STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 24 of the New York State Environmental Conservation Law ("ECL") and Section 663.4(d)(20) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

DEC Case No.
R4-2015-0105-1

ALEXANDRO GIACOMELLI,
ORCHARD EARTH & PIPE CORP., and
RONALD STEWART dba STEWART'S LOGGING & EXCAVATION,

Respondents.

RULINGS ON MOTIONS TO AMEND AND MOTION TO ADD PARTIES

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents violated 6 NYCRR § 663.4(d)(20)[1] when fill was deposited in Class 1 freshwater wetland ON-6 and its adjacent area, located at 572 Main Street, Town of Oneonta, Otsego County. The complaint alleges that respondents Orchard Earth & Pipe Corp. ("Orchard") and Ronald Stewart dba Stewart's Logging & Excavation ("respondent Stewart") deposited the fill in the wetland and adjacent area with the knowledge of property owner and respondent Alexandro Giacomelli ("Giacomelli").

Currently pending before me are: (1) staff's motion to amend the complaint, to remove "Ronald Stewart dba Stewart's Logging & Excavation" as a named respondent, and add "Stewart Logging, Inc." as a named respondent; and (2) two motions by respondent Ronald Stewart dba Stewart's Logging & Excavation: (i) a motion to amend the caption; and (ii) a motion under CPLR 1001 to join what respondent refers to as necessary parties.

No respondent has filed opposition papers in response to staff's motion to amend. Respondent Orchard Earth & Pipe Corp. ("Orchard") has filed a response joining and supporting respondent Stewart's motion to join parties. Staff has filed opposition to Stewart's motion to join parties. Respondent Giacomelli has filed no papers at all.

[1] In its caption and throughout its papers, Department staff refers to the relevant regulatory provision relating to placing fill in a freshwater wetland as section "663.4(20)." I have revised the citation in the caption to "663.4(d)(20)."

Staff's Motion to Amend the Complaint

Pursuant to 6 NYCRR § 622.5(b), "a party may amend its pleading at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond."

Staff seeks to amend the complaint to remove "Ronald Stewart dba Stewart's Logging & Excavation" as a named respondent, and add "Stewart Logging, Inc." as a named respondent. See Letter Request dated February 8, 2016 from Dusty Renee Tinsley, Esq. to Chief Administrative Law Judge James T. McClymonds ("Staff's Motion").

As stated above, no respondent has opposed this motion. Counsel for respondent Stewart has filed a letter stating that respondent Stewart has no objection. See Letter from J. Bailey, Esq. dated February 9, 2016. Indeed, respondent Stewart has made essentially the same motion. See Notice of Motion of Ronald Stewart dba Stewart's Logging & Excavation dated February 9, 2016, at 1-2 (motion to amend caption); see also Affidavit of Ronald Stewart, sworn to February 1, 2016, at 1, ¶¶ 1-2 (motion to amend the caption, and stating that "Ronald Stewart d/b/a Stewart's Logging & Excavating has been incorporated and is known as Stewart Logging, Inc."); Affirmation of Jason B. Bailey, Esq. dated February 1, 2016 ("Bailey Aff."), at ¶ 6 (motion "to amend the caption to reflect the [respondent] entity's proper corporate name, Stewart Logging, Inc.").

Given that there is no opposition to the motion, and no showing of any prejudice to any party to respond, staff's motion to amend the caption is granted. Staff has appended to its papers as Exhibit 9 a proposed amended notice of hearing and amended complaint, and has stated that, if the motion is granted, staff will serve the amended pleadings on the parties with notice to Ronald Stewart that he has been removed as a party. See Staff Motion at third unnumbered page. Respondents shall serve their amended answers no later than twenty days following service of the amended notice of hearing and amended complaint. See 6 NYCRR § 622.4(a).

Stewart Motion to Add Parties

Respondent Stewart moves to amend the caption and, pursuant to CPLR 1001, to join the following additional entities as respondents in this proceeding: Seward Sand & Gravel, Inc.; Mr. Blacktop; The DDS Companies; Jabolonski Excavating; and the Town of Oneonta. See Notice of Motion dated February 9, 2016; see also Bailey Aff. at ¶ 7. Ronald Stewart, owner and president of Stewart Logging, Inc.,[2] states in his affidavit that, "[a]fter investigation, I discovered" that these proposed respondents "were also seen dumping materials at Respondent Giacomelli's property." Affidavit of Ronald Stewart, sworn to February 1, 2016 ("Stewart Aff."), at 2-3, ¶ 7.

Respondent Orchard has filed papers joining and supporting Stewart's motion to add respondents. See Affidavit of Forrest Tarolli in Support of Respondent Stewart's Logging & Excavations Motion to Join Parties, sworn to February 18, 2016 ("Tarolli Aff."); see also

[2] As stated above, "Stewart Logging, Inc." is the proper name for respondent Stewart.

Affirmation of Steven C. Shahan, Esq. in Support of Respondent Stewart's Logging & Excavations Motion to Join Parties, dated February 18, 2016 ("Shahan Aff.").[3]

In support of its motion to join additional respondents, respondent Stewart argues that joinder is necessary if complete relief is to be accorded among the existing parties, and that failure to join the additional respondents would prejudice respondent Stewart. See generally Shahan Aff. ¶¶ 8-13. Respondent Stewart argues that proposed respondents would be prejudiced by failure to join them because, absent joinder, they (i) would not be able to contest that they delivered fill to the site; and (ii) cannot take part in formation of a removal plan. See id. ¶ 11.

In addition, respondent Stewart states that it "does not seek to use Proposed Respondents' activities as a defense to the environmental violations … but rather seeks to equitably apportion the remedies in this matter." Id.[4] According to respondent Stewart, neither Stewart nor property owner Giacomelli possesses sufficient financial means to fund the entire remediation, and joining the proposed respondents "adds additional parties to offset the financial burden of removal and ensure that the wetland and the adjacent area is promptly restored." Id. ¶ 12. Finally, Stewart argues that proceeding without the additional proposed respondents would prejudice the existing respondents, whereas adding parties at this point would not prejudice the Department. See id. ¶ 13.

Respondent Orchard's papers focus on the alleged inequity of requiring only the currently named respondents to pay for the entire remediation effort. Orchard states that Orchard and Stewart contributed less than 10% of the approximately 62,500 to 80,000 cubic yards of fill located at the site but, as the only named respondents, will be forced to pay for the entire remediation, estimated by Orchard's principal Forrest Tarolli to be as much as $1 million. See Tarolli Aff. ¶¶ 14-18, 20; see also Shahan Aff. ¶ 3. According to Mr. Tarolli, this would threaten the financial viability of his company. See Tarolli Aff. ¶ 21.

CPLR 1001 provides that persons are "necessary" in an action "if complete relief is to be accorded between the persons who are parties to the action or [the party to be joined] might be inequitably affected by a judgment in the action." CPLR 1001(a). If it is determined that a person is a "necessary" party, but that the party cannot be compelled to be joined, the tribunal may allow the action to proceed without the person, but must consider, among other things, prejudice to the defendant of proceeding without that person. See CPLR 1001(b)(1); see also Matter of Karta Corporation, Chief ALJ Ruling on Motion to Join Third-Party Respondent, December 8, 2008, at 4-5, n2.

In response to the motion to join parties, Department staff argues that joinder of additional respondents is neither warranted nor required. First, staff states that it possesses prosecutorial discretion with respect to choosing named respondents. See Dusty Renee Tinsley's

[3] Respondent Giacomelli has filed no papers with respect to Stewart's motion.

[4] Neither Respondent Stewart nor Respondent Orchard denies having brought fill to the site; in fact, both respondents admit bringing fill to the site. See Stewart Aff. ¶ 5 (Ronald Stewart stating that Respondent Stewart "delivered approximately 60 loads (14 cubic yards per load) of hard fill to Respondent Giacomelli's property"); Tarolli Aff. ¶¶ 14-15 (Orchard "dumped 444 loads of clean spoil at the Giacomelli site" totaling approximately 5,328 cubic yards of fill).

Affirmation in Support of Denial of Motion ("Tinsley Aff."), ¶ 13. Respondents do not disagree. See e.g. Shahan Aff. ¶ 6 ("the DEC attorney's points regarding prosecutorial discretion are well taken"); Bailey Aff. ¶ 14 (citing the Karta Corporation ruling as "allow[ing] for prosecutorial discretion in proceeding against a proposed respondent").

Second, according to staff, joinder is not necessary under CPLR 1001 because complete relief may be accorded without additional respondents, and the proposed respondents would not be inequitably affected by a judgment without their participation. See Dusty Renee Tinsley's Affirmation in Support of Denial of Motion ("Tinsley Aff."), ¶ 8. I agree. As to the issue of complete relief, the named respondents may be held liable for freshwater wetlands violations, jointly assessed a civil penalty, and directed to perform remedial relief. See e.g. Matter of Bradley Corporate Park, Decision and Order of the Commissioner, January 21, 2004, at 15-17, confirmed on judicial review sub nom. Matter of Bradley Corporate Park v. Crotty, 39 A.D.3d 632 (2d Dep't 2007); see also Matter of Francis, Order of Commissioner, April 26, 2011, at 3-5.

Respondent Stewart argues that failure to join the proposed respondents "would prejudice the Proposed Respondents as a plan to remove the fill should include the Proposed Respondents, who would be prejudiced without appearing in this action." Bailey Aff. ¶ 13. There has been no showing that proposed respondents would be prejudiced by not being joined, or by not participating in the fashioning or implementation of any remedy.[5] I find that movants have not made the requisite showing that proposed respondents "might be inequitably affected by a judgment" in this proceeding. CPLR 1001(a).

Given that it has not been demonstrated that the proposed respondents are "necessary," I need not address the question of whether respondents would be prejudiced by failure to join the proposed respondents. See CPLR 1001(b). As staff correctly points out, should this proceeding ultimately result in a finding of liability, respondents may thereafter institute judicial proceedings against the proposed respondents for contribution or indemnification.

Staff also asserts that the named respondents may subpoena proposed respondents in this proceeding to mitigate respondents' liability. See Tinsley Aff. ¶¶ 11-12 (quoting Matter of U.S. Energy Development Corp., Ruling of the Chief Administrative Law Judge, August 23, 2013, at 17-18 ("to the extent the record reveals that third parties were responsible, in whole or in part, for the charged violations, respondent's liability may be mitigated, in whole or in part") and Matter of Gramercy Wrecking and Environmental Contractors, Inc., Ruling of ALJ, January 14, 2008, at 9 ("[r]espondent is free to proffer evidence concerning the liability of other parties")).

Based on the foregoing, I hold the following:

I. Department staff's unopposed motion to amend the caption with respect to changing the name of the Stewart-related respondent, and to file an amended notice of hearing and amended complaint is GRANTED;

II. Respondent Stewart's unopposed motion to amend the caption with respect to changing the name of the Stewart-related respondent is GRANTED;

[5] I note that none of the proposed respondents has sought to intervene.

III. Respondent Stewart's motion, joined by respondent Orchard, to add certain respondents as "necessary parties" pursuant to CPLR 1001, is DENIED.

Dated: August 4, 2016
Albany, New York

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