**STATE OF NEW YORK**
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

- by -

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

Respondents.

**ORDER**

DEC Case No.
R7-20151223-102

Background

This administrative enforcement proceeding involves allegations by staff of the Department of Environmental Conservation (Department) that respondents Carrier Salvage & Recycling, LLC (Carrier Salvage & Recycling) and CNY Scrap Processing, LLC (CNY Scrap Processing) (collectively, respondents) have violated ECL articles 17 and 27 and 6 NYCRR parts 360 and 613 at respondents' facility located at 14725 State Route 104, Sterling, New York. Staff's complaint alleges the following four causes of action:

(1) Respondents violated 6 NYCRR 360-1.5(a) by storing of construction and demolition (C&D) debris for longer than 18 months without a permit and which now constitutes disposal;
(2) Respondents violated ECL 27-0707 and 6 NYCRR 360-1.7(a) by operating a solid waste management facility without a permit;
(3) Respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register a petroleum bulk storage (PBS) facility; and
(4) Respondents violated ECL 27-2303 by failing to submit an annual vehicle dismantler report to the Department by the date upon which it was due.

The complaint seeks a Commissioner's order holding respondents liable for the violations, and requests a civil penalty in the amount of $6,000.

After respondents served an answer to the complaint, Department staff filed a motion for order without hearing, which respondents opposed. Administrative Law Judge (ALJ) Lisa A. Wilkinson, to whom the matter was assigned, thereafter issued a ruling which (i) granted staff's motion with respect to the third and fourth causes of action; (ii) denied staff's motion with respect to the first and second causes of action; and (iii) reserved with respect to the issue of civil penalty (see ALJ Ruling on Motion for Order Without Hearing, dated April 25, 2017 [April 2017 Ruling], at 14).

By letter dated May 25, 2017, Department staff requested permission to withdraw the first and second causes of action, and submitted additional papers seeking a reduced civil penalty of $3,000. In response to staff's request, respondents submitted two affidavits dated June 10, 2017 with exhibits, which did not address staff's request to withdraw the two causes of action, but were instead offered as "objecting to staff's motion for order without hearing."

ALJ Wilkinson prepared the attached Ruling on Motions and Summary Report (Ruling and Summary Report), which I adopt as my decision in this matter, subject to my comments below.[1] In the Ruling and Summary Report, the ALJ:

- granted Department staff's request to withdraw its first and second causes of action;
- treated respondents' affidavits "objecting to staff's motion for order without hearing," which respondents filed in response to staff's request to withdraw the two causes of action, as a request by respondents to reargue or renew with respect to staff's motion for order without hearing, and denied respondents' request;
- reiterated her recommendations in the April 2017 Ruling that I hold that respondents violated:
    - ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register the PBS tank located at their facility (third cause of action); and
    - ECL 27-2303 by failing to timely submit the annual vehicle dismantler report for 2015 that was due on March 1, 2016 to the Department (fourth cause of action); and
- recommended that I impose on respondents a civil penalty in the amount of $3,000 for the two violations

(see Ruling and Summary Report at 9).

I concur with the ALJ that Department staff has submitted evidence sufficient to establish its entitlement to judgment as a matter of law on the violations alleged in the third and fourth causes of action in the complaint. The evidence submitted by staff demonstrates, among other things, that

- Respondent CNY Scrap Processing owns the site, and operates an automobile junkyard, scrap processing, vehicle dismantler and mobile car crusher at the site (see April 2017 Ruling at 3 [Finding of Fact No. 1] and 5-6 [Finding of Fact No. 15]);
- Respondent Carrier Salvage & Recycling recovers material for recycling at the site such as scrap metals, lawn/garden/household/agricultural/automotive equipment, trucks, trailers, locomotives, railcars, buses, and other industrial and commercial equipment.

[1] The findings of fact set forth in the April 2017 Ruling at pages 3-6 were incorporated by reference in the Ruling and Summary Report (see Ruling and Summary Report at 3). The exhibits to staff's motion for order without hearing are listed in the April 2017 Ruling (see April 2017 Ruling at 2). With respect to the third (unregistered petroleum bulk storage facility) and fourth (failure to timely submit an annual vehicle dismantler report) causes of action, I also adopt the ALJ's discussion in the April 2017 Ruling as part of my decision in this matter (see April 2017 Ruling at 7, 12-13).

The business involves draining waste fluids from vehicles into a 300-gallon aboveground storage tank (see Ruling and Summary Report at 3 [Supplemental Findings of Fact Nos. 1 and 2]);

- Respondents failed to register the aboveground storage tank at the site until July 2016, after this enforcement proceeding was commenced (see Ruling and Summary Report at 3 [Supplemental Findings of Fact Nos. 3 and 4]); and
- Respondents did not file the 2015 annual vehicle dismantling report until July 2016, after this proceeding was commenced, even though it was due on March 1, 2016 (see Ruling and Summary Report at 3 [Supplemental Finding of Fact No. 5]).

I also concur with the ALJ's ruling granting staff's request to withdraw the first and second causes of action. As the ALJ stated, respondents will not be prejudiced by the withdrawal of these claims from this proceeding (see Ruling and Summary Report at 2).

The ALJ's treatment of respondents' filings as requests to reargue or renew was also proper. The request pending before the ALJ was staff's request to withdraw two causes of action. Respondents' response, however, did not discuss the proposed withdrawal of the causes of action at all; rather, it was focused on staff's motion for order without hearing, which had been filed in February 2017, which respondents had already opposed, and which was decided by the ALJ in April 2017. The ALJ correctly determined that respondents were not entitled to reargument or renewal (see Ruling and Summary Report at 4-8).

I agree with the ALJ that the civil penalty of three thousand dollars ($3,000) sought by Department staff is authorized on this record. Furthermore, the penalty is far below the penalties that could be assessed pursuant to statute and Department policies (see id. at 8-9).

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

I. Department staff's motion for order without hearing is granted with respect to the third and fourth causes of action in the complaint. Respondents Carrier Salvage & Recycling and CNY Scrap Processing, LLC are adjudged to have violated:

a. ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register the petroleum bulk storage facility located at 14725 State Route 104, Sterling, New York; and

b. ECL 27-2303 by failing to timely submit the 2015 annual vehicle dismantler report for the CNY Scrap Processing facility located at 14725 State Route 104, Sterling, New York that was due on March 1, 2016.

II. Respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC are hereby assessed, jointly and severally, a civil penalty in the amount of three thousand dollars ($3,000), to be paid within thirty (30) days of service of this order upon respondents. Payment shall be made by certified check, cashier's

check or money order payable to the New York State Department of Environmental Conservation and mailed or otherwise delivered to:

Margaret Sheen, Esq.
Assistant Regional Attorney
NYSDEC – Region 7
615 Erie Boulevard West
Syracuse, NY 13204-2400

III. All questions regarding this order shall be addressed to Margaret Sheen, Esq. at the address referenced in paragraph II of this order.

IV. The provisions and terms of this order shall bind respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC, and their agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: January 9, 2018
Albany, New York

**STATE OF NEW YORK**
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

- by -

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

Respondents.

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**RULING ON MOTIONS AND SUMMARY REPORT**

DEC Case No. R7-20151223-102

**Appearances:**

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

## PROCEDURAL BACKGROUND

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by serving respondents with a notice of hearing and complaint dated June 22, 2016. Respondents filed an answer dated July 21, 2016, denying the allegations in the complaint and raising three affirmative defenses.

On or about February 15, 2017, staff filed a motion for order without hearing (Motion for Order) with supporting papers, seeking judgment on four causes of action. In response to staff's motion, respondents Carrier Salvage & Recycling, LLC (Carrier Salvage) and CNY Scrap Processing, LLC (CNY Scrap) (collectively respondents), filed a "Response letter" that opposed the relief requested by Department staff, including what respondents referred to as "affirmative defenses," and attached respondents' July 2016 answer that also included "affirmative defenses" and additional exhibits.

On April 26, 2017, I issued a ruling on staff's Motion for Order, holding that Department staff was entitled to judgment on the third and fourth causes of action in the complaint alleging that respondents failed to register a petroleum bulk storage (PBS) storage tank in violation of ECL 17-1009 and 6 NYCRR 613-1.9(a), and failed to timely submit a vehicle dismantler annual report in violation of ECL 27-2303 (*see* Ruling on Motion for Order Without Hearing, dated

April 25, 2017 [April 2017 Ruling], at 12-14). I denied staff's motion with respect to the first and second causes of action (*see id*. at 9-12), and deferred judgment on the civil penalty (*see id*. at 14).[1]

By letter dated May 25, 2017, Department staff requested permission to withdraw the first and second causes of action of the complaint and submitted an updated staff affidavit with a revised penalty calculation. In response to staff's request, Kevin Carrier and Shelley Carrier submitted affidavits dated June 20, 2017 "objecting to staff's motion for order without a hearing," including three exhibits.[2]

By letter dated June 22, 2017, I authorized Department staff to submit on or before July 17, 2017 a reply to respondents' response to staff's May 25th letter requesting leave to withdraw the first and second causes of action. On June 27, 2017, I also requested that Department staff provide a copy of the PBS registration issued to CNY Scrap for its PBS tank located at 14725 State Route 104, Sterling, New York 13156.

On July 6, 2017, Department staff served affidavits from Dave O'Brien, Environmental Program Specialist Region 7, Kevin Kemp, Environmental Engineer Region 7, and Nicole Smith, Environmental Engineer Region 7, and a reply memorandum from Assistant Regional Attorney Margaret Sheen.

I grant Department staff's request to withdraw the first and second causes of action. Respondents will suffer no prejudice from the withdrawal of these claims; indeed, by withdrawing the claims, staff is no longer alleging any solid waste violations against respondents, and staff's requested penalty has been reduced in half, from $6,000 to $3,000. In addition, I am treating respondents' "object[ions] to staff's motion for order without a hearing" as a request to reargue or to renew with respect to staff's Motion for Order. As discussed below, respondents are not entitled to relief.

I reiterate here my recommendations in the April 2017 Ruling that the Commissioner issue an order holding that respondents violated ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register the PBS tank located at the CNY Scrap Processing facility at 14725 State Route 104, Sterling, New York, and violated ECL 27-2303(1) by failing to submit the annual report by March 1, 2016. The parties' submissions currently pending before me provide the basis for the supplemental findings of fact set forth below, and additional support for the recommendations to the Commissioner contained in the April 2017 Ruling.

I also recommend that the Commissioner impose on respondents a civil penalty in the amount of three thousand dollars ($3,000) as requested by staff.

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[1] A complete description of the prior proceedings in this matter, including the papers submitted and my determinations with respect to Department staff's Motion for Order motion, are discussed in the April 2017 Ruling.

[2]The exhibits include the following: exhibit A – Morgan Wesson, *Junking a junkyard*, Daily Messenger, July 21, 2009; exhibit B - Letter from DEC Environmental Engineer 2 Steven E. Perrigo P.E. to Kevin Carrier dated January 12, 2011; and exhibit C – Letter from Glenn Flynn to the Town of Sterling, October 1, 2014. None of these exhibits is relevant to my recommendations.

## SUPPLEMENTAL FINDINGS OF FACT

In the April 2017 Ruling, I made findings of fact with respect to all four causes of action, which are incorporated herein by reference. I have made supplemental findings of fact relevant to the third and fourth causes of action, as set forth below.[3] Based upon the submissions of the parties, the following facts are undisputed or are determinable as a matter of law:

1. Respondent Carrier Salvage & Recycling, LLC (Carrier Salvage) recovers material for recycling such as scrap metals, lawn and garden equipment, household equipment, agricultural equipment, automotive equipment, commercial truck and trailers, locomotives, railcars, transportation buses, industrial and commercial equipment and parts therefrom (*see* Answer [factual background, unnumbered paragraphs] at 2).

2. Carrier Salvage drains waste fluids from vehicles and equipment into a 300 gallon above ground oil storage tank as part of its normal business operations (Affidavit of Kevin Carrier, sworn to June 20, 2017 [Kevin Carrier Aff], ¶ 12]; Answer at 3 [Affirmative Defense Third Cause of Action]).

3. From October 1, 2014 until at least November 29, 2016, the oil tank was stationary and located in the southwest corner of a bermed concrete pad at the facility (*see* Affidavit of Nicole Smith, sworn to July 5, 2017 [Smith July 2017 Aff], ¶¶ 6-8, and Smith exhibits A and B; Affidavit of Kevin Kemp, sworn to July 6, 2017 [Kemp Aff], ¶¶ 8-9 and Kemp exhibit 3).

4. Respondents filed the PBS registration application with the Department on July 5, 2016 and the tank was registered on July 6, 2016 (*see* Affidavit of Nicole Smith sworn to February 10, 2017 [Smith February 2017 Aff], ¶ 5[c]; Motion for Order, exhibit E; Kevin Kemp Aff, exhibit 1).

5. On July 18, 2016, the Department received respondents' 2015 annual report (annual report) that was due on March 1, 2016. Respondents previously failed to timely submit the 2012 annual report originally due on March 4, 2013. Respondents also failed to submit the 2013 report by July 30, 2014 as set forth in a remedial schedule of compliance proposed by Department staff. (*See* Smith February 2017 Aff ¶ 5(d); Motion for Order, exhibit D, NOVs dated January 30, 2014, June 2, 2014, and October 1, 2014.)

6. Respondents' affirmative defense to the third cause of action, which alleges that respondents violated 6 NYCRR 613-1.9(a) by failing to register the PBS tank, states in whole: "Respondents have a 300 gallon used oil tank on site that has been registered and is now in compliance with 6 NYCRR 613-1-9(a) [sic – should be 613-1.9(a)], please see attached Exhibit B" (*see* Answer, affirmative defense third cause of action).

[3] Because staff has withdrawn the first and second causes of action, the findings of fact in the April 2017 Ruling relating to those causes of action are now moot.

7. Respondents' affirmative defense to the fourth cause of action, which alleges that respondents violated ECL 27-2303 by failing to submit the annual report by March 1, 2016, states in whole: "Respondents have submitted on July 16, 2016 the annual report [pursuant] to ECL [] 27-2303 that was due on March 1, 2016" (*see* Answer, affirmative defense fourth cause of action).

**DISCUSSION**

As set forth above, in response to staff's request to withdraw two causes of action, respondents submitted two affidavits with three exhibits. Both affidavits are entitled "Affidavit Objecting to Staff's Motion for Order Without a Hearing." Respondents have filed no opposition to staff's request to withdraw the first and second causes of action. Instead, they seek to reargue or renew the Motion for Order, to which they already responded, and which was already decided in April 2017. Respondents have not, however, satisfied their burden to demonstrate entitlement to reargument or renewal.

Reargument may be granted only where it is shown that, in determining the prior motion, the ALJ overlooked or misapprehended matters of fact or law that were presented on the prior motion. Requests to reargue shall not include any matters of fact not offered on the prior motion (*see e.g. Matter of McCashion*, Default Summary Report and Ruling on Cross-Motion, dated January 27, 2017, at 6-7, *aff'd*, Order of the Commissioner, dated April 24, 2017, at 4; *see also* CPLR 2221[d][2]).

Respondents' two affidavits do not contain any argument that the ALJ overlooked or misapprehended any matters of fact or law that were presented on the prior motion. Instead, Mr. Carrier's affidavit asserts factual matters that were not presented in response to the Motion for Order, but does not offer any explanation as to why these facts were not submitted in response to that motion. Ms. Carrier's affidavit merely asserts that she is the owner of the two respondents, that she has read Mr. Carrier's affidavit, and states that "I agree to the facts and issues pointed out in this affidavit and concur with the same." Thus, respondents' submissions are insufficient to warrant granting reargument.

Respondents have also failed to demonstrate entitlement to renewal with respect to the Motion for Order. Motions to renew are based upon new facts not offered on the prior motion, but must include a reasonable justification for the failure to include such facts on the prior motion (*see Matter of McCashion*, *supra*, at 6-7). Again, Mr. Carrier's affidavit asserts new facts not offered in response to the Motion for Order, but fails to offer any justification for the failure to include such facts in respondents' opposition to the Motion for Order (*see* Kevin Carrier Aff ¶¶ 3-17)

Respondents' most recent submissions are clearly an attempt to revisit the Motion for Order, on which I ruled in April 2017. Respondents have not satisfied the requirements for reargument or renewal, and their requests are therefore denied.

Moreover, even were I to consider the new facts submitted by respondents, respondents would still not be entitled to relief. For example, with respect to the third cause of action, Mr.

Carrier now claims that the used oil tank at issue operated as a mobile tank prior to July 6, 2016, not a stationary tank, and, therefore, was not subject to the PBS registration requirements of 6 NYCRR part 613.

Mr. Carrier asserts that Carrier Salvage "during normal business practices at times has to drain equipment and vehicles of their waste fluids at locations other than their primarily [sic] place of business" and that the question has arisen whether the tank needed to be registered because it was not stationary (Kevin Carrier Aff ¶¶ 12-13). Mr. Carrier cites to ECL 17-1003(7) which defines the term "tank," in relevant part, as a "stationary device designed to store petroleum, which is constructed of non-earthen materials that provide structural support" (*see* Kevin Carrier Aff ¶ 13). According to Mr. Carrier, David O'Brien of the Department repeatedly advised him that the tank did not have to be registered because it was not stationary (*id.*, ¶ 12).

Mr. Carrier further contends that the Department's enforcement action was prompted by complaints from the owners of a neighboring parcel of land who, in 2014, "started [] bogus complaints to the staff at region 7" and that "[he has] received a totally different set of standards in the cooperation [] between staff and myself in dealing with the abovementioned property" (Kevin Carrier Aff ¶ 11).

As a threshold matter, respondents have not provided any explanation, much less a satisfactory explanation, why they did not assert until now that the PBS tank was exempt from registration. Kevin and Shelley Carrier have appeared at every stage of this enforcement proceeding and have responded to the Complaint and the Motion for Order. Moreover, respondents' contention that the tank was mobile is not credible. Department staff submitted three affidavits in rebuttal to respondents' claim that they operated the subject PBS tank as a mobile tank.

David O'Brien, an Environmental Program Specialist in the Division of Environmental Remediation in the Department's central office in Albany, spoke to Mr. Carrier and was specifically named in Mr. Carrier's affidavit as having advised Mr. Carrier that the tank did not have to be registered. Mr. O'Brien manages and coordinates the used oil program for the Department and provides guidance and answers inquiries on used oil regulatory requirements to Department staff and the public. Mr. O'Brien has worked for the Department for 28 years and is familiar with regulations pertaining to used oil, hazardous waste, solid waste and bulk storage. (*See* David O'Brien Affidavit, sworn to July 3, 2017 [O'Brien Aff], ¶¶ 1-2.)

Mr. O'Brien attested that he received a phone call from Mr. Carrier on June 20, 2017, the same day that Mr. Carrier filed his affidavit. Mr. O'Brien took notes of the phone call within one-half hour of the call, as is his customary practice of making a record of all calls he receives. According to Mr. O'Brien, Mr. Carrier identified himself during the call as a contractor who performs maintenance work in the field on various equipment and stated that during the course of performing this maintenance work, used oil is generated and placed in a tank located on his truck. Mr. Carrier told Mr. O'Brien that he hires Safety-Kleen on a periodic basis to remove the oil from the tank. Mr. Carrier asked Mr. O'Brien if he needed a PBS registration for the tank. Mr. O'Brien replied that based on the description of the tank Mr. Carrier had provided to him, the tank did not have to be registered with the Department because only stationary tanks are

subject to registration. Mr. O'Brien also advised Mr. Carrier that mobile tanks may be subject to U.S. Department of Transportation (USDOT) regulations. Mr. O'Brien asserted in his affidavit, however, that the tank that Mr. Carrier described to him does not appear to be the same stationary tank that Department staff inspected at the facility. (*See* O'Brien Aff ¶¶ 6-8 and O'Brien exhibit 1 [notes of phone call]).

Department staff also provided an affidavit from Kevin Kemp, an Environmental Engineer in the Department's Region 7 offices in Syracuse, who has worked for the Department since 2004. Mr. Kemp possesses a degree in civil engineering and is trained in the enforcement of petroleum and chemical/ hazardous bulk storage rules and regulations. He is familiar with respondents' vehicle dismantling and scrap metal recycling operations at the CNY Scrap Processing facility. (*See* Kemp Aff ¶¶ 1-4). According to Mr. Kemp, 6 NYCRR 613-1.9 and 6 NYCRR 374-2.3(c) require petroleum bulk storage tanks to be registered within 30 days of commencing use. Mr. Kemp received the initial registration application for the PBS tank on July 5, 2016. (*See* Kemp Aff ¶¶ 5-7 and Kemp exhibit 1.)

Mr. Kemp inspected the facility on November 29, 2016 and observed one 300 gallon skid-mounted aboveground storage tank storing a quantity of used motor oil. The tank was located in the center of a bermed concrete pad that also served as secondary containment. Mr. Kemp stated that based on the design of the tank, the tank should not be moved regularly, especially when product is present in the tank. According to Mr. Kemp, facility personnel told him that the tank is not moved on a regular basis, so he considers the tank to be stationary. Mr. Kemp also stated that if a 300 gallon tank were to be mounted on a truck, the tank would be subject to USDOT regulations for mobile tanks storing hazardous materials and require appropriate placarding. In addition, the tank would need to be transported by a driver who possesses a commercial driver's license with tank and hazardous materials endorsements. Mr. Kemp observed no such placarding on the tank. (*See* Kemp Aff ¶¶ 8-9 and Kemp exhibit 3.)

Nicole Smith, an Environmental Engineer in the Division of Materials Management, inspected the facility on October 1, 2014. Ms. Smith took a photograph of the tank at that time and stated that the tank was stationary and located in the southwest corner of the bermed concrete pad. Ms. Smith stated that the tank is utilized to store used oil collected from end-of-life vehicles and is pumped out periodically when full. (*See* Smith July 2017 Aff ¶ 6 and Smith exhibit A.). Ms. Smith attested that during her May 21, 2015 inspection, representatives for respondents advised her that they were in the process of registering the tank and communicating with Kevin Kemp about the tank registration application and requirements. According to Ms. Smith, the tank was stationary and located in the same southwest corner of the bermed concrete pad depicted in the October 1, 2014 photograph. (*See* Smith July 2017 Aff ¶ 7.) The tank was registered with the Department on July 6, 2016. Ms. Smith took a photograph of the tank during her November 29, 2016 inspection of the facility. She stated that the tank was again located in the southwest corner of the bermed concrete pad, at the same location as it was during each of her previous site visits, and there was no indication it had been moved at any time between October 1, 2014 and November 29, 2016. (*See* Smith July 2017 Aff ¶ 8 and Smith exhibit B.)

In sum, during three separate site visits over a two year period, Department staff consistently observed the tank in the same fixed location, atop a concrete bermed pad. (*See*

Kevin Kemp Aff ¶¶ 8-9; Smith July 2017 Aff ¶¶ 6-8; and Smith exhibits A and B.) Respondents, on the other hand, have provided no evidence in admissible form to substantiate their belated assertion that the tank was operated as a mobile tank prior to July 6, 2016. Mr. Carrier's June affidavit simply states that Carrier Salvage "during normal business practices at times has to drain equipment and vehicles of their waste fluids at locations other than their primarily [sic] place of business" (Kevin Carrier Aff ¶ 12). No mention is made of what means of transportation respondents utilized to transport the tank, how respondents provided adequate secondary containment for the tank during its transport, what locations that the tank traveled to, and whether the tank was subject to other regulatory requirements with which respondents had to comply.

The fact that respondents ultimately registered the tank on July 6, 2016, and came into compliance with regulatory requirements, is not a defense to liability for failing to register the tank when obligated to do so pursuant to 6 NYCRR 374-2.3(c) and 6 NYCRR 613-1.9(a).

Similarly, respondents' submissions with respect to staff's fourth cause of action are insufficient to warrant revisiting my April 2017 Ruling granting staff's Motion for Order. In his affidavit submitted in response to Department staff's request to withdraw the first and second causes of action, Kevin Carrier asserts for the first time in this proceeding, with respect to staff's fourth cause of action, the following:

> The staff has in the past accepted these reports late without penalty. With respect to this particular year the report may have been on time, however the NYSDEC changed the requirements significantly by requiring all weights of ferrous and non-ferrous be calculated for the year something that was never done before. The business is a small family owned business that moves a lot of this material and at the same time under staffed and financed, which leaves this information in hard copy paper form not in a database. There was a numerous [sic] amount of time to recover this needed information to fill in the report. Nichole [sic] Smith was contacted by Shelley Carrier during this delay in reporting regarding the new requirements

(Kevin Carrier Aff ¶ 16).

Pursuant to ECL article 27 title 23, both respondents are by definition vehicle dismantlers who are required, as an owner or operator of a facility that dismantles end of life vehicles on site, to submit annual reports (*see* ECL 27-2301[11] and ECL 27-2303[1]; Answer [factual background], at 2).

As with their new facts relating to the PBS tank registration cause of action, respondents have not provided any explanation for their failure to raise these issues in response to staff's Motion for Order. Moreover, alleging that Department staff allowed respondents to submit late reports in the past is not a legally sufficient defense to respondents' failure to submit a timely report in 2016, and is contradicted by the administrative record showing Department staff's attempts to bring respondents into compliance with this regulatory requirement for past reports (*see* Motion for Order, exhibit D, NOVs dated January 30, 2014, June 2, 2014, and October 1, 2014). Indeed, respondents' repeated tardiness suggests a disregard of this regulatory

requirement. The burden of preparing the report is squarely on respondents and the fact that respondents must expend some effort to prepare the report does not excuse a late filing. Respondents are engaged in a regulated activity and must adhere to the applicable laws and regulations governing that activity.

In sum, respondents have not provided a satisfactory explanation why they did not submit these matters associated with the annual report before now and, in any event, even accepting such submissions would not entitle respondents to relief through reargument or renewal.

Based on the foregoing, it is my determination that respondents' submissions in response to staff's request to withdraw the first and second causes of action are in substance a request to reargue or to renew the Motion for Order with respect to staff's third and fourth causes of action. Respondents have not satisfied the requirements for reargument or renewal, and their requests are denied. As set forth above, I reiterate here my April 2017 Ruling granting staff's motion for order without hearing with respect to the third and fourth causes of action, for the reasons stated in the April 2017 Ruling and as amplified herein.

Civil Penalty

ECL 71-1929 provides for a maximum penalty of not more than $37,500 per day for each violation of ECL article 17, including title 10 pertaining to petroleum bulk storage. In determining an appropriate civil penalty, staff calculated a maximum statutory penalty of $15,244,000 for the PBS tank registration violation for 412 days (May 21, 2015 to July 6, 2016 at $37,500 per day). Staff also considered DEE-22: Petroleum Bulk Storage Inspection Enforcement Policy Penalty Schedule (May 21, 2003), which sets the penalty range at $500 to $5,000 with an average penalty of $1,000.

Article 71 does not provide a specific civil penalty for violations of ECL article 27 title 23. ECL 71-4003 provides for a general civil penalty in cases where a specific penalty is not provided for in the ECL: for a first violation, not to exceed $1,000 and an additional penalty of not more than $1,000 for each day during which such violation continues. Staff calculated a maximum penalty of $139,000 for 139 days for the annual report violation (March 1, 2016 to July 18, 2016 at $1,000 per day). Staff also reviewed OGC-8: Solid Waste Enforcement Policy (December 9, 2015) to determine the penalty range for the reporting violation. Staff applied the lower penalty range applicable to minor violations, which is 5% of the statutory maximum, and calculated a minimum penalty of $6,950 for the reporting violation (see Affidavit of Nicole Smith, sworn to May 26, 2017 [Smith May 2017 Aff], ¶¶ 8-13, and attached Penalty Calculation Sheet).

Following the withdrawal of the first and second causes of action, Department staff seeks a total penalty of $3,000 (*see* Smith May 2017 Aff ¶¶ 13, 14). Department staff argues that the violations in this case, failing to register a PBS tank (6 NYCRR 613-1.9[a]) and failing to submit an annual report on time (ECL 27-2303[1]), obstruct the Department's ability to review and oversee the regulated activities at the facility (*see* Smith May 2017 Aff ¶ 10). I concur. PBS facility registration is an essential component of the Department's PBS regulatory program and enables the Department to determine if a facility is complying with the PBS regulations.

Likewise, the annual reports prescribed pursuant to ECL 27-2303 are necessary for the Department to ensure that facilities dismantling vehicles are operating in compliance with the law. Staff's requested penalty of three thousand dollars ($3,000) is well below the combined minimal penalties that could be assessed pursuant to DEE-22 and OGC-8, and is reasonable.

## CONCLUSIONS OF LAW

I previously concluded that Department staff had established respondents' liability on the third and fourth causes of action. Staff has withdrawn the first and second causes of action. The civil penalty sought by staff on the third and fourth causes of action is reasonable and authorized by statute and the Department's policies. Respondents' submissions are in substance a request to reargue or renew, and respondents have failed to satisfy the requirements for reargument or renewal.

## RECOMMENDATIONS

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for order without hearing regarding the third and fourth causes of action;

2. Holding respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC liable for violating ECL 17-1009 and 6 NYCRR 613-1.9(a) by failing to register the PBS tank located at 14725 State Route 104, Sterling, New York 14418;

3. Holding respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC liable for violating ECL 27-2303 by failing to submit the 2015 annual report for the CNY Scrap Processing facility located at 14725 State Route 104, Sterling, New York 14418 by March 1, 2016; and

4. Directing respondents Carrier Salvage & Recycling, LLC and CNY Scrap Processing, LLC to pay a civil penalty in the amount of three thousand dollars ($3,000) within 30 days of service of the Commissioner's order.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: July 26, 2017
Albany, New York