

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 24 of the New York
Environmental Conservation Law and Part
663 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York,

**RULING ON
MOTION TO
AMEND THE
NOTICE OF
HEARING AND
COMPLAINT**

- by -

**HURON ENTERPRISES, LLC, WAFFLER
NURSERY AND ORCHARD and PAUL
WAFFLER,**

DEC File No.
R8-20160503-
40

Respondents.

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General
Counsel (Dusty Renee Tinsley of counsel), for staff of the
Department of Environmental Conservation

-- No appearance for respondents

PROCEEDINGS

Staff of the Department of Environmental Conservation
(Department) commenced this administrative enforcement
proceeding by service of a September 19, 2016, notice of hearing
and complaint upon respondents Huron Enterprises, LLC, Waffler
Nursery and Orchard, and Paul Waffler. The notice of hearing
and complaint was served by certified mail, return receipt
requested, and received by each respondent on September 21,
2016, thereby completing service (see 6 NYCRR 622.3[a][3]).

The complaint alleges that respondents own property in
the Town of Huron, Wayne County, a portion of which contains
regulated freshwater wetland NW-3. The complaint further
alleges that respondents engaged in clearcutting and filling in

the wetland without a permit in violation of ECL 24-0701(1) and 24-0703(1).

Respondents failed to serve an answer to the complaint. However, respondent Paul Wafler (inaccurately spelled Waffler in the complaint), met with Department staff appearing individually and as a representative of Wafler Farms Inc. (inaccurately named as Waffler Nursery and Orchard in the complaint). Respondent Huron Enterprises, LLC has not appeared in this matter.

By motion dated March 9, 2017, Department staff requests permission to amend the notice of hearing and complaint. Staff seeks to (1) remove Waffler Nursery and Orchard and add Wafler Farms, Inc. as a respondent, (2) correct various misspelled names in the caption and complaint, (3) add language to the notice of hearing to conform to regulatory requirements, (4) add to the complaint an allegation that respondents are owners or operators of property located at 10748 Slaght Road in Wolcott, Town of Huron, Wayne County, (5) make technical corrections to the amended complaint, (6) remove the pre-hearing conference from the notice of hearing given the meeting with Mr. Wafler, and (7) make a substitution of Department counsel. Attached to staff's motion is the proposed amended notice of hearing and complaint.

Department staff's motion to amend the complaint was served on all respondents by regular mail on March 27, 2017. No responses to staff's motion have been filed by respondents.

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]). Where, as here, no ALJ has been assigned to the case, the motion is made to the Chief ALJ (see 6 NYCRR 622.6[c][1]).

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.).

With respect to clerical errors, correction of a pleading does not necessarily require amendment of the pleading, but amendment pursuant to CPLR 3025 is permitted if necessary (see Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014 at 5).

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, a 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 asserts that respondents will not be prejudiced if staff's motion is granted. Among other arguments, staff argues that many of the corrections are clerical in nature, and that Mr. Wafler and Wafler Farms, Inc. are on notice of the violations charged. In addition, staff notes that respondents will have an opportunity to answer the amended complaint, conduct discovery, and oppose the complaint at hearing if they so choose.

Respondents filed no submissions opposing Department staff's motion. Thus, no prejudice is argued, nor is any prejudice apparent. Respondents will have the opportunity to answer the amended notice of hearing and complaint and fully participate in adjudicatory proceedings in their defense. Accordingly, Department staff's motion should be granted.

RULING

Department staff's motion for leave to amend the notice of hearing and complaint in the above captioned proceeding is granted. Department staff shall serve the amended notice of hearing and complaint upon respondents pursuant to 6 NYCRR 622.3(a)(3). Respondents shall have twenty (20) days after receipt of the amended notice of hearing and complaint to

file an answer, unless such time to answer is extended by Department staff or by a ruling of the ALJ.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: April 12, 2017
Albany, New York