

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

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York ("ECL") and Part 360, *et seq.* of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No.
CO 5-20111215-28

-by-

KARA FIBERS RHRF and BONNIE L. SILVERNAIL,

Respondents.

On May 17, 2013 an adjudicatory hearing was convened before Administrative Law Judge ("ALJ") Richard A. Sherman of the Office of Hearings and Mediation Services, New York State Department of Environmental Conservation ("Department"). The hearing addressed the allegations of Department staff that respondents Kara Fibers RHRF and Bonnie L. Silvernail violated ECL article 27 and 6 NYCRR 360-12.2(d) by failing to file an annual report for calendar year 2010 with the Department for operations at Kara Fibers RHRF, a solid waste recyclables handling and recovery facility located at 1 School Street, Fort Edward, New York ("facility").

The ALJ prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the hearing report, the ALJ concluded that Department staff did not establish liability for the failure to file the annual report with regard to respondent Kara Fibers RHRF (see Hearing Report, at 3-4). However, the ALJ concluded that staff did establish the liability of respondent Silvernail, who is the owner, operator and president of the facility, with respect to the failure to file the facility's annual report for calendar year 2010 (see id., at 4). For the reasons set forth in the hearing report and based on the record before me, I concur with the ALJ's determinations on liability.

Respondent Silvernail failed to file an answer to the complaint served by Department staff in this matter and failed to appear at the adjudicatory hearing scheduled for and held on May 17, 2013 (see Hearing Report at 2-3 [Findings of Fact ¶¶ 7, 8]). As a consequence of respondent Silvernail's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for default be granted (see Hearing Report at 4), and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15 with respect to respondent Silvernail.

Furthermore, Department staff presented a prima facie case on the merits at hearing and proved its case by a preponderance of the evidence with respect to respondent Silvernail (see Hearing Report at 3-4). Accordingly, staff is entitled to a judgment based on record evidence.

Pursuant to ECL 71-2703(1), any person who violates any provision of title 7 of article 27 of the ECL (governing solid waste management and resource recovery facilities), or any regulation promulgated pursuant thereto, is liable for a penalty of up to seven thousand five hundred dollars (\$7,500) for each violation, and an additional penalty of up to one thousand five hundred (\$1,500) for each day the violation continues. Department staff testified at hearing that the annual reporting requirement for solid waste facilities is important to the regulatory scheme and that the proposed penalty is well below the maximum authorized by statute (see Hearing Report at 4; see also Hearing Exhibit DEC-8 [Affidavit in Support of Notice of Hearing and Complaint, sworn to March 14, 2013, by Richard Clarkson, ¶ 8]).

Department staff requests a penalty of five thousand dollars (\$5,000). Respondent Silvernail was required to submit the annual report for calendar year 2010 by no later than March 2, 2011. Respondent Silvernail failed to submit the annual report. Accordingly, respondent Silvernail has been in violation of 6 NYCRR 360-12.2(d) for over two years. Based on this period of violation and the importance of the annual reporting requirement, the requested penalty of five thousand dollars (\$5,000) is authorized and appropriate and is to be paid to the Department within thirty (30) days of the service of this order upon respondent Silvernail. I also direct, in accordance with staff's request and the ALJ's recommendation -- that respondent Silvernail submit the annual report for calendar year 2010 for the facility within thirty (30) days of the service of this order upon her.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 as against respondent Kara Fibers RHRF is denied and the complaint as against respondent Kara Fibers RHRF is dismissed.
- II. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 as against respondent Bonnie L. Silvernail is granted. By failing to answer or appear in this proceeding, respondent Bonnie L. Silvernail waived her right to be heard.
- III. Moreover, based upon record evidence, respondent Bonnie L. Silvernail is adjudged to have violated 6 NYCRR 360-12.2(d) for failing to submit an annual report for calendar year 2010 on or before March 2, 2011.
- IV. Within thirty (30) days of the service of this order upon respondent, respondent Bonnie L. Silvernail shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

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

-----X
In the Matter of the Alleged Violations of Article 27 of the
Environmental Conservation Law of the State of New York (ECL)
and Part 360, *et seq.* of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York (6 NYCRR),

HEARING REPORT

DEC Case No:
CO 5-20111215-28

-by-

KARA FIBERS RHRF and BONNIE L. SILVERNAIL,

Respondents.

-----X
Procedural History

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondents Kara Fibers RHRF (respondent RHRF) and Bonnie L. Silvernail (respondent Silvernail) with a complaint dated March 15, 2013, alleging that respondents violated ECL article 27 and 6 NYCRR 360-12.2(d) by their failure to submit an annual report for a solid waste management facility (facility) located in Fort Edward. The complaint seeks an order of the Commissioner (1) finding respondents in violation of ECL article 27 and 6 NYCRR 360-12.2(d); (2) directing respondent to submit an annual report for the facility for calendar year 2010; (3) assessing a civil penalty in the amount of \$5,000; and (4) granting such other relief as the Commissioner may deem appropriate.

In accordance with 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint was made by certified mail, delivered to respondent RHRF on March 16, 2013 and to respondent Silvernail on March 23, 2013 (DEC exhibit 1). Respondents failed to file an answer to the complaint.

DEC Administrative Law Judge (ALJ) Richard A. Sherman, Office of Hearings and Mediation Services (OHMS), convened an adjudicatory hearing on the matter on May 17, 2013 at the Department's Region 5 sub-office, 232 Golf Course Road, Warrensburg, New York. Department staff was represented by Scott Abrahamson, Assistant Regional Attorney, DEC Region 5. As noted on the hearing record, no one appeared on behalf of respondents. Staff indicated that it was prepared to proceed with the hearing and the hearing was held in the absence of the respondents.

Department staff called one witness, David Mt. Pleasant, P.E., an Environmental Engineer 2, with the Department. Eight exhibits were received in evidence at hearing.

Applicable Regulatory Provisions

Pursuant to 6 NYCRR 360-12.2(d), "the facility owner or operator must: (1) [p]repare and file an annual report, in accordance with paragraph 360-1.8(h)(8) of this Part." Paragraph 360-1.8(h)(8) provides, in part, that "[r]egistered facilities must submit an annual report, on forms prescribed by or acceptable to the department, to the department's central office and the office of the department administering the region in which the facility is located, no later than 60 days after the first day of January following each year of operation."

Findings of Fact

1. Kara Fibers, Inc. is registered with the Department as a recyclables handling and recovery facility (DEC Registration No. 58M04) located at 1 School Street, Fort Edward, New York (DEC exhibits 2, 3).
2. Kara Fibers, Inc. is an inactive New York State business corporation that was dissolved by proclamation on January 27, 2010 (DEC exhibit 4).
3. Respondent RHRF¹ is an entity of unknown legal status (staff counsel statement at hearing).
4. Respondent Silvernail is the owner, operator and president of the subject facility (DEC exhibit 2 [facility registration form, certified and signed by respondent Silvernail]; see also DEC exhibit 3; testimony of David Mt. Pleasant).
5. David Mt. Pleasant is an Environmental Engineer 2 with the Department and is the Acting Materials Management Program Supervisor for DEC Region 5 (testimony of David Mt. Pleasant).
6. David Mt. Pleasant reviewed the Department's file for the subject facility prior to the hearing and confirmed that a 2010 annual report was not filed for the facility on or before March 2, 2011, as required by 6 NYCRR 360-1.8(h)(8), or at any time since (testimony of David Mt. Pleasant).
7. Department staff filed an affidavit of service stating that each named respondent was served with a notice of hearing and complaint by certified mail sent on March 15, 2013. Attached to the affidavit of service are United States Postal Service confirmations of the delivery of the notices of hearing and complaints to the addresses of record for respondent RHRF on March 16, 2013 and respondent Silvernail on March 23, 2013 (DEC exhibit 1).

¹ The letters "RHRF" appear to be a reference to the facility's status as a "recyclable handling and recovery facility." All of the documents in evidence that are from the facility itself, however, identify the facility name as "Kara Fibers, Inc." (see DEC exhibits 2 [facility registration], 3 [annual reports for years 2000, 2001, 2002, 2005 and 2007]; see also DEC exhibit 4).

8. Respondents failed to file an answer to the complaint and failed to appear for the adjudicatory hearing held on May 17, 2013 (DEC exhibit 1, hearing record).

Discussion and Conclusions

At hearing, Department staff moved for a default judgment against respondents and for a determination on the merits with regard to respondents' liability for the violation alleged by staff. For the reasons set forth below, I conclude that staff's motions should be denied with respect to respondent RHRF and granted with respect to respondent Silvernail.

Department staff failed to proffer evidence at hearing to establish that respondent RHRF is the legal successor to Kara Fibers, Inc. with regard to the latter's obligations under 6 NYCRR part 360. As a recyclables handling and recovery facility, Kara Fibers, Inc. is required to file a registration form with the Department (see 6 NYCRR 360-12.1[d][1]; complaint ¶ 6). The registration form for the facility that is on file with the Department states that the facility name is Kara Fibers, Inc. and that Bonnie L. Silvernail is the president, owner, and operator of the facility.² Pursuant to 6 NYCRR 360-1.8(h)(6), registrations for solid waste facilities are transferable only with the prior written approval of the Department. Staff proffered no evidence, and there is nothing in the hearing record, to establish that the registration for Kara Fibers, Inc. has been transferred to Kara Fibers RHRF.

Moreover, although Department staff proffered evidence that Kara Fibers, Inc. is an inactive domestic business corporation and was dissolved by proclamation in early 2010, staff proffered no evidence to establish that Kara Fibers RHRF is a legal entity.³ At hearing, staff counsel stated that he did not know whether Kara Fibers RHRF was a legal entity and there is nothing in the record before me that establishes its legal status. Further, there is nothing in the record to suggest that Kara Fibers, Inc. ever held itself out as Kara Fibers RHRF.

In addition to the issue of the legal status of respondent RHRF, I note that the regulatory provision that respondents are alleged to have violated imposes the duty to file annual reports on the "owner or operator" of a facility, not on the facility itself. Specifically, Department staff alleges that "Respondent (sic⁴) failed to submit an annual report for calendar year 2010 within sixty (60) days after January 1st, 2011 [i.e., on or before March 2, 2011] as required by 6

² Respondent Silvernail's name is written under the "facility owner's name" (item #2) on the facility registration form. The sections under "facility operator's name (if different)" (item #3) and "site owner's name (if different)" (item #4) are crossed out, thereby indicating respondent Silvernail is the facility owner, operator and the site owner. Lastly, respondent Silvernail signed and certified the registration form as the "President" of Kara Fibers, Inc. (see DEC exhibit 2).

³ Under the regulations, an "owner" is a "person" who owns a solid waste facility and an "operator" is a "person" that is responsible for the overall operation of a facility (6 NYCRR 360-1.2[b][113], [114]). A "person" is defined as "any individual, public or private corporation, . . . or any other legal entity whatsoever" (6 NYCRR 360-1.2[b][117]).

⁴ Throughout the cause of action and the demand for relief, the complaint refers to respondents in the singular.

NYCRR 360-12.2(d)" and that the Department "issued Respondent a Notice of Violation ('NOV') for failure to file [the report]"⁵ (Complaint ¶¶ 16, 17). By its express terms, 6 NYCRR 360-12.2(d) imposes the obligation to file annual reports on "the facility owner or operator." Staff alleges that Bonnie L. Silvernail "owned and/or operated" the facility (complaint ¶ 4) and that is corroborated by the record (see finding of fact ¶ 4). There is, however, no basis in the record to conclude that respondent RHRF is an owner or operator of the facility. I conclude that respondent Silvernail is, and respondent RHRF is not, a proper respondent in this matter.

The record shows that respondent Silvernail failed to file an answer to the complaint and failed to appear for the adjudicatory hearing held on May 17, 2013 (see findings of fact ¶¶ 7, 8). On May 20, 2013 Department staff provided OHMS with a proposed default order. Department staff has satisfied the requirements governing default procedures set forth at 6 NYCRR 622.15. Accordingly, I conclude that staff's motion for a default judgment should be granted as to respondent Silvernail and respondent Silvernail should be held liable for violating 6 NYCRR 360-12.2(d).

Moreover, the proof adduced at the hearing, conducted in respondents' absence, demonstrates by a preponderance of the evidence that respondent Silvernail violated 6 NYCRR 360-12.2(d). Department staff's proof presents a prima facie case demonstrating that respondent Silvernail failed to submit the 2010 annual report for the facility on or before March 2, 2011, or at any time since, in violation of 6 NYCRR 360-12.2(d) (see finding of fact ¶ 6). Respondent Silvernail made no proffer and did not appear at hearing. Accordingly, I conclude that staff's motion for a determination on the merits should be granted and respondent Silvernail should be held liable for violating 6 NYCRR 360-12.2(d).

By its complaint Department staff requests a \$5,000 penalty. At hearing, staff stated that the penalty is justified because solid waste facility annual reports are important to the regulatory scheme (testimony of David Mt. Pleasant; see also DEC exhibit 8 ¶ 8). The reports provide the Department with information on the extent of a facility's operations and that information is used by the Department to assess whether the State is meeting its objectives relative to waste recycling and recovery (id.). Staff further stated that the penalty request is consistent with the Department's Solid Waste Enforcement Policy (id.; see also DEC exhibit 7). Moreover, the penalty requested is a small fraction of the maximum penalty authorized by statute (see testimony of David Mt. Pleasant; DEC exhibit 6 [staff penalty calculation showing the statutory maximum penalty to be in excess of \$1,000,000]). In light of the duration of the violation, the importance of annual reports in the regulatory scheme, and the Department's solid waste enforcement policy, I conclude that the penalty proposed by staff is authorized and appropriate.

Recommendations

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

1. Denying Department staff's motion for a default judgment against respondent Kara Fibers RHRF;

⁵ The NOV was sent to "Robert Silvernail" at the facility address and, attached to the NOV, is a proposed order on consent, naming Bonnie L. Silvernail as the sole respondent (see DEC exhibit 5).

2. Holding that Department staff failed to meet its burden of proof in relation to its charge that respondent Kara Fibers RHRF violated NYCRR 360-12.2(d);
3. Granting Department staff's motion for a default judgment against respondent Bonnie L. Silvernail and holding respondent Bonnie L. Silvernail in default pursuant to the provisions of 6 NYCRR 622.15;
4. Holding respondent Bonnie L. Silvernail liable for violating 6 NYCRR 360-12.2(d) for failing to submit an annual report for 2010 for the facility upon the proof adduced at the adjudicatory hearing;
5. Directing respondent Bonnie L. Silvernail to pay a civil penalty in the amount of \$5,000; and
6. Directing respondent Bonnie L. Silvernail to file the 2010 annual report for the facility.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
June 12, 2013

EXHIBIT CHART

Matter of Kara Fibers RHRF and Bonnie L. Silvernail
 DEC Case No. CO5-20111215-28

Exhibit No.	Description	Offered By	Rec'd (Y/N)
DEC-1	Affidavit of Service of Notice of Hearing and Complaint (with attachments, including copies of the notice of hearing and complaint)	Department Staff	Y
DEC-2	Registration Form for Solid Waste Management Facility (DEC Reg #58M04)	Department Staff	Y
DEC-3	Annual Reports Submitted by Kara Fibers, Inc. for Calendar Years 2000, 2001, 2002, 2005 and 2007)	Department Staff	Y
DEC-4	NYS Dept of State, Division of Corporations, Printout re: Kara Fibers, Inc.	Department Staff	Y
DEC-5	DEC Notice of Violation (dated Aug. 9, 2012) and Proposed Order on Consent	Department Staff	Y
DEC-6	Department Staff Civil Penalty Calculation	Department Staff	Y
DEC-7	DEC Solid Waste Enforcement Policy	Department Staff	Y
DEC-8	Affidavit of Richard Clarkson in Support of Notice of Hearing and Complaint	Department Staff	Y