STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

Alleged Violations of the Environmental Conservation Law ("ECL") Articles 17, 27 and 71; Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York; and Article 12 of the Navigation Law of the State of New York, by

Richard Locaparra,
d/b/a L & L Scrap Metals,
Respondent.

DEC Case No. 3-20000407-39

FINAL DECISION and ORDER OF THE COMMISSIONER

June 16, 2003

FINAL DECISION AND ORDER OF THE COMMISSIONER

In this administrative enforcement proceeding commenced pursuant to 6 NYCRR Part 622, Department of Environmental Conservation Staff ("Staff") moves for an order without hearing pursuant to 6 NYCRR 622.12 holding respondent Richard Locaparra liable for violations alleged in the three causes of action stated in its complaint and imposing a civil penalty. ALJ Buhrmaster, in his hearing report, recommends, among other things, that respondent be held liable for violations alleged in a portion of the first and third causes of action, that the second cause of action and the remainder of the first and third causes of action be dismissed, that remediation be directed and that a civil penalty in the amount of $7,500 be assessed. For the reasons that follow, I adopt the ALJ's report and recommendations in part.

Liability

I adopt in full the ALJ's "Findings of Fact" and will not repeat them here. In sum, this proceeding involves the discharge of petroleum (oil and gasoline) at respondent's car crushing and scrap metal business in Peekskill, New York. In its complaint, Staff alleged three causes of action: (1) that respondent discharged waste automotive fluids, including oil and gasoline, into the waters of the State in violation of ECL § 17-0501 and 6

NYCRR 703.6; (2) that respondent discharged pollutants into State waters without a SPDES permit in violation of ECL § 17-0803 and 6 NYCRR 751.1; and (3) that respondent discharged petroleum in violation of Navigation Law § 173. Each cause of action alleged that the discharges occurred on two separate occasions, March 14 and March 20, 2000.

In support of its motion for an order without hearing on the entire complaint, Staff relied on a certificate of disposition issued by the Peekskill City Court showing that respondent was convicted of two misdemeanors -- criminal violations of ECL § 71-2710 and ECL § 17-0501 -- resulting from a petroleum spill on March 14, 2000 at respondent's site. Staff contends that respondent's criminal conviction in the Peekskill City Court establishes that the facts alleged here occurred and, therefore, it is entitled to an order without hearing on all three causes alleged in the complaint. Staff took the position that the standard of proof required for a criminal conviction -- "proof beyond a reasonable doubt" -- is more burdensome than the standard involved in this administrative proceeding.

Staff brings this motion for an order without hearing pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and

proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.

The moving party on a summary judgment motion has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])."[1] The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact.[2] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof.[3] The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.[4]

Pursuant to the CPLR, where liability with respect to a particular cause of action is established as a matter of law, but

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[1]Friends of Animals v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979).

[2]See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

[3]See Hanson v Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 (Sup Ct, Oswego County 1968).

[4]See Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975).

triable issues of fact remain concerning the amount or extent of damages, summary judgment may be granted on the issue of liability only.[5] The Department's regulation expressly recognizes this possibility.[6] Similarly, both the CPLR and the regulation provide that where liability is determined with respect to one or more causes of action, but not all, summary judgment may be granted as to the causes of action established as a matter of law, leaving for a hearing the unresolved causes of action for which triable issues of fact remain.[7]

Here, Staff moved for summary judgment on the entire complaint, that is, on both the issue of liability and the issue of remedy (penalty/remediation) on all three causes of action alleged in the complaint. In support of its motion for summary judgment on the entire complaint, Staff relies on respondent's criminal conviction to satisfy all the essential elements of the three charges and the remedy sought. Staff correctly relied on the criminal conviction to establish a portion of the first cause of action.

A party convicted of a crime will, in a subsequent civil proceeding involving the same occurrence, be collaterally estopped from disputing the underlying facts already proven in

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[5]See CPLR 3212(c).

[6]See 6 NYCRR 622.12(f).

[7]See CPLR 3212(e); 6 NYCRR 622.12(d).

the criminal case.[8] For the principle of collateral estoppel, or issue preclusion, to apply, there must be an identity of issue which has necessarily been decided in the prior action, and the party to be estopped must have had a full and fair opportunity to litigate the issue.[9]

In this case, a portion of the first cause of action alleged here was necessarily established in the criminal proceeding. All of the elements of a violation by respondent on March 14, 2000 of ECL § 17-0501 were established beyond a reasonable doubt in the Peekskill City Court. Moreover, respondent had a full and fair opportunity to litigate those issues. Therefore, respondent is collaterally estopped from disputing his violation of the statute in this civil proceeding. Accordingly, I adopt the ALJ's conclusion that respondent violated ECL § 17-0501 on March 14, 2000 and, therefore, that Staff is entitled to judgment as a matter of law on the issue of liability on that portion of the first cause of action.

The third cause of action alleges the violation of Navigation Law § 173, which provides that the discharge of petroleum is prohibited. I adopt the ALJ's determination that Staff made out a prima facie case as to the discharge of

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[8]See S.T. Grand, Inc. v City of New York, 32 NY2d 300 (1973).

[9]See Gilberg v Barbieri, 53 NY2d 285, 291 (1981).

petroleum on March 14, 2000, in violation of Navigation Law § 173, by the detailed descriptions of the spilled petroleum contained in the affidavits submitted in support of the motion. These descriptions were not controverted by respondent in his response to the motion and, therefore, are deemed admitted by respondent. In the alternative, liability for this violation was also established by the facts litigated and necessarily decided in respondent's criminal proceeding. Although respondent was not criminally charged or convicted under the Navigation Law in the criminal proceeding, it is undisputed that the substance respondent was found to have discharged was petroleum. Accordingly, I approve the reasoning of the ALJ with respect to liability on a portion of the third cause of action, and adopt the ALJ's determination that on March 14, 2000, respondent violated Navigation Law § 173.

I also adopt the ALJ's reasoning and conclusion that Staff failed to demonstrate prima facie entitlement to an order without hearing on the second cause of action (the discharge of pollutants to the state's waters without a SPDES permit) and, therefore, Staff's motion for an order without hearing on that cause of action should be denied. As the ALJ noted, Staff produced no evidence that respondent was not issued a SPDES permit. Moreover, Staff's reliance on the criminal conviction is unavailing. Nothing in the record indicates that the lack of a

SPDES permit was litigated and necessarily decided in the criminal proceeding. Therefore, Staff failed to establish entitlement to judgment as a matter of law on the second cause of action.

I also adopt the ALJ's reasoning and conclusion that Staff failed to demonstrate prima facie entitlement to summary judgment on the remainder of the first and third causes of action that alleged ECL and Navigation Law violations on March 20, 2000. Nothing in the affirmation or affidavits submitted in support of the motion indicates that any violations occurred on March 20, 2000. Moreover, violations on March 20, 2000, were not established in the criminal proceeding. Accordingly, I agree that Staff's motion as to the remainder of the first and third causes of action should be denied.

I do not agree, however, that dismissal of the second cause and the remainder of the first and third causes of action is warranted on this record. Summary judgment may be granted to a non-moving party if a search of the record reveals the non-moving party's entitlement to judgment as a matter of law.[10] Here, a search of the record fails to reveal evidence that respondent was issued a SPDES permit or that no violations occurred on March 20. Therefore, the remainder of the first and third causes of action stemming from violations allegedly occurring on March 20, and the

[10]See CPLR 3212(b).

second cause of action alleging violations occurring on both dates, will not be dismissed and are continued.

Civil Penalty and Remediation

By moving for an order without hearing on its entire complaint, Staff carried the burden of establishing prima facie entitlement to summary judgment as a matter of law, not only on liability but also on the penalty sought. However, the record presented here lacks a well documented analysis and relevant evidence supporting Staff's recommended penalty of $110,000, $100,000 of which would be suspended, presumably upon a timely and successful remediation. The Department's Civil Penalty Policy provides that in an adjudicatory hearing, Department Staff should request a specific penalty amount, and should provide an explanation of how that amount was determined, with reference to the potential statutory maximum, the DEC Civil Penalty Policy, any program-specific guidance documents, other similar cases and, if relevant, any aggravating and mitigating circumstances Staff considered.[11]

The DEC Civil Penalty Policy also sets forth various components to be considered by Staff in assessing civil penalties. Many of these components are fact based, including the economic benefit of non-compliance, the gravity of the

[11]NYSDEC, Civil Penalty Policy, IV(1), June 20, 1990.

violation, culpability, violator cooperation, history of non-compliance and ability to pay.[12] Because no information or evidence regarding many of these components was provided in Staff's supporting papers in this case warranting the penalty sought, the ALJ properly declined to grant, as a matter of law, the entire penalty sought. Instead, the ALJ appropriately assessed the $7,500 penalty based upon the record before him. Accordingly, I adopt the ALJ's recommendation with respect to the amount of the penalty.

However, I do not agree with the ALJ that this penalty be allocated to the first cause of action only. As an initial matter, I, like the ALJ, reach no conclusion concerning the Commissioner's authority to assess penalties under Article 12 of the Navigation Law. The issue was not raised by the parties and is not properly before me. Moreover, I do not adopt the suggestion of the ALJ that the third cause of action be considered redundant of the first. This question also was not argued by the parties in this proceeding and is therefore not before me.[13] The penalty assessed in this case is entirely supported and justified by either the ECL §17-0501 or Navigation Law § 173 violations, or both.

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[12]See id.

[13]For similar reasons, I reject the ALJ's conclusion that any "redundancy" provides a basis for dismissing the second cause of action.

Finally, I concur with and adopt the ALJ's recommendations regarding remediation of the site including, but not limited to, the direction that within 30 days of service of a copy of my Final Decision and Order herein, respondent shall submit the interim report described by the ALJ on page 12 of his hearing report. Since the completion date suggested in the ALJ's summary report has already passed, I direct that the site be completely remediated within ninety days after service of a conformed copy of my order on this motion. I also decline to suspend any portion of the penalty assessed. The ALJ recommended such a suspension as an incentive for timely remediation. Recent communications with the parties reveal that timely remediation has not occurred and, accordingly, no further incentive is warranted.

Now therefore, upon due deliberation, it is ORDERED that:

I. The findings of fact in the ALJ's hearing report are adopted in their entirety and are made a part of this Order.

II. Staff's motion for an order without hearing with respect to the first and third causes of action stated in the complaint is granted as they relate to an occurrence on March 14, 2000, and respondent is determined to have violated ECL § 17-0501 and Navigation Law § 173 on that date.

III. Staff's motion for an order without hearing with respect to the second cause of action as it relates to an

occurrence on March 14, 2000 and with respect to the first, second and third causes of action as they relate to an occurrence on March 20, 2000 is denied and these causes of action are continued.

IV. Respondent is assessed a penalty of $7,500.00 for his violations of ECL § 17-0501 and Navigation Law § 173, which sum is to be paid by cashier's or certified check or money order payable to "NYSDEC" thirty (30) days after service of this Order upon respondent or his designated representative.

V. Within thirty days of service on respondent of a conformed copy of this Final Decision and Order, respondent shall:

1. institute, implement, and provide the Department with copies of company policies and procedures that are designed to ensure compliance with the ECL; and

2. in a manner consistent with applicable laws and regulations, either register and protect with secondary containment all petroleum bulk storage tanks on the site or dispose of such tanks off site.

VI. Unless and until appropriate secondary containment structures are approved by the Department and implemented by respondent, respondent shall not accept at the site any salvage vehicles or parts containing liquids and shall not engage in automobile dismantling and/or crushing at the site. Proposals

for appropriate secondary containment structures shall include plans and specifications for handling and storage of parts containing fluids, storage of waste fluid and waste fluid containers, and construction of impervious and protected pads and containment areas suitable for vehicle dismantling and/or crushing.

VII. Respondent shall prepare and submit a comprehensive Pollution Prevention Plan for the site, addressing the handling and management of fluids and waste at the site pursuant to the ECL and the Automotive Recyclers Association Storm Water Guidance Manual, dated September 1996.

VIII. Respondent shall complete a site cleanup within ninety (90) days of receipt of a conformed copy of this Final Decision and Order, and do so in accordance with the requirements of his remedial work plan dated March 5, 2001, which already has been approved by Department Staff. Within 30 days of receipt of this order, respondent shall submit an interim report identifying the plan phases that have been completed, describing activities conducted and findings resulting from the work. Within 30 days of completion of the site cleanup, respondent shall submit to the Department a final report and signed statement, certified and stamped by a professional engineer licensed by the State of New York, that the work was done in a manner required by the work plan. Respondent shall submit, with this documentation, receipts

for disposal of waste, confirming that all contaminated soils, sorbents, and screened materials were transported by a licensed waste hauler to a Department-approved disposal facility as determined appropriate by sample results.

IX. Staff's motion for leave to serve an amended complaint correcting the address of respondent's business as set forth in paragraph "3" of the complaint is granted. Since respondent has not opposed this branch of the motion, paragraph "3" of the complaint is hereby deemed amended to state that respondent's address is: 1009 Lower South Street in the Town of Peeksill, Westchester County, New York. Respondent is not granted leave to serve an amended answer.

X. All communications from the Respondent to the Department in this matter, including the payment of the penalty, shall be made to Jennifer David Hesse, Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 3, 21 South Putt Corners Road, New Paltz, New York, 12561-1696.

XI. The provisions, terms and conditions of this Order shall bind respondent, his agents, servants, employees, successors and assigns and all persons, firms and corporations acting for or on his behalf.

For the New York State Department of
Environmental Conservation

/s/
By: Erin M. Crotty, Commissioner

DATED: Albany, New York
June 16, 2003

TO: Jennifer David Hesse, Esq.
NYSDEC Region 3 - Division of Legal Affairs
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New Paltz, New York 12561-1696

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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

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Alleged Violations of the Environmental Conservation Law ("ECL") Articles 17, 27 and 71; Title 6 of the Compilation of Codes, Rules and Regulations of the State of New York; and Article 12 of the Navagation Law of the State of New York, by

RICHARD LOCAPARRA
d/b/a L&L SCRAP METALS,

Respondent

DEC Case No. 3-20000407-39

HEARING REPORT

- by -

/s/
Edward Buhrmaster
Administrative Law Judge

August 7, 2002

PROCEEDINGS

Department of Environmental Conservation Staff initiated this action with a notice of hearing and complaint, dated May 2, 2001. The Respondent, Richard Locaparra, filed an answer dated May 18, 2001. By papers dated November 20, 2001, Department Staff moved for a summary order with regard to all three of the complaint's causes of action. After a deadline extension to which Department Staff consented, a timely response to the motion, dated January 9, 2002, was filed by the Respondent.

On February 19, 2002, I discussed the pending motion with counsel for the parties: Region 3 assistant attorney Jennifer David Hesse for Department Staff, and Kathleen M. Riedy of Croton-on-Hudson for the Respondent. Subsequent efforts by the parties to settle this matter were unsuccessful, and I had a second call with the parties' lawyers on June 6, 2002. After another unsuccessful attempt at settlement, Department Staff advised me in writing on June 20, 2002, that it was seeking a decision on the pending motion.

POSITIONS OF THE PARTIES

- - Position of Department Staff

Department Staff claims it is entitled to a summary order on the three causes of action in its complaint. These causes of action stem from observations made at the Respondent's automobile dismantling and crushing facility, L & L Scrap Metals, at 1009 Lower South Street in Peekskill,Westchester County. The first cause of action is that the Respondent, in operation of the site, discharged waste automotive fluids, including oil and gasoline, from a car crusher into the waters of the state in violation of Environmental Conservation Law ("ECL") Section 17-0501 and Section 703.6 of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR 703.6). The second cause of action is that the discharge was done without a State Pollutant Discharge Elimination System ("SPDES") permit, in violation of ECL Section 17-0803 and 6 NYCRR 751.1. The third cause of action is that the discharge of petroleum (consisting of oil and gasoline) without a permit was done in violation of Article 12, Section 173 of the state's Navigation Law. The discharges are alleged to have occurred on March 14 and 20, 2000.

Asserting that site cleanup still remains to be completed, Department Staff wants the Respondent to implement a remedial work plan previously submitted on his behalf and approved by

Staff, that will assure the proper removal of contaminated soil. Department Staff also requests assessment of a One Hundred Ten Thousand Dollar ($110,000) penalty: Ten Thousand Dollars ($10,000) payable after issuance of the Commissioner's order, and payment of the remainder permanently suspended provided that the Respondent takes steps identified by Staff to properly clean up the site and prevent future pollution from his business operations.

- - Position of Respondent

The Respondent's answer denied the allegations in the complaint and asserted no affirmative defenses. In response to Department Staff's motion for summary order, the Respondent claimed that no evidence had been submitted that he took any action - - unlawful or otherwise - - on March 20, 2000, one of two dates of the alleged violations, and March 22, 2000, the date he was ticketed by a Department Environmental Conservation Officer ("ECO"). With regard to alleged violations on March 14, 2000, the Respondent claimed the motion should be denied since it is based on a criminal conviction that was being appealed at the time the answer was filed. The Respondent also claimed that Department Staff was misinformed about the substantial site clean-up work he had performed in October 2001. Therefore, he claimed, to the extent Department Staff's motion is premised upon current site conditions, it should be denied because there is a genuine issue of material fact related to the cleanup effort.

- - Amendment of Complaint

Department Staff's complaint indicated incorrectly that the L & L Scrap Metals automobile dismantling and crushing facility is in Harrison, New York, rather than in Peekskill. In moving for a summary order, Staff sought to amend the complaint to correct this inaccuracy, which it attributed to a clerical error. The Respondent did not object to the complaint's amendment, and therefore the motion to amend the complaint is hereby granted.

FINDINGS OF FACT

1. On March 14, 2000, Scott M. Daly, a Department ECO, responded to a complaint regarding an oil spill at L & L Scrap Metals, 1009 Lower South Street in Peekskill. On the premises he observed used tires, batteries, scrap metal, junked cars, scrapped cars, used hot water heaters and other scrap metals. He also noticed a large area surrounding the car compactor that was contaminated by petroleum products. The soil had a black

appearance and a strong petroleum odor.

2. ECO Daly then met with Richard P. Locaparra, who identified himself as owner of the premises, and together they inspected the site conditions. ECO Daly told Mr. Locaparra that no more oil was to be released to the ground.

3. John O'Dee, an environmental engineering technician in the Department's spill prevention and response bureau, also came to the site on March 14, 2000. Mr. O'Dee noticed extensive contamination from petroleum and other automotive waste products on the surface of the soil and on ponded surface water. He also observed many puddles of free product on the ground.

4. Mr. O'Dee determined that the contamination stemmed from operation of a car crushing operation without secondary containment, meaning that automotive waste fluids had not been contained for proper disposal. The lack of secondary containment allowed these fluids to flow freely onto the surrounding soil.

5. During his March 14 inspection, Mr. O'Dee informed Mr. Locaparra that he must stop the car crushing operation immediately and not resume in the absence of secondary containment. Mr. O'Dee also told Mr. Locaparra that he must begin cleanup of the contaminated surface water and soil as soon as possible and that he would be contacted by the Department's Division of Water with follow-up directives.

6. On March 22, 2000, ECO Daly again met with Mr. Locaparra at the site, issuing him two tickets which were the subject of a trial in Peekskill City Justice Court in August, 2001.

7. On August 9, 2001, as a result of the trial, Mr. Locaparra was found guilty of endangering public health, safety or the environment in the fifth degree, a Class "B" misdemeanor, in violation of ECL Section 71-2710. More particularly, it was found that on or about March 14, 2000, with criminal negligence, he engaged in conduct which caused the release of more than 50 gallons or 50 pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to the public health, safety or environment.

8. As a result of the trial, Mr. Locaparra was also found in violation of ECL Section 17-0501, which makes it unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into the waters of the state organic or inorganic matter that shall cause or contribute to a condition in contravention of the Department's standards for water quality and

purity. This violation, an unclassified misdemeanor pursuant to ECL Section 71-1933(1), also occurred on or about March 14, 2000, and also was attributed to the Respondent's criminal negligence.

9. Mr. Locaparra was sentenced to one year of probation, to expire on November 13, 2002, by which date, the court ordered, he is to complete a site cleanup. Mr. Locaparra was also ordered to pay a fine of Seventeen Thousand Five Hundred Dollars ($17,500) to the court by June 10, 2002.

10. By court order, Mr. Locaparra's time to perfect an appeal of his conviction was extended to February 1, 2002. However, the appeal has not been perfected, so there is no possibility of the conviction now being overturned.

11. Department Staff has approved a remedial work plan, dated March 5, 2001, which was prepared on behalf of Mr. Locaparra by Ira D. Conklin & Sons of Newburgh. The plan addresses the removal of petroleum and low-level PCB contaminated soils from defined surface and subsurface locations at the L & L Scrap Metals facility. It involves excavating contaminated soils down to the bedrock shelf, or until acceptable soils are encountered.

12. According to the remedial work plan, site activities were scheduled to begin in May 2001. As of September 25, 2001, when the site was visited by John O'Mara, a Department spills engineer, the surface cleanup outlined in the remedial plan had begun.

13. As of June 6, 2002, when I had my last conference call with the parties' lawyers, site remediation had not yet been completed.

DISCUSSION

A motion for summary order - - referred to in the Department's regulations as a motion for order without hearing - - will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules (CPLR) in favor of any party [6 NYCRR 622.12(d)]. CPLR Section 3212 addresses motions for summary judgment; such motions are granted where a court finds there is no substantial issue of fact in the case and therefore nothing to try.

This case involves three causes of action. All three stem from the alleged discharge of waste automotive fluids, including oil and gasoline, at L & L Scrap Metals, which is owned by the Respondent, Mr. Locaparra. There is no triable issue with regard to liability for the charged violations, nor are there triable issues of fact bearing on the relief to be granted. Therefore, no hearing is required.

- - Liability for Violations

Of the three causes of action, liability has been established for the first and third, but only with regard to violations occurring on March 14, 2000.

The first cause of action is that the Respondent's discharge of waste automotive fluids was in violation of ECL Section 17-0501 and 6 NYCRR 703.6. ECL Section 17-0501 forbids any discharge causing contravention of the state's water quality standards, and 6 NYCRR 703.6 sets effluent limitations for discharges to fresh groundwater, including maximum allowable concentrations for oil and benzene.

The violation of ECL Section 17-0501 is established adequately by the Respondent's conviction after trial on the same charge in the related criminal proceeding. The standard of proof in a criminal trial (beyond a reasonable doubt) is higher than it is in an administrative hearing (the preponderance of evidence), so there is no question as to whether that standard has been met here.

The third cause of action is that the Respondent violated Article 12, Section 173 of the Navigation Law, which prohibits the discharge of petroleum. Even though this violation was not charged in the criminal action, it is adequately demonstrated by the affidavits of Scott Daly and John O'Dee, which are part of Staff's motion papers. On March 14, 2000, ECO Daly noted the black appearance of the soil around the car compactor and the soil's strong petroleum odor. Also on March 14, spills engineering technician O'Dee noted the extensive contamination from petroleum and other automotive waste products on the soil surface and on ponded surface water.
The Respondent has provided no affidavits or other evidence contradicting Staff's description of the site on that date. Therefore, there is no substantive dispute of facts sufficient to require a hearing pursuant to 6 NYCRR 622.12(e).

A prohibited discharge under Navigation Law Section 173 includes "any intentional or unintentional action or omission

resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters." [See definition of "discharge" at Navigation Law Section 172(8).] Also, the "waters" of the state include both bodies of surface and groundwater, whether natural or artificial. [See definition of "waters" at Navigation Law Section 172(18).]

Department Staff did not prove that the petroleum discharge on March 14, 2000, was the result of an intentional act on the part of the Respondent, or that the discharge reached any particular ground or surface water feature, including the Hudson River, which, according to the Respondent's remedial work plan, is a quarter of a mile from the L & L Scrap Metals property. However, such proof is not necessary to prove the Navigation Law violation, since it is enough that the discharge resulted from the Respondent's failure to provide secondary containment, and that the discharge could have contaminated the waters of the state, whether or not it actually did. Courts have taken judicial notice that even when there is "nothing in the record to positively demonstrate" that spilled oil might have flowed through the ground into groundwater, or the nature and extent of the resulting harm, "judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater . . . and thereby cause ecological damage." [See Merrill Transport Co. v. State, 94 A.D.2d 39, 464 (3d Dept., 1983).]

Navigation Law Section 173 does not apply to discharges of petroleum pursuant to and in compliance with the conditions of a federal or state permit. However, the Respondent has not asserted that he had any permit authorizing the discharge observed on March 14, 2000. Had such a permit existed, one would expect this to have been raised by way of an affirmative defense to Department Staff's charge. Because no affirmative defenses were pled by the Respondent, and because the Respondent did not otherwise attempt to raise the exemption for permitted discharges, Staff's motion may be granted with regard to the third cause of action.

The second cause of action is that the Respondent discharged pollutants to the state's waters from an outlet or point source without a SPDES permit, in violation of ECL Section 17-0803 and 6 NYCRR 751.1. Though the lack of a permit is an element of the cause of action, Department Staff produced no evidence that a permit did not exist. Typically, the lack of a permit is demonstrated by an affidavit or testimony of a Department employee who is the custodian of the permit files or, at the

least, has reviewed those files to see if a permit has been issued. It is doubtful that the Department would issue a permit for the type of discharge described in Staff's affidavits. Even so, the lack of a permit is key to the prima facie case that Staff has the burden to establish, and the absence of evidence on this point means that the motion for order without hearing must be denied with regard to the second cause of action.

- - Dates of Violation

While the first and third causes of action are demonstrated in relation to the March 14, 2000 date, separate violations cannot be established for March 20, 2000, the second date identified in Staff's complaint. That a discharge occurred on March 14 is evidenced by Department Staff's affidavits describing blackened soil, a strong petroleum odor, and puddling of petroleum product on that date, even though the act of discharge was not observed. However, while these affidavits provide a vivid description of site conditions on March 14, Staff has provided no evidence regarding site conditions on March 20, and, as the Respondent's counsel argues, there is nothing to suggest that Mr. Locaparra did anything unlawful on that date. In fact, Department Staff's affidavits indicate that on March 14, 2000, the Respondent was told to stop his car crushing operations immediately until secondary containment could be implemented, and to release no more oil onto the ground. If the Respondent did not comply with these instructions, there is no evidence to that effect.

The Respondent is also correct that there is no evidence of a separate violation on March 22, 2000, the date he was ticketed by the ECO. However, while the preface to the complaint alleges that on that date - - as well as on March 14 and March 20 - - Department Staff observed that the Respondent had discharged waste automotive fluids, none of the three causes of action reference March 22. Because the causes of action reference only March 14 and 20, the Respondent's point about March 22, while accurate, is not relevant to the issue of liability.

- - Appeal of Criminal Convictions

Counsel for the Respondent answered the motion by arguing that Department Staff is relying on a criminal conviction that, at the time the answer was filed, was subject to appeal. However, as the Respondent's counsel acknowledged in a subsequent conference call I conducted, the appeal was not perfected, which eliminates any problem the Department might have in relying on the conviction to support its first cause of action.

- - Site Cleanup

The Respondent claims that Department Staff has not accounted for substantial site cleanup that he performed in October 2001, after the last visit referenced in Staff's affidavits, and argues that to the extent Staff's motion is premised upon current site conditions, it should be denied because there is a genuine issue of fact related to the clean-up effort.

In a letter to the criminal court on November 5, 2001, the Respondent's counsel argued that Mr. Locaparra had been making diligent and good faith efforts to remove the contaminated soil from his property as quickly as possible. She attached to the letter manifests confirming that tons of contaminated soil had been shipped to the Albany city landfill at a cost of about Nine Thousand Dollars ($9,000). The letter and attachments were submitted as part of the Respondent's answer to Department Staff's motion.

As of June 6, 2002, the date of my last conference call with the parties' counsel, there was agreement that the site had been only partially remediated; in other words, the work had not been completed. On June 20, 2002, Department counsel informed me that on June 10, 2002, the remedial work Staff is seeking had been incorporated into the terms of the Respondent's probation. Staff counsel also said that Mr. Locaparra was proceeding with that work and his consultant had already submitted technical documents for Staff's review.

Regardless of what the Respondent has done to clean up the site, it does not bar granting summary judgment in favor of Staff on the first and third causes of action, because those causes of action are based on past violations of law, not current site conditions. On the issue of relief, it is not necessary to know how far site cleanup has progressed if the goal of the Department is simply to see that the cleanup is completed. As discussed below, a timely completion of the site's remediation can be ordered by the Commissioner and tied to the permanent suspension of payment of any civil penalties that are assessed in this matter. This would help induce the Respondent to complete corrective actions that at any rate are now required under terms of his probation. As noted above, Department Staff has already approved a remedial work plan, dated March 5, 2001, that was submitted on the Respondent's behalf, and that plan can be referenced in any order that is issued by the Commissioner.

- - Civil Penalties

For the first cause of action, violation of ECL Section 17-0501, the Respondent may be held liable for a civil penalty not to exceed Twenty-Five Thousand Dollars ($25,000) per day pursuant to ECL Section 71-1929(1). Also, for the third cause of action, violation of Navigation Law Section 173, the Respondent may be held liable for a penalty of up to Twenty-Five Thousand Dollars ($25,000) for each offense, pursuant to Navigation Law Section 192.

During a conference call I had with the parties' counsel, Department Staff said that its recommended One Hundred Ten Thousand Dollar ($110,000) penalty could be supported on the theory that the violations continued from day to day, each day constituting a separate, distinct offense. However, as the Respondent's counsel pointed out, the Department's papers provide no notice of such a theory; in fact, in the complaint and the motion for summary order, each of the three causes of action are tied to two separate, non-consecutive dates (March 14 and 20), suggesting that the violations on March 14 did not continue into the next day, but recurred again six days later. The nature of the violations charged - - which involve the discharge of a substance into the environment -- cannot be deemed to continue from day to day without some evidence (absent from this case) that the discharge itself was of a continuing nature. Again, the only evidence of a discharge is based on observations made on March 14, 2000, at which point the Respondent was directed to stop the discharge immediately.

While the first and third causes of action together arguably could warrant a Fifty Thousand Dollar ($50,000) civil penalty, it is not clear whether, as a matter of law, such a penalty can be assessed in this proceeding. That is because Section 192 of the Navigation Law provides that any person who violates any of the provisions of Article 12 of that law (which includes Section 173) "shall be liable to" a penalty of not more than Twenty Five Thousand Dollars ($25,000) for each offense "in a court of competent jurisdiction." This language has been subject to conflicting interpretations by the Department. On the one hand, it has been read to the effect that "[n]o civil penalties can be assessed in an administrative proceeding for violations of the Navigation Law." [See In the Matter of James Wiese, page 9 of the Hearing Report of ALJ Andrew Pearlstein, adopted by the Commissioner in a decision and order dated May 21, 1992.] On the other hand, it has been read to mean just the opposite: that the Commissioner may assess penalties for violations of the Navigation Law, and in the event they are not paid, the

Commissioner may proceed to court to recover them. [See In the Matter of the City of Hudson Industrial Development Agency et al., page 5 of Rulings of ALJ Frank Montecalvo dated August 24, 1998, dismissing an affirmative defense that the Department lacks legal authority to impose civil penalties pursuant to Navigation Law. In this case, the ALJ said Navigation Law Section 192 had to be read and construed with Navigation Law Section 200(1), which provides that an action to recover a penalty "may be brought in any court of competent jurisdiction in this state on order of the Commissioner." This statutory language was recently interpreted as suggesting that "an action to recover certain penalties under the Navigation Law can be based, in the first instance, on an order of the Commissioner determining the amount of such penalty." See In the Matter of Amerada Hess Corporation, page 8 of ALJ Richard Wissler's Ruling on Motion to Clarify Affirmative Defenses, dated February 22, 2002, which references ALJ Montecalvo's ruling.]

Though there is disagreement whether, as a matter of law, the Commissioner may assess a penalty for the third cause of action, I find that assessing a penalty for that cause of action in addition to a penalty for the first cause of action would not be appropriate in this case. That is because both causes of action are the product of the same illegal act, which is the discharge of waste automotive fluids onto the facility property. Therefore, for penalty assessment purposes, the two causes of action should be considered redundant of each other, and a penalty of up to Twenty-Five Thousand Dollars ($25,000) may be assessed for the first cause of action - - violation of the Environmental Conservation Law - - without reaching the question of whether the Commissioner may assess a penalty for the third cause of action - - violation of the Navigation Law - - in this administrative proceeding.

According to the Department's civil penalty policy, Department Staff should provide an explanation for the penalty amount requested, with reference to the potential statutory maximum, the penalty policy itself, any program-specific guidance document, other similar cases, and, if relevant, any aggravating and mitigating circumstances which Department Staff considered. Staff did not provide any such explanation in this case, except to say that its requested penalty is "entirely reasonable" in light of its view of the facts of the case (though no particular facts were specified) and its determination of the statutory maximum penalty that could be assessed. As noted above, I consider Staff's requested penalty to be beyond the statutory maximum penalty that can be assessed in view of what was charged and proved in the motion papers.

Staff's failure to provide an adequate explanation for its requested penalty does not prevent me from making my own recommendation based on the civil penalty policy and certain undisputed facts that are relevant to penalty assessment. For instance, it is established through the criminal conviction that the violation of the ECL was due to the Respondent's criminal negligence, meaning that he failed to perceive a substantial and unjustifiable risk associated with his conduct, constituting a gross deviation from the standard of care a reasonable person would observe in his situation. [See definition of "criminal negligence" in Penal Law Section 15.05]. While it would be more serious if the violation was due to knowing or intentional conduct, the Respondent's criminal negligence still warrants assessment of some penalty, given the control he exercised over site activities and the foreseeability of groundwater contamination in the absence of secondary containment of waste fluids.

Assessment of some penalty is also warranted given the economic benefit the Respondent accrued from operating a car crushing business in the absence of secondary containment. Unfortunately, the amount of that benefit cannot be quantified because proof necessary to do so is absent from Staff's motion papers. There is no evidence even as to how long the Respondent was operating without secondary containment, though, because the violations were incidental to the conduct of his business, one can presume that petroleum and other automotive waste products were being released to the environment for some period before Department Staff, answering a complaint about an oil spill, came to the site on March 14, 2000.

Under the circumstances of this case, I recommend an assessed civil penalty of Seven Thousand Five Hundred Dollars ($7,500), to be assessed in relation to the first cause of action. This recognizes that the Respondent's conduct, while criminally negligent, was not demonstrated to be knowing or intentional, and that the Respondent was able to secure at the least some modest economic benefit by failing to install secondary containment. While there is some demonstration of environmental harm due to soil contamination, there is no indication that the contamination extended beyond the site and cannot be fully remediated. The lack of severe or irremediable environmental harm should be accounted for in the penalty assessment, on the understanding that, in general, maximum penalties should be reserved for the most serious violations of the ECL.

While an assessed penalty of Seven Thousand Five Hundred

Dollars ($7,500) is appropriate in this case, it is also warranted to permanently suspend penalty payment provided that the Respondent completes a timely remediation of the site and takes appropriate steps, identified in DEC Staff's motion papers, to prevent future pollution from his business operations.(The particulars of Staff's requests on these points are contained in an affidavit of Department spills engineer John O'Mara.) The Respondent's meeting these goals - - timely remediation and prevention of future violations - - should be the Department's key concern at this point, given that the Respondent already has been punished criminally for his behavior. Payment of additional penalties regardless of whether timely remediation occurs would not account for the fact that the Respondent already has been fined Seventeen Thousand Five Hundred Dollars ($17,500) for his wrongdoing and has incurred significant costs to remove contaminated soil from his property. Though Department Staff indicates that the Respondent, as part of his probation, is already proceeding with the compliance action Department Staff is seeking, connecting that action to the permanent suspension of the assessed civil penalty provides some additional inducement for the Respondent to get the work done.

Department Staff also proposes that the Respondent be directed to remediate the site as an independent obligation under any order the Commissioner may issue. While Staff requests that such work be done "pursuant to applicable provisions of the ECL," no particular provisions have been cited, and I find none that would authorize what Staff is seeking. On the other hand, there is apparent authority under Navigation Law Section 176(2)(a), which provides that upon the occurrence of a discharge of petroleum, the Department may either clean up and remove the discharge itself "or may, at its discretion, direct the discharger to promptly cleanup and remove the discharge."

Requiring timely remedial action under a Commissioner's order opens the door to additional civil penalties if the order is violated. Such penalties could be sought in an administrative action, freeing the Department from having to seek relief in the context of the criminal proceeding.

- - Disposition of Second Cause of Action

As discussed above, the motion for order without hearing must be denied with regard to the second cause of action because Department Staff did not provide evidence that the Respondent lacked a SPDES permit. Assuming the Department has such evidence, this defect could be cured by remanding this cause of action for a hearing. However, to do so would be wasteful if

proving the charge would not warrant additional relief beyond what is recommended in this report.

The second cause of action stems from the same illegal act as the first and third causes of action, and, as with those causes of action, the Respondent may be held liable for a penalty not to exceed Twenty-Five Thousand Dollars ($25,000) upon proof of the violation. If, as I argue, separate penalties are not appropriate for the first and third causes of action, a separate penalty for the second cause of action is similarly unwarranted. To avoid a hearing that at this point would be pointless in terms of supplementing the appropriate relief, I recommend that the second cause of action be dismissed so the Commissioner can now issue a final order concluding this matter.

CONCLUSIONS

1. On March 14, 2000, the Respondent, in operation of his automobile dismantling and crushing facility, L & L Scrap Metals, at 1009 Lower South Street in Peekskill, New York, discharged waste automotive fluids, including oil and gasoline, from a car crusher into the waters of the state, in violation of ECL Section 17-0501.

2. Also on this date, the Respondent, in operation of the facility, discharged petroleum (consisting of oil and gasoline) to the environment in violation of Section 173 of the Navigation Law.

3. Department Staff is entitled to summary judgment on these violations, which are stated in the first and third causes of action in its complaint.

4. Department Staff has not established a prima facie case for its second cause of action alleging discharge without a SPDES permit in violation of ECL Section 17-0803 and 6 NYCRR 751.1. That cause of action warrants dismissal, though if it is not dismissed, it should be the subject of a hearing.

5. Also warranting dismissal are all allegations of separate violations occurring on March 20, 2000, since there is no evidence to support them.

6. In its prayer for relief, Department Staff has requested an order directing that the Respondent be found in violation of Articles 17 and 27 of the ECL, as well as Article 12 of the Navigation Law. No violation of ECL Article 27, or of the

regulations promulgated pursuant thereto, has been alleged, let alone established.

RECOMMENDATIONS

I make the following recommendations in this matter:

- - Site Remediation

The Commissioner should order the Respondent to undertake steps recommended by Department Staff to complete remediation of his property, based on authority in Navigation Law Section 176(2)(a).

More particularly, consistent with the terms of his criminal probation, the Respondent should be directed to complete a site cleanup by November 13, 2002. This cleanup should be done in accordance with the requirements of the Respondent's remedial work plan dated March 5, 2001, which has been approved by Department Staff.

Within 30 days of receipt of a Commissioner's order, the Respondent should submit an interim report identifying the plan phases that have been completed, describing activities conducted and findings resulting from the work. Within 30 days of completion of the site cleanup, the Respondent should submit to the Department a final report and signed statement, certified and stamped by a professional engineer licensed in New York, that the work was done in a manner required by the work plan. The Respondent should submit with the certification receipts for disposal of waste confirming that all contaminated soils, sorbents, and screened materials have been transported by a licensed waste hauler to a Department-approved disposal facility as determined appropriate by sample results.

- - Civil Penalty

The Respondent should also be assessed a civil penalty of Seven Thousand Five Hundred Dollars ($7,500) in relation to the first cause of action, pursuant to ECL Section 71-1929(1). However, payment of that penalty should be permanently suspended provided that the Respondent completes the site cleanup by November 13, 2002, and, within 30 days of service of an order in this matter, undertakes the following steps recommended by Department Staff to prevent future pollution:

(1) Institution, implementation and provision to the

Department of copies of company policies and procedures that are designed to ensure compliance with the ECL;

(2) Registration and protection with secondary containment, as appropriate, of all petroleum bulk storage tanks on the site, or appropriate disposal of such tanks off site; and

(3) Preparation and submission of a comprehensive pollution prevention plan for the site, addressing the handling and management of fluids and waste at the site pursuant to the ECL and the Automotive Recyclers Association Storm Water Guidance Manual dated September 1996.

Consistent with Department Staff's recommendation, unless and until appropriate structures are approved by the Department and implemented by the Respondent, the Commissioner should insist that the Respondent deny site access to any salvage vehicles or parts containing liquids and not use the site for automobile dismantling or crushing. Proposals for appropriate structures should include plans and specifications for handling and storage of parts containing fluids, storage of waste fluid and waste fluid containers, and construction of impervious and protected pads and containment areas suitable for vehicle dismantling and/or crushing.