

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

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law ("ECL") and Part 360-12 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

**RULING ON MOTION
TO AMEND THE
COMPLAINT**

DEC Case No.
CO9-20130325-01

- by -

AIRPORT AUTO WRECKING,

Respondent.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Teresa J. Mucha of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondent

PROCEEDINGS

Department of Environmental Conservation ("Department") Central Office staff commenced this administrative enforcement proceeding by service of a March 29, 2013, notice of hearing and complaint upon respondent Airport Auto Wrecking. The notice of hearing and complaint was served by certified mail, return receipt requested, and received by respondent on April 5, 2013, thereby completing service (see 6 NYCRR 622.3[a][3]).

The complaint alleges a single cause of action -- that respondent, which owns or operates a vehicle dismantling facility located in Niagara Falls, Niagara County, failed to file a vehicle dismantler annual report for the year 2010, in violation of ECL 27-2303(1) and 6 NYCRR 360-12.1(c). Respondent failed to serve an answer to the complaint.

By motion dated May 30, 2013, Department staff moves to amend the complaint to add three additional causes of action against respondent charging that respondent allegedly: (1) failed to properly store containers of waste vehicle fluid in violation of ECL 27-2303(6); (2) failed to maintain a contingency plan in violation of ECL 27-2303(17); and (3) failed to register a used oil storage tank in violation of 6 NYCRR subpart 360-14 and 6 NYCRR 374-2.3(c)(2)(iii)(a). The additional causes of action arise from observations by the Department's Region 9 staff during an inspection of the facility conducted on October 11, 2012. Staff also seeks to increase the penalty sought in the complaint from \$5,000 to \$21,500, and requests leave to serve the amended complaint on respondent. Attached to the motion is the amended complaint staff proposes to serve (see Affirm in support of motion to amend complaint, Exh C).

Although Department staff's motion to amend the complaint was served by regular mail upon John Hagerman on behalf of Airport Auto Wrecking, no response to staff's motion has been filed by respondent.

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 so that all violations charged by both Central Office staff and Region 9 staff are included in a single comprehensive enforcement proceeding. Staff asserts that respondent will not be prejudiced if staff's motion is granted because staff notified respondent about the charges both during the inspection and in a subsequent October 15, 2012, letter, and respondent will have an opportunity to answer the amended complaint, conduct discovery, and oppose the complaint at hearing if it so chooses.

Respondent filed no submissions opposing Department staff's motion. Thus, no prejudice is argued, nor is any prejudice apparent. Respondent will have the opportunity to answer the amended complaint and fully participate in adjudicatory proceedings in its defense. 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 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: June 27, 2013
Albany, New York