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

In the Matter

- of -

the Alleged Violations of Articles 27 and 71
of the Environmental Conservation Law (ECL)
and Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York (6 NYCRR),

- by -

THOMPSON CORNERS, LLC AND METALICO SYRACUSE REALTY, INC.,

Respondents.

DEC File No. R7-20070627-35

DECISION AND ORDER OF THE COMMISSIONER

September 15, 2010

DECISION AND ORDER OF THE COMMISSIONER

Introduction

In this enforcement proceeding, staff of the Department of Environmental Conservation (Department) is seeking an order requiring respondents to (1) provide financial assurance related to corrective action at a hazardous waste facility located at 6223 Thompson Road, East Syracuse, Onondaga County, New York and (2) pay a civil penalty for the failure to provide financial assurance.

After serving amended complaints on each respondent, staff filed a motion for order without hearing. Respondents filed separate answers to the amended complaints and then filed a joint cross motion for order without hearing.

This matter was assigned to Administrative Law Judge (ALJ) Susan J. DuBois, who prepared the attached Ruling and Report on Motions for Order Without Hearing (Ruling and Report). I adopt ALJ DuBois's report as my decision in this matter, subject to the following comments.

History of Ownership and Operation of the Site

ALJ DuBois provided a detailed summary of the history of ownership of the facility in the attached Ruling and Report. Briefly, Roth Brothers Smelting Corporation (Roth) operated a metals recovery and smelting operation at the site from 1949 to 1997. Roth then merged with Philip Environmental (which later became Philip Services and then Philip Metals), and the operation continued from 1997 to 1999. In 1999, Philip Metals sold the facility to Wabash Aluminum Alloys, LLC (Wabash), the sole shareholder of which is Connell Limited Partnerships (Connell). Wabash operated the facility from 1999 to 2005. In 2005, Wabash sold the facility to respondent Thompson Corners, LLC (Thompson). The facility contains two smelting plants, and in 2006, Thompson sold one of the two plants to respondent Metalico Syracuse Realty, Inc. (MSR). Thompson retained ownership of the other plant at the site.

The Requirement to Provide Financial Assurance

Under the federal Resource Conservation and Recovery Act (RCRA), 42 USC 6901, et seq., when hazardous waste facilities contain contamination on the site, they are subject to "corrective action" to remediate the contamination. See 42 USC

6924(a)(6). When a party is required to carry out corrective action, it is also required to provide "financial assurance" to ensure that a funding source exists should the operator or owner of the facility fail to carry out the corrective action. Id. New York State received authority from EPA to implement RCRA, and the State implements the corrective action and financial assurance requirements under the State Environmental Conservation Law (ECL) and regulations. See e.g. ECL 71-2727(3), 27-0911(2), 27-0913(1), and 27-0917; 6 NYCRR 373-2.6(b)(iii), 373-2.6(k), 373-2.6(a)(1)(ii), and 373-2.6(l).

Here, the Department determined that the site was contaminated with hazardous waste stemming from Roth's historic operations at the facility and that the contamination required corrective action. The Department entered into an Order on Consent with Roth in 1994, which required Roth to perform corrective action, conduct post-remedial operation and maintenance (O & M), provide financial assurance, reimburse the State for administrative costs, and notify subsequent owners of the existence of the Order on Consent and its terms. When Wabash purchased the site from Philip Metals in 1999, it continued to provide O & M related related to the corrective action under the 1994 Roth Order on Consent. See Exhs 36, 40, ¶¶ 6-7.

The record of this proceeding demonstrates that financial assurance has been provided only sporadically. Roth provided a letter of credit in 1994, and Philip Services provided a certificate of insurance in 1998. Wabash, which purchased the facility in 1999 from Philip Metals and assumed the responsibility for O & M related to the corrective action, did not provide any financial assurance, nor did the respondents, who were subsequent purchasers of all or part of the facility. To date, neither Wabash nor either of the respondents has submitted financial assurance.

While Department staff sent proposed Orders on Consent addressing the failure to provide financial assurance to Wabash (through its sole shareholder, Connell Limited Partnerships [Connell]) and the respondents, only Connell signed an Order on Consent. That Order on Consent, dated January 2, 2008, required Connell to (1) pay a civil penalty of $33,600 for its failure to provide financial assurance for the period of its ownership of the facility (January 1999 to April 2005) and to (2) provide financial assurance within 90 days of the Order on Consent.[1]

[1] Even though Wabash no longer owned the facility, it continued to provide O & M for the corrective action at the facility. ALJ Ruling and Report, Findings

Department staff represented that Connell provided documents of a "financial test," but did not provide the required financial assurance as the Order on Consent mandated. See Department's Reply Memorandum of Law in Support of Staff's Motion for Order Without Hearing and In Opposition to Respondent's [sic] Notice of Cross-Motion for Order Without Hearing (May 27, 2008), at 5.[2]

Department staff served separate amended complaints against respondents Thompson and MSR in which it alleged that Thompson and MSR are required to provide financial assurance pursuant to the ECL and its regulations. Specifically, 6 NYCRR 373-2.6(a)(1)(ii) states that "[t]he financial responsibility requirements of [6 NYCRR 373-2.6(l)] apply to regulated units." 6 NYCRR 373-2.6(a)(1)(ii) also states that "all solid waste management units must comply with the requirements in 6 NYCRR 373-2.6(l)."

Neither Thompson nor MSR provided financial assurance since they acquired ownership of the facility, and Department staff is seeking (1) a civil penalty of $33,000 from Thompson for its period of ownership to the date of the motion for order without hearing (April 2005 to March 2008) and a civil penalty of $22,000 from MSR for its period of ownership to the date of the motion for order without hearing (April 2006 to March 2008) and (2) financial assurance from either or both respondents.

Department staff filed a motion for order without hearing on the grounds that these legal and factual issues did not require a hearing. Respondents cross moved for an order without hearing. The ALJ granted Department staff's motion and denied respondents' cross motion. The ALJ recommended that respondents (1) pay the requested civil penalties for their failure to provide financial assurance ($33,000 for respondent Thompson and $22,000 for respondent MSR) and (2) provide the required financial assurance, which could be done by either one of them, both of them, or some other responsible party.

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of Fact 23-25. Some of Wabash's responsibilities for conducting environmental monitoring and testing at the facility have since been undertaken by Metalico Aluminum Recovery, Inc. (MARI), an entity with an undefined affiliation to respondent MSR. Id., Finding of Fact 30.

[2] In a recent update on Connell's performance under the January 2, 2008, Order on Consent, Department staff stated that Connell paid the civil penalty but did not provide financial assurance. See E-mail from Margaret Sheen, Assistant Regional Attorney, NYSDEC, to Joan Matthews, Associate Commissioner, Office of Hearings and Mediation Services, NYSDEC (with copies to all counsel in this proceeding)(Aug. 30, 2010, 11:07 EST).

The respondents disputed that they were liable for financial assurance. First, they claimed that the regulations only applied to parties who were seeking a permit to operate a hazardous waste treatment, storage, and disposal (TSD) facility. Second, they argued that they were merely subsequent property owners and were not successors and assigns of Roth and its Philips progeny.

The ALJ determined that the respondents were liable for financial assurance because of the requirements imposed under 6 NYCRR part 373, specifically 6 NYCRR 373-2.6(a)(1)(ii) and 373-2.6(l). The ALJ also determined that the requested civil penalties were reasonable. The ALJ rejected the assertion that respondents were liable as successors and assigns. I agree that this matter can be decided without a hearing and that respondents are liable for failing to provide financial assurance.

I agree with the ALJ that liability for financial assurance arises out of the Department's regulations.[3] The regulations expressly state that owners and operators of solid waste management units must satisfy certain requirements, including providing financial assurance, "for all wastes . . . contained in solid waste management units at the facility regardless of the time the waste was placed in such units" (6 NYCRR 373-2.6[a][1][i]) and that "[t]he financial responsibility requirements . . . apply to regulated units" (6 NYCRR 373-2.6[a][1][ii]). Here, the respondents are owners and operators of a solid waste management unit. See e.g. Radtke Affidavit in Support of Staff's Motion for Order Without Hearing, at ¶¶ 5, 11; ALJ Ruling and Report, Finding of Fact 37. That the placement of the wastes preceded their ownership and operation of the facility is irrelevant.

Moreover, I reject the respondents' claim that they are not liable under the regulations because they are not seeking a permit to operate a treatment, storage, or disposal (TSD) facility. As the ALJ correctly noted, the site is still a hazardous waste facility, subject to corrective action, which includes ongoing monitoring and other aspects of operation and

[3] Having determined that respondents are liable for providing financial assurance under the Department's regulations, I decline to decide whether respondents also are liable based on staff's assertion that they are "successors and assigns." Accordingly, I neither accept nor reject the ALJ's analysis and recommendation on this issue. I note, also, that the respondents' denial that they are liable as successors and assigns is at odds with Wabash's position, as stated in Connell's 2008 Consent Order. See Exh 40, ¶¶ 5-7.

maintenance. In other words, the respondents here do not benefit from the expiration of an earlier permit for a TSD. The obligations in that permit were extended by the 1994 Roth Order on Consent, and the corrective action, with the attendant monitoring, continues, not only under the Roth Order on Consent, but also under the above-referenced regulations. Otherwise, as staff notes, parties would allow their permits to lapse so that they would no longer be responsible for corrective action and its attendant obligations. This is against the public interest because it would subvert the purpose of RCRA, and I do not read the regulations as allowing this to happen.

In this matter, at least three responsible parties are liable for providing financial assurance: Wabash (Connell), respondent Thompson, and respondent MSR. If one party provides the financial assurance, the other two would not have to provide it. Had Wabash (Connell) followed through on its obligation to provide financial assurance under the January 2, 2008, Order on Consent, Thompson and MSR would not have to provide the financial assurance. But Wabash (Connell) did not follow through, therefore continuing to expose all three to the requirement to provide financial assurance. Moreover, where more than one party is responsible for providing financial assurance and none provide it, all of the parties are liable for civil penalties for not providing it.

Thus, here, all three entities remain liable for providing financial assurance. As the ALJ noted, they can determine among themselves who will satisfy the obligation. Because, to date, none of them have provided financial assurance, all of them are responsible to carry out that obligation. To do nothing continues to expose each of them to the requirement.

Civil Penalty

Finally, I agree with the ALJ that the requested penalty for each respondent -- $33,000 against Thompson and $22,000 against MSR -- is reasonable. ECL 71-2705 authorizes a civil penalty for violations of ECL article 27, title 9, of up to $37,500 for a first violation, and $37,500 for each day the violation continues. The staff’s calculations here are grounded in the ECL and the RCRA Civil Penalty Policy. Indeed, as the ALJ notes, the calculations reflect mainly the gravity component of the RCRA Civil Penalty Policy and do not also take into account the economic benefit to the respondents for not having secured the financial assurance. Staff would have been well within its right to request a significantly higher penalty.

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, and respondents' cross motion for order without hearing is denied.

II. A. Respondent Thompson Corners, LLC (respondent Thompson) is adjudged to have violated 6 NYCRR 373-2.6(a)(1)(ii) and 6 NYCRR 373-2.6(1) from April 7, 2005, to at least March 12, 2008, by failing to provide financial assurance for operation and maintenance required as part of the corrective action for the facility.

B. Respondent Metalico Syracuse Realty, Inc. (respondent MSR) is adjudged to have violated 6 NYCRR 373-2.6(a)(1)(ii) and 6 NYCRR 373-2.6(1) from April 11, 2006, to at least March 12, 2008, by failing to provide financial assurance for operation and maintenance required as part of the corrective action for the facility.

III. Respondent Thompson is assessed a civil penalty in the amount of thirty-three thousand dollars ($33,000). Respondent MSR is assessed a civil penalty in the amount of twenty-two thousand dollars ($22,000). The civil penalty shall be due and payable from each respondent within thirty (30) days after service of this order upon each respondent. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of "New York State Department of Environmental Conservation" and shall be delivered by certified mail, overnight delivery, or hand delivery to the Department of Environmental Conservation at the following address: New York State Department of Environmental Conservation, Region 7, 615 Erie Blvd. West, 2nd Floor, Syracuse, NY 13204-2400, Attn: Margaret A. Sheen, Esq.

IV. Respondents Thompson and MSR are jointly and severally responsible for providing financial assurance for the operation and maintenance of the corrective action at the facility required under 6 NYCRR 373-2. This requirement may be satisfied by either respondent submitting within thirty (30) days of service of this order (1) the required financial assurance in a form satisfactory to Department staff or (2) proof of financial assurance by

Connell Limited Partnerships, which is the sole shareholder of the prior owner and operator of the facility, Wabash Aluminum Alloys, LLC. Submissions under this paragraph shall be sent to Margaret A. Sheen, Esq., at the address in paragraph III above.

V. All communications from respondents to the Department concerning this order shall be made to Margaret A. Sheen, Esq., at the address in paragraph III above.

VI. The provisions, terms, and conditions of this order shall bind respondents, Thompson Corners, LLC, and Metalico Syracuse Realty, Inc., and their agents, successors, and assigns in all capacities.

For the New York State Department
Of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
September 15, 2010

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of articles 27 and 71 of the Environmental Conservation Law and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by THOMPSON CORNERS, LLC and METALICO SYRACUSE REALTY, Inc., Respondents	RULING AND REPORT ON MOTIONS FOR ORDER WITHOUT HEARING DEC File No. R7-20070627-35 May 5, 2009

Summary

Staff of the Department of Environmental Conservation (DEC Staff) alleged that Respondents Thompson Corners, LLC and Metalico Syracuse Realty, Inc. failed to provide financial assurance for corrective action at a facility in East Syracuse after the dates on which the Respondents purchased all or part of the facility. The facility was subject to a permit for hazardous waste storage that expired in March 1992, and was the subject of an order on consent between the Department of Environmental Conservation (DEC or Department) and a prior owner of the facility.

DEC Staff moved for an order without hearing and the Respondents cross-moved for an order without hearing dismissing the complaint. As discussed in the ruling, DEC Staff's motion for order without hearing is granted to the extent that no hearing is required and a recommendation is being made that the Commissioner grant the relief sought by DEC Staff. DEC Staff's motion is denied with respect to concluding that DEC Staff proved its allegations concerning "successors and assigns" and concerning continuation of requirements in the expired permit.

The Respondents' cross-motion for an order without hearing is denied with regard to its requested relief, although Respondents' motion is granted to the extent that no hearing is required in this matter. This ruling and report is submitted to the Commissioner with a recommendation that he issue an order granting the relief sought by DEC Staff.

Proceedings

DEC Staff commenced this administrative proceeding by serving a notice of hearing and complaint upon three respondents:

Metalico Aluminum Recovery, Inc. (MARI),[1] Thompson Corners, LLC, and Wabash Aluminum Alloys, LLC (Wabash). The notice of hearing and complaint were sent on July 18, 2007 by certified mail, return receipt requested.

Connell Limited Partnerships (Connell), the sole shareholder of Wabash during the time when Wabash owned and operated the facility involved in the present motions, entered into an order on consent that was signed on behalf of Connell on December 13, 2007 and on behalf of DEC on January 2, 2008.

On December 7, 2007, DEC Staff served an amended complaint on Metalico Syracuse Realty, Inc. (MSR), 6223 Thompson Road, East Syracuse, New York 13057 and, on the same date, served an amended complaint on Thompson Corners, LLC (Thompson), 7050 Cedar Bay Road, Fayetteville, New York 13066. Both amended complaints are under the same DEC case number, R7-20070627-35. MSR and Thompson each served a separate answer on December 21, 2007. MSR and Thompson are the Respondents in this matter.

The amended complaints alleged that the Respondents failed to provide financial assurance for completing corrective action for a waste site at 6223 Thompson Road, East Syracuse, New York, in violation of an order on consent and in violation of part 373 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 373).

DEC Staff is represented in this matter by Margaret A. Sheen, Esq., Assistant Regional Attorney, DEC Region 7, Syracuse, New York, and Rebecca Denue, Esq., DEC Office of General Counsel, Albany, New York. Respondent MSR is represented by Barry R. Kogut, Esq., of the law firm Bond, Schoeneck & King, PLLC, Syracuse, New York. Thompson is represented by Philip H. Gitlen, Esq. and Peter C. Trimarchi, Esq., of the law firm Whiteman, Osterman & Hanna, LLP, Albany, New York.

On January 4, 2008, Mr. Kogut wrote to Chief Administrative Law Judge (ALJ) James T. McClymonds, of the DEC Office of Hearings and Mediation Services (OHMS), asking that the statement of readiness submitted by DEC Staff be withdrawn or stricken. Mr. Kogut argued that the provision regarding statements of readiness in DEC enforcement hearings (6 NYCRR 622.9) requires that discovery be complete or waived before a matter is placed on

[1] Metalico Aluminum Recovery, Inc. and Metalico Syracuse Realty, Inc. are two distinct entities (see, Findings of Fact 27 and 28, below).

the hearing calendar, but no discovery had taken place in this matter. The statements of readiness were sent to OHMS by DEC Staff on January 3, 2008. On January 9, 2008, Mr. Gitlen wrote to Chief ALJ McClymonds, stating that Thompson concurred with the statements in Mr. Kogut's January 4, 2008 letter and also sought the withdrawal or striking of the statement of readiness.

A telephone conference call took place on January 10, 2008 among representatives of the parties, Chief ALJ McClymonds, and ALJ Susan J. DuBois (the undersigned). During the conference call, and as confirmed in a letter dated January 11, 2008, Chief ALJ McClymonds consolidated the two administrative enforcement proceedings. During the conference call, the parties discussed and agreed to a discovery schedule. Chief ALJ McClymonds's January 11 letter noted that the discovery schedule had rendered academic the motion to strike the statement of readiness. I was assigned as the ALJ for the hearing.

My January 11, 2008 letter to the parties noted that Mr. Kogut had stated he intended to prepare a proposed stipulation of facts. February 21, 2008 was tentatively scheduled as the hearing date, with a conference call scheduled for February 11, 2008.

During the February 11, 2008 conference call, the parties stated they were attempting to arrive at a stipulation of facts about which they would then present legal arguments. In a letter dated February 11, I stated that, based upon the ongoing discussions among the parties, it was not necessary to start the hearing on February 21 and it was possible that testimony might not be necessary. During the conference call, the parties agreed to an additional conference call on February 21 about the status of the stipulation discussions and possibly about a schedule for submitting written legal arguments.

On February 21, 2008, two conference calls took place among the parties and me. Although the parties had been discussing a proposed stipulation of facts, the Respondents objected to statements in the proposed stipulation that they described as being legal conclusions rather than facts. The parties did not arrive at a stipulation of facts.

DEC Staff submitted a motion for order without hearing on March 14, 2008. On March 18, the Respondents requested a ten-day extension of their April 11, 2008 deadline to respond, which I granted over DEC Staff's objection.

DEC Staff's motion for order without hearing was accompanied by a memorandum of law and an affirmation of Ms. Sheen, and affidavits of the following DEC employees: Stephen Condon, Engineering Geologist 2, DEC Division of Solid and Hazardous Materials (DSHM), Albany, New York; Thomas Killeen, Environmental Engineer, DEC DSHM; and Denise Radtke, Engineering Geologist 3, DEC DSHM, Albany, New York. In addition, DEC Staff submitted documents that were identified and described in the affirmation and affidavits. On March 26 and 27, 2008, DEC Staff transmitted to the ALJ and the Respondents an affidavit of A. Paul Patel, Environmental Engineer, DSHM, Albany that was also part of the supporting documents for the motion.

On April 21, 2008, the Respondents submitted a cross-motion for order without hearing, moving that DEC Staff's motion be denied and that the complaint be dismissed. The Respondents submitted one memorandum of law in support of this motion, on behalf of both Respondents.

The Respondents' cross-motion was accompanied by an affirmation of Mr. Gitlen and an affidavit of Arnold S. Graber, Esq., Executive Vice President and General Counsel of Metalico, Inc., the parent company of MSR. The Respondents submitted additional documents that were described in this affirmation and affidavit.

On May 27, 2008, DEC Staff replied to the Respondents' cross-motion, submitting a memorandum of law to which was attached a copy of one electronic mail message from Ms. Denue to Mr. Trimarchi.

Motions for orders without hearing

The DEC enforcement hearing procedures provide that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence....Within 20 days of receipt of such motion, the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence." (6 NYCRR 622.12(a) and (c), quoted in part).

These procedures also state: "A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR [Civil

Practice Law and Rules] in favor of any party. Likewise, where the motion includes several causes of actions [*sic*], the motion may be granted in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established. Upon determining that the motion should be granted, in whole or in part, the ALJ will prepare a report and submit it to the commissioner pursuant to section 622.18 of this Part...The motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing. If a motion for order without hearing is denied, the ALJ may, if practicable, ascertain what facts are not in dispute or are incontrovertible by examining the evidence filed, interrogating counsel and/or directing a conference. The ALJ will thereupon make a ruling denying the motion and specifying what facts, if any, will be deemed established for all purposes in the hearing. Upon the issuance of such a ruling, the moving and responsive papers will be deemed the complaint and answer, respectively, and the hearing will proceed pursuant to [part 622]." (6 NYCRR 622.12[d] and [e]).

Positions of the parties

DEC Staff

DEC Staff stated that the site is a hazardous waste facility at which soil is contaminated by lead, cadmium and polychlorinated biphenyls (PCBs), for which corrective action was required under 6 NYCRR 373-2.6. DEC Staff stated that the permit expired in 1992 and the former site owner entered into an order on consent in 1994 that included implementation of a corrective action program, implementation of post-remedial operation and maintenance, and provision of post-remedial financial assurances.

DEC Staff argued that both Thompson and MSR, as the current owners of portions of the site, are required to comply with the order on consent's financial assurance requirements but have failed to submit acceptable financial assurance, in violation of the order on consent, the Environmental Conservation Law (ECL), 6 NYCRR part 373 and the facility's permit conditions. DEC Staff asserted that no genuine issue of material fact exists concerning these allegations, and moved for an order without hearing. DEC Staff asked that the Commissioner issue an order assessing a civil penalty of $33,000.00 against Thompson, assessing a civil penalty of $22,000.00 against MSR, and directing Respondents to immediately set up adequate and appropriate financial assurance.

Respondents

The Respondents argued that they have no obligation to provide post-closure financial assurance under 6 NYCRR part 373 and that DEC has already received adequate financial assurance from a former property owner (Connell). The Respondents presented arguments concerning the effect of the consent order signed in 1994 by an even earlier property owner (Roth Brothers Smelting Corp., (Roth)) that required Roth to undertake corrective measures and to provide financial assurance for the cost of post-remedial work. According to the Respondents, the 1994 consent order is binding only on Roth, its corporate successors and those to whom it assigned the consent order obligations, and does not run with the land. The Respondents stated that neither of them are successors or assigns of Roth, and argued that they should not be penalized for what they described as DEC's failure to maintain required financial assurance from Roth and its true successors and assigns.

FINDINGS OF FACT

The following findings are based upon the affidavits and affirmations submitted by the parties, and are not in dispute.

1. In March of 1987, the New York State Department of Environmental Conservation (DEC or Department) issued a permit to Roth Brothers Smelting Corporation (Roth) for operation of a hazardous waste storage facility located at 6223 Thompson Road, East Syracuse, New York. The permit was issued on March 20, 1987 and had an effective date of March 30, 1987 and an expiration date of March 30, 1992. The permit authorized "storage of 290 containers of toxic waste from off-site generators prior to reclamation as well as toxic waste generated as a result of the reclamation processes." The permit was permit number 70-86-0175 and the facility number was EPA ID No. D006977986. The hazardous wastes handled by the facility included "emissions dust/sludge from secondary lead smelting (K069) and emission control dust from aluminum processing which contains lead and cadmium (D008 and D006)." (Hearing exhibit[2] (Ex.) 1; Radtke affidavit, at 5).

[2] The parties submitted documents as exhibits, some of which were attached to affirmations, affidavits or briefs. For ease of reference in this ruling, and in a hearing if one is necessary, I have re-numbered the documents sequentially. The list of hearing exhibit numbers and identification of the renumbered exhibits is attached as Appendix 1 of this ruling.

2. According to the July 20, 1994 statement of basis, that described corrective measures for soil contamination at the facility, "[s]ince 1927, Roth Brothers has reclaimed non-ferrous metals and alloys through secondary smelting and refining of purchased scrap, drosses, and by-products. In 1949 the company moved to its present location off Thompson Road in East Syracuse, New York. The current facility covers approximately 32 acres which contain two principal operation areas, Plant Nos. 1 and 2 (with a combined area of 200,000 square feet), as well as surrounding storage areas. The original operations were conducted in Plant No. 1 and Plant No. 2 was added in the mid-1950's." (Ex. 2, at 2).

3. The site of the Roth facility is located in the Town of Dewitt, Onondaga County (see Schedule A (also referred to as Exhibit A) of the deeds that are hearing exhibits 5, 34, and 35). The description of the site as contained in these deeds includes several parcels of land, one of which is the Plant 2 parcel that was later sold separately from the remainder of the site. Respondent Thompson Corners, LLC (Thompson) currently owns Plant 1 and Respondent Metalico Syracuse Realty, Inc. (MSR) currently owns Plant 2. Changes in ownership of all or parts of the facility, between Roth's ownership of it and the present time, are described further below.

4. At some time prior to May 29, 1986, Roth had applied for an Interim Status (Part A) Hazardous Waste Management Permit under the federal Resource Conservation and Recovery Act (RCRA). This application was made while the United States Environmental Protection Agency (EPA) was responsible for administering the RCRA program, prior to EPA's May 29, 1986 grant of final authorization for DEC to administer the RCRA program. The permit issued by DEC to Roth on March 20, 1987 was a permit pursuant to subpart 373-2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) (Ex. 1; Radtke affidavit, at 3 - 4).

5. The permit expired on March 30, 1992 but the permit continued in effect for corrective action concerning soil contamination at the facility, until an order on consent requiring corrective action was put in place (Ex. 2, at 5).[3]

[3] This exhibit page is cited in both DEC Staff's memorandum (at 3 - 4) and the Respondents' memorandum (at 3) in support of the statement that the permit continued in effect for corrective action until the order on consent was in place.

6. On September 30, 1993, Steven J. Kaminski, of the DEC Division of Hazardous Substances Regulation, sent a letter to Neal Schwartz, Roth's General Manager, that approved the closure certification of Roth's hazardous waste management units and the change in the facility's regulatory status from a treatment, storage and disposal (TSD) facility to a generator of wastes (Ex. 23).

7. On October 21, 1994, Roth and DEC entered into an order on consent (Index No. C7-0001-94-10) that required Roth to undertake corrective actions concerning soils in the vicinity of Plant 2 that were contaminated by lead, polychlorinated biphenyls (PCBs), and cadmium. The corrective action included polysilicate fixation stabilization of contaminated soils, plus groundwater monitoring to assess the performance of the corrective action. The order on consent incorporated a work plan that was prepared by Roth and that, with DEC's conditional approval letter, was deemed the DEC-approved Corrective Measures Implementation Plan (CMI Plan). The plan and letter were attached to the order as Appendices A and B and made an enforceable part of the order (Ex. 3).[4]

8. The order on consent was issued pursuant to Environmental Conservation Law (ECL) section 71-2727(3) and ECL article 27, title 9, among other authority (Ex. 3, at 1). The order on consent stated that DEC and Roth agreed the goals of the order were for Roth to: "(i) implement a RCRA corrective action program which shall include implementation of the CMI Plan and development and implementation of a post-remedial operation and maintenance plan; (ii) provide post-remedial financial assurances and (iii) reimburse the State's administrative costs." (Ex. 3, at 2).

9. The order on consent provided for construction of a Corrective Action Management Unit (CAMU) at the facility, as described in Appendix C of the order on consent. Appendix C stated, among other things, that the CAMU will hold approximately 21,000 tons of treated soil and be located 150 feet north of Plant 2. The dimensions of the unit are about 500 by 350 feet.

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[4] The copy of the order on consent that DEC Staff submitted with its motion in this matter consists only of the text of the order plus Appendix C and does not include Appendices A and B. The Respondents did not submit a copy of Appendix A or B with their motion and these portions of the order on consent are not in the record at present.

Appendix C stated this is the area where much of the contaminated soil had been found.

10. Appendix C of the order on consent stated:

> "Soil that has been treated with polysilicate and cement will be placed in the CAMU in designated cells as directed in the Department approved CMI. Although the treated soils will form a monolith, it will not be so solid as to preclude excavation with a backhoe for reprocessing or off-site disposal if any particular batch of treated soil fails the treatment standards after the curing process has ended and such action is deemed necessary.
>
> This unit will then be closed according to the CMI Plan accepted on October 17, 1994, and any subsequent revisions approved by the Department.
>
> The groundwater at the Facility will continue to be monitored during and after remediation according to the Groundwater Sampling and Analysis Plan dated December 1992, and accepted on April 13, 1993 and any subsequent revisions approved by this Department."[5]

11. The order on consent required Roth to submit to DEC a post-remedial operation and maintenance plan (O&M Plan), among other documents. Roth was required to implement the O&M Plan once it was approved by DEC. Within 30 days following DEC's approval of the O&M Plan, Roth was required to provide to the Department a cost estimate for the O&M Plan and to provide financial assurance for requirements of the plan pursuant to one of the methods set forth in 6 NYCRR 373-2.8(f) (Ex. 3, at 3 and 4, sections II, III and IV).

12. The order on consent provided that Roth "shall modify and/or amplify and expand a submittal (undertake 'additional work') upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that, in accordance with generally accepted scientific principles and practices, further work is necessary." The order on consent included a dispute resolution process for use in the

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[5] The CMI plan and the December 1992 Groundwater Sampling and Analysis Plan are not in the record of this matter at the present time.

event that Roth objected in writing to a DEC demand for additional work (Ex. 3, at 6, sections VI.B and VI-A).

13. Section XII of the order on consent, entitled "Public Notice," stated:

> "A. Within 60 days after the effective date of this Order, Roth Bros. shall file a Declaration of Covenants and Restrictions with the Clerk of the County wherein the Facility is located to give all parties who may acquire any interest in the Facility notice of this Order.
>
> B. If Roth Bros. proposes to convey the whole or any part of Roth Bros.'s ownership interest in the Facility, Roth Bros. shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order."
>
> C. Within 60 days following submission to the Department of the O&M Plan, Roth Bros. shall incorporate a notice in an instrument which would normally be examined in a title search for the Facility that will, in perpetuity, notify a potential purchaser of any portion of the Facility of the following: (i) the types, concentrations, and locations of hazardous wastes or hazardous constituents at the Facility, (ii) that all future uses of the property must be non-residential in nature, and (iii) that the CAMU's contaminated soils and the cover for the contaminated soils may not be removed without Department approval. Roth Bros. shall forward to the Department a copy of this notice within ten days of filing." (Exhibit 3, at 9 and 10).

14. The order on consent included a section XIV.E, that stated:

> "The provisions of this Order shall be deemed to bind Roth Bros., its successors and assigns, and, as provided by law, its officers and directors. Any change in ownership or corporate status of Roth Bros. including, but not limited to, any transfer of assets or real or personal property shall in no way alter Roth Bros. responsibilities under this Order. [The preceding sentence appears twice in that section.] Roth Bros.'s officers, directors, employees, servants, and agents shall be instructed to comply with the relevant provisions of this Order in the performance of

their designated duties on behalf of Roth Bros." (Ex. 3, at 11).

15. Section XIV.J of the order on consent stated, "If Roth Bros. desires that any provision of this Order be changed, Roth Bros. shall make timely written application, signed by Roth Bros., to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Dolores A. Tuohy, Esq., and Steven J. Kaminski. If the modifications are approved, the modifications shall be attached to this Order." (Ex. 3, at 12).

16. Roth executed a declaration of covenants and restrictions on October 23, 1995 that was recorded on November 2, 1995 by the County Clerk of Onondaga County, at Book 4039, Page 0180 (Exs. 4 and 32; Graber affidavit, at 2).[6] The declaration provided notice of the order on consent, provided information about contaminants in the CAMU and immediately north and west of it, and required that future uses of these portions of the property be non-residential and not disturb the integrity of the CAMU unless prior approval is obtained from DEC or its successor for either type of use (see Ex. 4 or 32 for exact language of the declaration).

17. On December 15, 1997, a certificate of merger was filed between Philip Environmental (New York), Inc. and Roth. The merger filing also changed the name of the merged entity to Philip Services (New York), Inc. On February 26, 1998, a certificate of amendment was filed, further changing the name of the entity to Philip Metals (New York), Inc. Philip Metals (New York), Inc. was a subsidiary of Philip Services Corporation (Graber affidavit, at 2 - 3).

18. On November 13, 1998, Mr. Schwartz, writing on the letterhead of "PSC Philip Services, Metals Services Group, Aluminum Operations" with an address of 6223 Thompson Road in East Syracuse, transmitted to DEC a certificate of insurance for financial assurance for the O&M Plan for the Roth facility. The certificate of insurance, a one page document, was issued by American International Specialty Lines Insurance Company on October 31, 1998. The insurer certified that it had issued the policy "to provide financial assurance for CLOSURE for the facilities identified above." (Emphasis in original). The certificate of insurance also states that the policy "conforms in

[6] Both DEC Staff and the Respondents submitted copies of the declaration of covenants and restrictions as exhibits.

all respects with the requirements of 6 NYCRR Part 370 et seq, as applicable and as such regulations were constituted on [October 31, 1998]...the wording of this certificate is identical to the wording specified in 6 NYCRR 373-2.8(j)(4) and as such regulations were constituted on [October 31, 1998].” The certificate of insurance identifies an “Effective Date” of October 31, 1998 but does not identify an expiration date (Ex. 26).

19. During discovery in this matter, the Respondents requested from DEC Staff all documents relating to any financial assurances provided by any person for performance of the corrective action required by the Roth order on consent (Gitlen affirmation, at 3; Exs. 21 and 22). The more recent of the two financial assurance documents for this corrective action that DEC Staff provided in response to these requests was the October 31, 1998 certificate of insurance. The records of the DEC do not include a more recent financial assurance document for performance of the corrective action required under the Roth order on consent. Wabash did not provide this financial assurance during the time it owned the facility (Ex. 10). Neither Thompson nor MSR provided this financial assurance on or before March 11 or 12, 2008, the dates of two of DEC Staff’s affidavits (Radtke affidavit, at 8; Condon affidavit, at 5).

20. By deed dated January 7, 1999, Philip Metals (New York), Inc. sold the site of the Roth facility to Wabash Aluminum Alloys, LLC (Wabash). Connell Limited Partnerships (Connell) was the sole shareholder of Wabash at the time of the sale (Ex. 10, at 1). The land sold included all of the parcels described in Schedule A of the deed that is hearing exhibit 34. The deed was recorded by the County Clerk of Onondaga County at Book 4294, Page 145 (Graber affidavit, at 3; Ex. 34).

21. On February 19, 1999, Wabash notified Mr. Kaminski, with copies to Ms. Touhy, Denise Radtke and Steven Eidt (all of whom were DEC Staff members), concerning Wabash’s purchase of the facility (Ex. 31).

22. By deed dated April 7, 2005, Wabash conveyed the site to Thompson (Graber affidavit, at 3; Exs. 5 and 35). The land that was conveyed was the same group of parcels as those that Wabash purchased from Philip Metals (New York) Inc. in 1999.

23. Several interactions occurred prior to or at the time of the sale of the site from Wabash to Thompson. On January 31, 2005, Doreen A. Simmons, Esq., an attorney representing Wabash, wrote to Mr. Kaminski stating: “This is to inform you that the former

Roth Bros. Smelting facility is being transferred by Wabash Aluminum Alloys, L.L.C. to Thompson Corners, LLC. Wabash will continue to perform operation and maintenance activities as required under the historical Orders on Consent. The Company's consultant will continue to be C&S Engineers of Syracuse, New York." (Ex. 36; Graber affidavit, at 3). On April 7, 2005, Wabash, Thompson and Donald Brang (Member/Manager of Thompson) entered into an access agreement that allowed Wabash access to the site to conduct environmental studies and monitoring required under the Roth order on consent even though Wabash no longer had a fee title interest in the site. The access agreement, at paragraph 9, provided that Wabash's access rights would run with the land (Ex. 37; Graber affidavit at 3-4). In the conveyance of the site from Wabash to Thompson, a restrictive covenant was inserted in the deed, stating: "This conveyance is made and accepted subject to the restriction that the premises conveyed herein shall not be used for aluminum smelting operations of any kind. This restrictive covenant shall run with the land and shall be binding upon the grantee and on the heirs, successors and assigns of the grantee." (Ex. 35; Graber affidavit, at 4).

24. The access agreement also provided as follows: "1. Wabash, on and after the Closing and at all times, at its cost and expense, shall continue to conduct environmental studies and monitoring at the Thompson Road Property as required under NYS DEC Consent Order C7-0001-94-10 [the Roth order on consent]" (Ex. 37).

25. On December 15, 2005, Ms. Simmons, on behalf of Wabash, notified Stephen Condon, of the DEC Division of Solid and Hazardous Materials, that she was following up with Wabash about an inquiry from Mr. Condon concerning financial assurance. Ms. Simmons' December 15, 2005 e-mail to Mr. Condon stated that C&S Engineers continued to be the consultant to perform all additional work required under the Roth order on consent (Ex. 11). C&S Engineers was doing this work as a consultant for Wabash (Ex. 36). Ms. Simmons' December 15, 2005 e-mail also stated that Thompson was performing the monitoring and reporting work required under the State Pollutant Discharge Elimination System (SPDES, ECL article 17, title 8) for the facility.

26. Ms. Radtke, a section chief in the DEC Bureau of Hazardous Waste and Radiation Management, wrote to Mr. Brang (of Thompson) on February 14, 2006, stating that DEC had recently "performed a record review of Thompson Corners' post-closure cost estimates and associated financial assurance documents." Ms. Radtke's letter stated that DEC Staff had determined that Thompson was not in compliance with Provision IV of the Roth order on consent.

Ms. Radtke's letter transmitted a post-closure cost estimate calculated by DEC Staff and stated that Thompson was required to provide financial assurance (Ex. 7).

27. Metalico Syracuse Realty, Inc. (MSR, a Respondent in the present matter) purchased the Plant 2 portion of the site from Thompson by deed dated April 11, 2006 (Ex. 29). Metalico Aluminum Recovery, Inc. (MARI), the future operator, entered into a deed restriction relief agreement with Wabash on March 7, 2006 (Ex. 38).

28. Metalico, Inc. is the parent company of MSR (Graber affidavit, at 1). It can be inferred that MARI is also affiliated with Metalico, Inc., directly or possibly through another company, although the relationship between Metalico, Inc. and MARI is not specifically identified in the record concerning the present motions. The deed restriction relief agreement (Ex. 38) states that an affiliate of MARI intended to acquire land from Thompson and to lease land to MARI for aluminum smelting operations. The entity that acquired the land from Thompson was MSR. Mr. Graber, the Executive Vice President and General Counsel of Metalico, Inc., stated in his affidavit, "Given that our intent was to operate an aluminum smelting operation at the former Plant No. 2 portion of the Site, we needed to have Wabash waive that restrictive covenant, which it agreed to do in a Deed Restriction Relief Agreement with the future operator, Metalico Aluminum Recovery, Inc." (Graber affidavit, at 4).

29. Under the deed restriction relief agreement, Wabash agreed to waive the restrictive covenant that prohibited aluminum smelting operations on the site Wabash had sold to Thompson, in consideration of payment of royalties[7] and MARI's assumption of responsibilities that included "Wabash's obligations to conduct ongoing environmental monitoring and testing on the Site, (and only such monitoring and testing obligations) under the Consent Order" (Ex. 38, section 4.d). The deed restriction relief agreement defined the Consent Order as "New York State Department of Environmental Conservation Consent Order C7-0001-94-10, as such order may be amended or superseded" (the Roth order on consent)(Ex. 38, section 1). Wabash waived the deed restriction solely against MARI and its affiliates and for manufacturing of a

[7] Exhibit 38 is a copy of the agreement with financial information redacted from it (Graber affidavit, at 4). The amount of the royalties, and the scope of any other financial information contained in the agreement, cannot be determined from Exhibit 38 or from other evidence in the record at present.

specific type of aluminum products (Ex. 38, section 2; Graber affidavit, at 4).

30. The deed restriction relief agreement included a section 5.b that stated: "The assumption by MARI of Wabash's obligations to conduct ongoing environmental monitoring and testing on the Site pursuant to the Consent Order has and will have no effect on any other obligations retained by Wabash with respect to the Site, including without limitation any obligations for operations and maintenance under the Consent Order or as otherwise agreed between Wabash and either (i) Thompson Corners and/or Donald J. Brang, or (ii) the New York State Department of Environmental Conservation or any other governmental agency or authority having jurisdiction over the environmental condition of the Site" (Ex. 38).

31. MARI retained Hazard Evaluations, Inc. (HEI) to perform groundwater monitoring and periodic reviews of the CAMU cover as required under the Roth order on consent, work that C&S Engineers had been doing for Wabash when Wabash owned the facility (Condon affidavit, at 3; Graber affidavit, at 5). On June 25, 2006, Jon Marantz (of MARI) sent Mr. Condon (of DEC Staff) a letter stating that MARI had completed an inspection of the asphalt cover on the CAMU area (Ex. 19). On February 13, 2007, HEI submitted to DEC Staff a work plan for taking samples at a seep on the eastern side of the CAMU, for decommissioning a well and for work on two other wells. The letter that contained the work plan stated that HEI was submitting the work plan on behalf of MARI (Condon affidavit, at 3; Ex. 18).

32. As noted above, Ms. Radtke had written to Mr. Brang in February 2006 stating that Thompson was not in compliance with Provision IV (Financial Assurances) of the Roth order on consent. On June 5, 2006, Margaret A. Sheen, Esq., of DEC Region 7, wrote to Ms. Simmons (attorney for Wabash) and to Edward J. Moses, Esq.,[8] transmitting a financial assurance cost estimate. Ms. Sheen's letter also stated, "Thompson Corners, LLC remains in violation of the ECL and its supporting regulations (6 NYCRR 373-2.8)....Please submit acceptable financial assurance no later than two weeks of the date of this letter" (Ex. 8). Ms. Simmons replied on July 31, 2006, stating that she met with a representative of an insurance company "relative to posting

[8] Mr. Moses's role in this matter is not specifically identified in the record, but Ms. Simmons July 31, 2006 letter includes the notation "cc: Edward Moses, Esq., Thompson Corners" (Ex. 39).

insurance through that offered regulatory mechanism" and that she and the insurance company were continuing to exchange information. The letter stated, "Wabash recognizes its obligation to provide the financial insurance, and assures the Department that it is taking all reasonable steps to find a 'market' to satisfy the requirements." Ms. Simmons letter stated she anticipated contacting Ms. Sheen again in 30 days based upon timing indicated by the insurance company (Ex. 39).

33. On January 2, 2008, DEC and Connell entered into an order on consent (Case No. R7-20070627-35, Ex. 10, referred to in this report as "Connell order on consent"). In the Connell order on consent, Connell admitted that it "did not provide any financial assurance for the site from January 1999 to April 7, 2005 and, therefore was in violation of Consent Order C7-001-94-10 [*sic*] and/or 6 NYCRR 373-2.6(l)." (Ex. 10, paragraph 7 and 8). Connell agreed to pay a civil penalty of $33,600.00. Connell also agreed that "[w]ithin 90 days of the Effective Date of this Order, Respondent and/or other responsible party shall provide acceptable financial assurance to the Department as required by Consent Order C7-001-94-10 [*sic*], the ECL and regulation." (Ex. 10, paragraph II).

34. The Respondents or MARI have carried out all of the recent required monitoring activities. The two most recent CAMU cover inspection reports were submitted in a timely manner by MARI. As of March 12, 2008, the date of Mr. Condon's affidavit, a report of monitoring for the winter of 2007 was due (Condon affidavit, at 2 - 3; Ex. 12 and 19). On April 15, 2008, MARI sent to the Department the groundwater performance monitoring report for the December 2007 semi-annual monitoring event at the CAMU (Graber affidavit, at 5 - 6).

35. Under the Roth order on consent, the majority of the contaminants were treated by chemical stabilization, mixed with cement, and placed in a CAMU with a properly maintained macadam top. Some less contaminated soil was treated solely by covering it with a properly maintained macadam surface without chemical stabilization and cementing. These processes were intended to decrease the likelihood of contaminants leaching into the environment. Regular groundwater testing was required to be conducted into the future to ensure the continued adequacy of the design (Patel affidavit, at 2 - 3). Contamination still remains at the facility and the groundwater sampling is ongoing. Recent sampling has shown levels of lead, arsenic, or PCBs above groundwater standards in four of the ten wells in the monitoring system (wells B401, B402R, MW-8R and B281). Sediments and water samples associated with a seep along the eastern edge of the

asphalt covering the CAMU have been analyzed and found to be contaminated with levels of lead and PCB's that Mr. Condon described as "significant." Additional corrective actions will likely be necessary (Condon affidavit, 4-5).

36. The financial assurance estimate includes both future annual cost estimates and future one-time cost estimates for the monitoring system, the asphalt cover system and future New York State oversight costs. The estimates are based upon a likeliest scenario of minimal corrective action activities and long term monitoring and maintenance (Condon affidavit, at 4). The financial assurance amount is estimated for the past years to be between $700,000 and $400,000. Insurance policies, letters of credit and other financial assurance mechanisms cost substantial amounts of money (Sheen affirmation, at 5; Ex. 7).

37. Plant 1 and Plant 2 together comprise the facility. Neither DEC nor EPA has ever received a request to modify the RCRA facility boundary lines that make up the facility identified by EPA ID number NYD006977086 (Radtke affidavit, at 3 - 4). DEC has never received a notification or a request from Thompson, MSR or any prior owners or operators of the facility that they wished to redelineate the property boundary of the facility (Sheen affirmation, at 3). DEC also has never received a request from Thompson or MSR to modify the Roth order on consent (Sheen affirmation, at 3). The terms of the Roth order on consent have never been satisfied and the Roth order on consent has never been terminated (Radtke affidavit, at 8).

DISCUSSION

Lack of substantive disputes of fact

Most of the facts asserted by the parties in their motions are not in dispute. The above findings of fact have been made based upon the parties' affidavits, affirmations and attached exhibits. A dispute of fact exists, however, with respect to whether financial assurance, provided by Connell, is now in place for carrying out the O&M Plan for the former Roth facility.

In his April 21, 2008 affirmation, Philip H. Gitlen, Esq. (attorney for Thompson in this matter) stated, "The Department has advised Respondents that Connell Limited Partnership has submitted to the Department financial assurance in satisfaction of the terms of the Consent Order it entered with the Department in January 2008 (Department's Memorandum of Law, Ex. J [Ex. 10 of hearing record]), and that the Department is currently reviewing

the adequacy of the financial assurance." (Gitlen affirmation, at 4 - 5).

DEC Staff's May 27, 2008 reply memorandum of law argued that the Connell order on consent was worded in terms of "Respondent and/or other responsible party" specifically because there were "other responsible parties (current owners and operators)" that could also post financial assurance and the Department left it up to those parties to decide who would provide financial assurance. DEC Staff argued it could not demand that only a specific responsible party post financial assurance, when there are other legally responsible parties.

DEC Staff also argued that, contrary to the statement in Mr. Gitlen's affirmation, acceptable financial assurance has not been received by the Department from any party including Connell. The reply memorandum of law stated that "Respondents' counsel" was only told, via an e-mail, that DEC had received financial assurance documents but had not finished reviewing those. In support of this statement, the reply memorandum of law included a copy of an April 18, 2008 e-mail from Rebecca Denue, Esq., of DEC, to Peter Trimarchi, Esq., of Whiteman, Osterman and Hanna (Ex. 42).

Unlike the other letters and e-mail messages identified as exhibits, Ms. Denue's April 18, 2008 e-mail was not submitted with an affidavit or affirmation. It appears likely, however, that it could be authenticated and nothing in the record at present calls its authenticity into question. Mr. Gitlen's statement in his affirmation leaves open the question whether the required financial assurance is indeed in place, by stating that the Department is "reviewing the adequacy of the financial assurance."

As discussed further below, however, the question whether Connell had provided adequate financial assurance as of the date of DEC Staff's reply to the Respondents' motion to dismiss is not relevant to whether the Respondents Thompson and MSR are liable for the violations alleged in the complaint against them, nor to whether the Commissioner should order the relief sought by DEC Staff in the complaint and in its motion for order without hearing. This question may be relevant to a private matter among Wabash, MSR and Thompson regarding which of those entities provides the financial assurance, and/or to other financial interactions among them, but it does not affect the decision in this DEC enforcement matter.

A possible dispute exists between a statement in Ms. Radtke's affidavit and an exhibit that accompanied Mr. Gitlen's affidavit. The Respondents, however, did not specifically contest Ms. Radtke's statement and cross-moved for an order without hearing against the Department. In addition, Ms. Radtke's statement and the exhibit submitted by the Respondents can reasonably be interpreted in a manner that indicates they do not conflict with each other.

The statement in Ms. Radtke's affidavit is: "Neither the Department, nor EPA, has ever received a request to, an any way, modify the facility's status as a RCRA facility, or to modify the RCRA facility boundary lines that make up the facility with EPA ID # NYD006977086." (Affidavit, at 4). The Respondents' exhibit is Exhibit 23, the September 30, 1993 letter from Mr. Kaminski to Mr. Schwartz, in which Mr. Kaminski stated that the Department approved "the change in the regulatory status from a Treatment, Storage and Disposal (TSD) facility to a Generator."

These statements do not conflict if Ms. Radtke's reference to "status as a RCRA facility" is interpreted as meaning a facility subject to regulation under the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.) The term "RCRA facility" is not defined in 6 NYCRR section 370.2. Generators of hazardous waste are regulated under RCRA (42 U.S.C. 6922) and EPA identification numbers are assigned to hazardous waste generators, transporters, and treatment, storage or disposal facilities (6 NYCRR 370.2(b)(60)). Despite the 1993 change from a TSD facility to a generator, the facility remained subject to regulation under RCRA. Thus, no substantive dispute of fact exists that would require a hearing in this matter.

Financial assurance requirements

DEC Staff argued that Thompson and MSR violated the ECL, its supporting regulations, the Roth order on consent, and the facility's permit requirements by failing to provide financial assurance for the post-remedial operation and maintenance plan for the facility. DEC Staff asserted several reasons why Thompson and MSR would be responsible for providing this financial assurance, first, as owners and/or operators of a facility at which ongoing corrective action is required; second, as "successors and assigns" of Roth; and third, due to continuing obligations under the expired permit for the facility. The Respondents argued that none of these arguments are valid and that they were not, and are not, subject to any requirement to provide the financial assurance sought by DEC Staff.

As discussed below, the Respondents are required by 6 NYCRR part 373 to provide financial assurance for carrying out post-remedial operation and maintenance. This conclusion is based upon facts that are not in dispute, and supports granting DEC Staff's motion for order without hearing. Whether or not the Respondents are also responsible as "successors and assigns," or under the expired permit, they are responsible under part 373 for the financial assurance and failed to provide it.

Regulatory requirements

With regard to the regulatory requirements, DEC Staff argued that 6 NYCRR 373-2.6(a)(1)(ii) states that "[a]ll solid waste management units must comply with the requirements in subdivision (l) of this section,"[9] and that subdivision 373-2.6(l) requires financial assurance to be set up. DEC Staff argued that both Respondents currently own and/or operate the facility and noted that the definition of "facility" also applies to "facilities implementing corrective action under Subpart 373-2, ECL 71-2727(3), or RCRA section 3008(h)" (6 NYCRR 370.2[b][70]). DEC Staff stated that the facility is the entire property and it remains a "facility" even though "the actual operation or generation of hazardous waste has ceased" (DEC Staff memorandum of law, at 10 - 12).

The Respondents argued that under RCRA, the Department may only require corrective actions and financial assurance as conditions of a permit to own or operate a TSD facility, or as may be required in an order on consent. The Respondents argued that the financial security requirement in 6 NYCRR 373-2.6(l) applies to "the owner or operator of a facility **seeking a permit,**" that "[c]orrective action **will be specified in the permit,**" and that subdivision 373-2.6(l) "does not apply to remediation waste management units **unless they are part of a facility subject to a permit for treating, storing or disposing of hazardous wastes that are not remediation wastes**"

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[9] Specific terms may be used to designate the levels of organization of DEC regulations. Identifying some of these terms may be useful for understanding certain requirements of part 373. From the largest to the smallest, parts are numbered with Arabic numerals (part 373), subparts with hyphenated Arabic numerals (subpart 373-2), sections by Arabic numerals preceded by a decimal point (section 373-2.6), subdivisions by lower case letters (subdivision 373-2.6(a)), paragraphs by Arabic numerals (paragraph 373-2.6(a)(1)) and subparagraphs by small Roman numerals (subparagraph 373-2.6(a)(1)(ii)).

(Respondents' memorandum of law, at 8 - 9; emphasis in memorandum). The Respondents stated that neither of them is seeking, nor have they ever sought or been subject to, a permit for the treatment, storage or disposal of hazardous waste at the property, and that subdivision 373-2.6(l) is therefore inapplicable to the Respondents.

The Respondents noted that under 6 NYCRR 373-2.6(a)(5), when the Department issues an enforceable document under 6 NYCRR 373-1.2(e)(3), all references to a permit in section 373-2.6 are meant to refer to the enforceable document. The Respondents stated that the Roth consent order, an enforceable document, contains all of the obligations the Department is entitled to enforce (Respondents' memorandum of law, at 9 - 10). The Respondents argued that only Roth (including its corporate successors), or an entity with which Roth had specifically agreed to assign the order on consent, could be responsible for corrective action obligations at this facility (Respondents' memorandum of law, at 8 - 17). The Respondents also argued that 6 NYCRR 373-2.6(l) does not apply to remediation waste management units unless they are part of a facility subject to a permit for treating, storing or disposing of hazardous wastes but the property is no longer subject to such a permit. The Respondents also argued that the financial security sought by DEC Staff is for operation and maintenance of a CAMU used solely for management of remediation wastes, an activity to which subdivision 373-2.6(l) does not apply[10] (Respondents' memorandum of law, at 9 - 10).

According to DEC Staff, Respondents' argument about "seeking a permit" would allow a facility's owner to avoid any hazardous waste corrective action requirements simply by not "seeking" a permit or by letting its permit expire. DEC Staff noted that the facility formerly had a permit under part 373 for hazardous waste storage (DEC Staff memorandum, at 13). DEC Staff's reply memorandum of law stated that the regulations regarding corrective action were adopted in 1984, were strengthened shortly after, and were worded based upon the then-current permitting scheme that involved the transition from Part A to Part B applications. According to DEC Staff, "the wording of 'seeking a permit' was used to capture all facilities at that time and would also capture facilities day forward" and was not intended to drop out facilities that had obtained permits and thus were no longer

[10] The Respondents cited 6 NYCRR 373-2.6(l)(4) in support of their argument concerning remediation waste management sites.

"seeking" permits (DEC Staff reply memorandum of law, at 2).[11] DEC Staff argued that the facility fell under, and continues to fall under, the corrective action regulations and that the transfer of the facility through a sale does not change that fact. DEC Staff noted that "6 NYCRR 373-2.6 states that '**all** solid waste management units must comply with the requirements in subdivision (l)' which outline corrective action and financial assurance for such corrective action" (DEC Staff reply memorandum of law, at 2 - 3; emphasis in memorandum).

The facility that is the subject of the complaint is a facility implementing corrective action under ECL 71-2727(3), a portion of the statutory authority for the Roth order on consent. The facility remains a facility subject to corrective action and with contamination on site. This is not altered by the fact that DEC has not modified the Roth order on consent to reflect Roth's merger with Philip Environmental (New York), Inc. or the subsequent sales of all or a portion of the facility. Thompson was an owner of all or part of the facility from April 7, 2005 to at least the date of the complaint (December 7, 2007). MSR was an owner of part of the facility from April 11, 2006 to at least December 7, 2007. When Thompson, and later MSR, bought the land they also bought a facility that is the subject of an ongoing RCRA corrective action program under an order issued pursuant to ECL 71-2727(3). As owners of the facility, they are responsible for providing financial assurance to ensure that the work is carried out.[12]

The phrase "seeking a permit" appears in the initial paragraph (1)(one) of subdivision 373-2.6(l)(letter "l"), in a sentence that requires owners or operators to institute corrective action for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time the waste was placed in such

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[11] The first four pages are not numbered in DEC Staff's reply memorandum of law, but the quoted language is from the second page of that document.

[12] ECL 27-0917(9) directs the Commissioner to promulgate regulations establishing requirements of financial responsibility to assure the completion of corrective action required pursuant to ECL 27-0913(1) and 27-0911(2). ECL section 27-0911 sets forth standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities.

unit.[13] This sentence identifies the scope of corrective action required when a permit is sought but it does not relieve later owners of the facility from the corrective action requirements in subdivision 373-2.6(l). The reference to "seeking a permit" also does not relieve owners of hazardous waste TSD facilities from corrective action requirements that apply after the TSD permit has expired. This is particularly so in view of the provision in 373-2.6(a)(5) under which the requirements of section 373-2.6 apply to owners and operators of TSD facilities when the Department issues either a post-closure permit or an enforceable document,[14] and under which references in section 373-2.6 to "permit" mean the "enforceable document" when the Department has issued an enforceable document.[15]

The Roth order on consent is an enforceable document applicable to a facility that had a part 373 permit for storage of hazardous waste and that is also a facility at which corrective action was required and is ongoing. Under 373-2.6(l)(2), the permit (or enforceable document) will contain assurances of financial responsibility for completing the corrective action specified in the permit (or enforceable document).

In a decision involving enforcement of financial assurance requirements for a hazardous waste facility in Colorado, the United States Court of Appeals for the Tenth Circuit considered the relationship between financial assurances and the overall regulatory scheme of hazardous waste TSD facility permitting (United States v Power Engineering Company, 191 F3d 1224 [1999], *cert denied* 529 US 1086 [2000]). Although that decision was based upon Colorado's regulations, both those regulations and New York State's 6 NYCRR part 373 implement RCRA and contain similar requirements. The decision stated, "By their terms, these regulations apply to all owners and operators of hazardous waste

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[13] The phrase "seeking a permit" also appears in ECL 27-0911(2).

[14] "Enforceable document" is defined at 6 NYCRR 373-1.2(e)(3) and includes a corrective action order.

[15] See also, 6 NYCRR 373-2.6(a)(3)(iii), under which the regulations in section 373-2.6 apply "during the compliance period under subdivision (g) of this section if the owner or operator is conducting a compliance monitoring program under subdivision (j) or a corrective action program under subdivision (k)."

facilities; they are not limited to permit holders or applicants. In light of these clear provisions, we do not believe that the mere fact that the permit application requires a showing of compliance with the financial assurance provisions somehow renders these provisions applicable only in the context of permitting" (*Id*., at 1233).

Paragraph 373-1.7(a)(2) of 6 NYCRR requires that, when transfer of ownership or operational control occurs, the new owner or operator must demonstrate compliance with the requirements of section 373-2.8 (Financial requirements) within six months of the date of the change of ownership or operational control of the facility. DEC Staff cited this paragraph, in its amended complaints, as a provision Respondents allegedly violated.[16] Although this paragraph appears in a section governing permit modifications, paragraph 373-2.6(a)(5) imposes the requirements of section 373-2.6 on both permits and enforceable documents. No party identified a regulation other than paragraph 373-1.7(a)(2) that would govern transfer of the financial assurance responsibilities when a facility subject to an enforceable document is sold. The equivalent treatment of permits and enforceable documents in section 373-2.6 indicates that the transfer procedure for financial security under a permit also applies to the financial assurance requirement for the O&M Plan in the Roth order on consent. The Roth order on consent's requirement that Roth's responsibilities would not be altered by a transfer of real property (Ex. 3, section XIV.E) correspond to the requirement in paragraph 373-1.7(a)(2) that, when a transfer of ownership occurs, the previous owner or operator shall comply with the financial assurance requirements until the new owner or operator demonstrates compliance with those requirements.

The Respondents argued that subdivision 373-2.6(l) is inapplicable because the financial assurance is for operation and maintenance of a CAMU which is used solely for the management of remediation waste and the property is no longer subject to a permit for treating, storing or disposing of hazardous waste (Respondents' memorandum of law, at 10). In support of this, the Respondents cited 373-2.6(l)(4) that states: "This subdivision does not apply to remediation waste management sites unless they are part of a facility subject to a permit for treating, storing or disposing of hazardous wastes that are not remediation wastes."

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[16] The motion for order without hearing did not move that the Respondents be found in violation of 6 NYCRR 373-1.7(a)(2).

The former Roth facility was subject to a permit for storage of hazardous wastes that were not remediation wastes, and the CAMU is part of that facility. It is not a separate unit used solely for management of remediation waste.

The facility is also not necessarily exempt from the requirements of subdivision 373-2.6(l) on the basis that it includes a CAMU. Section 373-2.19 of 6 NYCRR contains requirements concerning CAMUs. Under 373-2.19(b)(2)(i), the Department may designate a regulated unit as a CAMU or may incorporate a regulated unit into a CAMU under circumstances described in that subparagraph. Subparagraph 373-2.19(b)(2)(ii) states that "[t]he section 373-2.6 [and other sections'] requirements. ..that applied to that regulated unit will continue to apply to that portion of the CAMU after incorporation into the CAMU."

"Regulated units," as described in 6 NYCRR 373-2.6(a)(1)(ii), include waste piles. At least one of the solid waste management units at the Roth facility included waste piles.[17] While the record does not include details on how the CAMU was constructed and its relationship to regulated units at the facility, the inclusion of a CAMU in the Roth order on consent does not make the facility exempt from 6 NYCRR section 373-2.6.

In the present case, during at least the time period between Thompson's purchase of the facility from Wabash and the date of the motion for order without hearing, no financial assurance was in place for costs of the O&M Plan. Thompson was responsible for providing financial assurance during this entire time, as owner of all of the facility and later as owner of part of the facility. MSR was responsible for providing financial assurance during the portion of this time that it owned a portion of the facility, as owner of that portion of the facility. Under private agreements with MSR and Thompson, Wabash might be the entity that would pay for the financial security mechanism, but such arrangements are between or among MSR, Thompson and Wabash and do not affect the requirements applicable to Respondents MSR and Thompson under 6 NYCRR part 373.

[17] The Northern Waste Storage Area (Ex. 20, at IV-55 through IV-57) included waste piles.

"Successors and assigns"

DEC Staff stated that the Roth order on consent specifically binds Roth's "successors and assigns," and cited definitions of these terms from Black's Law Dictionary, Sixth Edition, in support of Staff's argument that Thompson and MSR are "successors and assigns" of Roth with respect to the order on consent. DEC Staff argued that Department orders for hazardous waste have always run with the property and the environmental contamination to which the orders apply, and that Section XII of the Roth order on consent (concerning notice to future owners) proves that the order's requirements were to be applicable to all future property owners and operators. DEC Staff argued that the declaration of covenants and restrictions puts future owners on notice concerning the Roth order on consent, and that this notice would have been useless if it were not expected that responsibilities imposed by that order run with the land.

The Respondents contested DEC Staff's interpretations of the words "successors" and "assigns" and argued that "successors and assigns" refers not to future property owners but to Roth's corporate successors and those entities to whom Roth expressly assigned the obligations of the consent order. The Respondents stated that neither of them are successors or assigns of Roth Bros. The Respondents also argued that the deed notice required by the Roth order on consent does not state that all future property owners would be responsible for maintaining financial security for implementing the O&M Plan.[18]

In the Roth order on consent, the phrase "successors and assigns" appears in the following context: "The provisions of this Order shall be deemed to bind Roth Bros., its successors and assigns, and, as provided by law, its officers and directors. Any change in ownership or corporate status of Roth Bros. including, but not limited to, any transfer of assets or real or personal property shall in no way alter Roth Bros. responsibilities under this Order." (Ex. 3, at 11, section XIV.E).

The quoted provision suggests that Roth would remain bound by the order even if it sold the real property on which the facility is located, at least until the Department modified the

[18] The Respondents did not contest the terms of the O&M Plan, the implementation of which is required by the Roth order on consent, nor did the Respondents argue that the terms of the O&M Plan are inconsistent with 6 NYCRR part 373.

order to apply to the new owner or entered into a new order with the new owner. The order also contains a requirement that Roth notify the Department if Roth proposed to convey any ownership interest in the facility, and to notify the transferee of the applicability of the order (Ex. 3, section XII.B), further suggesting that the Department would take some action to modify or replace the order if a new owner was taking over some or all of Roth's roles in complying with the order. Although Philip Metals (New York), Inc. (Roth's corporate successor) sold the facility to Wabash, and Wabash notified the Department about the sale, the Roth order on consent was not modified or replaced.

The definition of successor, as contained in Black's Law Dictionary, Eighth Edition (2004) and quoted by Respondents, is: "successor. 1. A person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor. 2. A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation."

Neither Thompson nor MSR are successors of Roth under the second part of this definition. They are also not successors by having taken ownership of the facility.

DEC Staff's brief stated, "One of the definitions of "Successor" is "one who succeeds or follows," and cited Black's Law Dictionary as the source of this portion of the definition. The brief did not specify the edition of Black's Law Dictionary from which this quote was taken, but it is apparently the sixth edition, based upon the brief's use of that edition for the definition of "assigns". DEC Staff did not cite any court decisions in which this quoted definition, or the first definition of "successor" in the eighth edition, or similar language, were interpreted as binding a subsequent landowner to a contract or consent order entered into by a prior landowner concerning activities on the land the later owner had purchased.

DEC Staff argued that DEC orders "for hazardous waste, hazardous substances or environmental contamination have always run with the property and the environmental contamination it pertains to." In support of this assertion, DEC Staff cited Matter of Helen and Penelope Agramonte (Ruling of the ALJ, October 16, 2003)(DEC Staff memorandum of law, at 15). That ruling, however, concerned the Agramonte respondents' liability for an ongoing violation consisting of storage of more than 1,000 waste tires without a permit for such storage, on property that Penelope Agramonte had inherited. The ruling did not conclude that Ms. Agramonte was liable for violation of the orders on

consent signed by a prior owner of the property, nor that she was a "successor" under terms of those orders on consent due to her ownership of the property, but instead concluded that she violated ECL article 27 and 6 NYCRR part 360.

Respondents argued that references to "successors and assigns" in a contract do not apply to future property owners, and cited four decisions from Vermont, Texas, Utah and Massachusetts in support of this assertion. In those decisions, the landowners were not bound by agreements the prior owners of their land had made concerning use of the properties. The only New York cases cited by Respondents concerning "successors" were Hanna v Florence Iron Co. of Wisconsin (222 NY 290 [1918]) and Maline v City of Utica (267 AD2d 1022, 701 NYS2d 202 [4th Dept 1999]). The Hanna decision had to do with delivery of iron ore to receivers of an insolvent steel company. That decision's statement about the meaning of "successors," in the case of a corporation, is very similar to the second definition of "successor" in Black's Law Dictionary. With regard to the word "successor, the decision stated "[i]t means, ordinarily in the case of a corporation, another corporation which by a process of amalgamation, consolidation, or duly authorized legal succession has become invested with the rights and has assumed the burdens of the first corporation" (Hanna, 222 NY at 300).

Respondents also cited one federal court decision, Atchison Casting Corp. v Dofasco, Inc. (889 F Supp 1445 [US Dist Ct, D Kan 1995]) that applied a very similar definition of "successor," citing Black's Law Dictionary and a decision of the Supreme Court of Canada[19] (*id*. at 1459).

Neither Hanna nor Maline considered whether the term "successor" could also apply to a person that purchased land from an unrelated person. Court decisions have used the word "successor," and the terms "successors in interest" and "successor owner," to describe subsequent owners of land. This does not, however, answer the question whether the Respondents in this matter are "successors" bound by the financial assurance requirement in the Roth order on consent, even taking into account the statement in the declaration of covenants and restrictions that "[n]otice of the Order is hereby given to all parties who may acquire any interest in the Property." Certain conditions must be met in order for a covenant to run with the

[19] The decision states that Dofasco is a Canadian corporation (*id*. at 1450) and Canadian law applied to certain claims in that case (*id*. at 1455).

land (328 Owners Corp. v 330 West 86 Oaks Corp., 8 NY3d 372, 834 NYS2d 62 [2007]; Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank, 278 NY 248, *rearg. denied* 278 NY 704 [1938]; City of New York v Delafield 246 Corp., 236 AD2d 11, 662 NYS2d 286 [1st Dept, 1997]). The parties did not present arguments about these decisions, nor about whether or how the concepts set forth in these and related decisions apply to the facts in the present case. The record does not support concluding that the Respondents are "successors" under the Roth order on consent even using a broader definition than the one concerning corporate successors.

The meaning of "successors," when used in the term "successors and assigns" in identifying the persons bound by a DEC administrative enforcement order, has apparently not been considered in any prior decision or order of the Commissioner of DEC. The decisions that were cited by the parties concerning the present motion for order without hearing provide stronger support for the Respondents' interpretation than for DEC Staff's interpretation. Thus, this ruling concludes that neither Thompson or MSR are "successors" of Roth in the context of the Roth order on consent.

Neither Thompson nor MSR were shown to be assignees of the Roth order on consent's financial assurance requirements because the record contains no proof that they expressly agreed to assume this obligation (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395; Todd v Krolick, 96 AD2d 695, aff'd, 62 NY2d 836).

None of the parties put into the record any agreement between Philip Metals (New York), Inc. and Wabash about assignment of the order on consent responsibilities. While the Respondents gave a reason to think such an agreement might exist,[20] no party provided evidence that it exists nor evidence about its terms.

The record does, however, contain evidence that Wabash agreed to retain some responsibilities under the Roth order on consent when Wabash sold the facility to Thompson (Exhibits 36, 37 and 38). In the deed restriction relief agreement between Wabash and MARI (Ex. 38), MARI assumed Wabash's "obligations to conduct ongoing environmental monitoring and testing on the Site

[20] Footnote 7 of the Respondents' memorandum of law, stating that Wabash undertook the O&M Plan upon acquiring the property and noting two later statements by Wabash concerning responsibility for financial assurance.

pursuant to the Consent Order" but Wabash retained other obligations under the order (Ex. 38, section 5.b). Exhibits 37 and 38 are private agreements that do not affect the identity and responsibilities of the facility's owners under part 373, but they do indicate that Wabash probably did not assign the order's requirement for financial security to Thompson or to MARI.

Continuity of permit requirements

DEC Staff and Respondents both stated that the permit continued in effect for Roth to undertake corrective action until an order on consent requiring corrective action was in place. The copy of the permit that was included with DEC Staff's motion (Exhibit 1) does not contain specific financial assurance or corrective action requirements. Exhibit 1 is a three-page document that refers to modules and attachments that are not included in Exhibit 1. Even if financial assurance or corrective action requirements were included in the permit by reference or in attachments, they cannot be evaluated based upon Exhibit 1.

Penalty

The Respondents argued, and moved, that the case should be dismissed. They also argued that, if they are found to have violated any applicable regulations, no penalty should be imposed because the Respondents had a good faith basis to withhold providing financial assurance for the O&M obligations. The Respondents did not dispute the assertions in Mr. Condon's affidavit or Ms. Sheen's affirmation about avoided costs of providing financial assurance, other than to argue that the Respondents were not liable for providing financial assurance.

The Respondents also did not argue that Mr. Killeen's affidavit, which discusses how the RCRA Civil Penalty Policy should be applied to this case, misapplies that policy or is in error.[21] The penalty calculated by Mr. Killeen was based upon the violations having a moderate potential for harm and a major

[21] The affidavit refers to an attached copy of the RCRA Civil Penalty Policy, but no copy of that policy was attached with the affidavit received by the Office of Hearings and Mediation Services. The RCRA Civil Penalty Policy, as revised on June 23, 2003, can be viewed on the EPA web site via http://cfpub.epa.gov/compliance/resources/policies/civil/penalty (last viewed on February 4, 2009). The penalty matrix in the revised policy recommends penalties ten percent higher than those in the penalty matrix used by Mr. Killeen.

extent of deviation from the requirement violated. Each year or portion of a year during which a Respondent owned the site but did not provide financial assurance was considered to be a violation because facilities are required annually to submit to the Department an updated financial instrument to cover the costs for that year. This produced a proposed penalty of $33,000 against Thompson and $22,000 against MSR (Killeen affidavit, at 2 - 3).

The penalties calculated by this method are the same amounts requested in the amended complaints. They reflect only the gravity-based component of the penalty calculation in the RCRA Civil Penalty Policy. Under that policy, other factors may be taken into account including the economic benefit a respondent gained by failing to comply with a requirement and any good faith efforts to comply with applicable requirements.

DEC Staff's evidence and arguments about the amount of any avoided costs for insurance policies or other financial assurance mechanism, as opposed to the amount of the financial assurance itself, are qualitative (described as "substantial amounts of money" [Sheen affirmation, at 5]). The Respondents, however, did not submit evidence about the cost for providing financial security that would call this description into question.

The financial interactions among the Respondents, Wabash and MARI in connection with sale of the facility are not in the record. Some of this information, with respect to Wabash and MARI, was redacted by the Respondents in preparing Exhibit 38. Agreements among these entities may affect the extent to which MSR and/or Thompson avoided costs, but this cannot be determined from the affidavits and exhibits submitted by the parties.

DEC notified Mr. Brang on February 14, 2006 that Thompson was not in compliance with the financial security requirement of the order on consent. On June 5, 2006, Ms. Sheen notified Wabash and Thompson that Thompson would need to provide financial assurance. As of July 31, 2006, Wabash was stating both that it had an obligation to provide financial assurance and that it was taking steps to do so (Ex. 39). No party submitted evidence that DEC Staff had notified MSR, prior to the complaint, that it was responsible for providing financial assurance. These communications might support a further reduced penalty for MSR and possibly for Thompson. At the same time, no party submitted evidence that the Respondents and Wabash made efforts to decide which company would provide financial assurance or to ensure that financial assurance was in place. The overall record suggests there should be no adjustment of the requested penalty with

respect to good faith efforts to comply or good faith reasons for failing to provide financial assurance.

For violations of article 27, title 9 or its implementing regulations, ECL section 71-2705 authorizes a civil penalty not to exceed $37,500 for a first violation and an additional penalty of not more than $37,500 for each day during which such violation continues. DEC Staff's requested penalty is less than the maximum penalty authorized by ECL section 71-2705 for a single violation or a violation for each year of noncompliance, and is far less than the maximum penalty authorized if the calculation were done on the basis of individual days as violations. The Respondents were on notice of the penalty DEC Staff is seeking in this matter.

Further relief

The amended complaints served upon MSR and Thompson each requested that the Commissioner require that the respective Respondent provide financial assurance. DEC Staff's motion for order without hearing also sought an order directing the Respondents to immediately set up "adequate and appropriate financial assurance as required."

Connell Limited Partnerships, the entity that was the sole shareholder of Wabash when Wabash owned and operated the facility, signed an order on consent requiring that, within 90 days of the effective date of the order, Connell "and/or other responsible party shall provide acceptable financial assurance to the Department as required by Consent Order C7-001-94-10 [*sic*], the ECL and regulation" (Ex. 10) Which of the current owners or the former owner actually provides the financial security pursuant to their private agreements is a private matter for them to resolve.

The Respondents' memorandum of law argued that the Department's interpretation of the Roth order on consent would lead to "stacking of financial assurance from every owner of the Property in the chain of title" (Memorandum, at 14). This is not an accurate interpretation of the relief sought by DEC Staff. The "owner or operator" is responsible for financial assurance for implementing corrective action and the related financial assurance. Either the owner[22] or the operator could provide the financial assurance, but if no financial assurance is provided

[22] In the present case, there are two owners plus a former owner that jointly and severally have this responsibility.

both entities are liable for the failure to comply with the requirement. This does not mean that financial assurance must be provided twice, once by the owner and once by the operator, but instead means that financial assurance is required and these are the entities responsible for meeting the requirement.

CONCLUSIONS OF LAW

1. Respondent Thompson violated 6 NYCRR 373-2.6(a)(1)(ii) and 6 NYCRR 373-2.6(l) from April 7, 2005 to at least March 12, 2008 (the date of Mr. Condon's affidavit) by failing to provide financial assurance for operation and maintenance required as part of the corrective action for the facility.

2. Respondent MSR violated 6 NYCRR 373-2.6(l) and 6 NYCRR 373-2.6(a)(1)(ii) from April 11, 2006 to at least March 12, 2008 by failing to provide financial assurance for operation and maintenance required as part of the corrective action for the facility.

3. The financial assurance requirements for corrective action that are set forth in part 373 of 6 NYCRR were promulgated pursuant to ECL article 27, title 9 (ECL 27-0917[9]).

4. For violations of article 27, title 9 or its implementing regulations, ECL section 71-2705 authorizes a civil penalty not to exceed $37,500 for a first violation and an additional penalty of not more than $37,500 for each day during which such violation continues.

5. Connell (pursuant to order on consent R7-20070627-35), Thompson and MSR are all jointly and severally responsible for providing financial assurance for the operation and maintenance required under 6 NYCRR 373-2 for the facility, although the requirement would be satisfied by one of those entities providing acceptable financial assurance. Which of those entities provides the financial assurance is a private matter to be resolved by them.

RULING AND RECOMMENDATION

The papers and proof submitted by the parties establish the violations alleged by DEC Staff in its amended complaints against both Respondents sufficiently to warrant the granting of summary judgment under the CPLR. DEC Staff's motion is granted to the extent that no hearing is required and a recommendation is being

made that the Commissioner grant the relief sought by DEC Staff. DEC Staff's motion is denied with respect to concluding that DEC Staff proved its allegations concerning "successors and assigns" and concerning continuation of requirements in the expired permit.

Respondents' cross-motion for order without hearing is denied with regard to its requested relief, although Respondents's motion is granted to the extent that no hearing is required in this matter. Pursuant to 6 NYCRR 622.12(d), the present ruling and report is being submitted to the Commissioner.

I recommend that the Commissioner grant the relief sought by DEC Staff in this matter, including the requested penalties.

_____/s/_____
Albany, New York
May 5, 2009

Susan J. DuBois
Administrative Law Judge

Appendix 1

The exhibits submitted by the parties in support of their motions in Thompson Corners, LLC and Metalico Syracuse Realty, Inc. (DEC Case No. R7-20070627-35) are renumbered as described below. This renumbering is for ease of reference in the ruling and in a hearing, if one is necessary.

DEC Staff submitted four affidavits, an affirmation and exhibits labeled A through J. In addition to those exhibits, two of the affidavits refer to additional documents that are attached with the affidavits. Attached with DEC Staff's reply memorandum of law is a copy of an e-mail that is an additional exhibit.

DEC Staff submitted an affirmation by Margaret A. Sheen, Esq. and affidavits by Stephen Condon, Thomas Killeen, Denise Radtke and A. Paul Patel.

The Respondents submitted an affirmation by Philip H. Gitlen, Esq., to which are attached Exhibits 1 through 11, and an affidavit by Arnold S. Graber, Esq., to which are attached Exhibits A through J.

Hearing Exhibit Number	Description
1	DEC Staff Exhibit A, 1987 hazardous waste management permit (without modules and attachments).
2	DEC Staff Exhibit B, statement of basis, July 20, 1994 (without attachments).
3	DEC Staff Exhibit C, order on consent in the matter of Roth Brothers Smelting Corp., October 21, 1994 (without Appendices A and B).
4	DEC Staff Exhibit D, declaration of covenants and restrictions.
5	DEC Staff Exhibit E, deed, Wabash Aluminum Alloys, LLC (Wabash) to Thompson Corners LLC (Thompson).
6	DEC Staff Exhibit F, deed, Thompson to Metalico Syracuse Realty, Inc.

7 DEC Staff Exhibit G, letter of February 14, 2006 from Ms. Radtke to Donald J. Brang.

8 DEC Staff Exhibit H, letter of June 5, 2006 from Ms. Sheen to Doreen A. Simmons, Esq. and Edward J. Moses, Esq., without attachment.

9 DEC Exhibit I, letter of June 27, 2006 from Jon Marantz to Steven Congdon (sic) with black and white copies of photographs.

10 DEC Exhibit J, order on consent in the matter of Connell Limited Partnerships, January 2, 2008.

Exhibits 11 through 19 are attached with Mr. Condon’s affidavit.

11 December 15, 2005 message from Ms. Simmons to Mr. Condon.

12 Letter of June 27, 2006 from Mr. Marantz to Mr. Congdon (sic).

13 Printout of e-mail between Mr. Condon and Rory Woodmansee, August 9, 2006 and November 30, 2006.

14 Printout of e-mail between Mr. Condon and Mike Kellogg, November 30, 2006.

15 Printout of e-mail from Thomas Barba to Mr. Condon, August 2, 2006.

16 Printout of e-mail between Mr. Condon and Mr. Barba, August 2 and 3, 2006. This appears to be only a portion of this e-mail exchange, as indicated by the time and date of a message shown as the last line on the page.

17 Printout of e-mail between Mr. Condon and Ms. Simmons, December 13 and 21, 2005.

18 Letter of February 13, 2007 from C. Mark Hanna to Mr. Condon.

19 Letter of June 25, 2007 from Mr. Marantz to Mr. Condon.

Exhibit 20 is attached with Ms. Radtke's affidavit.

20 Chapter IV of the Draft Phase II RCRA Facility Assessment Report.

Exhibits 21 through 31 are attached with Mr. Gitlen's affirmation.

21 Thompson Corners, LLC first request for the production of documents, January 2, 2008 (Affirmation Exhibit 1).

22 Metalico Syracuse Realty, Inc. first request for the production of documents, January 4, 2008 (Affirmation Exhibit 2).

23 Letter of September 30, 1993 from Steve Kaminski to Neal Schwartz (Affirmation Exhibit 3).

24 Letter of September 6, 1995 from Ronald G. Hull to Mr. Patel (Affirmation Exhibit 4).

25 April 1, 1986 letter of credit (Affirmation Exhibit 5).

26 November 13, 1998 cover letter from Mr. Schwartz to Ida Potter, with enclosed certificate of insurance (Affirmation Exhibit 6).

27 Contract of sale between Wabash and Mr. Brang, October 7, 2004 (Affirmation Exhibit 7).

28 Access agreement between Wabash, Thompson and Mr. Brang, April 7, 2005 (Affirmation Exhibit 8).

29 Deed, Thompson to Metalico Syracuse Realty, Inc. (Affirmation Exhibit 9).

30 October 16, 2003 Ruling In the Matter of Helen and Penelope Agramonte, DEC Case No. R4-2001-0130-25 (Affirmation Exhibit 10).

31 Letter of February 19, 1999 from Robert Hubbert to Mr. Kaminski (Affirmation Exhibit 11).

Exhibits 32 through 41 are attached with Mr. Graber's affidavit.

32 Declaration of covenants and restrictions (Affidavit Exhibit A).

33 Printouts from New York State Department of State, Corporations Public Inquiry System (Affidavit Exhibit B).

34 Deed, Philip Metals (New York), Inc. to Wabash (Affidavit Exhibit C).

35 Deed, Wabash to Thompson (Affidavit Exhibit D).

36 Letter of January 31, 2005 from Ms. Simmons to Mr. Kaminski (Affidavit Exhibit E).

37 Access agreement between Wabash, Thompson and Mr. Brang, April 7, 2005 (Affidavit Exhibit F).

38 Redacted copy of deed restriction relief agreement (Affidavit Exhibit G).

39 Letter of July 31, 2006 from Ms. Simmons to Ms. Sheen (Affidavit Exhibit H).

40 Order on consent in the matter of Connell Limited Partnerships, January 2, 2008 (Affidavit Exhibit I).

41 Press release dated September 11, 2007 from Aleris International, Inc. (Affidavit Exhibit J).

Exhibit 42 is attached with DEC Staff’s reply memorandum of law.

42 Printout of e-mail from Rebecca Denue to Peter Trimarchi, April 18, 2008.