

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL) and Part 613 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
COMPLAINT**
DEC Case No.
R8-20200914-110

- by -

DANIEL J. HIGGINS and TORREY STATION INC.,

Respondent.

Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Dudley Loew, Esq., Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Regan & McLaud, P.C. (John M. Regan, Jr., Esq., of counsel) for respondents

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a January 20, 2021, notice of hearing and complaint upon respondent Daniel J. Higgins. The notice of hearing and complaint was personally served on respondent Daniel J. Higgins on January 25, 2021, pursuant to 6 NYCRR 622.3(a)(3) (*see* Affidavit of Service of Marcia Persson, sworn to April 6, 2022).

The complaint alleges that Daniel J. Higgins and Torrey Station Inc. (respondents) are liable for violations of 6 NYCRR 613-2.6(a)(3) for failing to permanently close underground storage tanks, Navigation Law §173 for discharging petroleum, and Navigation Law §176 for failing to remediate the petroleum discharge, at respondents' facility located at 1724 Route 14, Dresden, New York (Yates County). Respondents did not answer the complaint, but respondent Higgins appeared at a pre-hearing conference on April 7, 2021. During the conference the parties agreed to adjourn the matter and pursue settlement.

By letter dated February 4, 2022, Department staff requested permission to amend the complaint to remove the second cause related to alleged violations of the Navigation Law and revise the relief requested. Attached to the letter motion is the amended complaint staff proposes to serve. On February 14, 2022, respondents retained an attorney and requested an extension to respond to staff's motion. An additional request for an extension was granted on March 2, 2022, with March 25, 2022 set as the deadline for respondents to address staff's motion.

By email dated March 25, 2022, respondents' attorney advised that respondents "were in agreement with the terms of the consent order that the Department has previously proposed." It was also respondents understanding that due to that representation there was no need to respond to staff's motion. By email dated March 28, 2022, Department staff argued that the matter had not yet been settled and an executed consent order had not been received from respondents. Staff requested that the February 4, 2022 motion be granted.

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]).

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, 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 to remove a cause of action and amend the relief requested. Staff asserts that respondents will not be prejudiced if its motion is granted because respondents will have the opportunity to answer the amended complaint if the motion is granted.

Notwithstanding the fact that there may be an impending settlement of this matter, I previously set March 25, 2022 as the deadline for respondents to address staff's motion. Respondents' assertion that respondents agreed with the terms of settlement set forth by Department staff, without submitting an executed order on consent, does not obviate the need to respond to staff's motion as previously directed.

Respondents have not opposed Department staff's motion. Staff's motion, which was made prior to the filing of a statement of readiness for adjudicatory hearing or any other motion practice, is brought on sufficiently early in the pleading stage to allow respondents an adequate opportunity to respond to staff's amended complaint. 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 Daniel J. Higgins pursuant to 6 NYCRR 622.6(a)(1). Because staff did not provide proof of service of the original complaint on Torrey Station Inc., staff shall serve the amended complaint upon respondent Torrey Station Inc. pursuant to 6 NYCRR 622.3(a)(3). Respondents 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/

Michael S. Caruso
Administrative Law Judge

Dated: April 7, 2022
Albany, New York