

**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 3-20111215-13

-by-

**MAHOPAC SCRAP AND RECYCLING, INC. and
WILLIAM R. BOYAR, SR.,**

Respondents.

On May 15, 2013, an adjudicatory hearing was convened before Molly T. McBride, Administrative Law Judge (“ALJ”) 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 Mahopac Scrap and Recycling, Inc. and William R. Boyar, Sr. (“respondents”), violated ECL article 27 and its implementing regulation, 6 NYCRR 360-12.2(d), by failing to submit an annual report for calendar year 2010 for the solid waste management facility they own and operate at 205 Myrtle Avenue, Mahopac Falls, New York (“facility”).

ALJ McBride prepared the attached hearing report, which I adopt in part as my decision in this matter. As set forth in the ALJ’s hearing report, respondents Mahopac Scrap and Recycling, Inc. and William R. Boyar, Sr. failed to file an answer to the complaint served by Department staff in this matter and failed to appear for the adjudicatory hearing scheduled in the matter on May 15, 2013, as directed in the notice of hearing (see Hearing Report at 2 [Finding of Fact No. 4]). As a consequence of respondents’ failure to answer or appear in this matter, the ALJ recommended that Department staff’s motion for default be granted (see Hearing Report at 3).

Following ALJ McBride’s submission of the hearing report, I determined that further development of the record was required regarding the status and relationship of the two respondents. I directed Louis Alexander, Assistant Commissioner for Hearings and Mediation Services, to inquire of the parties concerning the status (inactive or active) of respondent corporation, Mahopac Scrap and Recycling, Inc., and whether the corporation’s status had any bearing on (i) the potential liability of the corporation and the corporate officers for the alleged violation, and (ii) the facility’s ownership. Department staff was also directed to advise whether the Department’s files contained any annual reports for the subject facility and whether, in light of certain ambiguities in

the papers, staff was proceeding against both respondents or just William R. Boyar, Sr. By letter dated January 9, 2014, Assistant Commissioner Alexander advised the parties of this request for additional information, and that Department staff was to reply by January 29, 2014. Respondents were given until February 12, 2014 to respond to staff's reply.

By letter dated January 29, 2014, Department staff submitted information pursuant to the January 9, 2014 letter ("January submission"). Respondents failed to file any response. In the January submission, Department staff provided a copy of a 2011 annual report that was filed on behalf of the facility and received by the Department in March 2013. Department staff further advised that no 2012 annual report for the facility had been received. Also included in the January submission was the facility's 1994 registration (previously submitted in this proceeding as Hearing Exhibit 1), and a consent order signed by William R. Boyar, Sr. relating to the facility's failure to file the 2010 annual report.¹ I hereby include the January submission as part of the record of this proceeding (see 6 NYCRR 622.18[d]).

Department staff clarified in the January submission that it was proceeding against both William R. Boyar, Sr. and Mahopac Scrap and Recycling, Inc. Staff noted that, although Mahopac Scrap and Recycling, Inc., was dissolved by proclamation on October 28, 2009, respondent Boyar, the corporation's president and owner, submitted the 2011 annual report on behalf of the facility. According to staff, this would lead to the conclusion that "either the corporation is still acting, or alternatively if the corporation is inactive, [respondent] Boyar is responsible for the remaining liabilities of Mahopac Scrap and Recycling Inc., as its owner and president" (January submission, at 2).

The record before me is insufficient to find liability as to Mahopac Scrap and Recycling, Inc. The 1994 Facility Registration Form (see Hearing Exhibit 1) lists the owner of the facility as William R. Boyar, Sr. On the form, Mahopac Scrap and Recycling, Inc., is simply listed as the facility name (see id.). Mr. Boyar, in the certification to the 1994 Facility Registration Form, states that he is the owner and operator of Mahopac Scrap and Recycling, Inc. On the 2011 annual solid waste management facility report, Mr. Boyar again listed himself as the facility owner and operator. Pursuant to 6 NYCRR 360-12.2(d)(1), which was promulgated pursuant to title 7 of article 27 of the ECL, the facility owner or operator is responsible for the preparation and filing of the annual report. Only William R. Boyar, Sr., and not Mahopac Scrap and Recycling, Inc., is listed in any of the documents as owner or operator of the facility.

I concur with the ALJ that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15 with respect to respondent Boyar, who, as noted, is listed as owner or operator of the facility in the record. Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence against respondent Boyar (see Hearing Report at 3). Accordingly, staff is entitled to a judgment based on record evidence against him.

¹ Respondent Boyer failed to pay the civil penalty assessed by the consent order (see January submission, at 1, n 1).

Department staff requested a penalty of five thousand dollars (\$5,000) for the failure to file the 2010 annual report. ECL 71-2703(1) provides for a penalty of up to seven thousand five hundred dollars for each violation of title 7 of article 27 of the ECL, or any regulation promulgated pursuant thereto, and up to one thousand five hundred dollars per day for each day the violation continues. Although Mr. Boyar submitted the annual report for the following year (2011), it was not received until more than a year after it was due. No annual report has been received for 2012 (see January submission, at 1). Although timely filings in subsequent years might have been a basis for consideration of a reduction in the civil penalty, the subsequent filings have either been considerably late (2011) or not filed at all (2012).

Accordingly, I am assessing a civil penalty of five thousand dollars (\$5,000) against Mr. Boyar, which is the penalty amount requested by Department staff and recommended by the ALJ. Based on this record, the penalty is authorized and appropriate.²

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 is granted as to respondent William R. Boyar, Sr. By failing to answer or appear in this proceeding, respondent William R. Boyar, Sr., waived his right to be heard at the hearing.

II. Moreover, based upon record evidence, respondent William R. Boyar, Sr., is adjudged to have violated 6 NYCRR 360-12.2(d), for failure to file an annual report for calendar year 2010 for the facility at 205 Myrtle Avenue, Mahopac Falls, New York.

III. Department staff's cause of action alleging that Mahopac Scrap and Recycling, Inc., violated 6 NYCRR 360-12.2(d), for failure to file an annual report for calendar year 2010 is dismissed.

IV. Within thirty (30) days of the service of this order, respondent William R. Boyar, Sr., 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.

V. Within thirty (30) days of the service of this order, respondent William R. Boyar, Sr., shall submit the annual report for calendar year 2010 for the facility at 205 Myrtle Avenue, Mahopac Falls, New York, to the New York State Department of Environmental Conservation.

² In addition to the applicable statutory language in ECL 71-2703, the ALJ considered the Department's guidance OGC 8 "Solid Waste Enforcement Policy," dated November 17, 2010 (see Hearing Report, at 3). I have also considered the aforementioned policy, exclusive of the chart in the appendix to that policy (see Matter of Queen City Recycle, Inc., Decision and Order of the Commissioner, December 12, 2013, at 4 n 10 [directing that the chart in the appendix not be applied]), and find the penalty to be consistent with that policy.

VI. The penalty payment and annual report shall be sent to the following address:

New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Elissa Armater.

VII. Any questions or other correspondence regarding this order shall be addressed to Carol Conyers, Esq. at the address referenced in paragraph VI of this order.

VIII. The provisions, terms and conditions of this order shall bind respondent William R. Boyar, Sr., and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: March 5, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 27 of
the Environmental Conservation Law of the State of New York
("ECL") and Section 360 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-3-20111215-13

-by-

Mahopac Scrap and Recycling, Inc., and
William R. Boyar, Sr., owner,

Respondent.

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Procedural History

Respondents Mahopac Scrap and Recycling, Inc., and William R. Boyar, Sr. ("respondents") were served with a notice of hearing and complaint dated March 15, 2013 alleging a violation of ECL Article 27 and 6 NYCRR 360-12.2(d) for failing to submit the Annual Solid Waste Management Activity Report ("annual report") for its solid waste management facility for the year 2010 with regards to the facility they operate at 205 Myrtle Avenue, Mahopac Falls, NY ("facility"). The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL Article 27 and 6 NYCRR 360-12.2(d); (2) directing respondent to submit the overdue annual report; (3) assessing a civil penalty in the amount of five thousand dollars (\$5,000.00); and (4) granting such other and further relief as the Commissioner may deem just and proper.

Service of the notice of hearing and complaint was made by service upon respondents on March 20, 2013 by certified mail, return receipt requested and received by respondents on March 20, 2013 (Department Exhibit D). Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on May 15, 2013, as directed in the notice of hearing.

As stated in the notice of hearing, on May 15, 2013, an adjudicatory hearing was scheduled at the Department's Region 3 Office 21 South Putts Corner Road, New Paltz, New York 12561 and Administrative Law Judge ("ALJ") Molly T. McBride of the Department of Environmental Conservation's ("Department") Office of Hearings and Mediation Services ("OHMS") was present and called the matter for hearing. Department staff was represented by Carol Conyers, Esq., Associate Attorney, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. No one appeared on behalf of respondents. Department staff was prepared to proceed to hearing and had its witness, David Pollock,

Environmental Engineer 1 in the Department's Region 3 office present. In all, seven (7) exhibits were marked for identification for the hearing.

Pursuant to 6 NYCRR 622.15, Ms. Conyers, on behalf of Department staff, orally moved for a default judgment based upon respondents' failure to answer the complaint dated March 15, 2013, and failure to appear for the prehearing conference scheduled in the notice of hearing served with that complaint. Also, Department staff proceeded to hearing and David Pollock testified for Department staff.

Applicable Regulatory Provision

§ 360 Solid Waste Management Facilities

Pursuant to NYCRR 360-12.2(d) all solid waste management facilities are required to take and submit an annual report to the Department. The annual report is to be submitted on forms provided by or acceptable to the Department in accordance with 6 NYCRR 360-1.8(h)(8) no later than 60 days after the first day of January following each year of operation.

Findings of Fact

1. Respondents own and operate a solid waste management facility at 205 Myrtle Avenue Mahopac Falls, New York (Exhibits A and C; Testimony of David Pollock.)
2. Respondent William A. Boyar Sr. signed a Solid Waste Management Facility registration form for the facility on September 5, 1994 identifying himself as the owner/operator of Mahopac Scrap and Recycling, Inc., Mahopac Scrap and Recycling Inc. as the facility name, and himself as facility owner (Exhibit A).
3. Respondents were issued DEC Solid Waste Management Facility Registration number 40M02 ("registration") for the facility (Exhibit A; Pollock Testimony).
4. Pursuant to the registration and the solid waste management regulations, respondents were to file an annual report with the Department by no later than 60 days after the first day of January following each year of operation (Exhibit C; Pollock Testimony).
5. Respondent failed to file the annual report for the calendar year 2010. Department staff sent a Notice of Violation dated August 9, 2012 (Exhibit B).
6. Service of the notice of hearing and complaint dated March 15, 2013, on respondents alleging a violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-12.2(d) for respondents' failure to file the annual report for year 2010 as indicated in Finding of Fact 4, above, was made by certified mail return receipt requested on March 20, 2013 (Exhibit D).

7. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on May 15, 2013, as directed in the notice of hearing (Exhibit C; Pollock testimony).

Discussion

The record shows that respondents failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on May 15, 2013, as directed in the notice of hearing. The Department is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Moreover, the proof adduced at the hearing on May 15, 2013, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondents failed to file the annual report for the year 2010, being set forth in Finding of Fact 4, above, in violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-12.2(d). The Department is entitled to judgment upon the facts proven. Relying the registration form filed by respondents (Exhibit A), it is established that both respondents are properly named and identified as parties.

As detailed in the affidavit of Richard Clarkson, Chief of Facilities Section of the Bureau of Permitting and Planning in the Division of Materials Management of the DEC's DEC Environmental Monitoring Program (Exhibit G), the Environmental Monitoring program is extremely important to the Department's solid waste program. The monitoring of facilities is the only way to ensure that adverse environmental impacts associated with improper handling and processing of solid waste are being prevented. With respect to penalty, Department staff submitted a penalty calculation detailing that pursuant to ECL 71-2703, the statutory maximum penalty is one million, ten thousand five hundred dollars (1,010,500.00) (Exhibit F) Department staff has requested a civil penalty of five thousand dollars (\$5,000.00). In support of the requested civil penalty, staff noted that the civil penalty amount is within the range authorized by section 71-2703 of the ECL. The penalty requested is consistent with DEC's Civil Penalty Policy (DEE-1, dated June 20, 1990). In addition, I have reviewed the Department's enforcement guidance memorandum entitled "OGC 8, Solid Waste Enforcement Policy," dated November 17, 2010 (SW Enforcement Policy), and determined that the staff-requested penalty is consistent with the SW Enforcement Policy.

Recommendation

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

1. Finding respondents in violation of ECL Article 27 and its implementing regulation, 6 NYCRR 360-12.2(d) for failure to file an annual report for the year 2010 for the solid waste management facility they operate at 205 Myrtle Avenue Mahopac Falls, New York, as set forth in Finding of Fact 4;

2. Directing respondent to file the annual report for the year 2010 with the New York State Department of Environmental Conservation within 30 days of the date of the Commissioner's order herein;
3. Directing respondents to pay a civil penalty in the amount of five thousand dollars (\$5,000); and
4. Directing such other and further relief as he may deem just and proper.

/s/

Molly T. McBride
Administrative Law Judge

Dated: Albany, New York
November 17, 2013

EXHIBIT CHART
Mahopac Recycling and Scrap, Inc
Edirol Number 0406140090920
May 15, 2013

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	Registration form for a Solid Waste Management Facility, DEC registration #40M02	✓	✓	Department Staff	
B	Notice of Violation issued August 9, 2012	✓	✓	Department Staff	
C	Notice of Hearing and Complaint dated March 15, 2013	✓	✓	Department Staff	
D	Affidavit of Service of Elissa Armater dated May 13, 2013	✓	✓	Department Staff	
E	March 15, 2013 cover letter of Scott Crisafulli, Esq.	✓	✓	Department Staff	
F	Penalty Calculation prepared by Department Staff	✓	✓	Department Staff	
G	Affidavit of Richard Clarkson dated March 14, 2013	✓	✓	Department Staff	