STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL") of the State of New York and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Article 12 of the Navigation Law of the State of New York,

- by -

HUNTINGTON AND KILDARE, INC. and METZ FAMILY ENTERPRISES, LLC,

Respondents.

RULING ON MOTION TO ALLOW THIRD-PARTY CLAIM

DEC Case No. R4-2001-0418-49

Appearances of Counsel:

Sgambettera & Associates, P.C. (Matthew J. Sgambettera of counsel), for respondents/movants Huntington and Kildare, Inc., and Metz Family Enterprises, LLC

Law Office of Marc S. Gerstman (Marc S. Gerstman of counsel), for third-party respondent Stewart's Shops Corporation[1]

Alison H. Crocker, Acting Deputy Commissioner and General Counsel (Ann Lapinski, Assistant Regional Attorney, Region 4), for the Department of Environmental Conservation

Respondents Huntington and Kildare, Inc. and Metz Family Enterprises, LLC (collectively "respondents"), move for leave to file a third-party complaint against Stewart's Ice Cream Company, Inc. ("Stewarts") in this administrative enforcement proceeding. Through their motion, respondents apparently seek both joinder of Stewarts as a necessary party, and to implead

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[1] Although respondents name "Stewarts Ice Cream Company, Inc." in their motion, counsel responds on behalf of "Stewart's Shops Corporation."

Stewarts for contribution or indemnification. For the reasons that follow, respondents' motion is denied.

Facts and Procedural Background

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated November 1, 2005 against respondents Huntington and Kildare, Inc. and Metz Family Enterprises, LLC (collectively "respondents"). Respondents filed an answer dated May 1, 2006, in which they deny the allegations of liability asserted in the complaint, and raise four affirmative defenses.

The underlying factual allegations alleged in the complaint and admitted in the answer are as follows. Respondent Metz Family Enterprises, LLC ("MFE") is the current owner of property located on Route 9G in the Town of Germantown, Columbia County (the "site"). MFE purchased the property on February 27, 2004 from Huntington and Kildare, Inc. ("H&K"). H&K is the former owner of the property and purchased the property from the now defunct Peterson Petroleum Inc. in August 1988. The site is presently being operated as a retail gasoline facility with new petroleum tanks and PBS facility owned by non-party RGLL, Inc.

The complaint also alleges, and respondents admitted, that in December 1986, the Department received a Petroleum Bulk Storage ("PBS") facility registration for the site naming Stewarts as the owner and operator of the PBS tanks at the site.[2] The registration was for three 4,000-gallon underground storage tanks ("USTs") with an unknown installation date. The Department issued a PBS registration to Stewart's for the tanks at the "historical tank location." Stewarts leased the property from Peterson Petroleum, Inc. from approximately 1977 to 1988.

The complaint further alleges that the USTs are the source, in part, of petroleum contamination on an adjacent property known as the Boice property. Accordingly, staff alleges four causes of action against respondents. In its first cause of

[2] The complaint also alleges that in January 2005, Stewarts informed the Department that it was not the owner of the tanks but, rather, the operator, and that the December 1986 submissions were incorrect in this regard (see Complaint, ¶ 16). Respondents state they are without information and belief sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint (see Answer, ¶ 16).

action, staff alleges that pursuant to Navigation Law § 173, H&K is responsible for the discharge of petroleum at its site since the Department notified it of petroleum contamination at the site on August 4, 1998, and that H&K violated Navigation Law § 173 by failing to immediately contain the discharge of petroleum on each day since August 4, 1998. With respect to MFE, staff alleges that MFE is responsible for the discharge of petroleum since its purchase of the property on February 27, 2004, and that MFE violated Navigation Law § 173 by failing to immediately contain the discharge each day since February 27, 2004.

In its second cause of action, staff alleges that respondents violated the Navigation Law § 176 prohibition against petroleum discharges on every day since their respective purchases of the property. In its third cause of action, staff makes similar allegations concerning respondents' violations of ECL 17-0501, and 6 NYCRR 703.5 since August 4, 1998 and during their respective periods of ownership. In its fourth cause of action, staff alleges that respondents violated regulations governing the temporary closure of PBS tanks, since April 30, 2001 for H&K, and since March 27, 2004 for MFE (see 6 NYCRR 613.9[a]).

As a consequence of the violations alleged, staff seeks various items of relief including, among other items, the imposition of a fine and the closure of the three USTs. Staff also seeks the conduct of an environmental assessment, additional subsurface investigation, if the necessity of such investigation is demonstrated by the environmental assessment, and the implementation of any required site remediation.

Simultaneous with the filing of their answer, respondents filed a motion to allow a third-party complaint against Stewarts. Respondents allege that at the time of the accrual of the allegations presented in the Department's complaint, Stewarts was the operator of the gas station at the site, and was the registered owner and operator of the PBS facility. Respondents further allege that all wrongdoing in this matter, if any, was "perpetrated by Stewarts prior to the Respondents acquisition of the property." Respondents assert that Stewarts is a necessary party to this proceeding "so that any wrongdoing, if any, may be attributed to the proper party." Respondents also rely on CPLR 1007 as the basis for a third-party claim against Stewarts in this proceeding. Accordingly, respondents request that Stewarts be brought into this matter, and that the Administrative Law Judge ("ALJ") provide direction as to the proper form of the third-party complaint.

By letter dated May 8, 2006, Department staff informed the ALJ that it would not be submitting a response to respondents' motion. Stewarts, however, filed an attorney's affirmation dated May 17, 2006, with attachments, in opposition to the motion. By leave of the ALJ, respondents filed a reply to Stewarts' affirmation in opposition dated June 5, 2006.

Discussion

Stewarts asserts that respondents' motion should be denied because the Department's current Uniform Enforcement Hearing Procedures (see 6 NYCRR part 622 ["Part 622"], effective Jan. 9, 1994, as amended) do not authorize impleader in enforcement hearings. Respondents argue, however, that such motions are authorized so long as the procedures established in 6 NYCRR 622.6(c) are followed.

To the extent respondents seek to implead Stewarts for purposes of asserting contribution or indemnification claims against Stewarts, their motion must be denied. Under both the pre- and post-1994 amendment versions of Part 622, it has been held that Departmental administrative enforcement proceedings are not a proper forum for the resolution of claims among respondent parties for contribution or indemnification (see Matter of Universal Waste, Inc., Commissioner's Second Interim Decision, Aug. 16, 1989, at 1 [1989 WL 162822, *1]; Matter of Frie, Commissioner's Order, Dec. 12, 1994, concurring with ALJ Hearing Report, at 6 [1994 WL 734523, *7]). Such claims would need to be pursued in an action in court pursuant to CPLR article 14 (see Universal Waste, at 1 [1989 WL 162822, *1]).[3]

To the extent respondents seek joinder of Stewarts as a necessary party and, thus, bring it into this proceeding as a co-respondent for purposes of determining the liability of Stewarts to the State, whether motions for joinder of necessary parties are authorized under current Part 622 is an open question. Assuming without deciding that such motions are available, I nevertheless conclude that respondents' motion must be denied on the merits.

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[3] Because contribution and indemnification claims are not adjudicable in Part 622 enforcement proceeding, I need not reach the argument raised by Stewarts that respondents' claims are barred under the doctrine of collateral estoppel (or issue preclusion) by the order of Supreme Court in Huntington & Kildare, Inc. v Stewart's Ice Cream Company, Inc. (Sup Ct, Columbia County, Feb. 22, 2005, Connor, J., Index No. 3903-01).

Whether a party should be joined as a necessary party depends upon (1) whether the present respondents would be prejudiced by the absence of the other party, and (2) whether complete relief between the Department and the present respondents can be granted in the absence of the other party (see Universal Waste, at 1 [1989 WL 162822, *1] [applying CPLR 1001(a)]; see also Matter of Radesi, Commissioner's Decision and Order, March 9, 1994, concurring with ALJ Hearing Report, at 7 [1994 WL 115079, *7 [same]). As to the first question, the charges in this case arise from petroleum discharges and operational violations that allegedly occurred after respondents purchased the property, and after Stewarts' relationship with the PBS facility, whether as owner or operator, terminated. Stewarts' responsibility for petroleum discharges allegedly occurring prior to respondents' assumption of ownership is irrelevant to the allegation of respondents' liability alleged in the complaint, or to the affirmative defenses they raise in their answer. To the extent respondents require examination of Stewarts in the defense of this proceeding, they may subpoena Stewarts as a witness. Stewarts need not be made a co-respondent for this purpose.

As to the second question, it is not necessary to include Stewarts as a party to determine the appropriate penalty, if any, to be imposed against respondents as a result of their own liability to the State. Again, to the extent Stewarts' responsibility is at all relevant to mitigation of any penalty to be imposed against respondents for their own conduct, such mitigation may be determined without Stewarts as a party. As to the remedial relief sought by staff, such relief is properly sought as against the current owners or operators of the site. As noted above, any claim for contribution or indemnification respondents may have against Stewarts for remediation costs is not an issue subject to resolution in this proceeding, and has no relevance to whether complete relief can be granted as between the Department and respondent.[4]

Ruling

Respondents' motion to allow a third-party claim is denied. The proceeding is hereby adjourned pending the filing of

[4] The circumstance that as a result of litigation before Supreme Court, Columbia County, a further proceeding pursuant to CPLR article 14 may be barred by the court's order does not require bringing Stewarts into this proceeding as a necessary party.

a statement of readiness for adjudicatory hearing by Department staff or other motion or request by the parties.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: November 15, 2006
Albany, New York

TO: Service List (via facsimile and first class mail)