

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

In the Matter of the Alleged Violations
of Article 17 of the Environmental
Conservation Law and 6 NYCRR Part 613,

- by -

SHAWNA M. KAVANAUGH,

Respondent.

**RULING ON
MOTION TO
AMEND THE
COMPLAINT**

DEC Case No.
R6-20180214-
07

August 21,
2018

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondent

PROCEEDINGS

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a May 24, 2018, notice of hearing and complaint upon respondent Shawna M. Kavanaugh. The notice of hearing and complaint was personally served on respondent on May 30, 2018 (see 6 NYCRR 622.3[a][3]; see also Affidavit of Service dated July 13, 2018).

The complaint alleges that respondent failed to renew the petroleum bulk storage (PBS) facility registration for and failed to permanently close out-of-service PBS tanks at a facility located at 38918 State Route 37, Town of Theresa, Jefferson County. Staff's papers do not indicate whether respondent filed an answer to the May 24, 2018 complaint.

By motion dated July 13, 2018, Department staff moves to amend the complaint to correct the total amount of penalties sought for the violations charged in the complaint.

Specifically, staff seeks to conform the aggregate amount of penalties sought to the specific amounts sought for each specific violation. Attached to the motion is the amended complaint staff proposes to serve.

Although Department staff's motion to amend the complaint was served upon respondent, respondent has not filed a response.

DISCUSSION

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), a party may amend its pleading once without permission at any time before the period for responding expires (see 6 NYCRR 622.5[a]). Thereafter, consistent with the CPLR, a party may amend its pleading at any time prior to the final decision of the Commissioner by permission of the Administrative Law Judge ("ALJ") or the Commissioner, and absent prejudice to the ability of any other party to respond (see 6 NYCRR 622.5[b]). Where, as here, no ALJ has been assigned to the case, the motion is made to the Chief ALJ (see 6 NYCRR 622.6[c][1]).

Pursuant to the CPLR, a party may amend its pleading at any time by leave of court or by stipulation of all parties (see CPLR 3025[b]). Leave to amend shall be freely given upon such terms as may be just, including the granting of continuances (see id.).

Except where otherwise prescribed by law or order of the court, an answer or reply to an amended pleading is required if an answer or reply is required to the pleading being amended (see CPLR 3025[d]). Service of such an answer or reply shall be made within twenty days after service of the amended pleading to which it responds (see id.). Pursuant to Part 622, a respondent has twenty days after receipt of the amended pleading to serve an answer (see 6 NYCRR 622.4[a]).

On this motion, Department staff seeks leave to amend its complaint to correct the total amount of penalties sought for the two causes of action alleged in the complaint. Staff asserts that respondent will not be prejudiced if its motion is granted because the original complaint correctly stated the total amounts sought for each specific violation charged, and only the aggregate amount was misstated. Staff further asserts that correcting the complaint will not prevent respondent from

presenting her case on what the appropriate penalty should be in this matter.

Respondent filed no submissions opposing Department staff's motion. Thus, no prejudice is argued, nor is any prejudice apparent. The motion, which was made prior to the filing of a statement of readiness for adjudicatory hearing or any other motion practice, is brought on sufficiently early in the pleading stage to allow respondent an adequate opportunity to respond to staff's allegations. Accordingly, Department staff's motion should be granted.

RULING

Department staff's motion for leave to amend the complaint in the above captioned proceeding to correct the aggregate penalty sought is granted. Department staff shall serve the amended complaint upon respondent pursuant to 6 NYCRR 622.3(a)(3). Respondent shall have twenty (20) days after receipt of the amended complaint to file an answer, unless such time to answer is extended by Department staff or by a ruling of the ALJ.

/s/
James T. McClymonds
Chief Administrative Law Judge

Dated: August 21, 2018
Albany, New York