

In the matter of the alleged violation(s) of the New York State Environmental Conservation Law (ECL) Articles 3, 17 and 23, Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR), and permits issued pursuant to Environmental Conservation Law Article 17, Title 8 and Article 23, Title 13; and the application for ECL Article 23 modification permit by

**RULING ON
DEPARTMENT STAFF'S MOTION
TO CLARIFY
AFFIRMATIVE DEFENSES**

DEC Case No: R8-1088-97-01
and
ECL Article 23-1301 Permit
Hearing

**BATH PETROLEUM STORAGE, INC.,
E.I.L. PETROLEUM, INC., and
ROBERT V. H. WEINBERG,**

Applicants-Respondents.

PROCEEDINGS

In a motion dated June 1, 2004, and filed with the Office of Hearings and Mediation Services on June 3, 2004, Staff of the New York State Department of Environmental Conservation ("Department Staff") sought clarification of certain of the affirmative defenses raised by Respondent Robert V.H. Weinberg ("Respondent Weinberg") in his Answer to Department Staff's Amended Complaint served on November 17, 2003 (referred to herein as the "2003 Amended Complaint"). Department Staff's 2003 Amended Complaint sought to impose liability upon Respondent Weinberg for alleged violations of Articles 3, 17, and 23 of the Environmental Conservation Law ("ECL"), as well as violations of a State Pollutant Discharge Elimination System ("SPDES") permit issued to E.I.L. Petroleum, Inc. ("EIL").

EIL is a corporation engaged in the international and domestic bulk purchase and sale of liquefied petroleum gases ("LPG"). According to the 2003 Amended Complaint, Respondent Weinberg is the president, director and sole stockholder of EIL, and the president of Bath Petroleum Storage, Inc. ("BPSI"), a

wholly-owned subsidiary of EIL, which operates an LPG gas storage facility (the "Facility") in Bath, New York. This action was commenced in March 1997 by service of a Notice of Hearing and Complaint upon BPSI and EIL (hereinafter the "Corporate Respondents"). The 2003 Amended Complaint alleges further that BPSI and EIL are solely owned by Respondent Weinberg, and that he exercises direct control over their operations. 2003 Amended Complaint, ¶ 6.

In a submission served on June 7, 2004, Respondent Weinberg opposed the motion. By letter dated July 14, 2004, Department Staff sought permission to respond to the opposition. The request is granted, and Department Staff's response will be considered herein.

DISCUSSION AND RULING

Department Staff's motion sought clarification of ten (the first, fourth, sixth, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth and eighteenth) of Respondent Weinberg's affirmative defenses. Section 622.4(f) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") provides that

The department staff may move for clarification of affirmative defenses within 10 days of completion of service of the answer on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based.

An affirmative defense is defined in Section 3018(b) of the New York Civil Practice Law and Rules ("CPLR") as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." Thus, "[a]n affirmative defense raises a matter that is not plain from the face of the complaint." Matter of Viewpoint Realty Corp., ALJ Ruling, at 2, 2002 WL 31970349, *1 (Dec. 16, 2002) (citations omitted). The pleading "should give notice of the relevant transactions and occurrences and set forth the material elements of the defense." Sinacore v. State, 176 Misc.2d 1, 4 (Ct. Cl. 1998).

In its motion, Department Staff alleges that several of Respondent Weinberg's affirmative defenses are vague and ambiguous, and do not put Department Staff on notice of the facts

or legal theory (or both) upon which those defenses are based. Respondent Weinberg takes the position that the affirmative defenses are properly asserted. Respondent Weinberg also objects to dismissal of the affirmative defenses. In its response, Department Staff indicates that clarification, not dismissal, of the particular affirmative defenses is the relief sought on the motion.

Accordingly, this ruling does not consider the merits of the affirmative defenses, and is concerned instead with whether a particular affirmative defense is "specifically pled" and "articulated with sufficient factual clarity to that Department Staff may be reasonably apprized of the circumstances out of which the affirmative defense arises and the legal theory upon which it is based." Matter of Amerada Hess Corp., ALJ Ruling, at 4, 2002 WL 266821, *3 (Feb. 22, 2002) (consideration of the merits "is only possible when the parties, in the first instance, plead their respective positions with sufficient factual and legal clarity to ensure that any opposing party is not surprised at a hearing on the merits or is not asked to rebut a position that is not clearly stated on the face of a pleading.")

Each of the affirmative defenses is discussed separately below.

First Affirmative Defense

The first affirmative defense states that the 2003 Amended Complaint alleges acts and omissions which, if proven, would subject Respondent Weinberg to fines, and that "[n]one of the causes of action allege any knowledge and/or actions taken by the Respondent, individually, which resulted in any violation of the law." Answer, ¶ 2, at 18. The Answer goes on to state that Department Staff must allege and prove "willful participation and knowledge of these violations," and concludes that "all causes of action must be dismissed as against Respondent for failure to state a cause of action upon which relief could be granted." Answer, ¶¶ 3 and 4, at 18.

Department Staff's motion for clarification asserts that this affirmative defense does not provide any facts as grounds for this defense, thus rendering the defense vague and ambiguous. In response to Respondent Weinberg's argument that Department Staff has not alleged knowledge or actions on his part that violated the law, Department Staff takes the position that it has alleged that Respondent Weinberg is the sole owner of BPSI and EIL, and that he "exercises direct control over their operations." Motion, at 3. Department Staff goes on to point

out that the 2003 Amended Complaint contains a number of allegations with respect to this respondent's "knowledge and actions which resulted in violations." Id. Therefore, Department Staff argues that Respondent Weinberg cannot contend that the 2003 Amended Complaint fails to assert claims as to this respondent's individual actions, and as a result, the affirmative defense is vague and ambiguous.

In addition, Department Staff takes issue with that portion of the affirmative defense that asserts that the Department "must allege and prove willful participation" by Respondent Weinberg in order to establish his individual liability. Motion, at 3-4. Department Staff contends that the 2003 Amended Complaint articulates violations of statutes and regulations that impose strict liability, and therefore, it is not necessary for Department Staff to establish "willful participation" on the part of this respondent. Department Staff maintains that this portion of the affirmative defense is vague and ambiguous and does not place Department Staff on notice of the legal theory upon which the defense is based.

In his opposition, Respondent Weinberg counters that the affirmative defense does contain factual statements sufficient to place Department Staff on notice. In addition, Respondent Weinberg argues that in order to prevail on a theory of direct liability, Department Staff must prove "actual knowledge and direct participation - not merely some abstract ability to control." In support of his argument, Respondent Weinberg cites to both the ruling on his motion to dismiss the complaint (Matter of Bath Petroleum Storage, Inc., ALJ Ruling, 2004 WL 598983 (Mar. 18, 2004) (claims as to Respondent Weinberg's individual liability should be considered at hearing), as well as State v. Markowitz, 273 A.D.2d 637, 641, lv. denied, 95 N.Y.2d 770 (2000) (individual corporate shareholders could not be held personally liable for cleanup costs in an action brought to address violations of the Navigation Law, "in view of the lack of evidence of their active involvement in corporate operations relating to the spills.")

As articulated in the March 18, 2004 ruling on the motion to dismiss, Department Staff's allegations as to joint and several liability should be considered at the hearing. That ruling went on to state that "Respondent Weinberg's arguments to the contrary may be asserted in his Answer, and heard as affirmative defenses to the 2003 Amended Complaint." Matter of Bath Petroleum Storage, Inc., ALJ Ruling, at 9, 2004 WL 598983, *9. The first affirmative defense articulates the legal theory upon which Respondent Weinberg intends to rely, and as such, no clarification is necessary, particularly in light of the

additional arguments set forth in his response to Department Staff's motion. See Matter of Saddle Mountain Corp., Inc., ALJ Ruling, at 2-3, 2002 WL 753874, *2-3 (Apr. 25, 2002) (respondent's affirmative defenses must reveal legal theory under which respondent is proceeding; SPDES permit violations carry strict liability but claims raised in affirmative defense may be pursued to the extent that they bear upon culpability as a penalty factor). The motion for clarification with respect to this affirmative defense is denied.

Fourth Affirmative Defense

Respondent Weinberg's fourth affirmative defense contends that "Respondent cannot be held liable for civil penalties that accrued between the commencement of this proceeding against BPSI in March 1997 and the date of any hearing." Answer, ¶ 21, at 21. The Answer goes on to state that "prosecution of the instant case has been characterized by at least three amendments to the underlying complaint to add factual and legal allegations that were extant at the time the action was initially commenced." Answer, ¶ 22, at 21. The fourth affirmative defense asserts that, upon information and belief, Department Staff "seeks civil penalties from Respondent for 'ongoing' violations that accrued daily during, but not limited to, the time between commencement of this proceeding in March 1997 and the present." Answer, ¶ 23, at 21. The affirmative defense goes on to claim that there were no stays in these proceedings that would have affected Department Staff's ability to prosecute Respondent Weinberg, and contends that Respondent Weinberg cannot be held liable for civil penalties that resulted from delayed prosecution as a result of Department Staff's failure to grant a hearing within a reasonable time.

Department Staff seeks clarification of this affirmative defense, arguing that Respondent Weinberg failed to adduce facts which would provide grounds for the defense. As a result, according to Department Staff, the allegations are vague and ambiguous and fail to place Department Staff on notice of those facts. Department Staff argues further that the affirmative defense does not identify the time period during which no penalties should be assessed, and states that "from the start it is not clear whether Respondent means to argue that he cannot be found liable for violations, or that no penalties should be assessed against him even if he is liable for violations, or to make both such arguments." Motion, at 5. Finally, Department Staff points out that a prior ruling in this case determined that a respondent's objection to Department Staff's request for civil penalties "is not a basis on which to dismiss charges." Matter

of E.I.L. Petroleum, Inc., ALJ Ruling, at 2, 1998 WL 1759900, *2 (Dec. 21, 1998). In that ruling, the ALJ went on to note that "the Parties are encouraged to develop the record about this question [the appropriate amount of any civil penalty]." Id.

In his opposition, Respondent Weinberg states that "this defense stands for the eminently reasonable proposition that the Department cannot commence an enforcement action against some, but not all Respondents, sit on their hands for 5 years for no reason before commencing the action against an individual, and then expect the individual to be responsible for civil penalties that accrued while the Department slept on its right to bring the matter to a hearing." Opposition, at 10. Respondent Weinberg points out that the affirmative defense does contain a temporal limitation (March, 1997), and that the December 21, 1998 ruling stated that the amount of civil penalties, if any, must await a hearing.

Department Staff's motion for clarification of this affirmative defense is denied. Respondent Weinberg's opposition makes clear that this affirmative defense goes to the question whether penalties should be assessed against him for ongoing violations from March 1997 to the date of the hearing, and, if so, the appropriate penalty amount. This is sufficient to place Department Staff on notice of the grounds for the affirmative defense, which should be considered at the hearing.

Sixth Affirmative Defense

The sixth affirmative defense asserts that, "[u]pon information and belief, the Department has not filed in the Office of the Department of State any regulations pertinent to causes of action nine through eighteen in the 2003 Complaint." Answer, ¶ 34, at 23. The Answer goes on to state that "[t]he Department's actions in imposing the *de facto* rules applied to Respondent are *ultra vires* and unconstitutional." Answer, ¶ 39, at 24.

Department Staff contends that because this affirmative defense does not include facts as the grounds for the defense, it is vague and ambiguous. Department Staff points out that the Answer does not specify the *de facto* rules and Department Staff's application of those rules to this respondent.

In his opposition to the motion, Respondent Weinberg asserts that the sixth, eighth, and eighteenth affirmative defenses "each allege that the Department has unlawfully applied rules and regulations that were never promulgated as required by the New

York State Constitution or the State Administrative Procedures Act." Opposition, at 10. Respondent Weinberg argues further that these defenses are very similar to the sixth affirmative defense in the Corporate Respondents' 1998 Answer, which was the subject of a motion to clarify. In the ruling on the motion, the ALJ determined that the Corporate Respondents had incorporated their arguments from their motion to dismiss, and that further clarification was not required. Matter of E.I.L. Petroleum, Inc., ALJ Ruling, at 5; 1998 WL 1759900, *5 (Dec. 21, 1998). Nevertheless, the ALJ stated that he would "expect the Respondents to clarify this affirmative defense in their opening statement before they attempt to prove it." Id.

While Respondent Weinberg is correct that Section 622.4(f) requires articulation of the "facts or legal theory" (emphasis in Respondent Weinberg's opposition) upon which a defense is based, Section 622.4(c) provides that an answer "must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted." At this point, it is appropriate to require clarification of the rules referred to in advance of the hearing, to avoid surprise and to eliminate ambiguity in the sixth, eighth and eighteenth affirmative defenses. This is particularly so in light of the Commissioner's January 26, 2005 Second Interim Decision, which directed that the adjudicatory hearing be convened at the earliest date possible. Matter of Bath Petroleum Storage, Inc., Commissioner's Second Interim Decision, at 4 (January 26, 2005). Clarification of Respondent Weinberg's affirmative defenses at this juncture will expedite discovery. Accordingly, Department Staff's motion with respect to this affirmative defense is granted.

Eighth Affirmative Defense

Respondent Weinberg's eighth affirmative defense asserts that "in effect, this enforcement action is based upon rules, which have never been promulgated by the Department or approved." Answer, ¶ 54, at 26. Respondent Weinberg argues that he was denied prior notice and the opportunity to comment on these "de facto" rules, and as a result, he has been deprived of his fundamental right to due process under the New York State Constitution, Article 1, Section 6.

Department Staff's arguments in support of its motion for clarification are similar to those advanced with respect to the sixth affirmative defense. Department Staff contends that the Answer fails to identify the rules in question or provide the requisite specificity as to Department Staff's application of

those rules to Respondent Weinberg. As was the case with the sixth affirmative defense, Respondent Weinberg should clarify his pleading in advance of the hearing. Department Staff's motion is granted as to the eighth affirmative defense.

Tenth Affirmative Defense

The tenth affirmative defense contends that all causes of action against Respondent Weinberg must be dismissed on statute of limitations grounds. According to Respondent Weinberg, because all of the actions alleged occurred in 1997 or before, "[t]he DEC failed to bring this case against Respondent in violation of the applicable statute of limitations." Answer, ¶ 64, at 27. The Answer goes on to state that "[f]or all the foregoing reasons, all causes of action against Respondent must be dismissed for failure to adhere to applicable statutes of limitations." Answer, ¶ 65, at 27.

Department Staff points out that the statute of limitations in question is not specified, and contends further that the word "statutes" in paragraph 67 renders the affirmative defense ambiguous, noting that the second affirmative defense seeks dismissal of the action based upon a violation of Section 301 of SAPA. Respondent Weinberg takes the position in his opposition to the motion that this defense does not require clarification, and states further that the federal statute of limitations, which he cites as 28 United States Code ("U.S.C.") Section 2468, is applicable in this case.

As an initial matter, research has not revealed any such provision in the U.S. Code. In his motion to dismiss, Respondent Weinberg referred to 28 U.S.C. Section 2462, which contains the general five-year federal statute of limitations. This ruling assumes that this is the provision referred to in the tenth affirmative defense.

The Court of Appeals has held that it is not necessary for a party asserting the statute of limitations as an affirmative defense to identify the statutory sections relied upon or to specify the applicable period of limitations. Immediate v. St. John's Queens Hospital, 48 N.Y.2d 671, 673 (1979); see Montes v. Manufacturers Hanover Trust Co., 78 A.D.2d 786, 786 (1st Dept. 1980). Nevertheless, this same affirmative defense was dismissed by the ALJ when it was raised by the Corporate Respondents in their Answer, which specified that the defense was based upon the limitations provision contained in 28 U.S.C. Section 2468. Matter of E.I.L. Petroleum, Inc., ALJ Ruling, at 4, 1998 WL 1759900, *3 (Dec. 21, 1998). The ALJ pointed out that the

Corporate Respondents "did not identify any particular administrative or court cases to support their claim concerning the applicability of 28 USC §2468 here," citing to 6 NYCRR Section 622.4(c), the regulatory provision that required the Corporate Respondents to provide "a statement of the facts which constitute the grounds of each affirmative defense." Id.

While Respondent Weinberg's motion to dismiss the 2003 Amended Complaint did include such citations and argument concerning the applicability of 28 U.S.C. Section 2462, the March 18, 2004 ruling on the motion considered and rejected those arguments. Matter of Bath Petroleum, Inc., ALJ Ruling, at 8-9, 2004 WL 598983, *8 (Mar. 18, 2004). That ruling is the law of the case. Accordingly, this affirmative defense is stricken, and there is no need for a ruling on Department Staff's motion for clarification.

Eleventh Affirmative Defense

Respondent's eleventh affirmative defense asserts that all causes of action must be dismissed as against Respondent Weinberg, because the 2003 Amended Complaint seeks to impose personal liability upon him, and "[s]imilarly situated corporations and entities have not suffered the personal prosecution of officers such as Respondent for similar conduct." Answer, ¶ 67, at 27. The affirmative defense contends that Respondent Weinberg is subject to selective prosecution in this proceeding, and that such prosecution is "arbitrary, capricious, in violation of the equal protection of the laws and constitutes unlawful selective treatment." Answer, ¶ 68, at 28.

In its motion, Department Staff takes issue with the eleventh affirmative defense, asserting that Respondent Weinberg failed to provide a statement of the facts which are the grounds for this defense. Department Staff goes on to note that the affirmative defense does not specify which corporations, entities, and officers were treated differently. Finally, Department Staff argues that a claim of selective enforcement is typically posed as a constitutional issue, and therefore not properly before this forum.

Respondent Weinberg's opposition states that he "seeks to preserve his constitutionally guaranteed rights because he has been singled out by the Department for excessive and continuous prosecution of claims, both in his personal capacity and by the DEC's action against the corporations in which he has an interest." Opposition, at 13. According to Respondent Weinberg, the eleventh affirmative defense contains sufficient facts to

notify Department Staff of the legal theory underlying the defense.

Department Staff's motion to clarify the eleventh affirmative defense is denied. The affirmative defense, as pleaded, is sufficient to place Department Staff on notice as to the claim asserted. Essentially, Department Staff's arguments go to the merits of the affirmative defense. To the extent Department Staff seeks more detail as to those corporations and entities not allegedly subjected to prosecution, interrogatories and document requests are the appropriate means to obtain such detail.

Twelfth Affirmative Defense

In the twelfth affirmative defense, Respondent Weinberg claims that all causes of action must be dismissed because the 2003 Amended Complaint seeks to impose personal liability upon him for the acts of the Corporate Respondents, "and/or his actions as an officer or director of said corporations." Answer, at 28, ¶ 70. The twelfth affirmative defense goes on to state that "[u]nder New York law, it is presumed that a business decision of an officer, or director, made in good faith, on an informed basis and in the honest belief that a particular action was in the best interests of the company, shall not subject such officer or director to any personal liability." Answer, at 28, ¶ 71.

Department Staff moves for clarification of this affirmative defense, arguing that the presumption articulated is subject to rebuttal, and that the Answer does not include a statement of facts sufficient to place Department Staff on notice of the grounds for this defense. Department Staff goes on to point out that Respondent Weinberg's Answer "does not assert that the alleged presumption would constitute a defense against *unlawful* acts of Respondent," such as the violations alleged in the 2003 Amended Complaint. Motion, at 10 (emphasis in original).

In his opposition to the motion, Respondent Weinberg contends that the grounds for this defense were the subject of his motions to dismiss and for a more definite statement, which "specifically placed at issue the standard that the Department must meet to impose personal liability upon a corporate shareholder." Opposition, at 11. According to Respondent Weinberg, this defense was clearly articulated, and that it is obvious that Department Staff "is prepared to attempt to rebut the presumption of good faith at the hearing." *Id.*

In this case, the affirmative defense is sufficiently clear to allow Department Staff to prepare a defense. Department Staff's arguments are essentially directed to the merits of this defense. As noted above, the merits of a defense are not considered on a motion for clarification. Rather, the inquiry is whether the defense is clear enough to place the opposing party on notice. Department Staff's motion for clarification of the twelfth affirmative defense is denied.

Thirteenth Affirmative Defense

The thirteenth affirmative defense states that the 2003 Amended Complaint "[t]he instant action against an individual Respondent for actions of the corporate Respondents in no way indicates or puts the individual on notice that his liability is predicated upon piercing the corporate veil." Answer, ¶ 75. The Answer goes on to state that "[t]he 2003 Amended Complaint in no way indicates that Respondent had so abused the corporate form so as to warrant piercing the corporate veil to hold the Respondent personally liable for the corporate acts." Answer, ¶ 76. Finally, the affirmative defense states that "[c]onclusory statements in the 2003 Amended Complaint alleging that the Respondent 'exercises direct control' of the corporations are insufficient as a matter of law." Answer, ¶ 77.

Department Staff takes the position that by raising this affirmative defense, Respondent Weinberg has acknowledged that "courts will pierce the corporate veil where appropriate," and that "he is on notice that facts asserted in the Complaint, or perhaps yet to be disclosed through discovery or at hearing, may give rise to piercing the veil." Motion, at 10. Department Staff reiterates its position that it is not required to pierce the corporate veil in order to establish Respondent Weinberg's liability, and argues that it is unclear how this affirmative defense could result in dismissal of the 2003 Amended Complaint. According to Department Staff, this renders the thirteenth affirmative defense vague and ambiguous, because it does not place Department Staff on notice of the legal theory on which it is based.

Respondent Weinberg's opposition does not offer any arguments specifically directed to the thirteenth affirmative defense, although his submission in opposition acknowledges that it is included in Department Staff's motion for clarification. Opposition, at 2, fn. 1. Nevertheless, clarification is not required, because the affirmative defense is sufficient to place Department Staff on notice of Respondent Weinberg's assertion that the 2003 Amended Complaint fails to adduce facts that would

support piercing the corporate veil in this matter. Department Staff's motion for clarification of this affirmative defense is denied.

Fourteenth Affirmative Defense

In this affirmative defense, Respondent Weinberg asserts that because the 2003 Amended Complaint seeks to impose liability upon him for the alleged conduct of BPSI and EIL, he "is entitled to equal protection of the laws relating to business entities as a shield against personal liability," and argues further that the imposition of such liability violates equal protection. Answer, ¶¶ 80-81, at 29.

Department Staff maintains that this affirmative defense does not include a statement of the facts which constitute the grounds for the assertion of the defense, as required by 6 NYCRR Section 622.4(c). Moreover, Department Staff contends that this defense raises a constitutional question which is not appropriate for consideration in an administrative proceeding, and does not identify the "laws" violated by the Department as a result of this enforcement action.

In his opposition to the motion, Respondent Weinberg contends that equal protection is an explicit standard under both the United States and New York State constitutions, and states that he "seeks to preserve his rights while pointing out the disparate treatment that he and the corporations with which he is affiliated had suffered at the hands of the DEC." Opposition, at 13.

Department Staff's motion for clarification of this affirmative defense is denied. The defense articulates Respondent Weinberg's claim concerning the alleged disparate treatment such that Department Staff is placed on notice, and no clarification is necessary. To the extent more information is sought, discovery is the proper avenue.

Eighteenth Affirmative Defense

The eighteenth affirmative defense refers to the ninth through fourteenth causes of action, in which Department Staff alleges illegal expansion of underground caverns 1 through 6 at the Facility. In this affirmative defense, Respondent Weinberg contends that the caverns have expanded "only through the normal and usual processes of the underground storage of LPG, and no additional solutioning for the specific purpose of expanding cavern size took place during the times alleged in the 2003

Amended Complaint." Answer, ¶ 95, at 31. The affirmative defense goes on to state that "[u]pon information and belief, at all relevant times, the Department was aware of the processes in use at Respondent's facility and minimal, incremental expansion in cavern size due to the normal operation of an underground LPG storage facility." Answer, ¶ 96, at 31. According to the Answer, the Department never required any additional applications for permits, or notified Respondents that any such permits were required, and furthermore, renewed all of the Facility's permits, including the SPDES permit, during the period in question.

The affirmative defense states that the permits issued to BPSI contemplated "an incremental and minimal expansion in cavern size" as a result of normal Facility operations. Answer, ¶ 98, at 32. Referring to the fifth and seventh affirmative defenses, the Answer states that Department Staff had no authority to impose additional regulations or conditions with regard to such expansion, and in fact waived any such permitting requirements.

Department Staff's motion seeks clarification of this affirmative defense, contending that the defense does not include a statement of the facts constituting the grounds of the defense. According to Department Staff, "[i]t is unclear, for example, how any Department 'awareness' of Respondent's processes, or even renewal of the SPDES permit under ECL 17, constituted a specific waiver of a permit requirement under ECL Article 23." Motion, at 12. The motion goes on to argue that Respondent Weinberg failed to adduce any facts in support of the argument that the Department had no authority to impose "additional regulations or conditions" upon him. Motion, at 12-13.

In his opposition, Respondent Weinberg asserts that this affirmative defense provides sufficient facts to place Department Staff on notice, and contends that Department Staff's statements "amount to nothing more than an argument of the factual basis." Opposition, at 14. Respondent Weinberg maintains that the arguments as to waiver and the *ultra vires* nature of Department Staff's action are evident from the pleading.

The pleading is sufficiently specific to place Department Staff on notice of Respondent Weinberg's waiver argument. Nevertheless, as was the case with the sixth and eighth affirmative defenses, this affirmative defense should be clarified to indicate which additional regulations or conditions are at issue. Department Staff's motion for clarification of this affirmative defense is granted.

CONCLUSION

Department Staff's motion to clarify the sixth, eighth, and eighteenth affirmative defenses is granted. The motion is denied with respect to the first, fourth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses. The tenth affirmative defense is stricken. Respondent Weinberg shall clarify the affirmative defenses specified in this ruling on or before Friday, February 18, 2005. Department Staff shall serve any additional interrogatories and document requests as a result of the clarification upon Respondent Weinberg on or before Friday, March 4, 2005. Respondent Weinberg's responses to Department Staff's discovery are to be served on or before Friday, April 8, 2005. Service via e-mail is authorized, with hard copy to follow by regular mail.

/s/

Maria E. Villa
Administrative Law Judge

Dated: January 27, 2005
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List