

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of  
Articles 17 and 27 of the Environmental  
Conservation Law of the State of New York,

**ORDER**

- by -

**LESTER J. WING,**

Case No.

R7-20081202-127

Respondent.

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Respondent Lester J. Wing owns and operates a vehicle dismantling facility located at 10671 Egypt Road, Weedsport, New York (the "facility"). This administrative enforcement proceeding addresses violations of New York State's laws governing vehicle dismantling facilities and water pollution control at the facility.

In lieu of a notice of hearing and complaint, staff from the Region 7 office of the New York State Department of Environmental Conservation ("Department") commenced this proceeding against respondent Wing by serving a motion for order without hearing, dated August 27, 2009, by certified mail, return receipt requested. Mr. Wing received a copy of staff's motion on August 28, 2009.

Based on inspections of the facility conducted on September 7, 2007 and September 19, 2008, Department staff asserts that respondent violated various provisions of title 23 of article 27 of the Environmental Conservation Law ("ECL") (Vehicle Dismantling Facilities). Department staff alleges further that respondent failed to comply with requirements in ECL article 17 related to stormwater management.

The notice of motion for order without hearing, which respondent Wing received on August 28, 2009, advised him that he was required to file a response with the Chief Administrative Law Judge in the Department's Office of Hearings and Mediation Services within 20 days, and that a failure to respond would constitute a default (see 6 NYCRR 622.12[b]). Accordingly, respondent's answer was due by September 17, 2009. The Office of Hearings and Mediation Services did not receive any answer

from respondent. Accordingly, Department staff's motion is unopposed.

The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell who has prepared the attached summary report.<sup>1</sup> I adopt the ALJ's report as my decision in this matter subject to the following comments.

I concur with the ALJ that a prima facie case has been established with respect to the alleged violations, except for staff's charge that respondent failed to safely handle, process and store residues (construction and demolition debris) in such a manner to prevent off-site migration or run-off, in violation of ECL 27-2303(14). I hereby grant Department staff's motion on all the other charges. I direct Department staff to advise ALJ O'Connell and respondent in writing within thirty (30) days of the effective date of this order whether staff wishes to proceed to a hearing on the alleged violation of ECL 27-2303(14). If not, the charge will be deemed withdrawn.

I note also that Department staff, with respect to the violations relating to the failure to file for an industrial stormwater State Pollutant Discharge Elimination System permit and the failure to implement a stormwater pollution prevention plan, only referenced the applicable titles of ECL article 17, and not the specific sections that were violated. Although Department staff's references, together with the accompanying narrative in the papers, were sufficient to provide respondent notice of the statutory violations, in the future, Department staff should cite the specific statutory sections that serve as the basis for the violations, rather than the more generic statutory titles.<sup>2</sup>

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<sup>1</sup> Section 622.12(d) provides that "[u]pon determining that the motion [for order without hearing] should be granted . . . in part, the ALJ will prepare a report and submit it to the commissioner pursuant to [6 NYCRR 622.18]." This regulatory language applies in circumstances such as here, where one or more separately pleaded causes of action may be determined in their entirety -- that is, as to both liability and penalty -- even though other causes of action are not sufficiently established for summary judgment purposes. Accordingly, the ALJ appropriately prepared the summary report and forwarded it to the Commissioner for decision even though the motion for order without hearing cannot be granted on one charge pleaded in the motion.

<sup>2</sup> Based on the papers in this proceeding, citing ECL §§ 17-0701(1)(a) and 17-0803 would have been appropriate.

Department staff has requested a civil penalty of \$10,000, and has provided an explanation in support of this request. Based upon my review of the record, the numerous violations at the facility would have supported a much higher penalty. In this instance, however, staff has only requested a penalty of \$10,000, which I hereby grant. Respondent is directed to pay the civil penalty within thirty (30) days of the service of this order upon him.

In addition to the civil penalty, Department staff requests that I direct respondent to implement various compliance measures that staff has listed on a document entitled "Schedule A," which is attached to this order. I have reviewed the compliance measures and, except as to item nos. 1 and 13, I am directing that respondent implement them in accordance with their terms and specified timeframes. Item no. 1, which relates to payment of the civil penalty, is superseded by the terms of this order. I am not directing that respondent implement item no. 13, which involves the removal of construction and demolition debris from the facility, because no prima facie case was demonstrated for the underlying charge (i.e., the violation of ECL 27-2303[14]).

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

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted in part and denied in part.

II. Respondent Lester J. Wing is adjudged to have violated:

- a. ECL 27-2303(1) for failing to file facility annual reports with the Department;
- b. ECL 27-2303(2) for failing to perform activities related to draining and removing fluids on a concrete or equivalent surface at the facility;
- c. ECL 27-2303(4) for failing to inspect end of life vehicles arriving at the facility to determine whether they were free of leaks and unauthorized waste;
- d. ECL 27-2303(5) for failing to remove mercury switches before crushing or shredding vehicles at the facility;

- e. ECL 27-2303(6) for failing to store collected fluids on a bermed, concrete or equivalent surface in containers that are marked and in good condition at the facility;
- f. ECL 27-2303(9) for storing more than 1,000 waste tires at the facility without a permit from the Department;
- g. ECL 27-2303(12) for failing to properly control access to the facility;
- h. ECL 27-2303(13) for failing to control vegetation in order to avoid obstructing fire access lanes and driveways at the facility;
- i. ECL 27-2303(15) for failing to control dust at the facility so as not to cause a nuisance or hazard;
- j. ECL 27-2303(17) for failing to have a contingency plan which includes a description of actions to be taken by facility employees in the event of a fire, a spill or release of vehicle waste fluids;
- k. ECL 27-2303(18) for failing to maintain records concerning the receipt of end of life vehicles at the facility; and
- l. Titles 7 and 8 of ECL article 17 for failing to file for an industrial stormwater State Pollutant Discharge Elimination System permit, and failure to implement a stormwater pollution prevention plan for the facility.

III. Respondent Lester J. Wing is assessed a civil penalty in the amount of ten thousand dollars (\$10,000). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to Margaret A. Sheen, Esq., Assistant Regional Attorney, NYSDEC - Region 7, 615 Erie Boulevard, West, 2<sup>nd</sup> Floor, Syracuse, New York 13204-2400.

IV. Respondent, within thirty (30) days of the service of this order upon him, shall implement the compliance measures that are listed on the Schedule A attached to this order, except for:



**Schedule A**  
**Schedule of Compliance**

1. Upon the effective date of this Order, Respondent shall pay the civil penalty as described in this Order.
2. **Within 30 days of the effective date of this order**, submit a completed “Annual Report Form for Waste Fluid Disposal,” for the period January 01 through December 31, 2009 and continue to submit annual reports **by March 1<sup>st</sup> of each year** thereafter to the Department to the address below.
3. **Immediately**, all spillage of fluids seen on-site at the facility during the time of inspection should be cleaned up. Affected soils must be removed and properly disposed. The release of petroleum is prohibited by Article 12 of the Navigation Law, and spills shall be handled and reported in accordance with section 175 of that law and Department regulation (17 NYCRR Part 32).
4. **Within 120 days of the effective date of this order**, construct a concrete surface, or other surface that allows equivalent protection to surface and groundwater, on which to drain, remove, or collect fluids from the end of life vehicles accepted at the facility. Send copies of receipts or other verification to the address below.
5. **Within 120 days of the effective date of this order**, construct a bermed concrete surface, or other surface that allows equivalent protection to surface and groundwater, on which to store fluids from vehicles. Send copies of receipts or other verification to the address below.
6. **Immediately**, start inspecting end of life vehicles that arrive at your facility for any leaks and immediately remedy the leaks to avoid a release of fluids onto the ground.
7. **Immediately**, make sure all fluids, lead acid batteries, mercury switches, refrigerants, and air bags are removed (or deployed) from vehicles before crushing operations occur at your facility.
8. **Immediately**, remove from site all stored fluids (including that recently drained by the mobile crusher). Fluids cannot be stored on-site until a bermed concrete surface, or equivalent surface, is constructed to store fluids. Send copies of receipts or other verification to the address below.
9. **Within 60 days of the effective date of this order**, begin to provide the Department with copies of receipts documenting that progress is being made toward removing the waste tires. **At a minimum, 100 tires per month shall be removed** and transported to an acceptable facility. This action should continue until such time as all tires that have been on the site for more than 18 months have been removed and less than 1,000 tires are on site. In addition, all tires that are not on vehicles shall be moved

to one location on the property, stored to prevent vector breeding and to facilitate counting for the purposes of ensuring compliance with the 1,000 tire limit. Send copies of receipts or other verification to the address below.

10. **Within 30 days of the effective date of this order**, put in place controls such as fencing, gates, and signs that will prohibit access to and use of the facility. Send copies of receipts or other verification to the address below.
11. **Within 30 days of the effective date of this order**, start controlling vegetation that has encroached onto fire access lanes and within the area used to store vehicles so that they do not impede access to the facility or increase the potential for a fire.
12. **Immediately** begin effectively controlling dust so that it does not constitute a nuisance or hazard to health, safety, or property.
13. **Within 90 days of the effective date of this order**, provide the Department with copies of receipts documenting that progress is being made toward removing the piles of existing Construction and Demolition (C&D) debris and solid waste. All debris stored greater than 18 months shall be removed and transported to a permitted disposal facility within six months of the effective date of this order. Send copies of receipts or other verification to the address below.
14. **Within 30 days of the effective date of this order**, prepare and implement a Contingency Plan at your facility for the actions that are to be taken in the instance that there is a fire, spill or a release of vehicle fluids onto the ground, or unauthorized material is received. Include fluid removal and vehicle stacking procedures as part of your plan. Make sure that all persons working at your facility are aware of the contingency plan and are educated about the facilities emergency procedures.
15. **Immediately**, begin recording the date that an end of life vehicle is received at your facility and maintain these records on site
16. **Within 30 days of the effective date of this order**, submit a “Notice of Intent, Transfer, or Termination (NOITT) to:  

NYSDEC, Division of Water  
Bureau of Permits  
625 Broadway  
Albany, NY 12233-3505
17. **Send verification in the form of photos, receipts, invoices, certificates of disposal, etc., to:**  
NYSDEC- Region 7  
Division of Solid and Hazardous Materials  
615 Erie Boulevard West  
Syracuse, NY 13204

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

Alleged Violations of Environmental Conservation Law  
of the State of New York (ECL) Articles 17 and 27

by

**LESTER J. WING,**  
Respondent.

DEC Case No. R7-20081202-127

Summary Report

by

/s/

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Daniel P. O'Connell  
Administrative Law Judge

## PROCEEDINGS

In lieu of a notice of hearing and complaint, Staff from the Region 7 Office of the New York State Department of Environmental Conservation (Department staff) commenced the captioned administrative enforcement proceeding against Lester J. Wing by serving a motion for order without hearing, dated August 27, 2009, by certified mail, return receipt requested (see Title 6 of the Official Compilation of Codes Rules and Regulations of the State of New York [6 NYCRR] §§ 622.3(b) and 622.12[a]). Mr. Wing received a copy of Staff's motion on August 28, 2009.

The August 27, 2009 notice of motion for order without hearing advised Mr. Wing that he was required to file a response with the Chief Administrative Law Judge (ALJ) within 20 days, and that a failure to respond would constitute a default (see 6 NYCRR 622.12[b]). Accordingly, Mr. Wing's answer was due by September 17, 2009. The Office of Hearings and Mediation Services did not receive any answer from Mr. Wing.

With a cover letter dated August 27, 2009, Staff filed a copy of the motion papers with the Office of Hearings and Mediation Services. Subsequently, Department staff provided a copy of the signed domestic return receipt under cover of letter dated September 1, 2009. The matter was assigned to Administrative Law Judge Daniel P. O'Connell on October 7, 2009. Department staff provided an affidavit of service with a cover letter dated November 24, 2009. The following report addresses the merits of Staff's unopposed motion for order without hearing.

According to the motion, Mr. Wing owns and operates a vehicle dismantling facility located at 10671 Egypt Road, Weedsport (Cayuga County), New York (the facility). Based on inspections of the facility conducted on September 7, 2007 and September 19, 2008, Department staff asserts that Mr. Wing violated various provisions of the Environmental Conservation Law of the State of New York (ECL) article 27, title 23 (Vehicle Dismantling Facilities). Department staff alleges further that Mr. Wing did not comply with requirements outlined in ECL

article 17 related to stormwater management. For these alleged violations, Department staff requests an order from the Commissioner that would assess a total civil penalty of \$10,000, and direct Mr. Wing to implement a schedule that would bring the facility into compliance with all applicable statutory requirements.

Department staff's August 27, 2009 motion papers consist of the following documents:

1. A notice of motion for order without hearing in lieu of a complaint dated August 27, 2009;
2. A motion for order without hearing in lieu of a complaint dated August 27, 2009 with attached schedule of compliance (Schedule A);
3. A memorandum of law in support of Staff's motion for order without hearing, dated August 27, 2009 with attached Exhibits A through D:
  - a. Exhibit A<sup>1</sup> is a copy of a Vehicle Dismantling Facility Inspection Report for the facility dated September 7, 2007;
  - b. Exhibit B is a copy of a notice of violation (NOV) dated September 19, 2007;
  - c. Exhibit C is a copy of Vehicle Dismantling Facility Inspection Report for the facility dated September 19, 2008; and
  - d. Exhibit D is a copy of a cover letter dated June 26, 2009 from Department staff concerning a proposed order on consent.<sup>2</sup>

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<sup>1</sup> With respect to the captioned matter, Staff's first inspection of the facility occurred on September 7, 2007. The NOV concerning the September 7, 2007 inspection is dated September 19, 2007. A year later, on September 19, 2008, Department staff inspected the facility again. Staff provided copies of all three documents with the motion for order without hearing.

<sup>2</sup> Department staff did not include a copy of the proposed order on consent with its motion papers. As a result, the terms and conditions of the proposed order on consent are not part of the record of this matter.

4. An affirmation by Margaret A. Sheen, Esq., Assistant Regional Attorney, dated August 27, 2009;
5. An affidavit by William Thayer, P.E., Environmental Engineer, Division of Solid and Hazardous Materials, NYS DEC-Region 7, sworn to August 27, 2009. A satellite map of Mr. Wing's facility is attached to Mr. Thayer's affidavit; and
6. An affidavit of service of the motion for order without hearing by Michael E. Barnholdt, sworn to November 24, 2009.

#### FINDINGS OF FACT

Based on the papers filed by Department staff, the following findings of fact are established for this proceeding as a matter of law:

1. Lester Wing owns and operates a vehicle dismantling facility (ID No. 13166) that is located at 10671 Egypt Road, Weedsport (Cayuga County), New York (the facility).
2. Department staff visited the facility on September 7, 2007, and completed an inspection report (Exhibit A).
3. After inspecting the facility on September 7, 2007, Department staff sent a NOV, dated September 19, 2007, to Mr. Wing by certified mail, return receipt requested (Exhibit B).
4. During the September 7, 2007 inspection, Staff observed the following violations, that are noted in the September 19, 2007 NOV:
  - a. Mr. Wing did not submit an annual report to the Department for the previous year. The annual report must include, among other things, information about the type and amount of waste fluids collected from end of life vehicles<sup>3</sup> brought to the facility, and where the fluids were disposed. (see ECL 27-2303[1]).

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<sup>3</sup> Pursuant to ECL 27-2301(4), the term, *end of life vehicle*, means "any motor vehicle sold, given, or otherwise disposed of as junk or salvage."

- b. Mr. Wing did not perform activities related to draining and removing fluids from end of life vehicles on a concrete or equivalent surface, and he did not clean the surface daily (see ECL 27-2303[2]).
- c. Upon their arrival to the facility, Mr. Wing did not inspect end of life vehicles to determine if they were free of leaks (see ECL 27-2303[4]). During the September 7, 2007 inspection, Staff observed a stain on the ground at the facility, which demonstrates that not all vehicles brought to the facility were free of leaks.
- d. Mr. Wing did not remove mercury switches before crushing vehicles (see ECL 27-2303[5]).
- e. Mr. Wing did not store collected fluids on a bermed, concrete or equivalent surface in containers that are labeled and in good condition (see ECL 27-2303[6]) During the September 7, 2007 inspection, Staff observed a total of four drums at the facility. Two of the four were 55-gallons drums of oil and gasoline. None of the drums were being stored on a bermed concrete or equivalent surface.
- f. Mr. Wing stored more than 1000 waste tires at the facility without a permit from the Department (see ECL 27-2303[9]).
- g. Mr. Wing failed to properly control access to the site (see ECL 27-2303[12]). During the September 7, 2007 site inspection, a car was parked at the entrance of the facility to control access.
- h. Mr. Wing did not control vegetation to avoid obstructing fire access lanes or driveways (see ECL 27-2303[13]). Staff noted on the September 7, 2007 inspection report that vegetation prevented Staff from comprehensively inspecting the facility.
- i. Mr. Wing did not effectively control dust so as not to cause a nuisance or hazard (see ECL 27-2303[15]).

- j. Mr. Wing neither prepared nor implemented a contingency plan to address a fire, a spill or release of fluids, or the receipt of unauthorized vehicles (see ECL 27-2303[17]).
  - k. Mr. Wing did not keep records related to the receipt date of vehicles (see ECL 27-2303[18]).
  - l. Mr. Wing did not have an industrial stormwater State Pollutant Discharge Elimination System (SPDES) permit for the facility (see ECL 17-0701).
  - m. Mr. Wing did not file a stormwater pollution prevention plan (SWPPP) with the Department and implement it (see ECL 17-0701).
5. Department staff visited the facility on September 19, 2008, and completed an inspection report on the same date (Exhibit C).
6. The following violations that Staff observed during the September 7, 2007 inspection had not been corrected by the September 19, 2008 inspection:
- a. Mr. Wing did not submit an annual report to the Department for the previous year (see ECL 27-2303[1]).
  - b. Mr. Wing stored more than 1,000 waste tires at the facility without a permit (see ECL 27-2303[9]).
  - c. Mr. Wing did not control vegetation to avoid obstructing fire access lanes or driveways (see ECL 27-2303[13]).
  - d. Mr. Wing neither prepared nor implemented a contingency plan to address a fire, a spill or release of fluids, or the receipt of unauthorized vehicles (see ECL 27-2303[17]).
7. During the September 19, 2008 inspection, Department staff observed that Mr. Wing did not store lead acid batteries either off the ground and covered by a tarp, or in a leak proof container (see ECL 27-2303[7]).

8. With a cover letter dated June 26, 2009 (Exhibit D), Department staff sent a proposed draft order on consent to Mr. Wing by certified mail, return receipt requested. Mr. Wing received Staff's June 26, 2009 cover letter and enclosures on June 27, 2009. The purpose of the draft order on consent was to settle the violations, that Department staff observed during the September 7, 2007 and September 19, 2008 inspections, without a hearing. Mr. Wing did not respond to Staff's proposed settlement offer.
9. Department staff served a copy of the August 27, 2009 motion for order without hearing and supporting papers upon Mr. Wing by certified mail, return receipt requested.
10. Mr. Wing received Staff's August 27, 2009 motion for order without hearing and supporting papers on August 28, 2009.

## **DISCUSSION**

### **I. Motion for Order without Hearing**

In lieu of a notice of hearing and complaint, Staff may commence an administrative enforcement proceeding by serving a motion for order without hearing. With service of the motion upon a respondent, Department staff must also send a copy of the motion papers to the Chief ALJ with proof of service of the motion upon the respondent. (See 622.3[b][1] and 622.12[a].) The motion must include statements that an answer must be filed with the Chief ALJ within 20 days after receiving the motion, and that the failure to file a timely answer constitutes a default (see 6 NYCRR 622.12[b]).

The November 24, 2009 affidavit of service demonstrates that Department staff served the August 27, 2009 motion for order without hearing upon Mr. Wing by certified mail, return receipt requested. Service of the motion in this manner is consistent with the regulations (see 6 NYCRR 622.3[a][3]). Accordingly, Staff duly commenced the captioned matter.

The signed copy of domestic return receipt demonstrates that Mr. Wing received a copy of the August 27, 2009 motion for

order without hearing on August 28, 2009. Based on the notice of motion for order without hearing, Mr. Wing was obliged to file an answer with the Chief ALJ by September 17, 2009. The Office of Hearings and Mediation Services did not receive any response to Staff's August 27, 2009 motion from Mr. Wing. Accordingly, Mr. Wing is in default (see 6 NYCRR 622.12[b]). Rather than move for a default judgment, however, Department staff requests that its unopposed motion for order without hearing be decided on the merits.

A motion for order without hearing must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. (See 6 NYCRR 622.12[d]; Civil Practice Law and Rules [CPLR] § 3212[b].)

An attorney's affirmation "has no probative force" unless the attorney has first-hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed] [citation omitted]). In 2003, the Commissioner elaborated on the standard for granting a motion for order without hearing, which is equivalent to the standard applied for summary judgment:

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. The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact. [A supporting] 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.... The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of the fact.

(*Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [internal quotation marks and citations omitted].)

Additionally, the weight of the evidence is not considered on a motion for order without hearing.

Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment. The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

(*Matter of Tractor Supply Co.*, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted].)

As outlined in Ms. Sheen's August 27, 2009 affirmation (at 4, ¶ 22), the evidence that Staff offered to demonstrate the violations alleged in the motion are the documents included with the motion (also see Mr. Thayer's August 27, 2009 Affidavit, at 1, ¶ 3). In particular, these include Mr. Thayer's inspection reports that he completed during his site visits on September 7, 2007 (Exhibit A) and September 19, 2008 (Exhibit C), as well as the September 19, 2007 NOV (Exhibit B).

Based upon a review of these documents, I conclude that the evidence establishes, with one exception, a prima facie case with respect to the violations alleged in the motion. The exception is discussed below and concerns the alleged violation of ECL 27-2303(14). Therefore, applying these standards to Department staff's August 27, 2009 motion for order without hearing, I conclude that the Commissioner should grant staff's motion, except for the allegation concerning Mr. Wing's lack of compliance with ECL 27-2303(14).

## II. Liability

In the notice of motion for order without hearing, Department staff lists the statutory requirements that Mr. Wing allegedly violated. Each requirement is addressed below.

### A. Annual Reports

ECL 27-2303(1) requires the owner of a vehicle dismantling facility to file an annual report with the Department by March 1 (see also 6 NYCRR 360-12.1[c]). Among other things, the report must include information about the nature and quantity of fluids extracted from end of life vehicles, and the disposal location

of these fluids. Some fluids, such as ethylene glycol, Freon, and petroleum, among others, are hazardous substances (see 6 NYCRR part 597 [List of Hazardous Substances]).

According to the September 7, 2007 and September 19, 2008 inspection reports, Mr. Wing did not submit annual reports to the Department. Therefore, Mr. Wing violated ECL 27-2303(1) by failing to submit these required reports for 2006 and 2007.

B. Waste Handling

When waste fluids are drained from end of life vehicles, ECL 27-2303(2) requires this activity to be undertaken on a concrete or equivalent surface. In addition, this statutory provision requires the surface to be cleaned daily. According to the September 7, 2007 inspection report, Mr. Wing did not perform activities related to draining and removing waste fluids from end of life vehicles on a concrete or equivalent surface, and he did not clean the surface daily. Therefore, Mr. Wing violated ECL 27-2303(2).

When end of life vehicles arrive at the facility, ECL 27-2303(4) requires that the vehicles be inspected for leaking fluids and unauthorized waste. Leaks must be contained to avoid any release to the environment. According to the September 7, 2007 inspection report, Mr. Wing did not inspect end of life vehicles upon their arrival to his facility to determine if they were free of leaks. During the September 7, 2007 inspection, Staff observed a stain on the ground at the facility, which demonstrates that Mr. Wing did not contain all the fluids leaking from the end of life vehicles brought to the facility. Based on the forgoing, Mr. Wing violated ECL 27-2303(4).

Potential environmental contaminants must be removed from end of life vehicles before they are crushed or shredded. Among these potential environmental contaminants are mercury switches and other mercury containing devices. (See ECL 27-2303[5][c].) The September 7, 2007 inspection report shows that Mr. Wing did not remove mercury switches before crushing vehicles in violation of ECL 27-2303(5).

After waste vehicle fluids are collected, each type of fluid must be stored in a separate container. In addition, containers must be labeled, maintained in good condition, and stored on either a bermed asphalt or concrete surface, or

surface that allows equivalent protection to ground water. (See ECL 27-2303[6].)

During the September 7, 2007 inspection, Staff observed four drums at the facility. Two were 55-gallon drums filled with waste oil and gasoline. None of the drums observed by Department staff on September 7, 2007 were stored on a bermed concrete surface or equivalent. Consequently, Mr. Wing did not store these collected fluids in a manner consistent with the requirements outlined at ECL 27-2303(6) and, therefore, violated this statutory provision.

Unless the owner of the vehicle dismantling facility has a permit from the Department, ECL 27-2303(9) prohibits the storage of more than 1000 waste tires at the facility. According to the inspection reports dated September 7, 2007 and September 19, 2008, Mr. Wing was storing more than 1000 waste tires at the facility without a permit in violation of ECL 27-2303(9).

C. Site Access

ECL 27-2303(12) requires the owner to continuously control access to the vehicle dismantling facility by fencing, gates, signs, or natural barriers. During the September 7, 2007 inspection, Department staff observed a car parked at the entrance of the facility to control access because a mobile crushing unit had damaged the gate. Therefore, Mr. Wing failed to control access to the facility in the manner prescribed by statute in violation of ECL 27-2303(12).

D. Facility Operation and Management

The owner must control vegetation at the facility to prevent encroachment into fire access lanes or driveways, and to decrease the potential of fire (see ECL 27-2303[13]). Staff noted on the September 7, 2007 inspection report that vegetation prevented Staff from thoroughly inspecting the facility. According to the September 19, 2008 inspection report, the conditions at the facility with respect to this requirement had not changed. Therefore, Mr. Wing violated ECL 27-2303(13), and this violation continued from September 2007 to September 2008.

Pursuant to ECL 27-2303(15), the facility owner must effectively control dust so as not to cause a nuisance or hazard. According to the September 7, 2007 inspection report,

Mr. Wing did not effectively control dust at the facility in violation of ECL 27-2303(15).

The owner of the facility is required, pursuant to ECL 27-2303(17) to have a contingency plan that describes what facility employees should do in the event of a fire, a spill of waste fluids, or the unauthorized receipt of material at the facility. According to the inspection reports dated September 7, 2007 and September 19, 2008, Mr. Wing did not have the required contingency plans at the facility at the time of Staff's inspections. Therefore, he violated ECL 27-2303(17), and this violation continued from September 2007 to September 2008.

Pursuant to ECL 27-2303(18), the owner must keep and maintain records about when end of life vehicles were received at the facility. At the time of Staff's September 7, 2007 inspection, Mr. Wing did not have any records related to the receipt date of vehicles in violation of ECL 27-2303(18).

E. Construction and Demolition Debris

Pursuant to ECL 27-2303(14), the facility owner must ensure the safe handling, processing, and storage of any residues, such as products leftover from the crushing process and extracted parts, in order to prevent off-site migration or run-off. With respect to this allegation, Staff counsel's memorandum of law states that construction and demolition (C&D) debris was present at the facility, but does not provide any additional details.

On the inspection reports (Exhibits A and C), there is a list of applicable statutory criteria. Next to each criterion, there are three boxes arranged under the headings "C" for "compliance," "V" for "violation," and "NI." The meaning of "NI" is presumed to be "no inspection."

On the September 7, 2007 inspection report (Exhibit A) concerning the requirements of ECL 27-2303(14), Mr. Thayer marked the boxes in the "NI" and "V" columns. Staff did not explain in the motion papers why both boxes were marked, and the significance of the two marks. No reasonable explanation for the double marking on the September 7, 2007 inspection report concerning this statutory criterion can be inferred from the record. The September 19, 2008 inspection report (Exhibit C) by Mr. Thayer notes that Mr. Wing failed to comply with ECL 27-

2303(14), but does not elaborate upon the nature of the alleged noncompliance.

Without any elaboration, the September 19, 2007 NOV (Exhibit B) states that C&D debris and solid waste was disposed at the facility without a permit in violation of ECL 27-2303(14), and Staff Counsel's affirmation states the same (at 3. ¶ 13; Staff's memorandum of law at 8). Nevertheless, Staff Counsel's affirmation has no probative force unless the attorney has first-hand knowledge of the facts at issue. With respect to the captioned matter, Staff Counsel affirms that she is "fully familiar with the facts and circumstances" (at 1, ¶ 1), but does not affirm that she has first-hand knowledge of the facts at issue.

Rather, Mr. Thayer has first-hand knowledge of the facts at issue because he inspected the facility on September 7, 2007 and September 19, 2008. Mr. Thayer's August 27, 2009 affidavit, however, does not offer any information about how Mr. Wing failed to comply with ECL 27-2303(14) at the time of Staff's inspections on September 7, 2007 and September 19, 2008.

The moving party has the burden of supporting the cause of action with evidence. The evidence offered with Staff's motion (*i.e.*, the September 7, 2007 inspection report; the September 19, 2007 NOV; the September 19, 2008 inspection report; and Mr. Thayer's affidavit), does not establish a *prima facie* showing that Mr. Wing violated ECL 27-2303(14). Absent any evidence, I conclude that Staff has not demonstrated the alleged violation of ECL 27-2303(14), and the Commissioner should deny Staff's request for summary judgment with respect to this allegation.

If Department staff wishes to pursue this charge, I will convene a hearing to provide Staff with the opportunity to present a case concerning Mr. Wing's alleged failure to comply with ECL 27-2303(14). If the hearing is held, Mr. Wing will have the opportunity to examine the proof that Staff offers to demonstrate the alleged violation of ECL 27-2303(14).

#### F. Stormwater Management

ECL 17-0505 prohibits point sources that discharge wastewater to the waters of the State without first obtaining a State Pollutant Discharge Elimination System (SPDES) permit required by ECL 17-0701. Department staff alleges in the motion

that Mr. Wing neither obtained an industrial stormwater SPDES permit for the facility, nor filed a stormwater pollution prevention plan (SWPPP) with the Department in violation of ECL article 17, titles 7 and 8.

The September 7, 2007 and September 19, 2008 inspection reports are silent about the alleged violations of ECL 17-0701. The September 19, 2007 NOV (Exhibit B), however, advised Mr. Wing that he had not filed an application with the Department for a SPDES stormwater permit, and that he had neither filed nor implemented a SWPPP. According to the September 19, 2007 NOV, Mr. Wing's vehicle dismantling facility is a Category VI facility that could be classified as either a Standard Industrial Code (SIC) 5015 (used motor vehicle parts) facility, or SIC 5093 (automotive scrap and waste material recycling) facility (see 40 CFR 122.26). Under these circumstances, Staff stated in the September 19, 2007 NOV that Mr. Wing's facility may qualify for a general SPDES permit, rather than an individual SPDES permit.

Under the terms of a general SPDES permit, the facility owner must file a Notice of Intent (NOI) and a SWPPP. The purpose of the SWPPP is to protect surface water resources by controlling runoff and the discharge of pollutants at the facility during storm events. Generally, after reviewing the NOI and SWPPP, Department staff would issue a letter that acknowledges receipt of the required information and documents, and which provides a permit identification number.

Based on Department staff's September 19, 2007 NOV, Mr. Wing did not file any application for a SPDES permit, and neither filed nor implemented a SWPPP. Given these circumstances, Staff asserted two separate violations of ECL article 17, titles 7 and 8.

Department staff demonstrated that two separate violations occurred. Mr. Wing was obliged to obtain a stormwater SPDES permit for his facility. If the facility qualified for the general SPDES permit, Mr. Wing was required to develop a SWPPP, file it with Department staff for review, and implement the SWPPP after Department staff approved it. To the extent that Mr. Wing's facility would require an individual SPDES permit, he would be required to implement the terms and conditions of the permit. Therefore, Mr. Wing did not comply with the requirements to obtain a SPDES permit, and implement its terms

and conditions, which are separate violations of ECL article 17, titles 7 and 8.

### III. Relief

In the motion for order without hearing, Department staff requests that the Commissioner assess a total civil penalty of \$10,000, and direct Mr. Wing to implement the schedule of compliance attached to the motion as Schedule A. The purpose of the schedule of compliance is to require Mr. Wing to remediate adverse environmental impacts, to bring the facility into compliance with the requirements outlined at ECL article 27, title 23 (Vehicle Dismantling Facilities), and to obtain a SPDES permit to manage stormwater runoff.

#### A. Civil Penalty

With reference to ECL 71-1929 and 71-4003, and the Department's Civil Penalty Policy (DEE-1, June 20, 1990), Department staff requests a total civil penalty of \$10,000 for the alleged violations asserted in the motion. ECL 71-1929 authorizes a civil penalty not to exceed \$37,500 per day for each violation of titles 1 through 11 and title 19 of ECL article 17 (Water Pollution Control).

ECL article 71 does not expressly address violations of ECL article 27, title 23 (Vehicle Dismantling Facilities) (*cf.* ECL 71-2703 and 71-2705). Accordingly, Staff relies on ECL 71-4003 as the authority for the Commissioner to assess civil penalties for Mr. Wing's violations of ECL article 27 title 23. ECL 71-4003 authorizes a civil penalty of not more than \$500 for violating provisions of the Environmental Conservation Law not otherwise specified in ECL article 71. Pursuant to ECL 71-4003, an additional civil penalty of not more than \$500 may be assess for each day that a violation continues.

Staff argues that the requested total civil penalty is substantially less than the potential maximum, which would exceed \$25 million based on the number of violations and the duration of each violation. Staff argues further that the requested civil penalty would deter Mr. Wing, and others similarly situated, from future violations of ECL article 27, title 23, and ECL article 17. Finally, Staff contends that the requested civil penalty would recoup the economic benefit that Mr. Wing realized from his noncompliance.

To further justify the requested civil penalty, Department staff offered an affidavit, sworn to August 27, 2009, by William Thayer, P.E. Mr. Thayer's August 27, 2009 affidavit addresses the potential and actual environmental harm associated with the violations.

Mr. Thayer is an Environmental Engineer from the Division of Solid and Hazardous Materials (NYS DEC Region 7 Office). Since May 2007, Mr. Thayer has reviewed permit applications for new solid waste management facilities, and inspected existing solid waste management facilities, including Mr. Wing's vehicle dismantling facility, for compliance with the applicable statutes and regulations.

Based on his September 7, 2007 and September 19, 2008 inspections of the facility, Mr. Thayer states that motor oil and other fluids have been released from end of life vehicles brought to, and stored at, the facility. Mr. Thayer states further that these releases have adversely impacted environmental resources and could potentially result in adverse impacts to public health.

Attached to Mr. Thayer's affidavit is an aerial photograph, which depicts the facility and the approximate boundary of a state regulated, Class II freshwater wetland. According to Mr. Thayer's affidavit, the regulated wetland is 100 feet from the western and southern property lines of the facility.<sup>4</sup> Mr. Thayer states that petroleum and other vehicle fluids entered the nearby wetlands via surface runoff, erosion and soil infiltration. He states further that contamination of the wetland will continue because vehicles and the fluids collected from them are improperly stored at the facility.

With respect to Mr. Wing's failure to file annual reports and an application for a SPDES permit, Mr. Thayer states that Department staff has not been able to monitor and regulate the facility properly. Mr. Thayer notes that the intent of the applicable statutory requirements is to protect the environment

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<sup>4</sup> In his August 27, 2009 affidavit, Mr. Thayer does not identify the regulated freshwater wetland. Based on the Department's Environmental Resource Mapper (see <http://www.dec.ny.gov/animals/38801.html>), it appears that the wetland is C-33 on the Cayuga United States Geological Survey (USGS) Quadrangle. Pursuant to 6 NYCRR 622.11(a)(5), I take official notice of the Cayuga USGS Quadrangle and Freshwater Wetland C-33.

and public health, and observes that the violations from September 7, 2007, and their resultant adverse impacts, have continued to the present.

In addition to the circumstances outlined in Mr. Thayer's affidavit, the Commissioner may reasonably infer that Mr. Wing is unwilling to cooperate with Department staff to resolve the demonstrated violations, and to bring his facility into compliance with all applicable requirements because he did not respond to either Staff's proposed settlement offer, or the August 27, 2009 motion for order without hearing.

Upon review of Staff's motion papers, I conclude that Department staff has provided a reasoned explanation for the requested civil penalty, particularly given the adverse environmental impacts associated with the continuous nature of the violations. Moreover, Staff's request is substantially less than the potential maximum civil penalty authorized by law. Therefore, the Commissioner should assess a total civil penalty of \$10,000.

B. Compliance Schedule

In addition to the requested civil penalty, Department staff requests that the Commissioner direct Mr. Wing to implement a schedule that would bring his facility into compliance with the applicable statutory requirements. A copy of the proposed schedule is attached to this report as Schedule A.

In his August 27, 2009 affidavit, Mr. Thayer states that the compliance schedule is necessary for two reasons. First, the adverse environmental impacts at the facility need to be remediated. Second, the facility needs to come into compliance with nearly all of the 18 statutory requirements outlined at ECL 27-2303. Based on the foregoing, the Commissioner should direct Mr. Wing to comply with the requirements outlined in Schedule A except as discussed below.

Item No. 1 of Schedule A directs payment of the civil penalty. In his order, the Commissioner may adjust the total amount of civil penalty assessed, and decide whether to suspend a portion of the total amount assessed. In addition, the Commission may provide instructions to Mr. Wing about when the payable portion of the civil penalty is due.

Item No. 13 of Schedule A concerns the allegation in Staff's August 27, 2009 motion for order without hearing that Mr. Wing violated ECL 27-2303.14 by disposed C&D debris at the facility. For the reasons outlined above, Department staff did not prove this alleged violation. A hearing may be held to provide the parties with the opportunity to develop a record about this alleged violation. Therefore, at this point in the proceedings, the Commissioner should reserve on whether to direct Mr. Wing to implement the requirements outlined in Item No. 13 of Schedule A.

### **CONCLUSIONS**

1. Department staff duly commenced the captioned administrative enforcement proceeding by serving Mr. Wing with a copy of the August 27, 2009 motion for order without hearing and supporting papers by certified mail, return receipt requested (see 6 NYCRR 622.3[a][3]; 622.3[b]; and 622.12[a]).
2. Except for the allegation that Mr. Wing failed to comply with ECL 27-2303(14), Department staff has established as a matter of law that Mr. Wing violated the various provisions of ECL article 27, title 23 concerning the operation of his vehicle dismantling facility located at 10671 Egypt Road in Weedsport, New York.
3. Department staff failed to established as a matter of law that Mr. Wing violated ECL 27-2303(14).
4. Department staff has also established as a matter of law that Mr. Wing violated requirements outlined at ECL article 17, titles 7 and 8 concerning Mr. Wing's failure to obtain the required SPDES permit to manage stormwater runoff at the facility and to implement the approved terms and conditions of the required SPDES permit.

### **RECOMMENDATIONS**

1. Except for the charge concerning Mr. Wing's alleged failure to comply with ECL 27-2303(14), the Commissioner should grant Department staff's August 27, 2009 motion

for order without hearing. With respect to the alleged violation of ECL 27-2303(14), the Commissioner should deny Staff's request for a motion for order without hearing.

2. The Commissioner should assess a total civil penalty of \$10,000.
3. Except for Item Nos. 1 and 13, as discussed above, the Commissioner should direct Mr. Wing to implement the requirements outlined in Schedule A.

#### **FURTHER PROCEEDINGS**

Upon receipt of a copy of the Commissioner's order and this Summary Report, Ms. Sheen shall advise whether Department staff wishes me to convene a hearing to consider the charge associated with Mr. Wing's alleged failure to comply with ECL 27-2303(14).

Attachment:        Schedule A

**Schedule A**  
**Schedule of Compliance**

1. Upon the effective date of this Order, Respondent shall pay the civil penalty as described in this Order.
2. **Within 30 days of the effective date of this order**, submit a completed “Annual Report Form for Waste Fluid Disposal,” for the period January 01 through December 31, 2009 and continue to submit annual reports **by March 1<sup>st</sup> of each year** thereafter to the Department to the address below.
3. **Immediately**, all spillage of fluids seen on-site at the facility during the time of inspection should be cleaned up. Affected soils must be removed and properly disposed. The release of petroleum is prohibited by Article 12 of the Navigation Law, and spills shall be handled and reported in accordance with section 175 of that law and Department regulation (17 NYCRR Part 32).
4. **Within 120 days of the effective date of this order**, construct a concrete surface, or other surface that allows equivalent protection to surface and groundwater, on which to drain, remove, or collect fluids from the end of life vehicles accepted at the facility. Send copies of receipts or other verification to the address below.
5. **Within 120 days of the effective date of this order**, construct a bermed concrete surface, or other surface that allows equivalent protection to surface and groundwater, on which to store fluids from vehicles. Send copies of receipts or other verification to the address below.
6. **Immediately**, start inspecting end of life vehicles that arrive at your facility for any leaks and immediately remedy the leaks to avoid a release of fluids onto the ground.
7. **Immediately**, make sure all fluids, lead acid batteries, mercury switches, refrigerants, and air bags are removed (or deployed) from vehicles before crushing operations occur at your facility.
8. **Immediately**, remove from site all stored fluids (including that recently drained by the mobile crusher). Fluids cannot be stored on-site until a bermed concrete surface, or equivalent surface, is constructed to store fluids. Send copies of receipts or other verification to the address below.
9. **Within 60 days of the effective date of this order**, begin to provide the Department with copies of receipts documenting that progress is being made toward removing the waste tires. **At a minimum, 100 tires per month shall be removed** and transported to an acceptable facility. This action should continue until such time as all tires that have been on the site for more than 18 months have been removed and less than 1,000 tires are on site. In addition, all tires that are not on vehicles shall be moved

to one location on the property, stored to prevent vector breeding and to facilitate counting for the purposes of ensuring compliance with the 1,000 tire limit. Send copies of receipts or other verification to the address below.

10. **Within 30 days of the effective date of this order**, put in place controls such as fencing, gates, and signs that will prohibit access to and use of the facility. Send copies of receipts or other verification to the address below.
11. **Within 30 days of the effective date of this order**, start controlling vegetation that has encroached onto fire access lanes and within the area used to store vehicles so that they do not impede access to the facility or increase the potential for a fire.
12. **Immediately** begin effectively controlling dust so that it does not constitute a nuisance or hazard to health, safety, or property.
13. **Within 90 days of the effective date of this order**, provide the Department with copies of receipts documenting that progress is being made toward removing the piles of existing Construction and Demolition (C&D) debris and solid waste. All debris stored greater than 18 months shall be removed and transported to a permitted disposal facility within six months of the effective date of this order. Send copies of receipts or other verification to the address below.
14. **Within 30 days of the effective date of this order**, prepare and implement a Contingency Plan at your facility for the actions that are to be taken in the instance that there is a fire, spill or a release of vehicle fluids onto the ground, or unauthorized material is received. Include fluid removal and vehicle stacking procedures as part of your plan. Make sure that all persons working at your facility are aware of the contingency plan and are educated about the facilities emergency procedures.
15. **Immediately**, begin recording the date that an end of life vehicle is received at your facility and maintain these records on site
16. **Within 30 days of the effective date of this order**, submit a “Notice of Intent, Transfer, or Termination (NOITT) to:  

NYSDEC, Division of Water  
Bureau of Permits  
625 Broadway  
Albany, NY 12233-3505
17. **Send verification in the form of photos, receipts, invoices, certificates of disposal, etc., to:**  
NYSDEC- Region 7  
Division of Solid and Hazardous Materials  
615 Erie Boulevard West  
Syracuse, NY 13204