STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Causing, Engaging in or Maintaining a Condition or Activity which Presents an Imminent Danger to the Health or Welfare of the People of New York State or which Is Likely to Result in Irreversible or Irreparable Damage to the Natural Resources of the State, Pursuant to Section 71-0301 of the Environmental Conservation Law

- by -

RICHARD MURTAUGH, GAIL MURTAUGH, CROSBY HILL AUTO RECYCLING, and MURTAUGH RECYCLING CORP.,

Respondents.

DEC Case No. 7-0001-03-11

DECISION AND ORDER OF THE ACTING COMMISSIONER

August 26, 2005

DECISION AND ORDER OF THE ACTING COMMISSIONER

Respondents Richard Murtaugh, Gail Murtaugh, Crosby Hill Auto Recycling, and Murtaugh Recycling Corp. (collectively, "respondents") have operated or allowed the operation of auto processing activities at 174-180 Flood Drive, Town of Volney, Oswego County, New York (the "site").

Pursuant to section 71-0301 of the Environmental Conservation Law ("ECL"), Commissioner Erin M. Crotty of the New York State Department of Environmental Conservation ("Department") duly issued a summary abatement order on December 15, 2003 ("SAO"), ordering respondents to immediately stop all auto processing activities at the site. In addition, the SAO directed respondents to prepare restoration and remediation plans for the site and to undertake removal, remediation, and other environmental cleanup-related activities at the site.

Among the documents submitted in support of the SAO was an affidavit dated December 1, 2003 of Richard Brazell, the Department's Region 7 Spill Engineer ("Brazell Affidavit"). Mr. Brazell noted that the operations at the site represented continuing violations of the New York Navigation Law and various articles of the ECL (Brazell Affidavit, ¶ 15). According to Mr.

Brazell, the processing activities at the site were continuing to create irreparable harm to the natural resources of New York State (id.; see also affidavits of Region 7 Solid Waste Engineer Thomas Annal, Environmental Conservation Investigator James L. Masuicca, Environmental Engineering Technician Christine T. Rossi, and Environmental Conservation Investigator Chad E. Donk [addressing, among other things continuous and recurring releases of petroleum, ethylene glycol and other pollutants at the site]).

Respondents were provided an opportunity to be heard and to present proof that the site conditions and the activities they conducted at the site, as described in the SAO, did not violate the provisions of ECL 71-0301. Pursuant to part 620 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), a hearing was conducted before Administrative Law Judge ("ALJ") Molly T. McBride on November 15, 16, 17, and 19, 2004 at the Department's Region 7 office in Syracuse, New York.

ALJ McBride prepared a hearing report, a copy of which is attached ("Hearing Report"). The ALJ recommends that the SAO continue without modification, until all of its provisions have been met by respondents. Based on my review of the record, I concur with and adopt the ALJ's Findings of Fact, Conclusions of

Law and Recommendation as my own, subject to the comments in this decision and order.

The record, including but not limited to videotape of the auto processing activities and photographs of environmental conditions at the site, clearly demonstrates that large amounts of petroleum product and other contaminants and pollutants were regularly released to the environment as a result of respondents' dismantling and crushing of automobiles at the site. Vehicles were dismantled and crushed in a manner that allowed gasoline, radiator fluid and other liquids to spill out on the ground, with no effort made to collect the fluids or otherwise prevent their release to the environment. Furthermore, these discharges were not isolated events but reflected the customary practice of this operation.

At the hearing, Department staff testified to the significant number and pervasive pattern of ongoing releases and spills and the existence of gross contamination at the site (see, e.g., Hearing Transcript ["Tr."], at 57 [contamination around on-site crusher, including oil, gasoline and a red-colored liquid], 90-91 [spills from gas tanks into the environment], 164 [discharges to the environment of radiator fluid], 172 [large pool of petroleum products and anti-freeze in the auto processing

area], 173 [sheen of petroleum contamination from auto processing area to surface waters], 264 [discharges of contaminants onto the ground and into wetland areas], and 373-379 [contamination events observed on videotape of the site]). In addition to visual observation, soil and water sampling further confirmed the presence of environmental contamination at the site.

The record also demonstrates that fill was illegally discharged into federal wetlands on the site, and that solid waste has been disposed throughout the site in contravention of State environmental standards.

ALJ McBride, in the Hearing Report, addresses the relationship of respondents to the site and the activities that were conducted (see Hearing Report, at 9). For example, as the record shows, respondent Gail Murtaugh is the owner of the property (see, e.g., Tr. at 589), and is the owner of and doing business as Crosby Hill Auto Recycling at the site (see Tr. at 603). Crosby Hill Auto Recycling, through its counsel, admitted that its activities on the site resulted in releases which were in violation of the law (Tr. at 102; see also Tr. at 210). Respondent Richard Murtaugh has conducted auto processing activities by himself or through Murtaugh Recycling Corp. and Crosby Hill Auto Recycling at the site for a number of years

(see, e.g., Tr. at 590 [oversaw the operations at the site], 613-615 [personally conducted activities at the site], 662). Respondent Murtaugh Recycling Corp. conducted auto crushing activities at the site (see, e.g., Tr. at 613) and previously executed an order on consent/stipulation to address its operation of an unpermitted solid waste management facility at the site (see Respondent Exhibit 20, which Richard Murtaugh signed in his capacity as president of Murtaugh Recycling Corp.).

The record confirms the existence of a multitude of environmental violations relating to auto processing activities at the site. For example, New York's Navigation Law prohibits the discharge of petroleum (Navigation Law § 173) and requires any person responsible for causing the discharge to notify the Department no later than two hours after the discharge occurs (id. § 175). Respondents failed to notify the Department of the numerous petroleum spills (see Tr. at 165) caused by their activities. In addition, no evidence was presented that respondents undertook any immediate measures to contain the discharges, as required by Navigation Law § 176.

ECL article 17 prohibits the discharge of pollutants to the waters of the State from any outlet or point source without a state pollutant discharge elimination system permit (see ECL

17-0803). Respondents had no permit that authorized the discharges from their onsite activities to the waters of the State.

With respect to respondents' handling of solid waste, ECL article 27 and the regulations promulgated pursuant thereto (see 6 NYCRR part 360) establish requirements that govern the disposal of solid waste. The record demonstrates that respondents disposed solid waste throughout the site. Respondents had no permit for such on-site disposal and were operating an unpermitted solid waste management facility in violation of applicable legal requirements.

ECL article 37 provides that no person shall release to the environmental substances that are hazardous or acutely hazardous to public health, safety or the environment in contravention of the rules and regulations promulgated by the Department (see ECL 37-0107). Such substances were routinely released at the site and respondents failed to notify the Department of the releases as required by law (see, e.g., Tr., at 162-165). Respondents did not hold any permit authorizing such releases. Furthermore, respondents failed to implement measures to contain or eliminate the releases of hazardous substances.

Prior to the hearing, respondents, by motion dated October 29, 2004, moved to vacate or modify the SAO. Respondents argued that the SAO should be vacated because of deficiencies in service of the SAO and that the statutory criteria for issuance of an SAO was not met. In the alternative, respondents argued that the SAO should be modified to eliminate the requirement for a site investigation, to eliminate any requirement for a federal wetland delineation, investigation or remediation, and to eliminate the prohibition on automobile processing at the site as long as certain conditions were met.

The ALJ denied respondents' motion in its entirety (see Hearing Report, at 3-8). Upon review of the record, including but not limited to the legal analysis presented by the ALJ in the Hearing Report, I hereby affirm the ALJ's denial of respondents' motion to vacate or modify the SAO.

NOW, THEREFORE, having considered these matters and being duly advised, it is ORDERED that:

I. Respondents Richard Murtaugh, Gail Murtaugh, Crosby Hill Auto Recycling, and Murtaugh Recycling Corp. have violated the New York State Navigation Law by discharging petroleum and petroleum products at the site, by failing to make the required

notifications, and by failing to immediately contain such discharges, and have violated articles 17, 27 and 37 of the Environmental Conservation Law and the regulations promulgated thereto in releasing and discharging hazardous substances and other pollutants and contaminants at the site and in disposing of solid waste on the site.

II. The summary abatement order is continued without modification, until all of its provisions have been met by respondents.

III. This matter is remanded to Department staff for further action in accordance with the ALJ's Hearing Report and this decision and order.

IV. All communications from respondents to the Department concerning this decision and order shall be made to Benjamin J. Conlon, Esq., Office of General Counsel, Division of Environmental Enforcement, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

V. The provisions, terms and conditions of this decision and order shall bind respondents, their successors, heirs and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By:_____

Denise M. Sheehan
Acting Commissioner

Albany, New York
August 26, 2005

To: Crosby Hill Auto Recycling (VIA CERTIFIED MAIL)
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DEC Case # R7-0001-03-11

HEARING REPORT

-by-

_____/s/_____

Molly T. McBride
Administrative Law Judge

BACKGROUND

Pursuant to Environmental Conservation Law (ECL) section 71-0301, Commissioner Erin M. Crotty of the New York State Department of Environmental Conservation (DEC or Department) issued a Summary Abatement Order (Order) on December 15, 2003. The respondents Richard Murtaugh (Murtaugh), Gail Murtaugh, Crosby Hill Auto Recycling (Crosby Hill) and Murtaugh Recycling Corp. (MRC) were given the opportunity to be heard and to present proof that the conditions and activities alleged in the Order did not violate the provisions of Title 3 of Article 71 of the ECL. ECL 71-0301 states that "whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgment, presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources" and it appears prejudicial to the interests of the people to delay action until a hearing can be held, the commissioner may order to discontinue or abate such activity.

Respondents appeared for the hearing on November 15, 2004[1] with counsel Richard J. Brickwedde, Esq. Department Staff appeared by Benjamin J. Conlon, Esq. from the Department's Office of General Counsel, Division of Environmental Enforcement.

Respondent Gail Murtaugh owns property located at 174-180 Flood Drive, Volney, New York (site) and Gail Murtaugh operates or allows the operation of an auto processing/scrap yard at that site under the name Crosby Hill. Department Staff has alleged that respondent Murtaugh is the chairman or chief executive officer of MRC and that Murtaugh and/or MRC have been conducting car processing activities at this site also, including operating a mobile car crusher. This site was under investigation by Department Staff since May, 2002. Department Staff allege that during the investigation of the site, prior to the issuance of the Order, they witnessed car processing activities that caused numerous spills of gasoline, oil, ethylene glycol and other pollutants into the environment at the site. Department Staff also alleges that respondents caused five to seven feet of fill, including metal waste, to be placed in a federal wetland area, making it an unpermitted solid waste landfill. The U.S. Army Corps of Engineers has confirmed this, according to Department Staff. The investigation by Staff included surveillance at the site. Video tapes of the surveillance were provided to the Commissioner for her review prior to the execution of the Order. Two search warrants were executed at the site, one in June, 2002 and the second in October, 2003. Sampling of the soil at the site as part of the second warrant execution revealed what the Department classified as "substantial contamination in both the groundwater and soil".

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[1]The statute directs that a hearing on a Summary Abatement Order shall be held within 15 days of the issuance of the order. The hearing was adjourned beyond that time limit by consent of all parties.

The Department sought the Order because the past and continuing operations at the site "is a significant source of continuing contamination that is causing ongoing irreparable damage to the natural resources of the State". Commissioner Erin M. Crotty executed the Order on December 15, 2003. The respondents were ordered to immediately stop all car processing activities at the site and they did. The Order also ordered the respondents to take other actions related to the site. Those matters will be addressed in detail below.

APPLICABLE REGULATORY PROVISIONS

6 NYCRR 620.2(a) provides that a summary abatement order may be issued by the commissioner "whenever the Commissioner finds, after an investigation, that any person is causing, engaging in or maintaining a condition or activity which, in the judgment of the commissioner:

> (1) presents an imminent danger to the health of welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources; and
>
> (2) relates to the prevention and abatement powers of the commissioner in that the condition or activity pertains to or affects any of the objectives or goals of the Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department; so that it appears to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided." [6 NYCRR §620.2(a)(1), (2); see also ECL §71-0301]

Part 620 provides that any respondent be served with a written summary abatement order stating the grounds upon which the order is based [6 NYCRR §620.2(b)] and giving notice of a hearing. [6 NYCRR §620.3(a)]. The hearing is held before a hearing officer designated by the commissioner, and whose job it is to create a hearing record and to "make a report to the commissioner setting forth the appearances, the relevant facts and arguments presented at the hearing, findings of fact and conclusions of law, a recommendation as to whether the order should be continued, modified or vacated and the reasons for this recommendation." [6 NYCRR §620.3(d)].

New York's summary abatement statute was mandated by the federal Clean Air Act that requires states to have emergency powers similar to those powers the Environmental Protection Agency has in the Clean Air Act. New York's summary abatement statute and implementing regulations place the burden of proof on the respondent party to prove that the complained of condition or activity does not come within the provisions of the statute [6 NYCRR 620.3(b)].

MOTION

1) Vacate order

Respondents, by motion dated October 29, 2004 moved to modify or vacate the Order. Respondents asked that the Order be vacated based on the following: (1) because the papers that were presented to the Commissioner for her review with the proposed Order were not served on respondents' attorney with the Order when it was served; (2) the Order was signed 19 months after the first search warrant and almost two months after the second search warrant, therefore, it "was a subterfuge to attempt to gather substantive data to support the criminal proceeding that the DEC was lacking and does not meet the statutory criteria for issuance of an Order".

(1) Respondents' counsel argues that the Order should be dismissed because the documents presented to Commissioner Crotty in support of the Order were not served with the Order. Part 620 of 6 NYCRR dictates the procedure for issuance of a Summary Abatement Order. Part 620 does not say that all supporting documents must be served on the respondents with the Order. In fact, the procedures are quite liberal with regards to the issuance of the Order. It may even be served telephonically, if necessary. 6 NYCRR 620.2(b). I agree that DEC Staff should have served the supporting documents sooner than they were served here, which was several months after the Order was served. The supporting documents should be made available to a respondent as soon as possible so that a respondent can prepare for the hearing, especially since the respondent has the burden of proof. I have no explanation from Staff for its failure to serve the supporting papers earlier in the process and hopefully, it was an isolated incident that will not occur again. More importantly, there was no prejudice to the respondents. If necessary, the hearing would have been delayed to allow respondents more time to review the supporting documents. Respondents did not request more time or allege any prejudice.

(2) The respondents also seek the dismissal of the Order based upon the argument that the Department was at the site in June, 2002 and did not seek an Order then, and that the Order was not issued until 2 months after the second search warrant was executed, so therefore the immediacy was not present that warrants a summary abatement order. If the Department sought an Order based on conditions and acts from only June, 2002, then I would agree with respondents that the immediacy is not present that warrants a summary abatement order. However, the basis for the December, 2003 Order was the conditions that existed at that time, based upon surveillance that took place over several weeks in October, 2003 as well as information gathered during the execution of a search warrant in October, 2003.

The Commissioner was provided with affidavits from Department Staff in support of the request for the Order. She was also furnished video surveillance tapes taken at the site in the fall of 2003. The video tapes show the yard in operation. Of particular significance is a portion of the video that shows several minutes of car processing at the site. The car processing at this facility included dismantling cars with heavy equipment by ripping out gas tanks, radiators and engines one by one and carrying them over the yard with the claw arm of the equipment and

placing the parts in a pile. Fluids were clearly flowing from the vehicles and parts during this process and respondents acknowledged that the fluids were not being drained from vehicles before processing at that time. After these parts were removed, the vehicles was taken across the lot to the crushing area and the mobile crusher of MRC was used to crush the vehicles. Staff testified that there were large pools of petroleum product found in the crushing area too. Spill after spill occurred every few minutes during this process that was repeated over and over again.

Additionally, as noted, affidavits were submitted by Department Staff. One of those affidavits was the affidavit of Christine Rossi, Environmental Engineering Technician 3. She detailed her observations when she assisted with the October 22, 2003 search warrant at the site. She observed an unregistered above ground petroleum bulk storage (PBS) tank that appeared to have numerous PBS violations. She observed well over 15 vehicles that were leaking fluids, engine oil, antifreeze, gasoline and transmission fluid. The mobile car crusher on the site had petroleum products spilling through a discharge point onto the ground because there was no collection system attached. She also stated that there was a large pool of petroleum product surrounding the crusher that was 10-15 feet in diameter and 3-6 inches deep. She observed numerous areas of stained soil, standing rust colored water in the wetland area on the site and a sheen on the surface of the water in the wetland. Department Staff requested that an outside contractor be present for the October search warrant execution to take samples. Ms. Rossi directed six samples to be taken at the site on that day and all samples came back positive for contaminants including anti-freeze, gasoline and lubricating oil. Ms. Rossi's testimony at the hearing confirmed her affidavit. She also reviewed the surveillance video taken in October, 2003 and saw what she recognized as anti-freeze spills when the vehicles were being processed (T.164)[2] as well as gasoline spilling from vehicles as they were being moved within the site. (T. 91)

In addition to Ms. Rossi's affidavit and testimony, the Department presented similar statements from Richard Brazell, Regional Spill Engineer, Chad Donk, Environmental Conservation Investigator, Thomas Annal, Solid Waste Engineer and James Masuicca, Environmental Conservation Investigator as to their observations in June, 2002, October, 2003 and what they observed during site surveillance prior to the issuance of the Order.

The Department Staff brought a back hoe with them during the October, 2003 search warrant execution. A test hole was dug to test for wetlands. According to Ms. Rossi, 4-5 buckets of dirt were removed for the hole. Ms. Rossi testified that although she did not direct samples to be taken, she concluded that there was petroleum contamination in that soil because she could smell petroleum products as the test pit was dug. She also stated that significant metal debris was found in the soil.

Water samples were taken from the site in January, 2002 and October, 2003. Ms. Rossi was questioned extensively about the surface water samples and whether the sampling data

[2]Numbers in parenthesis refer to pages in the hearing transcript.

showed if any water quality standards were violated. She testified that she applied the ground water standards to the sampling results as those were the strictest standards to apply. She chose those standards because the samples were taken from the wetland and she did not know if the wetland went dry at any point during the year. That would be determinative of which standards would be applied. Respondents counsel challenged this method and noted that if the surface water standards were used, no violations would have occurred. However, the pleadings presented to the Commissioner do not allege a violation of any water quality standards. Therefore, the Commissioner's decision to issue the Order was not based on any representation by Department Staff that there were violations of water quality standards.

It must be demonstrated to the Commissioner that a respondent is engaging in a continuous and recurring activity that "presents an imminent danger to the health of welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources ". 6 NYCRR 620.2(a)(1) Proof presented to the Commissioner prior to her execution of the Order established that the operation at the site resulted in the release of pollutants into the environment.

Respondents Gail Murtaugh and Crosby Hill admitted at the hearing to releases of automotive fluids at the site in violation of New York law. (T. 102) There can be no argument that releasing petroleum products to the environment is harmful. The situation as it existed at the time of the execution of Order was such that those releases would have continued every day that car processing continued at the facility. This situation is not an isolated event or a rare event. The operation of this business called for the crushing of motor vehicles. The respondents Crosby Hill and Gail Murtaugh were allowing this to proceed without draining fluid from the vehicles and respondent MRC was doing the actual crushing of the vehicles and causing the spills, at least in part.

Respondents argue that because the site can be remediated, the harm is not irreversible or irreparable and the standards for a summary abatement order were not met. That is incorrect. The regulations state that if the condition "presents an imminent danger to the health or welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources," then a summary abatement order is warranted. There is no qualifying provision in the statute or implementing regulations that if the harm can be remediated, then it does not warrant this type of emergency action.

Respondents never claimed that they intended to change the practices at this business before the Order was served on them. Respondents also never indicated that they cleaned up any of the spills before the Order was issued. The record indicates that respondents never reported any of the spills that they have now admitted to or that are visible on the video surveillance. Spills of petroleum must be reported to the Department, pursuant to New York law. New York State Navigation, Section 172, reads, in part, ""Discharge" means 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, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state." Section 175 of the Navigation Law requires the party responsible for the discharge to report it within two hours. Respondents have never claimed to have reported the spills at this site.

The respondents have offered no evidence that they would have altered their operations to prevent those spills or cleaned up any of the spills had the Department not issued the Order. Respondents attempt to characterize the spills on the Crosby Hill property as few and downplay the significance of them. Respondents claim that only seven spills were documented over a two year period. Department Exhibit 11 from the hearing is the videotape taken that was detailed above, in part. As noted, on that tape it is clear that as the vehicles were being crushed and moved around the yard, considerable amounts of fluids were being spilled from the vehicles. Respondents had ample opportunity to explain away this video or demonstrate that it was not representative of the way the facility operated prior to the Order. No such claims were ever made by the respondents.

Respondents' arguments would have more merit if even once respondents claimed that the images captured on the video tape were not demonstrative of their daily practices at this site. No such representation was ever made. Respondents actually appeared casual in their admission that spills occurred during the daily operations at this site. They did not appear shocked that such spills were taking place and that spills to the environment were routine. Only Richard Murtaugh commented on it. He stated that if he knew that such extensive spilling was occurring he would have stopped everything "I would never have let my neck out ".(T. 763) It was not that he was troubled by such releases and the potential for harm. He was concerned that he might be in trouble with the DEC if they found out about it.

It is not credible for respondents to now claim that only seven spills took place over a two year period. The video tape itself shows numerous spills over a short period of time on one day. One must conclude that this video is representative of a typical day at the site. The observations of Staff at the October, 2003 search warrant execution and the sampling results from that day support this conclusion.

The conditions identified by Department Staff in the pleadings requesting the summary abatement order met the standards of 6 NYCRR 620.2(a)(1). A continuous and recurring activity that "presents an imminent danger to the health of welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to the natural resources of the State" was present. [6 NYCRR 620.2(a)(1)]

The Department must also demonstrate that it met the requirements of 6 NYCRR 620.2(a)(2), in that the activity (car processing) that presented "an imminent danger" must relate "to the prevention and abatement powers of the commissioner in that the condition or activity pertains to or affects any of the objectives or goals of the Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department; so that it

appears to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided." [6 NYCRR §620.2(a)(2); see also ECL §71-0301]. It is the policy of New York State "to conserve, improve and protect its natural resources and environment and control water, land and air pollution" (ECL §1-0101). The Department is charged with the duty of implementing this policy. (ECL §3-0301). Respondents Gail Murtaugh and Crosby Hill have admitted to causing petroleum spills to the environment. Causing and/or allowing these discharges to the environment and placing fill in wetlands is in violation of New York statutes relating to petroleum discharges as well as wetlands protection. The Commissioner's decision to issue the Order was based upon the need to stop the activities immediately. As described above, the activities at this yard were resulting in a significant number of spills on a continuous basis. A delay to allow for a hearing before the activity was stopped would have resulted in these spills to the environment continuing and the harm continuing. The requirements of 6 NYCRR 620.2(a)(1)& (2) were met.

Ruling: The motion to vacate the order is denied.

2) Modify Order

Respondents also challenge the authority for certain ordering paragraphs in the Order and ask that the Order be modified to (1) eliminate the requirement for site investigation without prejudice to DEC bringing an enforcement action; (2) eliminate any requirement for a federal wetland delineation and requirement for removal of fill in the federal wetland; (3) eliminate the auto processing prohibition so long as certain requirements (identified in detail below) are met.

(1) The Order directs that respondents will conduct and complete a complete subsurface delineation of the vertical and horizontal extent of the contamination at the site and coming from the site, submit a remediation plan, implement the plan and submit a plan for removal and restore the federal wetlands area that has been filled and remediate the contaminated groundwater. Respondents do not agree that investigation of the site is a necessary component of the Order. Respondents argue that remediation is not related to the imminently dangerous condition that resulted in the Order.

The Department based the request for the Order on the spills that were taking place at the site. The reason the situation posed an imminent threat was that the respondents were allowing pollutants to be spilled onto the property and thereby contaminating the property and the waters of New York State. It is that contamination that poses the danger. Stopping further contamination was necessary and then cleaning up the existing contamination is as important in preventing irreparable harm. The Department can not deem the danger eliminated by stopping further contamination. More needs to be done to protect the environment as testified to by Department Staff. The contamination in the ground is or has the potential to travel into the ground water. Therefore, remediation is necessary.

(2) Respondents ask that the order be modified so that they do not have to conduct a

delineation of the federal wetland and do not have to remove fill at the site, except for non exempt solid waste as well as any petroleum or chemical contamination. It is agreed that there are federal wetlands that run along the back of the site. The Department alleges that fill has been placed in those wetlands in violation of federal and New York law and that petroleum products are present in the wetlands. Therefore, the Department wants a complete investigation and approved remediation. I conducted a site visit during the hearing in this matter in November, 2004 and I was able to view the wetlands. At that time it was apparent that debris was present in the wetlands but the source of that debris was not clear. Some of it did appear to be auto parts. There also appeared to be paper and plastic trash, source unknown.

Respondents seek a modification to remove any requirements related to the federal wetlands. It appears that the wetlands may have been negatively impacted at this site by the auto processing activities. The respondents need to complete the site investigation and address any problems that resulted from its activities in a thorough and proper manner.

(3) Respondents also moved to eliminate the prohibition on car processing as long as all vehicles brought on site by others have all hoses severed on vehicles and gas tanks removed and crankcases and transmissions drained prior to vehicles entering the site. Also, for vehicles brought on site by Crosby Hill, respondents agree to have similar restrictions, including all vehicles being placed in roll offs until all fluids are drained.

The respondents offer to modify their practices to provide for fluid collection. The Department has indicated that they would allow the respondents to resume operations once an acceptable operating plan was provided. Respondents should work with the Department to reach an acceptable plan. It would be wrong for me to make the final plan at this stage as to how best to collect fluids and protect the environment at the site from further contamination . There are Department Staff who are familiar with this site and the best way for the operation to continue while providing the appropriate protection. That plan can only come from a concerted effort between Staff and the respondents.

Ruling: The motion to modify the Order is denied.

HEARING

The hearing in this matter was held on November 15, 16, 17 & 19, 2004 at the Department's Region 7 office, 615 Erie Boulevard West, Syracuse, New York. The respondent Richard Murtaugh and Mark Schumacher of Delta Environmental Consultants testified on behalf of the respondents. The Department produced the following witnesses, Christine Rossi, Richard Brazell, Chad Donk, James Masuicca and Elwood Erickson, Captain, NYS DEC. The Department also subpoenaed Richard O. Murtaugh, son of respondents Gail and Richard Murtaugh. Richard O. Murtaugh refused to answer any questions put to him "on the grounds that my answer might incriminate me". Richard O. Murtaugh was questioned about the operations at the site and any spills that may have taken place at the site. The record closed on January 14,

2005.

Respondents raised a question as to who the proper parties are for this proceeding. Gail Murtaugh owns the property and admitted to operating an auto processing business at the site as Crosby Hill. Richard R. Murtaugh (referred to as Richard Murtaugh Sr.) is the owner and CEO of MRC. He has admitted that he has been closely involved in the operation of Crosby Hill since his wife purchased it in 1991. They file taxes jointly and live together. In January, 2004 he admits he took over complete charge personally (T.591). He also admitted that he was in charge the first few years of the business until it got on its feet.(T. 591). He has always done some of the buying for the business and all of the selling of scrap. (T. 591) A MRC flattener was used in the yard until 1995 or 1996 (T. 601). In 1995 or 1996 Crosby Hill purchased a flattener for use at the yard. MRC also used that flattener from time to time since its purchase (T. 602). MRC has lent employees who are on its payroll to work at Crosby Hill (T. 604). The DEC had been on the Crosby Hill site on at least two occasions prior to 2002. Richard R. Murtaugh apparently handled those visits by the DEC and in 1998 signed a consent order related to the business and paid a fine for the business (T. 609). A copy of the consent order is Respondent Exhibit 20. Mr. Murtaugh admitted that his wife does not go into the scrap yard at Crosby Hill and that he did that work for her (T. 613). His work at the site has been as MRC (T. 614). When the search warrant was executed in June, 2002 Mr. Murtaugh was contacted and immediately went to the site (T. 618). He was on the site when the second search warrant was executed in October, 2003 (T. 635). After both the June 2002 search warrant and the October, 2003 search warrant, Mr. Murtaugh directed actions to be taken at this site regarding cleaning up spills. Both Richard Murtaugh and Murtaugh Recycling Corp pled guilty to felonies with regards to the operations at this scrap yard that form the basis for the summary abatement order. Gail Murtaugh did not testify at the hearing.

FINDINGS OF FACT

1. Gail Murtaugh is the owner of the property located at 174-180 Flood Road, Volney, New York and does business as Crosby Hill Auto Recycling.

2. Gail Murtaugh was operating an auto processing business located at 174-180 Flood Road Volney, New York from 1991 through December 22, 2003 under the name Crosby Hill Auto Recycling.

3. Richard R. Murtaugh is the president and CEO of MRC.

4. MRC exclusively supplied heavy equipment and a car flattener to Crosby Hill for use in the yard from 1991 through 1995 or 1996.

5. MRC supplied heavy equipment to Crosby Hill and a car flattener to Crosby Hill for occasional use from 1995 or 1996 through December, 2003.

6. Richard R. Murtaugh solely directed operations at Crosby Hill from 1991 through 1995 or 1996.

7. Richard R. Murtaugh did the majority of the buying and all selling of scrap at Crosby Hill from 1991 through the present time and purchased the majority of vehicles that were processed at the facility.

8. Richard R. Murtaugh and MRC took over all management of Crosby Hill in January, 2004 and has continued to manage the business through the present time.

9. Automotive fuel, anti-freeze, motor oil and other fluids from vehicles were spilled onto the property at 174-180 Flood Road, Volney, New York during the auto processing operation up until the time that respondents ceased operations at this site upon service of the Order.

10. Gail Murtaugh and Crosby Hill admitted that petroleum and other auto fluids were spilled on the site during car processing prior to December 22, 2003.

11. The fluid spills admitted to by Gail Murtaugh and Crosby Hill were not cleaned up.

12. Fill was placed in the federal wetland on the site.

CONCLUSIONS OF LAW

1. 6 NYCRR Section 620.2 provides that the Commissioner may, without prior notice, order any person to discontinue, abate, or alleviate a condition or activity caused by, engaged in, or maintained by that person where that condition or activity, in his judgment: "(1) presents an imminent danger to the health or welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources; and (2) relates to the prevention and abatement powers of the commissioner in that the condition or activity pertains to or affects any of the objectives or goals of the Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department; so that it appears to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided." [6 NYCRR §620.2(a)(1), (2); see also ECL §71-0301]

2. The conditions identified by Department Staff in the pleadings and testified to at the hearing held herein met the standards of 6 NYCRR 620.2.

3. Respondent Gail Murtaugh, doing business as Crosby Hill Auto Recycling, caused or allowed the spill of automotive fluids onto the property located at 174-180 Flood Road, Volney, New York during the operation of the car processing facility.

4. Richard Murtaugh and MRC oversaw and directed the operation of Crosby Hill at the time that the spills at issue occurred.

5. Respondents failed to meet their burden of proof established by 6 NYCRR 620.3(b).

RECOMMENDATION

I recommend that the summary abatement order continue without modification, until all of its provisions have been met by respondents.

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