STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 19 of the Environmental Conservation Law ("ECL") and Part 211 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

COBLESKILL STONE PRODUCTS, INC.,

Respondent.

RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTIONS

DEC Case No. R4-2010-0909-93

January 18, 2012

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Richard Ostrov and Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- John Holmes, in-house counsel, for respondent Cobleskill Stone Products, Inc.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that a blast conducted on August 31, 2010, at a quarry owned and operated by respondent Cobleskill Stone Products, Inc., violated the prohibition against air pollution contained in former section 211.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). This ruling addresses Department staff's motion to strike certain affirmative defenses pleaded by respondent, and respondent's cross motion to dismiss staff's complaint for failure to state a cause of action. This ruling also addresses respondent's motion to exclude evidence and for a protective order.

I. PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated November 9, 2010 (see Complaint, Phillips Affirmation in Support of Motion to Strike Affirmative Defenses

[Phillips Affirm], Attachment 1). In the complaint, staff alleged that respondent Cobleskill Stone Products, Inc., owns and operates a limestone mine known as Schoharie Quarry in the Town of Schoharie, Schoharie County (Complaint, at 1). Respondent operates under a mined land reclamation permit effective November 1, 2005 (Mined Land Reclamation Permit, Phillips Affirm, Attachment 4, Exh A [MLR Permit]),[1] and an air State facility permit effective June 25, 2004 (Air State Facility Permit, id., Attachment 5 [Air Permit]).

In a single cause of action, staff alleged that on August 31, 2010, respondent's contractor performed a blast at the mine; that the blast created a dust cloud; that a dust cloud qualifies as an "air contaminant" as defined at 6 NYCRR 200.1(d); and that the dust cloud travelled beyond the mine property boundaries (Complaint, at 2). Staff further alleged that the Department received several complaints from local individuals, and that photographs taken by the individuals showed the dust cloud beyond the mine property boundaries (see id.). Staff also asserted that the individuals alleged that the dust unreasonably interfered with their comfortable enjoyment of life (see id.).

Staff charged respondent with violating 6 NYCRR former 211.2[2] by creating a dust cloud from the blast at the mine that travelled beyond the mine property boundaries, thereby causing emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration so as to unreasonably interfere with the comfortable enjoyment of life of the individuals (see id.). Staff seeks a civil penalty in the amount of $18,000 (see id. at 2-3). Staff also seeks an order directing, among other things, that no further blasting be conducted at the mine until respondent's blasting plan is revised to prevent blast dust from traveling beyond the mine's boundaries.

Respondent filed an answer and affirmative defenses dated December 23, 2010 (Cobleskill Answer, Phillips Affirm, Attachment 4). In the answer, respondent denied the allegations

[1] Department staff notes that although the MLR permit expired on October 31, 2010, the permit is extended pursuant to State Administrative Procedure Act (SAPA) § 401(1) (see Complaint, at 1).

[2] Effective January 1, 2011, 6 NYCRR former 211.2 was renumbered 211.1. This ruling refers to the former numbering throughout.

that the dust cloud qualified as an air contaminant as defined at 6 NYCRR 200.1(d), and that respondent violated 6 NYCRR 211.2 (see id. at 1). Respondent denied knowledge or information sufficient to form a belief regarding the allegations that the blast created a dust cloud; that the Department received several complaints from local individuals; that photographs taken by those individuals depicted the dust cloud beyond the mine property boundaries; and that the individuals alleged that the dust unreasonably interfered with their comfortable enjoyment of life (id.). Respondent also asserted nine separate affirmative defenses (id. at 1-5).

By motion dated January 6, 2011, staff moved to strike respondent's second, fourth, fifth, sixth, eighth, and ninth affirmative defenses (Motion to Strike Affirmative Defenses, at 1). In its affirmation in support of the motion, staff also asserts that respondent's first, third, and seventh affirmative defenses are in the nature of denials, and should be treated as denials.

In response, respondent filed an affirmation in opposition to staff's motion, and cross-moved to dismiss the complaint. In support of its opposition and cross motion, respondent filed affidavits from Michael M. Moore and Paul H. Griggs, and a memorandum of law. Department staff filed an affirmation in further support of its motion to strike, and in opposition to the cross motion to dismiss. Although respondent was provided the opportunity to file a rebuttal to staff's affirmation in further support of its motion to strike, respondent declined to do so.

On March 3, 2011, respondent moved for an order excluding evidence relating to all blasts other than the one named in the complaint, and for a protective order denying the Department's disclosure demands seeking evidence concerning other blasts. Dated March 10, 2011, Department staff filed an affirmation in opposition to respondent's motion to exclude evidence and for a protective order.

II. DISCUSSION

A. Respondent's Cross Motion to Dismiss the Complaint

Respondent moves to dismiss the complaint on two grounds: (1) that Department staff failed to allege a prima facie case of public nuisance in its complaint, and (2) that the blast conducted on August 31, 2010, complied with the terms and conditions of its fugitive dust plan attached to its air permit and, thus, cannot constitute a violation of section 211.2. Neither ground is availing.

A respondent's motion to dismiss Department staff's administrative complaint for failure to state a claim is governed by the same standards that apply to motions to dismiss under CPLR 3211(a)(7) (see Matter of Estate of Ryan, Ruling of the Chief ALJ on Motion to Dismiss, Oct. 15, 2010, at 11; Matter of Town of Virgil, ALJ Ruling on Motion to Dismiss, June 25, 2008, at 4). To determine whether a complaint states a claim, the facts alleged in the complaint are accepted as true, 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 Leon v Martinez, 84 NY2d 83, 87-88 [1997]). In addition, affidavits submitted in support of a complaint may be considered to preserve inartfully pleaded, but potentially meritorious claims (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976]). The question is whether the complainant actually has a cause of action, not whether the complainant has properly stated one (see Leon, 84 NY2d at 88; Rovello, 40 NY2d at 635).

Where, as here, the movant has submitted affidavits in support of the motion, the motion may be granted upon those affidavits only if they "establish conclusively" that the complainant has no valid cause of action to pursue (see Rovello, 40 NY2d at 636; see also Godfrey v Spano, 13 NY3d 358, 374 [2009]; Lawrence v Miller, 11 NY3d 588, 595 [2008]; Matter of Town of Virgil, at 4). If the affidavits do not "establish conclusively" that no viable cause of action exists, consideration of respondent's evidence is permissible only if the motion to dismiss is converted to a motion for summary judgment (see Rovello, 40 NY2d at 636).

Here, respondent's submissions do not conclusively establish that Department staff does not have a viable cause of action against respondent. In its complaint, Department staff alleges that the blast at respondent's mine violated 6 NYCRR former 211.2. In relevant part, former 211.2 provided:

> "No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration . . . which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others."

The term "air contaminant" is defined as "[a] chemical, dust, compound fume, gas, mist, odor, smoke, vapor, pollen or any combination thereof" (6 NYCRR 200.1[d]).

Here, staff's complaint alleges sufficient facts to state a claim for a violation of former 211.2. Staff alleged that respondent, a person under the regulations (see 6 NYCRR 200.1[bi]), caused emissions of air contaminants in the form of dust to the outside atmosphere. In addition, staff alleged that the dust cloud from the blast travelled beyond the mine property boundaries and was of such quantity, characteristic, or duration so as to cause an unreasonable interference with the comfortable enjoyment of life by several local individuals.

Respondent argues that staff fails to allege conduct that caused damage to the public in the exercise of rights common to all and, thus, fails to allege a public nuisance. Although section 211.2 incorporates the common law public nuisance standard (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ, Dec. 15, 2010, at 6; Matter of Delford Indus., Inc., ALJ Hearing Report, at 44, concurred in by Commissioner Decision and Order, April 13, 1989), the regulation implements a legislative enactment separate and independent from the common law claim. Section 211.2 implements the statutory definition of air pollution contained in ECL 19-0107(3), which provides that

> "`Air pollution' means the presence in the outdoor atmosphere of one or more air contaminants in quantities, of characteristics and of a duration which are injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property throughout the state or throughout such areas of the state as shall be affected thereby"

(see also ECL 19-0301[1][a] [authorizing the Department to adopt regulations to prohibit air pollution]). Thus, the Legislature has defined the relevant common right for purposes of violations of ECL article 19 and its implementing regulation -- that is, an outdoor atmosphere free of the presence of air contaminants that constitute a nuisance. In addition, the statute provides that violations of ECL article 19 are separate from and in addition to any claims the State might have, such as a common law public nuisance claim (see ECL 19-0703; State v Town of Huntington, 67 Misc 2d 875 [Sup Ct, Suffolk County], affd on the opn below 37 AD2d 858 [2d Dept 1971]). Here, Department staff has sufficiently alleged the elements of air pollution under the statute and regulation. Staff is not obligated to plead any further injury to a common right to state a violation of section 211.2.

Respondent also argues that Department staff failed to alleged conduct that is recurring or of such a magnitude as to constitute an infringement of the public's comfortable enjoyment of life. Respondent asserts that the complaints received by the Department are actually the result of a concerted effort by members of a citizen group called Save Our Schoharie (SOS) who opposes respondent in an unrelated permit modification proceeding (see Matter of Cobleskill Stone Products, Inc., DEC Project No. 4-4342-00001/000019, ALJ Ruling on Issues and Party Status, July 23, 2008, appeal pending) and wishes to see respondent out of business. These arguments are unpersuasive.

Although public nuisances are often of a recurring nature, respondent cites no authority for the proposition that a single event cannot constitute an unreasonable interference with the comfortable enjoyment of life, provided the interference is otherwise sufficiently significant (see Restatement of Law [Second] of Torts § 827, Comment c). Moreover, staff alleged that several members of the public complained that respondent's blast caused an unreasonable interference with their comfortable enjoyment of life. Accepting these allegations as true, as I am

required to do on a motion to dismiss, staff has sufficiently pleaded the elements of a violation of section 211.2. Whether the conduct complained of constitutes an unreasonable interference with the public's comfortable enjoyment of life is a fact question that staff will have the burden of proving at hearing (see New York Trap Rock Corp. v Town of Clarkstown, 299 NY 77, 80-81 [1949]). Respondent's assertions concerning the nature and motivation behind the complaints, at most, raises credibility issues that would need to be examined at hearing. They do not, however, provide a basis at this time for dismissal of staff's complaint.

Finally, respondent argues that the blast was conducted in compliance with the requirements of its approved fugitive dust plan and, therefore, was authorized under its air permit. Accordingly, respondent contends that the blast cannot constitute a violation of section 211.2. However, respondent's air permit contains a condition that expressly prohibits air pollution in violation of section 211.2 (see Air Permit, Condition 47, at 38). Nothing in respondent's fugitive dust plan otherwise overrides that condition. Thus, any violation of section 211.2 resulting from blasting, if proven, is not authorized by respondent's air permit.

Respondent's reliance on People v Allied Health Care Products, Inc. (81 NY2d 27 [1993]) is unavailing. Allied Health Care concerned a criminal prosecution and involved an exemption from certain criminal liability for the operation of an air contamination source during the pendency of a permit application (see id. at 34 [citing ECL 71-2720(2)]). In this case, Department staff has not charged respondent with criminal violations. Moreover, respondent does not cite any statutory exemption from civil liability, nor does the case involve operations allegedly taking place during the pendency of any permit application.

Respondent also relies on language in the Allied Health Care decision in which the Court took into account communications from the Department to the defendant in that case concerning what was approved during the pendency of the defendant's permit application (see id. at 33). In this case, the Department's communications about what was approved are clear and unambiguous. As noted above, the air permit expressly prohibits air pollution in violation of section 211.2 and

nothing in respondent's fugitive dust plan contravenes that clear directive.

In sum, respondent has failed to establish a basis for dismissing the Department's complaint in this matter. Accordingly, respondent's cross motion to dismiss should be denied.

B. Department Staff's Motion To Strike Affirmative Defenses

Department staff moves to strike respondent's second, fourth, fifth, sixth, eighth, and ninth affirmative defenses (Motion to Strike Affirmative Defenses, at 1). In its affirmation in support of the motion, staff also asserts that respondent's first, third, and seventh affirmative defenses are in the nature of denials, and should be treated as denials.

Respondent's first, seventh, and a portion of its third affirmative defenses are all variations on its assertion that Department staff fails to state a claim. Given the resolution of respondent's cross motion to dismiss above, these three defenses are rendered academic. The remainder of respondent's third defense, which asserts it is in compliance with all regulatory requirements, is in the nature of a denial and, therefore, not subject to dismissal.

With respect to the remaining affirmative defenses, a motion to strike affirmative defenses is governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see Matter of Original Italian Pizza, LLC, at 3; Matter of Truisi, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010, at 10-11). 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 as a matter of law (see Original Italian Pizza, at 3; Truisi, at 10). A threshold inquiry is whether the defense pleaded is, in fact, a true affirmative defense (see Original Italian Pizza, at 3; Truisi, at 4-5). A motion to strike an affirmative defense does not lie where the defense is actually a denial pleaded as a defense (see Original Italian Pizza, at 3; Truisi, at 11).

1. Second Affirmative Defense -- Statute of Limitations

In its second affirmative defense, respondent asserts that the present proceeding is barred by the applicable statute of limitations. In its affirmation in opposition to staff's motion, respondent asserts that the applicable statute of limitations period is the three-year period provided for in CPLR 214-c(2), which respondent claims is applicable to public nuisance claims.

Respondent's defense fails as a matter of law for several reasons. First, the statute of limitations periods provided for under the CPLR are not applicable to administrative enforcement proceedings (see Matter of Stasack, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010, at 9; Matter of Gaul, Rulings of the ALJ, Jan. 12, 2009, at 3-4; see also CPLR 101; CPLR 105[d]). Second, Department staff's claim is based upon the alleged violation of a regulation, not a public nuisance claim. Finally, even assuming a three-year limitations period applied, which it does not, the complaint in this case was served in November 2010 for a violation allegedly occurring in August 2010, well within the three-year period. Thus, respondent second affirmative defense fails as a matter of law.

2. Fourth Affirmative Defense -- Emission Source

In its fourth affirmative defense, respondent alleges that dust from blasting is not an emission from a "point source" and is not subject to regulation under chapter III of 6 NYCRR. In its affirmation in opposition, respondent corrects "point source" to "emission source" (see 6 NYCRR 200.1[f]).

It is not clear whether respondent's fourth affirmative defense is a variation of its claim that staff failed to state a cause of action, or whether respondent is asserting a subject matter jurisdiction defense. In any event, the defense fails as a matter of law. Former section 211.2 does not include "emission source" as one of its elements. At most, it requires proof of "emissions," which is defined as "[t]he release of any air contaminant into the outdoor atmosphere" (6 NYCRR 200.1[s]). Nothing in section 211.2 limits its applicability to emissions from emission sources or emission

points (see Matter of Kalmanson, Order of the Commissioner, July 27, 1993).

In addition, nothing in ECL article 19, upon which 6 NYCRR chapter III is based, limits its applicability only to air pollution from emission sources or points. Both the regulatory and statutory definitions of air pollution are broad enough to encompass emissions from any source, and are not limited to emissions from an apparatus, contrivance, or machine as asserted by respondent (see ECL 19-0107[3]; ECL 19-0301[1][a]). Thus, respondent fails to state a valid defense.

3. Fifth Affirmative Defense -- Void for Vagueness

In its fifth affirmative defense, respondent argues that section 211.2 is unconstitutionally void for vagueness. Respondent recognizes that I recently rejected a vagueness challenge to section 211.2 (see Original Italian Pizza, at 5-8). Nonetheless, respondent contends that under the facts as alleged here, the regulation is unconstitutionally vague. Respondent draws a contrast to Original Italian Pizza, which it characterizes as involving the continuous interference with a neighborhood's enjoyment of life over a considerable period of time. This case, respondent asserts, involves a single incident.

As noted by Department staff, section 211.2 has withstood void for vagueness challenges, both in administrative proceedings and civil judicial proceedings (see id.; Alberti v Eastman Kodak Co., 204 AD2d 1022, 1022-1023 [4th Dept 1994]; Matter of Delford Indus., Inc. v New York State Dept. of Envtl. Conservation, 126 Misc 2d 355 [Sup Ct, Orange County 1984]). Nothing about the facts alleged here compel a contrary result. Although the regulation is written in broad terms, it is sufficiently precise to provide notice to a person of ordinary intelligence of the conduct forbidden by the regulation (see People v Stuart, 100 NY2d 412, 420 [2003]). The phrase "emission of air contaminants to the outside atmosphere" is readily understandable when measured by common understanding and practice (see People v Shack, 86 NY2d 529, 538 [1995]). "Air contaminants" is separately defined to specifically include "dust," among other things (see 6 NYCRR 200.1[d]). Section 211.2 itself includes "particulates" in its non-exclusive list of prohibited emissions. A person of ordinary intelligence

would readily understand that a blast causing the release of a dust cloud into the surrounding area and resulting in complaints about the interference with the comfortable enjoyment of life by several individuals is forbidden by the regulation.

In addition, as previously concluded, the regulation contains an objective standard against which the alleged conduct is measured (see Original Italian Pizza, at 7-8; Stuart, 100 NY2d at 420). Department staff will have the burden of proving that the alleged dust cloud "unreasonably interfer[ed] with the comfortable enjoyment of life," an objective standard borrowed from the common law (see Original Italian Pizza, at 7-8; Stuart, 100 NY2d at 427-428; People v Bakolas, 59 NY2d 51, 53-54 [1983]; Clements v Village of Morristown, 298 AD2d 777 [3d Dept 2002]). Thus, as applied to the facts alleged in this case, section 211.2 is not void for vagueness. Accordingly, respondent's fifth affirmative defense should be dismissed.

4. Sixth Affirmative Defense -- MLRL Preemption

In its sixth affirmative defense, respondent argues that blasting is a mining operation governed solely by the Mined Land Reclamation Law (see ECL art 23, title 27 [MLRL]). Citing ECL 23-2703(2), respondent argues that the MLRL supersedes section 211.2 because that section is a State law related to the extractive mining industry. Thus, respondent asserts that section 211.2 cannot be applied to its blasting operations.

Although a preemption claim is an affirmative defense (see Adsit v Quantum Chem. Corp., 199 AD2d 899, 899 [3d Dept 1993]), respondent's sixth affirmative defense fails as a matter of law. ECL 23-2703(2) provides that the MLRL "shall supersede all other state and local laws relating to the extractive mining industry." The MLRL's supersession provision is narrow and only preempts State and local laws that regulate the actual operation and process of mining (see Matter of Sour Mountain Realty, Inc. v New York State Dept. of Envtl. Conservation, 260 AD2d 920, 923 [3d Dept], lv denied 93 NY2d 815 [1999]; Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 130-133 [1987]; Matter of Hunt Bros., Inc. v Glennon, 81 NY2d 906, 909 [1993]). State laws of general applicability that have only an incidental impact on mining are not preempted (see Sour Mountain, 260 AD2d at 923).

Here, section 211.2's prohibition against air pollution and its authorizing statute, ECL article 19, are State laws of general applicability that only incidentally impact mining operations. Accordingly, section 211.2 is not preempted by the MLRL, and respondent's sixth affirmative defense should be dismissed.

5. Eighth Affirmative Defense -- Laches

In its eighth affirmative defense, respondent argues that it has performed blasting operations in the virtually the same manner for the past 25 years. Thus, respondent argues that the Department's claim in this case is barred by laches. As Department staff correctly points out, the equitable doctrine of laches is not available as a defense against a State agency acting in its governmental capacity to enforce a public right (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]; Stasack, at 8-9). Accordingly, the eighth affirmative defense should be dismissed.

Respondent's reliance on Marlowe v Elmwood, Inc. (34 AD3d 970 [3d Dept 2006], lv denied 8 NY3d 804 [2007]) is misplaced. The plaintiff in that case was not a State agency acting in its governmental capacity. Thus, Marlowe is inapposite.

6. Ninth Affirmative Defense -- Takings Claim

In its ninth affirmative defense, respondent asserts that the remedy sought by Department staff would result in the unconstitutional taking of respondent's business and property without just compensation. Respondent alleges that it would be virtually impossible to control dust from blasting under all circumstances. Respondent asserts that if staff's remedy is awarded, it will be forced to close the mine, thereby depriving it of its business without compensation.

Respondent's ninth affirmative defense alleges an unconstitutional taking defense. Generally, the doctrine of exhaustion of administrative remedies requires respondents to raise most constitutional issues at the administrative level (see Original Italian Pizza, at 3-4 [and cases cited therein]).

However, the courts have recognized an exception from this general rule for takings claims (see Matter of Haines v Flacke, 104 AD2d 26, 32-33 [2d Dept 1984]). The courts require that takings claims be presented directly to the courts and not to the agency (see id.). Thus, to the extent the ninth affirmative defense raises a takings defense, it should be dismissed.

Notwithstanding the above, as Department staff concedes, if liability is proven, staff with have the burden of establishing that the remedy it seeks is appropriate and reasonable. Respondent will have the opportunity to litigate the practicality of any remedy sought by staff.

In sum, Department staff's motion to strike the second, fourth, fifth, sixth, eighth, and ninth affirmative defenses should be granted to the extent discussed above.

C. Respondent's Motion To Exclude Evidence and for a Protective Order

Respondent moves for an order (1) excluding any and all evidence, references to evidence, testimony, or argument to any event relating to the operations of its Schoharie quarry other than the blast conducted there on August 31, 2010, as alleged in the complaint, and (2) granting it an order of protection under CPLR 3103, denying Department staff's disclosure demands as set forth in staff's notice of discovery, paragraphs 4(a) and (e). In paragraph 4(a), Department staff seeks "[a]ll documents relating to blasting and dust complaints by the public to Respondent regarding Respondent's operation of its Schoharie, NY quarry and all replies made by Respondent thereto" (Notice of Discovery [dated 1-19-11], Holmes Affirmation [dated 3-3-11], Exh A). In paragraph 4(e), staff seeks "[a]ll photographs and videos pertaining to the August 31, 2010 blast and all previous blasts for the past three years occurring at Respondent's Schoharie, NY quarry" (id.).

Respondent argues that the evidence being sought in staff's discovery demand is irrelevant to the August 2010 blast and that staff's demands constitute an improper "fishing expedition" to establish a "course of conduct" complaint against respondent (Holmes Affirmation, ¶5). Respondent also argues that allowing evidence of prior blasts at the mine would make it impossible to effectively prepare for the hearing.

In response, Department staff argues that respondent has placed prior blasts at issue by asserting in its answer and other submissions that blasting at the Schoharie quarry has been conducted in substantially the same fashion for decades. Staff also asserts that evidence of prior blasts may provide evidence that blasting can be conducted without causing clouds of dust that leave the site, and reveal the conditions under which off-site impacts occur. Staff also asserts that the evidence sought is relevant to whether respondent was aware of a problem with off-site impacts.

With respect to Department staff's discovery demand, the scope of discovery under the Department's Uniform Enforcement Hearing Procedures is as broad as that provided under article 31 of the CPLR (see 6 NYCRR 622.7[a]; Matter of Berger, ALJ Ruling on Disclosure, Feb. 10, 2010, at 3). Unless it is protected from disclosure pursuant to New York law, any matter that is material and necessary in the prosecution or defense of a proceeding must be disclosed (see CPLR 3101; 6 NYCRR 622.11[a][3]). The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial . . . The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]). Disclosure is not limited to matters considered "evidence in chief" but also includes "all relevant information calculated to lead to relevant evidence" (see West v Aetna Cas. and Sur. Co., 49 Misc 2d 28, 29 [Sup Ct, Onondaga County 1965], mod on other grounds 28 AD2d 745 [3d Dept 1967]).

A party against whom discovery is demanded may move for a protective order, in general conformance with CPLR 3103, to deny, limit, condition or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrasment, disadvantage or other prejudice (see 6 NYCRR 622.7[c][1]). Respondent has failed to carry its burden on this motion (see 6 NYCRR 622.11[b][3]).

Respondent is correct that evidence of prior, similar acts is inadmissible to prove that a party committed a similar act on a later, unrelated occasion (see, e.g., Coopersmith v Gold, 89 NY2d 957, 958-959 [1997]). However, I also agree with Department staff that respondent placed the prior blasts at its quarry into controversy in this proceeding. In denying that the

August 2010 blast violated section 211.2, respondent has affirmatively asserted in its answer and subsequent submissions that that blast was substantially similar to other blasts at the mine that did not result in any complaints. Department staff is entitled to discovery to ascertain the factual basis for respondent's assertions raised in defense. In addition, a comparison of the characteristics and conditions surrounding the August 2010 blast to other blasts at the facility might lead to relevant evidence concerning whether the August 2010 blast was so quantitatively and qualitatively different as to constitute a nuisance.

In addition, an issue relevant to the nuisance determination is whether impacts from an alleged nuisance are reasonably avoidable (see Matter of Original Italian Pizza, Inc., Ruling of the Chief ALJ on Motion for Order Without Hearing, October 17, 2011, at 6; Matter of Town of Huntington, Commissioner Decision and Order, May 17, 1989, at 2; Matter of Delford Indus., Inc., Commissioner Decision and Order, April 13, 1989, at 3; McCarty v Natural Carbonic Gas Co., 189 NY 40, 50 [1907]). Evidence surrounding other blasts at the facility that did not result in complaints might lead to evidence relevant to whether the alleged impacts from the August 2010 blast were reasonably avoidable.

Accordingly, respondent has demonstrated no prejudice in allowing staff disclosure of evidence concerning prior blasts. In addition, staff's demand is not unduly burdensome. Respondent has indicated that only a limited number of blasts were conducted in the three years prior to the August 2010 blast (see Moore Affidavit [1-26-11], ¶ 9). Respondent also indicates that it is not aware of any blasting complaints prior to January 2005 (see Griggs Affidavit [1-26-11], ¶ 30). Thus, responding to staff's demands should not result in a burden to respondent. Accordingly, respondent's motion for a protective order should be denied.

With respect to respondent's motion to exclude evidence of prior blasts, the motion should be denied without prejudice to renew at hearing. For the reasons stated above, evidence of prior blasts may not be categorically rejected at this time. This is not to say, however, that other grounds for exclusion may be available when any evidence of prior blasts is presented at hearing. Respondent may raise any objections it has at the time evidence of prior blasts is offered at hearing.

III. RULING

Motion by Department staff to strike respondent's second, fourth, fifth, sixth, eighth, and ninth affirmative defenses is granted. Respondent's cross motion to dismiss the complaint is denied.

Motion by respondent, insofar as it seeks an order excluding any and all evidence, references to evidence, testimony, or argument to any event relating to the operations of its Schoharie quarry other than the blast conducted there on August 31, 2010, as alleged in the complaint, is denied without prejudice to renew at hearing. Motion by respondent, insofar as it seeks an order granting it an order of protection under CPLR 3103, denying Department staff's disclosure demands as set forth in staff's notice of discovery, paragraphs 4(a) and (e), is denied.

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

Dated: January 18, 2012
Albany, New York