STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No.
R4-2015-1215-140

-by-

JOHN McCASHION,

Respondent.

In a complaint dated July 14, 2016, staff of the New York State Department of Environmental Conservation (Department) alleges that respondent John McCashion (respondent) violated solid waste regulation 6 NYCRR 360-1.5(a) by depositing, on one or more occasion prior to 2014, "concrete, asphalt, bricks, soil, gravel, insulation, and tires from commercial operations" on land located in the Town of Colonie, New York, with Tax ID #28.02-4-1.2 (site) (Complaint ¶ 9). The site is part of the Albany Pine Bush Preserve, one of the largest of approximately only 20 inland pine barrens worldwide (see Affidavit of Joel Hecht, sworn to November 22, 2016 [Hecht Affidavit], ¶ 8).

Administrative Law Judge (ALJ) D. Scott Bassinson of the Department's Office of Hearings and Mediation Services was assigned to this matter. In response to staff's second motion for a default judgment, ALJ Bassinson prepared the attached default summary report and ruling on cross-motion (default summary report). I adopt the ALJ's findings of fact and conclusions of law as they relate to liability and injunctive relief, subject to my comments below. As discussed below, I am remanding the issue relating to the amount of penalty to the ALJ for further proceedings.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint served by Department staff in this matter. Respondent also failed to respond to staff's first motion for a default judgment (see Default Summary Report at 4). On staff's first motion for default judgment, the ALJ held that staff satisfied the requirements of 6 NYCRR 622.15(b)(1)-(3); that is, staff properly served respondent with the notice of hearing and complaint, respondent did not answer the complaint, and staff submitted a proposed order (see id.). The ALJ denied staff's first default motion, however, without prejudice, because staff did not submit proof of facts sufficient to support the claim against respondent (see Matter of McCashion, ALJ Ruling on Motion for Default Judgment, October 25, 2016, at 2-3).

Department staff thereafter served a second motion for default judgment, supported by an attorney's affirmation and two affidavits of individuals with personal knowledge (Default Summary Report at 4).

Liability

Staff's submissions accompanying its second motion for default judgment are sufficient to satisfy 6 NYCRR 622.15 default requirements, and to establish proof of facts that support staff's claim against respondent (see Default Summary Report at 4). The submissions establish, among other things, that respondent disposed of waste from commercial operations including fill, debris, tires and insulation in the Albany Pine Bush Preserve and that he admitted storing construction materials "near or upon the Site" (see id. at 2-3, Finding of Fact No. 3).

The disposed materials fall within the scope of the definition of "solid waste" under Department regulations (see 6 NYCRR 360-1.2[a]). Section 360-1.5(a) of 6 NYCRR states that "[e]xcept as provided for in Subparts 360-10 and 360-17 of [6 NYCRR], no person shall dispose of solid waste in this State except at: (1) a disposal facility exempt from the requirements of this Part; or (2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order." The site is not a disposal facility exempt from the requirements of 6 NYCRR part 360 nor is it a disposal facility authorized to accept such waste. Accordingly, respondent's disposal of solid waste at the site is a violation of 6 NYCRR 360-1.5(a).

Civil Penalty

Department staff has requested a civil penalty in the amount of seven thousand five hundred dollars ($7,500). For violations such as occurred here, ECL 71-2703(1)(a) provides for a civil penalty not to exceed seven thousand five hundred dollars for each violation and "an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues." Also relevant here is the Department's Civil Penalty Policy (see Affidavit of Brian Maglienti, sworn to November 22, 2016, ¶ 14).

Upon my consideration of the record in this proceeding, including but not limited to the significance of the Pine Bush, I have determined that the amount of the civil penalty that Department staff requests for the illegal disposal of waste in this sensitive and unique environmental area needs to be revisited. Joel Hecht, the stewardship director of the Albany Pine Bush Preserve Commission, notes that the New York State Legislature has formally recognized the significance of the Pine Bush with its "unique and endangered natural communities and species" (Hecht Affidavit, ¶ 7). The biological and environmental significance of the Pine Bush would be an aggravating factor in the context of establishing an appropriate penalty for this violation (see e.g. DEC Civil Penalty Policy, June 20, 1990, IV. Penalty Calculations [1. Introduction]). Accordingly, I am remanding this matter to the ALJ to schedule further proceedings with respondent and Department staff on the issue of penalty.

Injunctive Relief

Department staff requests that I direct respondent to remove the solid waste from the site. Staff specifically requests that all solid waste be removed down to the sand, without removal of any sand (see Complaint ¶ II, at third unnumbered page [removal of all solid waste from the site "exposing the sand. No sand shall be removed from the Site during the removal of the solid waste"]; see also Affirmation of Dusty Renee Tinsley, Esq., November 23, 2016, ¶ 32 IV). Department's staff request is authorized and appropriate.

Even though I am remanding this matter to address the amount of penalty, no reason exists to delay imposing injunctive relief at this time to remove the offending material from this sensitive environmental area. While respondent undertook some clean-up activities at the site, "a large amount of solid waste from commercial operations remains at the Site" (Hecht Affidavit, ¶ 7). Mr. Hecht, in further describing the impacted area, states:

> Solid waste that was removed was not removed down to the mineral soil. Solid waste remains on approximately [0.6] acres of the Site. The depth of the solid waste from commercial operations at the Site ranges from six to eight feet along the property line and one to four feet elsewhere on the Site. Id.

Because of the significant ecosystem involved, any removal activity must be conducted in a manner that ensures no further damage to the environment. The ALJ notes that respondent must obtain permission from the Albany Pine Bush Preserve Commission to access the site (see Default Summary Report at 7). Accordingly, I am directing respondent to provide both to the Albany Pine Bush Preserve Commission and to the Department, an approvable[1] written plan that describes the manner in which the solid waste will be removed and a timetable for completion of its removal (written removal plan). The written removal plan shall provide for the removal of the solid waste such that the sand is exposed, but no sand is to be removed from the site during the removal of the solid waste (see Hecht Affidavit, ¶ 9). The written removal plan is also to address the removal of any materials that may be stored on the site. I encourage respondent to discuss the written removal plan with Department staff prior to its formal submission to the Department and the Albany Pine Bush Preserve Commission.

Respondent shall have twenty (20) days from the service of this order upon him to submit the written removal plan to the Albany Pine Bush Preserve Commission and the Department. Together with the submission of the written removal plan, respondent is to submit to the Albany Pine Bush Preserve Commission a request for permission to access the site. Respondent shall remove all solid waste from the site within thirty (30) days of receiving permission from the Albany Pine Bush Preserve Commission to access the site; this removal date is to be reflected in the timetable in the written removal plan. The written removal plan shall also contain information about any revegetation of the impacted area, if such revegetation is necessary. Within seven (7) days following removal of the solid waste from the site pursuant to the approved written removal plan, respondent shall provide written information to the Department that documents that the removed solid waste was either disposed at an authorized facility or has been or will be reused in compliance with all applicable legal requirements. Photographs of the

[1] "Approvable" shall mean that which can be approved by Department staff, with only minimal revision.

area from which the waste was removed shall also be provided with the aforementioned written information.

Respondent's Cross-Motion

Although respondent did not answer the complaint or file a response to staff's first motion for default, respondent filed a cross-motion in response to Department staff's second motion for default judgment, by which respondent sought to reargue, to renew, and to reopen the default. I agree with the ALJ that respondent's cross-motion did not satisfy the necessary requirements for such relief (see Default Summary Report at 5-7).

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 in part and denied in part.

II. Respondent John McCashion is adjudged to have violated 6 NYCRR 360-1.5(a) by disposing of solid waste at property located off Albany Street and New Karner Road in the Town of Colonie, County of Albany, with Tax ID #28.02-4-1.2 (site), which property is neither exempt from the requirements of 6 NYCRR Part 360 nor authorized to accept such solid waste.

III. Within twenty (20) days of service of the Commissioner's order on respondent John McCashion, respondent shall:

A. Seek the permission of the Albany Pine Bush Preserve Commission to access the site to remove the solid waste from the site; and

B. Submit to the Albany Pine Bush Preserve Commission and to the Department, an approvable written removal plan that:

1. describes the manner in which the solid waste will be removed from the site and a timetable for completion of the removal; and

2. provides for the removal of the solid waste such that the sand at the site is exposed, but no sand is removed from the site during the removal of the solid waste.

IV. Within thirty (30) days of receiving permission of the Albany Pine Bush Preserve Commission to access the site, respondent John McCashion shall completely remove all the solid waste at the site, in accordance with the approved written removal plan, down to or exposing the sand but without removing any of the sand. Within seven (7) days of the removal of the solid waste, respondent shall provide the Department with written information documenting that the solid waste removed from the site was either disposed at an authorized facility or has been or

will be reused in compliance with all applicable legal requirements. Together with that written information, respondent shall provide photographs of the areas from which the waste was removed.

V. This matter is remanded to the Office of Hearings and Mediation Services for further proceedings relative to the civil penalty in this matter.

VI. Any questions or correspondence regarding this order shall be addressed to Dusty Renee Tinsley, Esq. at the following address:

Office of General Counsel, Region 8
NYS Department of Environmental Conservation
6274 East Avon-Lima Road
Avon, New York 14414
Attn: Dusty Renee Tinsley, Esq.

The written removal plan and other submissions referenced in paragraphs III and IV shall also be submitted to Attorney Tinsley at the aforementioned address.

VII. The provisions, terms and conditions of this order shall bind respondent John McCashion, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: April 24, 2017
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

DEFAULT SUMMARY REPORT AND RULING ON CROSS-MOTION

DEC Case No.
R4-2015-1215-140

-by-

JOHN McCASHION,

Respondent.

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondent John McCashion ("respondent") violated solid waste regulation 6 NYCRR § 360-1.5(a), when, "[o]n one or more occasion prior to 2014, Respondent deposited concrete, asphalt, bricks, soil, gravel, insulation, and tires from commercial operations on land" located in the Town of Colonie, Albany County. See Complaint ¶¶ 9, 12. Department staff further alleges that the property upon which respondent is alleged to have disposed of solid waste is neither exempt from solid waste regulatory requirements nor authorized to accept such waste for disposal. See id. ¶ 10. Finally, Department staff alleges that respondent "admitted that he disposed of solid waste on the Site." Id. ¶ 11.

In its complaint, Department staff seeks an order of the Commissioner relating to the alleged violation, including the imposition of a civil penalty in the amount of seven thousand five hundred dollars ($7,500), and direction to respondent to "remove all solid waste from the Site exposing the sand." See id. at unnumbered third page, ¶¶ I and II.[1]

Presently before the undersigned are (i) Department staff's motion for a default judgment and order; (ii) respondent's cross-motion "to compel the Department … to accept respondent's Answer, for an extension of time to answer, to reargue or renew and/or to vacate the proposed default judgment;" and (iii) Department staff's motion to strike affirmative defenses.[2]

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[1] This section of the complaint is drafted as an actual "ordering" clause; that is, the relief that staff might seek is written as if it is being So Ordered: "NOW, having considered this matter and being duly advised, it is ORDERED that:" etc. Department staff's submissions on the current motion include the statement that this section of the complaint "should read 'WHEREFORE, Department staff respectfully requests an Order directing'" etc. See Affirmation of Dusty Renee Tinsley, Esq. dated November 23, 2016, at unnumbered sixth page, footnote 2. I deem the language of the complaint amended accordingly.

[2] The submissions of the parties on Department staff's motions and respondent's cross-motion are listed in Appendix A hereto.

Before addressing the merits of staff's motions and respondent's cross-motion, I note that respondent has submitted a "Reply Affirmation" without first seeking leave. Pursuant to 6 NYCRR § 622.6(c)(3), the filing of any papers subsequent to opposition to a motion requires permission of the Administrative Law Judge ("ALJ"). In this matter, respondent has not sought permission to file any papers subsequent to its initial opposition to staff's motion for a default judgment or in further support of respondent's cross-motion. Except for the statement in paragraph 13 of the Reply Affirmation that "it is premature to be determining the validity of Mr. McCashion's affirmative defenses at this stage" – which may be construed as respondent's opposition to staff's motion to strike affirmative defenses – the entire Reply Affirmation presents additional argument on staff's default motion and/or respondent's cross-motion. Such argument on reply will not be considered.

A. Applicable Regulatory Provision

360-1.5 Prohibited disposal.

(a) *Solid waste disposal facilities.* Except as provided for in Subparts 360-10 and 360-17 of this Part, no person shall dispose of solid waste in this State except at:

(1) a disposal facility exempt from the requirements of this Part; or

(2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order.

B. Findings of Fact

1. Respondent is an individual with an address of 84 Frederick Avenue, Albany, New York. See Affidavit of Brian Maglienti, sworn to November 22, 2016 ("Maglienti Aff.") ¶ 4; see also Affirmation of Eric W. Gentino, Esq. dated December 5, 2016 ("Gentino Aff."), Exhibit ("Ex.") 3, ¶ 4.

2. Joel Hecht is employed as a stewardship director at the office of the Albany Pine Bush Preserve Commission ("Pine Bush Commission"). Mr. Hecht's responsibilities include routinely inspecting Albany Pine Bush Preserve boundaries for encroachments, and to coordinate with the Department to resolve encroachment violations. See Affidavit of Joel Hecht, sworn to November 22, 2016 ("Hecht Aff."), at ¶¶ 1-2.

3. Respondent disposed of waste from commercial operations including fill, debris, tires and insulation at property located off Albany Street and New Karner Road in the Town of Colonie, County of Albany, with Tax ID #28.02-4-1.2 ("Site"). See Affidavit of John McCashion in Opposition to Motion for Default Judgment and in Support of Cross-Motion, sworn to December 2, 2016 ("McCashion Aff."), at ¶ 5 ("I had stored certain unused construction materials near or upon the Site"); Hecht Aff. at ¶¶ 3-4 (personal observations of waste at the site) and id. ¶¶ 5-6 (respondent admitted to Mr. Hecht that

respondent deposited solid waste at the site); see also id. Attachments 1-5 (photographs from 2013-2016 showing waste deposited at the site); Maglienti Aff. ¶ 9 (observation of waste at site during August 18, 2016 inspection) and Attachment 1 (photographs of site during August 2016 site inspection).

4. The Site is property owned by or delegated to the Pine Bush Commission. See Hecht Aff. ¶ 3; see also Maglienti Aff. ¶ 14(c) ("Respondent's disposal of solid waste in this case was on Albany Pine Bush Preserve").

5. The Albany Pine Bush Preserve, created by the New York State Legislature in 1988, is a "globally rare" ecosystem, one of the largest of only 20 other pine barrens worldwide. See Hecht Aff. ¶ 8.

6. The Site is neither exempt from Part 360 requirements nor authorized by Part 360 or a Department- or court-issued order to accept solid waste for disposal. See Maglienti Aff. ¶ 10.

7. Department staff served on respondent, by certified mail, a notice of hearing and complaint dated July 14, 2016. See Affirmation of Dusty Renee Tinsley dated November 23, 2016 ("Tinsley Aff."), Attachments 1 and 2.

8. Respondent failed to file an answer to the complaint. See Tinsley Aff. ¶ 5.

C. Discussion and Conclusions of Law

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). Upon a respondent's failure to answer a complaint, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR §§ 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "also submit some proof of the facts sufficient to support the claims charged in the complaint." Matter of Greene Technologies Incorporated, Ruling of the Commissioner, November 10, 2016, at 3; Matter of American Auto Body & Recovery Inc., Ruling of the Commissioner, July 2, 2015, at 3; Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

1. Department Staff's Motion for Default Judgment

This is Department staff's second motion for default judgment in this matter. On October 25, 2016, the undersigned denied, without prejudice, Department staff's first motion for a default judgment. See Matter of McCashion, Ruling on Motion for Default Judgment, October 25, 2016 ("McCashion I"), at 2-3. As set forth therein, Department staff demonstrated in support of that motion that it had complied with the requirements of 6 NYCRR § 622.15(b)(1)-(3), submitting proof of service on respondent by certified mail with the notice of hearing and complaint, and proof of respondent's failure to appear or timely answer, and a proposed order. The motion was denied without prejudice, however, because Department staff failed to provide proof of facts sufficient to support the claim. See id. at 2-3.

In support of Department staff's second motion for default judgment, in addition to submitting proof satisfying the requirements of 6 NYCRR § 622.15 regarding respondent's default in responding to the notice of hearing and complaint, staff has submitted an attorney's affirmation and two affidavits of witnesses with personal knowledge. These submissions provide proof of the facts sufficient to support staff's claim that respondent disposed of solid waste in violation of 6 NYCRR § 360-1.5(a). A person violates that provision when he or she disposes of solid waste at a location that is neither exempt from part 360 nor authorized to accept such waste, by Part 360 or an order issued by the Department or a court.

The parties' submissions establish that:

- Respondent is a "person" for purposes of Part 360, see 6 NYCRR § 360-1.2(b)(117);
- Respondent disposed of waste from commercial operations including fill, debris, tires and insulation at the Site, see 6 NYCRR § 360-1.2(a)(1) (definition of "solid waste"); see also Finding of Fact No. 3;
- Respondent admits that he has "stored certain unused construction materials near or upon the Site," see Finding of Fact No. 3;
- The Site is owned by or delegated to the Pine Bush Commission, and is part of the Albany Pine Bush Preserve, see Finding of Fact No. 4; and
- The Site is neither exempt from Part 360 requirements nor authorized by Part 360 or a Department- or court-issued order to accept solid waste for disposal, see Finding of Fact No. 6.

Based upon the foregoing, Department staff is entitled to a default judgment and order.

2. Respondent's Cross-Motion to Reargue/Renew/Vacate or Reopen

By his cross-motion, respondent seeks:

> to compel the Department … to accept respondent's Answer, for an extension of time to answer, to reargue or renew and/or to vacate the proposed default judgment pursuant to CPLR 2004, 3012(d), 5015(a) and 6 NYCRR 622.15(d).

Notice of Cross-Motion, at 1. Each characterization of respondent's motion papers is addressed below.

a. Motion to Vacate or Reopen the Default

A motion to reopen a default "may be granted consistent with CPLR section 5015 … upon a showing that a meritorious defense is likely to exist and that good cause for the default exists." 6 NYCRR § 622.15(d). As discussed below, respondent's papers fail to demonstrate good cause for the default, and therefore the cross-motion is denied.

Respondent claims that he did not learn of these proceedings until receipt of the first motion for default judgment. He first states that the address used by staff to serve the notice of hearing and complaint – 84 Frederick Avenue, Albany, New York 12205 – is an address listed for an inactive corporation. See McCashion Aff. at ¶ 13. He states further that his mother, who resides at that address, signed the certified mail receipt accompanying the notice of hearing and complaint, and that she is "elderly" and "forgetful as a result of her advanced age and the residual effects from a stroke." Id. ¶¶ 14-15. Respondent states that his mother "forgot to mention" that she had signed for receipt of the notice of hearing and complaint and that "[a]s such, I did not learn of these proceedings until receipt of the first motion for a default judgment." Id. ¶¶ 15-16.

Nowhere in his papers, however, does respondent state that he does not reside at the Frederick Avenue address to which the notice of hearing and complaint were sent by certified mail. Indeed, in his proposed Answer, respondent admits that he "does maintain an address at 84 Frederick Avenue, [Albany] New York 12205, among other addresses." Gentino Aff., Ex. 3, proposed Answer, at ¶ 4. Thus, service by certified mail of the notice of hearing and complaint on respondent at respondent's Frederick Avenue address was effective.

This conclusion is further supported by the fact that, although respondent claims that he was unaware of the notice of hearing and complaint, he was clearly aware of the first motion for default judgment, even though the motion was sent by regular mail to the same Frederick Avenue address. See Letter from D. Tinsley, Esq. dated September 20, 2016 (cover letter enclosing motion papers, noting that they were copied to "John McCashion, 84 Frederick Avenue, Albany, New York 12205").

Even assuming, for purposes of argument only, that respondent did not learn of the proceeding until staff's first motion for default judgment, he then failed to file any response to that motion, even though he was clearly aware of the motion before his time to respond had expired. The record reflects that respondent contacted an attorney after receiving staff's first motion for default judgment. The attorney contacted Department staff no later than September 29, 2016, which was still within the time period for respondent to file a response to the first default motion. See Email from D. Tinsley to E. Vaida dated September 30, 2016 (referring to "our conversation yesterday" regarding the matter); see also Email from E. Vaida to D. Tinsley dated September 30, 2016 (stating "[a]ttached is the signed authorization from Mr. McCashion so that we can talk about his case"). Respondent failed, however, to file a response to staff's first default motion.

Respondent now claims that the attorney "apparently did not wish to represent me in this particular matter despite writing letters to the Administrative Law Judge and the DEC on behalf of myself." McCashion Aff. ¶ 17. Respondent then states that, "[a]s a result, there was a miscommunication or misunderstanding as to the nature and status of my legal representation." Id. ¶ 18. Respondent does not, however, state that he had retained that attorney to represent him in this matter, or that he had directed the attorney to file a response to staff's first motion for default judgment on his behalf. Indeed, the attorney's October 11, 2016 letter – which was copied to respondent – explicitly states that "I am not able to represent Mr. McCashion on this matter." See Letter from E. Vaida, Esq. dated October 11, 2016, at 3. Accordingly, respondent's claim of "miscommunication or misunderstanding" as to the nature of his legal representation at that time is not credible.

Respondent has not demonstrated good cause for his default in failing to respond to the notice of hearing and complaint. Nor has he established a reasonable justification for failing to file any response to Department staff's first motion for default judgment. Respondent's motion to vacate or reopen the default is denied.

b. Motion for Reargument

Motions for reargument may be granted only where it is shown that, in determining the prior motion, the ALJ overlooked or misapprehended matters of fact or law that were presented on the prior motion. Such motions shall not, however, include any matters of fact not offered on the prior motion. See e.g. Matter of Plagianakos and Felice, Ruling on Request for Reconsideration, March 1, 2016, at 1-2 (citing CPLR 2221(d)(2)); see also Matter of QP Service Station Corporation, ALJ Ruling on Respondents' Motion to Reargue, August 8, 2003, at 2 (same).

Respondent's motion for reargument is denied. The papers submitted do not demonstrate that the undersigned overlooked or misapprehended matters of fact or law presented on the prior motion. Respondent presented no facts or argument on the prior motion, so nothing could have been overlooked or misapprehended. Moreover, respondent's current papers seek to offer matters of fact not offered on the prior motion, which is not proper on a motion for reargument.

c. Motion to Renew

Motions to renew are based upon new facts not offered on the prior motion, but must include a reasonable justification for the failure to include such facts on the prior motion. See e.g. Matter of 2526 Valentine LLC, Ruling on Motion for Reconsideration, March 10, 2010; see also CPLR 2221(e)(2), (3). As set forth above, respondent presented no facts or argument on the prior motion, so respondent's current motion, construed as one to renew, is based upon new facts not offered on the prior motion.

Respondent has not, however, offered a reasonable justification for failure to present such facts on the prior motion. Given that the attorney Vaida communicated with counsel for Department staff prior to expiration of the time to respond to staff's first motion for default

judgment, and stated clearly in her October 11, 2016 letter that she did not represent respondent in this matter, I find not credible any claim on behalf of respondent that there is reasonable justification for his failure to present any facts in opposition to the first motion for default judgment. Respondent's motion to renew is denied.

Given the foregoing, I deny respondent's cross-motion in its entirety.

D. Relief Requested

Department staff seeks a Commissioner's order requiring respondent, within 30 days of the date of the order, to remove all solid waste from the Site down to or exposing the sand on the Site, but without removing any of the sand. Compare Complaint, third unnumbered page, at ¶ II and Motion for Default Judgment and Order, dated November 23, 2016, at second unnumbered page, Wherefore Clause ¶ IV, with Proposed Order, fourth unnumbered page at ¶ II.

I agree that removal of the solid waste from the Site, which is a "globally rare" inland pine barrens ecosystem, see Finding of Fact No. 5, is authorized and appropriate. Because the Site is under the control of the Pine Bush Commission, however, respondent will have to coordinate with the Commission to effectuate the remediation. Moreover, it is not certain that respondent will be able to obtain the permission of the Commission to access the property, and then complete the remedial activity, within 30 days of the date of the Commissioner's order.

I therefore recommend that the Commissioner direct respondent (i) to seek, within 10 days of service of the Commissioner's order on respondent, permission of the Albany Pine Bush Preserve Commission to access the Site to remove the solid waste from the Site; and (ii) within 30 days of receiving permission of the Pine Bush Commission, and in a manner approved by Department staff, to remove the solid waste at the Site down to or exposing the sand on the Site but without removing any of the sand.

E. Civil Penalty

Department staff's complaint seeks the imposition of a civil penalty in the amount of seven thousand five hundred dollars ($7,500). See Complaint at third unnumbered page, ¶ I. The relevant statute provides for a civil penalty not to exceed $7,500 for each violation, and an additional penalty of not more than $1,500 for each day such violation continues. See ECL § 71-2703(1)(a). [3] Referring both to ECL § 71-2703(1)(a) and the Department's Civil Penalty Policy, DEE-1, staff calculates the maximum civil penalty for respondent's violation as $7,500. See Maglienti Aff. ¶¶ 12-14.

I recommend that the Commissioner grant staff's request for a civil penalty of $7,500. In so recommending, however, I point out that the record reflects that the violation is continuing; that is, solid waste remains at the site and much remedial work remains to be performed. See e.g. Hecht Aff. ¶ 7 ("a large amount of solid waste from commercial operations remains at the

[3] In its motion papers, Department staff notes that the complaint's citation to ECL § 71-2701(1)(a) as the statutory authority for the requested civil penalty is a typographical error, and that the correct citation is ECL § 71-2703(1)(a). I deem the complaint amended accordingly.

Site … on approximately .6 acres of the Site;" "[s]olid waste that was removed was not removed down to the mineral soil;" "[t]he depth of the solid waste … at the Site ranges from six to eight feet along the property line and one to four feet elsewhere on the Site").

Thus, Department staff could have requested additional penalties up to $1,500 for each day the violation continued up to the date of the service of the complaint. A higher penalty would also be supported because the illegal disposal of solid waste here was in the Albany Pine Bush Preserve, a unique environmental resource, and one of the largest of approximately only 20 inland pine barrens ecosystems worldwide.

I nevertheless find that the requested civil penalty of $7,500 is appropriate, and am constrained by due process concerns from recommending a penalty higher than that requested in the complaint. See Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 13, 2013, at 3.

F. Ruling and Recommendations

Based upon the foregoing, I deny respondent's cross-motion, deny Department staff's motion to strike affirmative defenses as moot, and recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default judgment;

2. Holding respondent John McCashion liable for violating 6 NYCRR § 360-1.5(a);

3. Imposing a civil penalty in the amount of seven thousand five hundred dollars ($7,500); and

4. Directing respondent (a) to seek, within 10 days of service of the Commissioner's order on respondent, permission of the Albany Pine Bush Preserve Commission to access the Site to remove the solid waste from the Site; and (b) within 30 days of receiving permission of the Albany Pine Bush Preserve Commission, to remove, in a manner acceptable to Department staff, the solid waste at the Site down to or exposing the sand on the Site but without removing any of the sand.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
January 27, 2017

APPENDIX A

Matter of McCashion, Case No. R4-2015-1215-140

Papers Submitted with Respect to Department Staff's Motion for Default Judgment and Order, Respondent's Cross-Motion to Reargue/Renew/Reopen the Default, and Department Staff's Motion to Strike Affirmative Defenses

1. Department Staff's Motion for Default Judgment and Order dated November 23, 2016
2. Affirmation of Dusty Renee Tinsley, Esq. dated November 23, 2016
3. Affidavit of service by certified mail of Pamela Story, sworn to September 20, 2016, attaching (a) a signed certified mail return receipt; and (b) a letter dated July 14, 2016 from staff counsel Tinsley to respondent enclosing the notice of hearing and complaint
4. Affidavit of Brian Maglienti, sworn to November 22, 2016, attaching (a) several photographs; and (b) a copy of the Department's Civil Penalty Policy, DEE-1 (issued June 20, 1990)
5. Affidavit of Joel Hecht, sworn to November 22, 2016, attaching several photographs
6. Proposed order
7. Notice of Cross-Motion by Respondent
8. Affidavit of John McCashion in Opposition to Motion for Default Judgment and in Support of Cross-Motion, sworn to December 2, 2016
9. Affirmation of Eric W. Gentino, Esq. in Opposition to Motion for Default Judgment and in Support of Cross-Motion, dated December 5, 2016, attaching (1) a copy of an October 25, 2016 ruling on motion for default judgment; (2) a page printed from the Department of State Division of Corporation's website; and (3) a proposed Answer
10. Affirmation of Dusty Renee Tinsley, Esq. in Support of Opposition to Respondent's Cross-Motion and Department staff's Motion to Strike Affirmative Defenses, dated December 14, 2016
11. Reply Affirmation of Eric W. Gentino, Esq. in Opposition to Motions for Default Judgment and to Strike Affirmative Defenses and in Support of Cross-Motion, dated December 16, 2016