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,

RULING ON MOTION FOR DEFAULT JUDGMENT
DEC Case No.
R4-2015-1215-140

-by-

JOHN McCASHION,

Respondent.

This matter involves allegations by staff of the Department of Environmental Conservation ("Department staff") that respondent John McCashion ("respondent") violated solid waste regulation 6 NYCRR § 360-1.5(a), when, "[o]n more than one 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.

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] For the reasons discussed below, the motion is denied without prejudice.

Procedural History

Department staff has filed a motion for default judgment and order in this matter, and has submitted the following documents in support: (i) motion for default judgment and order dated September 20, 2016; (ii) affirmation of Dusty Renee Tinsley, Esq. dated September 20, 2016 ("Tinsley Affirm."); (iii) 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

[1] Although this section of a complaint might traditionally be referred to as the "Wherefore" clause, counsel has drafted this section of the complaint 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. For purposes of this particular ruling only, I will interpret this section of the complaint to be the section in which Department staff requests that the Commissioner issue an order granting certain relief, rather than as a section in which Department staff "orders" its own requested relief.

July 14, 2016 from staff counsel Tinsley to respondent; (iv) the notice of hearing and complaint, both dated July 14, 2016; (v) affidavit of Brian Maglienti, sworn to September 20, 2016, attaching a copy of the Department's Civil Penalty Policy, DEE-1 (issued June 20, 1990); and (vi) a proposed order. The September 20, 2016 cover letter accompanying Department staff's motion reflects that the motion papers were also sent to respondent.

Respondent has not filed any opposition to staff's motion for default. After the deadline by which opposition was to be filed, an attorney submitted a letter regarding the pending motion requesting, among other things, an extension of time for respondent "to retain the services of an attorney who handles environmental matters" and "to reply to the Motion for Default." See Letter from E. Vaida, Esq. dated October 11, 2016, at 1 and 3. Although stating that the letter was being submitted "on behalf of Mr. John McCashion," Ms. Vaida also stated that she was "not able to represent Mr. McCashion on this matter." Id. at 3.

Counsel for staff submitted a letter in response to the letter from Ms. Vaida stating, among other things, that respondent has had sufficient time to retain counsel for this motion, and that staff counsel and Ms. Vaida had telephone discussions and email correspondence during the pendency of this motion.

Because Ms. Vaida is not representing respondent in this matter, I deny her request that I grant respondent an extension of time, and I will disregard the remaining portions of Ms. Vaida's letter discussing the merits of staff's motion and other issues. Moreover, respondent has neither retained counsel in this matter nor filed any documents or requests on his own behalf.

Discussion

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).

The record in this matter establishes that Department staff served a notice of hearing and complaint on respondent by certified mail, and that the mailing was received by respondent. Moreover, respondent is clearly aware of the matter, given that he contacted – but apparently did not retain – a lawyer to write a letter regarding staff's motion for default judgment. Staff has also established that respondent failed to serve an answer to the complaint, and staff has submitted a proposed order. Thus, staff has satisfied the requirements of 6 NYCRR § 622.15.

Notwithstanding staff's satisfaction of the requirements of 6 NYCRR § 622.15, however, I am constrained to deny staff's motion for a default judgment, without prejudice. As set forth in Matter of Queen City Recycle Center, Inc., Order of the Commissioner, December 12, 2013, at

2-3, and its progeny, staff is required on all motions for a default judgment to "provide proof of facts sufficient to support the claim." Staff has here failed to satisfy that requirement.

As set forth above, staff alleges that, on one or more occasions prior to 2014, respondent disposed of solid waste at a location in Colonie, New York, that respondent admitted doing so, and that the location at which disposal took place was not exempt from regulation or authorized to accept such waste. See Complaint ¶¶ 9-11. Staff has submitted no affidavit based on personal knowledge, nor any document such as photographs, notices of violation, inspection reports, field notes, etc., regarding any of these allegations. Rather, staff has submitted (i) an affidavit of service regarding service of the complaint; (ii) an affidavit of a Department environmental engineer discussing the bases for staff's requested penalty; and (iii) an affirmation of counsel regarding service of the complaint, respondent's failure to answer, and the requested penalty. Staff has provided no proof of facts alleged in the complaint, and has therefore failed to satisfy the requirements of Queen City Recycle and its progeny.[2]

Staff's motion for a default judgment is denied without prejudice.

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

Dated: Albany, New York
October 25, 2016

[2] In addition, although staff's papers request the imposition of a civil penalty in the amount of seven thousand five hundred dollars ($7,500), staff's requests for remedial relief in the motion papers differ from that requested in the complaint. The complaint seeks removal of "all solid waste at the Site exposing sand. No sand shall be removed from Site during the removal of the solid waste." Complaint, third unnumbered page, at ¶ II. Staff's motion for default, counsel's affirmation, and staff's proposed order, submitted in support of the default motion, also seek removal of the solid waste from the site, but state in addition that respondent must "obtain[] permission from the Albany Pine Bush Preserve to access the Site." See Tinsley Affirm. ¶ 13(IV). This language is not mentioned in the complaint, and there is no discussion in any of the papers submitted regarding the basis for requiring, or the process of obtaining, such "permission."