STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 612 and 613 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

CROW PROPERTIES, L.L.C.,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION AND CROSS MOTION

DEC VISTA No. R6-20090827-49

December 20, 2010

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Nels G. Magnuson of counsel), for staff of the Department of Environmental Conservation

-- Norman P. Deep, for respondent Crow Properties, L.L.C.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION AND CROSS MOTION

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges multiple violations of the regulations governing petroleum bulk storage (PBS) facilities at a facility owned by respondent Crow Properties, L.L.C., located in the Town of Kirkland, Oneida County. Department staff moves to strike or clarify affirmative defenses. Respondent cross-moves to file an amended answer. For the reasons that follow, staff's motion is denied in part and otherwise granted. Respondent's cross motion is granted.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of notice of hearing and complaint dated February 2, 2010. In the complaint, staff

alleges that on August 11, 2005, respondent Crow Properties, L.L.C., purchased a PBS facility, formerly known as Tom's Small Engine & Gas, located at 7712 NYS Route 5, Town of Kirkland, Oneida County, New York. The facility allegedly consisted of three underground PBS tanks (USTs) (tank nos. 1, 2, and 3), and two aboveground PBS tanks (tank nos. 4 and 5), with a combined capacity of 10,550 gallons. Staff further alleges that on October 28, 2009, respondent removed all petroleum storage tanks from the facility.

In the complaint, Department staff charged seven causes of action:

(1) that respondent violated 6 NYCRR 612.2(b) by failing to re-register the PBS facility within 30 days after transfer of ownership to respondent;

(2) that respondent violated 6 NYCRR 612.2(e) by failing to display a current and valid PBS registration certificate at the facility;

(3) that respondent violated 6 NYCRR 613.9(b) by failing to properly close the facility consistent with regulatory requirements governing facilities that are permanently out of service;

(4) that respondent violated 6 NYCRR 613.3(d) by failing to maintain gauges and other spill prevention equipment for the USTs at the facility;

(5) that respondent violated 6 NYCRR 613.5(b)(3) by failing to monitor at least weekly for traces of petroleum from the USTs and associated piping at the facility;

(6) that respondent violated 6 NYCRR 613.4(a)(1) by failing to maintain daily inventory records for each UST at the facility; and

(7) that respondent violated 6 NYCRR 613.6(a) and (c) by failing to perform monthly inspections and maintain monthly inspection reports for a period of at least ten years for the aboveground PBS tanks at the facility.

As a consequence of the violations alleged, the complaint seeks a total civil penalty of $20,700, with no more

than one half suspended to ensure compliance with any order that might be issued. The complaint also seeks an order directing respondent to provide the Department with a report regarding the removal of the PBS tanks at the facility and the permanent closure of the facility.

In response, respondent filed an answer dated March 25, 2010. In the answer, respondent denied the allegations of the complaint, and asserted unnumbered affirmative defenses and two counterclaims.

After settlement negotiations mediated by Administrative Law Judge (ALJ) Molly T. McBride failed to produce an agreement, Department staff filed a motion dated April 30, 2010, to strike or clarify affirmative defenses. In papers dated May 19, 2010, respondent opposed the motion and cross-moved for permission to amend its answer. Attached to the cross motion, respondent submitted a proposed amended answer. In the proposed amended answer, respondent added allegations supporting its affirmative defenses, denominated the affirmative defenses as "first" through "fourth," and added a "sixth" affirmative defense of forfeiture.[1] Respondent asserted that the proposed amended answer cured any purported deficiency or ambiguity in its original pleading, urged that its motion to amend be granted, and argued that staff's motion to strike or clarify be denied.

Department staff opposed the cross motion in papers dated May 21, 2010. Staff asserted that the proposed amended answer does not cure the deficiencies in the affirmative defenses pleaded in the original answer, and that the affirmative defense of forfeiture lacked merit as a matter of law. Accordingly, staff seeks dismissal of all affirmative defenses or, in the alternative, clarification.

Meanwhile, Department staff filed a motion for order without hearing dated May 14, 2010. On the motion, staff seeks summary judgment on its first cause of action pleaded in the February 2, 2010, complaint and an order assessing a civil penalty in the amount of $5,000. Respondent opposed the motion in papers dated June 26, 2010. The matter was thereafter assigned to the undersigned as presiding ALJ.

[1] No "fifth" affirmative defense is pleaded in the proposed amended answer.

This ruling addresses Department staff's motion to strike or clarify affirmative defenses, and respondent's cross motion to amend the answer. Department staff's motion for order without hearing will be addressed in a separate ruling.

DISCUSSION

I. Cross Motion to Amend the Answer

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), a party may amend its pleading once without permission at any time before the period for responding expires (see 6 NYCRR 622.5[a]). Thereafter, consistent with the CPLR, a party may amend its pleading at any time prior to the final decision of the Commissioner by permission of the ALJ or the Commissioner, and absent prejudice to the ability of any other party to respond (see 6 NYCRR 622.5[b]).

Pursuant to the CPLR, a party may amend its pleading at any time by leave of court or by stipulation of all parties (see CPLR 3025[b]). Leave to amend shall be freely given upon such terms as may be just, including the granting of continuances (see id.; see also Matter of L-S Aero Marine Inc., Chief ALJ Ruling on Motion to Amend the Complaint, Dec. 17, 2009, at 2; Matter of Satur Farms, LLC, ALJ Ruling on Motion to Amend Complaint, June 10, 2008, at 8).

In this case, Department staff has had the opportunity to respond to the proposed amended answer, and makes no claim of prejudice if the cross motion is granted. Instead, Department staff challenges the proposed amended answer on the merits of the asserted affirmative defenses. Accordingly, respondent's cross motion for leave to file an amended answer is granted, and the proposed amended answer is accepted as filed.

II. Motion to Strike or Clarify Affirmative Defenses

In a recent ruling, the standards applicable to motions to strike or clarify affirmative defenses are discussed in detail (see Matter of Truisi, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010). In general, motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the sufficiency of the

notice provided by the pleading (see id. at 4, 6-7). They are not an opportunity for staff to obtain, in effect, a bill of particulars, which are prohibited by Part 622 (see id. at 7 n 2; 6 NYCRR 622.7[b][3]). If an affirmative defense provides staff with sufficient notice of the nature and basis of the defense, staff must use available discovery devices to obtain any further detail concerning the defense (see id. at 6-7; see also Matter of Bath Petroleum Storage, Inc., ALJ Ruling on Motion to Clarify Affirmative Defenses, Jan. 27, 2005, at 10, 12).

Motions to dismiss affirmative defenses, on the other hand, are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see Matter of Truisi, at 10-11). In general, motions to dismiss affirmative defenses may challenge the pleading facially -- that is, on the ground that it fails to state a defense -- or may seek to establish, with supporting evidentiary material, that a defense lacks merit as a matter of law (see id. at 10).

The threshold inquiry on a motion to dismiss or clarify affirmative defenses is whether the defense pleaded is, in fact, in the nature of an affirmative defense (see id. at 4-5). Where the defense is actually a denial pleaded as a defense, a motion to dismiss or clarify affirmative defenses does not lie (see id. at 5, 11; see also Rochester v Chiarella, 65 NY2d 92, 101 [1985] [motion to dismiss not a vehicle to strike a denial]).

Assuming the defense is in the nature of an affirmative defense, a pleading challenged on the ground that it fails to state a defense is liberally construed (see id. at 10 [citing Leon v Martinez, 84 NY2d 83, 87 (1994); Butler v Catinella, 58 AD3d 145, 148 (2d Dept 2008)]). The facts alleged are accepted as true and the pleader is afforded every possible inference (see id.; Matter of ExxonMobil, ALJ Ruling at 3). A motion to dismiss will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense (see Truisi, at 10 [citing Leon, 84 NY2d at 87-88; Foley v D'Agostino, 21 AD2d 60, 64-65 (1st Dept 1964)]). If any doubt exists as to the availability of a defense, it should not be dismissed (see Butler, 58 AD3d at 148).

Pure legal conclusions are not presumed to be true, however (see Truisi, at 10-11 [citing Bentivegna v Meenan Oil Co., 126 AD2d 506, 508 (2d Dept 1987)]). Thus, defenses that

merely plead conclusions of law without supporting facts are insufficient to state a defense (see id. [citing Bentivegna, 126 AD2d at 508; Glenesk v Guidance Realty Corp., 36 AD2d 852, 853 (2d Dept 1971)]; see also 6 NYCRR 622.4[c] [requiring respondent to explicitly assert any affirmative defense together with a statement of the facts which constitute the grounds of each defense asserted]).

Applying these principles, I conclude that the affirmative defenses pleaded by respondent are either sufficient to place staff on notice of the nature and bases for the defenses, or are denials denominated as defenses. Thus, staff's motion to clarify defenses should be denied. Accordingly, I turn to staff's motion to dismiss defenses.

A. First and Second Affirmative Defenses

In its first affirmative defense, respondent claims that the Department violated its right to due process under the 14th Amendment to the United States Constitution. In its second affirmative defense, respondent claims that its due process rights under article I, § 6 of the New York Constitution are similarly being violated. The bases for the alleged violations are that the Department failed to provide sufficient notice of the regulations applicable to respondent's facility. Specifically, respondent alleges that the Department failed to notify respondent of any requirements pertaining to the subject facility, and failed to post any signs or notices advising of the Department's involvement with the facility or of the need to contact the Department with respect to the facility. Respondent also asserts that the Department failed to provide any notice or advisement to respondent with respect to the facility, and failed to provide any advisement to respondent of a rule or regulation concerning the facility. Respondent further asserts that the Department failed to record a public record in the Office of the Oneida County Clerk informing the public of any rule, regulation, or requirement pertaining to the facility.

Respondent fails to state a defense based upon the Department's alleged failure to provide the notice specified. In administrative enforcement proceedings, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (Mullane

v Central Hanover Bank & Trust Co., 339 US 306, 314 [1950]; see also Matter of Block v Ambach, 73 NY2d 323, 332-334 [1989]). The Department is required by statute and regulation to provide reasonable notice of hearing, including a statement of the legal authority and jurisdiction under which the hearing is to be held, a reference to the particular sections of the statutes and regulations involved, and a short and plain statement of the matters asserted, among other things (see SAPA § 301[2]; 6 NYCRR 622.3[a][1]). Department staff's February 2, 2010, complaint complies with these statutory and regulatory requirements, and is sufficient to satisfy due process concerns.

To the extent that respondent asserts that the Department is required to post signs or otherwise provide direct notice to respondent and the public of the regulatory requirements relevant to PBS facilities, due process does not require the additional notice asserted. The Department's duly adopted regulations have the force and effect of law (see Molina v Games Mgmt. Servs., Inc., 58 NY2d 523, 529 [1983]; Chrysler Corp. v Brown, 441 US 281, 295-296 [1979]). Thus, respondent and the public are charged with knowledge of the regulations' requirements (see People v Marrero, 69 NY2d 382, 385 [1987] [ignorance of the law is no defense]; Matter of Hricik v McMahon, 247 AD2d 935, 935 [4th Dept 1998]; Stauber v Antelo, 163 AD2d 246, 249 [1st Dept 1990]). Respondent cites no specific statutory requirement, or any principle of due process, that imposes upon the Department the additional notice requirements asserted by respondent.

Respondent also asserts that this administrative adjudicatory forum does not comport with the Due Process Clauses of the New York and United States Constitutions because it does not afford a full or meaningful opportunity to be heard. These adjudicatory proceedings are being conducted pursuant to Part 622, which provides the procedural safeguards required by due process. In addition to the notice requirements discussed above, those safeguards include a hearing before a neutral hearing officer, a determination limited to the record, the right to respond to the Department's charges and the opportunity to offer evidence in rebuttal or explanation and, if an evidentiary hearing is convened, the right to cross-examine the Department's witness and to present witnesses and evidence in response (see Matter of 1616 Second Ave. Rest., Inc. v New York State Liq. Auth., 75 NY2d 158, 161 [1990]; Matter of Simpson v Wolansky, 38 NY2d 391, 395-396 [1975]). Respondent's amended

answer includes no factual allegations supporting its conclusory assertion that it has been denied a meaningful opportunity to be heard in contravention of the due process requirements applicable to administrative adjudications.

In sum, respondent has failed to state a valid due process defense under either the United States or New York Constitution. Accordingly, those portions of the first and second affirmative defenses that alleged that Department staff failed to provide adequate notice of regulatory requirements relevant to the facility at issue and a meaningful opportunity to be heard should be dismissed.

As part of its first affirmative defense, respondent also asserts that the proposed penalty is disproportionate to the offenses alleged against respondent. Department staff carries the burden of proof concerning the appropriate penalty, if any, to be awarded in this proceeding (see 6 NYCRR 622.11[b][2]). Thus, this portion of the defense is not in the nature of an affirmative defense but, rather, is a denial. Accordingly, that portion of the defense is not subject to clarification or dismissal.

B. Third Affirmative Defense

In its third affirmative defense, respondent alleges that Department staff's claims are barred in whole or in part by the applicable statute of limitations. Department staff correctly points that no statute of limitations are applicable to staff's claims, and respondent fails to identify any applicable statute in response. Thus, respondent has failed to state a valid statute of limitations defense.

C. Fourth Affirmative Defense

In its fourth affirmative defense, respondent alleges that Department staff's claims are barred by the doctrine of laches. However, the common law doctrine of laches is not applicable in administrative proceedings against a State agency acting in a governmental capacity (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]). To the extent respondent is viewed as raising a defense based upon administrative delay, respondent's

answer does not contain any factual allegations asserting a relevant delay, an injury to respondent's private interests, and any significant and irreparable prejudice to respondent's defense of the proceeding resulting from delay (see id. at 177-178, 180-181; see also Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11; Truisi, at 11). Thus, respondent's fourth affirmative defense should be dismissed.

D. Sixth Affirmative Defense[2]

In its sixth affirmative defense, respondent alleges that Department staff's claims "may be barred in whole or part by the doctrine of forfeiture" (Amended Answer, at 6). As staff again aptly notes, this defense has no basis in law. Respondent fails to explain how the doctrine of forfeiture is relevant to an administrative enforcement proceeding and fails to allege any facts supporting the defense. Accordingly, respondent's sixth affirmative defense should be dismissed.

RULING

Cross motion by respondent Crow Properties, L.L.C., to file an amended answer is granted, and the proposed amended answer is accepted as filed.

Motion by Department staff for clarification of affirmative defenses is denied.

[2] As noted above, no "fifth" affirmative defense is pleaded in the amended answer.

Motion by Department staff, insofar as it seeks to strike that portion of the first affirmative defense as alleged that the penalty sought is disproportionate to the offense, is denied; motion to strike the affirmative defenses pleaded in the amended answer is otherwise granted.

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

Dated: December 20, 2010
Albany, New York