STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law ("ECL") and Title 6, Part 608 et seq. of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ALAN GROUT,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY JUDGMENT

DEC File No. R4-2009-1120-176

November 23, 2015

Appearances of Counsel:

-- Thomas S. Berkman, Acting Deputy Commissioner and General Counsel (Karen S. Lavery of counsel), for staff of the Department of Environmental Conservation

-- Tooher & Barone, LLP (Meave M. Tooher of counsel), for respondent Alan Grout

In this administrative enforcement proceeding, respondent Alan Grout moves for summary judgment on his affirmative defenses of equitable estoppel and administrative delay. For the reasons that follow, respondent's motion is denied.

I. PROCEEDINGS

A detailed description of the procedural posture of this matter is provided in the December 12, 2014 Ruling on Motions and will not be repeated here. A summary of the proceedings relevant to this motion is as follows.

This matter concerns agricultural property owned by respondent on Fordham Road, Valatie, Town of Kinderhook, Columbia County, and the development of an agricultural pond on that property. In its June 25, 2014 complaint, as corrected by the December 12, 2014 ruling, staff of the Department of Environmental Conservation (Department) alleges that respondent

violated 6 NYCRR 608.2(a) by burying a protected stream known as Stuyvesant Brook (stream identification number H-209-1), a Class C(T) stream, within a 500-foot pipe without a permit. Staff seeks a civil penalty in the amount of $1,200, and the submission of a plan to restore the stream to its natural condition.

In his July 7, 2014 answer, respondent pleaded four affirmative defenses. In his second affirmative defense, respondent pleaded laches and an administrative delay defense under Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169 [1985], cert denied 476 US 115 [1986]). In his third affirmative defense, respondent pleaded an equitable estoppel defense.

By motion dated July 15, 2014, Department staff moved, among other relief, to strike the affirmative defenses on the ground that the defenses were not stated. In a December 12, 2014 ruling, I granted staff's motion in part, struck the first affirmative defense (inapplicability of permit requirement) and that portion of respondent's second affirmative defense as pleaded a laches defense, and otherwise denied the motion (see Matter of Grout, Ruling of the Chief Administrative Law Judge [ALJ] on Motions, Dec. 12, 2014, at 16). By ruling dated August 14, 2015, I denied Department staff's motion for leave to reargue that portion of the December 12, 2014 ruling as denied the motion to dismiss the third affirmative defense of equitable estoppel (see Matter of Grout, Ruling of the Chief ALJ on Motion for Leave to Reargue, Aug. 14, 2015).

On September 28, 2015, I issued a notice of enforcement hearing and scheduling order setting the matter down for hearing on December 2, 2015. I also directed that any pre-hearing motions be filed and served by close of business, October 26, 2015.

On October 26, 2015, respondent filed and served a notice of motion for summary judgment pursuant to 6 NYCRR 622.6(c). In support of the motion, respondent filed an affirmation of Meave M. Tooher in support of respondent's motion, an affidavit of Alan J. Grout, and a memorandum of law. In his motion, respondent seeks summary judgment on his defenses of equitable estoppel and administrative delay, and dismissal of the complaint or, in the alternative, dismissal of those

portions of the requested relief as seeks submission of a plan and restoration of the stream to its natural condition.

Under cover letter dated November 12, 2015, Department staff filed and served an affirmation of Karen Lavery, with attached affidavits of Nancy Heaslip and Jerome Fraine and exhibits, and a memorandum of law in opposition to respondent's motion. In addition to opposing respondent's motion, staff requests a ruling striking the two defenses, and making findings of undisputed facts or law.

By letter dated November 16, 2015, respondent requested leave to respond to Department staff's request for factual findings based on staff's affidavits, and requested that the letter be accepted as filed. By email dated November 17, 2015, Department staff objected to respondent's November 16, 2015 letter and made further argument, in essence, in sur-reply. By email dated November 17, 2015, I granted respondent's request to file the November 16, 2015 letter and accepted the letter as filed. Although Department staff had not requested leave to file its November 16, 2015 email, I also accepted the email as filed.

II. DISCUSSION

A. Standard of Review

A respondent's motion for summary judgment pursuant to 6 NYCRR 622.6(c) -- like a staff motion for order without hearing pursuant to 6 NYCRR 622.12 -- is governed by the standards applicable to summary judgment motions under Civil Practice Law and Rules (CPLR) § 3212 (see Matter of Stasack, Ruling of the Chief ALJ on Motion for Summary Judgment, April 25, 2015, at 3-4; see also 6 NYCRR 622.12[d] [motion for order without hearing]). A contested motion for summary judgment will be granted if, upon all the papers and proof filed, a cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (see CPLR 3212[b]; 6 NYCRR 622.12[d]). The motion must be denied with respect to particular causes of action or defenses if any party shows the existence of one or more substantive disputes of fact sufficient to require a hearing (see CPLR 3212[b]; 6 NYCRR 622.12[e]).

As the party making the motion, respondent carries the initial burden of establishing his entitlement to judgment as a matter of law on any of the defenses raised (see 6 NYCRR 622.11[b][3]; see also Matter of Stasack, at 3-4; Matter of Berger, ALJ Ruling, Sept. 19, 2007, at 4-5; Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [and cases cited therein]). A respondent carries its burden by producing evidence sufficient to demonstrate the absence of any material issues of fact (see Matter of Locaparra, at 4).

Once a respondent carries its initial burden of establishing a prima facie case justifying summary judgment, the burden shifts to Department staff to produce evidence sufficient to raise a triable issue of fact warranting a hearing (see Matter of Locaparra, at 4). As with the proponent of summary judgment, a party opposing summary judgment may not merely rely on conclusory statements or denials, but must lay bear its proof (see id. [and cases cited therein]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (see Zuckerman v New York City Tr. Auth., 49 NY2d 557, 562-563 [1980]; Drug Guild Distribs. v 3-9 Drugs, Inc., 277 AD2d 197, 198 [2d Dept 2000], lv denied 96 NY2d 710 [2001] [conclusory denial of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence]).

B. Equitable Estoppel

As his third affirmative defense, respondent claims that the Department should be equitably estopped from bringing this enforcement proceeding because staff negligently or wrongfully misrepresented to respondent that no permits were required to construct the agricultural pond on the Fordham Road property, and that he relied on those misrepresentations when he purchased the property, constructed the agricultural pond, and developed the orchard located there. In his affidavit in support of summary judgment, respondent avers that he contacted the Department at least six times before commencing construction of the pond, including a site visit on August 18, 2006 with Department employee Nancy Heaslip, and received repeated assurances that no permits were required for the pond project. Respondent further asserts that he relied on the Department's

representations when he purchased the property and constructed the pond.

Respondent has not established his entitlement to judgment as a matter of law on this motion. As noted in prior rulings in this matter, estoppel is rarely invoked against a governmental agency exercising its statutory duties (see Matter of Grout, Ruling on Motion for Leave to Reargue, at 10; see also Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282, appeal dismissed and cert denied 488 US 801 [1988]; see also Matter of Bartell, ALJ Ruling, June 11, 2009, at 12). Only in the rarest of cases involving exercises of agency discretion may an agency be equitably estopped for wrongful or negligent acts or omissions that induce reliance by a party who is entitled to rely and who changes its position to its detriment or prejudice (see Parkview, 71 NY2d at 282; Bender v New York City Health & Hosps. Corp., 38 NY2d 662, 668 [1976]; Matter of Rudey v Landmarks Preservation Commn., 182 AD2d 61, 63 [1st Dept 1992], affd on other grounds 82 NY2d 832 [1993]; see also Matter of Martino, Rulings of the ALJs, April 28, 2008, at 3-4). The defense to liability for the violation of a statute should be allowed only when failure to do so would operate to defeat a right legally and rightfully obtained (see Waste Recovery Enterprises, LLC v Town of Unadilla, 294 AD2d 766, 768 [3d Dept 2002], lv denied 1 NY3d 507, cert denied 542 US 904 [2004]; Matter of Hauben v Goldin, 74 AD2d 804, 805 [1st Dept 1980]; Matter of McLaughlin v Berle, 71 AD2d 707 [3d Dept 1979], affd for reasons stated below 51 NY2d 917 [1980]). Mere mistake by an agency official is insufficient to give rise to the defense (see Matter of Village of Fleischmanns [Delaware Natl. Bank of Delhi], 77 AD3d 1146, 1148 [3d Dept 2010]).

Thus, to establish his entitlement to estoppel on the issue of liability, respondent must establish that he described his proposed project in sufficient detail to make staff fully aware that his pond project included the alleged diversion and burying of the stream on the site (see Matter of Grout, Ruling on Motion for Leave to Reargue, at 10). Nothing in respondent’s affidavit indicates, however, that during his pre-construction inquiries, respondent described his project in sufficient detail to fairly suggest to staff that a permit determination under ECL article 15 and 6 NYCRR 608.2(a) might be required.

Moreover, a triable issue of fact is presented on the issue of respondent's reasonable reliance on staff's pre-construction statements. In the affidavits submitted by staff in opposition to the motion, former staff employees Nancy Heaslip and Jerome Fraine state that in a telephone conference in July 2008, and a site visit conducted on July 24, 2008, staff informed respondent that any disturbance of the stream on site would require an article 15 permit (see Heaslip affidavit ¶¶ 14-19; Fraine affidavit ¶¶ 11-16). Staff further state that this advice was given to respondent before any significant construction work on the pond occurred, and that various options for constructing the pond, both with and without an article 15 permit, were available to respondent (see Heaslip affidavit ¶¶ 15, 17-19; Fraine affidavit ¶¶ 11, 13-15). Thus, triable issues of fact regarding the estoppel defense are raised, and respondent's motion for summary judgment on this defense must be denied.

C. Administrative Delay

In his second affirmative defense, respondent alleges that Department staff failed to commence this enforcement proceeding within a reasonable time and, therefore, the June 25, 2014 complaint should be dismissed pursuant to State Administrative Procedure Act (SAPA) § 301(1) and the holding in Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 178 [1985], cert denied 476 US 1115 [1986]). In his affidavit in support of summary judgment, respondent claims that the delay between the October 2009 site visit, during which staff first informed him about an article 15 violation, and the service of the June 25, 2014 complaint has caused prejudice in several ways. First, respondent asserts that the delay has prejudiced his private interest. In the period between the October 2009 site visit and the service of the complaint, respondent has invested over $100,000 in the construction of a new orchard on the property that relies on the pond. Respondent asserts that this investment, as well as the costs associated with constructing the pond, would be lost if he is forced to alter or remove the pond.

Second, respondent asserts that the delay in commencing the proceeding has prejudiced his defense. In his affidavit, respondent states that two witnesses present during

the July 2008 site visit and a subsequent June 2009 meeting, namely, his son David Grout and his excavator Alfred McCagg, are no longer available as witnesses. David Grout has moved to Moscow, and Alfred McCagg has passed away. In addition, respondent claims that the prior owners of the property, Mike and Dianne Leiser, have moved out of the State and are no longer available to testify concerning the condition of the stream prior to the construction of the pond.

To prevail on an administrative delay defense, respondent must establish a relevant period of delay (see Cortlandt, 66 NY2d at 179). In addition, respondent must establish injury to the respondent's private interests, and a significant and irreparable prejudice to the respondent's defense of the proceeding resulting from the delay (see id. at 177-178, 180-181; see also Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11-13, confirmed in relevant part sub nom Matter of Giambrone v Grannis, 88 AD3d 1272, 1273 [4th Dept 2011]; Matter of Stasack, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010, at 9). The factors to be weighed in determining whether a period of delay is unreasonable include: (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation (see Cortlandt, 66 NY2d at 177-178; see also Giambrone, at 11).

On this motion, respondent has not established as a matter of law that the claimed delay resulted in substantial prejudice to respondent. First, on this motion, respondent states that Department staff made him aware at the October 2009 meeting that the pond construction, which had been completed, required an article 15 permit and would have to be modified (see Grout affidavit ¶ 24). Moreover, as noted above, triable issues of fact exist concerning whether Department staff brought the need for an article 15 permit to respondent's attention as early as July 2008, before any significant pond construction began. Thus, issues of fact are presented concerning whether the claimed injury to respondent's private interests -- namely, any loss of respondent's investment in the pond construction and orchard development -- is attributable to any delay in commencing this proceeding by staff rather than to respondent's

own determination to proceed in the face of the Department's warnings.

Second, respondent has failed to establish as a matter of law that the claimed loss of witnesses has resulted in prejudice to his defense. Respondent does not establish that the claimed lost witnesses were the only witnesses to either the two meetings with Department staff, or the condition of the stream prior to its disturbance by the pond construction. Indeed, respondent himself is available to testify concerning both of the meetings and the stream's pre-disturbance condition. As to the other witnesses to the meetings with staff, respondent has established that Alfred McCagg is no longer available. However, as to David Grout, respondent has not established that methods of obtaining or otherwise preserving the testimony of an out-of-State witness have been attempted and proven unsuccessful. With respect to the Leisers, respondent has also failed to establish that attempts have been made to obtain or preserve their testimony without success. Thus, respondent has failed to establish that he has been prejudiced by the claimed loss of witnesses.

Finally, the affidavits of respondent, Heaslip, and Fraine all raise issues of fact concerning settlement negotiations among the parties during the period between October 2009 and the service of the complaint. Thus, issues of fact exist regarding the causal connection between the conduct of the parties and any delay. Accordingly, respondent's motion for summary judgment on his administrative delay defense should be denied.

D. Department Staff's Request

In its opposition papers on the motion, Department staff requests that I dismiss both defenses as a matter of law. Inasmuch as I have found triable issues of fact regarding both defenses, staff's request should be denied.

In addition, if respondent's summary judgment motion is denied, staff requests that the ALJ issue a ruling specifying what facts, if any, will be deemed established for all purposes in the hearing (see 6 NYCRR 622.12[e]). In his November 16, 2015, letter, respondent objects to this relief, arguing that it

is only available on a Department staff motion pursuant to 6 NYCRR 622.12, not on a respondent's motion pursuant to 6 NYCR 622.6. Respondent argues that staff's requested relief requires a cross-motion by staff, and that any such cross-motion would be untimely pursuant to the notice of hearing and scheduling order.

Respondent's objection is overstated. Respondent is technically correct that motions pursuant to 6 NYCRR 622.12 are directed to staff motions, and that summary judgment motions by respondents are technically authorized by 6 NYCRR 622.6, not section 622.12. However, as noted above, respondent's motion for summary judgment is governed by the standards for summary judgment provided for in CPLR 3212. Pursuant to CPLR 3212(g), the court is authorized to ascertain what facts are not in dispute or are incontrovertible, and issue an order specifying those facts deemed established for all purposes in the action. Thus, the relief sought by staff is available whether this motion is one pursuant to section 622.12 or 622.6.

Nevertheless, I have not had the opportunity to interrogate counsel to ascertain what facts are not in dispute or are incontrovertible (see 6 NYCRR 622.12[e]; CPLR 3212[g]). Accordingly, I am reserving on staff's request until a pre-hearing conference call can be arranged. In the alternative, counsel are encouraged to negotiate stipulated facts without my involvement.

III. RULING

Respondent Alan Grout's motion for summary judgment on his equitable estoppel and administrative delay defenses is denied.

Department staff's request that the two defenses be dismissed is denied.

Staff's request for a ruling specifying undisputed or incontrovertible factual issues is adjourned until a pre-hearing conference between the parties can be convened.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: November 23, 2015
Albany, New York