STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 71 of the Environmental Conservation Law ("ECL"), Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Article 12 of the Navigation Law, - by - **ROUTE 52 PROPERTY, LLC., BOTTINI STATION HOLDINGS, LLC., MARK BOTTINI, ANTHONY BOTTINI, and BRIAN BOTTINI,** Respondents. (And Seven Other Proceedings.)	**DECISION OF THE CHIEF ADMINISTRATIVE LAW JUDGE** DEC File Nos. 3-410713, 3-410748, 3-410632, 3-177962, 3-410667, 3-410640, 3-178004, and 3-413682 March 14, 2012

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Scott W. Caruso of counsel), for staff of the Department of Environmental Conservation

-- Daniels & Porco, LLP (S. David Devaprasad and Heather N. Justice of counsel), for respondents Route 52 Property, LLC (DEC File No. 3-410713); Hyde Park Property, LLC (3-410748); Myers Property, LLC (3-410632); Route 82 Property, LLC (3-177962); Fishkill Property, LLC (3-410667); Route 376 Property, LLC (3-410640); Route 9 Plaza North, LLC (3-178004); and Route 44 Property, LLC (3-413682)

-- Wichler and Gobetz, P.C. (Kenneth Gobetz of counsel), for respondents Bottini Station Holdings, LLC; Mark Bottini; Anthony Bottini; and Brian Bottini (all proceedings)

DECISION OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTIONS

These administrative enforcement proceedings concern alleged violations of the regulations governing petroleum bulk storage (PBS) facilities and article 12 of the Navigation Law at eight gasoline stations located throughout Dutchess County. Staff of the Department of Environmental Conservation (Department) filed complaints against the alleged owners and operators of the facilities. Respondents filed answers pleading various affirmative defenses.

Department staff moves to strike or clarify the affirmative defenses pleaded by respondents in their answers. Department staff also moves to exclude as confidential allegations contained in respondents' answers or their affidavit filed in response to staff's motion to strike or clarify, and for other alternative relief.

For the reasons that follow, the motions to exclude evidence are granted in part and otherwise denied, the motions to clarify affirmative defenses are denied, and the motions to strike affirmative defenses are granted in part and otherwise denied.

I. FACTS AND PROCEDURAL BACKGROUND

Staff's eight separate complaints allege that each of the following respondent limited liability corporations (collectively, respondent LLCs) are the respective owners of eight separate gasoline stations located at the following addresses:

-- 1997 Route 52, East Fishkill, New York, owned by respondent Route 52 Property, LLC (DEC File No. 3-410713);

-- 4299 Albany Post Road, Hyde Park, New York, owned by respondent Hyde Park Property, LLC (DEC File No. 3-410748);

-- 233 Myers Corners Road, Wappingers Falls, New York, owned by respondent Myers Property, LLC (DEC File No. 3-410632);

-- 857 Route 82, Hopewell Junction, New York, owned by respondent Route 82 Property, LLC (DEC File No. 3-177962);

-- 747 Route 9, Fishkill, New York, owned by respondent Fishkill Property, LLC (DEC File No. 3-410667);

-- 1831 New Hackensack Road, Wappingers Falls, New York, owned by respondent Route 376 Property, LLC (DEC File No. 3-410640);

-- 2 Elm Street, Fishkill, New York, owned by respondent Route 9 Plaza North, LLC (DEC File No. 3-178004); and

-- 2400 Route 44, Salt Point, New York, owned by respondent Route 44 Property, LLC (DEC File No. 3-413682).

Department staff also alleges that each respondent LLC is the operator of each facility, respectively. However, respondent LLCs deny that they are operators of their respective facilities.

In each proceeding, Department staff also alleges that respondent Bottini Station Holdings, LLC, is a member of the LLC at each facility, and an owner and operator of each facility. Staff also alleges that respondents Brian Bottini and Mark Bottini are members of each LLC, members of respondent Bottini Station Holdings, LLC, and have managerial responsibilities for each LLC and Bottini Station Holdings, LLC. In all proceedings except Matter of Hyde Park Property, LLC, et al. (DEC File No. 3-4108748), staff further alleges that respondent Anthony Bottini is a member of each LLC, a member of respondent Bottini Station Holdings, LLC, and has managerial responsibilities for each LLC and Bottini Station Holdings, LLC. Respondents Bottini Station Holdings, LLC, Brian Bottini, Anthony Bottini, and Mark Bottini are collectively referred to here as the Bottini respondents.[1]

Respondent Bottini Station Holding, LLC, admits that it is a member of each LLC. Respondents Brian Bottini and Mark Bottini also admit that they are members of Bottini Station Holding, LLC. The Bottini respondents otherwise deny staff's allegation concerning their ownership and control.

Department staff entered into two consent orders with respondent LLCs, one dated January 4, 2007 (no. D3-0013-11-06),

[1] Because of common questions of fact, these eight separate proceedings are joined for purposes of ruling on Department staff's motions (see 6 NYCRR 622.10[e][1]).

and another dated March 30, 2009 (no. D3-1005-09-08).[2] The March 2009 consent order required respondent LLCs to audit their respective facilities. Audits of each of the facilities were conducted during the period from July to December, 2009. Department staff, through an agent, subsequently inspected all facilities except the Route 9 Plaza North, LLC, facility during the period from July to September 2010.

In February and March 2011, Department staff filed the eight complaints in these proceedings. Based upon information revealed in the audits and the Department's inspections, staff charged each respondent facility with various violations of the PBS regulations at 6 NYCRR parts 613 and 614, violations of Navigation Law § 173, or both. Department staff seeks civil penalties ranging from $10,000 (as against Route 44 Property, LLC, et al.) to $500,000 (as against Route 52 Property, LLC, et al.). Among other relief, Department staff also seeks financial assurances for closure of six of the facilities, and financial assurances for remediation of allegedly open petroleum spills at four of the facilities.

In each of the eight proceedings, respondent LLCs filed answers. In its answer, respondent Route 52 Property, LLC, raised 11 affirmative defenses. The remaining respondent LLCs each raised 12 affirmative defenses in their respective answers.

Also in each of the eight proceedings, the Bottini respondents separately filed joint answers. In the Matter of Myers Property, LLC, et al. (DEC File No. 3-410632), the Bottini respondents pleaded 11 affirmative defenses. In each of the remaining matters, the Bottini respondents pleaded 12 affirmative defenses.

In the Matter of Route 52 Property, LLC, et al. (DEC File No. 3-410713), Department staff filed motions seeking to strike or clarify the affirmative defenses pleaded by respondent Route 52 Property, LLC, and the Bottini respondents in their respective answers. Respondents filed a joint affirmation in opposition to staff's motions.

[2] Department staff alleged that the Bottini respondents also entered into the consent orders, but this is denied by the Bottini respondents. Copies of the consent orders have not been submitted to the Administrative Law Judge by any of the parties.

Thereafter, Department staff moved to exclude respondents' joint opposition to staff's motions to strike or clarify on the ground that the joint opposition contains confidential and privileged settlement negotiations. Respondents filed a joint affirmation in opposition to staff's motion to exclude.

In the remaining matters, Department staff moved to exclude certain portions of respondents' answers, and to strike or clarify affirmative defenses. In each matter, respondents filed joint affirmations in opposition to staff's motions.

By letter dated June 7, 2011, respondents requested permission to submit supplemental responses in further opposition to staff's motions to exclude, strike, or clarify based upon allegedly new information and documents recently received by respondents. Department staff opposed respondents' request by letter dated June 20, 2011. The parties subsequently agreed to acceptance of the submissions as filed and without any further response. Accordingly, by email dated July 20, 2011, I accepted respondents' June 7, 2011, supplemental submission and Department staff's June 20, 2011, submission in response as filed. I further provided that no further responsive pleadings were authorized or would be accepted without prior leave.

II. DISCUSSION

A. Department Staff's Motions to Exclude

Because Department staff's motions to exclude seek exclusion of certain of respondents' allegations and pleadings from any consideration in these proceedings, they are considered as an initial matter.[3]

As noted above, in Matter of Route 52 Property, LLC, et al., Department staff seeks exclusion of respondents' entire affirmation in opposition to staff's motion to strike or

[3] In Matter of Route 52 Prop., LLC, et al., respondents assert that staff's motion to exclude is an unauthorized response to respondents' joint opposition that required prior approval of the ALJ pursuant to 6 NYCRR 622.6(c)(3) before their submission. However, staff's motion is not a pleading in the nature of a reply to respondents' opposition to staff's motion to strike or clarify affirmative defenses. Rather, staff's motion to exclude is an original motion addressed to statements made in respondents' filing that does not require prior approval.

clarify. In the alternative, staff seeks a confidential means of briefing the issues or redaction of all settlement negotiations from respondents' affirmation. To the extent respondents' affirmation is admitted by the Administrative Law Judge (ALJ), staff requests that neither the ALJ nor any future decision maker give the settlement negotiations in the record any weight.

In the remaining matters, Department staff seeks exclusion of certain allegations contained in respondents' answers and the tenth affirmative defense pleaded in each answer, in which respondents assert an equitable estoppel defense. Citing CPLR 4547, staff argues that the material sought to be excluded constitutes evidence of settlement negotiations that are inadmissible at hearing. Department also asserts that the settlement negotiations are confidential.

Respondents oppose staff's motion arguing that the material sought to be excluded is relevant to issues that fall within the exceptions to the CPLR 4547 exclusionary rule. In addition, respondents argue that Department staff has failed to otherwise identify any basis for holding the alleged settlement negotiations confidential. I agree, but only in part.

CPLR 4547, adopted in 1998, constitutes the statutory codification and expansion of the common law rule that the settlement of a disputed claim or an offer to settle a claim is inadmissible to prove either the liability of the alleged wrongdoer or the weakness of the claimant's cause of action (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4547, at 842-844). CPLR 4547 provides that

> "Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. . . . [T]he exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of

> undue delay or proof of an effort to obstruct a criminal investigation or prosecution."

CPLR 4547 is an evidentiary rule of relevance (see Soumayah v Minnelli, 41 AD3d 390, 393 [1st Dept 2007]). CPLR 4547 does not provide that settlement discussions are confidential and, therefore, does not provide a basis for a confidentiality privilege (see Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 77 AD3d 224, 233 [3d Dept], appeal dismissed 15 NY3d 906 [2010], appeal pending after remand).

Furthermore, as an evidentiary rule, CPLR 4547 is subject to limitations and exceptions. First, CPLR 4547 does not apply to pre-dispute communications or statements made outside the negotiation context (see Alternatives Fed. Credit Union v Olbois, LLC, 14 AD3d 779, 781 [3d Dept 2005]; Alexander, Practice Commentaries, at 842-843). Statements will be excluded only when the claim or its amount was disputed, and only when the statements were made during negotiations aimed at compromising the dispute (see id.).

Second, CPLR 4547 expressly provides admissibility is not limited when evidence of settlement negotiations is offered for purposes other than proof of the invalidity of a claim or the amount of damages. For example, evidence of settlement negotiations is admissible to prove the bias or prejudice of a witness, or to negate a contention of undue delay (see CPLR 4547).

As to the procedural posture of staff's motions, the requests are not motions in limine. Rather, they are addressed to allegations in respondents' pleadings. As such, staff's motions are akin to motions pursuant to CPLR 3024(b) to strike prejudicial matter unnecessarily inserted in an answer (see Matter of Plaza at Patterson, LLC, 51 AD3d 931, 932 [2d Dept 2008]; Landa v Dratch, 45 AD3d 646, 647 [2d Dept 2007]). Under that standard, a matter is "unnecessarily inserted" in a pleading if it is irrelevant, in an evidentiary sense, to the controversy (see Soumayah, 41 AD3d at 393; Wegman v Dairylea Coop., Inc., 50 AD2d 108, 111-112 [4th Dept 1975]). Thus, matter that is unnecessary for a pleading's sufficiency, prejudicial, and irrelevant may be struck (see Schachter v Massachusetts Protective Assn., Inc., 30 AD2d 540, 540 [2d Dept 1968]). However, if the matter would be admissible at hearing under the evidentiary rules of relevancy, its inclusion in the

pleading would not justify a motion to strike (see Soumayah, 41 AD3d at 393).

In these cases, much of the material Department staff objects to does not constitute offers to compromise, settlement terms, or statements made during settlement discussions. Instead, much of the material merely alleges that settlement discussions were had and with whom, relates the subject matter of the discussions, and relates respondents' understanding concerning its obligations as a result of those discussions. Thus, the material complained of does not fall within the ambit of CPLR 4547. In addition, staff has not identified any confidentiality agreement, court or administrative confidentiality order, or any broad confidentiality privilege that would provide a basis for holding the material confidential. Thus, to the extent staff seeks to exclude those portions of respondents' affirmation in opposition in Matter of Route 52 Prop., LLC, et al. and respondents' answers in the remaining proceedings that do not contain offers to compromise, settlement terms, or statements made during settlement discussion, the motions to exclude are denied.

Some of the material objected to, however, does contain statements concerning Department staff's negotiating positions, both with regards to negotiations with respondents and with third-party Gas Land Petroleum, Inc., an entity alleged to be the potential purchaser of the facilities at issue. Thus, the statements are excludable under CPLR 4547 unless relevant to issues other than respondents' liability for the offenses charged or the amount of penalty.

Respondents argue that the negotiations referred to pre-date the violations charged and, therefore, constitute pre-dispute discussions not subject to CPLR 4547. Considering respondents' allegations in the light most favorable to respondents, however, reveals that the discussions were undertaken in the context of disputes between Department staff and respondents concerning compliance issues at the facilities, even if they were not the specific violations charged in the complaints. Moreover, respondents' allegations concerning discussions between Department staff and Gas Land indicate that they were undertaken in the context of a dispute concerning Gas Land's potential liability. Thus, the alleged discussions occurred in the context of live disputes and, therefore, are subject to exclusion under CPLR 4547.

Respondents also argue that staff's settlement offers are relevant on issues other than liability and amount of penalty and therefore are admissible under CPLR 4547. Respondents fail to identify any viable issue to which the statements are relevant, however. Respondents argue that the settlement offers Department staff made during negotiations with respondents form the basis for their equitable estoppel defenses. However, as discussed below, respondents fail to state valid equitable estoppel defenses and, therefore, the statements are not necessary for the sufficiency of their answers.

Respondents further assert that the settlement discussions between Department staff and Gas Land are relevant to their claims of bias or prejudice in the Department's enforcement efforts against respondents. Although respondents pleaded defenses based upon alleged violations of their procedural and substantive due process rights, respondents did not plead any equal protection defenses. Furthermore, respondents did not plead a discriminatory enforcement defense, which is unavailable in the administrative enforcement setting in any event. Thus, the settlement offers and terms negotiated between Department staff and Gas Land are not relevant to any valid defense and are not otherwise necessary for the sufficiency of respondents' answers.

Respondents also assert that the settlement discussions are relevant to any potential penalty determination, and are necessary to negate any Departmental claim of undue delay. They also argue that they cannot be precluded from offering evidence of the settlement discussions to establish the bias or prejudice of a witness at the hearing. A respondent's willingness to engage in settlement negotiations, however, is not relevant to the issue of a respondent's voluntary cooperation as a mitigating factor under the Department's Civil Penalty Policy (see Matter of Lopa, Interim Decision of the Commissioner, July 10, 1991). Thus, the Department's settlement offers are not relevant to any potential penalty. In addition, the Department has not alleged undue delay, nor have any witnesses been identified. Thus, the statements are not relevant to any other ripe issues.

Finally, respondents argue that any claim of privilege was waived by Department staff when staff disclosed the contents

of the settlement negotiations with third parties, including Gas Land. As noted above, the rule governing the admissibility of settlement negotiations is not a rule of privilege, to which a waiver defense would be relevant. Rather, the rule is premised upon the relevancy of settlement negotiations on the issue of liability and amount of penalty, and the policy in favor of encouraging the settlement of disputes. Thus, any waiver of confidentiality is irrelevant to the availability of the CPLR 4547 exclusionary rule.

Accordingly, because Department staff's settlement offers, the terms of its settlement with Gas Land, and any statements made in the course of settlement discussions with respondents or Gas Land are irrelevant to any viable defenses pleaded in respondents' answers and are otherwise unnecessary to sustain the sufficiency of respondents' answers, they should be struck at this time. This ruling is without prejudice to respondents' proffer of the evidence at hearing in the event the evidence becomes relevant, including to prove the bias or prejudice of a witness, or to negate a claim of undue delay raised at the hearing. In addition, respondents' allegations that settlement discussions occurred and their identification of the parties to those negotiations as part of their recitation of the procedural history of these proceedings are outside the CPLR 4547 exclusionary rule and will not be struck.

B. Department Staff's Motions To Strike or Clarify Affirmative Defenses

Department staff moves for dismissal or clarification of respondents' affirmative defenses. Each of respondents' answers share the first eleven affirmative defenses in common. A twelfth affirmative defenses is pleaded in each answer except the answers filed by respondent Route 52 Property, LLC (File No. 3-410713) and by the Bottini respondents in Matter of Myers Prop., LLC, et al. (File No. 3-410632). Each of the answers pleading a twelfth affirmative defense allege a waiver defense except the Bottini respondents' answer in Matter of Route 52 Prop., LLC, et al. In that case, the Bottini respondents allege that they are not proper parties to the proceeding as their twelfth affirmative defense.

Under the Department's practice, motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the

sufficiency of the notice provided by the pleading (see, e.g., Matter of Mustang Bulk Carrier, Inc., Order of the Acting Commissioner, Nov. 10, 2010, adopting Chief ALJ Ruling and Summary Report; Matter of Truisi, Chief ALJ Ruling on Motion, April 1, 2010, 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 Truisi, 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 strike affirmative defenses, on the other hand, are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see, e.g., 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 if necessary, 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; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38). Where the defense is actually a denial pleaded as a defense, a motion to dismiss or clarify affirmative defenses does not lie (see Truisi, 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 Truisi, 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 Oil Corp., ALJ Ruling, Sept. 13, 2002, 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)]). In addition, affidavits submitted in opposition to the motion

may be used to save an inartfully pleaded, but potentially meritorious, defense (see Faulkner v City of New York, 47 AD3d 879, 881 [2d Dept 2008]).

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 general principles, I conclude that respondents' affirmative defenses, as amplified by respondents' affirmations in opposition to staff's motions, are sufficiently clear to place Department staff on notice as to their nature and bases. Accordingly, to the extent the defenses pleaded are actual affirmative defenses, staff's motions for clarification should be denied.

With respect to staff's motions to dismiss, respondents' affirmative defenses and Department staff's objections are examined in turn.

1. First Affirmative Defenses (Personal Jurisdiction) (all proceedings)

In their first affirmative defenses, respondents plead that the Department lacks jurisdiction over respondents. In their affirmations in opposition to staff's motions, respondents clarify that the defenses are based on the alleged lack of personal jurisdiction. The defense of lack of personal jurisdiction is an affirmative defense that is waived if not asserted in the answer or in a pre-answer motion to dismiss (see CPLR 3211[e]; International Bus. Machs. Corp. v Murphy & O'Connell, 172 AD2d 157, 158 [1st Dept], appeal dismissed 78 NY2d 908 [1991]).

In the motions to dismiss defenses, staff has made a prima facie showing that the first affirmative defenses lack merit as a matter of law in all except one proceeding. With

respect to the LLCs, staff supplies affidavits of service indicating that the notices of hearing and complaints were served upon the LLCs by personal service through the Secretary of State pursuant to Limited Liability Company Law § 303 and CPLR 311-a(a) (see 6 NYCRR 622.3[3] [authorizing commencement of administrative enforcement proceedings by personal service consistent with the CPLR]).

With respect to the individual respondents, in Matter of Route 82 Prop., LLC, et al. (File No. 3-177962), Matter of Fishkill Prop., LLC, et al. (File No. 3-410667), Matter of Route 376 Prop., LLC, et al. (File No. 3-410640), Matter of Route 9 Plaza North, LLC, et al. (File No. 3-178004), and Matter of Route 44 Prop., LLC, et al. (File No. 3-413682), staff fails to provide affidavits of service of the complaints upon respondent Mark Bottini. Accordingly, staff's motions to dismiss respondent Mark Bottini's first affirmative defenses in those proceedings must be denied.

With respect to the remaining individual respondents in those five proceedings, and with respect to all individual respondents in the remaining three proceedings, staff supplies affidavits of service indicating that the notices of hearing and complaints were served on each of the individual respondents, or upon Anthony Bottini's attorney as agent, by certified mail as authorized by 6 NYCRR 624.3(a)(3). Staff's also supplies proof of receipt of the certified mailings, thereby establishing completion of service pursuant to 6 NYCRR 624.3(a)(3).

In response to staff's prima facie showing, respondents allege no facts to dispute service. Respondents' only factual allegation concerning lack of service is in Matter of Route 52 Prop., LLC, in which respondents argue that service may be an issue as to respondent Anthony Bottini. This assertion is unsupported, however. Because respondents fail to create an issue of fact concerning service, Department staff's motions to dismiss the first affirmative defenses should be granted as to those respondents for which proof of service has been provided (see Levin v Dorrian, 171 AD2d 415, 415 [1st Dept 1991]; Bidetti v Salter, 108 AD2d 890, 891-892 [2d Dept 1985]; Stevens v Feitknecht, 93 AD2d 998, 998 [4th Dept 1983]).

2. Second Affirmative Defenses (Statute of Limitations) (all proceedings)

In their second affirmative defenses, respondents plead that the complaints are barred, in whole or in part, by the applicable statute of limitations. In their affirmations in opposition, respondents argue that because no statute of limitations is provided in the ECL or Navigation Law, CPLR 214(2) provides the applicable limitations period.[4]

Respondents' second affirmative defenses fail as a matter of law. As has previously been held, the statute of limitations periods provided for under the CPLR are not applicable to administrative enforcement proceedings (see Matter of Cobleskill Stone Prods., Inc., Rulings of the Chief ALJ on Motions, Jan. 18, 2012, at 9; 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]). Respondents' reliance on case law applying CPLR 214(2) to Navigation Law claims is unavailing. Those decisions concern claims brought in civil judicial proceedings, to which the CPLR applies, and not administrative enforcement proceedings, to which the CPLR statute of limitations periods do not apply.

Moreover, even assuming the CPLR 214(2) three-year limitations period applied, which it does not, the complaints in these proceedings allege violations that occurred within three years prior to the complaints including, in some proceedings, on-going open petroleum spills. Thus, respondents' second affirmative defenses fail as a matter of law and should be dismissed.

[4] In the alternative, respondents rely on the provision of State Administrative Procedure Law (SAPA) § 301(1), which requires an administrative hearing within a reasonable period of time. This alternative argument is addressed in connection with respondents' eleventh affirmative defense.

3. Third Affirmative Defenses (Failure to State a Claim) (Matter of Route 52 Prop., LLC, et al. only)

In Matter of Route 52 Prop., LLC, Department staff challenges as meritless respondents' third affirmative defenses.[5] In their third affirmative defenses, respondents allege that the complaints fail to state a claim. As both Department staff and respondents note, the failure to state a claim is not properly pleaded as an affirmative defense, but rather is a basis for a motion to dismiss a complaint (see Matter of Original Italian Pizza, LLC, Ruling of the Chief ALJ, Dec. 15, 2010, at 9; Matter of Truisi, at 7; Matter of Gramercy Wrecking and Envtl. Constrs., Inc., ALJ Ruling, Jan. 14, 2008, at 3-4; see also Riland v Frederick S. Todman Co., 56 AD2d 350, 352 [1st Dept 1977]). Staff has been directed to ignore the defense unless and until a respondent moves to dismiss a complaint on this ground (see Original Italian Pizza, at 9; Truisi, at 12). To the extent staff seeks dismissal of the third affirmative defenses, the motions are denied (see id.).

4. Fourth Affirmative Defenses (Failure to Provide Timely Notice of Violations); Fifth and Seventh Affirmative Defenses (Due Process Violations); and Eleventh Affirmative Defenses (Laches and Administrative Delay) (all proceedings)

In their fourth affirmative defenses, respondents allege that Department staff's claims are barred because staff failed to provide proper notice as required by statute or common law. In their affirmations in opposition, respondents clarify that the notice was improper because staff delayed in commencing the enforcement proceedings, in notifying respondents of the violations and their continuing nature, and in apprising respondents of staff's claim for financial assurance until the eve of filing the complaints.

In their fifth and seventh affirmative defenses, respondents allege that staff's claims are unconstitutional and in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and the New York

[5] Respondents raise the failure to state a claim defense in each of the proceedings. Department staff only challenges the defense in the Matter of Route 52 Prop., LLC proceeding, however.

Constitution. In their affirmations in opposition, respondents assert that their due process rights were violated because they did not receive timely notice of the alleged violations and were not afforded a timely hearing.

In their eleventh affirmative defenses, respondents allege that staff's claims are barred by the doctrine of laches. In their affirmations in opposition, respondents assert that the Department's administrative delay in providing notice and commencing these proceedings within a reasonable amount of time severely prejudiced respondents through the accumulation of excessive penalties and the diminished ability to defend (citing Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169 [1985], cert denied 476 US 115 [1986]). Thus, the basis of respondents' fourth, fifth, seventh, and eleventh defenses is Department staff's alleged administrative delay in violation of SAPA § 301 and the due process clauses of the United States and New York Constitutions.

As an initial matter, Department staff argues that respondents' challenge to the Navigation Law violations constitutes a facial constitutional challenge not reviewable at the administrative level (citing Loretto v Teleprompter Manhattan CATV Corp., 53 NY2d 124, 138-139 [1981]; and Matter of Gordon v Planning Bd. of Town of Ramapo, 30 NY2d 359, 365-366 [1972]). However, the bases for respondents' constitutional challenges are not facial challenges to the governing statutes. Rather, respondents raise as-applied due process challenges to the application of the statute governing the timeliness of administrative proceedings (see SAPA § 301[1]). Constitutional challenges to an agency's application of governing statutes are within the agency's jurisdiction to review (see Matter of Zelinsky v Tax Appeals Trib., 1 NY3d 85, 89 [2003] [confirming agency rejection of as-applied challenge to agency regulation under Commerce and Due Process Clauses], cert denied 541 US 1009 [2004]; Matter of New York State Empl. Relations Bd. v Christ the King Regional High School, 90 NY2d 244 [1997] [as-applied challenge to statute under Free Exercise and Establishment Clauses]; Matter of Murtaugh v New York State Dept. of Envtl. Conservation, 42 AD3d 986, 988 [4th Dept 2007] [constitutional challenge to ECL 71-0301 and 6 NYCRR part 620]; see also Original Italian Pizza, at 4-5). A respondent is required to raise an as-applied constitutional challenge at the agency level or the defense will be waived (see Original Italian Pizza, at 3-4, and cases cited therein). Thus, respondents'

constitutional defenses are not subject to dismissal on the ground that they raise facial constitutional challenges not reviewable in the administrative adjudicatory context.

Nevertheless, respondents fail to state viable administrative delay and due process defenses. To plead an administrative delay defense based upon Cortlandt, a respondent must allege not only a relevant delay, but also injury to respondents' private interests, and a significant and irreparable prejudice to the respondent's defense of the proceeding resulting from the delay (see Cortlandt, 66 NY2d at 177-178, 180-181; 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]; Stasack, at 9; Truisi, at 11). Here, the alleged delay of between approximately 13 and 19 months, depending on the proceeding, in providing notice and commencing these proceedings is insufficient to constitute a significant delay. The mere passage of time and the potential accrual of penalties does not alone constitute prejudice (see Matter of Louis Harris and Assocs., Inc. v deLeon, 84 NY2d 689, 702 [1994]; Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 624-625 [1994]). Moreover, respondents' conclusory assertion that their ability to defend had been "diminished" (see, e.g., Route 52 Prop., LLC Affirm in Opposition, at 30) is insufficient to state substantial prejudice in their defense of these proceedings (see Matter of Diaz Chem. Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]). Thus, respondents have failed to provide sufficient factual allegations to state the defenses of unreasonable administrative delay or any due process violations arising from the alleged delay. Accordingly, Department staff's motions to dismiss the fourth, fifth, seventh, and eleventh affirmative defenses should be granted.

5. Sixth Affirmative Defenses (Subject Matter Jurisdiction and Standing To Bring Navigation Law Claims) (all proceedings)

In their sixth affirmative defenses, respondents allege that the Department lacks subject matter jurisdiction or standing to administratively enforce claims based upon the Navigation Law. Both subject matter jurisdiction and standing are affirmative defenses (see Morrison v Budget Rent A Car Sys.,

Inc., 230 AD2d 253, 257 [2d Dept 1997]; Matter of Fossella v Dinkins, 66 NY2d 162, 167 [1985]). However, respondents' sixth affirmative defenses fail as a matter of law.

In Matter of Gasco-Merrick Road Gas Corp. (Decision and Order of the Commissioner, June 2, 2008), the Commissioner held that the Department has subject matter jurisdiction to administratively adjudicate liability and penalties for violations arising under the Navigation Law (see id. at 2-11). Respondents' disagreement with the Commissioner's decision fails to provide a sufficient basis for departing from agency precedent on the issue. Accordingly, respondents' sixth affirmative defenses should be dismissed.

6. Eighth Affirmative Defenses (Sanctions Pursuant to 22 NYCRR Part 130) (all proceedings)

In their eighth affirmative defenses, respondents allege that Department staff's claims are frivolous within the meaning of 22 NYCRR part 130 and, therefore, entitle respondents to an award of costs and sanctions against the Department, including the reimbursement of actual expenses and reasonable attorney's fees. No legal basis supports respondents' claims for costs and sanctions. Part 130 of 22 NYCRR applies to courts and certain other officers in the Unified Court System (see 22 NYCRR 130-1.4; 22 NYCRR 37.1[a][1]). Nothing in Part 130 indicates that it is applicable to administrative agencies. Moreover, nothing in 6 NYCRR part 622 authorizes the award of costs or sanctions (see Matter of ExxonMobil Corp. [New Windsor], Rulings of the ALJ, Sept. 27, 2002, at 6). Accordingly, respondents' eighth affirmative defenses should be dismissed.

7. Ninth Affirmative Defenses (Arbitrary and Capricious) (all proceedings)

In their ninth affirmative defenses, respondents allege that the claims and causes of action set forth in the complaints, in whole or in part, are arbitrary and capricious. In their affirmations in opposition, respondents argue that these defenses are actually denials not subject to dismissal. Respondents assert that the Department has the initial burden of establishing that it did in fact act appropriately.

Viewed in light of respondents' clarification, the ninth affirmative defense is a denial that Department staff can establish its case. As a denial, it is not subject to dismissal. However, as a denial, it inaccurately states Department staff's burden at hearing and the appropriate evidentiary review standard. Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622), Department staff has the burden of proving the elements of each of the violation charged and all matters affirmatively asserted in the complaints (see 6 NYCRR 622.11[b][1]). Whether staff acted "appropriately" is not an element of any of the violations charged in these proceedings.

Moreover, with respect to factual matters alleged by Department staff, proof by a preponderance of the evidence is the applicable evidentiary standard (see 6 NYCRR 622.11[c]). The "arbitrary and capricious" standard is the appellate review standard applied by courts under CPLR article 78 when reviewing agency determinations not made after a hearing (see CPLR 7803[3]). The arbitrary and capricious standard is not applicable at this stage of the administrative adjudicatory process.

8. Tenth Affirmative Defenses (Equitable Estoppel) (all proceedings)

In their tenth affirmative defenses, respondents allege that the Department is equitably estopped from asserting the claims and causes of action set forth in the complaints as a result of staff's course of conduct and dealing with respondents relative to the alleged violations, upon which respondents claim they justifiably relied. In their affirmations in opposition, respondents assert that staff's alleged delay in bringing these proceedings, and staff's alleged failure to provide proper notice and procedural due process, support these defenses. Respondents assert that as a result of discussions and meetings with Department staff, respondents were led to believe that the Department was negotiating the resolution of certain compliance issues at the facilities, and "based on such discussions of plenary resolution Respondents were not required to conduct the tank liner inspections outlined in the [complaints]" (see, e.g., Route 52 Prop., Affirm in Opposition, at 30).

Equitable estoppel is an affirmative defense (see Glenesk v Guidance Realty Corp., 36 AD2d 852, 853 [2d Dept 1971]). As a general rule, equitable estoppel is not applicable to an agency acting in a governmental capacity in the discharge of its statutory responsibilities (see Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282 [1988]; see also Matter of Bartell, ALJ Ruling, June 11, 2009, at 12). Only in the rarest of cases may an agency be equitably estopped for wrongful or negligent acts or omissions by the agency 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]; see also Matter of Martino, Rulings of the ALJs, April 28, 2008, at 3-4). To plead an estoppel defense, respondent must allege facts that show in what manner and to what extent respondent relied on the complainant's inconsistent conduct and was prejudiced thereby (see Glenesk, 36 AD2d at 853).

In these proceedings, respondents fail to allege facts sufficient to state the estoppel defense. Specifically, respondents fail to allege any conduct by the Department upon they could have justifiable relied. In their factual averments, respondents allege that during settlement negotiations concerning alleged compliance issues at the facilities, Department staff indicated that it would waive certain compliance requirements at the facilities, including any interim tank liner inspections, if an agreement was reached as to certain improvements and upgrades. Respondent do not allege, however, that Department staff waived compliance requirements, including interim tank liner inspections, pending settlement negotiations. Nor do respondents allege that Department staff waived any compliance requirements in the absence of an agreement, or that an agreement was reached in which the charged violations were waived. Thus, respondents fail to allege any acts by Department staff upon which they justifiably relied in failing to conduct required inspections or other compliance activities during the pendency of the settlement negotiations. Accordingly, respondents' equitable estoppel defenses should be dismissed.

9. Twelfth Affirmative Defenses (Limited Enforcement Waiver) (all proceedings except Matter of Route 52 Prop., LLC, et al. and the Bottini respondents in Myers Prop., LLC, et al.)[6]

All respondents except respondents in Matter of Route 52 Prop., LLC, et al., and the Bottini respondents in Myers Prop., LLC, et al. plead a twelfth affirmative defense, in which they allege that the claims and causes of action set forth in the complaints are barred by a limited enforcement waiver contained in the January 1, 2007, and March 30, 2009, consent orders. Department staff moves to dismiss the defenses on the ground that respondents failed to place staff on notice of any facts or legal theory upon which the defense is based.

Respondents have sufficiently pleaded the defense. In their answers, respondents quote a provision of the March 30, 2009, consent order in which Department staff agreed not to seek any civil or administrative penalties for any instance of noncompliance disclosed in the environmental audit reports conducted pursuant to the consent order, provided respondents addressed such noncompliance in accordance with the environmental curative measures program described in the order (see, e.g., Matter of Hyde Park Prop., LLC, Affirmation in Support of Department Staff's Motion to Exclude Evidence and Strike or Clarify Affirmative Defenses, Exh 7, Answer ¶ 53, at 7). In addition, respondents allege that the environmental audits conducted pursuant to the consent order properly identified and disclosed the alleged violations claimed by the Department in these enforcement proceedings (see, e.g., id. ¶ 54). These allegations are sufficient to place staff on notice of the legal and factual bases of the defenses. Accordingly, the motions to dismiss the defenses should be denied.

[6] The Bottini respondents do not plead a twelfth affirmative defense in Matter of Myers Prop., LLC, et al.

10. Twelfth Affirmative Defense (Proper Parties) (Bottini respondents in Matter of Route 52 Prop., LLC, et al. only)[7]

In their answer in Matter of Route 52 Prop., LLC (File No. 3-410713), the Bottini respondents allege that they are not proper parties to the proceeding. As the Bottini respondents note in their affirmation in opposition, this defense is actually in the nature of a denial. Department staff has the burden of establishing the Bottini respondents' liability for the violations charged. Accordingly, the motion to dismiss the defense should be denied.

III. CONCLUSION

In sum, for the reasons stated above, Department staff's motion to exclude should be granted in part, and statements of settlement offers, the terms of settlement with Gas Land, and any statements made in the course of settlement discussions with respondents or Gas Land contained in respondents' answers or affirmation in opposition to staff's motions will be struck. Department staff's motions to exclude are otherwise denied.

Department staff's motions to strike affirmative defenses should be granted in part, and respondents' second, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh affirmative defenses should be dismissed. Respondents' first affirmative defenses should be dismissed as to those respondents for which proof of service of the notices of hearing and complaints have been provided. Department staff's motions to strike affirmative defense should otherwise be denied.

Department staff's motions for clarification of affirmative defenses should be denied.

[7] Respondent Route 52 Property, LLC, does not plead a twelfth affirmative defense.

This constitutes the ALJ's decision in these matters. Rulings on Department staff's motions consistent with this decision are issued herewith under separate captions.

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

Dated: March 14, 2012
Albany, New York