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(20) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

ALEXANDRO GIACOMELLI, ORCHARD EARTH & PIPE CORP., and STEWART'S LOGGING, INC.,

Respondents.

RULING ON MOTION TO DISMISS AFFIRMATIVE DEFENSE

DEC Case No. R4-2015-0105-1

Procedural Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents violated 6 NYCRR § 663.4(20) 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 Stewart Logging, Inc. ("Stewart") deposited the fill in the wetland and adjacent area with the knowledge of property owner and respondent Alexandro Giacomelli.

Currently before me is Department staff's motion to dismiss the fifth affirmative defense asserted by respondent Orchard in its Answer to the Second Amended Complaint and Cross Claim, dated June 13, 2017 ("2017 Answer"). Staff's motion, served on June 19, 2017, is comprised of (i) a notice of motion to dismiss affirmative defense; (ii) a motion to dismiss affirmative defense; and (iii) the affirmation of Dusty Renee Tinsley in support of Department staff's motion to dismiss affirmative defense, all dated June 19, 2017. Respondent Orchard has submitted an affirmation of its counsel, Steven C. Shahan dated June 23, 2017 ("2017 Shahan Aff."), in opposition to staff's motion. No other respondent has filed papers with respect to this motion.

By notice of motion dated February 9, 2016, respondent Stewart moved for leave to amend the caption and for "joinder of necessary parties as Respondents." Respondent Orchard filed an affidavit and affirmation joining Stewart's motion. See Affirmation of Steven C. Shahan, Esq. dated February 18, 2016 ("2016 Shahan Aff."), at ¶ 5 ("For the reasons stated in the moving papers of [respondent Stewart], Respondent Orchard Earth and Pipe joins and urges the court to grant said motion"); Affidavit of Forrest Tarolli, sworn to February 18, 2016 ("2016 Tarolli Aff."). Department staff opposed Stewart's motion.

In a ruling dated August 4, 2016, I denied that portion of Stewart's motion, joined by Orchard, seeking to add additional respondents to this matter. See Matter of Giacomelli, Rulings on Motions to Amend and Motion to Add Parties, August 4, 2016, at 2-4 ("August 2016 Ruling"). In denying Stewart's motion, I held, among other things, that joinder was not necessary because: (i) complete relief may be accorded without additional respondents; (ii) the proposed respondents would not be prejudiced by a judgment without their participation; (iii) respondents could subpoena the proposed respondents to proffer evidence concerning the liability of proposed respondents; and (iv) if respondents are ultimately held liable in this proceeding, they are free to institute judicial proceedings against the proposed respondents for contribution or indemnification.

Following the August 2016 Ruling, staff filed a motion dated August 31, 2016, seeking to dismiss the fifth affirmative defense asserted in Orchard's August 26, 2016 Answer to Amended Complaint ("2016 Answer"). In response to staff's August 2016 motion to dismiss, counsel for Orchard wrote a letter to counsel for Department staff, stating in relevant part: "In light of your objections and the judge's previous order in this matter, we will be voluntarily withdrawing our Fifth Affirmative Defense." Letter from S. Shahan to D. Tinsley dated September 9, 2016.

Department staff thereafter served a second amended complaint dated May 24, 2017. Notwithstanding Orchard's withdrawal of the fifth affirmative defense in its 2016 Answer, Orchard re-asserted the identical defense in its 2017 Answer, as follows:

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

26. Upon information and belief, the Petitioner, [sic] knew or should have known that fill was being placed into the alleged wetland and/or adjacent areas for years by other entities including but not limited to Seward Sand and Gravel, Inc., DDS Companies, Inc. as well as by various municipal entities including but not limited to the Town of Oneonta, the City of Oneonta and/or by contractors working for the aforesaid municipal entities.

27. As such, Petitioner has failed to name one or more necessary [sic – likely should include "parties"] for a full, fair, just and equitable adjudication of the issues set forth in the complaint.

28. Further, Petitioner by refusing to pursue other parties responsible for the placement of fill into the wetland the Petitioner has violated its statutory duty to preserve, protect and conserve freshwater wetlands.

2017 Answer at 4-5, ¶¶ 26-28.

Department staff now moves to dismiss Orchard's fifth affirmative defense. As discussed below, staff's motion is granted.

Discussion

Staff argues that its motion should be granted because the issue is "a matter previously decided in this case." Affirmation of Dusty Tinsley, dated June 19, 2017, at ¶ 10. Staff is correct. The issue of joinder of parties was addressed in the August 2016 Ruling, albeit in a different procedural context. The August 2016 Ruling addressed a motion by respondent Stewart to join parties, while the current motion is by Department staff to dismiss an affirmative defense of respondent Orchard.

Notwithstanding the differing procedural contexts, however, the issue whether additional parties are "necessary" and should be joined was squarely addressed in the August 2016 Ruling, and Orchard had a full and fair opportunity to litigate the issue. As stated above, Orchard filed papers joining Stewart's motion to add parties.

In its papers in opposition to staff's motion to dismiss Orchard's fifth affirmative defense, Orchard repeats the argument it made on the prior motion, claiming that the costs of remediation or reclamation will be so high that respondent Orchard (and, according to Orchard, respondent Stewart) will be forced into bankruptcy. Compare 2016 Shahan Aff. ¶ 8 with 2017 Shahan Aff. ¶¶ 16, 17, 20; see also 2016 Tarolli Aff. ¶¶ 20 (estimating that the cost of removing fill "could exceed one million dollars") and 21 ("Orchard may not be able to withstand that cost and remain financially viable").

Orchard also argues that its future remedy of seeking in a judicial forum contribution from responsible parties who are not named in this proceeding (see August 2016 Ruling at 4) "will not be able to remedy the bankruptcy that Orchard would likely suffer if it is required to pay for the removal of fill." 2017 Shahan Aff. ¶ 17. Orchard fails to substantiate either its financial condition or the alleged cost of any potential remediation.

Orchard also argues that, by bringing this enforcement proceeding against some but not all of the responsible parties, Department staff is violating its statutory duty to protect wetlands and prosecute violators. See e.g. 2017 Shahan Aff. at ¶¶ 11, 12 ("The Department is not fulfilling its statutory duty to protect the wetlands by ignoring evidence of other parties' involvement in the improper filling of a wetland"), and 20. As discussed in the August 2016 Ruling, however, and as conceded by respondents in their papers on that motion, Department staff has prosecutorial discretion. See August 2016 Ruling at 3-4. As stated in the August 2016 Ruling, respondents are free to subpoena non-parties to proffer evidence of the liability of others for the violations at issue here. See id. at 4.

Based on the foregoing, Department staff's motion to dismiss the fifth affirmative defense asserted by respondent Orchard Earth & Pipe Corp. in its Answer to the Second Amended Complaint and Cross Claim dated June 13, 2017 is GRANTED.

Dated: July 17, 2017
Albany, New York

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