentiary proof in admissible form. Department staff has the initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations.

Liability

Department staff's complaint alleges four causes of actions against respondents Carrier Salvage & Recycling and CNY Scrap Processing. At this point, none of the violations is continuing. Department staff is seeking enforcement for the violations that occurred during the timeframes identified in the complaint. (*See* complaint.)

Respondent Carrier Salvage & Recycling was incorporated in 2005 (motion, exhibit B). Respondent CNY Scrap Processing was incorporated in 2011 (*id.*). Both corporations have the same address for service of process (*id.*). Shelly Carrier filed an answer to Department staff's complaint on behalf of both respondents, using the address 14725 State Route 104 Sterling, New York 13111 (*see* answer). According to Ms. Carrier, CNY Scrap Processing "is an "Automobile Junkyard" and "Scrap Processing Facility" located at 14725 State Route 104, Martville, New York 13111 (*see id.* [factual background]). Cayuga County records list CNY Scrap Processing as the owner of 14725 State Route 104 in the Town of Sterling, New York, the site where the violations alleged in Department staff's complaint occurred (motion, exhibit A).

Initially, Ms. Carrier "denied sufficient information to form a belief" that either respondent was a vehicle dismantler as defined by ECL 27-2301 or subject to laws and regulations governing vehicle dismantling facilities (*see* answer ¶¶ 6-7). She admitted that the site has been operating as a solid waste management facility, but stated she "lacked sufficient information to form a belief" that respondents operated without the requisite permit or as a vehicle dismantler (*id.* ¶¶ 9-10). She also denied Department staff's allegation that Carrier Salvage & Recycling had the same facility address as CNY Scrap Processing (*see* answer ¶ 4). Other statements in her answer and response to the motion conflict with these denials.

The caption of Ms. Carrier's answer, submitted on behalf of both respondents, uses the 14725 State Road address, though it is not clear whether this address was intended to be used for Carrier Salvage & Recycling. In her affirmative defenses, Ms. Carrier asserted that both "[r]espondents operate as an Automobile Junkyard, Scrap Processing, Vehicle Dismantler and Moble [sic] Car Crusher" (*see* answer, affirmative defenses first and second causes of action at 1-2). Exhibits submitted to support her claim that respondents properly disposed of solid waste demonstrate that Carrier Salvage & Recycling was involved with the solid waste disposal operations at the CNY Scrap Processing site. Indeed, more than 30 invoices for solid waste disposal dated between September 30, 2011 and June 30, 2015, submitted with the answer, are addressed to "Carrier" at the same address as the CNY Scrap Processing site (*see* answer, exhibits B2-B33).

Based on the foregoing, the evidence submitted on the motion demonstrates that Carrier Salvage & Recycling is, and was at the time of the alleged violations, involved in operating and

managing the operations of CNY Scrap Processing. Accordingly, a sufficient basis exists in the record to address both respondents' liability for the alleged violations at the site.

First Cause of Action: Disposing of C&D Debris Without a Permit

Department staff allege in their first cause of action that on or before and during the Department inspections commencing on May 22, 2014 through May 21, 2015, and continuing through the date of the complaint, June 22, 2016, respondents failed to remove "construction and demolition debris (C&D) solid waste" from the site that had been stored for a period in excess of eighteen months without a permit (*see* complaint, first cause of action). Considering the papers submitted by Department staff, and viewing the evidence in a light most favorable to respondents, I conclude that Department staff has not established a prima facie case of respondents' liability on this cause of action.

C&D debris is a form of solid waste defined under the Department's regulations as "uncontaminated solid waste resulting from the construction, remodeling, repair, and demolition of utilities, structures and roads; and uncontaminated solid waste resulting from land clearing." (6 NYCRR 360-1.2[b][38].) "Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil, rock, wood (including painted, treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, asphaltic pavement, glass, plastics that are not sealed in a manner than conceals other wastes on the bottom, electrical wiring and components containing no hazardous liquids, and pipe and metals that are incidental to any of the above" (*id.*). Tires are expressly excluded from the definition of C&D debris, even if the tires resulted from the construction, remodeling, repair and demolition of utilities, structures and roads and land clearing (*id.*). This definition makes no mention of waste generated from vehicle dismantling.

The proof offered by Department staff with respect to C&D disposal does not conform to staff's pleadings in the complaint. Ms. Smith states in her affidavit with respect to the alleged storage of C&D debris on-site:

Construction and demolition (C&D) debris, which is considered a solid waste, was stored on-site longer than eighteen (18) months, constituting disposal in accordance with 6 NYCRR 360-1.2(a)(1)-(3) and 360-1.2(b)(164). On May 22, 2014 the Department inspected the facility and observed a dismantled trailer located in the back of the property. Kevin Carrier stated that it had been there prior to Respondents purchasing the property in 2011. The owner was told verbally that all C&D debris stored longer than eighteen (18) months at the Facility needed to be properly removed and disposed of or recycled. On July 29, 2015 the Respondents were informed that a regulated freshwater wetland was

located on their property and regulated activities, including C&D debris within the wetland and the 100-foot adjacent area, was subject to permit requirements and that the C&D debris needed to be removed by December 1, 2015.

(Smith aff, ¶ 5[b]).

Staff conducted the May 22, 2014 inspection pursuant to the provisions of ECL article 27 title 23 regulating vehicle dismantling facilities and prepared a vehicle dismantling inspection report (*see* exhibit D, May 22, 2014 vehicle dismantling facility inspection report). A vehicle dismantler is “any person or entity engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap” (ECL 27-0301[11]). Vehicle dismantlers are not subject to specific time limits with respect to the storage of junk automobiles, but they may not store more than 1,000 waste tires at any one time without a permit (ECL 27-2303[9]), and must submit an annual report to the Department (ECL 27-0303[1]).

The May 22, 2014 inspection report and related June 2, 2014 NOV documented several violations, including the storage of more than 1,000 waste tires without a permit in violation of ECL 27-2303(9) (*see* exhibit D, May 22, 2014 inspection report and June 2, 2014 NOV). The inspection report noted under “observations” the presence of “some C&D on-site, generated from dismantling trailers,” but did not cite respondents for a violation of 6 NYCRR 360-1.5(a), as alleged in the first cause of action (*see id.*). Moreover, the schedule of compliance proposed by staff to address the alleged violations did not include any remedial activities related to the removal of C&D debris (*see id.*).

Department staff re-inspected the facility on October 1, 2014, and sent a letter to Carrier Salvage & Recycling dated the same day updating the status of the June 2, 2014 NOV. Both the letter and the inspection report noted the continued presence of more than 1,000 waste tires on site without a permit in violation of ECL 27-0303(9), but did not mention illegal C&D disposal (*see* exhibit D, vehicle dismantling facility inspection report and letter dated October 1, 2014). Staff inspected the site again on November 6, 2014, documenting that the facility had outstanding NOVs for the storage of more than 1,000 waste tires without a permit and that several thousand tires remained on site (*see* exhibit D, vehicle dismantling facility inspection report and letter dated November 6, 2014). Again, the November 6 inspection report does not mention illegal C&D disposal. In sum, Department staff’s inspection reports and motion papers make little mention of the storage of C&D material on site.

Even assuming without deciding that C&D material was being stored on site, staff has not proffered sufficient evidence to that establish that the period of storage exceeded eighteen months. Staff noted the presence of C&D debris in the May 22, 2014 inspection report and again in the July 29, 2015 letter to Kevin Carrier (*see* motion, exhibit F). Staff advised Mr. Carrier that,

“[a] trailer, construction and demolition (C&D) debris, and several tires were located in the wetland area and buffer zone at the time of the delineation. This material must be removed from the site and properly disposed of by December 1, 2015” (*id.*). No indication exists in the record that staff inspected the facility on or before December 1, 2015. At the time of the next inspection on November 29, 2016, staff did not document any C&D material remaining on site (*see* motion, exhibit D, November 29, 2016 vehicle dismantling facility inspection report).

Inasmuch as the May 22, 2014 inspection noting the presence of C&D debris on site and the July 29, 2015 notification to respondents to remove it are less than eighteen months apart, and respondents came into compliance at an undetermined point subsequent to July 29, 2015 and prior to November 29, 2016, staff have not established a *prima facie* case that respondents violated 6 NYCRR 360-1.5(a) by storing C&D debris for more than eighteen months.

In her affidavit, Ms. Smith attests that Kevin Carrier told her the C&D debris had been on site since 2011. Under the circumstances present here, this hearsay statement is not sufficient to establish that respondents were storing C&D waste for more than 18 months and hold them liable as a matter of law. Ms. Carrier stated in her answer to the complaint that Carrier Salvage & Recycling and CNY Scrap Processing do not accept construction debris and that such debris is generated at the facility during vehicle dismantling and scrap processing operations (*see* answer to complaint at 3). She further stated that during vehicle dismantling and scrap processing, a small portion of residue from the vehicles generates construction debris, including wood floors from school and transportation buses, semi-trailers, van body trucks, motor homes, car trailers, farm equipment, rail road box cars, and campers. Whether this material generated from vehicle dismantling operations constitutes C&D debris within the meaning of 6 NYCRR 360-1.2(b)(38) is not clear from the regulatory definition of C&D debris and was not addressed by Department staff. Thus, triable issues of fact and legal questions concerning the nature of the debris and the length of time it remained on site remain.

I also note that the complaint does not allege that respondents violated ECL 27-2303(9) by storing more than 1,000 waste tires without a permit, notwithstanding staff’s inspection reports and NOV’s concerning alleged violations related to waste tire disposal pursuant to ECL article 27 title 23. Inasmuch as waste tires do not meet the definition of C&D debris under part 360, the first cause of action targeting illegal C&D disposal is not sufficient to encompass the illegal disposal of waste tires as alleged by Department staff in the vehicle dismantler inspection reports and NOV’s. On January 28, 2015, a little more than eight months after Department staff’s May 22, 2014 inspection, Department staff documented that less than 1,000 waste tires remained on site and the facility was no longer in violation of ECL 27-2303(9) (*see* exhibit D, vehicle dismantling facility inspection report dated January 28, 2015). Staff’s inspections on May 21, 2015 and November 29, 2016 similarly documented that the facility was in compliance with ECL 27-2303 (*see* exhibit D, vehicle dismantling facility inspection reports dated May 21,

2015 and November 29, 2016). Thus, triable fact issues exist concerning the basis for staff's allegations related to the storage of C&D debris greater than 18 months.

Second Cause of Action – Operation of a Solid Waste Management Facility Without a Permit

Department staff's allegation that respondents operated a solid waste management facility without a permit is premised on staff's first cause of action that respondents illegally disposed of solid waste (*see* motion, exhibit J, ¶¶ 23-25; *see also* memorandum of law at 9 [discussing violation of ECL 27-0707 and 6 NYCRR 360-1.7[a]). As discussed above, staff have not made a prima facie case that respondents illegally disposed of C&D debris in violation of 6 NYCRR 360-1.5(a). Nor has staff alleged in the complaint any violations of the ECL with respect to the storage of waste tires. Therefore, staff is not entitled to summary judgment on its second cause of action.

Third Cause of Action – Unregistered Petroleum Bulk Storage Tank

PBS tanks must be registered with the Department before they are used (6 NYCRR 613-9). On May 21, 2015, Ms. Smith inspected the facility and observed that the facility had a PBS tank that was not registered with the Department (Smith Aff ¶ 5[c]; *see also* motion, exhibit D, May 21, 2015 inspection report, ¶ 13 [checking compliance but noting "in the process of registering PBS used oil tank"). Following the inspection, Kevin Kemp from the Department's Spills Unit of the Division of Environmental Remediation contacted respondents and provided them with a registration application (*id.*). The tank was in-use and the Department did not receive the registration paperwork from respondents until July 5, 2016, more than one year after the May 2015 inspection (*id.*). The tank was registered on July 6, 2016. Staff's proof demonstrates that the PBS tank at respondents' facility was not registered with the Department from May 21, 2015 through and including July 5, 2016, in violation of 6 NYCRR 613-1.9.

Although respondents categorically "deny sufficient information to form a belief" as to the allegations in paragraphs 11 to 29 of staff's complaint, including the allegations associated with the third cause of action (*see* answer ¶¶ 10-11), respondents do not deny that they failed to register the PBS tank prior to July 6, 2016. Rather, respondents raise as an affirmative defense that the PBS tank is registered and "is now in compliance with 6 NYCRR 613-1.9(a)" (*see* answer, affirmative defense, third cause of action [emphasis supplied]).

Respondents' affirmative defense is in effect an admission that the PBS tank was not registered prior to July 6, 2016. "The failure of a responding party to deny a fact alleged in the moving papers constitutes an admission of fact" (*see Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4; *see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d

539, 544 [1975]). Respondents' general denial of allegations in staff's complaint is not sufficient to overcome their admission that the PBS tank was registered on July 6, 2016, and, by reasonable inference, not registered prior to that date. Therefore, I conclude that Department staff made a prima facie showing that respondents Carrier Salvage & Recycling and CNY Scrap Processing were operating an unregistered PBS tank at the facility from May 21, 2015 to July 6, 2016 in violation of ECL 17-1009(2) and 6 NYCRR 613-1.9. Respondents fail to raise a triable issue of fact and, accordingly, staff is entitled to summary judgment on this issue.

Fourth Cause of Action – Failure to Submit Annual Vehicle Dismantler Report

According to Cayuga County records, CNY Scrap Processing operates an automobile junkyard and scrap processing facility located at 14725 State Route 104 in the municipality of the Town of Sterling, New York (motion, exhibit 2). Ms. Carrier states in her answer that the CNY facility is an "Automobile Junkyard" and "Scrap Processing Facility" located at 14725 State Route 104, Martville, New York 13111 (answer, factual background).

ECL 27-2303(1) requires that any person operating or controlling a facility for the dismantling of end of life vehicles shall submit to the Department an annual report sixty days after the first of January following each year of operation that includes information pertaining to facility operations including, the number of vehicles received at the facility, the number of vehicles crushed and removed from the facility, the number of vehicles stored at the end of the year, the approximate area of the facility used for vehicle storage, and the quantities of waste fluid extracted from vehicles received and disposed (*see* ECL 27-2303[1]).

Ms. Carrier states in her answer that respondents "lacked sufficient information to form a belief" as to the allegations concerning the failure to submit the vehicle dismantler annual report by March 1, 2016 (*see* answer ¶¶ 10-11). She also raises as an affirmative defense to Department staff's fourth cause of action) that respondents submitted the annual vehicle dismantler report on July 16, 2016 (*see* answer, affirmative defense fourth cause of action. This affirmative defense is an admission that the report was more than four months late, but has since been filed.

Respondents' subsequent correction of a violation after the deadline for compliance had passed does not defeat their liability for failing to meet their statutory obligations in a timely manner. I conclude that Department staff's proof presents a prima facie case that respondents Carrier Salvage & Recycling and CNY Scrap Processing violated ECL 27-0303 by failing to submit the annual vehicle dismantlers' report by March 1, 2016, and that respondents fail to raise a triable issue of fact in response. Accordingly, Department staff is entitled to summary judgment on this issue.

Payable Penalty

Department staff seeks a payable penalty of \$6,000 for all four violations alleged in the complaint. The penalty calculation does not include a separate calculation for each violation. Because I am only granting Department staff's motion on two causes of action, I am deferring judgment with respect to the penalty amount.

RULING

Based upon the foregoing, my ruling on Department staff's motion is as follows:

1. Department staff's motion for order without hearing dated February 23, 2017 is granted in part on the issue of liability against respondents Carrier Salvage & Recycling and CNY Scrap Processing for the following violations:
 - a. ECL 17-1009 and 6 NYCRR 613-1.9(a) for failure to register the PBS tank on site; and
 - b. ECL 27-0303 for not submitting its annual vehicle dismantler report by March 1, 2016.
2. Department staff's motion for order without hearing on the first and second causes of action is otherwise denied.
3. I reserve ruling on the civil penalty requested in Department staff's motion for order without hearing until a hearing is held on the remaining issues.

Accordingly, Department staff's motion for order without hearing is granted in part, and denied in part. My office will schedule a call with the parties in the near future to discuss how to proceed in this matter.

/s/

Lisa A. Wilkinson
Administrative Law Judge

Dated: April 25 2017
Albany, New York