STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law, and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING

- by -

DEC Case No. CO3-20070201-9

ROBERT BERGER,
KAREN BERGER,
DAVID COOK and
JODY COOK,

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding against respondents Robert and Karen Berger (Berger respondents), and David and Jody Cook (Cook respondents), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law (ECL).[1]

The hearing on this matter was scheduled to commence on September 29, 2010. However, by letter dated August 31, 2010, Department staff advised this office and the Berger and Cook respondents that staff was about to undertake a survey of the boundary lines of parcels proximate to the Honk Falls Dam. Staff requested an adjournment to allow sufficient time for survey documents to be disseminated to, and evaluated by, the parties. By letter dated September 8, 2010, I granted staff's request. Department staff completed and certified the survey map on March 16, 2011. By correspondence dated April 29 and May 6, 2011, staff represented that it had completed its disclosure of documents related to the survey. After consultation with the parties, the hearing was rescheduled to commence on August 9, 2011. However, by letter dated August 1, 2011, staff, citing unforeseen medical circumstances, again requested an adjournment. I granted the adjournment. New hearing dates have not yet been confirmed.

Currently before me is Department staff's motion (motion), dated June 27, 2011, for clarification or dismissal of affirmative defenses set forth in the Berger respondents' revised

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[1] This matter has been the subject of substantial motion practice by the parties. Previously issued rulings may be viewed on the DEC website at: http://www.dec.ny.gov/hearings/2479.html.

amended answer, dated June 24, 2011.[2] Included with staff's motion are: the affidavit (Canestrari affidavit) of Donald E. Canestrari, dated June 27, 2011; the affidavit (Dominitz affidavit) of Alon Dominitz, dated June 27, 2011; and nine exhibits. The Berger respondents filed an affirmation (Berger reply), dated July 13, 2011, in opposition to staff's motion.[3] The Cook respondents did not file papers in relation to the instant motion.

DISCUSSION

Affirmative defenses are defined under the 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" (CPLR 3018[b]). An affirmative defense is a respondent's burden to plead and prove (see 6 NYCRR 622.11[b][2]). A denial, or an elaboration of the grounds for a denial, is not an affirmative defense and should not be pled as such. Rather, once a respondent has denied a charge or other matter alleged in the complaint, the matter denied is in dispute and a respondent may proffer evidence to contest the truth of the matter at hearing (see Richard v American Union Bank, 253 NY 166, 176-177 [1930] ["Under a denial of the material allegations of the complaint the defendant might introduce any relevant evidence which would tend to show the falsity of the allegations of the complaint. The defendant cannot change argumentative denials into an affirmative defense by pleading them affirmatively"]; Beece v Guardian Life Ins. Co., 110 AD2d 865, 867 [2d Dept 1985] ["The fact that in its answer the defendant denominated as an 'affirmative defense' its denial that death was accidental, is of no legal significance. The burden of proving accidental death and causation was on the plaintiff *ab initio* and did not shift merely because the defendant labeled its denial an 'affirmative defense'"]). Because an "argumentative denial" pled as an affirmative defense is not an affirmative defense, such a denial is harmless surplusage and is not subject to clarification or dismissal.[4]

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[2] Under the authority of 6 NYCRR 622.5(a), the Berger respondents filed an amended answer, dated June 9, 2011. By cover letter dated June 24, 2011, the Berger respondents filed a revised amended answer of the same date, and represented that the revision was necessary to correct and clarify the seventh affirmative defense. By letter dated June 27, 2011, Department staff acknowledged receipt of the revised amended answer, did not object to the revision, and stated that staff's motion to clarify or dismiss the affirmative defenses "remains unchanged." Unless otherwise specified, all references to the Berger respondents' answer are references to the revised amended answer, dated June 24, 2011.

[3] Under the provisions of 6 NYCRR 622.6(3), the Berger reply was filed several days late. Although I had granted Department staff additional time to file its motion, and had advised the Berger respondents that I would be amenable, upon request, to a similar extension for their reply, the Berger respondents did not request an extension prior to filing. Staff objected to the timeliness of the Berger reply, but cited no prejudice. By letter dated August 1, 2011, staff withdrew its opposition to the timeliness of the Berger reply. Accordingly, the Berger reply is considered herein.

[4] In this regard, denials denominated as affirmative defenses are to be treated in the same manner as the defense of failure to state a cause of action (see e.g. Butler v Catinella, 58 AD3d 145, 150 [2d Dept 2008] [adopting the position of "the Appellate Division, First Department, and Appellate Division, Third Department, [which] have previously held that pleading the defense of failure to state a cause of action is unnecessary, constitutes 'harmless surplusage,' and that a motion by the plaintiff to strike the same should be denied"]).

As to matters that are properly pled as affirmative defenses, 6 NYCRR 622.4(c) provides that a respondent "must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted." Department staff may move for clarification on the basis that an affirmative defense is so "vague or ambiguous . . . that staff is not thereby placed on notice of the facts or legal theory" of the defense (6 NYCRR 622.4[f]). Staff may also move for dismissal of an affirmative defense on the merits (see CPLR 3211[b] ["A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit"]). However, this is a drastic remedy that should not be granted where there is any doubt regarding whether the affirmative defense is viable (see e.g. New York Univ. v Continental Ins. Co., 87 NY2d 308, 323 [1995] [holding that "it was error to dismiss the affirmative defense at this early pleading stage of the litigation, because plaintiff had yet to establish that the affirmative defense was meritless as a matter of law"]; Federici v Metropolis Night Club, Inc., 48 AD3d 741, 743 [2d Dept 2008] ["Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed"]).

As part of its argument challenging the affirmative defenses raised by the Berger respondents, Department staff cites the burden of proof set forth under 6 NYCRR 622.11(b)(2) (motion ¶ 8), and argues that the Berger respondents have failed to meet their burden (see e.g. motion ¶¶ 13, 23, 26). This argument is misplaced in the context of staff's motion. As discussed above, to survive the instant challenge, the affirmative defenses must satisfy the pleading requirements set forth at 6 NYCRR 622.4(c) and (f), and must not be so lacking in merit as to warrant dismissal as a matter of law. For those affirmative defenses that survive the instant motion and are pursued at hearing, the Berger respondents will have the burden of proof as set forth under 6 NYCRR 622.11(b)(2).

With these principles in mind, the challenged affirmative defenses are discussed below.

Department staff argues that "each of the Berger respondents' nine affirmative defenses are improperly pled – whether by failing to include the requisite factual and legal grounds, or lacking sufficient clarity – and must be dismissed, or in the alternative clarified" (motion ¶ 10).

The Berger respondents argue that each affirmative defense "is totally self-explanatory and self-contained. No reasonable person with any knowledge whatever of the Environmental Conservation Law or this proceeding could possibly fail to understand what is being pled or be placed on notice of the substance of the facts and law upon which the [affirmative defense] is premised" (Berger reply ¶¶ 3, 10, 24, 32, 37, 43, 47, 51, 54).

-- First Affirmative Defense

The Berger respondents' first affirmative defense states that "[n]o law or regulation creates any legal obligation upon Answering Respondents with respect to the Honk Falls Dam" (Berger answer ¶ 22).

Pursuant to 6 NYCRR 622.4(f), "department staff may move for clarification of affirmative defenses within ten days of completion of service of the answer." The Berger respondents' first affirmative defense was pled four years ago in their original answer to the complaint, dated June 5, 2007, and it remains unchanged in the Berger respondents' revised amended answer. By letter dated June 16, 2011, I expressly limited staff's motion to those affirmative defenses that were "newly pled" in the revised amended answer. Therefore, staff's motion, as to the first affirmative defense, is untimely and unauthorized. Accordingly, staff's motion to clarify or dismiss the first affirmative defense is denied.

-- Second Affirmative Defense

The Berger respondents' second affirmative defense argues that former 6 NYCRR 673.3[5] mandates that, where the Department "intends that a particular hazard classification be effective" with respect to a dam, the Department must "affirmatively engage in the act of making a formal determination" of that dam's hazard classification (Berger answer ¶ 24). The Berger respondents allege that there has been no such determination with respect to the Honk Falls Dam and argue that "[a]s a consequence of the Department's having not affirmatively engaged in any act of making a formal determination as to [the hazard classification of] Honk Falls Dam . . . Honk Falls Dam has not been assigned a hazard classification" (Berger answer ¶ 27). The Berger respondents further argue that because no hazard classification has been assigned to the Honk Falls Dam, "the Department is jurisdictionally barred from prosecuting" alleged violations of requirements associated with any hazard classification (Berger answer ¶ 29).

Where a matter asserted as an affirmative defense is challenged, the first issue to consider is whether the matter asserted is, in actuality, an affirmative defense. The Berger respondents' second affirmative defense is a denial of a fact appearing on the face of a prior pleading. Specifically, the complaint alleges that the Honk Falls Dam is "classified a Class C dam," and the Berger respondents deny the allegation (complaint ¶ 9; Berger answer ¶ 7). If Department staff fails to meet its burden to prove the dam is a class C dam, any charge that is contingent on that classification will also fail.[6] Because respondents may "introduce any relevant evidence which would tend to show the falsity of the allegations of the complaint" (Richard, 253 NY at 176), including evidence purporting to show that the "Honk Falls Dam has not been assigned a hazard classification" (Berger answer ¶ 27), the Berger respondents' second affirmative defense is an argumentative denial pled as an affirmative defense and is surplusage. Accordingly, staff's motion to clarify or dismiss the second affirmative defense is denied.

[5] The current version of part 673 became effective on August 19, 2009. References to provisions of former part 673 are to the provisions that were in effect from January 1986 until August 19, 2009, the effective date of the current version.

[6] The second affirmative defense challenges only staff's authority to prosecute respondents "relative to requirements associated with 'C' [dams] or any other hazard classification dam" (Berger answer ¶ 29). Accordingly, by its terms, the second affirmative defense would not serve to defeat charges in the complaint that are not contingent on the dam's hazard classification.

-- Third Affirmative Defense

The Berger respondents' third affirmative defense asserts that "[a]ny classification of the Honk Falls Dam as a 'C' hazard or other without an explication of how the subjective criteria set out in [former] 6 NYCRR § 673.3 . . . were applied is arbitrary and capricious and an abuse of discretion"[7] (Berger answer ¶ 31). To the extent that the third affirmative defense challenges the existence, or the factual underpinning, of the hazard classification of the Honk Falls Dam, it is nothing more than an argumentative denial and is, therefore, harmless surplusage not subject to clarification or dismissal.

To the extent, however, that the Berger respondents assert that the process or method used by staff to determine the hazard classification was unlawful (irrespective of whether the Honk Falls Dam met the criteria for, and was designated as, a class C dam during the times relevant to the complaint), this is properly pled as an affirmative defense. The Honk Falls Dam has been designated as a class C dam in Department records dating back to at least 1983 (see Canestrari affidavit ¶¶ 4, 5; motion, exhibits E, F). The Berger respondents assert that "there is no record of the Department's ever having affirmatively engaged in any act of making a formal determination" of the hazard classification (Berger answer ¶ 25). The Berger respondents argue that this absence of any record providing an explication of how the hazard classification was made renders the classification unlawful.

To prevail on this assertion, the Berger respondents must overcome the presumption of regularity that attaches to determinations made by Department staff in the normal course of discharging their duties (see Matter of Whitman, 225 NY 1, 9 [1918] ["The general presumption is that an official does no act contrary to his official duty, or omits no act which his official duty requires"]; Culp v City of New York, 146 AD 326, 328 [2d Dept 1911] ["The presumption is that he did not usurp a function, but rather that he did his duty and kept within the power conferred by the statute. If it was done without the statute, let the defendant make proof of it"]; People v Bicet, 180 AD2d 692, 693 [2d Dept 1992], *lv denied* 79 NY2d 1046 [1992] [holding that "the presumption of regularity allows a court to assume that an official or person acting under an oath of office will not do anything contrary to his or her official duty or omit to do anything which his or her official duty requires to be done. The defendant has failed to come forward with any affirmative evidence of unlawful or irregular conduct to rebut this presumption"]). An allegation of illegality, whether premised on constitutional, statutory, or common law, is likely to take

[7] The Berger respondents' repeated use of the phrases "arbitrary and capricious" or "abuse of discretion" are inapposite in the context of this proceeding. The purpose of this proceeding is to resolve contested issues of fact and apply the law to the facts established by the pleadings or at hearing (see 6 NYCRR 622.18[a]). The party that bears the burden of proof on an issue must establish contested factual matters by a preponderance of the evidence, the standard of proof set for the under 6 NYCRR 622.11(c). In contrast, the arbitrary and capricious or abuse of discretion tests are limitations on the scope of review by a reviewing court (see e.g. CPLR 7803[3] [setting forth the scope of review to include "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion"]). Accordingly, where the Berger respondents allege that certain actions or determinations by staff were arbitrary and capricious or an abuse of discretion, these allegations will be deemed to allege that the actions or determinations were contrary to law.

Department staff by surprise and to raise issues of fact not appearing on the face of a prior pleading. Accordingly, such allegations are properly pled as affirmative defenses.[8]

Looking first at the less drastic remedy available where a pleading is challenged, I conclude that Department staff's request to clarify the third affirmative defense must be denied. This affirmative defense is sufficiently pled to place Department staff on notice of the facts and legal theory being asserted by the Berger respondents. The Berger respondents assert that "there is no record of the Department's ever having affirmatively engaged in any act of making a formal determination as to Honk Falls Dam with respect to its . . . hazard classification" (Berger answer ¶ 25). Based upon their assertion that an explication of the hazard classification determination is required by law, and that there is no record of such explication, the Berger respondents argue that the assigned classification is unlawful. Accordingly, Department staff has been placed on notice of the alleged facts, that there is no record of an explication of the hazard classification, and the legal theory, that the absence of such explication renders the classification assigned to the Honk Falls Dam unlawful. Accordingly, staff's motion to clarify this affirmative defense is denied.

Department staff's motion to dismiss the third affirmative defense is granted. Staff argues that this defense "fails to provide . . . legal support for the general allegation that ECL § 15-0507 [or] 6 NYCRR Part 673 requires 'explication' of the specific hazard classification factors" (motion ¶ 22). In their reply to the motion, the Berger respondents cite Matter of Industrial Liaison Committee v Williams, 131 AD2d 205 (3d Dept 1987), *affd on other grounds* 72 NY2d 137 (1988), and Cayuga Indian Nation of New York v Gould, 14 NY3d 614 (2010). These cases do not provide a legal basis for the third affirmative defense. In dicta, the court in Industrial Liaison states that "the lack of an acceptable test for compliance" relative to certain water quality standards promulgated by the Department, "creates an enforcement problem for DEC" (131 AD2d 212). The Court in Cayuga Indian Nation held that "the absence of an appropriate legislative or regulatory scheme governing the calculation and collection of cigarette sales taxes . . . precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged noncompliance with the New York Tax Law" (14 NY3d 653). Here, unlike the cases cited by the Berger respondents, there is no absence of criteria to be considered in making a hazard classification determination. The factors were expressly set forth under former 6 NYCRR 673.3 and are currently found at 6 NYCRR 673.5.

Moreover, the third affirmative defense does not allege the lack of enforceable criteria. Rather, it alleges that the lack of documentation in the Department's records concerning how the criteria were applied renders the hazard determination unlawful. Records from Department files indicate the Honk Falls Dam has been designated as a class C dam for over two decades. Even assuming that there once were contemporaneous records explicating how the regulatory criteria were applied, those records may have been lost or destroyed. The Berger respondents cite to no authority, and I am aware of none, that requires an explication for a determination such as that at issue here to be documented in Department records (cf. 6 NYCRR 617.11 [requiring a written findings statement where a final environmental impact statement has been filed under the State

[8] As stated at the outset, to the extent that the third affirmative defense challenges the existence, or the factual underpinning, of the hazard classification it is merely an argumentative denial. The Berger respondents' third affirmative defense does not alter staff's burden of proof to establish the fact that, during the times relevant to the complaint, the Honk Falls Dam was a class C dam.

Environmental Quality Review Act]; 6 NYCRR 622.18[a] [requiring enforcement hearing reports to include findings of fact and conclusions of law]).

The third affirmative defense fails as a matter of law and is dismissed.

-- Fourth Affirmative Defense

The Berger respondents' fourth affirmative defense asserts that "[a]ny classification of the Honk Falls Dam as a 'C' hazard other than in strict conformance with [former] 6 NYCRR § 673.3 [setting forth criteria for assigning dam hazard classifications] . . . is arbitrary and capricious and an abuse of discretion" (Berger answer ¶ 33). This affirmative defense is merely an argumentative denial of a factual issue appearing on the face of the complaint and is not properly pled as an affirmative defense.

Department staff alleges in its complaint that the Honk Falls Dam is classified as a class C dam "pursuant to [former] 6 NYCRR 673.3" (complaint ¶ 9). As discussed above, the Berger respondents have denied this allegation and, therefore, staff has the burden to prove the allegation by a preponderance of the evidence. To prevail on this allegation, staff must first make a prima facie showing that, pursuant to former 6 NYCRR 673.3, the Honk Falls Dam was a class C dam during the times relevant to the allegations in the complaint. Assuming that this showing is made and that the Berger respondents produce evidence in rebuttal, the record evidence must be weighed, and staff bears the ultimate burden of persuasion on the allegation. Under their denial, the Berger respondents are free to proffer evidence that the class C designation of the Honk Falls Dam was not in conformance with the criteria set forth under former 6 NYCRR 673.3. Accordingly, the fourth affirmative defense is merely an argumentative denial and no motion to clarify or dismiss it lies.

-- Fifth Affirmative Defense

According to the Berger respondents' fifth affirmative defense, "[t]he Complaint asserts that the 'C' hazard classification of the Honk Falls Dam was made by the [U.S. Army] Corps of Engineers in 1998" (Berger answer ¶ 35 [citing complaint ¶ 9]). Therefore, the Berger respondents argue, staff is "effectively incorporating the Corps' classification by reference" (Berger answer ¶ 36) and that this "[u]se of the Corps' classification of the Honk Falls Dam [as a class C dam] without independent consideration and formal assignment by the Department in accordance with [former] 6 NYCRR § 673.3 . . . was/is arbitrary and capricious and an abuse of discretion" (Berger answer ¶ 37). For the reasons discussed under the third affirmative defense, to the extent that the Berger respondents argue that the process or method used by staff to determine the hazard classification was unlawful (irrespective of whether the Honk Falls Dam met the criteria for, and was designated as, a class C dam during the times relevant to the complaint), this is properly pled as an affirmative defense.

Considering Department staff's motion for clarification first, I conclude that this affirmative defense is sufficiently pled to place Department staff on notice of the facts and legal theory being asserted by the Berger respondents. The Berger respondents assert that "[former] 6 NYCRR § 673.3 . . . provides that the Department 'may assign' a hazard classification to a dam,

together with an extensive list of criteria to be applied by the Department in determination of a dam's hazard classification" (Berger answer ¶ 23). The Berger respondents argue that this provision "requires that the Department affirmatively engage in the act of making a formal determination as to each dam with respect to which it intends that a particular hazard classification be effective" (Berger answer ¶ 24). They further argue that, "[t]here is no record of the Department's ever having affirmatively engaged in any act of making a formal determination as to Honk Falls Dam" (Berger answer ¶ 25), and, that the hazard classification for the Honk Falls Dam "was made by the Corps of Engineers." The Berger respondents argue that "without independent consideration" by staff, the use of the Corps' classification is unlawful. The facts alleged and legal theory are clear. Accordingly, staff's motion to clarify this affirmative defense is denied.

Department staff's motion to dismiss the fifth affirmative defense is granted. Department staff argues that this defense fails to provide "legal support for the contention that Staff are precluded from relying on the Army Corps[] of Engineers and DuBois & King's assignment of hazard classification for the Honk Falls Dam" (motion ¶ 28). The complaint states that the "Honk Falls Dam is currently classified as a Class C dam, based upon the Dam-Break Flood Analysis [Army Corps flood analysis] dated April 1998, by the U.S. Army Corps of Engineers New York District and Dubois & King Inc., pursuant to [former] 6 NYCRR 673.3" (complaint ¶ 9).

The Berger respondents cite to no authority, and I am aware of none, that precludes Department staff from relying on information contained in reports and studies prepared by non-Department personnel in making determinations such as that at issue here. To the extent that staff has relied on information contained in Army Corps flood analysis, the Berger respondents are free to challenge the accuracy of that information. However, irrespective of whether the Army Corps flood analysis is accurate, the fact remains that there is no legal bar to staff using the analysis in making a dam hazard classification. Accordingly, the Berger respondents' fifth affirmative defense fails as a matter of law and is dismissed.

-- Sixth Affirmative Defense

The Berger respondents' sixth affirmative defense asserts that "[t]he Department's incorporation by reference of the Corps' assignment of the 'C' hazard classification is unconstitutional, null and void. People of the State of New York v. Attco Metals Industries, Inc., 122 Misc.2d 689 (Co. Court, Suffolk County, 1984)" (Berger answer ¶ 39).

Department staff argues that this affirmative defense "fails to place Department staff on notice of any facts or legal theory upon which it is based [and, therefore] it is without merit and Staff request that it be dismissed with prejudice. In the alternative, Staff seek clarification" (motion ¶ 34).

Looking first at Department staff's request for clarification, I conclude that it must be denied. The Berger respondents' legal theory is quite clear. They assert that the holding in Attco Metals bars Department staff from incorporating by reference the hazard classification assigned to the Honk Falls Dam by the Army Corps of Engineers. The sixth affirmative defense also sets

forth the alleged facts upon which the Berger respondents rely (see Berger answer ¶¶ 35-37). Accordingly, I conclude that this affirmative defense provides sufficient notice to staff of the facts and legal theory.

Department staff also requests that the sixth affirmative defense be dismissed and argues that "[t]he case cited by Answering Respondents not only lacks legal authority, but is wholly misplaced within the context of the issues of this case" (motion ¶ 33). Department staff's first argument is without merit. There is nothing to suggest that Attco Metals "lacks legal authority." It has not been overturned and remains good law. Staff is correct, however, that the case is inapposite to these proceedings. Attco Metals considered whether New York Constitution, article IV, § 8, precludes the incorporation by reference of material that had not been filed with the Department of State into a state regulation. Article IV, § 8, provides that "[n]o rule or regulation made by any state department . . . shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws." The court held that "the standard to be applied, with regards to rule incorporation by reference, could not be more clear. Before any incorporation by reference will be constitutionally acceptable the exact content of the material that is sought to be incorporated by reference must be filed in the office of the Department of State" (Attco Metals, 122 Misc 2d at 691).

By their terms, both New York Constitution, article IV, § 8, and Attco Metals relate to the promulgation of rules and regulations, which must be filed with the Department of State and published in the State Register. The assignment of a hazard classification to a particular dam is not a rule or regulation and is not subject to these filing and publication requirements. Accordingly, the sixth affirmative defense fails as a matter of law and is dismissed.

-- Seventh Affirmative Defense

The Berger respondents' seventh affirmative defense asserts that from "no later than 1974, until about to 2006, the Department . . . never considered the owner of [the Berger respondents'] parcel to be the owner of the Honk Falls Dam" (Berger answer ¶ 40). The Berger respondents argue that this changed in 2006 and that "[t]he Department's reversal in 2006 of its long standing position was arbitrary, capricious, an abuse of discretion and null and void *per se*. 'A decision of an administrative agency which neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious[.]' Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516, 517 (1985)" (Berger answer ¶ 44).

Department staff argues that this affirmative defense "fails to place Department staff on notice of any relevant facts or legal theory upon which it is based [and, therefore] it is without merit and Staff request that it be dismissed with prejudice. In the alternative, Staff seek clarification" (motion ¶ 39).

Looking first at Department staff's request for clarification, I conclude that it must be denied. The Berger respondents' legal theory is quite clear. They assert that staff has altered its prior position without elucidating its rationale and, therefore, is acting in variance with the rule

set forth under Field. The seventh affirmative defense also sets forth the alleged facts upon which the Berger respondents rely. Accordingly, I conclude that this affirmative defense provides sufficient notice to staff of the facts and legal theory.

Department staff also requests that the seventh affirmative defense be dismissed and argues that the Berger respondents "appear to confusing a final agency decision or determination with the exercise of prosecutorial discretion" (motion ¶ 38). Staff is correct. From the outset of this enforcement proceeding, staff has maintained that the Berger respondents are owners of the Honk Falls Dam (see complaint ¶ 7). The fact that staff may not have viewed the Berger respondents or their predecessors in title as being potentially liable at some time prior to the initiation of this enforcement proceeding is of no moment. The Berger respondents cite no policy or precedent of the Department that would have precluded staff from adding, or eliminating, a potential respondent from this matter prior to commencing the instant enforcement action. Moreover, nothing in Field or its progeny would suggest that its holding is intended to extend to the exercise of prosecutorial discretion under the circumstances presented here (see e.g. Matter of LaCroix v Syracuse Exec. Air Serv., Inc., 8 NY3d 348, 357 n2 [2007] [holding that "Field, in any event, is inapposite, as this case concerns not a policy or precedent within the agency's purview but the interpretation of a statute"]). Accordingly, the Berger respondents' seventh affirmative defense fails as a matter of law and is dismissed.

-- Eighth Affirmative Defense

The Berger respondents' eighth affirmative defense asserts that "[t]he Department is not authorized to demand that the Answering Respondents break the law in any manner, including but not limited to trespassing, and any order to do so or imposition of penalties for failure to do so would be arbitrary, capricious, irrational, *ultra vires* and unconstitutional" (Berger answer ¶ 46).

The eighth affirmative defense is, in essence, a denial by the Berger respondents that they own any portion of the Honk Falls Dam. If Department staff fails to establish at hearing that the Berger respondents are or were owners of any portion of the dam, there will be no order of the Commissioner directing them to undertake remedial work on the dam or to pay penalties for failing to operate and maintain the dam in a safe condition. Conversely, if staff meets its burden to establish that the Berger respondents are or were owners of the dam, the Berger respondents may properly be held liable for violations of dam safety laws that occurred during the period that they owned the dam.[9] Accordingly, this affirmative defense is merely a denial of a fact appearing on the face of a prior pleading. Specifically, the complaint alleges that the Berger respondents are owners of the Honk Falls Dam and the Berger respondents have denied this allegation (complaint ¶ 7; Berger answer ¶ 5). Because respondents may "introduce any relevant evidence which would tend to show the falsity of the allegations of the complaint" (Richard, 253

[9] To the extent the eighth affirmative defense is directed at remedial relief rather than liability, it is not properly pled as an affirmative defense. The issue of access to property that is not owned by a respondent only becomes a concern after a respondent has been determined to be liable and remedial action is necessary on the subject property (see e.g. Matter of Ames, Commissioner's Order, at 2 (Dec. 29, 1994), (holding that "[r]equiring a landowner to provide access to third parties to remediate a violation where the landowner has committed no wrongdoing is an extraordinary remedy").

NY at 176), the eighth affirmative defense is surplusage. Accordingly, staff's motion to clarify or dismiss the eighth affirmative defense is denied.

-- Ninth Affirmative Defense

The Berger respondents' ninth affirmative defense asserts that for more than a decade "[t]he Department knew and has known upon documentary evidence that it compiled and maintained in its own files that there was no meritorious claim that could be made that Answering Respondents are or ever were owners of the Honk Falls Dam" (Berger answer ¶ 47).

The ninth affirmative defense is merely an argumentative denial of a fact appearing on the face of a prior pleading. Specifically, the complaint alleges that the Berger respondents are owners of the Honk Falls Dam and the Berger respondents deny the allegation (complaint ¶ 7; Berger answer ¶ 5). Because respondents may "introduce any relevant evidence which would tend to show the falsity of the allegations of the complaint" (Richard, 253 NY at 176), the ninth affirmative defense is surplusage. Accordingly, staff's motion to clarify or dismiss the ninth affirmative defense is denied.

CONCLUSION

For the reasons set forth herein, Department staff's motion for clarification or dismissal of the Berger respondents' affirmative defenses is denied, in part, and granted, in part.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: August 22, 2011
Albany, New York