

**OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of Articles 17 and 71 of the  
New York State Environmental Conservation Law (ECL),

**RULING ON  
MOTION TO  
AMEND  
COMPLAINT**

-by-

**VILLAGE OF KENMORE,**

DEC Case No.  
R9-20160923-78

Respondent.

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**Appearances of Counsel:**

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Teresa J. Mucha, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.

- Hodgson Russ LLP (Daniel A. Spitzer of counsel) for respondent Village of Kenmore.

By notice of hearing and complaint dated December 8, 2016, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent Village of Kenmore (respondent) for alleged violations of Environmental Conservation Law (ECL) articles 17 and 71. Respondent served an answer dated January 13, 2017 on Department staff.

By notice of motion dated October 11, 2019, Department staff moved for leave to amend the complaint to:

- i. expand the factual section and applicable statutes and regulations;
- ii. expand the time frame for the violations associated with the continued sanitary sewer overflow (SSO) discharges set forth in the initial complaint;
- iii. include an additional statutory citation pertaining to the SSO discharges that was previously admitted to in a prior order on consent;
- iv. increase the penalty being sought related to the additional SSO violations; and,
- v. permit service of the proposed amended complaint upon Patrick Mang, Mayor, Village of Kenmore.

On October 11, 2019, respondent was served with a copy of staff's cover letter, notice of motion and motion for leave to amend the complaint with the proposed amended complaint attached, and the affirmation of Theresa J. Mucha, Assistant Regional Attorney. Respondent has not responded to staff's motion.

## DISCUSSION

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR 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]).

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 (*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 (*id.*).

As noted above, respondent has not opposed staff's motion or otherwise argued that it would be prejudiced by the amendment of the complaint. Respondent will have an opportunity to serve an amended answer. Accordingly, Department staff's motion should be granted.

## RULING

Department staff's motion for leave to amend the complaint in the above captioned proceeding is granted. Department staff shall serve the amended complaint upon respondent pursuant to CPLR 2103 (*see* 6 NYCRR 622.6[a]). Department staff's request to serve the Mayor of respondent is denied as unnecessary.

\_\_\_\_\_/s/\_\_\_\_\_  
Michele M. Stefanucci  
Administrative Law Judge

Dated: October 22, 2019  
Albany, New York