STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) of the State of New York, Article 12 of the Navigation Law of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

RULING

DEC Case No.
3-601411.12-2017A

- by -

SAUGERTIES SNACK SHOP INC., B.A.B. PLUS, LLC, and GAS LAND PETROLEUM INC.,

Respondents.

Appearances of Counsel:

-- Thomas Berkman, Deputy Commissioner and General Counsel (Benjamin Conlon, Associate Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Young/Sommer LLC (Joseph Castiglione and Dean S. Sommer of counsel), for respondent Gas Land Petroleum Inc.

-- Hass & Gottlieb (Lawrence M. Gottlieb of counsel), for respondent B.A.B. Plus, LLC

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, dated June 28, 2019, upon respondents Saugerties Snack Shop Inc. (Snack Shop), B.A.B. Plus, LLC (BAB Plus) and Gas Land Petroleum Inc. (Gasland).

The complaint alleges, in two unnumbered causes of action,[1] that respondents violated: (i) a January 24, 2018 order on consent by delaying the start up and operation of the remediation system, and as to respondent Gasland by failing to take over and implement the remediation required by the order; and (ii) Navigation Law § 173 and the order on consent by failing to clean up petroleum contamination at the site. Department staff requests an order imposing a penalty of $600,000 and directing respondents to correct the violations alleged in the complaint, including the "implementation and complete remediation activities to address petroleum contamination that

[1] In *Matter of RGLL, Inc. and GRJH, Inc.*, Decision and Order of the Commissioner, December 29, 2009, at 5 n 4, staff counsel were directed to number the causes of action for all future matters.

is on its [sic] site and which has emanated off its [sic] site," and to comply with any such relief the Commissioner deems just and appropriate.

By letter dated July 5, 2019, respondent Gasland filed a notice of motion for more definite statement in the complaint together with the affirmation of Joseph F. Castiglione, with two exhibits attached, and a memorandum of law (*see* Appendix A attached hereto). Respondent Gasland served its motion papers on Department staff by first class mail and email on July 5, 2019, but served respondents Snack Shop and BAB Plus by emails to attorneys John Barone (for respondent Snack Shop) and Lawrence Gottlieb (for respondent BAB Plus). On July 10, 2019, respondent Gasland emailed a letter to Chief Administrative Law Judge James T. McClymonds, requesting that the Office of Hearings and Mediation Services (OHMS) direct Department staff to postpone and re-schedule the pre-hearing conference because respondent's time to answer the complaint did not expire until after the scheduled conference.

In an email dated July 11, 2019, Department staff argued that the motion for a more definite statement and the motion to postpone had not been properly served on the parties by respondent Gasland. Also, by email of the same date, Mr. Barone advised the parties that he did not yet represent respondent Snack Shop and had not appeared as counsel for respondent Snack Shop.

By letter dated July 11, 2019, respondent BAB Plus filed a notice of motion for more definite statement in the complaint, together with the affirmation of Lawrence M. Gottlieb and affidavit of Frank Palazzolo, collectively attaching four exhibits, and a memorandum of law (*see* Appendix A).

By letter ruling dated July 12, 2019, I denied respondent Gasland's request to postpone and re-schedule the pre-hearing conference. I also advised the parties that service of motions by email was not permitted without an agreement of the parties or permission from the administrative law judge (ALJ) and directed respondent Gasland to file affidavits of service of the motion for a more definite statement of the complaint demonstrating compliance with the service requirements of 6 NYCRR 622.6(a) and (c) and CPLR 2103.

Respondent Gasland served the motion papers on respondent Snack Shop by first class mail on July 12, 2019, and on respondent BAB Plus by first class mail on July 18, 2019.

Department staff, by letter dated July 17, 2019, filed a response to the motions of respondents Gasland and BAB Plus further objecting to Gasland's service and opposing respondents' motion for a more definite statement of the complaint.

I. SUMMARY OF THE PARTIES POSITIONS

A. Respondent Gasland

Respondent Gasland seeks a ruling pursuant to 6 NYCRR 622.4(e) that the complaint is "so vague or ambiguous that respondent cannot reasonably be required to frame an answer" and directing staff to serve an amended complaint on respondents with a more definite statement of

facts and a legal theory regarding Gasland's alleged violation of the order on consent and how that alleged violation constitutes a violation of Navigation Law § 173.

Respondent Gasland argues that staff alleges the same set of facts in support of both causes of action – failure to implement the work plan required by the order on consent constituting a violation of the order and a violation of Navigation Law § 173. Gasland argues that its obligations under the order on consent are different than those of respondents Snack Shop and BAB Plus, who are identified as the operating respondents in the consent order and staff's complaint, yet Department staff's complaint is vague as to respondent Gasland's obligations and lacks alleged facts pertaining to those obligations or violations thereof. Therefore, Gasland argues that the complaint is vague and ambiguous. Gasland further argues that a complaint seeking $600,000 in penalties from Gasland for vague and undiscernible violations fails to provide respondent with sufficient notice and specificity of the charges against it to prepare an adequate defense. Gasland's remaining arguments are more akin to affirmative defenses.

B. Respondent BAB Plus

Respondent BAB Plus also seeks a ruling pursuant to 6 NYCRR 622.4(e) directing staff to serve an amended complaint on respondents with a more definite statement of facts and a legal theory regarding BAB Plus's alleged violation of the order on consent and how that alleged violation constitutes a violation of Navigation Law § 173.

Respondent argues that specific acts constituting BAB Plus's alleged failure to act are lacking in the complaint. Because respondent believes it is in compliance with the work plan, respondent argues that it cannot discern the basis for staff's broad allegation in the complaint.

C. Department staff

Department staff argues that respondent Gasland failed to comply with my July 12, 2019 letter ruling regarding service of motions. Specifically, staff argues that respondent Gasland did not mail its motion to all respondents, and therefore, staff "disagrees that it should have to respond to a Motion that was not even attempted to be filed on all of the parties, as required by law, at the time it was filed on the Department." Because of the service defects, Department staff argues that "the Office of Hearings and Mediation Services should acknowledge that it lacks jurisdiction to entertain the Motion in this matter."

In response to respondents' contentions that staff's complaint was vague and ambiguous, staff refers to and attaches an April 19, 2018 email from staff to "respondent's consultant," which details conditions of staff's approval of the corrective action plan. Based on the remedial requirements, staff argues it does not understand why respondents are unable to answer the complaint. Staff argues that respondents knew and were told of the non-compliance issues.

II. DISCUSSION

A. Service

As a threshold matter, Department staff takes issue with respondent Gasland's service of its motion and argues that I lack jurisdiction to entertain the motion. Following the issuance of my July 12, 2019 letter ruling, Department staff sought clarification on when staff's response to respondent Gasland's motion was due. I advised staff that if respondent Gasland served its motion by first class mail on Department staff, later corrected service on the other respondents does not extend staff's time to respond. Staff disagrees but does not cite any law, regulation or decision in support of staff's position. Staff, however, did not request an extension to respond at that time.

The time to respond to a motion is measured from when the motion is served on the party required to respond to that motion and takes into consideration how the motion was served (*see e.g.* 6 NYCRR 622.6[a], [b]; CPLR 2103), unless otherwise directed by the ALJ or by agreement of the parties. The Uniform Enforcement Hearing Procedures state, "[a]ll parties have five days after a motion is served to serve a response" (6 NYCRR 622.6[c][4]). This provision does not expressly or impliedly mean all parties must be served before the five days for a response commences. Such a reading would render other provisions of part 622 meaningless. It is possible with multiple parties, that responses to a motion will be due at different times depending on how and when service was made on each respective party. One party may agree to service by email, while another party may not. The time for a party's response is calculated by taking into consideration the method of service on that party, not other parties. If a party assumed that it did not have to respond to a motion until all parties were served, that party runs the risk of serving an untimely response.

Pursuant to 6 NYCRR 622.3(a) and (c), motion papers are to be served on all parties even if the motion papers do not concern the other parties. Parties to an action have a right to notice of all proceedings. Previously, respondent Gasland had served its motion for a more definite statement on respondents' attorneys by email. Department staff objected to such service. Attorney Barone advised the parties that he has not appeared as counsel for respondent Snack Shop and that he could not confirm that he represented respondent at that time. My letter ruling of July 12, 2019, directed respondent Gasland to provide affidavits of service demonstrating proper service. In response, respondent Gasland corrected the defects in service of the motion, although service of Gasland's motion on the attorney for respondent BAB Plus by first class mail was not accomplished until after Department staff responded to respondents' motions.

Staff argues, because of the alleged continued defective service by respondent Gasland, that I lack jurisdiction to address respondent Gasland's motion. Staff relies on two judicial matters in support of staff's jurisdictional argument, *Matter of the Estate of Henry* (159 AD3d 1393 [4th Dept 2018]) and *Matter of Community Hous. Improvement Program* (166 AD3d 1135 [3d Dept 2018]). Those two matters involve deficiencies in filing and serving appeals from agency decisions to the courts. Service in such appeals are governed by CPLR 5515, in addition to CPLR 2103. Both courts cite the rule that a complete failure to comply with service and filing requirements of CPLR 5515 deprives the court of jurisdiction to entertain the appeal (*see Matter of the Estate of Henry* at 1394; *Matter of Community Hous. Improvement Program* at 1136). CPLR 5515 requires an appellant to timely file a notice of appeal in the proper court and to serve

the notice on the adverse party. Staff's reliance on those decisions is misplaced. Even in matters involving the application of CPLR 5515, the Appellate Division, Third Department, recognized that a single omission may be cured. "Where only one of these steps is properly completed, the court has the discretion to 'grant an extension of time for curing the omission'" (*Matter of Community Hous. Improvement Program* at 1136 *citing* CPLR 5520[a]). In other words, the appellate courts had "discretion to overlook a defect in filing or service because the other required step had been timely completed" (*id.* at 1137 n 2). Here, respondent Gasland had timely filed its motion with OHMS and properly served Department staff.

Furthermore, service of interlocutory papers in the Department's enforcement proceedings are governed by 6 NYCRR 622.3 and CPLR 2103. Defects in service of interlocutory papers do not render this office void of subject matter jurisdiction to consider the motions or prevent this office from providing a party the opportunity to cure defects because they are not papers filed to commence a proceeding. In the decisions cited by staff, the requirements of CPLR 5515 must be followed to commence a timely appeal (*see Matter of Gillard*, --AD3d--, 2019 Slip Op 06032 [3d Dept 2019]). CPLR 5515, however, is not applicable to this administrative enforcement proceeding.

In *Forte v Cities Service Oil Co.* (195 AD2d 805 [3d Dept 1993]), the Appellate Division, Third Department, held that plaintiff's failure to serve one of the defendants the subject motion was a mere irregularity, rather than a jurisdictional defect (*id.* at 807). Because the motion did not seek any relief from the defendant who was not served, the court concluded prejudice could not be alleged by the appellant and any irregularity in plaintiffs' service of their motion papers could safely be ignored (*id.*). Here, respondent Gasland only seeks relief from Department staff. Following *Forte*, I could have safely ignored Gasland's use of email service on the other respondents as a mere irregularity.

Instead, I exercised my discretion pursuant to CPLR 2001 and 6 NYCRR 622.10 (i) and overlooked the defective service of respondent Gasland's motion to postpone and reschedule the pre-hearing conference and ruled on that issue for the sake of judicial economy. Staff, however, would bind me to an unsupported premise that OHMS lacks jurisdiction when there is any defect in interlocutory service. Respondents BAB Plus and Snack Shop, who were the parties not properly served by Gasland, have not objected to Gasland's service or claimed any prejudice due to being served by mail after Department staff was served by mail. Pursuant to CPLR 2001, an ALJ may permit mistakes, omissions or defects to be corrected. If a substantial right of party is not prejudiced, the ALJ may disregard the mistake, omission or defect altogether (*see Forte* at *807)*. Staff's claims the one respondent that has not appeared in this matter, Snack Shop, may be prejudiced. Staff's claims of prejudice are based on speculation and conjecture and are without merit as a matter of law and fact. Similar to the facts in *Forte*, moving respondents are not seeking relief from respondent Snack Shop. Furthermore, I am not choosing to overlook respondent Gasland's original defective service, so prejudice is not considered. Respondent corrected its service, although for respondent BAB Plus, respondent Gasland was late in doing so. Although a response to Gasland's motion from respondents BAB Plus and Snack Shop was not required, respondents could have filed a response but did not. Likewise, none of the respondents responded to BAB Plus's motion, which was properly served. I conclude that any remaining irregularity, real, implied or perceived, in Gasland's service of its motion is a mere irregularity and can safely be ignored.

Moreover, despite Department staff's protestations about respondent Gasland's service of its motion by email, which has since been corrected, staff failed to serve its response papers pursuant to 6 NYCRR 622.3(a) and CPLR 2103. CPLR 2103(b) provides that papers to be served upon a party to a pending action shall be served upon the party's attorney using the methods of service prescribed in CPLR 2103(b)(1) - (7). As staff has argued and my letter ruling confirmed, service by email on an attorney is not permitted absent an agreement of the respective parties or by permission of the ALJ. Here, staff knew that respondents Gasland and BAB Plus have appeared by counsel, yet staff served its response on respondents Gasland and BAB Plus by first class mail and their respective attorneys by email. CPLR 2103 is clear and unambiguous, when a party is represented by an attorney, the attorney shall be served by the prescribed methods. Staff did not do that.

In addition, staff suggested in a July 11, 2019 email that staff properly served respondent "Snack Shop through the Department of State, which respondent Gasland could have done as well." That statement is not only misleading, it is incorrect. Although Department staff may commence a proceeding against a corporation or limited liability company by serving process on the Secretary of State, it is well settled that service of interlocutory papers, such as the instant motions, on the Secretary of State is not authorized by CPLR 2103 (*see Matter of Bissco Holding, Inc.*, Order of the Commissioner, July 24, 2017, at 4-5; Hearing Report at 15; *Matter of Gladiator Realty Corp.*, Order of the Commissioner, January 14, 2010, at 2-3 n 3; *Matter of Empire Construction*, Ruling, May 27, 2015, at 5 n 2; *Matter of 976 Simpson Street Housing Development Fund Corp*, Ruling, June 23, 2016, at 2).

Based on the discussion above, staff's request that I acknowledge that OHMS lacks jurisdiction to entertain respondent Gasland's motion is denied. If I used the same logic applied by staff, I would lack jurisdiction to consider staff's response papers for failure to properly serve respondents who have appeared by their attorneys. Instead, I am disregarding the defective service of staff's opposition to respondents' motions, and because further responsive pleadings are not authorized (*see* 6 NYCRR 622.6[c][3]), I conclude that respondents' substantial rights are not prejudiced. I have reviewed staff's remaining arguments and conclude they are without merit.

B. Motions for a more definite statement of the complaint.

Pursuant to 6 NYCRR 622.4(e), respondents Gasland and BAB Plus seek a more definite statement of the complaint on the grounds that staff's complaint is so vague or ambiguous that respondents cannot reasonably be required to frame an answer. Similarly, CPLR 3024(a) provides, "[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement." In other words, do staff's pleadings require clarification before a response is required?

Respondents' respective motion papers demonstrate that respondents Gasland and BAB Plus are aware of their respective obligations under the order on consent. Even if certain allegations of staff's complaint are construed to be overly broad, respondents' motion papers demonstrate that respondents understand that staff's first cause of action alleges each respondent violated the order on consent and that the second cause of action alleges a violation of the Navigation Law based on respondents' failure to comply with the order on consent.

Respondent Gasland asserts that it has different obligations under the order on consent from the other respondents. Gasland asserts that those obligations and the events that trigger the obligations are not specifically pleaded by staff in the first cause of action. Therefore, according to Gasland, staff must describe in detail how Gasland violated the order on consent. Likewise, respondent Gasland argues that staff must detail how violations of the order on consent constitute a violation of Navigation Law § 173.

Respondent BAB Plus alleges that respondent has been complying with the work plan and has no idea what violations are being asserted by staff. Plainly, respondent BAB Plus is denying the allegations of staff's complaint in respondent's motion, but requests that the pleadings be more specific. Respondent BAB Plus also argues that it does not understand how the alleged violations of the order on consent constitute a violation of Navigation Law § 173.

I conclude that staff's first and second cause are not so vague or ambiguous that respondents cannot answer the complaint. While staff's alleged violations could certainly be described in more detail, the Department's regulations require only a concise statement of the matters asserted. Elaboration and detail are not required, only notice sufficient to respond is required, which in this matter has been provided. Respondents' motions seek amplification of staff's pleadings, seeking details, but not clarification. Efforts to amplify pleadings are more appropriately addressed through discovery, not motions for a more definite statement of the complaint (*see e.g. Matter of Truisi*, Ruling, April 1, 2010, at 6). In this administrative enforcement proceeding, bills of particulars are not permitted (6 NYCRR 622.7[b][3]), but other broad discovery devices are available under part 622 that would allow respondents to gain the information respondents allege to seek through the instant motions (*see id.* at 7, n 2).

I conclude that the complaint puts respondents Gasland and BAB Plus on notice of the violations asserted against respondents. Respondents have not demonstrated that the allegations of staff's complaint require clarification. Accordingly, respondents' motions for a more definite statement in the complaint are denied.

RULING

Department staff's motion for a declaration that OHMS lacks jurisdiction to consider respondent Gasland's motion is denied. Respondent Gasland's motion for a more definite statement of the complaint is denied. Respondent BAB Plus's motion for a more definite statement of the complaint is denied.

Respondents Gasland and BAB Plus are directed to answer the complaint within ten (10) days of receipt of this ruling. Respondent Snack Shop has not appeared or answered the complaint.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: August 27, 2019
Albany, New York

Appendix A
Matter of Saugerties Snack Shop, Inc., B.A.B. Plus, LLC, and Gas Land Petroleum Inc.
Case No. 3-601411.12-2017A

Respondent Gas Land Petroleum Inc.

1. Filing transmittal letter, dated July 5, 2019, from Joseph Castiglione, Esq.
2. Notice of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 5, 2019
3. Affirmation of Joseph F. Castiglione, Esq. in Support of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 5, 2019, attaching the following exhibits:
   A. Notice of Hearing and Complaint, dated June 28, 2019
   B. Matter of Saugerties Snack Shop, Inc., B.A.B. Plus, LLC, and Gasland Petroleum, Inc., Order on Consent, Case No. 3-601411.12-2017
4. Memorandum of Law in Support of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 5, 2019
5. Filing transmittal letter, dated July 12, 2019, from Dean S. Somer, Esq., (refiling items 2, 3, and 4 above)
6. Affidavit of Service of Angeline L. Riccardi, sworn to July 5, 2019
7. Affidavit of Service of Angeline L. Riccardi, sworn to July 12, 2019
8. Filing transmittal letter, dated July 18, 2019, from Angelina L. Ricardi
9. Affidavit of Service of Angeline L. Riccardi, sworn to July 18, 2019

Respondent B.A.B. Plus, LLC

1. Filing transmittal letter, dated July 11, 2019, from Lawrence M. Gottlieb, Esq.
2. Affirmation of Service of Lawrence M. Gottlieb, dated July 11, 2019
3. Notice of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 11, 2019
4. Affirmation of Lawrence M. Gottlieb, Esq. in Support of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 11, 2019, attaching the following exhibits:
   A. Notice of Hearing and Complaint, dated June 28, 2019
   B. Matter of Saugerties Snack Shop, Inc., B.A.B. Plus, LLC, and Gasland Petroleum, Inc., Order on Consent, Case No. 3-601411.12-2017
   C. Service receipt from NYS Department of State
   D. Schedule of payments made for remediation
5. Affidavit of Frank Palazzolo, sworn to July 11, 2019, referencing exhibits A-D:
6. Memorandum of Law in Support of Motion for More Definite Statement in the Complaint Regarding the First and Second Causes of Action, dated July 11, 2019

Department staff

1. Filing transmittal letter, dated July 17, 2019, from Benjamin Conlon, Esq.
2. Department Staff's Response to Motion for a More Definite Statement, undated, attaching the following exhibit:
   A. Email dated April 19, 2018 from Daniel Bendell to Mike Carr regarding NYSDEC Spill #17-01873 – Saugerties Sunoco – Corrective Action Plan