

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 Title 6 Part 663 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

HIEU LUONG and HIEN THI LUONG,

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

DEC Case No.
R8-2018-0621-66

Respondents.

Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Dusty Renee Tinsley, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Henry S. Stewart, Esq. for respondents

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a June 26, 2018, notice of hearing and complaint upon respondent Hieu Luong. The notice of hearing and complaint was personally served on respondent Hieu Luong on July 2, 2018, pursuant to 6 NYCRR 622.3(a)(3) (*see* Affidavit of Service dated August 8, 2018).

The complaint alleges that respondent Hieu Luong is liable for multiple violations of 6 NYCRR part 663 for depositing fill, grading and clear-cutting trees in a regulated freshwater wetland after November 8, 2017, at a property owned by respondent Hieu Luong and located at 4254 Lyell Road, Gates, New York 14606 (Town of Gates, Monroe County). Respondent Hieu Luong failed to answer the complaint. Respondent, however, retained counsel who requested permission from Department staff to file a late answer. Staff denied the request.

On September 18, 2018, I convened a conference call with the parties, and respondent Hieu Luong was provided the opportunity to file a motion for permission to file a late answer to the complaint. The parties engaged in settlement discussions, and the deadline for filing the motion was stayed indefinitely and remains so at the time of this ruling.

In a previous proceeding regarding the same property, the Commissioner held that respondent Hieu Luong had violated (i) a 2016 order on consent, (ii) ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20) by placing fill in the freshwater wetland without a permit or letter of permission; and (iii) ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25) by grading portions of the freshwater wetland adjacent area without a permit or letter of permission (*see Matter of Hieu Luong*, Order of the Commissioner, dated September 24, 2018 at 4 [for violations occurring before November 8, 2017]).

By letter dated January 24, 2019, Department staff requested permission to amend the complaint to add Hien Thi Luong as a respondent because she is also an owner of the subject premises. Attached to the motion is the amended complaint staff proposes to serve (*see Exhibit 3*).

Respondents oppose staff's motion. Respondents argue that CPLR 3025 does not support adding a party to a proceeding. In addition, respondents argue that Mrs. Hien Thi Luong's consent was required for the 2016 order on consent. Respondents state, "the Luongs will only consent to DEC's request if the Consent Order is negated, the collected penalties refunded, and the entire matters are nullified and abandoned as having been commenced based upon circumstances arising from improper entry onto the Luong's property without the valid consent granted by all of its owners."

In effect, respondents desire the vacation of the Commissioner's order in the previous matter and for the Department to commence a new proceeding for all violations, including those previously determined in the 2016 order on consent. Respondents claim that Department staff is dealing with unclean hands by attempting to add Mrs. Luong as party.

Department staff requested and was granted permission to reply to respondents' response. In its reply, staff notes that respondents did not allege any prejudice to respondents' ability to respond to the amended complaint. Staff argues that much of the response concerns matters decided in a previous proceeding and any affirmative defenses in that matter have been waived as they were not timely raised in an answer. Staff also addressed each of the assertions made by respondents' counsel.

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.*). Contrary to respondents' position, CPLR 3025(b) may be used to amend or supplement the pleadings to add a party (*see* Siegel and Connors, NY Prac § 237 at 449 and 453 [6th ed 2018]); *see also Matter of Juda Construction, Ltd.*, Ruling on Motion for Leave to Amend the Complaint, August 23, 2001). In

Juda Construction, Ltd., the ALJ noted, “[t]he CPLR provides that, if a party seeks to add additional defendants, that party must seek leave pursuant to CPLR 3025(b) and 1003.” Although, CPLR 3025(b) and 1003 require leave, I conclude Department staff does not need to plead both as the basis for its motion or request to add parties.

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, respondents have 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 add Hien Thi Luong as a respondent because she is also an owner of the property located at 4254 Lyell Road, Gates, New York. Staff asserts that respondents will not be prejudiced if its motion is granted because respondents had the opportunity to oppose the motion and will have the opportunity to answer the amended complaint, if the motion is granted. Moreover, respondent Hieu Luong did not timely answer the original complaint and has not yet sought permission to serve a late answer to that complaint.

Respondents’ opposition to Department staff’s motion does not allege any prejudice to respondents’ ability to respond to an amended complaint. I also do not find any apparent prejudice because Department staff states it will allow respondent Hieu Luong to answer the amended complaint without needing to seek permission to do so. I have considered respondents’ remaining arguments and find them to be specious, speculative and not based on fact or law.

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 allegations. 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 Hieu Luong pursuant to 6 NYCRR 622.6(a)(1), and upon respondent Hien Thi Luong 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: February 11, 2019
Albany, New York