

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

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

**U.S. ENERGY DEVELOPMENT
CORPORATION,**

Respondent.

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE ON MOTION FOR
DISMISSAL OF
AFFIRMATIVE DEFENSES**

DEC File No.
R9-20111104-150

August 23, 2013

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR DISMISSAL OF AFFIRMATIVE DEFENSES

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) filed an April 24, 2012, amended complaint charging respondent U.S. Energy Development Corporation with violations of two orders on consent executed with the Department. The consent orders addressed violations of New York State water quality standards for the Yeager Brook, a stream located in New York's Allegany State Park, as a result of alleged discharges into the stream from respondent's natural gas development operations across the border in Pennsylvania. Department staff moves for dismissal of affirmative defenses pleaded in respondent's May 14, 2012, answer to the amended complaint. Respondent opposes, and requests that this Administrative Law Judge (ALJ) search the record and dismiss staff's amended complaint. For the reasons

that follow, Department staff's motion for dismissal of affirmative defenses is granted in part. Respondent's request that the amended complaint be dismissed is denied.

I. Facts and Procedural Background

The Yeager Brook flows into New York from McKean County, Pennsylvania. In New York, the Yeager Brook (Waters Index No. Pa 53-8-8), a tributary of Quaker Run, is designated as a class B(T) water body (or class B trout stream) (see 6 NYCRR 802.4, Item No. 65; 6 NYCRR 701.7 [Class B fresh surface waters]; 6 NYCRR 701.25 [Trout waters (T or TS)]). The best usages for class B streams are primary and secondary contact recreation and fishing (see 6 NYCRR 701.7). The T designation indicates that the stream is suitable for trout habitat (see 6 NYCRR 701.25; 6 NYCRR 700.1[a][67]).

ECL 17-0501 and its implementing regulations prohibit the discharge of organic or inorganic matter into the waters of the State so as to cause or contribute to a condition in contravention of the water quality standards adopted by the Department pursuant to ECL 17-0301. The water quality standards applicable to class B trout streams prohibit the introduction of color producing substances in amounts that adversely affect the color of the water or impair the water for its best usages (see 6 NYCRR 703.2). The standards also prohibit increases in turbidity (cloudiness) that result in a substantial visible contrast to natural conditions (see id.).¹

Respondent U.S. Energy Development Corporation is a privately held New York-based oil and natural gas exploration and development company with corporate offices located in Getzville, Erie County, New York (see amended complaint at 1, ¶ 3; answer to amended administrative complaint ¶ 3). Respondent

¹ The Department and its predecessor agencies promulgated the State's water quality classification system and standards (see 6 NYCRR parts 701-703, and 800 et seq.) pursuant to ECL 17-0301 and predecessor statutory enactments, and the Legislature has approved and adopted the classification system and standards (see ECL 17-0301[7], [8]). The federal Environmental Protection Agency (EPA) has also reviewed and approved the water quality standards pursuant to section 303 of the Clean Water Act (33 USC § 1313). Accordingly, New York's water quality standards are part of the federal law of water pollution under the Clean Water Act (see Arkansas v Oklahoma, 503 US 91, 110 [1991]).

is registered in New York as a domestic business corporation (see amended complaint at 1, ¶ 3; answer ¶ 3). Respondent conducts oil and gas drilling operations in McKean County, Pennsylvania (see answer ¶ 5).

In 2010, Department staff alleged that on August 10, 2010, respondent violated ECL 17-0501, and 6 NYCRR 701.1² and 703.2 as a result of discharges from an oil or gas well drilling operation in Pennsylvania that entered a stream in Pennsylvania and flowed into the Yeager Brook in New York. The discharges caused the Yeager Brook to appear cloudy and milky white in color. Respondent entered into a consent order in December 2010 to resolve the August violations (see Order on Consent No. R9-20100913-39, Malcomb affirmation, exhibit A). In anticipation of a "return to compliance upon completion of the requirements contained in Schedule A and on-going, continued compliance," respondent agreed, among other things, to provide the Department with a letter "summarizing what actions have been taken to prevent recurrence of this incident at other US Energy sites in the future" (id. ¶ II and Schedule A).

Subsequently, Department staff alleged that in November 2010, discharges from respondent's oil and gas development operations in Pennsylvania again resulted in the violation of water quality standards in the Yeager Brook in New York. Staff alleged that storm water runoff from respondent's oil and gas operations in Pennsylvania were again causing cloudy conditions and turbidity in the Yeager Brook in New York in violation of ECL 17-0501, and 6 NYCRR 556.5, 701.1,³ and 703.2. Respondent entered into a second consent order in August 2011 to resolve the November 2010 violations (see Order on Consent No. R9-20110111-1, Malcomb affirmation, exhibit B). Again, in anticipation of a return to compliance and on-going, continued compliance, respondent agreed, among other things, to implement erosion and sediment controls for roads, wells, and ancillary sites at locations referenced in the order "to prevent contravention of stream standards in New York," and to submit a

² The December 2010 consent order cites 6 NYCRR 703.1 (see Order on Consent No. R9-20100913-39, Malcomb affirmation, exhibit A, ¶¶ 10, 13). However, the operative regulatory language quoted in the consent order is that of 6 NYCRR 701.1 (compare id. ¶ 10 with 6 NYCRR 701.1).

³ Again, the August 2011 consent order cites 6 NYCRR 703.1 (see Order on Consent No. R9-20110111-1, Malcomb affirmation, exhibit B, ¶¶ 10, 23). Again, however, the operative regulatory language quoted in the consent order is that of 6 NYCRR 701.1 (compare id. ¶ 10 with 6 NYCRR 701.1).

report summarizing the "actions performed to prevent a recurrence of these violations" (id. ¶ II and Schedule A).⁴

Department staff further alleged that in September 2011, December 2011, and January 2012, Yeager Brook again became cloudy, discolored, and turbid as a result of respondent's failure to comply with the consent orders. Accordingly, Department staff commenced this administrative enforcement proceeding by serving respondent with a notice of hearing and complaint dated January 24, 2012 (see Malcomb affirmation, exhibit C). In the January 2012 complaint, staff charged respondent with violations of ECL 17-0501, and 6 NYCRR 701.1 and 703.2, and the December 2010 and August 2011 consent orders (see id.). Respondent served an answer on March 28, 2012.

In March 2012 and May 2012, the parties engaged in some pre-hearing discovery.⁵ Meanwhile, respondent filed a CPLR article 78 petition dated March 28, 2012, in Supreme Court, Erie County, seeking, among other things, an order enjoining this administrative proceeding and dismissing the January 2012 complaint on the ground that the Department is proceeding in excess of its jurisdiction. Staff subsequently served respondent with an amended complaint dated April 24, 2012, in which staff charged respondent only for violations of the two consent orders (see Malcomb affirmation, exhibit D). Respondent filed in Supreme Court an amended verified CPLR article 78 petition/complaint dated May 4, 2012, again seeking, among other things, an order enjoining this proceeding and dismissing the amended complaint on the ground that the Department is proceeding in excess of its jurisdiction.

In this administrative proceeding, respondent also filed an answer to the amended complaint dated May 14, 2012 (see Brady affirmation, exhibit A). In its answer, respondent, among other things, denied violating the consent orders, and pleaded nine defenses.

⁴ Respondent's attorney affirms that the corrective actions required by the consent orders were completed (see Malcomb affirmation at 2, ¶ 6). However, no letters or other documentation confirming respondent's assertions have been filed by the parties.

⁵ Respondent also made a Freedom of Information Law (FOIL) request in January 2012, seeking records pertaining to its and other operations in Pennsylvania. The Department responded to respondent's FOIL request.

By order dated October 17, 2012, and entered October 26, 2012, Supreme Court, Erie County (Devlin, J.), granted the Department's motion to dismiss the article 78 proceeding/action, and dismissed the amended verified petition/complaint (see Malcomb affirmation in support of motion for a stay, exhibit G). Supreme Court issued no opinion with its order. In November 2012, respondent filed a notice of appeal from the October 26, 2012, order (see id., exhibit H).

In December 2012 and January 2013, the parties engaged in settlement negotiations before ALJ Richard R. Wissler. When those negotiations proved unfruitful, Department staff served a statement of readiness for adjudicatory hearing dated January 30, 2013, and the matter was assigned to the undersigned ALJ for administrative adjudicatory proceedings.

During a telephone conference call with the parties convened to schedule the hearing, respondent orally moved to stay this proceeding pending the appeal in the article 78 proceeding/action. Pursuant to my direction, respondent filed its motion in writing on March 26, 2013. On April 16, 2013, Department staff filed an affirmation in opposition to respondent's motion. Staff also filed the present motion for dismissal of respondent's affirmative defenses.

By letter dated April 17, 2013, respondent requested that its time to respond to staff's motion to dismiss affirmative defenses be extended to no less than twenty days following a final decision on its motion for a stay. Based upon Department staff's consent, in an email dated April 22, 2013, I directed that in the event respondent's motion for a stay is denied, respondent will have twenty days following a ruling on respondent's pending motion for a stay to respond to staff's April 16, 2013, motion to dismiss affirmative defenses.

By ruling dated July 10, 2013, the undersigned ALJ denied respondent's motion for a stay of this administrative enforcement proceeding pending its appeal from the Erie County Supreme Court order (see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Motion to Stay Proceedings, July 10, 2013). Accordingly, on July 30, 2013, respondent filed a timely affirmation of Charles W. Malcomb in opposition to the Department's motion to dismiss affirmative defenses, together with exhibits, and a memorandum of law in opposition.

II. Discussion

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), motions to dismiss affirmative defenses are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see Matter of Truisi, Ruling of the Chief ALJ on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 10-11). As noted by respondent, on a motion to dismiss defenses under the CPLR, a tribunal is empowered to "search the record" and dismiss any defective causes of actions as well as any defective defenses (see Groat v Town Board of Town of Glenville, 100 Misc 2d 326, 328 [Sup Ct, Schenectady County 1979] [citing CPLR 3211(c) and 3212(b)]; see also 7-3211 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3211.43). In opposition to staff's motion to dismiss, respondent affirmatively invokes this principle and seeks dismissal of the complaint. Accordingly, respondent's arguments for dismissal of the complaint, and their respective defenses, are addressed first. The remaining defenses and staff's motion to dismiss are addressed thereafter.

A. Challenges to Department Staff's Amended Complaint

Respondent argues that Department staff's amended complaint should be dismissed on two grounds: (1) that the Department lacks subject matter jurisdiction; and (2) that the amended complaint fails to state a claim.

1. Subject-Matter Jurisdiction

Respondent argues throughout its papers submitted on this motion (and pleads as its first and second defenses) that the amended complaint should be dismissed for lack of subject matter jurisdiction. Respondent asserts that by seeking to enforce the two consent orders, the Department is acting in excess of its jurisdiction. Citing International Paper Co. v Ouquette (479 US 481, 494 [1987]), respondent argues that the CWA preempts application of New York law to an out-of-state point source of water pollution. Respondent further asserts that the two consent orders, and the amended complaint, are premised on violations of New York water quality standards for discharges from a Pennsylvania point source. Because the Department lacks jurisdiction to enforce New York law as against

discharges in Pennsylvania, and otherwise lacks the power to establish standards for Pennsylvania waters,⁶ respondent asserts that the consent orders are null and void, and their enforcement is in excess of the Department's jurisdiction.

Department staff responds that respondent waived the subject matter jurisdiction defense and voluntarily agreed to application of New York standards for the alleged discharges when it signed the consent orders. Respondent counters that its pre-emption defense is non-waivable and that subject matter jurisdiction may not be conferred by consent. Respondent's argument is unpersuasive.

As a general proposition, absent some affirmative indication of Congress's intent to preclude waiver, federal statutory provisions are presumptively subject to waiver by voluntary agreement of the party the statute is intended to benefit (see United States v Mezzanatto, 513 US 196, 201 [1995]). In the context of the federal pre-emption of state laws, distinction is made between choice-of-forum pre-emption and choice-of-law pre-emption (see Saks v Franklin Covey Co., 316 F3d 337, 349 [2d Cir 2003]). Federal statutes that vest exclusive jurisdiction within a specific court or tribunal -- and thereby dictate the choice of forum -- are jurisdictional and may not be waived (see id.; see also International Longshoremens' Assoc. v Davis, 476 US 380, 390-391 [1986]). On the other hand, where federal statutes affect only the choice of law to be applied, the pre-emption defense may be waived (see Saks, 316 F3d at 349; Rehabilitation Inst. of Pittsburgh v Equitable Life Assur. Socy., 131 FRD 99, 100-101 [WD Pa 1990], affd without opinion 937 F2d 598 [3d Cir 1991]).⁷

⁶ New York's lack of power to establish water quality standards for Pennsylvania water bodies is the basis for respondent's ninth defense (see Answer ¶¶ 76, 77).

⁷ New York law is substantially similar. Under New York law, the rule that subject-matter jurisdiction is non-waivable only applies in those cases where the tribunal "has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime" (Matter of Estate of Rougeron, 17 NY2d 264, 271 [1966], cert denied 385 US 899 [1966]). Thus, where a state forum lacks competence to entertain an action -- such as when federal law vests jurisdiction over federal rights exclusively in a federal forum -- the state forum lacks subject matter jurisdiction and the defense is non-waivable (see Editorial Photocolor Archives, Inc. v Granger Collection, 61 NY2d 517, 523 [1984]). On the other hand, where the case merely involves alleged errors in application of the substantive law in a case in which the tribunal otherwise has the

In International Paper, the United State Supreme Court held that in cases where discharges into interstate waters in one state (the "source state") are allegedly causing water pollution in another state (the "affected state"), the CWA precludes application of the affected state's laws as against the out-of-state source (see 497 US at 494). Although the Court noted that nothing in the CWA expressly addressed the issue, it was guided by the goals and policies of the Act in reaching its conclusion (see id. at 493). Among those policies and goals were the CWA's goals of efficiency and predictability in the Act's permit system, which would be undermined if dischargers into interstate waters had to be concerned about potentially multiple and conflicting affected state standards (see id. at 496-497).

In concluding that the CWA pre-empts application of an affected state's law to discharges in a source state, however, the Court expressly noted that the CWA only pre-empts state laws, not state courts (see id. at 499-500). The Court held that nothing in the CWA prevented a tribunal sitting in an affected state from hearing a claim, provided that jurisdiction was otherwise proper (see id. at 500). Rather, the CWA merely requires a tribunal considering a state-law claim concerning interstate water pollution that is subject to the CWA to apply the law of the state in which the point source is located (see id. at 487). Thus, pre-emption under the CWA is choice-of-law pre-emption, not choice-of-forum pre-emption, and is therefore waivable (see Saks, 316 F3d at 349; Rehabilitation Inst., 131 at 100-101).

Here, the ECL provides a State-law claim for violations of federally-approved water quality standards occurring in New York. ECL 17-0501 prohibits any person, directly or indirectly, from discharging into New York waters any organic or inorganic matter that causes or contributes to a violation of a duly promulgated water quality standard. ECL 17-0501 makes no distinction between discharges from in State or out of State sources, provided the resulting harm occurs in New

power to adjudicate -- such as when a litigant belatedly seeks to raise a defense of exclusivity of statutory remedies in a tribunal otherwise vested with jurisdiction to decide the matter -- subject matter jurisdiction is not implicated and the defense is waivable (see Miraglia v H & L Holding Corp., 67 AD3d 513, 514-515 [1st Dept 2009], lv dismissed in part and otherwise denied 14 NY3d 766 [2010]).

York. Moreover, the ECL authorizes enforcement of ECL 17-0501 in either judicial proceedings or in administrative adjudicatory proceedings before the Department (see ECL 71-1927; ECL 17-0901; ECL 17-0905). Thus, the ECL grants the Department jurisdiction to administratively enforce State law claims under ECL 17-0501 and consent orders issued pursuant to that section (see ECL 17-0901; ECL 17-0905; ECL 71-1929; ECL 71-4003).

With respect to the discharge of pollutants from a Pennsylvania source that causes violations of water quality standards in New York, under International Paper, the CWA would merely require the Department to use Pennsylvania's federally-approved water quality standards in place of New York's standards⁸ in administrative proceedings enforcing State claims under ECL 17-0501. And because federal pre-emption of New York's water quality standards in this context is choice-of-law pre-emption, a Pennsylvania source of water pollution that causes harm in New York may waive Pennsylvania standards and consent to application of New York standards through an administrative consent order with the Department.

In this case, respondent admits that it executed the two consent orders with the Department. Moreover, papers submitted by respondent to Supreme Court in its CPLR article 78 proceeding (and submitted in this proceeding on its motion for a stay) demonstrate that respondent was aware of the federal pre-emption defense and that the Department was seeking to apply New York standards to its Pennsylvania discharges, but nonetheless made the "business decision" to settle with the Department (Memorandum of Law in Opposition to NYSDEC's Motion to Dismiss, Malcomb Affirmation in Support of Motion to Stay Proceedings, Exh L at 6-7). Accordingly, by executing the two consent orders with the Department, respondent voluntarily waived application of Pennsylvania water quality standards and consented to the application of New York's standards to resolve the Department's claims under ECL 17-0501 and serve as the basis for its obligations under the consent orders.

I note that review of Pennsylvania's water quality standards for color and turbidity reveals that they are substantially similar to New York's standards. Pennsylvania's

⁸ As noted above, New York's federally-approved water quality standards are part of the federal law of water pollution under the Clean Water Act (see Arkansas v Oklahoma, 503 US 91, 110 [1991]). So are Pennsylvania's federally-approved standards.

general water quality criteria control substances "that produce color, tastes, odors, turbidity or settle to form deposits" (25 Pa Code § 93.6[b] [emphasis added]). Conditions applicable to all Pennsylvania water pollution control permits include a prohibition against the discharge of "substances that produce an observable change in the color, taste, odor or turbidity of the receiving water" (id. § 92a.41[c] [emphasis added]). One of the Pennsylvania permits respondent alleges to be operating under prohibits the discharge of "substances which produce odor, taste, turbidity, or settle to form deposits" (Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities [ESCGP-1] at 3, ¶ 14 [sample permit available at <http://www.elibrary.dep.state.pa.us/dsweb/view/Collection-10450>] [accessed Aug. 16, 2013] [emphasis added]). The Pennsylvania water quality criteria applicable to respondent's operation appear comparable to New York's standards for color and turbidity at issue here (see 6 NYCRR 703.2 [turbidity standard for Class B waters -- "no increase that will cause a substantial visible contrast to natural conditions"; color standard -- "None in amounts that will adversely affect the taste, color or odor" of waters (emphasis added)]). Thus, application of New York water quality standards to respondent's alleged discharges in Pennsylvania would not result in the application of standards significantly at odds with the standards established for Pennsylvania under the CWA and, therefore, would not undermine the goals and policies the Act seeks to achieve (see International Paper, 479 US at 497).

In any event, because respondent consented to application of New York water quality standards and, therefore, waived its defense of federal choice-of-law pre-emption under the CWA, respondent's first, second, and ninth defenses, as well as those portions of its remaining defenses that raise the subject matter jurisdiction defense, should be dismissed.

2. Failure to State a Claim

In response to staff's motion to dismiss defenses, respondent urges that its third defense be sustained and, after searching the record, that the amended complaint be dismissed

for failure to state a claim against respondent.⁹ Under Part 622, a request to dismiss a complaint for failure to state a claim is governed by the standards applicable to motions to dismiss the complaint pursuant to CPLR 3211(a)(7) (see Matter of Estate of Ryan, Ruling of the Chief ALJ on Motion to Dismiss, Oct. 15, 2010, at 11). Under those standards, a request to dismiss a complaint is addressed to the sufficiency of the pleadings (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). In the administrative context, a complaint is sufficient if it is reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against that party and to allow for the preparation of an adequate defense (see Matter of Board of Educ. v Commissioner of Educ., 91 NY2d 133, 139-140 [1997]; Matter of Block v Ambach, 73 NY2d 323, 332 [1989]; see also 6 NYCRR 622.3[a][1]). To determine whether a complaint states a claim, the pleading is liberally construed, the facts alleged in the complaint are accepted as true and the proponent of the complaint is given the benefit of every possible favorable inference, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; Leon, 84 NY2d at 87-88).

Generally, extrinsic evidence is considered on a CPLR 3211 motion to dismiss for the limited purpose of remedying defects in the complaint (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976]). In such a case, the criteria is whether the proponent of the pleading has a cause of action, not whether one is artfully pleaded (see Leon, 84 NY2d at 88; Guggenheimer v Ginzburg, 43 NY2d 268, 274-275 [1977]).

In limited circumstances, dismissal under CPLR 3211 may be granted when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see Beal Sav. Bank v Sommer, 8 NY3d 318, 324-325 [2007]). For example, the interpretation of an unambiguous contract is a question of law for the tribunal, and contract provisions that set forth the rights of the parties will prevail over the allegations in the complaint (see id.).

⁹ Ordinarily, the defense of failure to state a claim is not properly pleaded as an affirmative defense, and a motion to dismiss the defense would be denied as unnecessary (see e.g. Truisci at 12). By affirmatively requesting dismissal of the amended complaint on this ground, however, respondent has placed its defense at issue.

In its first cause of action, Department staff alleges that by failing to install adequate and effective erosion and sediment controls as required by the December 20, 2010 order on consent, respondent violated ECL 71-1929 for failure to perform obligations imposed by the order (see amended complaint at 6, ¶ 43). In its second cause of action, staff alleges that by failing to install adequate and effective erosion and sediment controls as required by the August 24, 2011, order on consent, respondent violated ECL 71-1929 for failure to perform obligations imposed by that order (see id. at 7, ¶ 46). Respondent argues that staff failed to state a claim because staff failed to allege (1) that the 2010 consent order required installation of erosion and sediment controls, (2) that the 2011 consent required installation of erosion and sediment controls throughout its operations in Pennsylvania, and (3) that respondent's operations resulted in any illegal discharges into New York State waters.¹⁰

A liberal review of the amended complaint, together with an examination of the underlying consent orders, reveals sufficient allegations to place respondent on notice of, and thereby state, staff's claims. With respect to the first cause of action, the amended complaint alleges that in the December 2010 consent order, respondent agreed to "return to compliance and maintain ongoing and continued compliance" with New York's water quality standards (id. at 3, ¶ 15). Review of the December 2010 consent order suggests that to return to and maintain compliance, respondent obligated itself to take "actions . . . to prevent recurrence" of the water quality violations "at other US Energy sites in the future" (December 2010 consent order, Schedule A). The complaint's allegations together with the terms of the consent order are sufficient to state the claim that the 2010 consent order obliged respondent to install erosion and sediment controls at its operations.

With respect to the second cause of action, the amended complaint expressly alleges that in the August 2011 consent order, respondent agreed to implement erosion and sediment control measures for roads, wells, and ancillary sites at the Yeager Brook snowmobile trail in Allegheny National Forest, the Yeager Brook, and several culverts and roadside ditches in McKean County, Pennsylvania, to prevent contravention

¹⁰ Respondent's claim that staff failed to allege any discharges is the basis for respondent's third defense (see answer ¶ 59).

of stream standards in New York (see amended complaint at 4, ¶ 20). These allegations are sufficient to place respondent on notice of the basis for staff's second cause of action.

With respect allegations of illegal discharges, a fair reading of the amended complaint reveals staff's factual allegations that on or about September 28, 2011, and December 21, 2011, missing or ineffective erosion controls at respondent's well pads and roads in Pennsylvania were allowing the discharge of cloudy turbid stormwater from those pads and roads into the Yeager Brook in Pennsylvania, and that the cloudy and gray water was flowing into New York and causing water quality violations for color and turbidity (see amended complaint at 4-6, ¶¶ 23-39). Similarly, staff alleged a violation of turbidity standards in New York on or about January 17, 2012, and that the only land disturbances upstream from the monitoring stations on the Yeager Brook were well pads and roads owned or operated by respondent (see id. at 6, ¶¶ 38, 40-41). These factual allegations, and the reasonable inferences drawn therefrom, are sufficient to place respondent on notice of, and thereby state staff's claims of unlawful discharges into New York waters as a result of ineffective erosion and sediment controls at respondent's operations in Pennsylvania.

Respondent argues that notwithstanding the allegations in the amended complaint, the consent orders, which respondent asserts are in the nature of contracts (see 19th St. Assocs. v State of New York, 79 NY2d 434, 442 [1992]), did not order perpetual compliance with New York law. Respondent asserts that at most, the orders indicated that the Department "anticipated" a return to compliance if respondent undertook certain actions, which it claims it completed. Respondent asserts that the orders placed no further obligations upon respondent. Moreover, respondent notes that the 2010 consent order has an expiration date, further undermining a conclusion that the order imposed on-going obligations. Respondent also argues that notwithstanding any allegations in the complaint, neither consent order obligated it to implement any alleged erosion and sediment controls. Because the terms of the consent orders prevail over conclusory allegations of the complaint, respondent contends, the complaint should be dismissed.

The terms of the consent orders, however, do not conclusively establish respondent's defenses to the complaint. The consent orders do not unambiguously preclude on-going

compliance and future obligations. Notwithstanding the orders' terms cited by respondent, other provisions of the consent orders, as well as consideration of the overall general purposes of the consent orders (see Beal Sav. Bank, 8 NY3d at 324-325), support the conclusion that on-going and continued compliance with the orders were agreed to by the parties. Moreover, based upon the terms of the 2010 consent orders noted above, and terms of the 2011 consent order (see August 2011 consent order at 4, ¶ II, and Schedule A), the underlying consent orders do not conclusively negate respondent's alleged obligations to implement erosion and sediment controls, or to take other actions to prevent discharges of turbid and muddy stormwater from its operations in Pennsylvania into the Yeager Brook. Because the terms of the consent orders do not conclusively establish respondent's defenses to the complaint, they do not provide a basis for dismissal of the complaint on this motion to dismiss addressed to the pleadings. Accordingly, respondent's request that the amended complaint be dismissed for failure to state a claim is denied, and its third defense should be dismissed.

B. Challenges to Respondent's Remaining Defenses

As noted above, motions to dismiss affirmative defenses are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see e.g. Truisi at 10-11). In general, motions to dismiss affirmative defenses may challenge the pleading facially -- that is, on the ground that it fails to state a defense -- or may seek to establish, with supporting evidentiary material, that a defense lacks merit (see id. at 10).

The threshold inquiry on a motion to dismiss affirmative defenses is whether the defense pleaded is, in fact, in the nature of an affirmative defense (see id. at 4-5; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38). Where the defense is actually a denial pleaded as a defense, a motion to dismiss affirmative defenses does not lie (see Truisi at 5, 11; see also Rochester v Chiarella, 65 NY2d 92, 101 [1985] [motion to dismiss not a vehicle to strike a denial]).

Assuming the defense is in the nature of an affirmative defense, an answer, like a complaint, challenged on

the ground that it fails to state a defense is liberally construed (see Truisi at 10 [citing Leon, 84 NY2d at 87; Butler v Catinella, 58 AD3d 145, 148 (2d Dept 2008)]). The facts alleged are accepted as true and the pleader is afforded every possible inference (see id.; Matter of ExxonMobil Oil Corp., ALJ Ruling, Sept. 13, 2002, at 3). A motion to dismiss will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense (see Truisi at 10 [citing Leon, 84 NY2d at 87-88; Foley v D'Agostino, 21 AD2d 60, 64-65 (1st Dept 1964)]). In addition, affidavits submitted in opposition to the motion may be used to save an inartfully pleaded, but potentially meritorious, defense (see Faulkner v City of New York, 47 AD3d 879, 881 [2d Dept 2008]).

Pure legal conclusions are not presumed to be true, however (see Truisi at 10-11 [citing Bentivegna v Meenan Oil Co., 126 AD2d 506, 508 (2d Dept 1987)]). Thus, defenses that merely plead conclusions of law without supporting facts are insufficient to state a defense (see id. [citing Bentivegna, 126 AD2d at 508; Glenesk v Guidance Realty Corp., 36 AD2d 852, 853 (2d Dept 1971)]; see also 6 NYCRR 622.4[c] [requiring respondent to explicitly assert any affirmative defense together with a statement of the facts which constitute the grounds of each defense asserted]).

1. Uncharged Violations -- Fourth and Fifth Defenses

Department staff seeks dismissal of respondent's fourth defense on the ground that it lacks merit. In its fourth defense, respondent asserts that under CWA § 402(1)(2), stormwater discharges from oil and gas operations -- including construction activities -- are exempt from federal National Pollution Discharge Elimination System (NPDES) permitting requirements under the CWA unless stormwater runoff from oil or gas mining operations comes into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of those operations (citing 33 USC § 1342[1][2]). Respondent argues that the amended complaint alleges no facts that stormwater runoff from respondent's activities came into contact with any of the above listed materials and, therefore, staff failed to allege an illegal discharge. Accordingly, it asserts that its fourth defense is properly pleaded, and should be sustained.

I disagree. Department staff has not charged respondent with violations of the federal NPDES permitting requirements and, thus, any failure to allege that stormwater from respondent's operations have come into contact with mining materials or wastes is not a pleading defect. Moreover, both Pennsylvania and New York may impose standards stricter than the CWA, including the water quality standards applicable here (see International Paper, 479 US at 497-498). Respondent makes no argument, and cites no authority, for the proposition that the stormwater exemption under CWA § 402(1)(2) pre-empts enforcement of state water quality standards for discharges from oil and gas operations. Thus, section 402(1)(2) does not provide a defense to alleged violations of state water quality standards.

As concluded above, the amended complaint charges respondent with violations of the consent orders and alleges illegal discharges in violation of those consent orders. Thus, to the extent the fourth defense asserts that the amended complaint fails to allege an illegal discharge, it is without merit. Accordingly, the fourth defense should be dismissed.

Department staff also seeks dismissal of respondent's fifth defense. In its fifth defense, respondent asserts that the amended complaint does not mention respondent's coverage under applicable Pennsylvania permits and alleges no violations of those permits. Respondent also asserts that the complaint does not mention respondent's Pennsylvania erosion and sediment control plan, or identify any specific erosion and sediment controls that are allegedly insufficient. Staff seeks dismissal of the fifth defense on the ground that respondent's Pennsylvania permits are not relevant to the alleged violations of the consent orders respondent voluntarily agreed to here.

For reasons similar to those discussed in connection with the fourth defense, I agree with Department staff. The amended complaint does not charge respondent with violations of its Pennsylvania permits or its erosion and sediment control plan. Rather, it charges respondent with violations of the consent orders to which it voluntarily consented. Moreover, as discussed above, examination of the terms of the Pennsylvania Erosion and Sediment Control General Permit ESCGP-1 reveals that that permit does not exempt respondent from compliance with applicable state water quality standards. By executing the consent orders, respondent consented to the application of New York water quality standards as the applicable standards. Thus,

the Pennsylvania general permit does not provide a defense to the charges alleged in the amended complaint. Accordingly, the fifth defense should be dismissed.

2. Failure to Join Necessary Parties -- Sixth and Seventh Defenses

In its sixth defense, respondent asserts that the amended complaint must be dismissed for failure to join the United States Forest Service as a necessary party. Respondent alleges that the discharges from public roads alleged in the complaint are from roads owned by the Forest Service and cannot be attributed to respondent. In its seventh defense, respondent also asserts that the amended complaint should be dismissed for failure to join the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP) and the State of New York as necessary parties. Respondent alleges that structures, roads, or soil disturbances in the Allegany State Park caused or contributed to the alleged increase in turbidity on the Yeager Brook.

Department staff argues that it cannot be compelled to join other parties in enforcement proceedings because to do so impinges on prosecutorial discretion. Accordingly, staff seeks dismissal of the sixth and seventh defenses.

As with joinder of necessary parties, whether the failure to join necessary parties is an available defense in a Part 622 proceeding is an open question (see Matter of Berger, ALJ Ruling on Joinder, May 28, 2010, at 5-6; Matter of Huntington and Kildare, Inc., Chief ALJ Ruling on Motion to Allow Third-Party Claim, Nov. 15, 2006, at 4-5). Nevertheless, the defenses fail on the merits.

Whether a party is a necessary party depends upon (1) whether the present respondent would be prejudiced by the absence of the other parties, and (2) whether complete relief between the Department and the present respondent can be granted in the absence of the other parties (see Matter of Huntington and Kildare, Inc., at 5 [citing CPLR 1001(a)]). Here, staff alleges that on at least three occasions, respondent's operations caused water quality violations in violation of the consent orders. Staff will have the burden of proving respondent's responsibility for those violations at hearing. To

the extent respondent seeks to establish that other parties are responsible in whole or in part for the water quality violations complained of, witnesses or other evidence may be presented at hearing supporting those assertions. Because witnesses may be subpoenaed, respondent will not be prejudiced if the third parties are not made parties to this proceeding. Moreover, to the extent the record reveals that third parties were responsible, in whole or in part, for the charged violations, respondent's liability may be mitigated, in whole or in part. Thus, complete relief as between the Department and respondent may be granted in the absence of the other parties cited by respondent.

Accordingly, the sixth and seventh defenses, insofar as they allege the failure to join necessary parties, should be dismissed. To the extent the sixth and seventh defenses allege that other parties are responsible for the alleged violations, they are denials not subject to dismissal.

3. Unclean Hands -- Eighth Defense

In its eighth defense, respondent claims that the amended complaint should be dismissed under the doctrine of unclean hands. Respondent's sole allegation in support of this defense is that "the State of New York has caused and contributed to the sources of sediment in the Yeager Brook watershed from structures, roads, trails, and property in Allegany State Park" (answer ¶ 74).

Department staff moves to dismiss the eighth defense on the ground that the doctrine of unclean hands is an equitable remedy that is not available against a governmental agency. Respondent counters that although equitable defenses, including unclean hands, are rarely allowed against governmental entities, they are sometimes allowed in the environmental law context.

As respondent notes, as a general rule, equitable defenses, such as the defense of unclean hands, are not applicable against an agency acting in a governmental capacity in the discharge of its statutory responsibilities (see Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441, cert denied 488 US 850 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282 [1988]; see also Matter of Giambrone, Order of the

Commissioner, Dec. 21, 2001, adopting ALJ Summary Report, at 25-26). Only in the rarest of cases may an agency be equitably estopped for affirmative wrongful acts or omissions by the agency when there is a duty to act (see Parkview, 71 NY2d at 282; Matter of Hamptons Hosp. & Med. Ctr., Inc. v Moore, 52 NY2d 88, 93 n 1 [1981]; Bender v New York City Health & Hosps. Corp., 38 NY2d 662, 668 [1976]; see also Matter of Martino, Rulings of the ALJs, April 28, 2008, at 3-4). To plead a defense of unclean hands, respondent must allege that the Department has committed some unconscionable act that is directly related to the subject matter of the proceeding and has injured respondent (see Hytko v Hennessey, 62 AD3d 1081, 1085-1086 [3d Dept 2009]).

Affording respondent every possible inference, and considering all evidence submitted on the motion, respondent fails to cite any specific affirmative unconscionable act or omission by the Department, or any resulting harm to respondent from such an affirmative act or omission, directly related to the subject matter of this proceeding. Respondent's conclusory assertion that the State caused or contributed to sources of sediment in the Yeager Brook as a result of structures, roads, trails, and property in the Allegany State Park is an insufficient allegation of affirmative wrongdoing to support an unclean hands defense. Thus, respondent fails to state the defense of unclean hands, even assuming the defense is otherwise available in this forum. Accordingly, the eighth defense should be dismissed to the extent it raises the unclean hands defense. To the extent the eighth defense alleges that the State contributed, in whole or in part, to the water quality violations alleged here, those allegations are in the nature of denials and are not subject to dismissal.

III. RULING

For the reasons stated above, Department staff's motion to dismiss affirmative defenses is granted in part. Respondent's first, second, third, fourth, fifth, and ninth defenses pleaded in its May 14, 2012, answer to the amended administrative complaint are dismissed in their entirety. Respondent's sixth defense is dismissed to the extent it alleges the failure to join the United States Forest Service as a necessary party. Respondent's seventh defense is dismissed to the extent it alleges the failure to join OPRHP and the State of New York as necessary parties. Respondent's eighth defense is

New York as necessary parties. Respondent's eighth defense is dismissed to the extent it alleges the doctrine of unclean hands. Department staff's motion to dismiss affirmative defenses is otherwise denied.

Respondent's request that this ALJ search the record and dismiss Department staff's April 24, 2012 amended complaint is denied.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: August 23, 2013
Albany, New York