STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York ("ECL") and Title 6, Part 750 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

-by-

C AND J ENTERPRISES, LLC and JAMES P. BURR, Individually,

Respondents.

RULING ON MOTION TO AMEND COMPLAINT AND MOTION FOR PROTECTIVE ORDER

DEC Case No.
R5-20140313-2107
(Valley Estates
Mobile Home Park)

I. Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents C and J Enterprises, LLC ("C and J") and James P. Burr ("Burr") (collectively "respondents") have violated ECL article 17 and its implementing regulations, 6 NYCRR part 750, by (i) failing to properly operate and maintain a sewage disposal system; (ii) discharging raw or partially-treated sewage onto the ground; (iii) failing to report discharges of inadequately treated sewage; and (iv) failing to prevent impacts to human health and the environment caused by discharges of inadequately treated sewage, at property known as Valley Estates Mobile Home Park, located in the Town of Perth, Fulton County, New York ("Valley Estates"). See generally Complaint dated November 18, 2014 ("2014 Complaint").

In the 2014 Complaint, staff seeks an order of the Commissioner:

- Holding respondents liable for the violations alleged;
- Imposing on respondents a total civil penalty of $100,000, of which $70,000 would be suspended contingent upon compliance with the Commissioner's order;
- Directing respondents to cease discharging sewage and commence holding-and-hauling sewage until the sewage treatment system at Valley Estates is capable of operating in compliance with law;
- Directing respondents to submit to the Department for approval an engineering report that addresses the causes of the sewage treatment system failure at Valley Estates, and contains an evaluation of the sewage collection system and recommendations for correcting all deficiencies;

- Directing respondents to notify the Department "of means by which Respondents shall bring the sewage treatment system into complete compliance;"
- Directing respondents to complete within one year of service of the order on respondents all actions to bring the sewage treatment system into compliance with applicable law; and
- Directing respondents, if they fail to complete within one year all actions necessary to bring the Valley Estates sewage system into compliance, or fail within one year to apply for a State Pollution Discharge Elimination System ("SPDES") permit, to close Valley Estates in accordance with the terms of a written demand from Department staff.

See 2014 Complaint at 22-24, Wherefore Clause ¶¶ I-X.

Department staff served the 2014 Complaint on respondents in December 2014, and respondents served an Answer on December 31, 2014. See Motion to Amend Complaint dated November 16, 2016, at ¶ 5. On June 2, 2016, Chief Administrative Law Judge James T. McClymonds issued a pre-hearing scheduling memorandum and assigned this matter to the undersigned. In accordance with that scheduling memorandum, discovery in this matter and the related Deerfield Estates matter[1] closed on October 17, 2016, and Department staff was to file a statement of readiness no later than October 17, 2016. See Memorandum to Parties dated June 2, 2016. Following teleconferences with the parties on July 22, 2016 and September 1, 2016, I issued scheduling memoranda reiterating that Judge McClymonds's June 2, 2016 case discovery schedule in this proceeding remained in effect. See Memoranda to Parties dated July 22, 2016 and September 1, 2016.

On November 16, 2016, a month after discovery closed as per the case scheduling order, Department staff served on respondents a 155-page Notice to Admit, containing 1,666 individual requests to admit. See Notice to Admit dated November 16, 2016. Department staff also served the following papers, dated November 16, 2016: (i) Notice of Motion to Amend Complaint; (ii) Motion to Amend Complaint, attaching (a) the 2014 Complaint and 18 exhibits; and (b) the proposed Amended Complaint. Respondents thereafter served an "Attorney's Affirmation in Reply and Opposition" dated November 23, 2016, attaching four exhibits, submitted in opposition to Department staff's motion to amend the complaint, and in support of a motion "seeking a protective order in accordance with the CPLR Section 3103 to strike the notices to admit." Affirmation of Kevin M. Young, Esq. dated November 23, 2016 ("Young Aff."), at 1-2, ¶ 2.

Department staff thereafter served the following papers, both dated November 29, 2016: (i) Attorney Affirmation of Scott Abrahamson, Esq. ("Abrahamson Aff."), attaching eight exhibits; and (ii) Memorandum of Law.

Before addressing the merits of the parties' respective motions, I note that Department staff characterizes its November 29, 2016 submission as "responding on behalf of Department staff to Respondent's Motion for Protective Order and their opposition to staff's Motion to

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[1] The related matter, Matter of C and J Enterprises, LLC and James P. Burr, DEC Case No. R5-20160308-2200, concerns allegations against respondents relating to sewage and wastewater treatment at another trailer park, known as "Deerfield Estates Mobile Home Park."

Amend the 2014 Complaint." Abrahamson Aff. ¶ 4. To the extent such papers reply to respondents' opposition to staff's motion to amend the complaint, staff did not request permission to file reply papers, and I will therefore not consider them. See 6 NYCRR § 622.6(c)(3) (filing of any papers subsequent to opposition to a motion requires permission of the Administrative Law Judge).

II. Staff's Motion to Amend the Complaint

A party "may amend its pleading at any time prior to the final decision of the commissioner," consistent with the CPLR, if permission is granted by the ALJ or the Commissioner and if there is no prejudice to the ability of any other party to respond. See 6 NYCRR § 622.5(b). CPLR 3025(a) states that a party may amend a pleading at any time by leave of court, and that "[l]eave shall be freely given upon terms as may be just."

According to its motion papers, staff seeks to amend the complaint "to account for … material changes in circumstance" since the initial complaint was served, including: (i) the fact that C and J no longer owns Valley Estates; (ii) that documents obtained by staff support additional allegations relating to respondents' alleged history of non-compliance with laws and regulations and respondent Burr's status as a "responsible corporate officer;" and (iii) discovery in 2016 of additional violations. See Motion to Amend Complaint at 2-3, ¶¶ 7(A)-(E).

The proposed amended complaint contains additional factual allegations, e.g., stating that respondent C and J no longer owns the property, see proposed Amended Complaint at 2, ¶¶ 8-9, and has eliminated the cause of action alleging "failure to mitigate." In addition, staff has amended the relief requested, expressly stating that it does not request "that the Commissioner order Respondents to complete remediation of the subsurface sewage disposal system at Valley Estates Mobile Home Park." See id. at 29, Wherefore Clause ¶ VI. Staff now seeks only a finding of liability and the imposition of a civil penalty of $75,000. See id. at 28-29, Wherefore Clause ¶¶ I-VI.[2]

Department staff argues that respondents would not be prejudiced with respect to the amended complaint, because discovery was concluding, staff produced 933 pages of documents in response to respondents' discovery demands, and counsel for staff "identified all the documents I intend to offer into evidence" at the hearing, "as well as the Department's eye witnesses and expert witnesses." Id. ¶ 8.

Respondents argue that the motion to amend should be denied because it violates the case scheduling order. See Young Aff. at 3, ¶ 3. As stated above, pursuant to the scheduling order, Department staff was to serve a statement of readiness by October 17, 2016. See Memorandum to Parties dated June 2, 2016, at 3, ¶ (4). Staff has not served a statement of readiness. See Abrahamson Aff. ¶ 12. Staff's failure to serve a statement of readiness, however, is not dispositive with respect to whether permission should be granted for staff to amend the complaint. As stated above, a party may amend its pleading "at any time prior to the final decision of the commissioner." See 6 NYCRR § 622.5(b). Thus, staff could seek to amend the

[2] The Wherefore Clause of the proposed Amended Complaint contains no paragraph IV.

complaint even if it had served a statement of readiness; indeed, even after the hearing but before the Commissioner issued a final decision.

The key issue on the motion for leave to amend the complaint is whether respondents would be prejudiced. Respondents have not argued that they would suffer prejudice should staff be allowed to serve an amended complaint. Indeed, respondents state that they "are prepared to proceed with the adjudicatory hearing at any time." Young Aff. at 6, ¶ 6.

I therefore grant Department staff's motion for leave to amend the complaint, and the proposed Amended Complaint is accepted as filed. Respondents will serve their response to the complaint within 20 days of service of this ruling on respondents. In addition, respondents shall have 30 days from service of this ruling on respondents to serve any discovery requests, limited to discovery relating to matters in the amended complaint that were not part of the initial complaint. Given that staff's amended complaint is based upon documents obtained during the discovery period, there is no need for staff to conduct further discovery. Indeed, as part of its motion to amend, staff states that it has produced all documents it intends to offer at hearing, has identified witnesses and experts, and that "[r]espondents will have the benefit of reviewing the Department's entire case when preparing their answer." Motion to Amend Complaint, ¶ 8.

III. Respondents' Motion for a Protective Order

Discovery in Departmental enforcement proceedings is governed by CPLR article 31. See 6 NYCRR § 622.7(a). CPLR 3123(a) provides in relevant part as follows:

> a party may serve upon any other party a written request for admission … of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs … or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

The underlying purpose of a notice to admit "is to eliminate from contention factual matters which are easily provable and about which there can be no controversy … to expedite the trial by eliminating as issues that as to which there should be no dispute." Taylor v. Blair, 116 A.D.2d 204, 206 (1st Dept. 1986) (internal quotations and citations omitted); see also Nacherlilla v. Prospect Park Alliance, Inc., 88 A.D.3d 770, 771-72 (2d Dept. 2011). A notice to admit "may not be utilized to request admission of material issues or ultimate or conclusory facts." Taylor v. Blair, 116 A.D.2d at 206.

Respondents argue that Department staff's Notice to Admit, which is dated November 16, 2016, (i) violates the case scheduling order, pursuant to which discovery closed on October 17, 2016, see Young Aff. at 2-3, ¶ 3; (ii) is "patently burdensome," seeks material that is not relevant to the proceeding, and seeks admissions with respect to material issues or ultimate or conclusory facts. See id. at 6, ¶ 7.

With respect to the lack of timeliness of the discovery request, Department staff concedes that "Mr. Young's comments regarding the Scheduling Memoranda are valid," that staff "deeply regret[s] this oversight" and "should have reached out to … modify the deadlines in the Scheduling Memoranda." Abrahamson Aff. at 2, ¶ 13. I agree. Department staff's submissions do not offer sufficient justification for failing to serve this discovery prior to expiration of the discovery period. I therefore grant respondents' motion for a protective order based upon staff's untimely service of the discovery request.

Even had the Notice to Admit been served timely under the case scheduling order, however, I hold that responding to the notice would be unduly burdensome, and many of the requests exceed the appropriate scope of requests to admit. The Notice contains 189 requests to admit, but each request has subparts; thus, the Notice is actually comprised of 1,666 requests. Moreover, although the rule specifically authorizes seeking admissions with respect to the genuineness of documents, many of the requests in staff's Notice to Admit (i) relate to ultimate conclusions, which can only be made after a full and complete trial, or (ii) seek admissions with respect to language contained in the documents to which the requests relate. See e.g. Request Nos. 37.8, 38.7, 60.9, 61.8, 78.9, 90.7, 91.7, 123.7, 124.8, 166.8, 167.6, etc.; see also Young Aff. Ex. B (Letter from K. Young to S. Abrahamson dated November 22, 2016), at 1-2.

I will contact the parties to set up a teleconference for finalizing the hearing schedule, including setting dates for: (i) submission of exhibit lists, which shall include identification of all exhibits as to which admissibility is stipulated by the parties; (ii) submission of witness lists, including expert witnesses; (iii) submission of stipulated facts; and (iv) the hearing.

IV. Conclusion

Department staff's motion for leave to amend the complaint is granted, and respondents' motion for a protective order is granted.

_________/s/____________
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
January 31, 2017