NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Violations of Articles 27 and 71 of the Environmental Conservation Law and Parts 370 et seq. of Title 6 of the New York Codes, Rules and Regulations

- by -

MORGAN MATERIALS INC. (f/k/a Morgan Chemicals, Inc.),
MORGAN CHEMCIAL, INC. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.),
MORGAN GLOBEX, INC., NORTH SEA MINING & MATERIALS, LTD.,
ORCHARD MECHANICS, INC.,
DONALD SADKIN, as Chief Executive Officer of Morgan Materials, Inc., Morgan Chemicals, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd.,
DONALD SADKIN, Individually,
and
JONATHAN SADKIN, Individually,

Respondents.

RULING ON MOTION FOR CLARIFICATION OF AFFIRMATIVE DEFENSES

DEC File No. 17-11
R9-20170214-15

Appearances on Motion:

- Thomas S. Berkman, General Counsel (Jennifer Dougherty, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Lippes & Lippes (Richard J. Lippes of counsel), for respondents Morgan Materials, Inc., Morgan Chemcial, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd.[1], Orchard Mechanics, Inc., and Donald Sadkin, individually and as chief executive officer of Morgan Materials, Inc., Morgan Chemicals, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd.
- No appearance for Jonathan Sadkin, respondent

[1] Morgan Globex, Ltd. and North Sea Mining & Minerals, Ltd. are frequently cited by the parties as North Sea Mining & Minerals, LTD. The suffix "Ltd." is used throughout this ruling.

PROCEEDINGS

Staff of the Department of Environmental Conservation (Department) commenced this enforcement proceeding against the above-named respondents,[2] by a notice of hearing and complaint dated December 29, 2017, alleging violations of articles 27 and 71 of the Environmental Conservation Law (ECL) and parts 370 *et seq*. of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) (*see* Notice of Hearing and Complaint dated December 29, 2017 [Complaint]).[3]

This ruling addresses a notice of motion, dated October 18, 2018, accompanied by an attorney affirmation (affirmation of Jennifer Doherty, Esq., dated October 18, 2018 [Doherty Aff]), filed by Department staff (collectively Motion). The Motion seeks clarification, pursuant to 6 NYCRR 622.4(f), of the affirmative defenses pleaded in the answer dated October 9, 2018 (Answer) of respondents Morgan Materials Inc. (f/k/a Morgan Chemicals, Inc.), Morgan Chemcial, Inc. (a/k/a Morgan Chemical, Inc. and Morgan Chemicals, Inc.), Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., Donald Sadkin, as Chief Executive Officer of Morgan Materials Inc., Morgan Chemcials, Inc., Morgan Globex, Inc. and North Sea Mining & Minerals, Ltd., and Donald Sadkin, individually (collectively Respondents).[4]

The Motion was served on Respondents and respondent Jonathan Sadkin by service on their respective attorneys by first class mail on October 18, 2018 (*see* Affidavits of Service of Pamela Frasier sworn to October 18, 2018). Neither Respondents nor Jonathan Sadkin responded to the Motion.

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[2] The entity name Morgan Chemcial is as spelled in the caption of this proceeding and in the related summary abatement proceeding. *See Matter of Morgan Materials, Inc*., Order of the Commissioner, February 6, 2018. As noted by Department staff, the spelling "Chemcial" is the spelling found on the records of the Secretary of State (*see* Complaint at 2 n 1).

[3] *See* affidavit of service of Pamela Frasier sworn to January 10, 2018 (Frasier Aff.) (service on respondent Jonathan Sadkin); affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 3, 2018 (service on Orchard Mechanics, Inc.); affidavit of service of Environmental Conservation Officer T. Machnica #564 sworn to January 26, 2018 (service on respondents Morgan Materials Inc., Morgan Globex, Inc., North Sea Mining & Minerals, Ltd., and Donald Sadkin).

[4] In a prior ruling, I denied Respondents' motion to dismiss the Complaint (*see Matter of Morgan Materials, Inc*., Ruling of the Administrative Law Judge, June 11, 2018). I directed Department staff to amend the Complaint and serve it on all respondents on or before August 1, 2018, and directed respondents to file an answer on or before September 4, 2018. Subsequently, I granted Mr. Lippes's request for an extension of time to serve an answer. Mr. Lippes served the Answer on Department staff on October 11, 2018. Respondent Jonathan Sadkin has not filed an answer in this proceeding.

DISCUSSION

Department staff moves to clarify all six affirmative defenses pleaded in the Answer, but does not move to strike any of the defenses. Section 622.4(c) of 6 NYCRR states that:

> The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.

Section 622.4(f) further provides that:

> The department staff may move for clarification of affirmative defenses within 10 days of completion of service of the answer on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based.

Motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the sufficiency of the notice provided by the pleading, and may be granted only when the defense is so vague or ambiguous that Department staff is not placed on "notice" of the nature of the defense (*see Matter of Truisi*, Ruling of the Chief ALJ on Motion To Strike or Clarify Affirmative Defenses, April l, 2010, at 4, 6-7 [*Matter of Truisi*]).

The threshold inquiry on a motion to clarify under section 622.4(f) is whether the pleaded defense is, in fact, an affirmative defense. Section 622.4(f) only authorizes clarification of an affirmative defense. If the pleading is merely labeled as an affirmative defense, but does not constitute an affirmative defense under the law, it is not subject to a motion for clarification. For example, a denial of a charge in a complaint labeled as an affirmative defense is not an affirmative defense. Under New York's liberal pleading rules, the mere fact that a respondent asserts a denial as an affirmative defense does not automatically shift the burden of proof from the complainant to the respondent. Where a complainant has the burden of proof on an allegation in its complaint, the burden remains with the complainant (*see Matter of Truisi* at 5).

Part 622 recognizes as an affirmative defense a defense based upon the regulatory exemptions from permitting requirements, *i.e.*, the activity charged in the complaint as having been improperly conducted without a permit does not require a permit (*see* 6 NYCRR 622.3[a][2]). The CPLR also provides specific examples of affirmative defenses, including an arbitration and award, collateral estoppel, a discharge in bankruptcy, payment, release, or statute

of limitation. More generally, the CPLR defines affirmative defenses as "matters which if not pleaded would likely take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018[b]; *Matter of Truisi* at 5.) Affirmative defenses are not an opportunity for staff to obtain, in effect, a bill of particulars, which is prohibited by 6 NYCRR part 622 (Part 622) (*see* 6 NYCRR 622.7[b][3]).

With respect to the sufficiency of the notice provided by an affirmative defense, the notice requirement is similar to the notice pleading requirements under the CPLR and need only be reasonably specific, in light of all relevant circumstances, to inform a party of the charge against it so the party can prepare and present an adequate response (*see Matter of Truisi* at 6; *Block v Ambach*, 73 NY2d 323, 333 [1989]; *Matter of Board of Educ. of Monticello Cent. School Dist. v Commissioner of Educ*., 91 NY2d 133, 137 [1997] [requiring fair notice of charges in school suspension proceedings to allow preparation and presentation of an adequate defense]). Adequate notice is provided where the affirmative defense apprises Department staff of the nature of the defense and the activities or incidents upon which it is based so that staff has a fair opportunity to respond (*see Matter of Board of Educ.*, 91 NY2d at 140; *see also Foley v D'Agostino*, 21 AD2d 60, 62-64 [1st Dept 1964] [discussion of New York's notice pleading requirements under the CPLR]; *Matter of Truisi* at 6). A motion to clarify should be granted only if an affirmative defense is so vague or ambiguous as to be unintelligible and unrelated to any cognizable defense *(see Matter of Truisi* at 6*; Della Villa v Constantino*, 246 AD2d 867, 867 [3d Dept 1998] [CPLR 3024(a) motion]; *see also Bower v Weisman*, 639 F Supp 532, 538 [SDNY 1986] [standard under Federal Rules of Civil Procedure § 12(e) is that motion for a more definite complaint should only be granted where 'the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it']). Where a motion for clarification seeks an explanation of the defense, rather than challenges the sufficiency of the notice provided by the defense, the motion should not be granted. Staff may utilize discovery to obtain additional details concerning the facts or legal theory upon which an affirmative defense is based, and may bring motions for summary order to address unmeritorious claims. (*See* Siegel and Connors, NY Prac § 230, at 431 [6th ed]; *Matter of Truisi*, at 6.)

With these principles in mind, I address staff's Motion with respect to each of the affirmative defenses.

1. <u>First Defense</u>

Respondents state as their first affirmative defense that "[t]he Second Amended Complaint was not properly commenced within the statute of limitations" (Answer at 9). The defense does not identify an applicable statute of limitations. Department staff seeks clarification with respect to the statute of limitations referenced in the Answer (Doherty Aff ¶ 5).

The Department's administrative precedent recognizes that the CPLR statute of limitations provisions only apply to civil judicial proceedings, and that none of the CPLR article 2 provisions have been incorporated into Part 622. Thus, the limitation periods established by the CPLR are not applicable to administrative enforcement proceeding *(see Matter of C and J Enterprise, LLC*, Ruling of the ALJ, April 10, 2018, at 2; *see also Matter of Oldcastle, Inc*., Ruling, February 29, 2016, at 13-14; *Matter of Stasack*, Ruling of the Chief ALJ, December 30, 2010, at 9; *Matter of Edkins Scrap Metal Corp*., Ruling of the ALJ, March 10, 2015, at 19 and 23).

The Answer's general assertion of a statute of limitations defense, without reference to the CPLR or other statutory provision, fails to provide adequate notice to Department staff of the facts and legal theory that respondents rely on to enable staff to prepare a response. Staff is entitled to this information, especially in light of relevant case law holding that the Department's administrative proceedings are not subject to a limitations period. Accordingly, I grant staff's Motion with respect to the first defense and direct respondents to replead it. In the repleaded defense, respondents should provide the specific the statute of limitations that they contend applies to this proceeding and the relevant facts and legal theory that support its application.

2. Second Defense

As a second affirmative defense, respondents state that "the issue of who is an Owner or Operator of the Sadkin Facility is barred by the doctrine of collateral estoppel" (Answer at 9). Collateral estoppel is one of the recognized affirmative defenses under CPLR 3018(b), and, therefore, falls within the scope of a clarification motion, assuming that the relief sought deals with the sufficiency of the notice rather than the merits of the defense. Department staff seeks (1) "clarification generally" on the second defense, and (2) clarification on which respondents are covered by the defense (*see* Doherty Aff ¶ 6).

As noted above, section 622.4(f) requires that the assertion of an affirmative defense be accompanied by "a statement of the facts which constitute the grounds" for the defense. The doctrine of collateral estoppel, also known as issue preclusion, bars a party from litigating an issue in a second action that was decided against that party in a first action where the party had the opportunity to litigate the issue in that action (*see* Siegel and Connors, NY Prac § 442). Although the Answer raises a collateral estoppel defense with respect to the owners and operators of the Sadkin Facility, it fails to identify the prior action in which this issue was allegedly decided. Thus, the Answer provides insufficient notice to Department staff of the facts and legal theory supporting the second defense to enable staff to respond to it.

Accordingly, I grant Department staff's Motion with respect to the second defense and

direct respondents to replead the defense, identifying the prior action that respondents claim decided the issue who is an owner or operator of the Sadkin Facility.

3. Third Defense

As a third defense, respondents assert that "[t]he DEC has improperly designated the materials at the Sadkin Facility as waste, and all of the materials at the facility were purchased for resale, and had existing markets for their sale. Moreover, none of the materials at the facility could be considered waste or hazardous waste, and therefore, Respondents are not a waste or hazardous waste facility" (Answer at 9). Department staff seeks "clarification generally" with respect to the third defense (*see* Doherty Aff ¶ 7).

The third defense is in the nature of a denial of liability of the charges in the Complaint that the materials at the Facility constituted waste or hazardous waste and that respondents did not comply with the Department's regulations with respect to the proper handling and management of the waste. It is not an affirmative defense and, therefore, not subject to a motion for clarification under section 622.4(f). Staff can inquire in discovery as to the facts and legal theory upon which this denial is based. (*See* 6 NYCRR 622.4[f]; *Matter of Truisi* at 7.)

Staff's Motion is denied with respect to the third defense.

4. Fourth Defense

Respondents claim in the fourth defense that "[t]he activities of the Respondents positively impacted the environment, since otherwise such materials may not have been resold and may have had to have been sent to a disposal facility" (Answer at 9). Department staff seeks clarification on the fourth defense and the legal basis for it (*see* Doherty Aff ¶ 8).

The fourth defense is vague and ambiguous on its face. It is impossible to determine whether the defense operates as a denial of liability, is in the nature of a legal argument why respondents should be granted leniency in terms of the relief sought by Department staff, or whether the defense is premised on another legal theory. In its current form, the fourth defense is inadequate to provide fair notice to Department staff as to the nature of the defense and the facts and legal theory that support it such that staff could reasonably prepare a response.

Accordingly, I grant staff's Motion with respect to the fourth defense and direct respondents to replead the defense and provide a statement of the facts and legal theory upon which it is based.

5. Fifth Defense

Respondent's fifth affirmative defense asserts that "[t]he DEC improperly directed that all of the materials at the facility be either reacquired by the entities that the materials were purchased from, or otherwise disposed of in landfills. Since the materials on site were salable materials, it was improper for the DEC to require that such materials could not be sold by Respondent Sadkin or Morgan, and in fact put him out of business, and made him destitute, by such requirement, which was unnecessary and punitive" (Answer at 9).

Department staff seeks clarification generally with respect to the fifth defense (*see* Doherty Aff ¶ 9). Similar to the fourth defense, the fifth defense is unintelligible on its face. It is impossible to determine whether the defense operates as a denial of liability, is in the nature of a legal argument why respondents should be granted leniency in terms of the relief sought by Department staff, or whether the defense is intended to function as a counterclaim, which is not permitted in an administrative proceeding. In its current form, the fifth defense is inadequate to provide fair notice to Department staff as to the nature of the defense and facts and legal theory that support it such that staff could reasonably prepare a response.

Accordingly, I grant staff's Motion with respect to the fifth defense and direct respondents to replead the defense and provide a statement of the facts and legal basis upon which it is based.

6. Sixth Defense

In their sixth defense, respondents assert: "[r]espondent informed the DEC and the DEC has known for a period of years, that submitted inventories were a best effort, and reflected an ongoing inventory being conducted by Respondent Sadkin. Moreover, Respondent Sadkin knew of all of the materials that were at the facility, and where they were located, and if he was present at inspections where this issue was raised, he could and did at times show where such materials were located" (Answer at 9). Department staff seeks general clarification as to this defense (*see* Doherty Aff ¶ 9).

The sixth defense is not an affirmative defense, but rather a denial of liability, labeled as a defense, that Respondents failed to meet their regulatory obligations with respect to inventory management and materials handling. Therefore, a motion for clarification does not lie under section 622.4(f). Department staff can inquire in discovery as to the facts and legal theory or theories upon which this denial is based. (*See* 6 NYCRR 622.4[f]; *Matter of Truisi* at 7.) Staff's Motion is denied with respect to the sixth defense.

CONCLUSION

To summarize, I grant Department staff's Motion with respect to the first, second, fourth and fifth affirmative defenses. Respondents are directed to replead these defenses and provide a statement of the facts and legal theory upon which these defenses are based, consistent with this ruling. I deny the Motion with respect to the third and sixth affirmative defenses.

RULING

Department staff's Motion is granted in part. Respondents are directed to provide clarification with respect to the first, second, fourth and fifth affirmative defenses and replead these defenses within twenty days after this ruling is received by respondents. The Motion is otherwise denied.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: Albany, New York
November 19, 2018