STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 24 of the Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 663,

- by -

BRANDON MARTIN,

Respondent.

RULING

DEC Case No.
R8-2018-0710-71

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) alleges that respondent Brandon Martin (respondent) violated Article 24 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 663 by filling, grading, dredging, or constructing a residence, structure, or facility in a regulated wetland or adjacent area on property he owns at 5500 Fisher Road, Newark, New York (site). Department staff served a notice of hearing and complaint on respondent on August 3, 2018 (NOHC). By motion dated September 27, 2018, respondent moved pursuant to 6 NYCRR 622.4 to serve an answer beyond the twenty (20) day time period as provided for in 6 NYCRR Part 622 and the motion was granted by ruling dated October 23, 2018. Respondent's answer, attached to the motion, was deemed served on October 23, 2018. Department staff, by motion dated October 29, 2018, moved to dismiss the affirmative defenses in respondent's answer. For the reasons that follow, Department staff's motion is granted in part and denied in part.

PROCEEDINGS

Respondent failed to timely serve an answer to Department staff's NOHC and moved to serve a late answer and the motion was granted on October 23, 2018. Respondent's answer, with seven affirmative defenses, was deemed served. By motion dated October 29, 2018, Department staff moved to dismiss affirmative defenses in respondent's answer, pursuant to 6 NYCRR 622.10(b)(1)(i). The motion was served with the affirmation of assistant regional attorney Dusty Renee Tinsley dated October 29, 2018 (Tinsley affirmation). Respondent opposed the motion by affirmation of attorney Alan Knauf, of the firm Knauf Shaw LLP, dated November 8, 2018 (Knauf affirmation), the affidavit of Brandon Martin sworn to on November 8, 2018 (Brandon affidavit), and the affidavit of Steven Martin sworn to on November 8, 2018 (Steven affidavit) as well as a memorandum of law dated November 8, 2018 (MOL). Department staff served a reply to respondent's opposing papers by affirmation of Ms. Tinsley

dated November 16, 2018 (Tinsely 2) and respondent served a sur-reply by affirmation of Alan Knauf dated January 3, 2019 (Knauf 2).

Motions to dismiss affirmative defenses are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see *Matter of Truisi*, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April 1, 2010, at 10-11). In general, motions to dismiss affirmative defenses may challenge the pleading on the ground that it fails to state a defense or that a defense lacks merit as a matter of law (*see id.* at 10). The initial question is whether the defense pleaded is, in fact, in the nature of an affirmative defense. Respondent must factually detail the nature of the defense so as to allow DEC staff to be reasonably apprised of the defense, and provide the legal basis for the defense pleaded (*see Matter of Amerada Hess Corp.*, ALJ Ruling, February 22, 2002, at 5). Once it is determined that a defense is properly pleaded, the facts alleged are accepted as true and the pleader is afforded every possible inference (*see Truisi*, at 10). A motion to dismiss will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense (*see id.* at 10 [citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *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* v. *Cantinella*, 58 AD3d 145, 148 [2d Dept 2008]).

FINDINGS OF FACT

The following facts are either admitted or accepted as true for purposes of this ruling.

1. Respondent Brandon Martin resides at 5500 Fisher Road, Newark, New York 14513 (site).

2. A portion of the site contains a Class 3 mapped freshwater wetland designated NE-23, identified on the Department's wetland map Newark Quad, Wayne County Map 17 of 20 and a 100-foot adjacent area surrounding the wetland (Tinsley Affirm at ¶4).

3. Department staff inspected the site on August 11, 2017 and alleged to have observed violations of ECL Article 24 and 6 NYCRR 663 (Tinsley Affirm at ¶5). Staff alleges respondent placed fill, graded, constructed a structure, or dredged in the wetland and adjacent area without a permit (NOHC ¶¶ 29, 34, 39 and 44).

4. Department staff met with respondent on July 30, 2018 regarding the alleged violations (Tinsley Affirm ¶6).

5. Department staff served respondent with a NOHC on August 3, 2018 (Tinsley Affirm, Exhibit 2). Respondent moved for and was granted leave to serve a late answer (*see* Ruling of ALJ McBride dated October 23, 2018).

6. Respondent's answer contained seven affirmative defenses.

7. Department staff moved to dismiss the affirmative defenses by motion dated October 29, 2018. Respondent opposed the motion by affirmation of Alan Knauf, Esq. and the affidavits of Brandon Martin, respondent, and his uncle Steven Martin, both dated Novembers 8, 2018. Ms. Tinsley served an affirmation in reply to those pleadings dated November 16, 2018, and Respondent then served a sur-reply to the Department's reply dated January 3, 2019.

DISCUSSION

Respondent's answer asserts seven affirmative defenses. The affirmative defenses are as follows: (1) the inspection of the property by DEC staff was a warrantless search in violation of the Fourth Amendment to the U.S. Constitution and Article 1, § 12 of the New York Constitution; (2) some of the facts alleged in the complaint are barred by the applicable statute of limitations, laches, estoppel or waiver; (3) some of the alleged violations resulted from upsets, unusual weather conditions or other acts of God; (4) activities conducted were exempt from regulation pursuant to 6 NCYRR 663.4(d) or ECL 24-0701; (5) some or all of the land was filled prior to the enactment of the Freshwater Wetlands Act or is exempt pursuant to ECL 24-1305; (6) any violations were de minimis and no environmental harm resulted; and (7) respondent is now in full, substantial or partial compliance with applicable laws, regulations and permits, and any alleged deficiencies in the past are moot.

First affirmative defense alleges Department staff's site inspection, wherein the alleged violations were found, was a warrantless search in violation of the Fourth Amendment to the United States Constitution and Article 1, § 12 of the New York Constitution. ECL 24-1301(2) provides DEC staff with the authority to go onto the respondent's property "after reasonable notice and for good cause shown for the purpose of undertaking any investigations, examination, survey, or other activity for the purposes of this article." Respondent has acknowledged that he was present and participated in the inspection. Thus, Department staff has established that the first affirmative defense lacks merit as a matter of law (*see Truisi*, at 10). The motion is granted with respect to the first affirmative defense.

Second affirmative defense alleges "some of the facts alleged in the complaint are barred by the applicable statute of limitations, laches, estoppel or waiver". Department staff correctly argues that these defenses generally do not apply to government agencies. Estoppel is generally not available against the State when it acts in a governmental capacity (*see New York State Health Facilities Assn. v Axelrod,* 154 AD2d 10, 14 [3d Dept 1990]). 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). Generally, laches and waiver are also not an allowable defense against a

governmental agency action. However, as noted in the Ruling to Strike or Clarify Affirmative Defense in the *Matter of Truisi*, the Chief ALJ ruled that pleading substantial actual prejudice in the defense of a proceeding resulting from the Department's alleged delay in commencing the proceeding "places Department staff on notice that the respondent intends to raise an administrative delay defense based upon *Cortlandt* -- i.e., that the Department failed to conduct adjudicatory proceedings within a 'reasonable time' under SAPA" (s*ee Truisi*, at 8 [citing *Matter of Cortlandt Nursing Home v Axelrod*, 66 NY 2d 169, 177 n 2 (1985), *cert denied* 476 US 1115 (1969) and *Matter of Gramercy Wrecking and Envtl. Contrs., Inc.*, ALJ Ruling, Jan. 14, 2008, at 5]). Department staff has been put on notice that respondent intends to raise a *Cortlandt* defense and that claim is supported by the affidavits of Brandon Martin and Steven Martin. Both affidavits provide adequate detail about the history of wetlands on the property. Respondent has alleged that if any fill was placed on the property, it was done by prior generations of his family, before his birth (Brandon affidavit at 2-3). Respondent's uncle confirmed that if any fill was placed on the property, it was done before his birth in 1956 (Steven affidavit at 2). Respondent has pleaded sufficient facts to place Department staff on notice of the basis for his defense and the motion to dismiss the second affirmative defense is denied.

Third affirmative defense, "Some of the alleged violations resulted from upsets, unusual weather conditions or other Acts of God" is dismissed. Respondent has not pleaded facts sufficient to support this defense, so the motion is granted with request to this defense.

Fourth affirmative defense, "Activities conducted were exempt from regulation pursuant to 6 NCYRR 663.4(d) and/or ECL §24-0701" is sufficiently detailed and the motion is denied. Respondent has provided sufficient detail as to why the areas in question may be exempt from requiring a permit pursuant to ECL 24-0701(4) and Department staff has sufficient information to proceed.

Fifth affirmative defense alleges some or all of the land was filled prior to the enactment of the Freshwater Wetlands Act or is exempt pursuant to ECL 24-1305. As noted above, respondent has submitted affidavits from himself and his uncle who provide historic information regarding the property alleging that any fill that may have been placed in areas designated as wetlands was done prior to the enactment of the Freshwater Wetland Act in 1975. Sufficient detail has been provided to DEC staff as to the foundation for the affirmative defense. The motion is denied with respect to the fifth affirmative defense.

Sixth affirmative defense states "any violations were de minimis and no environmental harm resulted". ALJ Helene G. Goldberger addressed this affirmative defense in the *Matter of Exxon Mobil Corporation* and ruled that a defense that no harm

occurred to the environment can not result in respondent being absolved of responsibility for the violation, but the defense may be relevant in determining an appropriate penalty *(see Matter of ExxonMobil Corp.,* Ruling of the ALJ, September 23, 2002, at 3). The defense may be pleaded by respondent as it may be relevant in any penalty calculation.

Seventh affirmative defense states that respondent is now in full, substantial or partial compliance with applicable laws, regulations and permits, and any alleged deficiencies in the past are moot. If it is found that respondent is now in compliance with all applicable statutes and regulations, that would not excuse any violations that may have occurred prior to coming into compliance. Thus, the defense lacks merit as a matter of law. The motion is granted with respect to the Seventh affirmative defense.

RULING

Department staff's motion to strike affirmative defenses in respondent's answer is granted in part, and denied in part, as detailed herein.

_____/s/_____
Molly T. McBride
Administrative Law Judge

Dated: March 4, 2019
Albany, New York